THE COMMERCE OF RECOGNITION
(BUY ONE ETHOS, GET ONE FREE):
TOWARD CURING THE HARM OF THE UNITED STATES’
INTERNATIONAL WRONGFUL ACTS IN THE HAWAIIAN ISLANDS

Julian Aguon

‘Ohia
A Periodic Publication of Ka Huli Ao Center for Excellence in Native Hawaiian Law
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The name ‘Ohia was inspired by a line from a chant for Kalākaua: ‘ohia mai ʻā pau pono nā ‘ike kumu o Hawai’i, gather up every bit of the basic knowledge of Hawai’i.

Ka Huli Ao Center for Excellence in Native Hawaiian Law is an academic center that promotes education, scholarship, community outreach and collaboration on issues of law, culture and justice for Native Hawaiians and other Pacific and Indigenous peoples.

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1 Post-Juris Doctor Research Fellow, 2010–11, Ka Huli Ao Center for Excellence in Native Hawaiian Law, William
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Tell the children the truth.
—Bob Marley

I. INTRODUCTION

In light of the potential passage in the U.S. Congress of the Native Hawaiian Government Reorganization Act (“Akaka Bill”), many complicated international legal and political issues remain in dire need of resolution. One important unresolved issue concerns the possible implications of the Akaka Bill’s passage on the various international legal claims inhering in Native Hawaiians and other heirs of the formerly internationally recognized independent state of Hawai‘i as a result of a series of international wrongful acts committed by the United States beginning with the overthrow of the lawful government of the Hawaiian Kingdom and later annexation and incorporation, under U.S. law, of the territory of Hawai‘i into the U.S. union in the late 1800s. There is, in other words, the real possibility that the Akaka Bill, or some variant of it, may inadvertently disinherit Native Hawaiians and other kingdom heirs (henceforth “collective heirs”) of their international legal claims against the United States. In addition, the bill may have additional adverse implications for Native Hawaiians specifically inasmuch as it may prematurely curtail the full panoply of rights normatively available to indigenous peoples under international law via the 2007 United Nations Declaration on the Rights of Indigenous Peoples.3

In the rush to presumably insulate so-called “race-based” programs from constitutional race challenges—a task that took on seeming urgency in the wake of the U.S. Supreme Court’s decision in Rice v. Cayetano4—the election to pursue a status akin to that of a federally recognized Indian tribe is an intelligible one in light of the long-recognized exceptionalism allowed tribes so recognized to remain outside certain general principles of American constitutional jurisprudence.5 However, it is imperative that Native Hawaiians, whom alone the Akaka Bill addresses, understand the price they are paying for such recognition. To fully appreciate this commerce of recognition, Native Hawaiians must have a handle on the following international legal (and political) questions: What international legal claims are still plausibly, i.e., normatively as opposed to politically, available to Native Hawaiians and other descendents of the subjects of the formerly independent state of Hawai‘i? Which among them is the most (or least) likely to be accepted by the international community as persuasive, so as to hasten the recovery of, among other things, independence? What, under international law, does the Akaka Bill do if passed and implemented? Does it effectuate a waiver of these collective heirs’ still outstanding international legal claims or, at the least, represent their acquiescence to the current status quo? That is, will the international community read an executed Akaka Bill to mean that U.S.

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2 H.R. 862, 111th Cong., 1st Sess. [hereinafter, Akaka Bill]. Although the Akaka Bill was first introduced in 2000, it now exists in multiple versions, which between them contain legally significant differences. See Kekuni Blaisdell et al., An Urgent Open Letter to Barack Obama: Why the Native Hawaiian Reorganization Act Must be Rejected (Apr. 15, 2009), available at http://www.counterpunch.org/blaisdell04152009.html.


sovereignty over the formerly independent Hawaiian state is no longer in question and that the collective
heirs have abandoned their rights to the remedy owed to them under international law for the United States’
international wrongful acts? How can the bill be reconciled with the 1993 Apology Resolution,6 wherein the
U.S. Congress formally acknowledged the role its diplomatic and military representatives played in the over-
throw of the Hawaiian Kingdom government and further acknowledged that the Native Hawaiian people
never relinquished their sovereignty nor acquiesced to U.S. rule?

This paper sets out answers to these questions, or, more rightly, the beginnings of answers. Where
international law harbors indeterminacy, this paper endeavors to set out a principled construction of the
relevant law in order to provide a useful normative guide for those pursuing redress at the international
level for the harm visited upon the polity of the formerly independent Hawaiian state. This paper is di-
vided into five parts. After this introduction, Part II briefly outlines the United States’ legally significant
actions in the Hawaiian Islands beginning with the 1893 overthrow of the government of the Kingdom of
Hawai’i as much as these acts produced the harm that still needs to be cured. Part III sets out the three
main regimes theoretically available under international law for curing the harm caused by the wrongful
acts described in the preceding section. These are the regimes of occupation/deoccupation; colonization/
decolonization; and indigenization/indigenous rights. This section analyzes the three regimes, setting
out for each the applicable international law and attendant pros and cons. It additionally relates these
regimes to legal narratives over which Hawaiian sovereignty activists are deliberating in order to take to
the international community to generate support for, among other things, the recovery of Hawaiian inde-
pendence.7

These international law narratives can be summarized as follows. First, the occupation/deoccupation
narrative is that under international law, Hawai’i remains an independent country that has been illegally
occupied by another country, i.e., the United States, for more than a century (and counting). The separate
sovereignty of the Hawaiian state, the narrative goes, is not in dispute because under international law an
illegal occupation and annexation cannot pass lawful title to the occupying power. According to this nar-
rative, the United States is effectively at war with the Hawaiian state; the former standing in the shoes of
the occupying state, the latter in the shoes of the occupied state. As the occupying state, the United States
is bound by the 1899 and 1907 Hague Regulations,8 and the 1949 Fourth Geneva Convention,9 which to-
gether constitute a larger body of international law known as the law of war. The gestalt of this narrative,
which is often referred to by its advocates in Hawai’i, notably Dr. D. Keanu Sai, as a theory of state conti-
nuity, is that due to the illegality of the U.S. military invasion and annexation, the separate sovereignty of

6 See Joint Resolution to Acknowledge the 100th Anniversary of the January 17, 1893 Overthrow of the Kingdom of
Hawaii and to Offer Apology to Native Hawaiians on Behalf of the United States for the Overthrow of the Kingdom
7 This reading of the international law options currently debated in Hawai’i can be found in the works of Maivân
Clech Lâm, a renowned Vietnamese-American scholar of both international law and anthropology as well as a
longstanding ally of the Hawaiian independence movement.
8 See Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the
Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277, T.S. No. 539 [hereinafter, 1907 Hague Convention];
Convention With Respect To The Laws And Customs Of War On Land, July 29, 1899, 32 Stat. 1803, [here
inafter, 1899 Hague Convention].
the Hawaiian state simply "continues" *ad infinitum* or until legally terminated, which has not happened. Second, the colonization/decolonization narrative is that the once independent country of Hawai‘i, which eventually became a non-self-governing territory of the United States, was in 1946 placed on the United Nations list of colonies slated for decolonization and wrongly removed therefrom in 1959 after a self-determination referendum that failed to comply with international standards for decolonization, which provided for independence to be a legitimate option for non-self-governing peoples. Taking their interpretive cue from the example of Kanaky/New Caledonia—a French colony that was re-inscribed onto the U.N. decolonization list some forty years after its wrongful removal therefrom—Hawaiian activists advancing arguments under this narrative maintain that there is a case to be made for re-inscription of Hawai‘i onto the decolonization list. Any removal therefrom, the narrative goes, must follow a legitimate political status plebiscite that includes all three internationally recognized status options, i.e., independence; free association with another sovereign state; and integration into another sovereign state. Third, the indigenization/indigenous rights narrative is that the Kānaka Maoli, or Native Hawaiian people, have a wide array of individual and collective rights inhering in them as the indigenous people of the Hawaiian Islands. These rights, the narrative goes, now include the all-important right to self-determination, which was recently extended to indigenous peoples via the 2007 United Nations Declaration on the Rights of Indigenous Peoples. Although activists advancing their arguments under this narrative concede that the 2007 Declaration somewhat muddied the scope of the self-determination right, they maintain that the instrument nevertheless expressly extended the right to indigenous peoples, in its third article, in its classic formulation. Moreover, they contend, whether or not the 2007 Declaration includes a right to outright independence is at worst indeterminate and that the more principled construction of the text is that it does so include the right.

Part IV addresses the possible international legal implications of the Akaka Bill. In sum, the bill is federal legislation designed to set in motion a U.S. domestic legal process by which Native Hawaiians will ultimately be accorded a political status akin to a federally recognized Indian tribe. In the main, the bill's supporters maintain that the purpose of the legislation is to shield from constitutional challenges those programs specially benefitting Native Hawaiians, which is a project into which many Native Hawaiians have poured their political energies following the U.S. Supreme Court's ominous pronouncement in *Rice v. Cayetano* that ancestry can be a "proxy for race." This section attempts to address whether and how the Akaka Bill, a piece of U.S. domestic legislation, might set in motion a process that may affect the above described international legal claims. Part V suggests that the election of redress regimes implicates a whole host of other issues that do not register in strictly legal terms. Specifically, this section posits that what is going on

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13 Declaration on the Rights of Indigenous Peoples, *supra* note 3, at art. 3.
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beneath the surface-level rush for federal recognition is a portentous underground bartering of narratives, one that signals a contracting as opposed to expanding legal and moral imagination. In sum, it is suggested that the election of legal narratives has deep extralegal consequences and that it is worth considering that the abandonment of the “larger confusion [for] the smaller certainty”15 is unwise at this particular historical moment, wherein the hegemonic role of the United States in international society is more than ever appearing uncertain. This part puts forward a set of normatively charged questions for consideration such as whether the pursuit of federal recognition exacts psychic violence on the Kānaka Maoli, who are being asked to effectively “trade in” one set of wanting legal fictions for another. This part seeks to encourage within the Hawaiian sovereignty community careful consideration of questions of cultural imperialism, violence and warfare.

15 Frickey, supra note 5, at 433 (quoting John Ciardi, Manner of Speaking, Saturday Rev., June 2, 1962, at 9, 9).
II. THE HARM

By the time foreigners from the United States began wielding significant power and influence in the Hawaiian Islands in the mid-to-late 1800s, the Hawaiian Kingdom was already a recognized state in the international sense.16 As such, Hawai‘i had entered, and continued to enter, into treaty and other diplomatic relations with other states, including, but not limited to, Great Britain, Belgium, France, Germany, Portugal, Spain, Switzerland, Japan, and the United States.17 The Kingdom concluded five treaties with the United States alone.18 Toward the end of the century, however, U.S. settlers who had accumulated an increasing amount of power pushed to reshape the political makeup of the Kingdom. Lusty businessmen seeking commercial advantage and proselytizing Christian missionaries attempted with increasing fervor to remake Hawaiian cultural, economic, and political life.19 The traditional land tenure system came under increasing pressure as foreigners sought land for themselves and settled in the islands in increasing numbers.20 This pressure reached its boiling point in the middle of the 19th century.

Responding to the pressure, the Kingdom, in 1845, began to lay the groundwork for the Māhele, which provided for the king and chiefs to separate out into separate parcels their hitherto co-joined yet different interests in the various ahupua‘a, or mountain-to-sea wedges of land, that formed the units of traditional Hawaiian land tenure in the archipelago.21 The Māhele was followed by the Kuleana Act of 1850, which provided a mechanism for the disentanglement, in theory, of the interests of chiefs and commoners that were still co-joined throughout the post-Māhele ahupua‘a.22 In combination, these two Acts made room for a new property regime that more and more accorded with contemporary Anglo-American landholding regimes

17  See Jennifer M.L. Chock, One Hundred Years of Illegitimacy: International Legal Analysis of the Illegal Overthrow of the Hawaiian Monarchy, Hawai‘i’s Annexation, and Possible Reparations, 17 Haw. L. Rev. 463, 464-65 (1995). Great Britain (Nov. 16, 1836 and July 10, 1851), The Free Cities of Bremen (Aug. 7, 1851) and Hamburg (Jan. 8, 1848), France (July 17, 1839), Austria-Hungary (June 18, 1875), Belgium (Oct. 4, 1862), Denmark (Oct. 19, 1846), Germany (March 25, 1879), France (Oct. 29, 1857), Japan (Aug. 19, 1871), Portugal (May 5, 1882), Italy (July 22, 1863), The Netherlands (Oct. 16, 1862), Russia (June 19, 1869), Samoa (March 20, 1887), Switzerland (July 20, 1864), Spain (Oct. 29, 1863), Sweden and Norway (July 1, 1852).
19  See Lilikalā Kamelēhīwa, Native Land and Foreign Desires: Pehea Lā E Pono Ai? 166, 388 (1992); Osorio, supraKwaiian k in h at into the U.S.et test nonetheless applied.tutionally protected. note 15, at 3 (“[C]olonialism literally and figuratively dismembered the lahui (the people) from their traditions, their lands, and ultimately their government.”).
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that valued, above all else, the alienability of land. Nor surprisingly, the ensuing historical period saw a
dramatic alienation of the archipelago’s lands, with most of it passing disproportionately into Western hands.

By the latter part of the century, foreigners, mostly American, owned more than a million acres in Hawai‘i
and leased another three-quarters of a million acres of land.

Westerners’ appetite for power also prompted them to demand that the Hawaiian monarchy appoint a
new cabinet whose foremost task was to write a new constitution. After vociferous protest, King Kalākaua
reluctantly signed a new constitution in 1887 that reduced him to the status of a ceremonial figure, made his
military powers subject to legislative control, placed executive powers in the hands of a cabinet appointed
by him but responsible to the legislature, made the house of nobles an elective office, and extended the
privilege of voting to American and European males regardless of citizenship. This new “Bayonet Constitu-
tion” set property qualifications for voting so high that many Native Hawaiians were disenfranchised. In
1891, Queen Lili‘uokalani succeeded to the throne, determined to put power back into Hawaiian hands.

Concerned that the growing settler population living in Hawai‘i had come to wield a disproportionate influ-
ence over Hawai‘i’s affairs, she drafted a new constitution limiting the vote to Hawaiian-born or naturalized
citizens, and making cabinet ministers subject to removal by the legislature. As word of the new constitu-
tion spread, members of the Annexation Club, an association of white settlers, met to discuss the overthrow
of the Kingdom. These men, who controlled the economy and much of the private property of Hawai‘i,
avowed annexation to the United States. They sought and received the help of U.S. government agents in
their conspiracy to overthrow the Queen.

A. 1893 Overthrow of the Government of the Kingdom of Hawai‘i

In January 1893, U.S. Minister to Hawai‘i John L. Stevens met and conspired with members of the Annexa-
tion Club to overthrow the constitutional government of Hawai‘i. On January 16, 1893, Stevens ordered
U.S. Marines to land in Honolulu, under the guise of protecting American lives and property. Supported
by U.S. military troops, the insurrectionists took control of the government building, declared the monarchy

23 Id. at 245-267.
24 Id. at 236-37.
No. 3, 1967).
26 See Van Dyke, supra note 20, at 145-49. For further discussion on the Bayonet Constitution and its effects, see also
Osorio, supra note 16, at 193-249.
27 See Osorio, supra note 15, at 193-197; Van Dyke, supra note 20, at 123.
28 1887 Constitution, art. 59; see also Van Dyke, supra note 20, at 145 (delineating property requirements for voting
as owning at least $3,000 in taxable property or having an annual income of $600 per year).
29 Ralph Kuykendall, The Hawaiian Kingdom, volume iii 474 (1967).
.org/constitution-1893.html.
31 See Van Dyke, supra note 20, at 153.
32 See id. at 162-171.
33 See Kuykendall, supra note 29, at 533, 587-88. The quest for fertile plantation lands, tariff-free U.S. markets,
political power and military control fueled the coup. See id.
34 See Van Dyke, supra note 20, at 162.
35 See id.
abolished, and proclaimed the existence of a “provisional government” until annexation with the United States could be negotiated.36 Minister Stevens immediately recognized the provisional government, even before Queen Lili‘uokalani’s line of defense had surrendered.37 The Queen, realizing the futility of resisting American forces, and in order to prevent bloodshed, temporarily relinquished her authority to the superior forces of the United States.38

B. 1898 Annexation of Hawai‘i

Immediately after the fall of Hawai‘i’s monarchical government, its republican successor sent a delegation to Washington, D.C. to seek a treaty of annexation.39 Such a treaty was negotiated and sent to the U.S. Senate by President Harrison on February 14, 1893.40 Harrison asked for prompt and favorable action, and denied that the United States was in any way involved in overthrowing the monarchy.41 But the American national elections had already replaced Harrison’s pro-annexation administration with Grover Cleveland, who considered the U.S. involvement in the overthrow illegal.42 Cleveland, having received notice by a Hawaiian envoy commissioned by Lili‘uokalani that the overthrow and so-called revolution were derived from illegal intervention by U.S. diplomats and military personnel, withdrew the treaty.43 A report by James Blount, a special commissioner then sent to Hawai‘i to examine the situation, concluded that the overthrow could not have happened without U.S. intervention.44 Ultimately, however, Cleveland’s administration failed to restore the Queen, and Congress pushed for a “hands-off-policy”45 toward Hawai‘i.46

For their part, members of the provisional government, who later called themselves the “Republic of Hawai‘i,” did not give up on their desire for annexation by the U.S. The newly empowered Republic proclaimed a new constitution47 and declared Sanford Dole, the son of American missionaries, its new

36 See id. at 162-63.
37 See id. at 163.
38 Lili‘uokalani, Hawaii’s Story by Hawaii’s Queen 354 (1898) (“Because that protest and my communications to the United States Government immediately thereafter expressly declare that I yielded my authority to the forces of the United States in order to avoid bloodshed, and because I recognized the futility of a conflict with so formidable a power.”).
39 See Van Dyke, supra note 20, at 165.
40 See id.
41 See id. at n.85 (In his message to the Senate on the treaty, President Harrison said “that the overthrow of the monarchy was not in any way promoted by the United States, but had its origin in what seemed to be a reactionary and revolutionary policy on the part of Queen Lili‘uokalani…”).
43 See id.
44 See Van Dyke, supra note 20, at 167 (“The ‘Blount Report’ stated that ‘the presence of American troops, who were landed without permission of the existing government, was used for the purpose of inducing the surrender of the Queen, who abdicated under protest the understanding that her case would be submitted to the President of the United States.”).
46 See id.
47 See id. at 166 (explaining that the new constitution established strict voting qualifications that discriminated against native Hawaiians and Asians so much so that between 1890 and 1894 the total number native Hawaiians registered to vote declined by 67%).
President. During the years following the overthrow, the provisional government undertook ever-more egregious actions in Hawai‘i. It regulated newspaper printing, kept suspects in jail without bail, deported various citizens, and denied Native Hawaiians and Asians the power to vote. After an unsuccessful revolt, the Queen spent nearly two years under house arrest and other revolutionaries received death sentences. In 1897, pro-annexationist William McKinley became the 25th U.S. President. Three months after his inauguration, on June 16, 1897, he signed the Annexation Treaty, ignoring petitions against annexation submitted by three-quarters of the adult Native Hawaiian population. Despite lack of a two thirds majority in the Senate necessary to ratify it, in 1898, the Annexation Treaty passed in the U.S. Congress by way of a joint resolution, requiring a mere majority in each house of Congress. Annexation was justified by the U.S. Defense Department’s position that Pearl Harbor was a “military necessity” in the Spanish-American War.

In 1900, applying U.S. domestic law to impose U.S. citizenship on the people of Hawai‘i, then technically a territory, and to confer upon all persons born in the territory after 1898 with U.S. citizenship, the United States in effect provided for the explosion of its own national population in Hawai‘i from 1,928 out of a total population of 89,990 in 1890 to 423,174 out of a total population of 499,794 in 1950. By 1950, Native Hawaiians made up a mere 20% of the total population of the Hawaiian Islands. This stark change in demography would play a key role in Hawai‘i becoming the 50th state of the United States.

48 See Van Dyke, supra note 20, at 172.
49 Budnick, supra note 45, at 164-65.
50 Id. at 167 (adding that the Provisional Government did not carry out the death sentences for the sake of public image).
51 See 55th Cong. 2d sess. Congressional Record, 5982 (June 15, 1898)); “Joint Resolution to Provide for Annexing the Hawaiian Islands to the United States,” 30 Stat. 750 (1898); see also Tom Coffman, Nation Within: The Story of America’s Annexation of the Nation of Hawai‘i (1992).
53 See id. at 209; U.S. Const. art. II, § 2 (“[The President] shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur.”) (emphasis added); see also David Keanu Sai, A Slippery Path towards Hawaiian Indigeneity: An Analysis and Comparison between Hawaiian State Sovereignty and Hawaiian Indigeneity and its Use and Practice in Hawai‘i Today, 10 J.L. & Soc. Challenges 68, 82-83 (2008) [hereinafter Sai, A Slippery Path].
54 Joint Resolution to Provide for Annexing the Hawaiian Islands to the United States, H.R. Con. Res. 55, 55th Cong. (1898) (enacted) (stating, in part, that “[w]hereas the Government of the Republic of Hawaii having, in due form, signified its consent, in the manner provided by its constitution, to cede absolutely and without reserve to the United States of America all rights of sovereignty whatsoever kind […]”); Sai, A Slippery Path, supra note 52, at 100.
55 See Comparative Table of Nationality of Population of Hawaiian Islands at various census periods since 1872, Hawaiian Annual, reprinted in All About Hawaii 18 (1907), available online at http://books.google.com/books?id=Qgxh8TZy-pIC&printsec=toc#PPA18,M1; see also David Keanu Sai, American Migration to the Hawaiian Kingdom and the Push for Statehood into the American Union, Focus On Hawaiian History, available at http://www.hawaiiankingdom.org/pdf/American_Migration.pdf (last visited Mar. 19, 2009), at 1; Sai, A Slippery Path, supra note 53, at 100.
C. 1959 Removal of Hawai‘i from the U.N. List of Non-Self-Governing Territories

Beginning in 1900, American settlers living in Hawai‘i sought the conversion of the Territory of Hawai‘i into a state of the U.S. The first statehood bill was introduced in Congress in 1919 but failed because Congress did not view the Hawaiian Islands as a fully incorporated territory but, rather, as a territorial possession.58 However, by 1950, with the American settler population in the majority, Hawaiian soil was fertile for full U.S. incorporation.

