One Hundred Years of Illegitimacy: International Legal Analysis of the Illegal Overthrow of the Hawaiian Monarchy, Hawai'i's Annexation, and Possible Reparations

I. INTRODUCTION

A. The Hawaiian Kingdom: internationally recognized state

During the reign of King Kamehameha III, the great foreign powers of the world recognized the independence of the Kingdom of Hawai'i.[1] In a letter dated December 19, 1842, U.S. Secretary of State Daniel Webster wrote "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 the purpose of colonization, and that no power ought to seek for any undue control over the existing government . . . . [2]"

In 1843, France and Great Britain signed a joint declaration recognizing Hawai'i's independence and the ability of the Hawaiian government to perform foreign relations capably.[3] The United States was invited as a signatory to the document, but refused on the grounds

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[1] JOHN WESTLAKE, CHAPTERS ON THE PRINCIPLES OF INTERNATIONAL LAW 81 (1894). "International society was comprised of the European states, the American states (they inherited the international law of Europe upon gaining their independence), and a few Christian states in other parts of the world such "as the Hawaiian Islands, Liberia, [and] Orange Free State . . . " *Id.*

[2] RALPH S. KUYKENDALL, THE HISTORY OF HAWAI'I 157 (1945) [hereinafter Kuykendall, HISTORY].

[3] *Id.* at 163.

that such action was contrary to its policy against entangling alliances.[4] The United States stated, however, that it would always solemnly respect Hawai'i's independence.[5] In 1849 the United States entered into and ratified the Treaty of Friendship, Commerce and Navigation with the Hawaiian Kingdom.[6] Also, King Leopold of Belgium promised to support Hawai'i's continued independence.[7] Furthermore, the island kingdom executed treaties[8] with Sweden-Norway,[9] the Netherlands,[10] Italy,[11] Spain,[12] Switzerland,[13] Russia,[14] Austria-Hungary,[15] Portugal,[16] Denmark[17] and Japan.[18] Within fifty years, however, the Hawaiian

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[4] RALPH S. KUYKENDALL AND A. GROVE DAY, HAWAII: A HISTORY FROM POLYNESIAN KINGDOM TO AMERICAN STATE 69 (1961) [hereinafter KUYKENDALL & DAY, HAWAII].

[5] *Our Control in Hawaii*, N.Y. TIMES, Feb. 2, 1893, at 2; SEN. EX. DOCS. No. 77, 52d Cong., 2d Sess. 35-37 (1893).

[6] 3 CHARLES BEVANS, TREATIES AND OTHER INTERNATIONAL AGREEMENTS OF THE UNITED STATES OF AMERICA 1776-1949 874 (1971) [hereinafter BEVANS], 19 Stat. 625.

[7] Treaty of Amity, Commerce and Navigation between Belgium and Hawai'i, Oct. 14, 1862, Belg.-Hawai'i, 126 Consol. T.S. 329.

[8] The treaties that Hawai'i executed established the commercial and diplomatic foundation for relations between the parties. Treaty provisions included certain protection and rights for foreigners residing in the Islands. For example, the 1846 treaty between Denmark and Hawai'i established commercial relations between the two kingdoms. The treaty also regulated Danish citizens residing in Hawai'i. Treaty between Denmark and Hawai'i. Oct. 19, 1846, Den.-Hawai'i, 100 Consol. T.S. 13.

[9] Treaty of Friendship, Commerce and Navigation, July 1, 1852, Hawai'i-Swed., 108 Consol. T.S. 217.

[10] Treaty of Amity, Commerce and Navigation between Hawai'i and Netherlands, Oct. 14, 1862, Neth.-Hawai'i, 126 Consol. T.S. 343.

[11] Treaty of Friendship, Commerce and Navigation between Italy and Sandwich Islands, July 22, 1863, Italy-Hawai'i, 128 Consol. T.S. 109.

[12] Treaty of Friendship, Commerce and Navigation between Hawaiian Islands and Spain, Oct. 29, 1863, Hawai'i-Spain, 128 Consol. T.S. 251.

[13] Treaty of Amity, Establishment of Commerce between Hawai'i and Switzerland, July 20, 1864, Hawai'i-Switz., 129 Consol. T.S. 333.

[14] Convention of Commerce and Navigation between Hawai'i and Russia, June 19, 1869, Hawai'i-Russia, 139 Consol. T.S. 351.

[15] Treaty of Commerce and Navigation between Austria-Hungary and Hawai'i, June 18, 1875, Aust-Hung.-Hawai'i, 149 Consol. T.S. 305.

[16] Convention between Hawai'i and Portugal for the Provisional Regulation of Relations of Amity and Commerce, May 5, 1882, Hawai'i-Port., 160 Consol. T.S. 209.

[17] Treaty between Denmark and Hawai'i. Oct. 19, 1846, Den.-Hawai'i, 100 Consol. T.S. 13.

[18] Treaty of Commerce and Navigation, Aug. 19, 1870, Hawai'i-Japan, 141 Consol. T.S. 447.

Kingdom lost its independence to foreigners, and later to a country that once had recognized its independence.

In the late nineteenth century, a group of pro-annexationists Americans living in Hawai'i formed the Committee of Safety.[19] On January 17, 1893, the Committee seized control of a Hawai'i government building located across from 'Iolani Palace.[20] Backed by 160 armed U.S. Marines mobilized under the direction of United States Minister John L. Stevens, the insurrectionists declared the abolishment of the monarchy and proclaimed the provisional government as Hawai'i's sovereign until annexation with the United States could be negotiated. Although Queen Lili'uokalani's[21] line of defense had not yet surrendered, Stevens immediately recognized the provisional government and placed it under the protection of the United States.[22]

The Queen, hoping to avoid the needless loss of life,[23] issued a conditional and temporary surrender

> until such time as the government of the United States shall, upon the facts being presented to it, undo the action of its representative and reinstate . . . [her] as the constitutional sovereign of the Hawaiian Islands.[24]

The United States, despite having existing treaty obligations with the Hawaiian Monarchy, executed an annexation treaty with the provisional government on February 14, 1893.[25] Before the United States Senate could ratify the treaty, however, newly elected President Cleveland withdrew it to examine the United States' role in the overthrow.[26] Cleveland's presidential commission concluded that the

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[19] LORRIN THURSTON, MEMOIRS OF THE HAWAIIAN REVOLUTION 249-50 (1936); KUYKENDALL & DAY, *supra* note 4, at 475.

[20] 'Iolani Palace was the seat of Hawai'i's government and the residence of the reigning monarch.

[21] Queen Lili'uokalani reigned from 1892 until her overthrow in January 1893. Melody K. MacKenzie, *Historical Background*, *in* NATIVE HAWAIIAN RIGHTS HANDBOOK 11 (Melody K. MacKenzie ed., 1991) [hereinafter MacKenzie, *Background*].

[22] *Id.* at 12.

[23] *Id.*

[24] Bradford W. Morse & Kazi A. Hamid, *American Annexation of Hawaii: An Example of the Unequal Treaty Doctrine*, 5 CONN. J. OF INT'L L. 407, 415 (1990).

[25] SEN. EXEC. DOC. No. 76, 52d Cong., 2d Sess. (1893), *reprinted in* PAPERS RELATING TO THE FOREIGN RELATIONS OF THE UNITED STATES, 1894, H.R. EXEC. DOC. No. 1., 53d Cong., 3d Sess., pt. 1, at 202; William J. Hough, III, *Baltic State Annexation*, 6 N.Y.L. SCH. INT'L & COMP. L. 300, 317 (1985).

[26] THOMAS J. OSBORNE, EMPIRE CAN WAIT: AN OPPOSITION TO HAWAIIAN ANNEXATION (1893-1898) 10-12 (1981).

United States was responsible for the ousting of Lili'uokalani.[27] Cleveland recommended reinstating the Queen,[28] but left that decision to Congress.[29] Congress chose neither to reinstate Lili'uokalani nor to annex Hawai'i[30].

The Republic of Hawai'i, an oligarchy controlled by American citizens, replaced the interim government on July 4, 1894.[31] The Republic continued attempts to annex the Islands to the United States.[32] In 1897 the Republic was successful and executed the Annexation Treaty of 1397.[33] The U.S. Senate, however, failed to ratify the treaty. To circumvent this set-back, pro-annexation Congressmen passed a joint resolution annexing Hawai'i[34]. Hawai'i's admission to statehood followed in 1959.

B. Modern rule against the use of force

Current international law opposes the use of force or threat of force against another state. The United Nations Charter, Article 2(4) states:

> All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence

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[27] *See generally* JAMES BLOUNT, REPORT OF COMMISSIONER TO THE HAWAIIAN ISLANDS, EXEC. DOC. No. 47, 53d Cong., 2d Sess. (1893).

[28] Cleveland states:

> [I]f a feeble but friendly state is in danger of being robbed of its independence and its sovereignty by a misuse of the name and power of the United States, the United States can not fail to vindicate its honor and its sense of justice by an earnest effort to make all possible reparations.

PRESIDENT'S MESSAGE RELATING TO THE HAWAIIAN ISLANDS, H.R. EXEC. DOC. NO. 47, 53d Cong., 2d Sess., at 15 (1893) [hereinafter INTERVENTION].

[29] The U.S. Senate Foreign Relations Committee, controlled by pro-annexationists, issued a report regarding the United States' role in the overthrow. *See* MacKenzie, *Background*, *supra* note 21, at 12. Even though no one visited Hawai'i in conducting research for the report, the committee decided to condone Steven's actions and formally recognize the provisional government. The committee justified Stevens' actions by characterizing Hawai'i as "a virtual suzerainty of the United States." Because of this special relationship, the committee asserted that the United States' actions were legal and did not violate any international protocol. S. REP. No. 277, 53d Cong., 2d Sess. 21 (1894).

[30] Mackenzie, *Background*, *supra* note 21, at 12.

[31] *Id.* at 13.

[32] THOMAS J. OSBORNE, EMPIRE CAN WAIT: AN OPPOSITION TO HAWAIIAN ANNEXATION (1893-1898) 10-16 (1981).

[33] SEN. REP., No. 681, 55th Cong., 2d Sess. 96-97 (1898).

[34] Joint Resolution of Annexation of July 7, 1898, 30 Stat. 750; 2 Supp. R.S. 895.

> of any state, or in any other manner inconsistent with the Purposes of the United Nations.[35]

The numerous countries comprising the international community have adopted various resolutions and charters codifying this general non-aggression principle.[36]

Under the current status of International Law, the actions by the United States and its Minister Stevens in 1893 clearly violate the rule against the use of force against another state.

This paper addresses whether international law in 1893 subscribed to similar anti-aggression prohibitions. This paper also explores what

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[35] U.N. CHARTER art. 2, ¶ 4.

[36] The U.N. General Assembly has also issued the Declaration on Principles of International Law concerning Friendly Relations. This resolution states: "Every State has the duty to refrain in its international relations from the threat or use of force against the territorial integrity or political independence of any State . . . Such a threat or use of force constitutes a violation of international law . . . . " DECLARATION ON PRINCIPLES OF INTERNATIONAL LAW CONCERNING FRIENDLY RELATIONS AND CO-OPERATION AMONG STATES IN ACCORDANCE WITH THE CHARTER OF THE UNITED NATIONS, G.A. Res. 2625(XXV), U.N. GAOR, 25th Sess., Supp. No. 28, at 212, U.N. Doc. A/8028 (1970), *reprinted in* 9 I.L.M. 1292 (1970).

Aggression, as defined by the U.N. General Assembly Resolution 3314, Art. I, is: the use of armed force by a State against the Sovereignty, territorial integrity or political independence of another State, or any other manner inconsistent with the Charter of the United Nations. G.A. Res. 3314(XXIX), U.N. GAOR, 29th Sess., Supp. No. 31, at 142, U.N. Doc. A/9631(1975), *reprinted in* 13 I.L.M. 710 (1974). Art. III continues:

Any of the following acts, regardless of a declaration of war, shall . . . qualify as an act of aggression:

(a) The invasion or attack by the armed forces of a State of the territory of another State, or any military occupation, however temporary, resulting from such invasion or attack, or any annexation by the use of force of the territory of another State or part thereof.

Id.

The Nuremburg Tribunal Charter offers another articulation of the centuries-old anti-aggression concept. Art. 6(1) states:

"Crimes against Peace: namely, planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing." *Judicial Decisions, International Military Tribunal(Nuremburg), Judgment and Sentences*, 41 AM. J. INT'L L. 174 (1947). The United Nations affirmed the Charter.

See G.A. Res. 95(I), U.N. Doc. A/64, at 188 (1946).

types of remedies might be available to Native Hawaiians today if the United States violated such prohibitions.

II. Sources of Internation Law

In 1893, international law had not yet been codified as it is presently recorded in the United Nations Charter. The lack of formal international state organizations in the Nineteenth century similarly presents another difficulty in assessing what constituted international law because no entity could speak on behalf of the international community regarding what conduct was and was not acceptable. Nineteenth century international law, however, generally condemned the use of force, especially when conquest was utilized to gain a fellow state's territory.

A. Treaties

A treaty is an international contract of agreement between states in which the states expressly consent to be legally obligated by the contract's terms.[37] States conclude treaties for innumerable purposes, including stipulating international laws. Treaties which specify general rules of future international conduct, or which confirm, define, or abolish existing customary law, are called law-making treaties.[38] When all or practically all of the international states conclude a law-making treaty, universal international law is created.[39] When a majority of states, including the leading powers, execute a law-making treaty, general international law is created.[40] Although only treaty signatories are bound by these general laws, non-signatories may become bound when they recognize those stipulated rules through their customary state practice.[41] Thus, general law may develop into universal law through the operation of a state's customary practices.[42]

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[37] James L. Brierly, The Law of Nations, an Introduction to the International Law of Peace 45 (1928).

[38] Lassa F.L. Oppenheim, International Law §18 (1948). One such law-making treaty is the Charter of the United Nations.

[39] *Id.* and Brierly, *supra* note 37, at 46. *See* General Treaty for the Renunciation of War, Aug. 27, 1928, T.S. No. 29 (1929), Cmd. 3410; 94 L.N.T.S. 57.

[40] Oppenheim, *supra* note 38, § 18. A law-making treaty executed by a number of states creates particular international law that is only binding upon the parties to that treaty. *Id.*

[41] *Id.*

[42] *Id.* Particular international law is created when a number of states conclude a law-making treaty. *Id.*

B. *State custom*

Custom is the second source of international law. Unlike law-making treaties in which a state expressly consents to be bound by the law created, custom provides a state's tacit consent to be bound, implied through that state's conduct.[43] Thus different states' habitual international practices define, create, and confirm a customary rule.[44] Customary law may be either general or particular. Once the vast majority of states recognize a custom as law, then the entire international community is bound by that law, unless dissenting states clearly express that they will not be bound by that principle.[45] With particular customary law, only the states that participated in its creation are bound by its rule.[46]

1. *Usage and customary law.*

International law describes custom as usage that has achieved the force of law.[47] In lay terms custom and usage are interchangeable ideas, however, they are distinguishable terms of art. Usage is a clear and continuous state practice or international habit that is adhered to without the conviction that the act is a legal duty.[48] Usage attains the status of custom when the habitual conduct is accompanied by the state's conviction that the conduct is required by law.[49] Thus custom is a state's clear and continuous habit which is adhered to because the state believes that the practice is a legal obligation under international law.[50]

Constant and uniform state habit crystallizes into customary international law when two requirements are met: 1) the state's conduct is

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[43] *Id.* § 16.