The object of U.S. Statehood was finally accomplished in 1950 after the new putative electorate of Hawai‘i—an electorate that included the fast-growing American settler population—voted in the second of two special elections for convention delegates to draft a constitution for the State of Hawai‘i.59 The draft constitution was ratified by a vote of 82,788 to 27,109 on November 7, 1950.60 On March 12, 1959, the U.S. Congress approved the statehood bill, which was signed into law on March 18, 1959.61 In a special election held on June 27, 1959, the electorate voted to make Hawai‘i a state of the U.S. union.62 One month later, two U.S. Senators and one Representative were elected to office.63 Finally, on August 21, 1959, the President of the United States proclaimed that the process of admitting Hawai‘i as a State of the U.S. union was complete.64 According to the United States, Hawai‘i’s admission into the union meant that Hawai‘i was no longer a non-self-governing territory, and that the United States no longer had to submit annual reports to the international community regarding Hawai‘i’s progress toward self-government, which the U.S. was under an international obligation to do since it first placed Hawai‘i on the U.N. list of non-self-governing territories in 1946.65 Though the volatile transition of Hawai‘i from a recognized state among the Family of Nations, to a non-self-governing territory administered by the U.S., to the 50th U.S. state, was wholly dependent upon U.S. congressional authority, and not international law, the United States maintained that it had fulfilled its international legal obligations to the people of Hawai‘i. Consequently, the U.N. General Assembly removed Hawai‘i from its list of non-self-governing territories by resolution on December 12, 1959.66

58 See Van Dyke, supra note 20, at 255; Sai, A Slippery Path, supra note 53, at 103 (“Hawai‘i was deliberately treated as a non-self-governing territory or colonial possession in order to conceal the United States’ prolonged occupation of an independent and sovereign State for military purposes.”)(emphasis added).
59 See Van Dyke, supra note 20, at 256 (discussing the 1940 plebiscite and the 1950 election); Sai, A Slippery Path, supra note 53, at 101.
60 See Van Dyke, supra note 20, at 256.
64 See Hawai‘i Legislative Reference Bureau, supra note 140; Sai, A Slippery Path, supra note 52, at 102; Sai, American Migration to the Hawaiian Kingdom, supra note 54, at 2.
The above-described actions on the part of the United States produced the harm still in need of a cure. The following section sets out the three main international legal regimes theoretically available for redressing the harm caused by these international wrongful acts, evaluating in turn the relevant international law and attendant pros and cons of each regime.
III. CURING THE HARM

Since the inception of the modern Hawaiian sovereignty movement, which many agree reached a peak in the early 1990s, three main international legal regimes have been advanced within the movement as possible vehicles for pursuing redress for the harms described in the preceding section. These regimes have, so to speak, clamored for pride of place within the activist community, each fighting to displace the other two as the “most correct” regime under which to recover the loss of, among other things, Hawaiian independence. These are the regimes of occupation/deoccupation; colonization/decolonization; and indigenization/indigenous rights. They in turn inform the legal narratives that the Hawaiian independence movement is taking, or trying to take, to the international community in an attempt to present the latter with the most recognizable and compelling account of the harm done to Hawai‘i by the U.S. in the hope of generating international support for an appropriate remedy, which must include the option for independence. As such, the narratives tied to these three legal regimes represent particular ways of telling the story of the harm described in the preceding section, and, correlative, of prescribing the cure. I shall examine each regime in turn.

A. Occupation/Deoccupation

The first part of this section sets out the law of occupation, both as it was traditionally understood at the turn of the nineteenth century and as evolved after World War II. The second part of this section addresses how a number of individuals and groups in Hawai‘i are invoking the law of occupation to support their contention that the separate sovereignty of the Hawaiian Kingdom “continues” despite effective U.S. rule since the late 1800s. The third part of this section sets out the significant hurdles over which proponents of this particular international law narrative would have to jump to convince an international audience that this narrative “fits the facts” of the Hawaiian situation.

1. The Law of Occupation

The law of occupation is part of a larger body of international law known as the law of war, which developed during the late 1800s through to the mid 1900s. Its principal texts are the Hague Regulations,68 codified first in 1899 and again in 1907, and the 1949 Fourth Geneva Convention. 69 The “phenomenon of occupation,”

67 To be precise, illegal annexation and illegal occupation are distinct international legal questions. However, for the purposes of this analysis, it suffices that the question of whether or not a challenged annexation is illegal springs from the international prohibition on the use of force, which is analyzed in the text of this section. As will be shown in this section, because both the U.S. overthrow and subsequent annexation of the Hawaiian Islands occurred prior to the crystallization of international law’s prohibition on the use of force, the analysis contained in this section is sufficiently explicative of the issue of illegal annexation. This issue aside, the legal import of the U.S. Apology Resolution remains an open question in international law, which will be taken up in another section of this paper. See infra.


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to international law scholar Eyal Benvenisti, can be defined as “the effective control of a power (be it one or more states or an international organization, such as the United Nations) over a territory to which that power has no sovereign title, without the volition of the sovereign of that territory.” The plain language of the Hague Regulations confirms the link between the phenomenon of occupation and war. Article 42 of the Hague Regulations provides: “[t]erritory is considered occupied when it is actually placed under the authority of the hostile army. The occupation extends only to the territory where such authority has been established and can be exercised.” Under the law of occupation, it is “assumed that upon gaining control, the occupant would establish its authority over the occupied area, introducing a system of direct administration.” This duty on the part of the occupying power to establish a system of administration was “widely accepted in practice and in the literature as mandatory.” Nevertheless, because the definition of occupation is not dependent on the establishment of an occupation administration, failure to do so does not relieve an occupant of its duties under the law of occupation.

The entire law of occupation rests on the foundational principle of the inalienability of sovereignty through the use of force, be it actual or threatened. Put plainly, “[e]ffective control by foreign military force can never bring about by itself a valid transfer of sovereignty.” From this principle “spring the constraints that international law imposes upon the occupant,” the heart of which is the command that the occupying power has “only temporary managerial powers, for the period until a peaceful solution is reached.” “During that limited period, the occupant administers the territory on behalf of the sovereign.” Thus, under the traditional law of occupation as enshrined in the Hague Regulations, the occupant’s status was “conceived to

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71 Article 42 of the Regulations Respecting the Laws and Customs of War on Land, annex to the Convention (IV) Respecting the Laws and Customs of War on Land, signed at the Hague, October 18, 1907 [hereinafter, Hague Regulations].
72 Id. supra note 70, at 4.
73 Id. at 5.
74 Id. discussing article 47 of Fourth Geneva Convention.
75 Id. Under the early traditional law of occupation, the one recognized exception to the duty to establish a regime of occupation was the situation of debellatio. The doctrine of debellatio asserted that if the enemy state had “totally disintegrated and no other power [was] continuing the struggle on behalf of the defeated sovereign, then occupation transferred sovereignty.” Benvenisti, supra note 70, at 29. This early conceptualization of the law of occupation reflected the late eighteenth and early nineteenth century commitment to safeguarding the interests of the elites of the more powerful participants to the Hague Conferences. Id. Today, however, the demise of the doctrine of debellatio has been universally recognized. Id. at 95. According to Benvenisti, the doctrine is now debunked:

This doctrine has no place in contemporary international law, which has come to recognize the principle that sovereignty lies in a people, not in a political elite. The fall of a government has no effect whatsoever on the sovereign title over the occupied territory, which remains vested in the local population. The fact that their army has been totally defeated cannot divest them of their entitlement. The only lawful change of status (annexation, secession, etc.) may therefore take effect with the consent of the people involved. Otherwise, the territory should continue to be treated as occupied.

Id.
76 Id. at 5.
77 Id. at 6.
78 Id.
79 Id.
be that of a trustee.”80 As a transient trustee, the occupying power is to interfere as little as possible with the institutions or government of the occupied territory, instructed only to manage therein the vaguely-worded “public order and [civil life].”81 Article 43 of the 1907 Hague Regulations, which contains in its sparse wording the “gist”82 of the law of occupation, states:

The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore and ensure, as far as possible, public order and [civil life], while respecting, unless absolutely prevented, the laws in force in the country.83

Article 43 has been accepted as merely pronouncing upon the state of the law at the turn of the nineteenth century and thus as an embodiment of customary international law.84 The international community would later confirm this view after the second world war, in the International Military Tribunal in Nuremberg.85 Article 43 enshrines the foundational principle that occupation does not confer upon an occupant sovereignty over the occupied territory, as evidenced by the wording in its opening phrase, “[t]he authority of the legitimate power having in fact passed into the hands of the occupant.86

Article 43, however, provides little guidance to the international community both as to the nature of the occupation regime and as to the scope of the occupant’s legitimate powers, deficiencies that would later be partially remedied by the Geneva laws.87 As the provision intended to address the general powers of the occupying power in cases of occupation, Article 43 mentions both the obligations of the occupying power and its rights in the course of fulfilling said obligations.88 In short, the occupier’s obligations are to take all measures in its power to restore and ensure, as far as possible, “public order and [civil life].”89 It is required to do so “while respecting, unless absolutely prevented, the laws in force in the country.”90 Historically, this phrasing has proven deceptively simple, as its meaning has been hotly contested over the decades by occupier and occupied alike.91 At the turn of the nineteenth century, however, its meaning was not so contentious.

80 Id.
81 Id. at 7.
83 Article 43 of the Regulations Respecting the Laws and Customs of War on Land, annex to the Convention (IV) Respecting the Laws and Customs of War on Land, signed at the Hague, October 18, 1907 [hereinafter Hague Regulations]. When Article 43 was first translated from French to English, it employed the phrase “public order and safety.” Eventually “safety” was replaced by the more comprehensive phrase quoted in the text above, i.e., “civil life,” which was widely considered closer in meaning to the original French “l’ordre et la vie publique.”
84 Benvenisti, supra note 70, at 8; Krystyna Marek, Identity and Continuity of States in Public International Law 78 (2d ed. 1968).
85 See The Trial of the Major War Criminals 253-54 (1947), also published in 41 AJIL 172, 248-49 (1947); see also Gerhard von Glahn, The Occupation of Enemy Territory 10-12 (1957).
86 Benvenisti, supra note 70, at 8 (emphasis added).
87 Id. at 7.
88 Id. at 9.
89 Id.
90 Id.
91 Id. at 9-10.
Benvenisti submits that based on the “then-prevailing notions of the proper role of central governments and assumptions as to the short duration and nature of war,”92 imputing a duty upon the occupant to restore and ensure public order and civil life not only did not excite alarm among nations but was in fact most strongly advocated by those countries most susceptible to occupations.93 These weaker countries were of the view that occupying countries otherwise “might choose not to get involved in matters concerning the civilian population of an occupied territory.”94 Enlarging the scope of the occupier’s duties was seen by the weaker parties to the Hague conferences as a way of ensuring their ability to “return as quickly and as much as possible to their regular daily life.”95 Importantly, the working assumption during this period was that occupiers lacked “any self-interest in regulating those social functions.”96 Consequently, Benvenisti states, “no one raised the possibility of the occupant’s intervention in these areas to further its own policies.”97 The likely motives of any given occupier, it was thought, would only be “short-term military concerns, not impinging upon the local civil and criminal orders.”98

The traditional law of occupation has been characterized as a “laissez-faire”99 approach under which the occupant was “not expected, during the anticipated short period of occupation, to have pressing interests in changing the law to regulate the activities of the population, except for what was necessary to the safety of its forces.”100 Although commentators would by the post-World War II period concede other non-military-related subjects for an occupier’s lawmaking,101 it was widely understood that the only truly relevant question for the early occupant was whether or not it could accommodate its security interests with the existing laws.102 Late eighteenth and early nineteenth century notions of occupants as trustees lacking in self-interest in their management of occupied territory would prove dramatically deficient in light of state practice during and after the first world war. Equally unsatisfying from a state practice perspective would be the then-dominant view that occupiers would take a hands-off approach, interfering with civilian life in the occupied territory as little as possible.

Despite whatever shortcomings may now be imputed to the law of occupation as it was conceived at the turn of the nineteenth century, discussed in more detail below, the salient features of the early law are as follows. First, occupation was conceived as a transient occupation, intended only to last “for the short period between hostilities and the imminent peace treaty, which would translate wartime victories into territorial concessions by the defeated party.”103 Indeed, the traditional law of occupation recognized only

92 Id. at 10.
93 Id.
94 Id.
95 Id.
96 Id.
97 Id.
98 Id.
99 Id. at 14.
100 Id.
101 See, e.g., von Glahn, supra note 85, at 97. Although von Glahn maintains that an occupier may lawfully enact laws for nonmilitary goals such as for the safeguarding of the welfare of the native population of the occupied territory, such a purpose is only a “secondary” aim of any occupation. Id.
102 Benvenisti, supra note 70, at 14.
103 Id. at 27; Marek, supra note 84, at 80 (“the most significant characteristics of [belligerent] occupation itself is that it is provisional and temporary.”). See id. at 82 (“belligerent occupation is by its very nature provisional.”).
one way to end an occupation regime, i.e., a peace treaty concluded between the occupant and the ousted government after the close of hostilities. This conception of occupation was “part of a more general theory of war in the nineteenth century, in which war was seen as a legitimate means to achieve national goals.” Because war was seen primarily as a contest between governments and their armies, “civilians were no more than the cheering fans of the fighting teams,” and were thus “left out of the war, and kept unharmed as much as possible, both physically and economically.” Combined with the more general laissez-faire political and economic philosophy of the period, this minimalist conception of war “made possible a conception of laissez-faire type of government even in wartime.” This conception of war in turn gave purchase to Article 43 of the Hague Regulations; that is, it seemed plausible at the time to have “the peaceful cohabitation of the local population with the enemy’s army, with the minimal necessary interaction between them, and with the continuous immunization of the former’s private interests from the intervention by the latter.” This early conception of occupation was supported not only in theory but also by state practice, i.e., nineteenth-century occupations themselves. Second, the law of occupation was understood to simultaneously protect two sets of interests, the first being the sovereign rights of the ousted government, and the second being the local population (from exploitation by the occupant). In cases of conflict between these two sets of interests, an occupier was to privilege the interests of the ousted government. In this scenario, the occupying power was expected to fill the vacuum created by the ousting of the local government and to maintain power only “until the conditions for the latter’s return [are] mutually agreed upon.” As a logical correlative, “the local population was similarly under a duty to abide by the occupant’s exercise of authority.” According to Benvenisti, this approach found favor with the elites of the more powerful participants in the Hague Conferences, such as the Austro-Hungarian and Ottoman Empires.

Bluntly, the law of occupation has “completely changed” since the Hague Conferences. Benvenisti observes:

The fundamental concepts of human rights and self-determination of peoples, which had transformed international law in the latter half of the twentieth century, have not been duly reflected in the constituting documents of the law of occupation. Issues concerning the management of public resources, including scarce natural resources, and even transboundary natural resources, had to be governed by rules that reflected the late nineteenth-century conception of public property as one
that belongs to the sovereign ruler but not to his people. The law of occupation had to adapt itself to offer responses to enormous challenges….\(^{117}\)

Estonian international law scholar Lauri Mälksoo asserts that the law of occupation has evolved to the point that it has turned the premises that undergirded the Hague Regulations on their head. The extent to which national governments in European countries became more involved in their countries’ economic and social life, combined with the growing demand of national armies for human and material resources, necessarily pulled civilian populations into the arena of war.\(^{118}\) These developments were intensified by the rise in World War I of competing ideologies concerning the “proper functions of the national government in both internal and international affairs, and last, but not at all least, by the advent of the claim for self-determination of peoples and the complementary idea that sovereignty lies in the people and not in its government.”\(^{119}\)

“Moreover,” Benvenisti asserts, “as it became more difficult to reach accord on the transfer of sovereignty as a result of war, the periods of occupation became longer than before.”\(^{120}\) Consequently, the balancing mechanism envisioned in Article 43 was “put under tremendous strain”\(^{121}\) and the “theoretical peaceful coexistence between the former and the local population could not be realistically expected any longer.”\(^{122}\) Benvenisti continues:

More and more issues gradually became the objects of unbridgeable conflicts of interest, as the occupant sought to intervene in the affairs of the territory under its control, and at the same time its acts had the potential of causing profound effects in both the public and the private sectors. It was no longer possible to expect the occupant to perform the function of the impartial trustee of the ousted sovereign or the local population; it was no longer feasible to demand that the occupant pay no heed to its own country’s interests…Thus the mandate to ‘restore and ensure public order and civil life’ has become at best an incomplete instruction to the occupant…Almost every occupation involved a conflict of interests between the occupant and the ousted sovereign…in some occupations the conflict of interests was further complicated by the appearance of a conflict between the ousted elite and the indigenous community: Article 43’s bias in favor of the former was challenged by the emerging principles of self-determination and self-rule…these developments contributed to the decline of Article 43’s commanding authority.\(^{123}\)

Although Article 43 of the Hague Regulations continues to serve as the “cornerstone of the law of occupation,”\(^{124}\) it has been supplemented by the 1949 Fourth Geneva Convention, which reformulated certain aspects of the law in response to the experience of World War II. In short, all three Axis powers, i.e., Germany, Italy, and

\(^{117}\) Id. at x.
\(^{118}\) Id. at 29.
\(^{119}\) Id.
\(^{120}\) Id. at 29-30.
\(^{121}\) Id. at 30.
\(^{122}\) Id.
\(^{123}\) Id.
\(^{124}\) Id.
Japan, wholly ignored the dictates of the law of occupation.\textsuperscript{125} For their part, the Allies—while often professing the continued existence of the Hague Regulations and at times their adherence to them—employed various justifications for their failure to abide by them.\textsuperscript{126} Setting aside their more outright violations of the Hague Regulations,\textsuperscript{127} the Allies often claimed their inapplicability on the basis of their official recognition of governments other than the acting ones as the lawful governments in the relevant occupied territory.\textsuperscript{128} In addition, Allies used so-called agreements with local elements as well as claims to sovereign powers in a post-surrender occupation to justify their noncompliance with the law.\textsuperscript{129}

Freshly sobered by the conduct of occupants during and after World War II, the drafters of the 1949 Fourth Geneva Convention took on two issues: the principle of the inalienability of sovereignty through the use of force and the delimited control by an occupier over the occupied territory. Article 47 provides:

Protected persons who are in occupied territory shall not be deprived, in any case or in any manner whatsoever, of the benefits of the present Convention by any change introduced, as the result of the occupation of a territory, into the institutions or government of the said territory, nor by any agreement concluded between the authorities of the occupied territories and the Occupying Power, nor by any annexation by the latter of the whole or part of the occupied territory.

As the first article in the section of the treaty dealing with occupied territories, Article 47 provides that an occupied territory shall remain characterized as such despite any purported change in its status.\textsuperscript{130} Intended to address World War II occupant practice (such as the creation of new states, the appointments of new governments, and the annexations and other changes of territorial boundaries), Article 47 provides that any such change would not affect the applicability of the convention.\textsuperscript{131} Article 47 further provides that the passage of time also would not render the convention inapplicable, stating that it continues to apply “for the duration of the occupation.”\textsuperscript{132} As evidenced by its title, “Convention (IV) relative to the Protection of Civilian Persons in Time of War,” the Geneva law is principally concerned with the rights of individuals under alien occupation and not necessarily with the issue of sovereignty per se. Benvenisti notes that this switch was “quite distinct from that of the Hague Regulations, which strove to cater to the interests of the governments involved in the dispute.”\textsuperscript{133}

Article 64 of the Fourth Geneva Convention, which generally delimits the scope of the prescriptive power of the occupant and is followed by six sequential articles prescribing more specific limits, provides:

The penal laws of the occupied territory shall remain in force, with the exception that they may be repealed or suspended by the Occupying Power in cases where they constitute a threat to its security

\textsuperscript{125} Id. at 60.
\textsuperscript{126} Id. at 96.
\textsuperscript{127} Id. at 96-97.
\textsuperscript{128} Id. at 96.
\textsuperscript{129} Id.
\textsuperscript{130} Id. at 99.
\textsuperscript{131} Id. (internal citations omitted).
\textsuperscript{132} Id.
\textsuperscript{133} Id. at 99-100.
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or an obstacle to the application of the present Convention. Subject to the latter consideration and to
the necessity for ensuring the effective administration of justice, the tribunals of the occupied terri-
tory shall continue to function in respect of all offenses covered by the said laws.

The Occupying Power may, however, subject the population of the occupied territory to provisions
which are essential to enable the Occupying Power to fulfil its obligations under the present Con-
vention, to maintain the orderly government of the territory, and to ensure the security of the Occu-
pying Power, of the members and property of the occupying forces or administration, and likewise
of the establishments and lines of communication used by them.

Under the Fourth Geneva Convention, an occupant’s prescriptive powers and duties are more numerous
and more clearly defined. According to Benvenisti, the convention makes two significant contributions to
the law of occupation. First, it delineates a bill of rights for the occupied population akin to a set of interna-
tionally approved guidelines for the lawful administration of occupied territories—a vast improvement over
the vague commands of Article 43 of the Hague Regulations. This stated, the convention failed to provide
the modern occupant clear guidance for balancing the conflicting interests of the parties involved in a situ-
ation of occupation; that is, the needs of the occupied population on the one hand, and the security of the
occupation forces on the other. This failure is notable insomuch as one cannot realistically expect an occu-
pant to compromise its security interests in favor of the interests of the local population. Second, the con-
vention shifted the emphasis from political elites to peoples, which changes the emphasis of the traditional
law of occupation by privileging the interests of the local population vis-à-vis the ousted sovereign. This
shift is notable insomuch as it marked a “growing awareness in international law of the idea that peoples are
not merely the resources of states, but rather they are worthy of being the subjects of international norms.”

To be sure, the traditional law of occupation “initially reflected the premise that kings were the sovereigns
and that international law should protect their possessions.” Since then, the international community has
had to adapt the law of war to conform to a “new philosophy—the philosophy of international humanitarian
law—which posited that peoples were the true sovereigns and that human rights had to be respected.”

A much more recent pronouncement on the law of war arose out of the context of the United States-led
war on Iraq. In 2003, the United Nations Security Council, in Resolution 1483, recognized the presence of
U.S. and U.K. forces in Iraq as occupying powers subject to the law of the Hague Regulations and the Fourth
Geneva Convention. When the Security Council announced the applicability of the law of occupation to
the Iraq war in 2003, it had to adapt what was a largely obsolete or antiquated law of war and make it fit the
new facts of international life. Benvenisti maintains that Resolution 1483 “can be seen as the latest and most

134 Id. at 104-05.
135 Id. at 105.
136 Id.
137 Id. at 106.
138 Id.
139 Id. at x.
140 Id.
142 Benvenisti, supra note 70, at x.
authoritative restatement of several basic principles of the contemporary law of occupation.” In sum, the resolution reaffirms that “[o]ccupation is a temporary measure for reestablishing order and civil life after the end of active hostilities, benefitting also, if not primarily, the civilian population.” In addition, the resolution recognizes that because sovereignty inheres in the people and not the ousted sovereign, regime collapse does not extinguish sovereignty. Thus, the resolution “implicitly confirms the demise of the doctrine of debellatio, which would have passed sovereign title to the occupant in case of total defeat and disintegration of the governing regime.” By granting a mandate to the occupants to transform the previous legal system to enable the Iraqi people “freely to determine their own political future and control their own natural resources…to form a representative government based on the rule of law that affords equal rights and justice to all Iraqi citizens…,” Resolution 1483 confirmed the contemporary understanding that the law of occupation must make room for notions of self-determination. The resolution also recognizes in principle the continued applicability of international human rights law in occupied territories in tandem with the law of occupation. Benvenisti thus concludes that “[h]uman rights law may thus complement the law of occupation on specific matters.” Finally, Resolution 1483 re-envisions for contemporary occupants a hands-on role, calling upon them to pursue an “effective administration.” This call stands in strong contrast to the initial orientation of the traditional law of occupation as codified in the Hague Regulations, which envisioned a disinterested occupant who does not intervene in the lives of the occupied population.

More recently still, in its celebrated 2004 advisory opinion, on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory ("Wall"), the International Court of Justice confirmed the applicability of human rights law to occupied territories. In ruling that Israel’s construction of a separation wall in the occupied West Bank was illegal under the law of occupation in particular and international law in general, the Court found that the wall obstructed the Palestinians’ right to self-determination on West Bank territory and violated several other rights that Palestinians were entitled to under both international humanitarian law and human rights law, some of which can now be found in the International Covenant on Civil and Political Rights; the International Covenant on Economic, Social, and Cultural Rights; and the Convention on the Rights of the Child.

2. Proponents of Deoccupation/State Continuity Theory in Hawai‘i
Those advancing their arguments under the regime of occupation/deoccupation essentially assert that be-
cause the Hawaiian Kingdom was a recognized state and member of the then-held Family of Nations at the time of the U.S. military invasion and overthrow, its separate sovereignty continues today despite 117 years (and counting) of uninterrupted occupation by the United States. Although the numerous sovereignty groups advancing arguments under this regime do not share identical legal views on the subject, all of them advance the basic argument that under international law the independence of the Hawaiian state is not in dispute due to the illegality of both the overthrow and subsequent annexation of Hawai‘i into the U.S. union. All maintain that the passage of time cannot clothe with legality the United States’ initially illegal actions in the Hawaiian Islands.

In his political science dissertation, *The American Occupation of the Hawaiian Kingdom: Beginning the Transition from Occupied to Restored State*, one of the most vocal proponents of state continuity theory, Dr. D. Keanu Sai, maintains that absent evidence that Hawai‘i’s sovereignty during or since the nineteenth century was extinguished, international law protects the international personality of the occupied state by presuming, as a matter of law, the continuance of a recognized state. Dr. Sai’s especially high visibility in the Hawaiian sovereignty landscape warrants a brief digression in order to roughly sketch the contours of his position.

Dr. Sai’s position is grounded generally in international legal principles of state sovereignty, equality and non-intervention, and specifically in agreements between the United States and Hawai‘i wherein the former assumed the duty of non-intervention. Sai asserts that the United States violated Hawai‘i’s rights under international law when it: 1) aided in the illegal overthrow of Hawai‘i, 2) subsequently recognized the illegitimate governmental entities comprised of insurgents involved in the overthrow, and 3) annexed and incorporated Hawai‘i into the U.S. union. Dr. Sai’s theory is more specifically grounded in the law of occupation, both in terms of turn-of-the-nineteenth century custom and as codified in the Hague Regulations. Dr. Sai asserts that the United States, as the occupying power vis-à-vis the Hawaiian Kingdom, continues to: 1) illegally occupy Hawai‘i; and 2) illegally substitute its own laws for those of the rightful, or *de jure*, Hawaiian state. These charges, the theory goes, are tied to the United States’ earlier infringement of Hawai‘i’s international legal status as a neutral state during the Spanish-American War. Dr. Sai ultimately concludes: absent any evidence that Hawai‘i’s sovereignty during or since the nineteenth century was extinguished, international law protects the international personality of the occupied state by presuming, as a matter of law, the continuance of a recognized state. This means, according to international law scholar Matthew Craven, that the “continuity of the Hawaiian Kingdom, in other words, may be refuted only by reference to a valid demonstration of legal title, or sovereignty, on the part of the United States.”

In terms of redressing these violations of international law, Dr. Sai proposes to “compel the President of

157 See generally id.
158 See id. at 120-47.
159 See id. at 147-55.
160 See id. at 125-28.
161 Id. at 154-55.
162 Matthew Craven, *The Continuity of the Hawaiian Kingdom*, legal opinion for the entity calling itself the acting Government of the continuing Hawaiian state, at 5, ¶ 2.6 (Jul. 12, 2002).
the United States, through his commander of the U.S. Pacific Command, to establish a military government for the administration of Hawaiian Kingdom law." Dr. Sai asserts that such a move would bring the United States into conformity with the international law of occupation, the theory being that only the U.S. President has the power under the U.S. Constitution to extend his authority beyond U.S. territory. In this scenario, Dr. Sai envisions the commander of the U.S. Pacific Command, in the absence of any diplomatic corps in the Hawaiian Islands, as the "highest ranking officer of the U.S. government recognizable under international law." According to Dr. Sai, such a move would entail a sweeping declaration by the U.S. military government that all laws exercised in the Hawaiian Islands from the overthrow to the present which are consistent with Hawaiian Kingdom law and the law of occupation, are heretofore the provisional laws of the occupier. In addition, this process would necessarily entail a total reconstitution of all courts now operating in the Hawaiian Islands into Article II courts, which are the only courts recognized by the U.S. Constitution as having exterritorial force. Dr. Sai maintains that such a move would mark the beginning of Hawai‘i’s transition from an occupied to a restored state.

According to international law scholar Maivân Clech Lâm, a longstanding ally to and member of the Hawaiian independence movement, were the international community to accept this narrative as persuasive—and this is the key point—this would arguably constitute the “cleanest way back” to the status quo ante, i.e., the way things were before, or the state of affairs before the breach of the international law at issue occurred. Theoretically, the United States could today sign a peace treaty with duly constituted representatives of the descendants of the Hawaiian Kingdom subjects, thereby enabling an independent Hawaiian state to reconstitute itself.

For the following reasons, however, it is unlikely that the international community would find this narrative persuasive. As will be demonstrated, there are a number of hurdles over which the state continuity theory would need to jump in order to convince an international audience that the separate sovereignty of the Hawaiian state simply “continues” despite more than one hundred years of effective U.S. rule in the Hawaiian Islands.

3. Hurdles: Doctrine of Inter-temporal Law; Underdeveloped State Practice and Redress Mechanisms; Limited Analogical Import of the Baltic Cases; War; U.S. Hegemony in the United Nations Security Council; Montevideo Criteria and Effectiveness

a. Doctrine of Inter-temporal Law

Under international law, the principle or doctrine of inter-temporal law posits that any alleged breach of

163 Id. at 290-91.
164 Id. at 134.
165 Id. at 242.
166 Id. at 288.
167 Id.
168 See generally id.
170 Id.
international law must be appraised in light of the rules of international law as they existed at the time of the alleged breach, and not as they exist today.\footnote{171} This principle can be traced to the now-famous dictum of Judge Max Huber in the \textit{Island of Palmas Case},\footnote{172} which involved a territorial dispute over Palmas Island between the Netherlands and the United States. Huber wrote: "a juridical fact must be appreciated in the light of the law contemporary with it, and not of the law in force when a dispute arises regarding that fact."\footnote{173} Applying the principle to the facts before it, the arbitration court ruled that "[t]he effect of discovery of Spain is therefore to be determined by the rules of international law in force in the first half of the 16th century—or (to take the earliest date) in the first quarter of it…."\footnote{174} Although this case has been cited over time as enshrining a more or less fundamental principle of international law, a more restrictive reading of the ruling is possible. There, the United States claimed the disputed territory as successor to Spain under an 1898 treaty of cession. Accordingly, the outcome in that case squarely turned on the nature of the Spanish rights at that time.\footnote{175} In his seminal text, \textit{Principles of Public International Law}, international law scholar Ian Brownlie limits the reach of the inter-temporal principle announced in \textit{Island of Palmas}. Brownlie asserts that while a certain date, or several dates, may "assume prominence in the process of evaluating the facts," depending on the dispute,\footnote{176} ultimately:

The choice of such a date, or dates, is within the province of the tribunal seized of the dispute and will depend in some circumstances on the inevitable logic of the law applicable to the particular facts and, in other cases, on the practical necessity of confining the process of decision to relevant and cogent facts and thus to acts prior to the existence of a dispute…Of course, evidence of acts and statements occurring after the critical date may be admissible if not self-serving, as in the case of admissions against interest. There are several types of critical date, and it is difficult and probably misleading to formulate general definitions…\footnote{177}

Brownlie buttresses his position by pointing to other cases of international arbitration where critical dates \textit{eo nomine} did not feature in the judgment.\footnote{178} Moreover, Brownlie concludes, "[i]n any case the principle cannot operate in a vacuum: its theoretical extent will in practice be reduced by the effect of recognition, acquiescence, estoppel, prescription, the rule that abandonment is not to be presumed, and the general condition of the pleadings and evidence."\footnote{179}

The doctrine of inter-temporal law remains contested in international law. Judge Huber himself balanced his dictum in the same award with another one, namely:

\begin{flushright}
\footnote{171} \textit{Ian Brownlie, Principles of Public International Law} 123-24 (7th ed. 2008).
\footnote{173} \textit{Id.} at 845.
\footnote{174} \textit{Id.}
\footnote{175} \textit{Brownlie, supra} note 171, at 126 (citing \textit{Island of Palmas} case at P. 136?).
\footnote{176} \textit{Id.} at 125.
\footnote{177} \textit{Id.} at 126.
\footnote{178} \textit{Id.} (citing Minquiers and Ecrehos (Fr./U.K.), 1953 I.C.J. 47 (Nov. 17); Temple of Preah Vihear (Cambodia v. Thail.), 1962 I.C.J. 6 (June 15)).
\footnote{179} \textit{Brownlie, supra} note 171, at 126.
\end{flushright}
The same principle which subjects the act creative of a right to the law in force at the time the right arises, demands that the existence of the right, in other words its continued manifestations, shall follow the conditions required by the evolution of law.\textsuperscript{180}

More recent jurisprudence reveals that the doctrine of inter-temporal law remains ambiguous in international law, as illustrated by the South West Africa and the Namibia cases of the International Court of Justice. In the former, the ICJ seemed to affirm the doctrine, ruling that “…the Court must place itself at the point in time when the mandate system was being instituted…the Court must have regard to the situation as it was [at] that time.”\textsuperscript{181} In the latter, the ICJ seemed to overturn the doctrine, ruling that “[t]he Court must take into consideration the changes which have occurred in the supervening half-century, and its interpretation cannot remain unaffected by the subsequent development of law.”\textsuperscript{182}

Proponents of state continuity theory assert that under international law the independence of the Hawaiian state is not in dispute due to the illegality of the overthrow and annexation of Hawaiian Islands into the U.S. union. To support their contention that the separate sovereignty of the Hawaiian state “continues,” many theorists curiously invoke the doctrine of inter-temporal law.\textsuperscript{183} The rationale appears to be that because the Hawaiian Kingdom was a recognized state at the time of the overthrow and subsequent annexation, its separate legal personality was protected by international law’s general prohibition on the use of force. In tandem with the doctrine of inter-temporal law, many of the proponents of these theories also invoke the doctrine of non-recognition, which flows from the international law maxim \textit{ex injuria jus non oritur}, which means that legal rights cannot obtain from an illegal situation and commands states to withhold recognition of any new entity or situation born of illegality.\textsuperscript{184}

With regard to the doctrine of inter-temporal law, its strict application would actually do more harm than good for Hawai‘i’s state continuity claim. First, it is well established in international law that the use of force among states was not technically illegal until the 1920s, with the signing in 1928 of the General Treaty for the Renunciation of War, commonly known as the Kellogg-Briand Pact.\textsuperscript{185} The Kellogg-Briand Pact was the first international legal instrument to formally outlaw war as an instrument of national policy. It was not until 1928, then, that the prohibition on the use of force became a part of general international law. The logical correlative is that any use of force predating 1928 is not per se illegal under international law. Indeed, there is evidence supporting the view that during the relevant time period, i.e., 1898, forcible annexation was considered a legitimate mode of acquiring title to territory under international law.\textsuperscript{186} Second, the doctrine of non-recognition, which is also known as the Stimson Doctrine after its original formulator U.S. Secretary

\begin{thebibliography}{99}
\bibitem{180} (U.S. v. Neth.), 2 R.I.A.A. 839 (Perm Ct. Arb. 1928).
\bibitem{181} South West Africa Case, ICJ Reports 1966, p. 23 (§ 16).
\bibitem{182} Namibia Case, ICJ Reports 1971, p. 31 (§ 53).
\bibitem{184} \textit{See Brownlie, supra} note 171, at 509.
\bibitem{185} \textit{See id.} at 729-30; \textit{see also} Mälksoo, \textit{supra} note 84, at 89.
\bibitem{186} The literature goes so far as to note the difference between \textit{actual} and \textit{threatened} for purposes of the Kellogg-Briand Pact’s prohibition of the use of force. In short, most international legal scholars maintain that before the entry into force of the United Nations Charter, general international law, although clearly prohibiting the \textit{actual} use of force, did not so prohibit the mere \textit{threat} of force. Mälksoo, \textit{supra} note 82, at 90.
\end{thebibliography}
of State Henry Stimson, was employed for the first time after the adoption of the Kellogg-Briand Pact, on the occasion of Japanese aggression in Manchuria in 1932. After many fits and starts in state practice, the duty of non-recognition was finally firmly absorbed into general international law with the passage of the 1970 Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States, or Resolution 2625 (XXV). Thus, the strict application of the doctrines of inter-temporal law and non-recognition does not help Hawai‘i’s state continuity claim because the U.S. invasion and annexation of the Hawaiian Islands, in 1893 and 1898 respectively, were not per se illegal under the rules of international law at that time.

Proponents of state continuity theory should instead take their cue from the ICJ’s decision in the Namibia Case, where the Court seemed to overturn the doctrine, ruling that it “must take into consideration the changes which have occurred in the supervening half-century, and its interpretation cannot remain unaffected by the subsequent development of law.” Theoretically, were the ICJ today to pronounce upon the U.S. invasion and annexation of the Hawaiian Islands in light of its Namibia ruling (and therefore in light of the evolution of self-determination from a principle to a right to an exalted normative domain of international law), Hawai‘i’s continuity claim would be more persuasive. But as will be shown, other hurdles remain.

b. Underdeveloped State Practice and Redress Mechanisms

According to Professor Lâm, as compared to the regimes of colonization and indigenization, the regime of occupation is “conspicuously underdeveloped in terms of available mechanisms and processes of redress.”

This is an important fact to bear in mind inasmuch as “there has not been enough cases of occupation since the United Nations was created for there to be a huge body of law or mechanisms where you can bring your grievance.” In other words, Lâm argues, “as compared to decolonization, you would have to almost invent the mechanisms and processes for redress.” The fact that there are no specialized committees, fora, or tribunals to pass on the disputed legality of an occupation, Lâm concludes, is a “huge failing of this approach.” Indeed, despite having been codified since the late 1800s, the law of occupation remains woefully underdeveloped in terms of state practice and redress mechanisms.

Whereas World War I occupations (e.g., Germany’s occupation of Belgium from 1914-1918), might be characterized by occupants’ adaptation of the Hague Regulations to modern exigencies (e.g., Germany’s construction of Article 43 to allow for its exercise of unrestrained prescriptive powers in occupied Belgium, resulting in the pillaging of the latter’s wealth and resources for the benefit of the German war

187 Id. at 115.
188 Id. at 123; See 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), at 123, U.N. Doc. A/8082 (Oct. 24, 1970) [hereinafter, Declaration on Friendly Relations] (“The territory of a State shall not be the object of acquisition by another State resulting from the threat or use of force. No territorial acquisition resulting from the threat or use of force shall be recognized as legal.”).
189 Namibia Case, ICJ Reports 1971, p. 31 (§ 53).
190 Lâm Remarks, supra note 168.Id. at 116.
191 Id.
192 Id.
193 Id.
194 See Benvenisti, supra note 70, at 32-48.
effort). World War II occupations were marked by their flat-out rejection of the commands of the law of occupation. In short, all three Axis powers, i.e., Germany, Italy, and Japan, “completely ignored the basic tenets of the law of occupation.” The professed ideologies of these countries “explicitly contradicted the basic concepts of the law of occupation.” Benvenisti bemoans that the “great majority of post-World War II occupations have honored the law of occupation by virtue of its breach.” For their part, the Allied powers also undermined the law of occupation, though more in deed than word. While acknowledging the existence of the Hague Regulations and occasionally professing adherence to them, the Allies employed various justifications for their failure to abide by them. The Allies often claimed the inapplicability of the Hague Regulations on the basis of their official recognition of governments other than the acting ones as the lawful governments in the relevant occupied territory. In addition, Allies used so-called agreements with local elements as well as claims to sovereign powers in a post-surrender occupation to justify their noncompliance with the law.

To summarize, already by World War I, only seven years after the 1907 Hague Peace Conference, the working assumptions undergirding the Hague Regulations had already proved “inadequate.” Germany’s occupation of Belgium showed that the “interests of the modern occupant covered many aspects of daily life, that these interests could often clash with those of the local community, and that occupant and occupied could be competing for the same scarce resources.” In such situations, it was demonstrated, “the occupant was not likely to adopt an impartial stance.” Gone was the notion of the occupant as an impartial trustee. ”With vital interests at stake, the occupant would hardly be discouraged from making use of the effectively exclusive control over the occupied territory.” Rather, the occupant was “more likely to be an interested party, with short- and long-term objectives, with effective power to implement those objectives, and with the opportunity to couch them within the language of Article 43.” The Hague Regulations suffered further setbacks by occupant practice during and after World War II. As noted above, all the major powers failed to apply them in most of the territories that came under their control. “At the same time that the International Military Tribunal in Nuremberg described these rules as being declaratory of customary international law,” Benvenisti writes, “they effectively lost their normative value.” Further still, all of the major post-World War II occupations (e.g., Iraq’s occupation of Kuwait, Morocco’s occupation of Western Sahara, Indonesia’s occupation of

195 See id. at 46.
196 See id. at 59.
197 Id. at 60.
198 Id. at 96.
199 Id. at vii.
200 Id. at 96.
201 Id.
202 Id.
203 Id. at 46.
204 Id.
205 Id.
206 Id. at 47.
207 Id.
208 Id. at 96.
209 Id. at 98.
210 Id.
East Timor), blatantly failed to conform to the most basic principles of the law of occupation, being principally interested in permanent and exclusive control over coveted foreign territories.\textsuperscript{211} As a result, today, the law of occupation faces not only a challenge to its underlying principles but also a challenge to its enforceability.

For all of these reasons, then, in terms of cases and useful examples in practice, far and away the most important, indeed the paradigmatic, modern case of occupation is that of Israel's occupation of Palestine. The Israeli occupation of Palestinian territory is the only occupation since World War II in which a military power has established a direct military government over occupied areas in accordance with the framework of the law of occupation.\textsuperscript{212} As noted above, all other modern occupants who have assumed control over a foreign territory have rejected this body of law as inapplicable or irrelevant. Moreover, the Israeli occupation has been prolonged, lasting over three decades (and counting).\textsuperscript{213} This length of time, Benvenisti notes, "enables us to assess various problems encountered during occupation, and also to appraise whether the law of occupation should be modified to accommodate long-term occupations, and if so, how."\textsuperscript{214} A cursory look at the legal and political landscape of the Israeli occupation of the West Bank and Gaza gives a glimpse as to why the situation there—indeed why any situation of occupation—seems intractable.

As expertly set out in their article, \textit{The Relevance of International Law to Palestinian Rights in the West Bank and Gaza: In Legal Defense of the Intifada},\textsuperscript{215} preeminent international law experts Richard Falk and Burns Weston show that the Israeli occupation of the West Bank and Gaza is and has been for many years deemed in flagrant violation of the law of occupation in particular and international humanitarian and human rights law in general.\textsuperscript{216} This has been "abundantly and persuasively"\textsuperscript{217} documented by groups such as the International Commission of Jurists, the United Nations Special Committee to Investigate Israeli Practices Affecting the Human Rights of the Populations of the Occupied Territories, Amnesty International, the International Committee of the Red Cross, the National Lawyers Guild, and the Swiss League for Human Rights, to name but some.\textsuperscript{218} Although Israel remains bound by the requirements of the law of occupation, it has "defiantly contravened both the letter and spirit of these requirements and obligations by way of the harsh character of its administration in the West Bank and Gaza over the last twenty-three years."\textsuperscript{219} It has also "aggravated its failed responsibility toward the Palestinian people by the length of its occupation, by its establishment of Jewish settlements, by its refusal to commit itself to eventual withdrawal, and, not least, by its opposition to negotiating within the normative framework deemed reasonable by an overwhelming consensus of the international community."\textsuperscript{220} According to Falk and Weston, "[s]uch a record not only warrants severe

\textsuperscript{211} Id. at 149-190.
\textsuperscript{212} Id. at 107.
\textsuperscript{213} Id.
\textsuperscript{214} Id. at 107-08.
\textsuperscript{216} See generally id.
\textsuperscript{217} Id. at 134.
\textsuperscript{218} Id. at 133-34.
\textsuperscript{219} Id. at 144.
\textsuperscript{220} Id.
Among Israeli illegalities are:

The settlement of more than 90,000 of Israel’s Jewish citizens in the West Bank and Gaza as of June 1990 (plus more than 100,000 in East Jerusalem) and the establishment of approximately 140 settlements there; the refusal to repatriate thousands of Palestinians displaced during the 1967 fighting; the summary deportation of prominent Palestinian citizens from many walks of life (including lawyers “guilty” of attempting to safeguard Palestinian rights through official legal channels); systematic arbitrary arrests, detentions and the denial of procedural rights with respect to alleged security violations; the imposition of collective punishments, especially in the form of the destruction of family residences; and the mistreatment (including torture) of detainees.