[44] MARK E. VILLIGER, CUSTOMARY INTERNATIONAL LAW & TREATIES ¶ 91 (1985).

[45] 1 JAN VERZIJL, INTERNATIONAL LAW IN HISTORICAL PERSPECTIVE 38 (1968).

[46] VILLIGER, *supra* note 44, ¶ 39-41.

[47] J. STARKE, INTRODUCTION TO INTERNATIONAL LAW 34-38 (9th ed. 1984).

[48] *Id.*

[49] *Id.*

[50] MARK E. VILLIGER, CUSTOMARY INTERNATIONAL LAW & TREATIES ¶ 17 (1985). The Statute of the International Court of Justice defines customary law as an "international custom as evidence of a general practice accepted as law." Statute of the International Court of Justice, June 26, 1945, art. 38, 59 Stat. 1055, T.S. No. 993, 3 Bevans 1179.

a material practice; and 2) the state follows the practice out of the conviction that the practice is law.[51]

a. Constant and uniform usage: generality, uniformity, duration.

Before an international habit or state practice qualifies as usage, the practice must be regular and repeated, as determined by the practice's generality, uniformity, and duration.[52]

Generality refers to the number of states that support the practice, as demonstrated through their active or passive acts.[53] Legal scholars have never established a minimum number of states necessary to meet the generality factor. The number of states required depends upon the type of customary law created. General customary law develops from a general usage embraced by a vast majority of nations.[54] Once a custom is embraced by the international community, it is enforceable against all members who do not specifically dissent from the rule.[55] Particular customary law develops from usage embraced by only a small number of states. Only states agreeing to the particular usage will be legally bound by the resulting particular customary law.[56]

Uniformity refers to the consistent and repetitious practice of individual states. The manner in which each state applies the practice defines the usage. Once each state's conduct becomes substantially the same as the other states' conduct, then uniformity of the practice is achieved.[57] If a state that once embraced the practice later acts contrary

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[51] *See infra* text at II.B.a.a and II.B.1.b.

[52] J. STARKE, INTRODUCTION TO INTERNATIONAL LAW 34-38 (9th ed. 1984).

[53] MARK E. VILLIGER, CUSTOMARY INTERNATIONAL LAW & TREATIES ¶ 17 (1985).

[54] *Id.*

[55] 1 JAN VERZIJL, INTERNATIONAL LAW IN HISTORICAL PERSPECTIVE 38 (1968). Absent an explicit reservation, a state may be considered to have acquiesced to the customary rule. *Id.*

[56] *Id.*; RESTATEMENT OF THE LAW OF FOREIGN RELATIONS §102 cmt. b (Tentative Draft 1985), states: "Failure of a significant number of important states to adopt a practice can prevent a principle from becoming general customary law though it might become 'particular customary law' for the participating states." *Id.*

[57] VILLIGER, *supra* note 53, ¶ 61. States' application of the practice need not be identical. The International Court of Justice stipulated that before a customary rule can be formed,the state practice was "*virtually uniform* in the sense of the provision invoked." *Id.* (quoting *North Sea Continental Shelf* (W. Ger. v. Den.; W. Ger. v. Neth.), 1969 I.C.J. 3 (Judgment of Feb. 20) [hereinafter *Continental Shelf*]).

to it, this interruption of uniformity will not necessarily destroy the development of usage or abrogate its authority.[58]

Duration refers to the lapse of time that is required to establish usage. Legal scholars have not agreed upon what length of time is required before a practice becomes a usage. Nevertheless, once the practice is uniformly followed, the period of time before the practice acquires the status of a customary rule need not be very long.[59] And the lapse of the practice for a brief period "is not necessarily . . . a bar to the formation of a new rule."[60] Accordingly, the practice's duration is sufficient when "within the period in question, short though it may be, State practice . . . [was] both extensive and virtually uniform."[61]

b. Opinio juris: accepting the practice as law

Opinio juris sive necessitatis has been described as "the invariable test that usage has crystallized into custom."[62] *Opinio juris* is a state's conviction that it is acting in accordance with a certain usage as a matter of law, and that departure from that practice will or should result in sanctions.[63] Thus once a state demonstrates that it believes that the usage is required by a legal obligation, customary law is created.[64] A state conforming to the usage for reasons other than legal obligation, such as comity or courtesy, do not possess the cognitive recognition that will transform the usage into customary law. Under these circumstances that customary law is not binding on such a state.[65]

2. Evidence of state practice and opinio juris

Before a state practice achieves the status of a customary rule, that practice must first meet the required generality, uniformity, and du-

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[58] 1 JAN VERZIJL, INTERNATIONAL LAW IN HISTORICAL PERSPECTIVE 35 (1968); MARK E. VILLIGER, CUSTOMARY INTERNATIONAL LAW & TREATIES ¶ 61 (1985).

[59] CLIVE PARRY, JOHN P. GRANT, ANTHONY PARRY & ARTHUR D. WATTS, eds., ENCYCLOPEDIA DICTIONARY OF INTERNATIONAL LAW 81 (1986) [hereinafter DICTIONARY OF INTERNATIONAL LAW]; RESTATEMENT OF THE LAW OF FOREIGN RELATIONS § 102 cmt. b (Tent. Draft 1985).

[60] Bradford W. Morse & Kazi A. Hamid, *American Annexation of Hawaii: An Example of the Unequal Treaty Doctrine*, 5 CONN. J. OF INT'L L. 407, 448-49 (1990).

[61] *Continental Shelf*, *supra* note 57.

[62] J. STARKE, INTRODUCTION TO INTERNATIONAL LAW 34-38 (9th ed. 1984).

[63] MARK E. VILLIGER, CUSTOMARY INTERNATIONAL LAW & TREATIES ¶ 69 (1985).

[64] 1 JAN VERZIJL, INTERNATIONAL LAW IN HISTORICAL PERSPECTIVE 38 (1968).

[65] STARKE, *supra* note 62, at 34-38.

ration thresholds. A state's acts, articulations, and behavior in the national and international arenas may satisfy those requirements.[66] In 1950 the International Law Commission listed the classical forms evidencing state practice. The examples include "treaties, decisions of national and international courts, national legislation, diplomatic correspondence, opinions of national legal advisers, [and the] practice of international organizations."[67] Diplomatic correspondences, general declarations of foreign and legal policy, instructions to state representatives (diplomats, consuls, military commanders), legal arguments delivered before international tribunals, statements made before the United Nations committees and organs, and written reservations on the text of a resolution may also denote a state practice.[68]

Evidence of a state's *opinio juris* regarding a usage need not be explicit but may be inferred from that state's acts or omissions.[69] The clearest evidence of a state's legal conviction is an express statement to that effect.[70] But the state actions, articulations, and conduct that demonstrate state usage may also demonstrate a state's *opinio juris*.[71]

It is not unusual that a state's conduct satisfies both requirements of customary law: usage and opinio juris. International conferences and treaties are examples of this phenomenon.

States may form international organizations and convene conferences to take a collective stand on certain issues.[72] Their actions as a group constitute state practice, provided that the organization's decision may be attributed to the individual participating states.[73] And while mere state attendance or participation in a conference does not automatically indicate *opinio juris*, how a state votes on a resolution, or arguments it

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[66] MARK E. VILLIGER, CUSTOMARY INTERNATIONAL LAW & TREATIES ¶ 19, 27-29 (1985).

[67] *Id.* ¶ 19. The list is only intended to be illustrative.

[68] *Id.* ¶ 28; JAMES L. BRIERLY, THE LAW OF NATIONS, AN INTRODUCTION TO THE INTERNATIONAL LAW OF PEACE 40-41 (1928).

[69] RESTATEMENT OF THE LAW OF FOREIGN RELATIONS §102 cmt. c (Tent. Draft 1985). Failure of a state to opt out of a newly emerging general customary law will result in that state being bound through acquiescence. 1 JAN VERZIJL, INTERNATIONAL LAW IN HISTORICAL PERSPECTIVE 38 (1968).

[70] *Id.* ¶ 73.

[71] MARK E. VILLIGER, CUSTOMARY INTERNATIONAL LAW & TREATIES ¶ 27 (1985).

[72] *Id.* If any customary law derives from these conferences, only the members participating and exhibiting their *opinio juris* are bound by the customary rule. *Id.* ¶ 27-33.

[73] VILLIGER, *supra* note 71, ¶ 33.

makes during debate, may reflect whether that state views the drafted rule as having the force of law.[74]

A treaty, while it may create explicit law itself,[75] may also be the foundation for demonstrating customary international law. Ordinarily, a treaty is legally binding only upon signatories.[76] However, frequent repetition of a certain phrase or concept in numerous treaties may demonstrate that the practice is general, uniform, and of sufficient duration to qualify as state usage.[77] This usage becomes customary law when the different states conclude this usage-articulating-treaty, thus exhibiting their *opinio juris*.[78] If a vast majority of states embrace the articulated usage as a general custom, then all states, even non-signatories to those treaties, are bound by the new rule.[79]

III. Customary Law Condemned the Use of Force in 1893

During the nineteenth century, the norm prohibiting the use of force between states evolved from a mere custom to binding customary law. American states primarily developed this rule through the American Continental System.[80]

A. Regional customary law deplored the use of force.[81]

1. The non-aggression evidenced in inter-american treaty provisions.

At the beginning of the nineteenth century, American states signed treaties not to enter into war.[82] These treaties characterized the use of

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[74] *Id.*, ¶ 30-31.

An abstention from voting is likely to be interpreted as passive approval of the draft rule. But consensus voting for a draft concept will not necessarily demonstrate *opinio juris* since this type of forum reduces the opportunity for states to voice reservations or opposition to an issue. *Id.*

Under these circumstances, only members of the group are held to the regional custom declared, until such time as the world community at large also decides to be bound by the rule. William J. Hough, III, *Baltic State Annexation*, 6 N.Y.L. Sch. Int'l & Comp. L. 300, 343 (1985).

[75] For a discussion on law-making treaties, *see infra* text at II.A.

[76] Bradford W. Morse & Kazi A. Hamid, *American Annexation of Hawaii: An Example of the Unequal Treaty Doctrine*, 5 Conn. J. of Int'l L. 407, 422 (1990).

[77] 1 Jan Verzijl, International Law in Historical Perspective 40 (1968).

[78] Morse & Hamid, *supra* note 76, at 422.

[79] Verzijl, *supra* note 77, at 40. But states always have the option of choosing not to be bound by the custom.

[80] *See infra* text at III.A.

[81] Francis A. Boyle, *American Foreign Policy Toward International Law and Organizations:*

force as "an evil act" to be avoided.[83] For example, the Treaty of Peace and Friendship executed between Guatemala and Salvador on July 4, 1839 read: "they will not declare war nor commit any positive act of hostility against each other, for any cause or pretext, not even for the alleged violation . . . of this treaty . . . ."[84] The Treaty of Peace and Friendship between Guatemala and Honduras on February 1856 similarly stated:

> they establish as a permanent rule of conduct, that in no event will they levy war against each other, nor consent that any hostile operations may be carried on . . . against the other under any pretext or motive; and in case any differences should occur, they will make each other adequate explanations, and have recourse . . . to the arbitration of some government of a friendly nation.[85]

The Treaty of Friendship, Commerce and Navigation signed by Peru and Venezuela on April 1, 1859 declared: "neither of the contracting parties shall declare war against the other, nor order or authorize act of reprisal or hostility, except in the case the other shall make impossible a settlement through diplomatic channels or the arbitral decision of a friendly government.[86]

1898-1917, 6 LOY. OF L.A. INT'L & COMP. L.J., No. 2, at 291 (1983). The American system of international relations essentially differed from the European system. The European system was grounded in monarchism, the balance of power, spheres of influence, war, conquest, imperialism, and the threat and use of force. Although the American states, especially the United States, also practiced some of these policies, the similar heritage of the American states permitted principles "more exacting, humane, enlightened, liberal and moral than those currently in operation between the states of the Old World." *Id.*

These principles of sovereign equality, state independence, noninterventionalism, peaceful settlement of disputes, mutual cooperation, are evident in the treaties the American states executed. *Id.*

[82] William J. Hough, III, *Baltic State Annexation*, 6 N.Y.L. SCH. INT'L & COMP. L. 300, 421-22 (1985).

[83] *Id.* at 422.

[84] TRATADOS DE GUATEMALA (DERECHO INTERNACIONAL GUATEMALTECO), vol. 1, at 560 (1892), *translated and quoted in* WILLIAM MANNING, ARBITRATION TREATIES AMONG THE AMERICAN NATIONS 18 (1924).

[85] TRATADOS DE GUATEMALA, *supra* note 77, at 522, *quoted in* MANNING, *supra* note 77, at 33.

[86] Aranda, Tratados del Peru, vol. 12, at 623, *translated and quoted in* MANNING, *supra* note 77, at 48.

These three excerpts are representative of the common ideas found within the treaties which demonstrate both the non-aggression usage and the individual state's *opinio juris*.[87]

The first regional custom recognizes solving international disputes primarily through mediation or arbitration channels. The second re-

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[87] This concept of non-aggression and arbitration are also found in many treaties. *See* Treaty of Peace & Friendship between Guatemala and Salvador signed July 4, 1839. MANNING, *supra* note 77, at 18:

> Art. 3. They likewise agree that they will not declare war nor commit any positive act of hostility against each other, for any cause or pretext, not even for the alleged violation of the whole or a part of this treaty, without having previously presented claims and asked due explanations of the offense, grievance, or damage that may give rise to the complaint . . . Should either party fail to comply with what is herein stipulated, it shall be answerable to the other for all the expenses, damages and losses that the war may occasion to the same.

Id.; Treaty of Peace, Friendship, Commerce and Navigation, Argentina and Chile, Aug. 30, 1855. *Id.* at 33.

> Art. 39 . . . to discuss them [boundary questions] pacifically and amicably afterwards, without ever having recourse to violent measures, and in case a complete settlement should not be arrived at, to submit the decision to the arbitration of a friendly nation.

Id.; Treaty of Friendship, Commerce, & Navigation, Ecuador & New Grenada July 9, 1856. *Id.* at 34:

> Art. 3: . . . the contracting parties solemnly pledge themselves not to appeal to the grievous recourse of arms before exhausting that of negotiation . . . .

Id.; Treaty of Friendship, Commerce, & Navigation, Guatemala & Nicaragua, Sept. 20, 1862. *Id.* at 56:

> Art. 7: The two republics agree that in no case shall there be war between them; and should any differences arise, proper explanations shall first be given, recourse being had eventually, failing mutual agreement, to the arbitration of the government of some friendly nation.

Id.; Treaty of Friendship, Commerce, & Navigation, Columbia & Peru, Feb. 10, 1870. *Id.* at 84:

> Art. 32: In general, in all cases of controversy . . . they shall have recourse to an arbitrator for peaceful and definitive arrangement of their differences, and neither of them shall declare war or authorize acts of reprisal against the other, except in the event of a refusal to submit to the decision of a friendly power, or to fulfill the sentence which may be issued.

Id.; Treaty of Friendship, Commerce, & Navigation, Ecuador & Salvador, Mar. 29, 1890. *Id.* at 190:

> Art. 1:
>
> All questions . . . which cannot be settled in a friendly manner, shall be referred to arbitration. Consequently in no case, and on no grounds whatever, can war be declared between the two nations.

Id.

gional custom permits the use of force, but only after all diplomatic recourses fail. These treaties evidence the *opinio juris* of the signatories and also demonstrate that States in this hemisphere clearly condemn unjustified aggression.

2. Inter-American conferences demonstrate the customary law of non-aggression in the American continents and Hawai'i

Although the United States did not enter into specific arbitration and non-aggression treaties with other American states during the nineteenth century, the United States supported the concept.

In 1890, the United States, under the leadership of then Secretary of State James Blaine, convened the International Conference of American States.[88] During the Conference, participants adopted the idea of the mutual respect for territorial integrity between states.[89] The committee on general welfare reported that the concept of conquest should never thereafter be recognized as permissive American public law.[90] Fifteen members adopted the report.[91] The United States dissented,

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[88] Francis A. Boyle, *American Foreign Policy Toward International Law and Organizations: 1898-1917*, 6 LOY. OF L.A. INT'L & COMP. L.J., No. 2, 245, 292 (1983). The first Inter-American conference was called on Nov. 29, 1881 by Secretary of State Blaine. The agenda was to discuss the prevention of warfare between American states. The conference, however, became sidetracked when Blaine resigned his post following President Garfield's assassination. *Id.*

[89] William J. Hough, III, *Baltic State Annexation*, 6 N.Y.L. SCH. INT'L & COMP. L. 300, 317, 434-35 (1985).

[90] John Bassett Moore, *Fifty Years of International Law*, 50 HARV. L. REV. 395, 435 (1937).

In response to Chile's forcible annexation of parts of Bolivia and Peru, delegates from Argentina and Brazil proposed resolutions declaring acts of conquest to be illegal under "the public law of America." *Id.*

The committee on general welfare issued a report declaring (1) that the principle of conquest should never, in the future, be recognized as admissible under American public law; (2) that, after the declarations were adopted, all cessions of territory made under threats of war or in the presence of armed forces, should be absolutely void; (3) that the nation making such cessions should always have the right to demand that the question of their validity be arbitrated; and (4) that any renunciation of this right should be "null and void, without regard to the time, circumstances, and conditions" under which it was made. Hough, *supra* note 89, at 317 n.56; *see also*, *International American Conference*, 2 REPORTS OF COMMITTEES AND DISCUSSIONS THEREON 1123-24 (Eng. ed. 1890).

[91] The Chilean delegation abstained from participating in the debates and voting of the report. Their refusal to participate was not surprising because the anti-conquest resolutions were in response to Chile's use of force in gaining territory from the Pacific War. Moore, *supra* note 90, at 435.

concerned that Chile would withdraw from the conference, thus jeopardizing the validity of the conference and its resolutions.[92] James Blaine, hoping to preserve the conference, proposed amending the resolutions which would go into effect only after the delegates concluded a mandatory arbitration treaty.[93] The conference unanimously adopted the compromise plan.[94] It read:

> 1. The principles of conquest is eliminated from American public law during the period in which the treaty of arbitration is in force.
> 2. All cessions of territory made during the continuance of the treaty of arbitration shall be void if made under threats of war or as a result of the pressure of armed force.
> 3. Any nation from which such cessions shall be extracted may demand that the validity of the cessions so made shall be decided by arbitration.
> 4. Any renunciation of the right to arbitrate, made under conditions named in the second section, shall be null and void.[95]

The conference, with the exception of Chile, adopted the revised resolutions. The conference also adopted blueprints for the arbitration treaty, but the plan failed to become operative and the treaty was never concluded.[96] Consequently the anti-conquest principle never expressly became law.[97] Under the Blaine amendments, because the conference never concluded the arbitration treaty, the anti-conquest resolution never achieved the status of a law. These resolutions, how-

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[92] *Id.*

[93] International American Conference, 2 Reports of Committees and Discussions Thereon 1078 (Eng. ed. 1890); Francis A. Boyle, *American Foreign Policy Toward International Law and Organizations: 1898-1917*, 6 LOY. OF L.A. INT'L & COMP. L.J., No. 2, 245, 292 (1983). The treaty would require mandatory arbitration of disputes not affecting a state's independence. *Id.*

[94] *Id.* at 185, 294.

[95] William J. Hough, III, *Baltic State Annexation*, 6 N.Y.L. SCH. INT'L & COMP. L. 300, 317 n.56 (1985). The original report declared (1) that the principle of conquest should never, in the future, be recognized as admissible under American public law; (2) that, after the declarations were adopted, all cessions of territory made under threats of war or in the presence of armed forces, should be absolutely void; (3) that the nation making such cessions should always have the right to demand that the question of their validity be arbitrated; and (4) that any renunciation of this right should be "null and void, without regard to the time, circumstances, and conditions" under which it was made. *Id.*

[96] John Bassett Moore, *Fifty Years of International Law*, 50 HARV. L. REV. 395, 436 (1937).

[97] Boyle, *supra* note 93, at 295.

ever, demonstrate the customary norm against conquest in the American System and the *opinio juris* of the participating states.

The Kingdom of Hawai'i, although not an American State, was intended to be included in the American System. The U.S. Congress extended a conference invitation to Hawai'i, but unfortunately Hawai'i's acceptance arrived after the Conference had adjourned.[98] Despite Hawai'i's non-participation, the invitation extended by the United States illustrates that the American Continental Legal system included the Kingdom of Hawai'i.

Blaine's communications with Great Britain further illustrates that the United States regarded Hawai'i as an independent state[99] within the American Continental system. In a letter to the British on November 19, 1881, Blaine announced:[100]

> This policy has been based upon our belief in the real and substantial independence of Hawai'i. The government of the United States has always avowed and now repeats that, under no circumstances, will it permit the transfer of the territory or sovereignty of these islands to any of the European powers.[101]

3. Other evidence of regional state practice

In 1883, Simon Bolivar met with representatives of Latin American republics in Caracas, Venezuela. They issued the Caracas Protocol which upheld the integrity of Latin American territory and recognized the obligation to ignore "the so-called right of conquest."[102]

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[98] ALICE FELT TYLER, THE FOREIGN POLICY OF JAMES G. BLAINE 183 (1927). Hawai'i's absence disappointed Blaine. He wrote to the Hawaiian government: "in view of those well known qualities which would have rendered [Hawai'i's] participation of signal value to the work of the Conference." *Id.*

[99] *Id.* The United States favored the Native rule. It stated it would continue to strengthen the economic relations with the Kingdom. *Id.* at 198-99.

[100] *Id.* at 199.

[101] *Id.* at 198. Blaine's support for Hawai'i's independence was the official policy of the Arthur Administration. Blaine himself, however, ultimately supported Hawai'i's annexation to the United States. Blaine recognized that the goal of annexation could similarly be achieved through distinct protection and increased U.S. immigration and investment; a *de facto* rather than *de jure* control. This conforms with Blaine's extension of the Monroe Doctrine to Hawai'i. British or European intrusions into the political or economic affairs of the Kingdom might jeopardize the United States' attempt to control Hawai'i. *Id.* at 200 n.18.

[102] ALICE FELT TYLER, THE FOREIGN POLICY OF JAMES G. BLAINE 317 (1927).

This concept against the use of force also surfaced in the *Drago Doctrine*. The Argentine Foreign Minister Louis M. Drago formulated the concept in December 1902, stating that "the public debt cannot occasion armed intervention nor even the actual occupation of the territory of American nations by a European power."[103] Read narrowly, this doctrine condemns the use of force by European powers in the American nations. Read liberally, it condemns any use of force. A broader reading is appropriate here since Drago's articulation was echoed in 1907 at the Second Hague Convention where signatory states agreed not to use force for debt collecting without first attempting arbitration.[104]

The arbitration treaties, resolutions from the Inter-American Conference, and foreign policy statements illustrate the non-aggression practice was sufficiently general, uniform, and of sufficient duration to qualify as a regional usage. States in the American system, the United States included, embraced this non-aggression usage, and their actions elevated this usage to the status of a customary law.

B. United States: opinion juris through its foreign policy

The United States demonstrated its willingness to be bound by the emerging law against the use of aggression through its reactions to international skirmishes. The United States issued an official statement denouncing Chile's annexation of Peruvian provinces and the Bolivian seacoast during the Pacific War (1879-1883).[105] The United States, which had never previously voiced its position on the right of conquest, issued this statement through Secretary Blaine:

> This Government feels that the exercise of the right of absolute conquest is dangerous to the best interest of all the republics of this continent . . . This government also holds that between two independent nations, hostilities do not, from the mere existence of war, confer the right of conquest until the failure to furnish the indemnity and guarantee which can rightfully be demanded. Nor can this government admit that a cession of territory can be properly exacted for exceeding in value that amplest estimate of a reasonable indemnity.[106]

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[103] 1 JAN VERZIJL, INTERNATIONAL LAW IN HISTORICAL PERSPECTIVE 217 (1968).

[104] JAMES L. BRIERLY, THE LAW OF NATIONS, AN INTRODUCTION TO THE INTERNATIONAL LAW OF PEACE 300 (1928).

[105] William J. Hough, III, *Baltic State Annexation*, 6 N.Y.L. SCH. INT'L & COMP. L. 300, 314 (1985).

[106] *Id.* at 315.

The United States offered to arbitrate a peace settlement between Chile and Peru, but the attempts failed.[107] Chile and Peru eventually signed the Ancon Peace Treaty without the aid of the United States.[108]

The United States also showed its *opinio juris* through a revised Monroe Doctrine. As originally declared in 1823, the Monroe Doctrine articulated the United States's special position to safeguard the stability of the Western Hemisphere against European intrusion.[109] During the late 1800s, the Monroe Doctrine escalated from a mere "veto" of European intervention to the affirmative right of the United States to intervene on behalf of American nations. The United States reserved the right to act as friendly counselor, mediator, or advisor to prevent the outbreak of war.[110] In one instance when a border dispute arose between Great Britain and Venezuela in 1895, the United States intervened by demanding that Great Britain submit to impartial arbitration.[111] Although Great Britain initially rejected arbitration, it reconsidered and agreed on February 2, 1897 it agreed to the arbitration.[112]

C. The customary law against the use of force began to emerge in the world community by the end of the nineteenth century

The principle of non-aggression originated as regional customary law between the members of the American Continental System. This concept against the use of force eventually found recognition and acceptance in the European community.

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[107] ALICE FELT TYLER, THE FOREIGN POLICY OF JAMES G. BLAINE 109 (1927). Chile desired to annex nitrate-rich areas of Tarapaca in Peru. *Id.* at 120 n.27.

[108] *Id.* at 118-25; Chile and Peru signed the treaty on Oct. 20, 1883. Chile gained the Peruvian department of Tarapaca and the Bolivian province of Antofagasta. HISTORICAL DICTIONARY OF CHILE 31 (Salvatore Bizarro ed., 2d ed. 1987).

[109] JAMES L. BRIERLY, THE LAW OF NATIONS, AN INTRODUCTION TO THE INTERNATIONAL LAW OF PEACE 162-63 (1928). The American Continents were no longer open to European colonization and, in return, the United States would not interfere with the European community. *Id.*

[110] ALICE FELT TYLER, THE FOREIGN POLICY OF JAMES G. BLAINE 17 (1927). The revised Monroe Doctrine forbade any act, hostile or friendly, violating or compromising the independence of the American community of states. BRIERLY, *supra* note 109, at 33.

[111] *Id.* at 163.

[112] 1 CHARLES CHENEY HYDE, INTERNATIONAL LAW: CHIEFLY AS INTERPRETED AND APPLIED BY THE UNITED STATES 143-46 (1922). After Great Britain initially refused the United States' demand, President Cleveland authorized funds for the formation of a committee to determine the border and, if necessary, a military presence to enforce the border. Great Britain later reconsidered and agreed to arbitration. *Id.*

The European powers first articulated the laws of war and the peaceful settlement of disputes at the Hague Peace Conferences of 1899 and 1907.[113] Czar Nicholas II convened the First Conference to discuss universal peace through armament reductions.[114] At the second Hague Peace Conference, the Porter Convention condemned the use of force to collect debts.[115] This European counterpart to the *Drago Doctrine* conditioned debt collection through force only when the debtor state refused to arbitrate the claim.[116]

International codification of the customary rule against aggression continued with the League of Nations. Article 10 of the League of Nations Covenant discouraged the use of force to resolve international disputes and guaranteed member States the right of political independence and territorial integrity against external aggression.[117] The Kellogg-Briand Pact, signed in July 1929, also generally renounced war. Article One renounced war to end international controversy, and Article Two advocated settlement of disputes through peaceful means.[118] The regional customary rule against aggression gradually gained acceptance and crystallized into the current law.

IV. THE UNITED STATES VIOLATED THE CUSTOMARY LAW OF NON-AGGRESSION

A. The United States was obligated to uphold the customary rule against aggression

The concept of non-aggression fully matured into regional customary law within the American Continental System. Beginning in the mid-

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[113] Bradford W. Morse & Kazi A. Hamid, *American Annexation of Hawaii: An Example of the Unequal Treaty Doctrine*, 5 CONN. J. OF INT'L L. 407, 442 (1990).

[114] LASSA F.L. OPPENHEIM, INTERNATIONAL LAW § 31 (1948).

[115] *Id.* § 136 n.4.

[116] *Id.* § 136.

[117] LEAGUE OF NATIONS COVENANT, art. 10 (1919) states: "The members of the league undertake to respect and preserve as against external aggression the territorial integrity and existing political independence of all Members of the League." *Id.*

[118] Aug. 27, 1928, 46 Stat. 2343, T.S. No. 796, 94 L.N.T.S. 57. Art. I states:

> "The High Contracting Parties solemnly declare in the names of their respective peoples that they condemn recourse to war for the solution of international controversies, and renounce it as an instrument of national policy in their relations with one another."

Id. Art. II states:

> "The High Contracting Parties agree that the settlement or solution of all disputes or conflicts of whatever nature or of whatever origin they may be, which may arise among them, shall never be sought except by pacific means."

Id.

nineteenth century, the practice among the American nations consistently and uniformly condemned the use of force to acquire territory or to resolve international disputes. The United States, through its foreign policy declarations and expansion of the Monroe Doctrine demonstrated an acceptance of the practice as a legal obligation. Thus, under customary international law, the United States was bound not to use aggression, force, or the threat of force against any other state.