All these and other abusive and illegal policies and practices directed at the Palestinian population as a whole are a matter of record. All this to say: Despite near universal agreement by the international community that Israel is a military occupier within the meaning of the law of occupation and that the West Bank and Gaza constitute occupied territory within the meaning of the Hague Regulations and Fourth Geneva Convention, the occupation nevertheless remains uncured. As Falk and Weston reluctantly concede, “the prospect of terminating Israeli occupation and establishing Palestinian rights by voluntary agreement seems remote, perhaps even impossible.” And figuring centrally to this intractability is the fact that the law of occupation is just plain ill equipped to deal with the changed facts of contemporary international life. As Falk and Weston grudgingly point out, there is simply “no legal analysis” offered by the Hague or Geneva law (or even the Geneva Protocols of 1977), to address the modern-day occupant seeking to convert the condition of temporary presence into indefinite duration.

c. Limited Analogical Import of the Baltic Cases

Some sovereignty advocates advancing arguments under the regime of occupation/deoccupation have increasingly looked to the example of the Baltic republics, namely Estonia, Latvia and Lithuania, for support for their proposition that Hawai‘i’s separate sovereignty continues despite the occupation and annexation of the Hawaiian Islands by the United States. Some basic background information is warranted in order to appreciate whether and in what measure the Baltic cases can be analogized to the Hawaiian case.

In his book, Illegal Annexation and State Continuity: The Case of the Incorporation of the Baltic States by the USSR (A study of the Tension between Normativity and Power in International Law), Estonian scholar

221 Id.
222 Id. at 134.
223 Id.
224 Id. at 153.
225 Id. at 154.
226 Id.
227 To date the most detailed explication of Hawai‘i’s state continuity claim in light of the Baltic cases can be found in Kūhiō Vogeler’s political science dissertation. See Kūhiō Vogeler, For Your Freedom and Ours: The Prolonged Occupations of Hawai‘i and the Baltic States (Aug. 2009) (unpublished Ph.D. dissertation, University of Hawai‘i).
228 Mälksoo, supra note 82.
Lauri Mälksoo meticulously analyzes the Baltic thesis of state continuity in the cases of Estonia, Latvia, and Lithuania, all of which had been under illegal occupation by the Soviet Union for some fifty years (1940-1991). According to Mälksoo, the “depth and intensity of the transformation in Eastern and Central Europe in the 1980’s and 1990’s took most diplomats and political commentators by surprise.” It was this very unique historical moment that led the international community to reach for international legal doctrines such as state continuity to deal with the political exigencies of that moment. “As political truths, concepts and entities collapsed, little else was available apart from the language and principles of international law through which to address the changes in an organised way.” Mälksoo continues:

What was offered by international law was a language and a set of concepts through which the political conflicts could be articulated, claims and counterclaims could be made and political negotiation could be conducted through a more or less non-biased means. Precedents could be (and were) invoked, analogies were made and all the standard legal arguments entered to provide a set of conceptual instruments through which political interests could receive shape and outlines or political settlement be perceived. International law provided then a relatively uncontested point of reference for the political struggles rocking Europe in that historical moment.

In sum, Estonia, Latvia, and Lithuania were all militarily invaded and occupied by the Soviet Union during World War II, first in August 1940 and then again from the close of that war until 1991. All three Baltic independentists, in various forms and in varying measure, insisted over the course of those fifty years that the Soviet occupation had been illegal, and that this meant that they had been under illegal occupation that entire time and that they could effectuate their self-determination not through the creation of new states but rather through a re-establishment of the old ones. Likening the three Baltic republics to “sleeping states” in a Sleeping Beautyish recounting of the legal record, Baltic states were “forcibly erased [by Soviet occupation and annexation] from the world map in 1940 but awoke in 1991 as though from a long comatose sleep upon receiving kisses [recognition] from third states recognizing their identity with pre-1940 Estonia, Latvia, and Lithuania.” The recognition of the ‘sameness’ of the Baltic states fifty one years after their de facto disappearance, Mälksoo continues, became a unique precedent in international relations, a remarkable ‘world record’ of its kind. Essentially, proponents of state continuity theory in Hawai‘i assert that the Hawaiian Kingdom is like the Baltic republics inasmuch as it is simply “sleeping,” i.e., lying in wait for a kiss of recognition from the international community.

Those theorists attempting to analogize the Baltic cases to the Hawaiian case, however, have largely failed to acknowledge a number of legally significant distinctions between the situations, which effectively weaken the proffered analogy. The key differences are as follows. First, numerous third party states not only

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229 Id. at vii.
230 Id.
231 Id.
232 Id. at viii.
233 Id.
234 Id.
235 Id. at xxv.
236 Id.
officially condemned the Soviet annexation of the Baltic states but also continued to recognize the independence of the Baltic states throughout the entire 51 years of occupation, many right up to their formal restoration in 1991.\footnote{Id. at 117-36.} According to one estimate, by the end of the 1980s, approximately fifty countries had still formally withheld recognition of the incorporation of the Baltic states into the Soviet Union.\footnote{Id. at 135.} Setting aside realpolitik issues of politically motivated non-recognition and the “Janus-faced nature of the non-recognition doctrine,”\footnote{Id. at 134.} the fact remains that up until the very end of occupation, third party states were still filing notes registering their non-recognition of Soviet title to the Baltic states.\footnote{Id. at 135.} Second, while technically no genuine governments in exile were initially created, throughout the entire Soviet rule in Estonia, Latvia, and Lithuania, some Legations of the pre-World War II independence period continued to exist and function in other countries.\footnote{Id. at 141.} For instance, thanks in large part to the determined non-recognition policy of the United States, legations of all three Baltic states continued to exist and function in the United States during all 51 years of Soviet rule.\footnote{Id. at 144.} Third, the Soviet military invasion and annexation of all three Baltic states occurred after the conclusion of the Kellogg-Briand Pact, which, again, banned the use of war as an instrument of national policy and authoritatively pronounced that territorial acquisitions brought about through the use of force cannot be recognized.\footnote{Id. at 92.} The Pact was brought into force between the Soviet Union and the Baltic States as signatory states through the Litvinov Protocol, signed in 1929.\footnote{Id. at 91-92.} Fourth, specific agreements in effect between the Soviet Union and the Baltic states explicitly outlawed aggression, and these non-aggression pacts were further supplemented by arbitration agreements.\footnote{Id. at 92.} Fifth, in force between the Soviet Union and all three of the Baltic states at the time of the former’s invasion and annexation of the latter was a remarkably specific treaty known as the \textit{Convention on the Definition of Aggression}, which explicitly defined aggression as including any naval blockades of coasts and ports of any other state.\footnote{Id. at 98.} Exactly such a blockade was undertaken by the Soviet union against the Baltic states in June 1940.\footnote{Id.}

In contrast, these cannot be said of the Hawaiian case.\footnote{In the spirit of revealing as opposed to hiding one’s subjectivities, the author considers it problematic that certain state continuity theorists advancing arguments under the regime of occupation/deoccupation have done so in a manner that depicts the law of occupation in particular and international law in general as existing more or less in a vacuum, altogether insulated from and unsullied by the touch of power politics. Because all legal positions are a “politics of law” and any attempt to posit otherwise would be, mildly put, anthropologically unsound, it is worth remembering the words of Friedrich von Martens, the renowned Russian international lawyer and diplomat: “International law may not remain suspended in the holy spheres of pure theory, but must descend into life, in order to win an honorable place in the interstate relations and in the life of the peoples…” Friedrich von Martens, \textit{Völkerrecht. Das internationale Recht der civilisierten Nationen}, Deutsche Ausgabe von C. Bergbohm, Teil I, Berlin: Weidmannsche Buchhandlung, 1883, p. VII. Commentators generally agree that the outcome of the Baltic cases, i.e., the restoration of independence of all three states and their recognition not as successor states but rather as}
The Commerce of Recognition (Buy One Ethos, Get One Free)

d. War
As originally conceived at the turn of the nineteenth century (and recently reaffirmed in the above-discussed U.N. Security Council Resolution 1483), the “phenomenon of occupation” was always understood to be a transient state of affairs intended to last from the close of wartime hostilities to the signing of a peace treaty. Though the intended beneficiaries of the law of occupation’s protections may have changed over time (from the ousted sovereign government to the local population of the occupied area), the law’s salient features remain: a regime of occupation is conceptually linked to a state of war and is intended to apply to a finite chronological interval. In October 2009, speaking before members of the Hawaiian sovereignty movement, Professor Lâm reminded the audience that “belligerent occupier in international law is understood to be at war with the occupied.” According to Professor Lâm, “while the overthrow relied on the armed might of the United States, arguably annexation did not.” “Rather, Lâm continued, “the military motive behind the U.S. presence in Hawai’i at the time of annexation and since has always been primarily directed at—not the occupied—but, rather, at third parties, i.e., Spain, later the U.S.S.R., and now China.” For these and other reasons herein discussed to varying depth, Lâm concludes that it is “unlikely to be seen by the international audience as fitting the facts of occupation.”

Assuming arguendo that the law of occupation applies to the Hawaiian fact pattern, the Question of Hawai’i would be appropriately taken up by the international community in the United Nations Security Council, the organ vested by the U.N. Charter with oversight over peace and security. That the United States has and continues to exert hegemonic influence in the Council has been the subject of extensive scholarship in the literature and needs no further elaboration here. This “hegemonic capture” of the Council was most recently demonstrated by U.S. attempts to rework international law’s prohibition on the use of force with respect to increasingly flexible U.S. notions of pre-emptive self-defense (e.g., the reconfiguration of certain types of terrorist violence as an armed attack for purposes of U.N. Charter Article 51 rights of self-

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identical ones, was largely determined by the dramatic play of power politics at that particular historical moment. See Mälköo, supra note 81, at xxvi-xxvii. Finally, Mälköo urges us to consider that while international law and international politics remain separate, “[l]awyers should not deceive themselves about the fact that international law is based upon values, and that the determination and choice between values in the process of the creation and application of international legal norms is never purely ‘legal’, but also an ethical, moral, and thus inevitably also a ‘political’, matter.” Id. at xxi. To be fair, some state continuity theorists in Hawai’i have advanced de-occupation propositions that more plainly and ably accommodate the interplay of international law and power politics. See, e.g., Vogeler, supra note 183, at 278-312.

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250 Mälköo, supra note 82, at 173 (“The linking of the regime of occupation to the state of war and military conduct implied that conceptually, military occupation was conceived as a provisional state of affairs.”).
251 Lâm Remarks, supra note 169.
252 Id.
253 Id.
254 Id.
255 U.N. Charter art. 51.
defense). Suffice it to say that such a consideration should be borne in mind by those advancing arguments under the regime of occupation/deoccupation.

f. Montevideo Criteria and Effectiveness

The Montevideo Convention of 1933 sets out what is near universally considered the criteria for statehood today. In short, any entity aspiring to be regarded by the international community as a state must: possess a permanent population; occupy a clearly defined territory; operate an effective government over the extent of its territory; and display capacity to engage in international relations, which includes the ability to fulfill international treaty obligations. Whatever its ontological shortcomings, the Montevideo Convention remains the “best known formulation of the basic criteria for statehood.” Assuming without deciding that the international community would employ the Montevideo criteria to the Hawaiian fact pattern, it would likely find the issue of effectiveness highly probative. Although various sovereignty groups that have formed over the last three decades have claimed to be the duly constituted representatives of that very government, the international community will not likely deem any of these groups as having wielded the kind of effectiveness needed to satisfy the third and fourth Montevideo criteria, i.e., none of these groups are seized of an effective government with demonstrable capacity to engage in the affairs of international life.

It should first be noted that some Hawaiian sovereignty theorists have attempted to render irrelevant the issue of effectiveness by asserting that in cases of belligerent occupation, even a prolonged period of absence of effective government does not lead to the extinction of the legal personality of the occupied state. While there is some support for this proposition in the literature, attempts by some commentators to altogether dismiss the principle of effectiveness have been marked by quite serious mischaracterizations of the principle itself. Ultimately, effectiveness is a foundational principle in the international legal system, as preeminent international law scholar Ian Brownlie forcefully notes:

International law is a realistic legal system. It takes into account of existing power relationships and endeavours to translate them into legal rules. It is largely based on the principle of effectiveness, that is to say, it provides that only those claims and situations which are effective can produce legal effects. A situation is effective if it is solidly implanted in real life. Thus, for instance, if a new State emerges from a secession, it will be able to claim international status only after it is apparent that it undisputedly controls a specific territory and the human community occupying it. Control over the State community must be real and durable...The principle of effectiveness permeates the whole body of rules making up international law. One of its corollaries is the fact that legal fictions have no place on the international scene...New situations

257 See id. at 341.
259 Article I of the Montevideo Convention reads: “The state as a person of international law should possess the following qualifications: (a) a permanent population (b) a defined territory; (c) government; and (d) capacity to enter into relations with the other states.” Id.
261 Crawford, supra note 260, at 701; Marek, supra note 84, at 73-102.
are not recognized as legally valid unless they can be seen to rest on a firm and durable display of authority...262

Setting aside the fact that the role of force in international life has gradually become subject to important qualifications where peremptory norms are concerned, Brownlie’s basic thesis that might makes right still rings at least partially true. Estonian international law scholar Lauri Mälksoo provides a more nuanced view of the role of effectiveness in international law:

One fundamental choice between conflicting values has been well known to the international community since the origins of international law: how much weight ought to be attributed to the principle of legality (ex injuria ius non oritur), and how much to the principle of effectiveness (ex factis oritur ius)? While international law must take both of these principles into account – in order to be law and to be effective – it must also decide which of the two is to be preferred in a particular type of conflict.263

Although the Baltic cases have been construed by some as a victory of the principle of legality over the principle of effectiveness, international law scholar Obiora Chinedu Okafor cogently reminds us:

While effectiveness no longer automatically confers legitimacy, the doctrine is still an important element of international law and practice. The pendulum of international law may yet swing back to the side of the effectiveness principle, especially if the costs of de-legitimising effective but illegal situations become too heavy for the system to bear...the last word has not been said on this subject.264

Elaborating on state continuity theory in the context of the Baltic cases, Mälksoo notes that though law and power politics remain separate phenomena, the outcome in the Baltic cases (i.e., the restoration of independence in Estonia, Latvia, and Lithuania) turned mostly on political axes. Turning specifically to the issue of illegal annexation, Mälksoo notes that state practice provides “quite ambiguous signals about the response of international law to [a] situation in which the illegal annexation has been effectuated and the situation stabilized.”265 “This is a clash between the normativity, unsupported by an adequate system of sanction, and reality.”266 Mälksoo maintains that it is the geopolitical drama that seized the then-bipolar world in that particular historical moment that ultimately emboldened the international community to uphold the fiction that the three Baltic states that emerged in 1990s were identical to the states that existed as independent countries before their occupation by the Soviet Union in 1940.267 In light of the rule that in order for an entity to be considered a state it must possess the criteria set out in the Montevideo Convention, Mälksoo cannot but conclude that the recognition in 1991 of the Baltic republics as their pre-annexed selves was in the end an illustration of the international community’s willingness to uphold a legal fiction for, at least par-
Mälksoo ultimately imparts a haunting question: “How long can international law, and the international community, uphold a legal fiction which is not supported by reality?”

In an attempt to argue away the issue of effectiveness, Dr. Sai, in his dissertation, lifts the following quotation from international law scholar Krystyna Marek’s book, *Identity and Continuity of States in Public International Law*:

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

The above-quoted passage is incomplete. In the next sentence, Marek goes on to say:

The explanation of this unusual fact is to be found in the temporary nature of belligerent occupation. International law could not permanently relinquish the requirement of effectiveness, since this would mean reducing international law and relations to pure fiction. But belligerent occupation is by definition not of a lasting character. Sooner or later it is bound to end, whether in favour of the occupied or the occupying State…It follows that in an obviously temporary situation international law can dispense with the overriding principle of effectiveness and can admit a temporary divorce between effectiveness on the one hand and validity on the other. This disposes of any primitive notion of effectiveness; the latter, instead of determining the law, is determined by it. It would be absurd to claim that even a strong title can dispense with effectiveness altogether.]

Assuming the applicability of the Montevideo Convention to the Hawaiian statehood claim, said claim is considerably weak with respect to the third and fourth criteria, i.e., an effective government with demonstrated capacity to engage in international relations. First, the criterion of government refers to the existence of an effective government, which means that the institutionalized organizational machinery must actually

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268 Id.
269 Id. at 42.
271 Marek, *supra* note 84, at 102.
exercise state authority over the claimed territory and the people residing therein. To be effective, there must be an entity or organ capable of establishing and maintaining a legal order throughout the territory of the prospective state. Marek herself confirms this view when she writes:

As a rule, negotiations can only be conducted with a real and effective government; treaties can only be concluded with such a government which alone can give the guarantee their implementation, and only a real and effective government can successfully be held responsible. In all those real transactions of international law fictitious or merely claimant governments can have no place.

The fourth criterion enshrined in the Montevideo Convention, i.e., the capacity to enter into foreign relations, assumes independence of the entity claiming statehood. Historically, the emphasis has been on the “capacity” of the claiming entity. For its part, the American Law Institute has stated that, “an entity is not a state unless it has competence, within its own constitutional system, to conduct international relations with other states, as well as the political, technical, and financial capabilities to do so.” Essentially, the entity trying to convince the international community that it is a state cannot be under the legal authority of any other state; independence in this scenario entails that the entity must have the legal capacity to act as it wishes, albeit within the limits of international law. The would-be state entity must have both formal and actual independence. For Montevideo purposes, then, the independence of the entity claiming statehood cannot be a fiction in any sense.

Finally, some Hawaiian sovereignty groups—in their varied attempts to cast themselves as the bona fide “sovereign” entity in occupied Hawai‘i—have effectively overlooked an important development in the law of occupation; that is, the law no longer concerns itself with the prerogative of the ousted sovereign, but rather, with the wishes of the local population, in whom sovereignty now rests. Indeed, although certain proponents of state continuity theory have attempted to distance the Hawaiian polity from all notions of “self-determination”—even from the claim of being a “people” (indigenous or otherwise)—such a strategy is, from an international law perspective, unsound.

In the next sections, I address the problematique of “peoples” in international law. In brief, international law has created two different tools for potentially lifting the singular oppressions inflicted in the last

273 Marek, supra note 84, at 59.
274 Raič, supra note 272, at 74.
275 Id. at 73.
276 Id. (citation omitted).
277 Id. at 75.
278 See id. at 75-82.
279 There has also been an attempt by some Hawaiian sovereignty theorists to create an impenetrable conceptual binary between the occupation and colonization paradigms. See, e.g., Sai, The American Occupation, supra note 155, at 180-83. Arguably, no such binary exists. There are numerous examples where the international community has coterminously referred to territories under alien subjugation as being both colonized and occupied. Two such examples are the cases of Western Sahara and East Timor. Although Western Sahara has been formally recognized by the United Nations as a non-self-governing territory, albeit originally as a colony of Spain, the United Nations as well as the International Court of Justice have also recognized it as being currently occupied by Morocco. Similarly, though East Timor remained on the U.N. list of colonies until its independence in 2002, the international community routinely recognized it as being under military occupation by Indonesia.
centuries on colonized as well as indigenous peoples by powerful entities alien to them who remain hell-bent on exploiting their resources for one end or another. These two distinctive paradigms of redress, which coalesced at different historical moments, have generated two different regimes of international legal protection, each with its particular if overlapping sets of norms and processes. I will examine each paradigm in turn, in the process highlighting the two regimes’ approach to the foundational principle and right of self-determination, which underpins their architecture.

B. Colonization/Decolonization

The first part of this section sets out the evolution of self-determination from a principle to a right to an exalted norm of international law. The second part of this section addresses how a number of individuals and groups in Hawai‘i have already referenced the principle as well as the right of self-determination to support their contention that there remains in international law a path to outright independence for Hawai‘i. This part evaluates the legal strength of their contention that the political status plebiscite organized by the United States in Hawai‘i in 1959 was illegitimate under international law. The third part of this section addresses both the advantages and disadvantages of the U.N. decolonization system.

1. Self-Determination

Upon the founding of the United Nations and continuing thereafter, the international community recognized that the plight of colonized peoples must be terminated and their self-determination assured. The U.N. Charter itself, being both a political compact and an organic document, made but cursory references to this norm. Its Article 1 called for the development of “friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples.” Article 55 then states that the United Nations shall promote, among other values, “universal respect for, and observance of, human rights and fundamental freedoms for all.” Article 73, which addresses the rights of peoples in non-self-governing territories who have not yet attained a full measure of self-government, commands states administering them to “recognize the principle that the interests of the inhabitants of these territories are paramount.” These Administering Powers accept as a “sacred trust” the obligation to develop self-government in the territories, taking due account of the political aspirations of the people. Toward this end, subsection (e) of Article 73 commands Administering Powers to submit annual reports to the United Nations on the steps they have taken and the progress they have made to move the territories toward self-government. Note that Article 73 references “self-government” and not “independence.” The ambiguous first term was used originally to avoid the unambiguous second term, which European colonial powers, especially Churchill’s U.K., rejected.