B. The United States violated its legal obligation not to use force against the Hawaiian Kingdom.

1. The landing of 160 Marines in Honolulu constituted the use of force against the Hawaiian Kingdom

Minister Stevens ordered the landing of 160 armed Marines in Honolulu, allegedly to protect American lives and property. Under international law, a state has the inherent right to self-defense against armed attack. Logically, this right extends to the protection of its citizens abroad. Under these circumstances, the use of force is permissible for the *limited* purpose of self-defense. In this situation, however, the military occupation was not a vehicle of self-defense, but an affirmative tactic to discourage any opposition to the impending insurrection.[119] Although Minister Stevens claimed to mobilize the Marines for the protection of American citizens, the location of the troops in the vicinity of the insurrectionists suggests a different purpose. A later investigation ordered by newly elected President Grover Cleveland found Stevens' argument unconvincing. No riot or disturbance was ongoing when the troops landed.[120] Admiral Skerrett, officer in command of the naval force on the Pacific station, added that the troops' location would have been ineffective to defend U.S. interests since the U.S. consulate, and citizens' residences and businesses were situated in a different area of Honolulu. The troops' position, across from 'Iolani palace and adjacent to the building seized by the insurrectionists, was the ideal location to support the provisional government as it

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[119] ALICE FELT TYLER, THE FOREIGN POLICY OF JAMES G. BLAINE 215 (1927).

[120] JAMES BLOUNT, REPORT TO UNITED STATES CONGRESS: HAWAIIAN ISLANDS, EXEC. DOC. NO. 47, 53d Cong., 2d Sess., at 10 (1893) [hereinafter BLOUNT, REPORT]. Fear of rioting was unfounded. Men, women and children in Honolulu were going about their business in an ordinary and routine fashion.

declared the Hawaiian monarchy's abolition.[121] Following the investigation, Cleveland addressed Congress and declared: "[T]he military occupation of Honolulu by the United States on the day mentioned was wholly without justification, either as an occupation by consent or as an occupation necessitated by dangers threatening American life and property."[122] Although the Marines never opened fire or otherwise performed an act of war, under the customary rule against aggression, the *threat* of force or hostility was sufficient to violate international law.[123]

2. The United States planned the aggression against the Kingdom of Hawai'i

In 1882, Lorrin Thurston, a U.S. citizen living in Hawai'i, approached U.S. officials in Washington D.C. about the possibility of annexing the Kingdom. He received a positive response from Navy Secretary Tracy.[124] He received a similar assurance from the Harrison Administration: "[I]f conditions in Hawai[']i compel you to act as you have indicated [a revolution], and you come to Washington with an annexation proposition, you will find an exceedingly sympathetic administration here." [125]

Harrison's appointment of known annexationists, James Blaine and John Stevens, to Secretary of State and Minister to Hawai'i, also reflected his desire to gain legal control over the islands.[126] The design to annex Hawai'i is revealed in a letter Blaine sent Harrison on August 10, 1891: "I think there are only three places that are of value enough to be taken, that are not continental. One is Hawai[']i . . . Hawai[']i may come up for decision at any unexpected hour and I hope we shall be prepared to decide it in the affirmative."[127] And by appointing the

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[121] *Id.* at 9.

[122] PRESIDENT'S MESSAGE RELATING TO THE HAWAIIAN ISLANDS, H.R. EXEC. DOC. No. 47, 53d Cong., 2d Sess., at 10 (1893) [hereinafter INTERVENTION]

[123] TYLER, *supra* note 119, at 215.

[124] Bradford W. Morse & Kazi A. Hamid, *American Annexation of Hawaii: An Example of the Unequal Treaty Doctrine*, 5 CONN. J. OF INT'L L. 407, 413 (1990). The Secretary assured Thurston that the Arthur Administration favored the takeover of Hawai'i. *Id.*

[125] Secretary Tracy's statement to Thurston, as authorized by Harrision, 2 NATIVE HAWAIIAN STUDY COMMISSION, REPORT ON THE CULTURE, NEED AND CONCERNS OF NATIVE HAWAIIANS (MINORITY REPORT) 57 (1983) [hereinafter 2 NHSC, (MINORITY)].

[126] 1 NATIVE HAWAIIAN STUDY COMMISSION, REPORT ON THE CULTURE, NEED AND CONCERNS OF NATIVE HAWAIIANS (MAJORITY REPORT) 294 (1983) [hereinafter 1 NHSC, (MAJORITY)].

[127] Letter from Blaine to Harrison of Aug. 10, 1891, ALICE FELT TYLER, THE FOREIGN POLICY OF JAMES G. BLAINE 208 (1927).

annexation advocate Stevens as Minister, Harrison created a potentially volatile situation. Given the physical isolation of Hawai'i and Stevens' sympathies, the United States was in the ideal position to trigger a chain of events that would topple the monarchy while maintaining the semblance of propriety, and thus gain control of Hawai'i.

3. The United States is liable for the actions of minister Stevens under international and domestic agency law

Minister Stevens was clearly the United States' agent in the Kingdom of Hawai'i. The ordering of the Marine landing, recognizing the provisional government, and placing the provisional government under the United States' protection was, arguably, within the scope of Stevens' agency. However, in 1983, the federally created Native Hawaiians Study Commission concluded in its majority report that the actions of Stevens were unauthorized.[128] Because neither the U.S. President nor Congress did not explicitly sanction Stevens' actions, the report concluded that "as an ethical or moral matter, Congress should not provide for native Hawaiians to receive compensation either for loss of land or of sovereignty."[129] Arguably, Stevens acted without explicit authorization. In a letter to Secretary of State James Blaine on March 8, 1892, Minister Stevens requested official instructions in the event of a revolution. Blaine chose not to send a reply, leaving the decision to Stevens' discretion.[130] Because Blaine knew of Stevens' pro-annexation

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[128] 2 NHSC, (MINORITY), *supra* note 125, at iv-vii. The Native Hawaiian Study Commission's nine members disagreed on all the major issues, including the liability of the United States in the overthrow of the monarchy. The Minority, comprised of three Native Hawaiians, believed that the Majority's findings were "inaccurate and fatally-flawed." Therefore, they issued a dissenting minority report. *Id.*

[129] 1 NHSC, MAJORITY, *supra* note 126, at 25, 28. The Majority recognized the role Minister Stevens and the U.S. troops played in the overthrow of the Queen. These actions, however, were not expressly authorized by the United States. Thus, Native Hawaiians did not qualify for redress from the United States. *Id.* Native Hawaiians, however, have never conceded that Stevens' acted without authorization. But this statement leaves open a legal argument. If the United States did, in some fashion, sanction or ratify Stevens' actions, then the United States would be liable for compensation for Native Hawaiians' loss of land and sovereignty. *Id.* at 28.

[130] ALICE FELT TYLER, THE FOREIGN POLICY OF JAMES G. BLAINE 210 (1927). In a letter to Blaine, Stevens practically unveils the conspiracy to control Hawai'i and reveals the matter's delicacy:

> Believing that the views I have herein expressed are in accord with much in the past course of the American Government and in harmony with the opinions of

journalism activities in Hawai'i and never explicitly disapproved or approved of Stevens' actions, Blaine knew, or should have known, that the State Department's silence would be interpreted as consent. Thus it is reasonable to infer that Stevens would support a revolution if it would procure annexation.[131]

Even if the United States argues no liability because of a lack of authorization, under both international and U.S. agency law, the government is responsible for all illegal acts of its agents. The Inter-American Court of Human Rights articulated the international rule in the *Velasquez Rodriguez*[132] case:

> "[U]nder international law a State is responsible for the acts of its agents undertaken in their official capacity and for their omissions, even when those agents act outside the sphere of their authority or violate internal law."[133]

Under U.S. agency law, acts committed within an agent's actual or apparent authority are binding upon the principal, and a principal is liable for all acts committed by the agent within the scope of his agency.[134] A principal is also liable for the unauthorized acts of its agent if the principal ratifies, or fails to repudiate, those acts.[135] The

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> the President and of the Secretary of State, I submit them for what they are worth . . . As an official representative of the government of the United States in these special circumstances I can properly say no more.

Stevens to Blaine, September 5, 1891, FOREIGN RELATIONS OF THE UNITED STATES IN 1894: AFFAIRS IN HAWAI[']I, H.R. EXEC. DOC. No. 1, 53d Cong., 3d Sess., pt. 1, at 350-52, *quoted in id.* at 209.

Stevens' strong annexationist views were common knowledge in Hawai'i. The Majority NHSC report admits "it was obvious that he would not oppose a change." 1 NHSC, MAJORITY, *supra* note 129, at 294. James Blaine similarly supported Hawai'i's acquisition. The two men were friends and although Stevens was appointed by President Harrison, "[i]t is quite obvious that Stevens was a Blaine appointee." TYLER at 202.

[131] *See also infra* text at IV.B.2, for a discussion of President Harrison's possible secret agenda of annexing the Hawaiian Kingdom.

[132] Velasquez Rodriguez case, *Inter-Am. Ct. H.R.*, *reprinted in* 28 I.L.M. 291, 325 (July 29, 1988).

[133] *Id.*

[134] 3 C.J.S. *Agency* § 390 (1973). An agency relationship is characterized by the power of the agent to act on the principal's behalf in a representative capacity. 2A C.J.S. *Agency* § 5 (1972).

[135] 3 C.J.S. *Agency* § 390 (1973). A principal may repudiate or ratify the acts of the agent. *Id.* § 70 (1972). But repudiation of the agent's unauthorized acts must be

United States never repudiated the Marine deployment, the recognition of the provisional government, or the placement of the provisional government under U.S. protection.[136] Instead the United States, in conduct and declaration, ratified Stevens' acts. Harrison negotiated and signed an annexation treaty with the provisional government on February 15, 1893,[137] demonstrating the United States' intent to ratify and approve its agent's actions, especially because the United States would benefit from these acts. The following year the United States Senate's Foreign Relations Committee condoned Stevens' actions.[138] The Committee also recognized the provisional government, thus expressly ratifying Stevens actions.[139]

The United States did not repudiate Stevens' unauthorized actions. Instead, the United States, in conduct and declaration, ratified Stevens' acts. Therefore, the United States was responsible for the overthrow of the Hawaiian sovereign and is liable for the damages and injuries stemming from this illegality.

4. President Cleveland's admission of the United States' role in the Queen's overthrow confirmed the acceptance of customary law against aggression.

On February 14, 1893, Secretary of State John W. Foster, concluded the treaty of annexation with the provisional government.[140] Before the Senate could ratify it, newly elected President Cleveland withdrew the document, "for the purpose of re-examination" of the events leading

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prompt. *Id.* § 402.

A principal's ratification may be express or implied. 2A C.J.S. *Agency* § 83. Implied ratification may be construed if a principal's conduct or action: (1) tends to show the intent to ratify, 2A C.J.S. *Agency* § 84. (2) is inconsistent with the intent to repudiate, or (3) shows apparent approval or recognition of the unauthorized act. 2A C.J.S. *Agency* § 88.

[136] MacKenzie, *Background*, supra note 21, at 12.

[137] *Id.*

[138] S. REPT. No. 77, 53d Cong., Sess. 21 (1894). The Committee, controlled by pro-annexationists, held hearings on the Hawaiian Question and issued the Morgan report in February 1894. The report, not surprisingly, condoned Stevens' actions. THOMAS J. OSBORNE, EMPIRE CAN WAIT: AN OPPOSITION TO HAWAIIAN ANNEXATION (1893-1898) 74-80 (1981).

[139] S. REPT. No. 77, 53d Cong., Sess. 21 (1894). The Committee states that because relations between the United States and the Hawaiian Kingdom were akin to "a virtual suzerainty," international norms of conduct between countries did not apply. S. REPT. No. 77, 53d Cong., Sess. 21 (1894); Karen Blondin, *A Case for Reparations*, 16 HAW. B.J., 13, 22 (1981).

[140] William J. Hough, III, *Baltic State Annexation*, 6 N.Y.L. SCH. INT'L & COMP. L. 300, 317 (1985).

to the overthrow of the Hawaiian sovereign.[141] James H. Blount investigated the Hawai'i situation and concluded that the overthrow resulted from a conspiracy between the insurrectionists and John L. Stevens, and that the Marines from the *Boston* were landed to aid the U.S-led coup.[142]

Cleveland addressed the joint Houses of Congress declaring that the aid of U.S. diplomatic and naval agents enabled the Committee of Safety to dethrone the legitimate sovereign.[143]

> [B]ut for the lawless occupation of Honolulu under false pretexts by the United States forces, and but for Minister Stevens' recognition of the provisional government when the United States forces were its sole support and constituted its only military strength, the Queen and her government would never have yielded to the Provisional government.[144]

Cleveland characterized the participation of Minister Stevens in the conspiracy as unauthorized acts of war committed under the misappropriation of the United States name. He added, "the United States can not fail to vindicate its honor and its sense of justice by an earnest effort to make all possible reparation."[145] In support of these findings, Cleveland sent a new minister, Albert S. Willis, to Hawai'i to restore the legitimate government. Willis arrived in November 1893, and after negotiating the restoration with Lili'uokalani, he asked provisional government President Sanford Dole to relinquish the government to Lili'uokalani.[146] Dole refused.[147] And since Cleveland did not have Congressional authorization to use force to restore Lili'uokalani, and since Congress's support was unlikely, he could act no further.[148]

By 1893, the United States had bound itself to the customary law of non-aggression against a fellow-state. By landing U.S. armed forces in Honolulu for no apparent reason, the United States violated that law. And although the Marines and battleship never opened fire, the imminent threat of hostilities by the troops were sufficient to qualify

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[141] Mackenzie, *Background*, *supra* note 21, at 12.

[142] KUYKENDALL, HISTORY, *supra* note 2, at 280.

[143] Bradford W. Morse & Kazi A. Hamid, *American Annexation of Hawaii: An Example of the Unequal Treaty Doctrine*, 5 CONN. J. OF INT'L L. 407, 415 (1990).

[144] INTERVENTION, *supra* note 28, at 13.

[145] MacKenzie, *Background*, *supra* note 21, at 12.

[146] KUYKENDALL, HISTORY, *supra* note 2, at 280-81.

[147] *Id.* at 281. Dole refuted Blount's findings and claimed the United States was interfering with the internal affairs of Hawai'i. *Id.*

[148] *Id.*

as aggression. Given the circumstances, Lili'uokalani reasonably inferred that the United States intended to forcefully remove her from power. Realizing the futility of resisting and hoping to prevent bloodshed, she relinquished her authority over Hawai'i to the United States.[149] President Cleveland himself later admitted that the United States's role in the overthrow was clearly illegal.

V. The United States Violated Its Treaties With the Hawaiian Kingdom

The United States entered into a series of treaties with the Kingdom of Hawai'i prior to Lili'uokalani's overthrow. The two states executed their first formal agreement in 1826.[150] Although never ratified by the U.S. Senate and thus never legally binding, United States officials sought to impress upon the chiefs the moral duty to respect "the sanctity of this agreement."[151] In 1849, the United States signed and ratified the Treaty of Friendship, Commerce and Navigation.[152] Article One stated that "[t]here shall be perpetual peace and amity between the United States and the King of the Hawaiian Islands, his heirs and his successors."[153] The two nations entered into the Treaty on Commercial Reciprocity on January 30, 1875.[154] And in 1884 the Reciprocity treaty was amended to give the United States the exclusive right to enter and use Pearl Harbor as a coaling and repair station.[155]

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[149] MacKenzie, *Background*, *supra* note 21, at 12.

[150] *See* Treaty with Hawai'i on Commerce, Dec. 23, 1826 *in* Bevans, *supra* note 6, at 861. Section One stated that "peace and friendship . . . are hereby confirmed and declared to be perpetual." *Id.*

[151] Melody K. MacKenzie, *Self-Determination and Self-Governance*, in Native Hawaiian Rights Handbook 77-78 (Melody K. MacKenzie ed., 1991) [hereinafter MacKenzie, *Self-Determination*] *quoting* H. Bradley, *Thomas Ap Catesby and the Hawaiian Islands, 1826-1829* 39 Hawaiian Hist. Soc'y Rep. 23 (1931).

[152] Treaty of Friendship, Commerce and Navigation, Dec. 20, 1849, United States-Hawai'i, 9 Stat. 977, *in* Bevans, *supra* note 6, at 864; The treaty was effective for ten years after which either party could terminate treaty obligations one year after notifying the other state. Because neither party exercised the termination provision, this treaty was in effect at the time of the overthrow. *Id.*

[153] *Id.*

[154] Treaty with Hawai'i on Commercial Reciprocity, Jan. 30, 1875, United States-Hawai'i, 19 Stat. 625, *in* Bevans, *supra* note 6, at 874. This treaty was amended in 1884.

[155] Treaty with Hawai'i on Commercial Reciprocity, Dec. 6, 1884, United States-Hawai'i, 25 Stat. 1399, *in* 3 Charles Bevans, Treaties and Other International Agreements of the United States of America 1776-1949 at 878 (1971) [hereinafter Bevans]. This treaty amended the earlier 1875 treaty and was still in effect in 1893. *Id.*

At the time of the overthrow, the Treaties of 1849 and 1884 were still in force. The United States clearly violated its express promise of "peace and amity" when it landed in peaceful Honolulu to provide military support for the overthrow of the legitimate sovereign. By recognizing the provisional government and later the Republic of Hawai'i, and eventually annexing the Republic further, the United States continually contradicted the explicit and implicit obligations found within the different treaties.

VI. The Republic of Hawai'i Lacked the Legitimate Authority to Annex Hawai'i

A. The overthrow of the Sovereign failed to qualify as an authentic revolution and was therefore illegal

Under principles of international law, an authentic revolution staged by the people dissatisfied with the government is not illegal. In practice, the United States readily recognized governments that emerged from revolution, provided that citizenry supported the change.[156]

In Hawai'i, however, the "revolution" was not an uprising of dissatisfied masses. A small, select group of pro-annexation United States citizens staged the revolt. Only through the combined forces of a military presence and apparent diplomatic support did the overthrow succeed. Since the revolt was not an authentic revolution of the citizenry but an insurrection by foreign interests, the successive government and its subsequent acts were illegitimate.

B. The Republic of Hawai'i did not have the authority to annex Hawai'i

Once McKinley entered the White House, Republic President Dole sent representatives to Washington, D.C. to negotiate a possible transfer of Hawai'i. The Republic and the United States signed the Treaty of Annexation on June 16, 1897. The treaty stated:

> The Republic of Hawai'i hereby cedes absolutely and without reserve to the United States of America all rights of sovereignty of what so ever in and over the Hawaiian Islands and their dependencies; and it is agreed that all the territory of and appertaining to the Republic of

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[156] Intervention, *supra* note 28, at 13.

> Hawai'i is hereby annexed to the United States of America under the name of the Territory of Hawai'i.[157]

The proposed annexation of the Republic of Hawai'i lacked two vital elements: one, approval by the majority of the people; and two, the legitimate authority to represent Hawai'i.

The Republic in name and form resembled the United States and British governments, but its true form was an oligarchy intended to keep the U.S.-citizen minority in control of Hawai'i.[158] After the annexation treaty of 1893 failed, the provisional government convened a constitutional convention to create the Republic.[159] Insurrection leader Sanford Dole personally selected 19 of the 37 delegates so that the insurrectionists would have a majority and retain control of Hawai'i.[160] The remaining delegates were elected, but many of the previously qualified voters were excluded by strict voting requirements.[161] To further insure control of the convention by pro-U.S. individuals, all voters were required to declare allegiance to the Provisional government.[162] To oppose this political oppression, those Hawaiians who could fulfill the voting requirements refused to register to vote or to otherwise participate in the newly established government.[163] The result: government by the few, for the few.

An editorial in the *New York Times* in July 1893 denounced the provisional government because it was "not set up by the people of the Hawaiian Islands as the result of overturning the former rule because it was unsatisfactory to them."[164] The author argued that under the political principles the United States embraced, the People of Hawai'i had the right to determine their own political destiny. Hawai'i could be legally transferred only if Hawaiian citizens, dissatisfied with the monarchy, revolted and then asked the United States

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[157] Bradford W. Morse & Kazi A. Hamid, *American Annexation of Hawaii: An Example of the Unequal Treaty Doctrine*, 5 CONN. J. OF INT'L L. 407, 418 (1990).

[158] MacKenzie, *Background*, *supra* note 21, at 13.

[159] *Id.*

[160] Poka Laenui (Hayden F. Burgess), *Hawaiian Independence: Its Legal Basis*, SYMPOSIUM ON NATIVE HAWAIIAN SOVEREIGNTY 85, 102 (Dec. 2-3, 1994); MacKenzie, *Background*, *supra* note 21, at 13.

[161] MacKenzie, *Background*, *supra* note 21, at 13.

[162] *Id.*

[163] MacKenzie, *Background*], *citing* W.A. RUSS, JR., THE HAWAIIAN REPUBLIC (1894-1898), 33-34 (1961).

[164] Editorial, *To Convey a Stolen Kingdom*, N.Y. TIMES, July 28, 1893, at 4.

to assume control of the government.[165] Nevertheless, because of the lack of Hawaiian involvement in the overthrow and voting, the United States should not have accepted Hawai'i's annexation.

Renowned legal scholar Thomas M. Cooley, echoed the anti-annexationist position. Cooley, former justice of the Michigan Supreme Court (1864-85), Chairman of the Interstate Commerce Commission[166] and professor of constitutional law at the University of Michigan[167] discussed the constitutionality of the proposed annexation in his article"Grave Obstacles to Hawaiian Annexation."[168] Although this work addressed the annexation treaty the United States and the provisional government executed, Cooley's basic constitutional analysis regarding any Hawaiian annexation is instructive. He asked: (1) did the provisional government possess the authority to cede the Hawaiian Islands? And if so, (2) did the United States have the constitutional power to accept the annexation?[169]

Cooley concluded that annexation would be unconstitutional. First, the provisional government could not legitimately offer Hawai'i to the United States because Hawaiian citizens never consented to the secession.[170] Second, the United States lacked the constitutional power to annex Hawai'i under the terms offered the provisional government offered.[171] Cooley characterized the provisional government as seeking the status of an "outlying colony" as opposed to the status of a state or conventional territory.[172] And because "outlying colonies are not within the contemplation of the Constitution of the United States[,]" annexing the Islands would be unconstitutional.[173]

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[165] *Id.*

[166] THOMAS J. OSBORNE, EMPIRE CAN WAIT: AN OPPOSITION TO HAWAIIAN ANNEXATION (1893-1898) 32 (1981).

[167] *Id.*

[168] *Id.*, at 33 (citing Thomas M. Cooley, *Grave Obstacles to Hawaiian Annexation*, THE FORUM 15, 392 (June 1893)).

[169] *Id.*

[170] *Id.* But were either the provisional government or the Republic of Hawai'i ever legitimate governments? Consider this argument: Lili'uokalani never surrendered to the Provisional government; instead she relinquished her authority to the President of the United States. Thus, the sovereign power to govern Hawai'i never "passed" to either government but remained with the United States. And when President Cleveland instructed to have Lili'uokalani restored, the sovereign power to govern Hawai'i lay with Lili'uokalani. *Id.*

[171] *Id.*

[172] *Id.*

[173] *Id.*

The second U.S. attempt to annex Hawai'i would also be unconstitutional following Cooley's analysis. Under the first part of the analysis, the offer to cede Hawai'i was invalid because the Republic lacked the legitimate power to act in that fashion since the inhabitants of Hawai'i never gave their consent.[174]

Members of the Canadian parliament similarly objected to annexation actions by the United States. Parliament member N.F. Davin stated: "[t]o annex forcibly on the part of any power would be contrary to modern ideas of the obligations which control the actions of the great powers."[175] Parliament member Alexander McNeill added: "If it be true that the native population is opposed to a change, any interference by the United States would be contrary to [the United States'] own principles."[176]

When the U.S. Senate failed to ratify the Treaty of 1897, the pro-annexationist McKinley administration turned to the House of Representatives.[177] On May 4, 1898, Representative Francis G. Newlands introduced a resolution to annex Hawai'i.[178] Hawai'i's annexation was put to joint resolution of both Houses of Congress. The constitutionality of annexing Hawai'i's by joint resolution instead of by a treaty was hotly debated in the Senate. Georgia Senator Augustus O. Bacon argued that the United States Constitution only authorized acquiring territory pursuant to treaty.[179] Bacon and other anti-imperialists maintained that annexing territory through a joint resolution infringed upon the exclusive powers of the Senate and President to deal in matters relating to the incorporation of foreign territory.[180] Furthermore a

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[174] *Id.* While the Republic's Senate debated the annexation treaty, Native Hawaiians met and on September 6, 1896 and passed resolutions voicing their opposition to annexation and their desire for their independence under a monarchy. The next day these resolutions were given to U.S. Minister to Hawai'i, H.M. Sewall and to the Republic's President Dole. W.A. Russ, Jr., The Hawaiian Republic (1894-1898) 198, 209 (1961).

[175] *Canadians Don't Like It: They Think Annexation Would Mean Trouble for U.S.*, N.Y. Times, Feb. 16, 1893, at 1.

[176] *Id.*

[177] Thomas J. Osborne, Empire Can Wait: An Opposition to Hawaiian Annexation (1893-1898) 109 (1981).

[178] MacKenzie, *Background*, *supra* note 21, at 15.

[179] 31 Cong. Rec. 6138, 6149 (1898). *See also* 31 Cong. Rec. 6293, 6310, 6518 (1898).

[180] 31 Cong. Rec. 6516, 6518 (1898). Minnesota Senator Cushman K. Davis believed that the passage of the Newlands resolution would impinge upon senatorial prerogatives.

dangerous precedent might be established whereby the senate's treaty-ratifying power could be circumvented and usurped by a legislative act of Congress.[181] Lastly, even if territorial acquisition through joint resolution was constitutional, the Newlands Resolution would not be operative in Hawai'i since a resolution cannot bind people residing outside of the United States' jurisdiction.[182]

With only a simple majority needed to pass the resolution, the former independent Kingdom of Hawai'i became the territory of its former sister state on July 7, 1898 when President McKinley signed the Newlands joint resolution.[183] Because the provisional government came to power through an illegal uprising, the government it established was illegitimate and thus the Republic's cession of Hawai'i was similarly illegitimate.[184]

VII. CONCLUSIONS

The United States breached its express obligations under the Treaty of 1849, of peace and amity with the Hawaiian Kingdom. It also violated the customary rule against planning and initiating the con-

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In a letter to his law partners, he wrote:

> It may be that those who are opposing the [Newlands] resolutions upon Constitutional grounds may come to me with a proposition to let them drop it, and advise and consent to the treaty instead. If this proposition is made, I shall accept it, because I have been exceedingly reluctant all through to proceed by way of resolutions. Which I have little doubt of their Constitutionality, I dislike very much to see the treaty making prerogatives of the Senate maimed by that method of procedure.

Letter from Senator Cushman K. Davis to Frank B. Kellogg and Cordenio A. Severance (June 30, 1898) *in* CUSHMAN K. DAVIS PAPERS, at 9 (Minnesota Historical Society), *quoted in* THOMAS J. OSBORNE, EMPIRE CAN WAIT: AN OPPOSITION TO HAWAIIAN ANNEXATION (1893-1898) 159 n.12 (1981).

[181] 31 CONG. REC. 6516, 6518 (1898).

[182] 31 CONG. REC. 6516, 6518 (1898).

[183] Joint Resolution of Annexation of July 7, 1898, 30 Stat. 750; 2 Supp. R.S. 895.

[184] Even under the Territorial government, Native Hawaiians were denied the right to political participation. The U.S. Congress erected the territorial administration, reserving the right to abolish or change its form. Congress could also amend or invalidate any territorial law, even if passed by the territory's bicameral legislature. The U.S. President appointed the Governor and Department heads and the top level judges. Lower level judges were appointed by the Chief Justice of the Territorial Supreme Court. KUYKENDALL, HISTORY, *supra* note 2, at 195.

spiracy using force against the Hawaiian ruler.[185] Since the overthrow of the legitimate sovereign was indeed illegal, the provisional government and its successor, the Republic of Hawai'i, were also illegitimate. Consequently, the illegitimate governments' negotiations and obligations would not be binding upon the parties and were invalid. Accordingly, the United States is an alien colonial power that has occupied the Hawaiian nation for over one century.[186]

VIII. What Remedy is There For the Loss of Native Hawaiian Sovereignty?

A. The International community supports remedying violations of international law

International law articulates the standards governing how a state conducts itself with other states and how a state treats its people. The United Nations Charter, international conventions, treaties, and customary law provide the source for these standards. When a state violates one of these recognized laws, the world community, often through the United Nations, will respond to the illegality through diplomatic, economic, or military channels.

1. Form of the reparations

International reparations traditionally include monetary compensation and satisfaction.[187] The form of the reparations depends upon the classification of injury. Damages, and thus reparations, can be classified into two major categories: moral and material injury. A material injury is the "damage to persons or property."[188] Monetary compensation is the common reparation form.[189]

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[185] Bradford W. Morse & Kazi A. Hamid, *American Annexation of Hawaii: An Example of the Unequal Treaty Doctrine*, 5 Conn. J. of Int'l L. 407, 425 (1990).

[186] *Id.* at 449.

[187] Dictionary of International Law, *supra* note 59, at 336. "Satisfaction" is defined as a term used to "describe any form of redress that is available under international law to make good a wrong done by one State to another . . . In a narrower sense, it refers to measures other than reparation proper, such as punitive damages, apology." *Id.*

[188] Carl Q. Christol, *International Liability for Damage Caused by Space Objects*, 74 Am. J. Int'l L. 346, 362 (1980) [*hereinafter* Christol].

[189] Robert F. Turner, *Justice: What Iraq Owes Its Victims; After the Fighting, the Principle of Law Must Still be Defended*, The Wash. Post, Mar. 3, 1991, at C4.