280 U.N. Charter art. 1, para. 2.
281 Id. at art. 55, para. c.
282 Id. at art. 73.
283 Id.
284 Id. at art 73, para. e.
285 Id. at art 73, para. b.
The confirmation and elaboration of these Charter articles has been set out in major declarations adopted since by the General Assembly (GA). While declarations are not per se legally binding,\textsuperscript{287} they do set out and interpret the obligations of U.N. member-states. The 1960 Declaration on the Granting of Independence to Colonial Countries and Peoples, or Resolution 1514, states that “[t]he subjection of peoples to alien subjugation, domination, and exploitation constitutes a denial of fundamental human rights, is contrary to the Charter of the United Nations and is an impediment to the promotion of world peace and co-operation.”\textsuperscript{288} Additionally, both the International Covenant on Civil and Political Rights,\textsuperscript{289} and the International Covenant on Economic, Social and Cultural Rights,\textsuperscript{290} (known collectively as the 1966 Human Rights Covenants) enshrine self-determination as a right. Approved by the U.N. General Assembly in 1966, and legally binding as of 1976, these treaties bind those countries that ratify them. The first article in each covenant, identically worded, indicates the fundamental importance of the right of self-determination in international law and sets out its classic wording: “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.”\textsuperscript{291} Finally, the 1970 Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States, also known as Resolution 2625 (XXV), provides:

> By virtue of the principle of equal rights and self-determination of peoples enshrined in the Charter of the United Nations, all peoples have the right freely to determine, without external interference, their political status and to pursue their economic, social and cultural development, and every State has the duty to respect this right in accordance with the provisions of the Charter.\textsuperscript{292}

Unlike the 1966 Covenants, which bind only those states that ratify them, Resolution 2625 has become a “datum of customary international law” as its drafting and adoption “re-involved all states in the debate over the who, the what, and the how of self-determination generated by Resolutions 1514 and 1541, which also constitute manifestations of customary law.”\textsuperscript{293} The above instruments collectively enshrine the norm of the self-determination of “peoples.” While there is no definition of “peoples” in international law,\textsuperscript{294} for purposes of determining who holds the right of

\textsuperscript{287} Brownlie, supra note 171, at 15.
\textsuperscript{289} International Covenant on Civil and Political Rights art. 1, Mar. 23, 1976, 999 U.N.T.S. 171.
\textsuperscript{291} Id.
\textsuperscript{293} MaiVân C. Lâm, At The Edge Of The State: Indigenous Peoples And Self Determination 124 (2000). The Declaration on Friendly Relations was the product of a conviction that emerged in the 1960s among socialist and developing countries that international law must meet the demands of the new states that had since joined the traditional members of the international community. See Antonio Cassese, International Law 47 (2d ed. 2005). The Declaration is generally understood as having restated the principles “already set forth in the UN Charter,” albeit giving them “greater emphasis or flesh[ing] them out[,]” Id. Also, unlike the Charter, which theoretically applies only to member states, the Declaration “extended their application to all States:” Id.
self-determination in international law, “peoples” have been understood in international law to be groups under alien, colonial, and racist domination and subjugation. Earlier in the U.N., this has largely meant that only those in the classic colonial setting were “peoples” entitled to the right of self-determination and the attendant remedy of decolonization. Since 1960, the U.N. General Assembly has set out the three options by which colonized peoples could effectuate their decolonization: independence; free association with another independent state; or complete integration into another state.\textsuperscript{295} Today, the right to self-determination is generally accepted as a \textit{jus cogens} or peremptory norm from which no deviation is allowed. That is to say the self-determination right is, at least in theory, unbreachable.\textsuperscript{296}

2. Proponents of Decolonization in Hawai‘i

Some members of the Hawaiian activist community have long advocated for the recovery of Hawaiian independence via a legitimate political status plebiscite under the auspices of the U.N. decolonization regime. In 1946, the United Nations, through a General Assembly resolution, placed Hawai‘i on its list of non-self-governing territories eligible under international law for self-government from 1946 to 1960, and thereafter for full independence.\textsuperscript{297} The United States was recognized as Hawai‘i’s Administering Power charged with a responsibility characterized as a “sacred trust.”\textsuperscript{298} The principal argument advanced by proponents of decolonization is that the political status plebiscite conducted by the United States in Hawai‘i in 1959, which ultimately led to its incorporation into the U.S. union, was illegal under international law. The 1959 vote was illegitimate, they argue, on two main grounds: 1) substance, i.e., the choices enumerated on the ballot did not include independence; and 2) suffrage, i.e., the persons who participated in the vote included individuals who were not part of the colonized group and therefore not entitled to participate in the vote. I address these arguments next.

\textbf{a. Analysis of 1959 political status “plebiscite” in Hawai‘i}

Though mandated by the international community to prepare Hawai‘i for self-determination, the United States had another goal for the territory: statehood within the U.S. system.\textsuperscript{299} Importantly, the initial debate in the United States regarding Hawai‘i did not focus on the United States’ “sacred trust” obligation imposed by Chapter XI of the Charter or other U.N. guidelines, but, rather, whether incorporation of Hawai‘i’s “alien” population of Native Hawaiians and Asians into the U.S. union would corrupt America’s “special qualities.”\textsuperscript{300} Rather than fulfilling its international legal mandate to prepare the people of Hawai‘i for an exercise of self-determination, the United States repeatedly attempted to incorporate Hawai‘i into the U.S. union as the 50th state, succeeding in March 1959 with the passage of the Hawai‘i Statehood Bill in the U.S.
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Congress. Thereafter, the United States put the vote for statehood before Hawai‘i’s electorate, which it later called a political status plebiscite in accordance with its obligations under the Charter. The United States’ intention to maintain control over Hawai‘i, however, was evident in its inclusion of only one option on the 1959 ballot: statehood. The ballot’s single operative question was: “Shall Hawaii immediately be admitted into the Union as a State?” It is telling that while the settler and/or immigrant majority voted “yes” for statehood, the only electoral precinct where Native Hawaiians dominated, Niihau, voted against it.

On December 12, 1959, the U.N. General Assembly, based on the United States’ claim that the people of Hawai‘i had properly exercised their right to self-determination in a referendum earlier that year, passed Resolution 1469 (XIV), removing Hawai‘i from its list of non-self-governing territories.

The 1959 plebiscite was not carried out in a manner consistent with international standards for decolonization at the time. Resolution 742 (VIII), passed by the General Assembly in 1953, provides guidelines by which Administering Powers could determine whether their respective non-self-governing territories had attained an adequate measure of self-government. Resolution 742 clearly states that the validity of any form of association between a non-self-governing territory and another country rests on the “freely expressed will of the people at the time of the taking of the decision.” Hawai‘i voters in 1959 were informed neither of Hawai‘i’s status as a non-self-governing territory nor of how the vote would affect such a status. Moreover, Hawai‘i voters were not informed that independence was an option available to them. This is especially significant in light of Resolution 742’s provision that the General Assembly “[c]onsiders that the manner in which [non-self-governing territories] can become fully self-governing is primarily through the attainment of independence.” The United States’ failure to inform the Hawai‘i electorate of the independence option renders the vote illegitimate.

301 The U.N. General Assembly in 1953 passed Resolution 742 (VIII), which provided guidelines by which Administering Powers could determine whether their respective non-self-governing territories had attained a full measure of self-government, declaring that it “[c]onsiders that the manner in which Territories referred to in Chapter XI of the Charter can become fully self-governing is primarily through the attainment of independence.” Factors which should be taken into account in deciding whether a Territory is or is not a Territory whose people have not yet attained a full measure of self-government, G.A. Res. 742 (VIII), U.N. GAOR (Nov. 27, 1953). Arguably, as asserted in the text of this paper, the United States’ failure to include the option of independence in the 1959 plebiscite renders the vote illegitimate.

302 In 1952, the U.S. conducted a similar “plebiscite” for the non-self-governing territory of Puerto Rico, wherein only one substantive option, i.e. commonwealth, was available to voters. After this vote, the United States, as it did in the case of Hawai‘i, reported to the United Nations that the territory of Puerto Rico should be removed from its list of non-self-governing territories. See James L. Dietz, Puerto Rico: Negotiating Development and Change 194 (2003).


304 See generally Lopez-Reyes, supra note 299.


306 See supra note 301.

307 Id. ¶ 5.

308 Interview with Maivân Clech Lâm, Professor of International Law (Ret.), Ralph Bunche Institute for International Studies, The Graduate Center, City University of New York, in Waimanalo, Haw. (Mar. 25, 2011).

309 See Lopez-Reyes, supra note 299, at 1.

310 Factors which should be taken into account in deciding whether a Territory is or is not a Territory whose people have not yet attained a full measure of self-government, G.A. Res. 742 (VIII), U.N. GAOR (Nov. 27, 1953) at ¶ 6 (emphasis added).
or include such an option on the 1959 ballot violates the intent of Resolution 742, and precludes the claim that the "plebiscite" was a legitimate exercise of self-determination. These events would be plainly illegitimate if they happened today. Indeed, one year after the Hawaiian plebiscite—only one year after Hawai'i was taken off the U.N. list of non-self-governing territories—the General Assembly passed Resolution 1541 (XV), explicitly setting out the three types of political status it would, from then on, recognize as legitimate measures of self-government for non-self-governing territories: independence; free association with an independent state; or integration with an independent state.

Moreover, because the most common mode of self-determination during the decolonization era was complete independence involving the transfer of all powers to the people of the territories without any conditions or reservations, the United Nations exercises a higher level of scrutiny in the case of integration to ensure that the people of the territory act "with full knowledge of the change in their status, their wishes having been expressed through informed and democratic processes." In other words, a process of decolonization pursuant to international legal standards never occurred in Hawai'i. Therefore, decolonization advocates argue, Hawai'i remains a non-self-governing territory under U.S. colonization. Moreover, they say, the United States conceded the illegitimacy of the 1959 vote when it stated in its 1993 Apology Resolution that "the indigenous Hawaiian people never directly relinquished their claims to their inherent sovereignty as a people...either through their monarchy or through a plebiscite or referendum." Arguably, as a material admission against interest, this congressional resolution would be accorded a good deal of weight were the international community to pass on the legality of the plebiscite. The full legal import of this admission, however, remains to be seen.

A principled interpretation of the international law governing the decolonization of non-self-governing territories indicates that the participation of the American settler population in the 1959 plebiscite was illegal inasmuch as decolonization is a remedy available only to the colonized. In the 1970 Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States, or Resolution 2625 (XXV), the General Assembly clearly instructs:

311 See Lopez-Reyes, supra note 299, at 1.
313 Id. at Principle VI.
314 Cassese, supra note 286, at 74-75. Drawing his conclusions primarily from a report prepared for the United Nations by then Special Rapporteur of the Sub-Commission on the Prevention of Discrimination and Protection of Minorities of the Commission of Human Rights Hector Gros Espiell, Cassese maintains that "in only a limited number of cases was the right of self-determination exercised and independence not achieved." Id. at 75. These anomalies include: West Irian, which became part of Indonesia; Ifni, which incorporated into Morocco; the Northern Mariana Islands, which became a commonwealth in association with the United States; and Niue, which entered into free association with New Zealand. Id. For further reading on this subject, see generally H. Gros Espiell, Implementation of United Nations Resolutions Relating to the Right of Peoples under Colonial and Alien Domination to Self-Determination, Study for the Sub-Commission on Prevention of Discrimination and Protection of Minorities of the Commission on Human Rights, UN Doc E/CN.4/Sub.2/405/Rev. 1 (1980).
317 Id.
318 Brownlie, supra note 171, at 126.
The territory of a colony or other Non-Self-Governing Territory has, under the Charter, a status separate and distinct from the territory of the State administering it; and such separate and distinct status under the Charter shall exist until the people of the colony or Non-Self-Governing Territory have exercised their right to self-determination in accordance with the Charter, and particularly its purposes and principles.\textsuperscript{320}

This language suggests that the United States, as Hawai'i's Administering Power, should not have treated Hawai'i as its domestic soil nor exploited its control over immigration into Hawai'i to flood the Hawaiian Islands with its own non-Hawaiian expatriates. By the time of the 1959 statehood vote, American settlers substantially outnumbered Native Hawaiians in the Hawaiian Islands. This fact renders their participation in the 1959 vote especially problematic. In stark contrast, whereas the Native Hawaiian population constituted 45\% of the Hawaiian national population in 1890,\textsuperscript{321} by 1950 it had dwindled to less than 20%.\textsuperscript{322} This, coupled with the fact that the only electoral precinct that did not vote for statehood was the all-Hawaiian precinct of Ni'ihau, makes the 1959 plebiscite dramatically suspect.\textsuperscript{323}

Moreover, the Declaration on the Granting of Independence to Colonial Countries and Peoples instructs that the right to self-determination belongs to peoples who are subjected to “alien subjugation.”\textsuperscript{324} The Principles Which Should Guide Members in Determining Whether or not an Obligation Exists to Transmit the Information Called for under Article 73e of the Charter further instructs that the right to self-determination in the decolonization context is a right available to the people of those territories “geographically separate” and “distinct ethnically and/or culturally from the country administering it.”\textsuperscript{325} In short, to allow the American settler population in Hawai'i to vote alongside the colonized population on a key question of self-determination dilutes ad absurdum the latter’s right to a decolonization remedy guaranteed by international law. Further, the Apology Resolution’s language that “the indigenous Hawaiian people never directly relinquished their claims to their inherent sovereignty as a people…through a plebiscite or referendum”\textsuperscript{326} registers that the United States recognizes that decolonization is a remedy belonging only to the colonized. Again, a strong argument remains that the right to self-determination, in the context of the decolonization of the Territory of Hawai'i, was not to be accorded to American settlers living in Hawai'i, but rather, only to those subjected to “alien subjugation, domination, and exploitation[,]” i.e., Native Hawaiians and other descendents of the citizens of the Hawaiian Kingdom.\textsuperscript{327} Perhaps the strongest argument against the participation of U.S. expatriates in the 1959 plebiscite is the most obvious one. A settled principle in both international and domestic law is that legal principles ought not be construed to lead to an absurd result. Here, because decolonization is about curing a wrong (colonization), construing the right to self-determination in the decolonization context as belonging to those who were not wronged, indeed those who can be characterized as the beneficiaries of the wrong done, is

\begin{thebibliography}{9}
\bibitem{320} Id.
\bibitem{321} See Comparative Table of Nationality, \textit{supra} note 55.
\bibitem{322} Id.
\bibitem{323} See Lopez-Reyes, \textit{supra} note 299, at 2.
\end{thebibliography}
an absurd result. To approve any conclusion to the contrary would be tantamount to a re-imposition of colonization by legal means.

Slightly more contentious is whether those persons who participated in the 1959 plebiscite who were neither American settlers nor Native Hawaiians were entitled to the remedy of decolonization. At the time of the plebiscite, apart from approximately 102,403 Hawaiians, and 202,230 Caucasians, there were approximately 38,197 Chinese, 69,070 Filipino, 203,455 Japanese, and others who had come to call Hawai‘i home.328 These demographics reflect, among other things, U.S.-controlled immigration into the Hawaiian Islands.

Although this issue is not decisively settled as a matter of general international law, neither is international law silent on the matter. For instance, in 1980, the U.N. General Assembly adopted a resolution instructing member states to prevent migration to colonial territories because of the distorting impact such influx might have on the exercise of the right to self-determination:

Member states shall adopt the necessary measures to discourage or prevent the systematic influx of outside immigrants and settlers into territories under colonial domination, which disrupts the demographic compositions of those territories and may constitute a major obstacle to the genuine exercise of the right to self-determination and independence by the people of those territories.329

By the time of the 1959 vote, the demographic composition of the Hawaiian Islands was disturbingly disparate with that of 1893, when the harm of colonialism may be reasonably said to have first occurred. The post-kingdom population that then began to settle in the islands was thus, it must be emphasized, both “let in” by way of U.S. control of immigration into the islands and a group apart from the kingdom heirs who alone suffered the harm of colonization the remedy for which is here at issue. It should be noted here that, under international law, both occupier and, later, colonizer states are forbidden to flood territories under their control with their own (or any other) settlers. In any event, these later settlers in Hawai‘i and their descendants are simply not part of the colonized polity and, manifestly, cannot be entitled to vote on a cure for the harm that that polity suffered. This principle stands in the case of both past and future political status plebiscites in Hawai‘i.

In 1893, the population of the islands was approximately as follows: 40,622 Native Hawaiians (the largest ethnic group); 37,878 Caucasians; 16,752 Chinese; and 12,610 Japanese. To the extent that the Chinese and Japanese populations then residing in the islands were considered alien under the domestic legal system of the Hawaiian Kingdom (their physical presence in the islands originated with finite contractual relationships they or their predecessors had entered into as foreign workers on, by and large, Hawai‘i’s plantations), these groups and their descendants can also not be considered part of the colonized polity because the 1893 overthrow did not bring down their government nor capture their state. However, to the extent that this plantation worker population was then enfranchised either by naturalization or citizenship into the Hawaiian Kingdom, it too partakes of the right of the kingdom heirs to vote for a legitimate remedy still due to them as a collectivity.

Again, while the issue of the lawful disposition of the matter of the rightful electorate will vary from
case to case, a principled approach necessarily involves revisiting the very purpose of decolonization, i.e., it
is a remedy for the wrong of colonization. The operative question then becomes: Who was harmed by the
colonization of Hawai‘i? Here, manifestly, the group most clearly harmed was the entire citizenry—Kānaka
Maoli and non-Kānaka Maoli—of the Hawaiian state as constituted in 1893/1898, when the harm occurred,
and their descendants, the collective kingdom heirs. It stands to reason then that it is this group and this
group alone that is owed a remedy and, with it, the right to register votes in a future political status plebiscite
for Hawai‘i.

The logic set out above rests on solid international law principles and practice. In addition to the
above-quoted Resolution 35/118—wherein the General Assembly expressly instructed colonial powers
to prevent migration to territories under their control because of the distorting impact such influx might
have on the exercise of the right to self-determination—this issue has already concretely arisen in the
context of the independence movement in Kanaky/New Caledonia. There, France had argued for years
previous to the 1998 Nouméa Accord that all French citizens who had moved from France to Kanaky/
New Caledonia had the right to vote in any self-determination referendum in the colony.330 Denying them
the vote, France said, would be tantamount to discrimination forbidden, it continued, by France's Con-
stitution, laws and, it claimed, the International Covenant on Civil and Political Rights ("ICCPR"), which
bars racial discrimination.331

In 2002, in the case of Gillot et al. v. France,332 the Human Rights Committee, which is the treaty body
created by the ICCPR to monitor its implementation, addressed the issue of voting restrictions placed on a
class of residents of Kanaky/New Caledonia. The case involved French citizens who failed to meet qualifica-
tions for voting in future referenda as set out in the 1998 Nouméa Accord executed between representatives
of France and the Kanaky independence movement, both of whom, in the process of negotiating the Ac-
cord, made several political concessions to the other on the matter of the composition of the electorate.333
Said French citizens brought the case to the Committee under the Optional Protocol attached to the IC-
CPR.334 The Committee—in explaining that a referendum to effectuate a colonized people's right of self-
determination is not to be likened to ordinary elections—adopted the reasoning that it is in the very nature
of a self-determination referendum that it should be “limited to eliciting the opinion of, not the whole of the
national population, but the persons concerned with the future of a limited territory who prove that they
possess certain specific characteristics.”335 Such a “restricted electorate,” it ruled, did not violate the treaty's
anti-discrimination provisions because these must be read in the first place to harmonize with the ICCPR's
own Article 1 highlighting the right of self-determination.336

330 This non-controversial proposition has been articulated by numerous commentators. See, e.g., Alan Berman, Fu-
Berman, Future Kanak Independence].
331 Berman, supra note 330, at 315.
(July 26, 2002).
333 See generally id.
334 Id. at ¶ 10.7.
335 Id. at ¶ 8.3.
336 Id. at ¶ 13.16.
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The Committee noted that such voting restrictions work to “ensure that the referendums reflect the will of the population ‘concerned’ and that their results cannot be undermined by a massive vote by people who have recently arrived in the territory and have no proven, strong ties to it.”337 The French claimants were challenging, among other referenda provisions, a 20-year residency requirement for voting.338 The Committee found that the cut-off points set for the referendum of 1998, and for referenda from 2014 on, were neither discriminatory nor excessive inasmuch as they were in keeping with the nature and purpose of these ballots, namely a self-determination process involving the participation of persons able to prove sufficiently strong ties to the territory whose future is being decided.339 The Committee summed up its view as follows: restrictions on the electorate in the 1998 Nouméa Accords are not discriminatory but instead based on “objective grounds for differentiation that are reasonable and compatible with the provisions of the Covenant.”340

3. Advantages and Disadvantages

a. Well Developed Practice and Redress Mechanisms

Antonio Cassese, in his masterful treatise on self-determination, *Self-Determination of Peoples: A Legal Reappraisal*,341 submits that the United Nations’ “record in the field of decolonization is impressive.”342 Indeed, more than eighty once-colonized territories have gained independence since 1945.343 In fact, only sixteen colonies remain on the decolonization list.344 These sixteen colonies, most of which are small islands in the Atlantic/Caribbean and the Pacific, are administered by one of four powers: the United States, the United Kingdom, France, and New Zealand.345 Between them, the United States and the United Kingdom administer thirteen of the sixteen.346 Re-inscription onto the U.N. list of non-self-governing territories may thus be an attractive option to the injured Hawaiian polity because U.N. practice, since 1959, has evolved fairly satisfactorily to assure the legitimacy of the decolonization process for non-self-governing territories. Since the time of the plebiscite in Hawai’i, “the United Nations has organized, and often supervised, self-determination plebiscites in non-self-governing territories, before their accession to independence or their association or integration with other countries.”347 Indeed, after the passage of General Assembly Resolutions 1514 and 1541 in 1960, the U.N. became a fairly regular guarantor of the decolonization process. For example, it refused in cases involving Puerto Rico and New Caledonia to recognize that self-determination

337 Id. at ¶ 14.3.
338 Id. at ¶ 3.10.
339 Id. at ¶ 14.7.
340 Id. at ¶ 13.18.
342 Id. at 74.
344 Id.
346 See id.
347 Cassese, *supra* note 286, at 76. For a non-exhaustive list of U.N.-supervised self-determination plebiscites in non-self-governing territories, see id. at 76-78.
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has been exercised simply because Administering Powers have so reported.\textsuperscript{348} Moreover, the 1970 Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States instructs all states to work to ensure a legitimate exercise of self-determination by those who have been denied the all-important right.\textsuperscript{349} Hence, international law should sanction rather than bar the re-examination of the validity of the 1959 removal of Hawai‘i from the list of non-self-governing territories.

Arguably, once it is shown that the colonized group—again, Kānaka Maoli and non-Kānaka Maoli citizens and heirs of the Hawaiian state as constituted in 1893/1898—has not yet exercised its right to self-determination in a legitimate self-determination plebiscite, the General Assembly should by right be obliged to act, as it did in the case of Kanaky/New Caledonia, to re-inscribe Hawai‘i on the list of non-self-governing territories.\textsuperscript{350} In the case of New Caledonia, various member states of the South Pacific Forum,\textsuperscript{351} as well as member states of the Non-Aligned Movement,\textsuperscript{352} called upon the United Nations to re-inscribe New Caledonia onto its list of non-self-governing territories. In response to these calls and mounting political pressure from those sympathetic to the indigenous Kanak\textsuperscript{353} liberation movement, the General Assembly

\textsuperscript{348} Two relevant examples of this phenomenon include the United Nations' handling of the Questions of New Caledonia and Puerto Rico, discussed more fully below.

\textsuperscript{349} See G.A. Res. 2625, 25 U.N. GAOR Supp. (No. 28) at 123-24, U.N. Doc. A/8082 (1970) ("Every state has the duty to promote, through joint and separate action, realization of the principle of equal rights and self-determination of peoples, in accordance with the provisions of the Charter, and to render assistance to the United Nations in carrying out the responsibilities entrusted to it by the Charter regarding the implementation the principle.").