A moral injury to a state is an "injury to the dignity or sovereignty of a state,"[190] for example the violation or breach of a treaty. The remedy could include a monetary award,[191] punishment of the wrongdoer, an apology to the victim, acknowledgment of wrongdoing by the guilty party, and other measures necessary to prevent the recurrence of the illegal act.[192]

The reparations package for a moral injury depends upon the facts of the claim. Whatever the form of reparation, the Permanent Court of International Justice (P.C.I.J.) explained in the *Chorzow Factory* case that the "reparation must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed."[193] However, all reparation packages must meet the standards of justice and reasonableness.[194] Any award of an excessive or disproportionate

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[190] LASSA F.L. OPPENHEIM, INTERNATIONAL LAW 352 (1948). *See also* SENATE COMM. ON FOREIGN RELATIONS, CONVENTION ON INTERNATIONAL LIABILITY FOR DAMAGE CAUSED BY SPACE OBJECTS, S. EXEC. REP. 38, 92d Cong., 2d Sess. 9 (1972), *quoted in* Carl Q. Christol, *International Liability for Damage Caused by Space Objects*, 74 AM. J. INT'L L. 346, 363 (1980) ("The United States government also recognizes the principles of moral and material damages"). In a statement relating to the liability for damage caused by space objects, the spokesperson for the Department of State notes: "claims covering moral damage aspects are well-known in international legal and United States domestic practices, and hence the United States would not hesitate to include them in claims we might present [for injuries caused by space objects]." *Id.*

Punitive damages are not a generally acceptable form of reparations. OPPENHEIM at 320. Even though a claim is not so labeled, an excessive or disproportionate amount of compensation that would have the penal effect would be contrary to international law principles. *Letelier and Moffitt Case* (United States v. Chile), *reprinted in* 31 I.L.M. 1, 22 (Jan. 11, 1992)(concurrence of Professor Francisco Orrego Vicuna) [*hereinafter* Letelier and Moffitt].

[191] Christol, *supra* note 188, at 362-63. The violating state is obligated to make monetary amends to the injured state. GOVERNMENT OF CANADA, DEPT. OF EXTERNAL AFFAIRS COMMUNIQUE NO. 8, Jan. 23, 1979, *quoted in id.* at 363.

[192] DICTIONARY OF INTERNATIONAL LAW, *supra* note 59, at 356.

[193] *Chorzow Factory* (Ger. v. Pol.), 1928 P.C.I.J. No. 17, at 47 (1928), *quoted in* Robert F. Turner, *Justice: What Iraq Owes Its Victims; After the Fighting, the Principle of Law Must Still Be Defended*, WASH. POST, Mar. 3, 1991, at C4.

[194] *Letelier and Moffitt*, *supra* note 190, at 25. "In calculating the amount for moral damages, factors which might mitigate the award include a formal apology, a non-judicial inquiry into the situation, enactment of legislation to prevent future illegalities, criminal prosecution for the wrongful conduct, and other actions demonstrating that the violating state "is not indifferent to the moral issues involved in the matter." *Id.*

amount may be challenged and disallowed as being penal in nature (even though not labeled punitive damages), and thus prohibited under international law.[195]

2. Examples of reparations for violations

International law recognizes that "the principal legal consequences of an international delinquency are reparation of the moral and material wrong done."[196]

The *Trail Smelter*[197] case reinforces the sense that when one state inflicts injury upon another state, the offending party must redress that wrong. The arbitration tribunal ruled "under the principles of international law . . . no State has the right to use or permit the use of its territory in such a manner as to cause injury . . . in or to the territory of another or the properties or persons therein . . . ."[198]

This sense of state responsibility is also illustrated in the Cosmos 954 claim and the *Lucky Dragon* compensation. In 1978, the Soviet's nuclear-powered satellite, Cosmos 954, reentered the earth's atmosphere and crashed in Canada. On January 1979, Canada presented its $6 million claim for "those costs . . . which would not have been incurred had the satellite not entered Canadian territory."[199] Two years later, the Soviet Union paid the Canadian government $3 million, about half of the cleanup costs.[200]

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[195] LASSA F.L. OPPENHEIM, INTERNATIONAL LAW 156a (1948). Although punitive damages are generally not included as reparations, Oppenheim cited cases in which victims were awarded punitive-like compensation. *Id.* at 156a, 321 n.1.

[196] *Id.* at 318.

[197] *United States v. Canada*, in popular name *Trail Smelter Case*, 3 R.I.A.A. 1965 (1938) (1941) [hereinafter *Trail Smelter*].

[198] *Id.* The case involved sulphur dioxide fumes from a Canadian smelter plant that caused to land in Washington State. *Id.* RESTATEMENT OF RESTITUTION § 1 (1936).

The domestic law also supports the proposition of redressing the breach of a legal obligation. The Restatement states in pertinent part "[a] person who has been unjustly enriched at the expense of another is required to make restitution to the other." Restitution is viewed as an act of restoring or giving equivalent for any loss, damage or injury. BLACK'S LAW DICTIONARY 682 (5th ed. 1983). A similar concept, reparations, is defined as "[P]ayment or otherwise making amends for an injury or for damages that have been committed on or to another. *Id.* The international community and the United States accepts the remedy of reparations to redress a wrong or injury.

[199] Government of Canada, Dept. of External Affairs, Communique No. 8, Jan. 23, 1979, *quoted in* Carl Q. Christol, *International Liability for Damage Caused By Space Objects*, 74. AM. J. INT'L L. 346 (1980).

[200] Ronald J. Ostrow, *Soviets Probably Not Required to Pay Damages, Law Experts Say*,

The *Lucky Dragon* claim arose from a hydrogen bomb test on Bikini Atoll on March 1, 1954.[201] The *Lucky Dragon* vessel and its twenty-three Japanese fishermen were 160 kilometers from the blast site when the bomb exploded. Although the boat was clearly within the danger zone, the United States failed to warn them of the impending blast. Consequently, the twenty-three were exposed to nuclear fallout that resulted in radiation sickness.[202] A year later, the United States tendered to the Japanese government an *ex gratia* payment of two million dollars for the damages and injuries the thermonuclear tests caused.[203]

And when Iraq annexed neighboring Kuwait through force in 1990, the world community united against Iraq. The United Nations' Security Council utilized condemning resolutions, economic sanctions,[204] and eventually military force to restore Kuwait's independence. Following the surrender of Iraq's forces, the United Nations passed several resolutions requiring Iraq to pay restitution to Kuwait and its citizens for the invasion's physical and economic injuries.[205]

B. The United States violated international law against aggression and benefitted from the violation, resulting in injury to Native Hawaiians.

The world community, in 1893 and through to the present, condemned the gaining of land through conquest. The United States

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L.A. TIMES, May 4, 1986, at Part 1, p. 19.

The Soviets did not compensate for Canada's ecological damage caused. Laurie Watson, *Canada Prepares for Possible Satellite Crash,* U.P.I., Sept. 12, 1988, LEXIS, in Nexis library.

[201] *Livermore Lab Scientists Cleaning up Bikini Atoll,* PR Newswire, Oct. 21, 1985, *available in* Lexis, in Nexis library.

[202] Jeff Adams, *Remembering the Horror,* CALGARY HERALD, Apr. 23, 1992, at A5.

[203] Luke T. Lee, *The Right to Compensation: Refugees and Countries of Asylum,* 80 AM. J. INT'L L. 532, 565 n.174 (1986). The U.S. government never admitted liability for the damages. *Id.*

[204] *See* S. RES. 662, U.N. SCOR, 45th Sess., U.N. Doc. S/Res/662 (1990), *reprinted in* 29 I.L.M. 1327 (1990). Paragraph two calls upon states not to recognize the annexation of Kuwait. S. RES. 661, U.N. SCOR, 45th Sess., 2933d, U.N. Doc. S/Res/661 (1990), *reprinted in id.* at 1325. Paragraph 5 established an economic embargo against Iraq. *Id.*

[205] S. RES. 687 (Apr. 3, 1991), *reprinted in* 30 I.L.M. 846 (1991). U.N. Security Council passed Resolution 687 on April 3, 1991. It reaffirmed Iraq's liability for any loss, damage, or injury to foreign governments, nationals, and corporations as a result of the unlawful invasion and occupation of Kuwait. *Id.* Resolution 692, adopted on May 20, 1991 established a Fund and Commission to award compensation for damages. S. RES. 692 (May 20, 1991), *reprinted in id.* at 864.

violated international customary law by participating in the overthrow of Hawai'i's legitimate sovereign.[206] The United States also benefitted from the changed government which enabled it eventually to annex the formerly independent Kingdom.

Native Hawaiians suffered two principle injuries because of the United States's military aggression during the insurrection.[207] First, Native Hawaiians lost 1.75 million acres of lands the sovereign held in trust for the people's benefit.[208] Second, Native Hawaiians lost their right to political self-determination.[209]

The Republic of Hawai'i ceded approximately 1.75 million acres of lands to the United States upon annexation.[210] These lands, illegally seized from the Hawaiian Kingdom[211] during the insurrection, were comprised of Government Lands and Crown lands.[212] These lands were

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[206] The United States also violated the principle of non-intervention in the internal affairs of another state, and it violated the treaties it signed with the Hawaiian Kingdom in 1849 and 1884. *Id.*

[207] *But see* Patrick W. Hanifin, *Hawaiian Reparations: Nothing Lost, Nothing Owed*, 17 HAW. B.J., at 107 (1982). Hanifin argues that Native Hawaiians, as individuals, held neither land nor political power at the time of the overthrow and consequently are not owed reparations. *Id.* But Hanifin fails to consider that the United States has attempted to address "wrongs" to a group through restitution or reparations to individuals. For example, the General Allotment Act placed Native American individuals on a parcel of land as a means to rehabilitate and prepare the individual for citizenship. The United States has established scholarships for Japanese-American individuals to "make amends" for the internment of that group during World War II. *See also* Ramon Lopez-Reyes, *The Demise of the Hawaiian Kingdom: A Psycho-Cultural Analysis and Moral Legacy (Something Lost, Something Owed)*, 18 HAW. B. J., at 3, 4 (1983). Lopez-Reyes discusses the psychological injuries that resulted from the loss of sovereignty and land. "[T]he loss of sovereignty set in train repercussions that most likely would not have occurred in the same manner had the Kingdom survived." *Id.*

[208] Melody K. MacKenzie, *Self-Determination and Self-Governance, in* NATIVE HAWAIIAN RIGHTS HANDBOOK 79 (Melody K. MacKenzie ed., 1991) [hereinafter Mackenzie, *Self-Determination*].

[209] *Id.* Very few Native Hawaiians could participate in the political process under either the provisional government or the Republic of Hawai'i. The Republic's property requirement for voter qualification screened out most Native Hawaiians. *Id.*

[210] Melody K. MacKenzie, *The Ceded Lands Trust, in* NATIVE HAWAIIAN RIGHTS HANDBOOK 26 (Melody K. MacKenzie ed., 1991) [hereinafter MacKenzie, *Ceded Lands*], *citing* 42 Stat. 108 *reprinted in* 1 Haw. Rev. Stat. 167-205 (1985, 1989 Supp.).

[211] MacKenzie, *Ceded Lands*, *supra* note 210, at 26.

[212] *Id.* Both of these land classifications were held in trust by the Hawaiian sovereign on behalf of the gods for the benefit of all the people. The Government Lands were set aside 1848 by Kamehameha III for the benefit of the chiefs and the people. The Crown lands, created by an 1865 act, were set aside to support the sovereign's expenses. *Id.*

held in trust by the Hawaiian sovereign for the benefit of the Hawaiian people. Thus, when the insurrectionists seized the land from the Queen-trustee, Native Hawaiians lost the benefits from their land.[213]

Sovereignty is "the international independence of a state, combined with the right and power of regulating its own internal affairs without foreign dictation."[214] Basic to the concept of sovereignty is the right to exist.[215]

Other rights also stem from the right to exist: the right to control domestic affairs, the right to choose the government's form, the right to provide for the people, and the right to enter into intercourse and agreements with other nations.[216]

The Kingdom of Hawai'i was sovereign in 1893.[217] It possessed the signposts of sovereignty which the international community of civilized sovereign nations, including the United States, recognized.[218] But after the overthrow of the Lili'uokalani, Hawaiians could no longer exercise domestic and international rights nor control their future.[219] Restrictive voter qualifications under the provisional government and Republic excluded most Native Hawaiians from the political process.[220] One historian characterized the Republic's legislature as "predominately American, Republican, and Annexationist.'"[221] By depriving Hawaiians of political power, the Republic could impede opposition to Hawai'i's annexation and admittance as a state.[222]

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[213] Ramon Lopez-Reyes, *The Demise of the Hawaiian Kingdom: A Psycho-Cultural Analysis and Moral Legacy (Something Lost, Something Owed)*, 18 HAW. B. J., at 3, 11-13 (1983). The value of land, or *'aina*, to Native Hawaiians was not based on economic or political power. Its value was based upon a spiritual and cultural "connectedness." Because the Native Hawaiian culture was so tied to the land, its loss resulted in a psychological separation from "a fundamental source which fashioned [the Native Hawaiian's] identity . . . . " To compensate for this loss, Native Hawaiians turned to coping strategies, such as alcohol. *Id.*

[214] BLACK'S LAW DICTIONARY 1252 (5th ed. 1983).

[215] MacKenzie, *Self-Determination*], *supra* note 208 at 77 (citing C.H. RHYNE, INTERNATIONAL LAW 77 (1971)).

[216] 1 CHARLES CHENEY HYDE, INTERNATIONAL LAW: CHIEFLY AS INTERPRETED AND APPLIED BY THE UNITED STATES 77 (1922); *see also* MacKenzie, *Self-Determination*, *supra* note 215, at 77.

[217] MacKenzie, *Background*, supra note 21, at 10-11.

[218] Karen Blondin, *A Case for Reparations*, 16 HAW. B.J., at 13, 21 (1981).

[219] Melody K. MacKenzie, *Self-Determination and in* NATIVE HAWAIIANS HANDBOOK 78 (Melody K. MacKenzie ed., 1991) [hereinafter MacKenzie, *Self-Determination*].

[220] *Id.* at 79 (citing W.A. RUSS, THE HAWAIIAN REPUBLIC (1894-1898) 46 (1961)).

[221] *Id.*

[222] During Blount's investigation in Hawai'i, he reported to Secretary of State

C. Restoration of the status quo of 1893: land and sovereignty

The United Nations Charter denounces gaining territory through conquest or aggression.[223] To this end, the international community has attempted to restore land occupied by an aggressor to the legitimate sovereign.[224] Kuwait is a modern example of the return to the status quo following an invasion.

Although the United Nations acted quickly to quash Iraq's invasion and restore Kuwait's independence, a longer passage of time will not bar the restoration remedy. For example, following World War II, African and Asian kingdoms, formerly absorbed by the stronger states in the eighteenth and nineteenth centuries, regained their independence.[225] Although these former colonies endured foreign occupation for over a century, major European powers restored independent to their previously annexed territories.[226] After the Allied power restored these territories' self-governance, these countries were accorded the status of independent members of the world community.[227] This territorial restoration illustrates that the passage of time does not legitimize the illegal acquisition of land. Also significant is the fact that the extended passage of time between the harm and the remedy did not bar restoration.

Gresham that no annexationist he met expressed a willingness to submit the question of annexation to a vote of the people. JAMES BLOUNT, REPORT TO UNITED STATES CONGRESS: HAWAIIAN ISLANDS, EXEC. DOC. No. 47, 53d Cong., 2d Sess., at xv, xxvi (1893) [hereinafter BLOUNT, REPORT]

In response to the eminent annexation of Hawai'i, Native Hawaiians presented petitions and resolutions in 1897 to the Republic's representative and the United States Minister protesting the annexation and requesting a vote on the issue. MacKenzie, *Self-Determination*, *supra* note 151, at 79.

The Hawaiian sovereignty coalition, Ka Pakaukau, states: "We Native Hawaiians have never voluntarily surrendered our sovereignty. We were never allowed to vote on the Republic or Annexation, and we had no chance to vote separately on statehood." Letter to the Forum by Paul D. Lemke, member of Ka Pakaukau, Garden Isle, Mar. 21, 1991, *cited in* MacKenzie, *Self-Determination*, *supra* note 151, at 80.

[223] U.N. CHARTER art. 2, ¶ 4.

[224] William J. Hough, III, *Baltic State Annexation*, 6 N.Y.L. SCH. INT'L & COMP. L. 300, 449-50 (1985).

[225] *Id.* at 450 n.514.

[226] *Id.* at 460.

[227] *Id.*

1. Material injury and the return of land.

One type of reparation for Native Hawaiians is the return of lands the provisional government seized from the Monarchy. Aboriginal groups have regained portions of land illegally taken and received redress payments. For example, different Native American groups in Canada have signed agreements with the Canadian federal government.[228] The Gwich'in Indians recently approved a $75 million dollar land settlement whereby the tribe was given 24,000 square kilometers of land in the northwest territories and the Yukon.[229] Included in the agreement are exclusive hunting and trapping rights to another 60,000 square kilometers.[230] Subsurface rights to 6,000 square kilometers and 50% membership on various environmental and land use boards are also included.[231] In return, however, the tribe relinquished all other aboriginal claims, rights, and interests to any other lands or waters in Canada.[232]

The Aborigines of Australia have also successfully asserted land claims. Australia's treatment of its natives has been peppered with the continually changing policy of assimilation, private homesteading, isolation on reserves, and again assimilation.[233] The first attempt to assert Aboriginal land claims through litigation in 1971 failed.[234] However, by 1972 Australia established the Aboriginal Land Rights Commission to explore land claims outside of reserves and to consider the possibility of Aborigine self-determination over tribal lands.[235]

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[228] *Natives OK Major Land-Claims Deal*, CALGARY HERALD, Sept. 22, 1991, at D1.

[229] *Id.*

[230] *Id.*

[231] *Id.*

[232] *Natives OK Major Land-Claims Deal*, CALGARY HERALD, Sept. 22, 1991, at D1. The Inuits and Champagne-Aishihiks also signed similar agreements where they would receive a reparations package of land and payments. The settlements, however, are conditioned upon a "extinguishment" or "certainty clause" in which future land and resources claims are surrendered. But not all Native American groups are willing to waive aboriginal rights and future claims against Canada. A $500 million agreement with the Dene-Metis bands collapsed when the tribe refused to waive their rights. *Id.*

[233] Karen Blondin, *A Case for Reparations*, 16 HAW. B.J., at 13, 18-19 (1981).

[234] *See Millirrpum and Ors v. Nabalco Proprietary, Ltd., and the Commonwealth of Australia* (1971) 17 F.L.R. 141 (S.C.N.T.).

[235] *Id.* Its report in 1974 rejected the assimilation policy and suggested a means to provide Aborigines with a viable economy which would support a "state within a state" governing entity.

Returning land to cure an injustice is not exclusively reserved to aboriginal groups. In the closing days of World War II, the Soviet military commandeered four Japanese islands.[236] Japan viewed the seizure of land as an illegal act of aggression and has demanded the return of these "Northern Territories" as a precondition to a peace treaty with Moscow.[237] Until Mikaihail Gorbachev's arrival at the Kremlin, the Soviet Union denied any territorial dispute.[238] As of early 1992, Russian President Boris Yeltsin's Adviser, Vladlen Martynov, has proposed the immediate return to Japan of the islands of Shikotan and Habomai, with a proposal for opening negotiations over the return of Etorofu and Kunashiri.[239] The United States, which similarly seized Okinawa at the end of World War II, formally returned control of the island to Japan in 1972, reserving 20% of the land for itself.[240] By 1980 other parcels were returned, and in 1990 the United States concluded negotiations to return another 4% from its base installation.[241]

Furthermore, under the Camp David peace accords, Egypt and Israel executed a peace treaty that included a "framework" for the comprehensive settlement of the Mideast land dispute.[242] The 1979 peace treaty established a "Joint Commission" to determine the location of approximately 100 pillars marking the boundary between Egypt and Israel.[243] When disputes arose over fourteen of the Com-

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[236] Steven R. Weisman, *Dispute Over Seized Islands Delays Tokyo Aid to Russia*, N.Y. TIMES, Feb. 7, 1992, at A7.

[237] *Russia Must Overcome 1960 Memo Negating 1956 Declaration*, Japan Economic Newswire, Feb. 10, 1992, LEXIS, in Nexis library. The Soviet Union agreed to return the two smaller islands in 1956 as part of a joint declaration ending hostilities between the two states. But the Soviets negated the declaration when Japan entered into a security treaty with the United States. *Id.*

[238] *Id.*

[239] *Yeltsin Adviser Proposes 2-Stage Solution to Territories*, Japan Economic Newswire, February 20, 1992, LEXIS, in Nexis library. It is likely that Yeltsin is hoping to gain Japanese economic aid once the disputed territory is returned. If this is the case, the return of the two smaller islands may be a good faith showing of Russia's desire to resolve the dispute, conclude the peace treaty, and begin a new era of Sino-Russian relations. *Id.*

[240] James Sterngold, *U.S. is to Return Land in Okinawa*, N.Y. TIMES, June 20, 1990, at A6.

[241] *Id.*

[242] William J. Lanouette, *Carter Moves to Center Stage As Middle East Peacemaker*, NATIONAL JOURNAL, Dec. 9, 1978, vol. 10, no. 49, at 1968.

[243] Haihua Ding & Eric S. Koenig, *Arbitral Decision: Treaties — Treaty of Peace Between Egypt and Israel — Demarcation of Internationally Recognized Boundaries — Arbitration of Disputes — Taba*, 83 AM. J. INT'L L. 550 (1989).

mission's findings, Egypt and Israel agreed to submit to binding arbitration to resolve their boundary dispute on the Sinai Peninsula.[244] Following the arbitration decision, both countries moved to implement the decision, resulting in Israel's transfer of land and sovereignty on March 15, 1989.[245]

2. Moral injury and the restoration of sovereignty

Generally, the return of land necessarily includes the transfer of sovereignty over the land. The transfer is feasible and uncomplicated when the land is merely reinstated to an existing country, as in the cases of the Sinai Peninsula and Okinawa. A more difficult situation develops, however, when land is awarded to a people or group whose

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[244] *Id.*

[245] *Id.* at 591-95. Another interesting wrinkle added by the Egyptian-Israeli arbitration over Taba was the transfer of a beach resort facility developed during Israel's administration over the disputed area. An Egyptian private-sector tourism company agreed to pay the Resort's owner $38.7 million for the hotel and tourist complex. It will continue to be operated and managed by Sonesta International, with a gradual replacement of Israeli workers with Egyptian workers. *Id.*

This raises the issue of reimbursements for improvements to land returned. If Native Hawaiian groups receive land with infrastructure and commercial improvements, will they similarly have to reimburse the owner or government for these "improvements?" Nevertheless, if the modernization is at the expense of Native Hawaiian cultural sites or indigenous plants and animals, would Native Hawaiians have a claim for environmental damage which justifies compensation?

If Hawaiian Home Lands and ceded lands are returned to the control of Native Hawaiians, then the status of U.S. or state facilities and programs currently located on these lands would present a dilemma. The state and federal governments might purchase the returned lands, lease the property, or condemn them under eminent domain. Furthermore, the State and Federal governments may also be liable for back-rent for unauthorized use of property. At the end of Hawai'i Governor John Waihee's term in 1994, he signed a settlement agreement with the Department of Hawaiian Home Lands to settle claims of the State's mismanagement of the Hawaiian Home Lands Trust and trust property. The Hawaii legislature is currently debating whether the State should make a single lump sum payment of $320 million which would be funded through an excise tax increase. William Kresnak, *Sales Tax Hike in Works*, THE HONOLULU ADVERTISER, Mar. 2, 1995, at A1. Current Governor Ben Cayetano favors a plan which would pay the settlement by borrowing $30 million each year over 20 years, at a total cost of $600 million. *Id.*

These issues are outside this paper's scope but illustrate the possible magnitude of the compensation Native Hawaiians and a sovereign Native Hawaiian government are entitled.

de facto or *de jure* sovereignty has not been wholly exercised by a governing entity for a period of time.

The United Nations supports the idea of returning sovereignty to territories formerly under the control of a foreign state.[246] Chapter Twelve of the United Nations Charter establishes the International Trusteeship System. Article 76 describes the objectives of the system as promoting the "political, economic, social, and educational advancement of the inhabitants of the trust territories, and their progressive development towards self-government or independence . . . ."[247]

Other international declarations also support self-determination of peoples once under foreign domination.[248] The 1960 Declaration on Granting of Independence to Colonial Countries and Peoples declared: "All peoples have the right to self-determination; by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development."[249] And the 1970 Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States provides: "all peoples have the right freely to determine, without external interference their political status and to pursue their economic, social and cultural development."[250] This resolution extended the scope of the right to self-determination to all people, regardless of their *current* political status.[251]

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[246] U.N. CHARTER art. 76, ¶ 1.

[247] U.N. CHARTER art. 76, ¶ 1.

[248] *See, e.g.*, the Universal Declaration of Human Rights which states: "The will of the people shall be the basis of the authority of government; this will shall be express in periodic and genuine elections which shall be held by universal and equal suffrage . . . . " This was unanimously passed by the U.N. in 1948. G.A. Res. 217A(III), U.N. Doc. A/810 (1948), art. 15, *cited in* MacKenzie, *Self-Determination*, *supra* note 151, at 79.

The International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights was approved by the General Assembly in 1966 and became legally binding upon the signatories in 1977. The U.S. has only been legally bound since April 2, 1992 when the U.S. Senate ratified the treaty which President Carter had signed. Art. I reads: "All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development." G.A. Res. 2200A, 21 U.N. GAOR SUPP. No. 16 at 52, U.N.Doc. A/6546 (1966). G.A. Res.2200, 21 U.N. GAOR SUPP. (No. 16) at 49, U.N. Doc. A/6316 (1966).

[249] G.A. RES. 1514, 15 U.N. GAOR Supp. No. 16 at 66-67, U.N. Doc. A/4684 (1960), *quoted in* MacKenzie, *Self-Determination*, *supra* note 208, at 96.

[250] G.A. RES. 2625, 25 U.N. GAOR Supp. No. 28 at 121, U.N. Doc. A/8082 (1970), *quoted in* MacKenzie, *Self-Determination*, *supra* note 208, at 96.

[251] MacKenzie, *Self-Determination*, *supra* note 208, at 96.

Based on these documents, Native Hawaiians could possibly claim an international right to sovereignty and self-determination.[252]

The concepts of sovereignty and self-determination are also familiar to the United States. A "nation within a nation" characterizes the current Native American relationship to the federal government in which *complete* sovereignty is divided between the tribal and federal governments.[253] Tribes exercise fundamental powers of self-governance, such as deciding their government's form and membership, exercising police powers, administering justice, and maintaining sovereign immunity against suits.[254] Other rights of sovereignty, such as the right to execute treaties and conduct foreign relations, however, remain with the federal government.[255]

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[252] Under the various International Human Rights Declarations, self-determination is an international right for Native Hawaiians if proven they fall within the definition of "peoples." *Id.* at 97.

In the past, the Permanent Court of International Justice has classified "peoples" as

> a group of persons living in a given country or locality, having a race, religion, language and traditions of their own and united by this identity of race, religion, language and traditions, in a sentiment of solidarity, with a view to preserving their traditions, maintaining their form of worship, insuring the instruction and upbringing of their children in accordance with the spirit and traditions of their race and rendering mutual assistance to each other.

The Greco-Roman "Communities," Collection of Advisory Opinions (Greece v. Bulgaria), 1930 P.C.I.J. (ser. B) No. 17, at 21 (July 31). Although this court does not recognize the principle of *stare decisis*, the description the court accepts is a useful guideline for defining "peoples."

The International Commission of Jurists, a non-governmental organization with consultative status at the U.N., lists the elements of "people." A group falls into the definition if it shares: (1) a common history; (2) racial/ethnic ties; (3) cultural or linguistic ties; (4) religious or ideological ties; (5) a common territory or geographical location; (6) a common economic base; and (7) a sufficient number of individuals. (*The Events in East Pakistan*, 1970 International Commission of Jurists 70 (report by the U.N. Secretariat 1972).

Native Hawaiians satisfy all the elements except the requirement of a shared economic base. But Native Hawaiians did share a common economic base prior to the Western capitalism. MacKenzie, *Background*, *supra* note 21, at 3-5.

[253] The idea of shared or divided sovereignty is not an unique arrangement. Under U.S. federalism, the individual states relinquished their international sovereignty to the federal government, while retaining other internal or domestic sovereignty.

[254] MacKenzie, *Self-Determination*, *supra* note 208, at 84.

[255] *Id.*; Karen Blondin, *A Case for Reparations*, 16 HAW. B.J., at 13, 14-17 (1981). Furthermore, Congress has the power to specifically legislate criminal offenses out of the native governments' jurisdiction. *See, e.g.*, the Major Crimes Act, 18 U.S.C. §

The restoration of Native Hawaiian sovereignty is an appropriate remedy for Native Hawaiians. The form of this sovereignty, however, is uncertain. Hawaiians could be afforded complete sovereignty, as articulated by the international community. Hawaiians might also exercise partial sovereignty, similar to Native American tribes.

D. Compensation for land damaged under the control of the dominant power

1. Ecological damages

The Republic of Nauru filed an action against Australia on May 19, 1989 in the International Court of Justice, alleging exploitation and neglect for phosphate mining activities.[256] Between 1919 and 1967, Australia administered the former German colony under the Mandate System and the International Trusteeship System[257] until the central pacific island achieved nation-status in 1968.[258] Under the Mandate System and the International Trusteeship System, Australia owed Nauru a certain duty of care. Nauru lists two claims for the breach of duty: 1) that long term mining leases paid to Nauru were kept artificially low;[259] and, 2) that Australia has a duty to help repair lands damaged by phosphate mining on the Island.[260]

After 70 years of intensive phosphate mining, four-fifths of the island's approximately 13 square kilometers are covered with phosphate, rendering the land hostile to vegetation and habitation.[261] Nauru is

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1153 (1982) which extends federal jurisdictions for numerous crimes, including murder, manslaughter, and rape.