\textsuperscript{350} Lopez-Reyes, supra note 299, at Appendix H, pg. 87. New Caledonia was placed on the U.N. list of non-self-governing territories in 1946, and was removed only one year later, when France unilaterally declared New Caledonia a French overseas territory and refused to submit information to the U.N. Secretary-General concerning the economic, social, and educational conditions in the territory, as required under Article 73(e) of the U.N. Charter. For an insightful account of the rocky terrain of self-determination in Kanaky/New Caledonia, see generally Berman, Future Kanak Independence, supra note 330.

\textsuperscript{351} The South Pacific Forum, or the Pacific Islands Forum since 2000, was founded in 1971 and today comprises of sixteen Pacific states including: Australia, New Zealand, Cook Islands, Fiji, Nauru, New Zealand, Tonga, Western Samoa (Samoa), Federated States of Micronesia, Kiribati, Niue, the Marshall Islands, Palau, Papua New Guinea, Solomon Islands, Tuvalu and Vanuatu. See Pacific Islands Forum Secretariat website, available at http://www.forumsec.org.fj/pages.cfm/about-us/. New Caledonia and French Polynesia, previously Forum Observers, were granted Associate Membership in 2006. Id. The Forum is the region's premier political and economic policy organization whose leaders meet annually to develop collective responses to regional issues. Id. Its administrative arm is the Pacific Islands Forum Secretariat, based in Suva, Fiji. Id.

\textsuperscript{352} The Non-Aligned Movement (NAM) is an international organization of states considering themselves not formally aligned with or against any major power bloc. See generally Non-Aligned Movement website, available at http://www.nam.gov.za/ [hereinafter NAM website]. Born in 1955 by African and Asian states, meeting in Indonesia, to address the perceived need to resist the pressures of the major powers, today, the NAM consists of more than 100 countries, representing nearly two-thirds of the U.N. members. Id. Guided by principles of multilateralism, mutual non-aggression, and equality between large and small nations, the NAM aspires to strengthen the rule of international law, and further purpose of the U.N. Charter. See generally Gobierno Bolivariano de Venezuela, General Notes of the Non-Aligned Movement (NAM), available at http://www.cominacvenezuela2008.org.ve/doc/notasgeneralesdelmnoaleng20080618-1259.pdf. The NAM does not have a constitution or a permanent secretariat, and its highest decision-making body is the Conference of Heads of States or Government, which usually meets once every three years. See generally NAM website.

\textsuperscript{353} Kanak refers to the indigenous people who settled in what is now known as New Caledonia roughly 3,000 to 4,000 years ago. See Michael Ntumy, New Caledonia, in SOUTH PACIFIC ISLANDS LEGAL SYSTEMS 595 (Michael Ntumy ed., 1993).
re-inscribed New Caledonia on said list in 1986.\textsuperscript{354} It now remains for principled and/or sympathetic states to do the same for Hawai‘i.

\textit{b. The United Nations General Assembly: A Friendlier Forum}

Although advocates of Hawaiian independence should by no means consider that the U.N. General Assembly (GA) is an unproblematic forum in which to advocate for a valid plebiscite, they do need to know that it is a far more egalitarian and therefore promising forum for them than the U.N. Security Council. In voting on important global issues, every member state in the GA has the same single unweighted vote as every other member state. At least in theory, the GA is the pre-eminent international forum where the lambs can lay down with the lions. Moreover, the GA itself is made up of scores of countries that owe their very existence to the decolonization movement in the first place, the ethos of which they should not lightly nor decently turn aside.

\textit{c. “Colonial Accommodation” at the United Nations}

Any agenda brought to the General Assembly must of course heed realpolitik considerations. Thus, it must be noted that the current U.N. decolonization regime, under the auspices of the Special Committee on Decolonization, or Committee of 24, is marked by certain deficiencies.\textsuperscript{355} According to Dr. Carlyle Corbin, whose work with the U.N. decolonization system spans three decades, the United Nations today (as opposed to shortly after World War II when decolonization was at the top of organization’s list of priorities) appears to be suffering from “decolonization fatigue.”\textsuperscript{356}

Last year, 2010, marked the formal conclusion of not one but two U.N.-designated international decades for the eradication of colonialism.\textsuperscript{357} In 1990, the General Assembly proclaimed 1990 to 2000 as the International Decade for the Eradication of Colonialism.\textsuperscript{358} Toward this end, the GA adopted a detailed Plan of Action to expedite the unqualified end of all forms of colonialism.\textsuperscript{359} In 2001, citing a wholesale lack of progress during the first decade, the GA proclaimed a second decade to effect the same goal.\textsuperscript{360} The second decade has come and gone with only Timor-Leste, or East Timor, managing to attain independence from Indonesia.


\textsuperscript{356} Interview with Carlyle G. Corbin, Minister Emeritus for External Affairs, Advisor on Global Governance, St. Croix, Virgin Islands, in New York, New York. (Apr. 24, 2008).


\textsuperscript{360} See generally Corbin, \textit{Mid-Term Assessment}, supra note 355.
in 2002. Indeed, “the situation is so outrageous” that commentators have decried the current policy of the decolonization committee as one of “colonial accommodation.”

That said, a Third International Decade for the Eradication of Colonialism was just announced in January 2011, which may prove more productive given the present shifting of power relations in the world, notably the accelerating decline of the United States, the ascendancy of Brazil and other Latin American countries, and popular uprisings in the Middle East, to name but a few.

C. Indigenization/Indigenous Rights

This section turns now to the self-determination right for indigenous peoples as indigenous peoples. The first part of this section sets out the status of indigenous peoples under international law in light of the 2007 U.N. Declaration on the Rights of Indigenous Peoples. It explains the Declaration’s legal status in the universe of international law as well as its complicated extension of the self-determination right to indigenous peoples. This section also posits that though the scope of the self-determination right is ambiguous, Native Hawaiians should, in their advocacy, assert that that ambiguity must be interpreted in favor of the indigenous beneficiary, understanding, in the process, the key differences between the decolonization and the indigeneity paths concurrently of relevance to them, as shall be explained later. Suffice it to note here that the blatant disparity between the Apology Resolution tendered by the U.S. to Native Hawaiians in 1993, which acknowledged the injury the U.S. wrought on the Kingdom of Hawai‘i, with the contemporaneous if ever born again Akaka Bill, which offered the remedy for that injury not to the injured party—the collective kingdom heirs—as would therefore be logically and legally required, but, in a non sequitur move, to the wrong party: i.e., a subset of the kingdom’s heirs whom the U.S. chooses to call Native Hawaiians. The second part of this section describes emerging state practice with respect to the Declaration to the extent it is decipherable given that the normative practice of indigeneity is still gestational.

362 Trask Address, supra note 361.
364 This non-controversial proposition is the subject of much popular and academic writing and needs no elaboration here. See, e.g., Alfred W. McCoy, The Decline and Fall of the American Empire: Four Scenarios for the End of the American Century by 2025 in HUFFINGTON POST (Dec. 6, 2010), available at http://www.huffingtonpost.com/alfred-w-mccoy/the-decline-and-fall-of-t_1_b_792570.html.
1. Who are indigenous peoples?
The most widely invoked description\(^{367}\) of “indigenous peoples” in international fora is that provided in 1986 by U.N. Special Rapporteur Jose Martinez Cobo, who conducted the first comprehensive U.N. study on the situation of indigenous peoples globally. Cobo asserted:

Indigenous communities, peoples and nations are those which, having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of the societies now prevailing in those territories or parts of them. They form at present non-dominant sectors of society and are determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal systems.\(^{368}\)

This still uncodified definition of indigenous peoples is in accordance with what some consider part of the core of indigenous-state relations: unresolved historic injustice.\(^{369}\) Citing and discussing the noted Mexican anthropologist Rodolfo Stavenhagen, Professor Lâm shows that “it is a type of unjust social relationship, and not some abstraction, that creates the ‘indigenousness’ that many now seek to protect via an international regime.”\(^{370}\) Thus, while tensions may accompany attempts to precisely define indigenous peoples under international law, it is “generally agreed”\(^{371}\) that indigenous peoples share plights “not of their own making but follow from the actions that others took, and continue to take, in the earlier colonial and now global phases of the industrial capitalist economy.”\(^{372}\) U.N. Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous Peoples, James Anaya, likewise asserts that indigenous peoples are identified, and identify ourselves, “by reference to identities that predate historical encroachments by other groups and the ensuing histories that have wrought, and continue to bring, oppression against their cultural survival and self-determination as distinct peoples.”\(^{373}\)

While a definition of indigenous peoples predicated on subjugation may trigger discomfort (both of degree and of kind), the ineluctable fact remains that the forces of empire, conquest, and modern state-formation set in motion in the sixteenth century onward caused the “harm” to those groups once variably referred to as indigenous, native, or aboriginal—for which the contemporary international indigenous rights regime is a proffered cure. Leaving aside the issue of subjugation, indigenous peoples may also be understood as culturally distinctive communities whose ancestral roots are embedded in the lands in which they live (or wish to live) and who possess a “continuity of existence and identity that links them to the communities,

\(^{367}\) Any definition of indigenous peoples purporting to encompass the more than 370 million indigenous peoples worldwide is, more accurately, a description. See LÂM, supra note 293, at 7 (“U.N. fora and agencies now addressing indigenous matters thus proceed on a basis of descriptions, rather than formal ones.”).


\(^{369}\) See LÂM, supra note 293, at 2-4.

\(^{370}\) Id. at 3.

\(^{371}\) Id. at 13.

\(^{372}\) Id.

\(^{373}\) S. JAMES ANAYA, INDIGENOUS PEOPLES IN INTERNATIONAL LAW 5 (2004).
tribes, or nations of their ancestral past.”

Thus, indigeneity encompasses much more than notions of subjugation but also includes notions of deep-rooted intergenerational connections to place, land, ocean, etc. In this light, part of the thrust of indigeneity is about territoriality even in the absence of formal statehood and is poised to re-connect myriad obliterated collectivities. Many feel it is this more forward-looking aspect of indigeneity that adds normative richness to international law in general. Moreover, setting aside all notions of subjugation, injustice, even morality, some indigenous peoples consider the reservations that have attended the attempt to reach consensus on a “definition” of indigenous peoples as more or less missing the point. To many indigenous peoples, the matter of our continued existence as self-determining distinctive groups is a non-negotiable requirement of nature itself; that is, despite whatever structures a European imagination conjures up to define and deal with indigenous peoples, nature, and humanity as a part thereof, requires bio- and ethno-diversity respectively. In this light, it becomes clear that the matter of maintaining diversity of peoples and cultures is no deeper than understanding the time-tested truth that monoculture is death.

2. 2007 U.N. Declaration on the Rights of Indigenous Peoples
On September 13, 2007, in the General Assembly, 144 countries adopted the Declaration on the Rights of Indigenous Peoples, an international human rights instrument that for the first time in history formally and unequivocally recognized the world’s indigenous peoples as “peoples” under international law, with the same human rights and freedoms as other “peoples.” Historically and strictly speaking, international law had not explicitly recognized indigenous peoples as holders of the self-determination right; instead, they had been seen, if at all, as minority “populations” within their respective enclosing states. The Declaration was the fruit of more than twenty years of negotiations between indigenous representatives, nation-states, and independent experts in Geneva and, briefly, New York. It embodies both new and older norms relevant to indigenous-state relations.

The Declaration’s preamble places its lineage in the comprehensive body of human rights norms that protect and promote human dignity, diversity, non-discrimination, equality, self-determination, environmental integrity, and non-militarization. The Declaration makes explicit the application to indigenous persons of all human rights and fundamental freedoms previously enshrined in individual human rights law. Most importantly, it makes explicit the applicability of the right of self-determination to indigenous peoples, which is not an individual human right, but rather a collective political right. The Declaration

374 Id. at 3.
375 For a path-breaking academic critique of European worldview and cultural orientation, see generally Marimba Ani, Yurugu: An Afrikan-Centered Critique of European Cultural Thought and Behavior (1994).
377 For an insightful discussion of whether indigenous peoples constituted “peoples” for purposes of international law, see Iorns, supra note 294, at 287-93.
378 Id. at 252.
379 See generally Declaration on the Rights of Indigenous Peoples, supra note 3, pmbl.
380 Id. art. 1.
381 For an insightful discussion on how special emphasis was placed on the collective nature of indigenous rights throughout years of advocacy in international fora, see Robert A. Williams, Jr., Encounters on the Frontiers of
protects indigenous peoples against ethnocide, genocide, forcible relocation, and assimilation.\(^3\)\(^8\)\(^2\) It assures their right to practice and transmit their culture, which is a concept conceived broadly and progressively.\(^3\)\(^8\) It safeguards their access to non-discriminatory employment as well as to education and to media that honor their culture and language.\(^3\)\(^8\) It establishes their right to participate fully in decision-making processes that affect them,\(^3\)\(^8\) It to determine their own development,\(^3\)\(^8\) to be secure in the enjoyment of their own means of subsistence,\(^3\)\(^8\) and to access institutions of the state.\(^3\)\(^8\) It recognizes their comprehensive control over their traditional lands, territories, and resources,\(^3\)\(^9\) including, most importantly, the right that states obtain their free, prior and informed consent prior to undertaking any project affecting these rights.\(^3\)\(^9\)\(^0\) It also recognizes their entitlement to the recognition and enforcement of treaties they have concluded with states,\(^3\)\(^9\)\(^1\) and to have access to just and fair procedures, including at the international level, for the resolution of conflicts with states.\(^3\)\(^9\)\(^2\) The Declaration further requires nation-states to give its provisions full effect and the U.N. system to follow up on its efficacy.\(^3\)\(^9\)\(^3\) Finally, the rights contained within the Declaration constitute the "minimum standards for the survival, dignity and well-being of the indigenous peoples of the world."\(^3\)\(^9\)\(^5\)

As regards the all-important self-determination right, the 2007 Declaration somewhat muddied its scope. The analysis is as follows. The Declaration’s third article specifically recognizes, using the classic textual formulation of the right enshrined in the 1966 Human Rights Covenants, that indigenous peoples hold the right.\(^3\)\(^9\)\(^6\) However, in its fourth article, the Declaration states that, “[i]ndigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs.”\(^3\)\(^9\)\(^7\) Article 4 is troubling for two reasons. First, opportunistic states may attempt to argue that its placement immediately after the article extending the right to self-determination to indigenous peoples has the effect of qualifying or limiting the right to self-determination, as opposed to being merely illustrative of the right. These states will point out that in the earlier 2004 draft version of the Declaration, Article 4 was placed far lower in the text, in Article 31. Its subsequent placement as the fourth article, they will argue, reveals the final drafters’ intent in the General Assembly, as opposed to the Human Rights Council, to so qualify Article 3. Second, although the earlier draft linked self-determination to autonomy, it

\[^{382}\] Declaration on the Rights of Indigenous Peoples, supra note 3, arts. 7-8.

\[^{383}\] Id. arts. 11-13.

\[^{384}\] Id. arts. 14-17.

\[^{385}\] Id. arts. 18-19.

\[^{386}\] Id. arts. 23, 32.

\[^{387}\] Id. art. 20.

\[^{388}\] Id. arts. 24, 39, 40.

\[^{389}\] Id. art. 26.

\[^{390}\] Id. art. 32.

\[^{391}\] Id. art. 37.

\[^{392}\] Id. art. 40.

\[^{393}\] Id. art. 38.

\[^{394}\] Id. art. 42.

\[^{395}\] Id. art. 43.

\[^{396}\] Id. art. 3.

\[^{397}\] Id. art. 4.
The Commerce of Recognition (Buy One Ethos, Get One Free)

did not equate the first with the second. Former Article 31 stated, "Indigenous peoples, as a specific form of exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs….")\(^{398}\) Again, Article 4 now states, "Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs….\(^{399}\)

The question of whether the self-determination right in the 2007 Declaration includes an option for independence is partly beguiled by Article 41, which somewhat clumsily and problematically reproduces only in part the clause on territorial integrity contained in the Declaration on Friendly Relations:

Nothing in this Declaration may be interpreted as implying for any State, people, group or person any right to engage in any activity or to perform any act contrary to the Charter of the United Nations or construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States.\(^{400}\)

The 2007 Declaration has thus re-animated the longstanding debate in international law between secession on the one hand, and territorial integrity on the other. Longstanding but now erstwhile opponents of the Declaration, namely the United States and other western Anglophonic states, repeatedly pronounced in Geneva during the drafting years that the instrument must not accord to indigenous peoples a right of secession.\(^{401}\) Further, these countries argued, the Declaration’s extension of the self-determination right to indigenous peoples in its third article illegally threatens states’ territorial integrity.\(^{402}\) According to Professor Lām—who served for years as the international law advisor to the American Indian Law Alliance ("AILA"), an entity that was involved in the Declaration’s genesis since its inception—these arguments are not only self-serving but also “misleading” mischaracterizations of international law.\(^{403}\) In sum, Lām asserts, “international law has nothing whatsoever to say about secession, for or against.”\(^{404}\) "However," Lām continues, “international law does say that ‘peoples,’ which it does not define, may exercise their right of self-determination to claim independence, an action that certainly entails separation from an existing state.”\(^{405}\) Therefore, Lām concludes, “a people’s separation from an existing state, whether or not called ‘secession’…is not as such forbidden in international law.”\(^{406}\)

According to Lām, any attempt to privilege territorial integrity over self-determination is “jurisprudentially faulty.”\(^{407}\) First and most importantly, as stated above, the right of self-determination is generally considered a *jus cogens* or peremptory norm from which no derogation is permitted. Hence self-determination

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399 Declaration on the Rights of Indigenous Peoples, supra note 3, art. 4 (emphasis added).
400 Id. art. 41.
402 Id.
403 Id.
404 Id.
405 Id.
406 Id.
407 Id. at 143.
occupies an exalted status under international law and is, at least in theory, unbreachable. In contrast, territorial integrity, “while fundamental as a principle that shields states from other states,” does not enjoy the same status.408 Second, Lâm argues, while it is true that international law protects the territorial integrity of states, this protection is of the inter-state kind, meaning that international law protects against threats to the territorial integrity of states made by other states. The logical correlative is that the principle of territorial integrity does not bar a state’s own constituents from challenging its borders.409 Finally, it should be remembered that the Declaration is a document signed by states alone and as such indigenous peoples cannot be said to be bound thereby, especially because they are its intended beneficiaries and because the Declaration itself provides, in Article 43, that the rights recognized therein constitute only the “minimum standards” for their survival.410 As a norm-creating instrument, any early construction placed upon the Declaration ought err on the side of enlarging, not limiting, the scope of the rights it sets out.

The 2007 Declaration, as is typical with all human rights declarations adopted by the General Assembly, is a normative instrument that exhorts states to behave in accordance with the principles it sets out. Because of the Declaration’s normative, as opposed to strictly legal, nature, indigenous peoples continue to enjoy a measure of latitude and indeed creativity regarding their reading and application of its provisions.411 For example, AILA, which has closely followed and contributed to the genesis of the Declaration at the United Nations, unhesitatingly endorses most of the document’s provisions but simultaneously lodges serious reservations regarding other key provisions that were formulated or modified in the eleventh hour in New York by states acting in the absence of the broad-based indigenous input and assent that had marked the prior twenty years of the Declaration’s inception in Geneva.412

According to Professor Lâm, AILA’s proposal that indigenous peoples selectively advance provisions of the Declaration is justified on at least three grounds. First, indigenous peoples are only morally bound by what some 500 of them who assiduously attended the Geneva sessions over two decades agreed to with state negotiators there.413 States later made significant changes in New York with the participation of, at best, only 5% of this contingent, who were allowed to be consultants but not negotiators.414 Second, the worldwide indigenous peoples’ enthusiasm for the Geneva version contrasted starkly with their muted acceptance of the New York instrument, a disparity that must be honored.415 Finally, inasmuch as the 2007

408 Id.
409 Id. at 142.
410 Declaration on the Rights of Indigenous Peoples, supra note 3, art. 43.
411 See generally American Indian Law Alliance, Paper on The General Assembly Adoption of the Declaration of the Rights of Indigenous Peoples (Oct. 17, 2007) (unpublished manuscript, on file with author). Many legal scholars schooled in critical race theory have, in the domestic law context, compelling made the case for the rejection of narrow legal formalism and the alternate embrace of more imaginative political lawyering in complex cases involving the rights and interests of indigenous and/or other subjugated groups such as Kānaka Maoli and Puerto Ricans. See, e.g., D. Kapua’ala Sproat, Wai through Kānāwai: Water for Hawai‘i’s Streams and Justice for Hawaiian Communities, 95 MARQ. L. REV. 127 (2011); Susan K. Serrano, Collective Memory and the Persistence of Injustice: From Hawai‘i’s Plantations to Congress—Puerto Ricans’ Claims to Membership in the Polity, 20 S. CAL. REV. L. & SOC. JUST. 353 (2011).
412 See id. at 5.
414 Id.
415 Id.
version muddied the self-determination right, indigenous activists must be careful not to establish a record of acquiescence to the muddied waters. At the same time, Lâm urges indigenous communities around the world to follow the example set by several such communities in Latin America who are creatively invoking the Declaration’s many positive provisions in multiple settings to advance their rights.416

3. Is the 2007 Declaration binding?

Although the general rule is that declarations and resolutions of the U.N. General Assembly are not in themselves binding,417 to the extent that they illuminate and record the position of the international community on any given subject, they may be, and are frequently invoked as, evidence of the practice of states, which is a source of customary international law.418 According to international law scholar Ian Brownlie, where General Assembly resolutions concern general norms of international law, their acceptance by a majority vote both “constitutes evidence of the opinions of governments” on any given subject and provides a “basis for the progressive development of the law and the speedy consolidation of customary rules.”419 The International Court of Justice (ICJ) in its 1975 advisory opinion in the Western Sahara case,420 adopted this perspective when it “relied heavily on General Assembly resolutions to establish basic legal principles concerning the right of peoples to self-determination.”421 Moreover, the General Assembly itself has recommended that the ICJ heed its declarations and resolutions as instruments in which “the development of international law may be reflected.”422 International law scholar Mark Janis asserts that “the soundest way to account for the legal effect [of General Assembly declarations and resolutions] is to note that [they] are particularly useful evidence of the simultaneous attitudes of a number of states with respect to a specific legal issue or topic.”423 As such, the vote of a state on any given matter before the Assembly is itself an act of that state, and moreover, the balloting of many states on a specific question may effectively illustrate the emerging consensus regarding a rule of customary international law.424 In this light, the dramatic September 13, 2007 vote in which the U.N. General Assembly adopted the Declaration by an overwhelming majority of 144 to 4 powerfully launched the norms contained in the Declaration on their way to becoming rules of customary international law.

To be precise, only when the Declaration’s provisions are formalized in a convention or are so consistently obeyed by states out of a sense of legal obligation that they “harden” into rules of customary international law may they be considered legally binding. However, for the Declaration’s provisions to transmute into rules of customary international law, state practice regarding its norms need neither be unanimous nor

417 BROWNLEI, supra note 171, at 15.
418 Id.
419 Id.
421 MARK W. JANIS, AN INTRODUCTION TO INTERNATIONAL LAW 43-44 (3d. 1999) (citing Western Sahara, 1975 I.C.J. at 31-37).
422 Id. at 44 (citing Preamble, GAOR Res. 3232 (XXIX), Nov. 12, 1974).
423 Id.
424 Id.
ancient.\textsuperscript{425} As the ICJ held in 1969 in the \textit{North Sea Continental Shelf} case,\textsuperscript{426} a “passage of only a short period of time is not necessarily, or of itself, a bar to the formation of a new rule of customary international law,” so long as state practice is “extensive and virtually uniform” and occurs in “such a way as to show a general recognition that a rule of law or legal obligation is involved.”\textsuperscript{427} What is key, then, is whether states adhere to a given rule out of a sense of legal obligation, as opposed to mere courtesy. This aspect of compulsion versus volition is known in international law as \textit{opinio juris}.

\section*{4. Emerging Practice}

Recent legal responses to the Declaration suggest that the rights it enshrines may eventually be transmuted into binding rules of customary international law. In October 2007, the Supreme Court of Belize invoked legal norms contained in the Declaration to recognize the property rights of two groups of indigenous Maya peoples in southern Belize.\textsuperscript{428} While initially remarking that the Declaration is technically non-binding, the judge in \textit{Aurelio Cal v. Attorney General of Belize} determined that principles of general international law contained in the Declaration are not to be disregarded, taking special notice that an overwhelming number of countries adopted it, thus reflecting the “growing consensus and the general principles of international law on indigenous peoples and their lands and resources.”\textsuperscript{429} The Belize case is most important for its reasoning, not its holding. The judge, without stating he was doing so, conceptualized and imported norms contained in the Declaration as rules of customary international law. Indeed, “much of the work of discerning and developing customary international law is done by judges in the process of preparing and rendering judicial decisions and by scholars in researching and writing legal doctrine.”\textsuperscript{430}

In addition, recent practice of at least one human rights treaty body, the Committee on the Elimination of Racial Discrimination (CERD), strengthens the position that the Declaration embodies rules of customary international law. The CERD, or the body created by the International Convention on the Elimination of All Forms of Racial Discrimination\textsuperscript{431} to oversee its implementation, deals with the international norm of non-discrimination. In a recent report to the United States, the CERD instructed the United States to use the Declaration on the Rights of Indigenous Peoples to interpret its obligations under the convention on racial discrimination, as they relate to indigenous peoples.\textsuperscript{432} Significantly, the CERD made this recommendation after the United States asserted it was not bound by the Declaration.

Of note also, in 2007 Bolivia affirmed the importance of the Declaration by incorporating it in its entirety into domestic law.\textsuperscript{433} Hopefully, several more states will follow suit. In any event, the Declaration’s

\textsuperscript{425} See id. at 40.
\textsuperscript{427} Id. ¶ 74, at 43.
\textsuperscript{429} Id. ¶ 131.
\textsuperscript{430} Janis, supra note 421, at 44.
\textsuperscript{431} The Committee on the Elimination of Racial Discrimination was created by the International Convention on the Elimination of All Forms of Racial Discrimination. 660 U.N.T.S. 195 (entered into force Jan. 4, 1969).
transmutation into customary law will result from a range of state practice, and requires time. It should be noted that the absence of state denunciations of the 2007 Declaration—which would be “uncool” and politically costly to them—is itself a datum of transmutation.434 Once transmuted, the Declaration would be binding in U.S. courts pursuant to the 1900 U.S. Supreme Court decision in the *Paquete Habana*.435

434 To the extent that they illuminate and record the position of the international community on any given subject, declarations of the General Assembly may be understood (and are frequently invoked as) evidence of the practice of states, which is a source of customary international law. The absence of official denunciations is part of the evidence of state practice in the case of the Declaration and should be favorably invoked by indigenous peoples against opportunist states attempting to place subsequent incongruous constructions upon the instrument.

435 The *Paquete Habana*, 175 U.S. 677, 700 (1900) (“International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction as often as questions of right depending upon it are duly presented for their determination.”). That there are examples in the case law of the U.S. Supreme Court rejecting international legal norms, see, e.g., *Stanford v. Ky.*, 492 U.S. 361 (1989) (rejecting international legal norms and upholding capital punishment for juveniles), should neither surprise colonized and indigenous peoples nor give them pause. There is not only inestimable political value in asserting international human rights in U.S. courts but also a tactically wise way to go about doing it. See generally Aguon, *Other Arms*, *supra* note 12.
IV. THE AKAKA BILL: CURE OR PLACEBO?

A. The seduction of federal Indian law

1. Exceptionalism and the political classification doctrine

In order to appreciate the legal and political significance of the Akaka Bill, one must understand the nature of exceptionalism and the political classification doctrine, which are key features of contemporary federal Indian law. The concept behind what is often termed “exceptionalism” is that Indian tribes, as separate (quasi)-sovereigns vis-à-vis the United States, are allowed to remain outside of certain general principles of U.S. constitutional law. This is especially true in the context of “race” jurisprudence. In short, in light of the unique legal status of Indian tribes, any classification based on Indian tribal status for purposes of assigning benefits not conferred on non-Indians is deemed not to constitute racial discrimination.436 In fact, such classifications are deemed not to be racial at all, but rather, political.437 This is the nutshell of the political classification doctrine, as articulated by the U.S. Supreme Court in its 1974 decision in Morton v. Mancari.438

Mancari was a challenge by non-Indian applicants to a hiring preference for Indians within the Bureau of Indian Affairs (“BIA”), the federal agency charged with overseeing Indian affairs. As part of an effort to hire and promote Indians into higher positions within the BIA, which the agency had historically largely failed to do, the BIA adopted a hiring preference to do just that.439 The hiring preference was challenged as an invidious racial classification that violated civil rights statutes and the Fifth Amendment.440 The Court agreed with the government’s characterization of the hiring preference as being based not on race but rather on membership in an Indian tribe with a special political relationship with the United States, ruling that the policy was an effort to increase the participation of tribal Indians in the agency, thereby effectuating the federal government’s policy of promoting Indian self-determination.441 Emphasizing the “unique legal status of Indian tribes” and the “sui generis” nature of the BIA, the Court held that the hiring preference did not constitute racial discrimination.442 In so holding, the Court deemed the preference as not being directed to a racial group composed of Indians, but rather, only to members of federally recognized tribes.443 Heretofore, the Court pronounced, even manifestly racial preferences would be upheld “as long as the special treatment [of Indians] can be tied rationally to the fulfillment of Congress’ unique obligation toward the Indians.”444 Although federal Indian law scholars have ably pointed out the problems with the Court’s reasoning, especially its selective interpretation of the facts, Mancari has since been so consistently employed by practitioners and

436 This subject has been written about extensively by various commentators. See, e.g., Addie C. Rolnick, The Promise of Mancari, Indian Political Rights As Racial Remedy (86 N.Y.U. L. Rev. 958).
437 See id. at 973.
438 417 U.S. 535 (1974). To be precise, though Mancari did not itself technically pronounce such a sweeping conclusion, it has been so consistently invoked and interpreted as having done so that it is now emblematic for the proposition that Indian classifications are per se political rather than racial classifications. See Rolnick, The Promise of Mancari, supra note 436, at 994-95.
440 Id. at 539.
441 Id. at 554.
442 Id. at 554.
443 Id. at 554 n.24.
444 Id. at 555.
courts as to now be paradigmatic for the proposition that classifications based on Indian tribal status are per se not racial classifications. The doctrinal shortcomings of this oppositional framing of Indianness on the one hand, and race on the other, has been compellingly written about in a recent article but is in any event beyond the scope of the present study. Suffice it to say that the political classification doctrine is what largely informs many Hawaiians’ embrace of the Akaka Bill in the wake of *Rice v. Cayetano*. It should be noted here that the *Rice* case has been surreptitiously represented by proponents of the Akaka Bill as involving the 14th Amendment mandate to generally forbid racial discrimination whereas the case’s holding rested solely on the 15th Amendment’s requirement that the suffrage in state elections be racially non-discriminatory. Suffrage in a state organized election, and that alone, was the issue decided in the case.

2. *Rice v. Cayetano*

*Rice v. Cayetano* involved a challenge by a white resident of Hawai’i to a state law permitting only persons of Native Hawaiian ancestry to vote for trustees of the Office of Hawaiian Affairs (“OHA”), the state agency tasked with administering trust resources for, among other things, the express benefit of Native Hawaiians. In 1978, Hawai’i’s multiracial population, recognizing the need to remedy a history of subjugation, voted to establish the state agency. Harold Rice, a white rancher who failed to meet the statutorily defined ancestry requirement, applied to vote in OHA trustee elections. When his application was denied, Rice sued the state of Hawai’i in federal court, arguing *inter alia* that the voting restriction was invalid under both the Fourteenth and Fifteenth Amendments. Specifically, Rice claimed that the state law, by hinging voter eligibility on ancestry, conditioned the right to vote upon an unconstitutional racial classification. Rice further argued that though Native Hawaiians are an indigenous group, they have not been formally recognized by Congress as an Indian tribe and thus cannot avail themselves of the political classification doctrine set out in *Mancari* for tribes so recognized.

Though invited by the petitioner to rule upon the Fourteenth Amendment issue, the U.S. Supreme Court elected not to do so, describing it as “difficult terrain.” In February 2000, the Court, resting its decision on the Fifteenth Amendment alone, invalidated the state law permitting only Native Hawaiians to vote for OHA trustees. The Court narrowly held that the voting restriction at issue was an impermissible use of ancestry in a state election and as such it violated the Fifteenth Amendment’s blanket prohibition of racial classifications in voting. However, the Court commented more generally on the divide between tribal or political classifications on the one hand, and racial classifications on the other. In dispensing with the *Mancari*...
Julian Aguon

cari issue, the Court made the now-(in)famous statement that “[a]ncestry can be a proxy for race.”456 In sum, the post-Rice decade has been marked by litigation at the hands of those who have made of this dictum their jurisprudential lodestar.457 Arguably, the most important post-Rice development is the repeated introduction in both houses of Congress of the ever-revised Native Hawaiian Government Reorganization Act, or the Akaka Bill.

B. Akaka Bill

1. The bill itself
In light of the exceptionalism allowed federally recognized Indian tribes, the pursuit of federal recognition in order to protect programs benefitting Native Hawaiians appears reasonable. However, as this section shows, even a cursory review of the Akaka Bill reveals its many problematic features. The Native Hawaiian Government Reorganization Act, or Akaka Bill, was first introduced in 2000 in part because of the U.S. Supreme Court’s Rice decision earlier that year. Today, the bill confusingly exists in multiple versions. The most recent version of the bill, S. 675,458 was reintroduced in the Senate in March 2011. The following month, its companion bill, H.R. 1250,459 was reintroduced in the House of Representatives. In short, the Akaka Bill endeavors to set into motion a process whereby Native Hawaiians will be accorded a political status very similar but not identical with that of American Indians organized in federally recognized Indian tribes.460 Seeking to “recognize a Native Hawaiian nation within the confines of U.S. federal policy for Native Americans,”461 the bill would “lay the foundation for a nation-within-a-nation model of self-governance.”462 Specifically, the bill sets out a detailed process for the constituting of what is termed a “single unified Native Hawaiian governing entity” (“NHGE”).463 This process is similar but not identical to that set out for American Indians in the Indian Reorganization Act of 1934 (“IRA”),464 which sought to centralize governance in Indian tribes in a single entity that would be designated their representative capable of binding the group into political and legal agreements with the United States. The bill would “reorganize” Native Hawaiians into the NHGE, which would adopt governing documents approved by the U.S. Secretary of the Interior and ultimately be recognized by the United States.465 Most importantly, after the NHGE gains federal recognition, no competing Hawaiian sovereignty group would have any legal standing in a domestic court.466 Such

456 Id. at 514.
460 Akaka Bill, § 20.
462 Id.
463 Akaka Bill, § 30.
465 See generally Akaka Bill, § 8.
466 Id. at § 10 (b).
was the fate of those groups within Indian tribes who resisted reorganization under the IRA. Even so, under the IRA, the Indians themselves determined their membership and who would sit on the tribal council.467 In contrast, under the Akaka Bill, the NHGE would be formed by a “Commission” composed of nine members appointed at the outset by the U.S. Secretary of the Interior.468 While these individuals must have some demonstrable expertise with Native Hawaiian genealogy and language, none of them need themselves be Native Hawaiian.469

This Commission, whose legal fealty would thus run to its U.S. federal mandate, would be charged with the task of assembling a base roll of all the adult members of the Native Hawaiian community entitled to vote in a future election to constitute its new NHGE representative to Washington and to the state of Hawai‘i both of which, of course, would have had the defining role in its very genesis.470 Moreover, the Akaka Bill provides that Washington’s Secretary of the Interior and Congress will retain a substantial degree of supervisory and legislative control, respectively, over the NHGE.471 The Commission would have to define who qualifies as “Native Hawaiian” and then include or exclude individuals accordingly.472 Once the NHGE is formed, it would adopt governing documents subject, as indicated, to the approval of the Secretary of the Interior.473 Only after such approval would the NHGE have authority to take action as a recognized governmental entity.474

The Akaka Bill is principally concerned with the creation of the NHGE, not with delineating its power inasmuch as any action of the NHGE implicating the interests of the state of Hawai‘i or the U.S. would be subject to tripartite negotiations with the federal and state governments. Only after the Secretary of the Interior approves its constitution will the NHGE be federally recognized and thereafter able to enter into negotiations with the United States and the State of Hawai‘i. These negotiations may address matters including but not limited to the transfer of lands, natural resources and other assets, and the exercise of governmental authority over any lands so transferred.475 Any agreements reached during these negotiations would then need to be approved by the U.S. Congress and the Hawai‘i State Legislature, and implemented by enacting legislation.476 While it is possible that certain lands and resources would be transferred to the NHGE at some future time, such a transfer as well as all aspects of regulation and jurisdiction are expressly reserved for future negotiation.477 In other words, federal Indian law expert Rebecca Tsosie writes, “[u]nlike Indian tribes under the IRA, who had reservations, tribal councils, and the right to organize court systems to adjudicate rights within their territories, the NHGE has NONE of these rights, unless and until all three governments reach agreement.”478 Assuming arguendo that the three entities cannot reach agreement on one or more of

467 See William C. Canby, American Indian Law in a Nutshell 68-69 (5th ed. 2009).
468 Akaka Bill, S. 675, § 8 (b)(1)-(2).
469 Id. at § 8 (b)(2)(B)(1)-(2).
470 Id. at § 8 (c)(1).
471 See generally id. at §§ 4-6.
472 Id. at § 8 (c)(1)(E).
473 Id. at § 8 (II)(3)-(4).
474 See generally id. at § 8.
475 Id. at § 9 (b)(1)(A)-(F).
476 Id. at § 9 (b)(2)(A)-(B).
477 Id. at § 9 (b)(1)(A)-(F).
478 Memorandum from Rebecca Tsosie, Professor of Law and Executive Director of the Indian Legal Program at Arizona State University, to Mililani Trask, International Human Rights Lawyer (Dec. 19, 2006) (on file with author).
these issues—what then? The bill confusingly provides that, “[u]nless so agreed, nothing in this Act shall preempt Federal or State authority over Native Hawaiians or their property under existing law....” 479 As for the issue of outstanding claims against the federal or state governments, the bill provides only that it neither creates nor waives any cause of action against either. 480

2. The double-edged sword of the political classification doctrine

Momentarily setting aside the problems with the bill itself, there is another important and under-examined dimension of the political classification doctrine that appears to have eluded many of the bill’s supporters, at least in the dominant discourse. In short, though U.S. courts have frequently relied on Mancari to uphold a broad array of legislation benefiting Indian tribes against challenges by non-Indians, courts have also, and frequently, relied on Mancari to do just the opposite; that is, uphold a broad array of state and federal intrusions onto tribal sovereignty. Preeminent constitutional law scholar Milner S. Ball put it well when he wrote, “when the Court upheld this special treatment of Indians to their advantage, it laid the groundwork for later approval of special treatment of Indians to their disadvantage. If Congress was free to favor Indians without legal restraint, it was equally free to disfavor Indians without legal restraint.” 481 For instance, the Court’s characterization in Mancari of Congress’ special treatment of Indians as political rather than racial had the effect of disabling all—not some—equal protection arguments. According to Ball, “[i]f Congress’s differential treatment of Indians is detrimental and provides them with less than equality mandates, Indians do not have recourse to equal protection law. The discrimination is political, not racial, and so is insulated from equal protection scrutiny.” 482 Moreover, Mancari’s ringing conclusion that “as long as the special treatment [of Indians] can be tied rationally to the fulfillment of Congress’s unique obligation toward the Indians, such legislative judgments will not be disturbed,” 483 means that the judiciary will virtually always defer to the legislative will when it comes to Indian tribes. This has proven abundantly true in the case law. 484 In Washington v. Yakima Indian Nation, 485 the U.S. Supreme Court, citing Mancari, pronounced it permissible to single out Indians in ways “that might otherwise be constitutionally offensive.” 486 Ball warily but rightly concludes that, “[g]iven the content of the Indian trusteeship and given what can be said to be rationally related to it, there is little chance that any action of Congress will fail the test when it is used.” 487

Despite the shortcomings of the Akaka Bill specifically and federal Indian law generally, its supporters maintain that, ultimately, it is the best deal on offer. Indeed, the perceived need to protect programs specially benefitting Native Hawaiians in the wake of Rice v. Cayetano—coupled with the perception of independence as unrealistic—has convinced many in the community that federal recognition is the only way forward, even if that recognition comes at the cost of independence. Many others, however, remain resolute in the opposite

479 Id. at § 9(b)(3).
480 Id. at § 9(c)(2).
482 Id. at 127.
483 417 U.S. 535, 555.
486 439 U.S. at 501.
487 Ball, supra note 481, at 128.
conviction; that is, they believe that the Akaka Bill sounds the death knell for Hawaiian independence and thus should be roundly rejected. Whether or not the latter group is right is examined next.

3. Effect of federal recognition on international legal claims

Beyond the realm of U.S. domestic law, the Akaka Bill may have implications on the unresolved international claims set out in the preceding section, i.e., the claims of occupation, colonization, and indigeneity. One of the most important (and contentious) questions to have arisen is whether or not the Akaka Bill would effectuate a waiver of these international claims, so as to cut off the longstanding independence movement at its knees. However unsatisfying an answer this may be, the fact of the matter is that international law remains more or less open on the question. That understood, it must also be said that there is substantial reason to believe that the bill, or some variant of it, may indeed effectuate a waiver of said claims by setting into motion a process by which the Native Hawaiian people might be said to have effectively acquiesced to U.S. rule. The relevant analysis follows.

The advisory opinion of the International Court of Justice in the 1975 Western Sahara Case\(^\text{488}\) illustrates what non-acquiescence looks like and is therefore useful for the purpose of predicting what the international response would be to the question of whether, via the mechanism of domestic recognition, i.e., as a nation within a nation, the people of Hawai‘i could be said to have finally acquiesced to U.S. rule. In Western Sahara, the ICJ was asked by the General Assembly to determine, among others things, the legal relationship between Western Sahara and Morocco and Western Sahara and Mauritania during the period prior to Spanish colonization in order to determine the extent to which said ties had any bearing on the decolonization then slated for the territory. The General Assembly had asked Western Sahara’s Administering Power, Spain, to enable a self-determination referendum for the Saharawi people to move forward.\(^\text{489}\) In preparing to hold it, both Morocco and Mauritania “began to make bids for the territory, even threatening military violence if a referendum with independence appeared on the ballot.”\(^\text{490}\) “Tensions reached a boiling point, resulting in the General Assembly’s adoption of a resolution requesting Spain to postpone its planned referendum, in order to obtain an advisory opinion from the ICJ.”\(^\text{491}\)

Both Morocco and Mauritania maintained that their respective claims over Western Sahara arose prior to Spain’s colonization of the territory. Morocco argued that its title was based on a “continued display of authority” over the territory through certain historical and political ties.\(^\text{492}\) “Morocco emphasized the alleged religious allegiance owed by the Saharawi people to its sultan,”\(^\text{493}\) essentially arguing that that allegiance was tantamount to acceptance by the Saharawi people of Morocco’s territorial sovereignty over Western Sahara.\(^\text{494}\) Morocco, contending that its territory included Western Sahara, claimed it had a right to have its territorial integrity respected and its borders maintained.\(^\text{495}\)

\(^{489}\) Id. at ¶ 3-4.
\(^{491}\) Id.
\(^{492}\) Western Sahara, Advisory Opinion, 1975 I.C.J. at 42.
\(^{493}\) Epstein, supra note 490, at 112.
\(^{494}\) Id. at 45.
\(^{495}\) Id. at 29.
In its analysis, the Court partially conceded Morocco's contention finding a legal tie of allegiance between Morocco's sultan and some of the Saharawi tribes.\textsuperscript{496} The Court, however, rejected Morocco's overall claims of territorial sovereignty, stating that the appointment of local administrators and various taxes merely confirmed the existence of Sahrawian tribal leaders' authority, and, moreover, the sultan's exalted status under Islamic law did not constitute an exercise of territorial sovereignty over Western Sahara.\textsuperscript{497} The Court ultimately held that the evidence Morocco produced did "not establish any tie of territorial sovereignty between Western Sahara and [Morocco]."\textsuperscript{498} Specifically, Morocco failed to display any "effective and exclusive State activity in Western Sahara."\textsuperscript{499} The Court essentially determined that only ties of a more formal nature (as opposed to purely cultural or religious ties) could overcome the application of the principle of self-determination. The Court likewise rejected Mauritania's claim of territorial sovereignty, partly because the claiming Mauritanian entity itself had not yet achieved state sovereignty at the time of Spain's colonization of Western Sahara.\textsuperscript{500} Because Mauritania lacked international legal personality at the relevant time, it was barred from arguing the "legal ties of State sovereignty" argument.\textsuperscript{501} As a result, the Court focused its analysis on what it characterized as "other legal ties"—which it found—that existed between Western Sahara and the Mauritanian entity, specifically those of a "racial, linguistic, religious, cultural and economic nature."\textsuperscript{502}

Despite having recognized some legal ties between Western Sahara and both Morocco and Mauritania, the ICJ determined that "those ties did not involve territorial sovereignty or co-sovereignty or territorial inclusion in a legal entity..."\textsuperscript{503} Finding no legal territorial connection, the Court based its decision on the fact that the legal relationship between Western Sahara and Morocco and between Western Sahara and Mauritania was not of such sufficient strength as to establish a territorial sovereign connection that would affect the implementation of the decolonization mandate slated for Western Sahara.\textsuperscript{504} In other words, none of the ties between the colonized territory and the contesting states were compelling enough to disenfranchise the Saharawi people of their right to self-determination through the free and genuine expression of their will. The ICJ essentially found no relevant international legal doctrine to maintain the right of Morocco (and for a period Mauritania) to occupy or claim sovereignty over the territory of Western Sahara, and found further that no subsequent actions had altered that assessment.