[256] Paul L. Montgomery, *Tiny Nauru, a Colony No Longer, Sues Australia for Neglect*, N.Y. TIMES, June 5, 1989, at A8.

[257] Kalinga Seneviratne, *Nauru: Locked in a 'David and Goliath' Struggle with Australia*, Inter Press Service, July 30, 1991, LEXIS, in Nexis library.

[258] Montgomery, *supra* note 256, at A8.

[259] W.I. Michael, *International Fiduciary Duty: Australia's Trusteeship Over Nauru*, 8 B.U. INT'L L.J., 381, 403 (1990).

[260] *Id.* at 397. Australia administered the former German colony between 1919 and 1967 through the League of Nation's Mandate System and then Under the International Trusteeship System. The goal of the Trusteeship Act was to serve long term political, social, and economic interests of the indigenous population and eventually to move the territory to full sovereignty. *Id.*

[261] Australia Asks Court to Throw Out Nauru Compensation Claim, Reuter Library Report, Nov. 11, 1991, LEXIS, in Nexis Library.

asking for $250 million to compensate for the ruined land and the artificially low price set for phosphate.[262]

Nauru's claims were supported by the United Nations Decolonization Committee. The Committee contends that Australia violated its trusteeship duty by profiting from the phosphate mining and by failing to care for the indigenous population.[263] Australia continued to challenge financial responsibility for rehabilitating the damaged land and alleged price fixing. In December 1991 Australia moved to dismiss the case, arguing: 1) outstanding claims were settled when it sold the phosphate works to the independent Nauru, and 2) Nauru was not a full-fledged nation when the harm was inflicted and consequently, Nauru could not sue in the International Court of Justice.[264]

This is the first situation where a formerly non-self-governing territory sued its trustee state in an international forum because of a breach of the trusteeship duties.[265] If Nauru succeeded, the implication is that any former trustee may be sued by a former ward.[266] And although Hawai'i was never under the Mandate or International Trusteeship Systems uncompensated, this case stands for the proposition that economic and environmental harm caused by a dominant "administering" country will not go uncompensated.[267]

Nevertheless, in August 1993, Australia and Nauru reached an out of court settlement whereby Nauru dismissed the case and Australia

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[262] Paul L. Montgomery, *Tiny Nauru, a Colony No Longer, Sues Australia for Neglect*, N.Y. TIMES, June 5, 1989, at A8.

[263] *Decolonization Committee Reviews situations in 18 Territories; Special Meeting on Declaration Asked; Includes Articles on World Court, Trusteeship Council, and the Committee on the Indian Ocean*, U.N. CHRONICLE, Dec. 1989, Vol. 26, No. 4, at 59.

Under the United Nations Charter Art. 73, the International Trusteeship Duty requires the administering country to act in a manner that will "ensure, with due respect for the culture of the peoples concerned, their political, economic, social, and educational advancement." The administrator must act to preserve the long term interest of the indigenous groups, irrespective of the trustee's own interests. Michael, *supra* note 259, at 408.

[264] *Nauru: World Court Hearing on Environmental Law*, American Political Network, Inc., Dec. 5, 1991, LEXIS, in Nexis library. Under the ICJ statute, only internationally recognized states may bring suit. I.C.J. CHARTER art. 34, ¶ 1.

[265] W.I. Michael, *International Fiduciary Duty: Australia's Trusteeship Over Nauru*, 8 B.U. INT'L L.J., 381, 402 (1990).

[266] *Id.* at 418.

[267] It may be possible to argue a *de facto* trusteeship relationship existed between the United States and the Territory of Hawai'i. Relevant factors might include: 1) The degree of control the United States exerted politically, socially, and economically; and 2) The level of political and civil rights given to Hawai'i residents.

agreed to pay $76 million.[268] Australian Prime Minister acknowledged Australia's responsibility for the environmental damage through the phosphate mining.[269] Great Britain and New Zealand, Australia's partners in administering Nauru during the colonial era and who jointly controlled the mining company, also agreed to contribute $17 million to the $76 million settlement, however, both countries never acknowledged responsibility.[270]

A related issue is whether a state may collect compensation for ecological damages caused by an occupying military. In June 1991, Russia and Hungary entered negotiations addressing environmental damages to the 460 square kilometers Soviet troops formerly occupied.[271] Pollution levels were highest at airports, where kerosene, petrol, and other hazardous wastes leaked into the soil and subsoil. The governments declined to disclose the damage figure but estimated that it fell in the range of thousands of millions of forints.[272]

Again, Native Hawaiians should observe negotiations and talks between the former Soviet Union and countries their troops once occupied. The eventual outcome or settlement could result in precedent for the United States paying compensation to Native Hawaiians for damage caused by the military's use of lands. In particular, the federal government might be liable for ecological damages to land it currently occupies.[273]

2. *Monetary compensation*

Monetary compensation for unjust land acquisition is another possible form of restitution. In 1946 the United States established the

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[268] Kalinga Seneviratne, *Environment-Nauru: Britain, New Zealand Pay for Past Plunder*, Inter Press Service, Mar. 31, 1994, LEXIS, in Nexis library.

[269] *Id.*

[270] *Id.*

[271] *Soviet Troops - Assessment of Ecological Damage*, MTI Hungarian News Agency, June 10, 1991, LEXIS, in Nexis Library.

[272] *Id.*

[273] This damaged land could include military bases, Pearl Harbor, and the Honolulu International Airport. The United States Congress has already recognized its responsibility to restore the environmental viability of land it uses. In May 1994, the U.S. Navy returned control of Kaho'olawe to the State. Joy Aschenbach, *Native Hawaiians Set Sights on Regaining Sovereignty*, L.A. TIMES, Feb. 12, 1995, at B1. Congress also set aside $400 million to clean and restore the island which the U.S. military used as a bombing target since its commandeering during World War II. *Id.*

Indian Claims Commission. It allowed identifiable native groups to bring "claims arising from the taking by the United States, whether as the result of a treaty or cession or otherwise, of lands owned or occupied by the claimant without . . . payment for such lands."[274]

Compensation, however, was limited to monetary awards. The Canadian government likewise awarded its Native Americans monetary compensation for their loss of land as part of a reparations package.[275] The United States also paid monetary reparations to Japanese-Americans interned during World War II and to Marshallese who suffered radiation poison from hydrogen bomb testing in the Pacific.[276]

IX. What Redress is Possible for Native Hawaiians?

The ideal reparations package would restore, to an extent, the pre-insurrection status quo of the Hawaiian Kingdom by returning the Ceded Lands and restoring Hawaiian self-determination and sovereignty. Monetary compensation is also appropriate for the use of ceded lands by the state and federal government, and for possible claims of ecological damage to those lands under United States' administration.

Native Hawaiian sovereignty groups have also suggested a basic reparations-restitution package. The Native Hawaiian Rights Confer-

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[274] MacKenzie, *Self-Determination*, *supra* note 151, at 81. Congress established a "judicial" commission to determine claims arising prior to August 13, 1946. *Id.*

[275] *See supra* text accompanying note 232 for a discussion of the land settlements signed between Canada and some of its indigenous people.

[276] The United States has redressed wrongs committed against the Japanese-Americans who were unconstitutionally interned during World War II. United States Representative Norman Y. Mineta states: "In the annals of civilization, there aren't many instances of a government apologizing this way . . . Here we have a government saying, we were wrong, we apologize." Ronald J. Ostrow, *World War II Internees to Hear 'We Apologize'; Civil Liberty: the First Round of Payments to Japanese-Americans Starts Tuesday. More Than $1/5 Billion will Go to 60,000 to Redress the Detainment*, L.A. Times, Oct. 7, 1990, at A4. The reparations bill, signed in August of 1988 included a formal apology and $20,000 for each living survivor. *Reparations Victory Called 'Bittersweet,'* L.A. Times, Nov. 23, 1989, at B2.

The United States is also settling claims with victims of nuclear fallout from sixty-six tests conducted in the Marshall Islands between 1945-1958. The United States has agreed to a $270 million compensation package. A treaty between the two states established the Nuclear Claims Tribunal. The panel will adjudicate claims and dispense monetary compensation to anyone on the islands during the testing, provided that they file a claim. Giff Johnson, *Pacific Islanders to Start Getting Nuclear Money in June*, Reuter Library Report, Feb. 16, 1990, LEXIS, in Nexis Library.

ence met in August 1988 and adopted a Five-Plank Resolution for self-governance which included an apology, return of land, recognition of sovereignty, and monetary compensation.[277] The Office of Hawaiian Affairs,[278] a Hawai'i state agency, also authored a blueprint for Native Hawaiian entitlements which incorporated the basic principles of the five-plank resolution.[279]

A. Form of the remedy

One possible reparations model is arbitration. The successful arbitration of the Egyptian-Israeli dispute over the area of Taba represents

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[277] Resolution adopted at Native Hawaiian Rights Conference, August 7-8, 1988, *quoted in* MacKenzie, *Self-Determination*, *supra* note 273, at 91. Specifically, the Resolutions provided the following:

> 1. An apology by the United States to Native Hawaiians and their government for its role in coup of 1893.
> 2. Substantial land and natural resource base comprised of a reformed Hawaiian Homes program, fair share of the ceded lands trust, the return of Kaho'olawe and other appropriate lands.
> 3. Recognition of the Native Hawaiian government with sovereign authority over the land base's territory.
> 4. Recognition and protection of subsistence and commercial hunting, fishing, gathering, cultural and religious rights of Native Hawaiians, and the exercise of sovereign power over these rights.
> 5. Appropriate cash payment.

Id.

[278] The Office of Hawaiian Affairs [hereinafter OHA] was established through amendments to the Hawai'i Constitution. HAW. CONST., art. XII, §§ 4-6.

> The committee intends that the Office of Hawaiian affairs will be independent from the executive branch and all other branches of government although it will assume the status of a state agency . . . The status of the Office of Hawaiian Affairs is to be unique and special. The establishment by the Constitution of [OHA] with power to govern itself through a board of trustees . . . results in the creation of a separate entity independent of the executive branch of the government . . . .

Hawaiian Affairs Comm. Rep. No. 59, *reprinted in* 1 *Proceedings of the Constitutional Convention of Hawai'i of 1978* at 645.

OHA's powers include acquiring, holding, and managing property, entering into contracts and leases, managing and investing funds, and formulating public policy relating to Hawaiians affairs. HAW. REV. STAT. §§ 10-4, 10-5,10-6 (1985).

[279] *Draft Blueprint for Native Hawaiian Entitlement* (Sept. 2, 1989). In hearings held on the draft blueprint in September and October of 1989, the concern arose that since OHA is a state agency which relies upon the Hawai'i Legislature for funding, its loyalties might be divided, thus making OHA an inappropriate leader for self-determination. MacKenzie, *Self-Determination*, *supra* note 151, at 92.

a "significant milestone," not only for resolving the border disputes but also because of the "spirit of cooperation and courtesy which permeated the proceedings" between the former enemies.[280]

Pursuant to a 1979 Treaty between Egypt and Israel, Article 4 created a Joint Commission to establish disputed boundaries between the two nations if negotiations failed.[281] In 1986, the former warring nations agreed to submit to arbitration over the demarcation line on the Sinai Peninsula.[282] Egypt prevailed and Israel transferred the Taba area, in its entirety, to Egypt.[283]

This model, voluntarily entered into by the two nations, is an amicable resolution to an international dispute. Furthermore, the parties tailored the mechanism by which their disputes would be settled and placed these terms into a treaty.[284] Arbitration, thus, is flexible to meet the needs of the parties and their problem. It may be conditioned upon a certain non-occurrence, or made mandatory. A fair tribunal may easily be convened, with each side choosing a set number of arbitrators, with a tie-breaking arbitrator being approved by both.

The more difficult route to reparations is through the International Court of Justice. Two hurdles must be overcome: (1) gaining jurisdiction over the United States,[285] and (2) successfully arguing that Native Hawaiians meet the qualification as a state.[286] Because the United States revoked its acceptance of the Court's compulsory jurisdiction, in order to satisfy jurisdiction requirements, the United States must explicitly agree to be bound by the court.[287] And since only states may be a party to a case before the court, Native Hawaiians must successfully argue that they qualify as a state because of the current sovereignty organizations,[288] or because the Hawaiian Kingdom was, and would

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[280] Haihua Ding & Eric S. Koenig, *Arbitral Decision: Treaties — Treaty of Peace Between Egypt and Israel — Demarcation of Internationally Recognized Boundaries — Arbitration of Disputes — Taba*, 83 AM. J. INT'L L. 550, 594 (1989).

[281] *Id.* at 590-91.

[282] Id.

[283] *Id.* at 594-95.

[284] Treaty of Peace between Egypt and Israel, Mar. 26, 1979, Egypt-Isr., *reprinted in* 18 I.L.M. 362 (1979).

[285] I.C.J. CHARTER art. 36.

[286] I.C.J. CHARTER art. 34, ¶ 1.

[287] I.C.J. CHARTER art. 36.

[288] One sovereignty group, the Ohana Counsel, declared its independence on January 16, 1994. *Hawaii's Search for Sovereignty*, CHRISTIAN SCI. MONITOR, Oct. 17, 1994, at 9. The Independent Nation State of Hawai'i claims 10,000 citizens and issues its own driver's licenses and automobile insurance. *Id.*

have continued to be, an internationally recognized state but for the illegality which they now are asking the court to remedy.

B. Conclusion

The United States violated international law by participating in the coup that robbed an independent nation of its sovereignty and its accompanying rights. On November 23, 1993, President Bill Clinton signed Senate Joint Resolution 19 in which Congress acknowledged the illegal overthrow of the Kingdom of Hawai'i and the United States' role.[289] And although the Congress "apologizes to 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[,]" the Congress added that "[n]othing in this Joint Resolution is intended to serve as a settlement of any claims against the United States."[290]

Nevertheless, under the analysis of this paper, the United States' is liable under international law for its illegal conduct over 100 years ago. Monetary restitution is appropriate. Reparations to Native Hawaiians would reaffirm that the rights and duties of the world community are equally applied against all states, from the most powerful, like Iraq and the United States, to the unimposing, like Kuwait and the Hawaiian Kingdom.

The following statement by a legal scholar was directed at the collective use of force against Iraq during the Gulf Crisis. It also serves to answer the question of why the world community should unite and support Native Hawaiian reparations for the illegal use of force against their once sovereign nation.

> It may well be utopian to expect that wars will be prevented by a common obligation to "protect each and all," but it is surely realistic for governments to press for the goal of security through preventive measures and the commitment to uphold — and, if necessary, to enforce — the basic law of the UN Charter.[291]

Jennifer M.L. Chock

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[289] S.J. Res. 19, 103d Cong., 1st Sess. (1993) (enacted).

[290] *Id.*

[291] Oscar Schacter, *United Nations Law in the Gulf Conflict*, 85 AM. J. INT'L L. 452, 473 (1991).