For purposes of the present analysis, arguably the most important language of the opinion can be lifted from the declaration of Judge Nagendra Singh, who—while agreeing with the advisory opinion and the emphasis it placed on ascertaining the "genuinely expressed" will of the Saharawi people as the basic pillar of self-determination—wrote separately to address what he perceived as a pressing need to flesh out what is meant by those "legal ties" that could impact the implementation of decolonization in Western Sahara. “It may be worthwhile,” Singh says, “to throw more light on the nature and character of the legal ties.”\textsuperscript{505} “No

\textsuperscript{496} Id. at 42-45; 68.
\textsuperscript{497} Id. at 47-49.
\textsuperscript{498} Id. at 49.
\textsuperscript{499} Id.
\textsuperscript{500} Id. at 63.
\textsuperscript{501} Id.
\textsuperscript{502} Id.
\textsuperscript{503} Id. at 67.
\textsuperscript{504} Id. at 68.
\textsuperscript{505} Id. at 79.
tribunal would appear to depart from its judicial character if it were to state precisely the implications of those ties in terms of decolonization which is the very object and the main theme of the exercise pending before the General Assembly.506 Singh writes:

The Court, having reached the correct conclusion that there were no legal ties of such a nature as might affect the application of [the Declaration on the Granting of Independence to Colonial Countries and Peoples], and, in particular, of the application of the principle of self-determination through the free and genuine expression of the will of the peoples of the territory, would appear to be justified in proceeding further by indicating the extent to which those legal ties that did exist could have a bearing on the decolonization process and if so what concrete shape it could take...[A]s the Court finds that there were certain legal ties in existence, it becomes necessary to proceed to assess them with the sole purpose of evaluating them to ascertain if they indicate a definite step in terms of the decolonization process. In short the strength and efficacy of these ties though limited must still be held to be of such an order as to point in the direction of the possible options which could be afforded to the population in ascertaining the will of the people. These options...could be either integration with Morocco or with Mauritania or having free association with any one of them or for opting in favour of a sovereign independent status of the territory. Even if it is conceded that the procedures for decolonization lie within the exclusive province of the General Assembly it is yet appropriate for a court to point out the relationship between the existence of the legal ties and the decolonization process in order fully to enlighten the General Assembly. To do so is not to trespass on the prerogatives of the General Assembly but to fulfil the role as the principal judicial organ of the United Nations.507

The very raison d'être of the General Assembly's request for the advisory opinion, Singh asserts, is the Court's appraisal of the nature of said ties "which must be understood as referring to such legal ties as may materially affect the method or the policies and procedures to be applied in the decolonization of Western Sahara."508 Singh, in effect thinking out loud, writes:

In my opinion the consultation of the people of the territory awaiting decolonization is an inescapable imperative whether the method followed on decolonization is integration or association or independence. This is established by not only the general provisions of the United Nations Charter but also by specific resolutions of the General Assembly on this subject...However, I am in agreement with the clarification given by the Court to that aspect of the matter which relates to certain cases in which the General Assembly has dispensed with the requirement of consulting the inhabitants of a given territory. It follows, in my view, that the principle of self-determination could be dispensed with only if the free expression of the will of the people was found to be axiomatic in the sense that the result was known to be a foregone conclusion or that consultations had already taken place in some form or that special features of the case rendered it unnecessary. Such exceptional circumstances are possible

506 Id.
507 Id. at 79-80.
508 Id. at 80.
and could exist but they do not appear to be present in this case so as to do away with the salutary principle of ascertainment of the freely expressed will of the people of the territory who could, on consultations, elect to integrate with any one of the adjoining interested States if they so desired.\textsuperscript{509}

The above-quoted language suggests that an international tribunal—seized of the question of whether the medium of federal recognition as set out in the Akaka Bill amounts to Hawaiian acquiescence to U.S. rule—might entertain the view that such recognition is sufficiently indicative of the fact that the requisite “consultations have already taken place” and that the “freely expressed will of the people can be found to be axiomatic” so that, finally, the “principle of self-determination can be dispensed with.”\textsuperscript{510} At the very least, the plausible possibility of an international tribunal so finding—that Native Hawaiian actions undertaken as mandated by the Akaka Bill amounted to acquiescence to incorporation into the U.S.—should be taken as a serious warning by Native Hawaiians solicitous of preserving their self-determination right under international law. In other words, though international law is admittedly open on the question, it is not wide open.

Moreover, there is reason to believe that an international tribunal so seized might also reach, as a gap-filling measure, for general principles of international law in the absence of positive and specific international law dispositive of the issues before it. Specifically, it is plausible that general legal international legal concepts such as prescription and acquiescence might be called upon, in a close case, to split the difference. For instance, in light of contemporary international law’s prohibition on the use of force to acquire territory on the one hand, and turn-of-the-nineteenth century international law’s lack of said prohibition on the other—made more problematic still by the ambiguity surrounding the application of the doctrine of inter-temporal law—it seems plausible that an international tribunal seized of the “Question of Hawai’i” might reflexively reach for the general principle of prescription, the essence of which is “the removal of defects in a putative title arising from usurpation of another’s sovereignty by the consent and acquiescence of the former sovereign.”\textsuperscript{511} How this “reach” would be squared with the principle of self-determination cannot be precisely predicted at this time. Further, given that the law of occupation has evolved to the point of now recognizing as “the sovereign” the population of the occupied territory as opposed to the ousted government, the relevant party whose acquiescence for purposes of prescription must now be measured is the people of Hawai’i—and it is their acts which must now register that acquiescence, or lack thereof. In other words, the whole of the Native Hawaiian response to the recognition process set into motion by the Akaka Bill—among other things, their voluntary inclusion of their names onto the NHGE base roll and their overall acceptance of a political status akin to that of an Indian tribe, or domestic dependent nation—might be looked upon as evidence of acquiescence to the territorial sovereignty of the United States. And to the extent that their actions constitute evidence of recognition of U.S. sovereignty over Hawai’i, the United States will be entitled to rely upon them.\textsuperscript{512}

The above analysis, however, is incomplete inasmuch as the full legal import of the 1993 Apology Resolution has yet to be mined from the perspective of international law. In the now-famous congressional

\textsuperscript{509} Id. at 81 (emphasis added).
\textsuperscript{510} Id.
\textsuperscript{511} \textit{Brownlie}, supra note 171, at 146.
\textsuperscript{512} See \textit{Eastern Greenland Case}, (1933), PCIJ, Ser. A/B, no. 53, pp. 51-52; World Court Reports, iii. 175-76.
resolution, the U.S. federal government formally acknowledged the role its diplomatic and military representatives played in the overthrow of the Hawaiian Kingdom government and further acknowledged that the Native Hawaiian people never relinquished their sovereignty or acquiesced to United States rule. The Apology Resolution plainly provides that the illegal overthrow was effectuated by the support of the armed naval forces of the United States. The resolution further pronounces that, “the indigenous Hawaiian people never directly relinquished their claims to their inherent sovereignty as a people or over their national lands to the United States, either through their monarchy or through a plebiscite or referendum.”513 Under international law, this is a material admission against interest. As such, any international tribunal seized today of the “Question of Hawai‘i” will take judicial notice of this admission and most likely consider it as evidence of Hawaiian non-acquiescence to U.S. rule. Moreover, it will likely do so even despite the doctrine of inter-temporal law. As noted by international law scholar Ian Brownlie, while a certain date, or several dates, may “assume prominence in the process of evaluating the facts,” depending on the dispute,514 ultimately:

The choice of such a date, or dates, is within the province of the tribunal seized of the dispute and will depend in some circumstances on the inevitable logic of the law applicable to the particular facts and, in other cases, on the practical necessity of confining the process of decision to relevant and cogent facts and thus to acts prior to the existence of a dispute…Of course, evidence of acts and statements occurring after the critical date may be admissible if not self-serving, as in the case of admissions against interest.515

The question must be asked: Why, if the 1993 Apology Resolution in effect provides a solid case for the non-acquiescence of the Hawaiian people to U.S. rule, would anyone thereafter pursue federal recognition as a quasi-sovereign nation vis-à-vis the United States given the likelihood that the international community will read acquiescence in said recognition? It is this that has led at least one commentator to conclude that the Akaka Bill is nothing other than “the red carpet the assassin lays out before the murder takes place.”516

514 Brownlie, supra note 171, at 125.
515 Id. at 126.
516 Interview with Maivân Clech Lảm, Emeritus Professor of International Law, Ralph Bunche Institute for International Studies, The Graduate Center, City University of New York, in Waimanalo, Haw. (Mar. 25, 2011).
V. THE COMMERCE OF RECOGNITION (BUY ONE ETHOS, GET ONE FREE)

Last year, in July 2010, 23 young men from the Iroquois Nationals Lacrosse Team were marooned in a motel in Queens for about a week after being turned back at the John F. Kennedy airport. The team was en route to England for an international lacrosse tournament when they were informed by the British government that their tribal passports did not qualify as true travel documents. British officials, on security grounds, would not accept their tribal documents in lieu of conventional ones, i.e., American or Canadian passports. Despite the whirl of diplomatic dancing that ensued, which included an official U.S. State Department one-time waiver to travel without U.S. passports, the British did not budge: the Iroquois were out of luck. I offer this story because it is a simple one with a simple point. Though it is a story about sport, it is not about lacrosse. It is a story about the sport of international life. A game played by big boys, e.g., the United Kingdom and the United States. The young Haudenosaunee men are not players in this game. Neither are their mothers or fathers or sisters or brothers or lovers. And if and when they do get to play, it will not be because of any innate skill or ability on their part. It will be for one of two reasons. Either they will have been let in on the basis of the big boys’ benevolence or they will have broken out the guns, figurative and/or real, and asserted their existence not with their lips alone, but with their teeth as well. That, begging or fighting, is the tragic choice that the actions of the powerful all too often leave for the subjugated.

Throughout this paper, I have employed a metaphor of malady. Harm and cure. In this final section, I submit that though there remains in international law redress regimes which the harmed Hawaiian polity

518 Id. In an interview with National Public Radio, Tonya Frichner, board member and attorney for the Iroquois Nationals Lacrosse Team, reported that the team had traveled internationally multiple times before, for other world games, including to England on more than one occasion. Iroquois Nationals Lacrosse Team Hangs In Limbo, available at http://www.npr.org/templates/story/story.php?storyId=128539863.
520 Id.
521 The Haudenosaunee people are politically organized under the larger grouping known as the Six Nations Iroquois Confederacy. See supra note 518.
522 Not discussed in this paper is the option of a national liberation movement which, it must be noted, remains a valid means under international law for the termination of the unlawful conditions of colonialism (as in the Third World), alien (as in Palestine), or racist (as in apartheid South Africa) rule. See Cassese, supra note 293, at 140. More, a “consequence of this legitimation” would be that “no ban would be imposed on [third party] States to refrain from providing national liberation movements with humanitarian, economic, and military assistance short of sending armed troops…” Id. at 141. In addition, all states would be “duty-bound to refrain from assisting a state denying self-determination to a people or a group entitled to it.” Id. That said, a specifically realist, as opposed to ideological, rationale also supports international law’s stance here which, at base, elevates liberation movements to the rank of quasi-subjects of international law partly “because they tend (or at least strive) to acquire control over territory.” Id. Overall, however, a strong ideological aversion to colonialism continues to mark international relations and international law as is expressed in statements like the following where the General Assembly affirms, after calling colonialism a “crime,” that “colonial peoples have the inherent right to struggle by all necessary means at their disposal against colonial Powers and alien domination in exercise of their right of self-determination…” Basic Principles of the Legal Status of the Combatants Struggling Against Colonial and Alien Domination and Racist Régimes, G.A. Res. 3103 (XXVIII) (Dec. 12, 1973) (emphasis added).
should investigate and pursue, ultimately, the people of these islands cannot find in international law what they most passionately seek; that is, medicine for their deepest affliction. International law is a tool, and, when the political climate is right, it can be a very powerful one. But that is all it is. More importantly, inasmuch as international law has not been fashioned from a Kānaka Maoli imagination, it cannot ever be the primary foundation upon which to build a Hawaiian home.

The same holds even truer for the relevance and reliability of U.S. domestic law. In light of the potential passage of the Akaka Bill, I cannot help but wonder: What really is at issue in the pursuit of federal recognition? Certainly, Akaka Bill supporters cannot be unaware of the oft-bemoaned, by Indian nations and their allies, abysmal status of the “domestic dependent nation” historically imposed by the United States and now maintained in the case of some 560 federally recognized Indian tribes—the most salient feature of which is that the status is subject to complete defeasance by the U.S. Congress. As demonstrated in the 1950s by a series of federal statutes extinguishing recognition of selected Indian tribes, aptly called “termination legislation,” Congress in that period unilaterally terminated its political relationship, such as it was, with more than one hundred tribes and bands that it had once recognized. The ruinous effects of termination on these groups are well documented and the lesson is clear: What Congress giveth, it can taketh away. What, then, is federal recognition but a house without a foundation—a house built on air? One has to ask: Is it worth pouring all of one’s political energy into a process that must ultimately be affirmed by the existing power arrangement between the United States and the indigenous peoples it controls? When is compromise not compromise but rather Death with Life’s name on her lips?

Rebecca Tsosie, a leading analyst of federal Indian law in the United States, charges the U.S. with disingenuousness with respect to federal recognition for Native Hawaiians. How in good faith, she wonders, can the United States enter into a trust relationship with Native Hawaiians when it cannot or will not even deliver on trust obligations to the native groups it is already in a trust relationship with? And what of this

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523 See, e.g., United States v. Wheeler, 435 U.S. 313, 323 (1978) (“The sovereignty that the Indian tribes retain is of a unique and limited character. It exists only at the sufferance of Congress and is subject to complete defeasance.”).
525 Id.
526 That pursuing federal recognition might be compared to building such a house has already been tacitly acknowledged by the U.S. Supreme Court in United States v. Lara, 124 S. Ct. 1628 (2004). Lara is, if nothing else, a bright red flag with the word ‘WARNING’ slapped across it. There, the Court had to determine whether—in light of its earlier decision that tribes lacked the authority to prosecute non-member Indians and in light of Congress’ subsequent attempt to so extend said authority to tribes—tribal prosecutions of such persons are actions grounded in delegated federal authority or in inherent tribal power. Although it ultimately ruled that said prosecutions emanated from the latter, the Court was bitterly divided, producing three concurring and one dissenting opinion, with each Justice writing separately to decry what each rightly consider a constitutional crisis. In his concurrence, Justice Thomas squarely and forcefully identified this crisis, concluding that the entire body of federal Indian law is essentially confused, arising from “largely incompatible and doubtful assumptions” in need of rigorous re-evaluation. Id. at 215 (Thomas, J., concurring). “In my view,” Justice Thomas writes, “the tribes either are or are not separate sovereigns, and our federal Indian law cases untenably hold both positions simultaneously.” Id. For a searching analysis of Lara’s true import, see generally Frickey, supra note 5. That said, this author would be remiss not to note here the numerous fine legal scholars who, knowing well the deficiencies that mark U.S. federal Indian law and policy, continue to work within its parameters to hold the line, as best they can, for native peoples’ separate sovereign space.
527 Rebecca Tsosie, presentation, available at http://www.youtube.com/watch?v=XF7bLOMhuKkE.
Julian Aguon

word “trust?” If history is any indication at all, should not native peoples have about as much trust in the U.S. federal government as hens in a fox? Or is there a point at which the birds are also to blame? If a people ever becomes so psychically satiated with its own subjugation, to the point that its impulse for freedom is more a matter of being kept than about self-assertion, is it not at that point a chicken in a coop? Liberty—a pellet here, a pellet there? Is the Akaka Bill being fed to Native Hawaiians? Or are Native Hawaiians being fed to it?

How the Western constructs of both “international” and U.S. law harbor betrayals of Kānaka Maoli ethos and existence may be understood by reference to critical scholarship that the knowledge factories of the First World continue to suppress. Marimba Ani, in her pioneering anthropological work on cultural warfare, Yurugu: An Afrikan-Centered Critique of European Cultural Thought and Behavior,528 defines cultural imperialism as “the systematic imposition of an alien culture in the attempt to destroy the will of a politically dominated people.”529 In her meticulously written book, Ani traces Europe’s exploitation and transformation of the concept of culture into a ruthlessly successful mechanism of domination whose predominant feature is the enlistment of its non-European victims in their own subjugation.530 “The secret Europeans discovered early in their history,” Ani writes, “is that culture carries rules for thinking, and that if you could impose your culture on your victims you could limit the creativity of their vision, destroying their ability to act with will and intent and in their own interest.”531 Echoing her intellectual predecessor, John Henrik Clarke, Ani sources this mode of cultural warfare to the “evil genius” of Europe.532

Turning specifically to her academic field of anthropology, Ani argues that most of the potentially valuable anthropological studies of European culture have suffered a common infirmity: because they implicitly imagined European culture as a representation of a universal stage in human development, they were left with no place to look for solutions or creative alternatives.533 In these studies, she writes, “Western problems become the problems of modern man.”534 These studies, and the European ethos they affirm, are thus

528 Ani, supra note 375.
529 Id. at xxvi.
530 See id. at 427-85. Variations of this basic thesis have emerged in various disciplines, including psychology. Native American scholars Eduardo and Bonnie Duran, in their path-breaking work on indigenous-centered postcolonial psychology, maintain that the tragic success of colonialism is that it is the colonized who ultimately finish off the work of the colonizer. See generally Eduardo Duran & Bonnie Duran, Native American Postcolonial Psychology (1995).
531 Id. at 1.
532 Id. at xv; 428.
533 Id. at 21.
534 Id. at 21.
535 Black psychologist Wade Nobles defines ethos as the “tone” or “character” of a particular people, which emerges as a “set of guiding principles that define the underlying attitude they have toward themselves and their world.” Ani, supra note 375, at 15. To be precise, ethos is not quite right; in Yurugu, Ani discusses ethos and other related terms but ultimately insists on her own. Ani, whose work can be situated at the edge of a growing body of African-centered critical scholarship, has created new language with which to engage the study of cultural imperialism from an African-oriented worldview. “Ultimately,” Ani writes, “the liberation of our thought from its colonized condition will require the creation of a new language.” Id. at 10. In Yurugu, Ani introduces words and concepts based in African languages and cultural conceptions. One such word is asili, which is a Kiswahili word used in several related ways to mean ‘beginning’, ‘origin’, ‘source’, ‘essence’, ‘seed’, or ‘germ.’ Id. at 11. Ani explains that as a conceptual tool for cultural analysis, asili can be understood as an ‘explanatory principle of a culture,’ or the ‘germinal principle of the being of a culture, its essence.’ Id. at 12. In Yurugu, Ani examines everything from art
“superficially universalized.” In this light, she says, European imperialism is “not seen as the product of the behavioral patterns of a particular cultural group nor of certain kinds of people, but rather of the natural tendencies of all people at a particular period of cultural development.” The argument continues that, “every culture becomes European as it becomes more modern.” In her analysis of Western-constructed notions of “universalism” and “progress,” Ani builds on black psychologist Wade Nobles’ definition of power as “the ability to define reality and have other people respond to your definition as if it were their own.” “Europeans have been able to convince us that we are in a ‘race.’ We enter the race somehow not realizing that by its very definition, its locus of control, and the nature of its organization, we can never win. We are losers even before we start….” Ani concludes that as long as non-European peoples continue to accept the terms of their survival being set out and circumscribed by the Western ethos, they will not only never be free, but they will also be blindly unaware of their chains. In this regard, Ani’s thesis adds new life to Carter G. Woodson’s haunting reminder in The Mis-Education of the Negro:

If you control a man’s thinking you do not have to worry about his actions. You do not have to tell him not to stand there or go yonder. He will find his ‘proper place’ and will stay in it. You do not need to send him to the back door. He will go without being told. In fact, if there is no back door, he will cut one for his special benefit. His education makes it necessary.

Yurugu, though undeniably dense, is uncomplicated at the root. It sets out simply to say: Imperialism is—to Europe, and, by extension, to America—a cultural commitment. This is not news. What is worth getting excited about, wrestling with, and ultimately bringing down, is the “intellectual mystification” that has to date prevented so much of the non-European world to even think in a manner that would lead to authentic self-determination. In his book, Dismembering Lāhui: A History of the Hawaiian Nation to 1887, the erudite Jonathan Kamakawiwo‘ole Osorio confirms the continuing morbidity of colonialism on the psyche of his people:

[U]ltimately this is a story of violence, in which colonialism literally and figuratively dismembered the lāhui (the people) from their traditions, their lands, and ultimately their government. The mutilations were not physical only, but also psychological and spiritual. Death came not only through infection and disease, but through racial and legal discourse that crippled the will, confidence and trust of the Kānaka Maoli as surely as leprosy and smallpox claimed their lives and limbs.

to aesthetics, Platonic philosophy to scientism, religion to rhetoric, ultimately concluding that it is the nature of the European asili to seek power.

536 Id.
537 Id.
538 Id. at 21-22.
540 Ani, supra note 375, at 509 (emphasis in original).
541 Carter G. Woodson, The Mis-Education of the Negro 6-7 (2010).
542 Id. at 1.
543 Osorio, supra note 16, at 3.
544 Id..
In the early gestation phase of this paper, I was convinced that the most urgent task at hand was to set out with precision the three main international law narratives/regimes theoretically available to the harmed Hawaiian polity, and, more specifically, to answer the question of whether an executed Akaka Bill would act to effectuate a waiver of these international claims. As the paper evolved, however, so too did its author. The deeper I journeyed into the intricacies of these regimes, the more I realized that perhaps I had not been asking the right questions, or enough questions. While a coherent appraisal of these regimes remains absolutely necessary for both the project of independence for the collective kingdom heirs, as well as the separate if related project of safeguarding the self-determination right of the indigenous people of the Hawaiian archipelago whoever now and in the future controls its territory, even the most surgical legal analysis possible of these regimes would in the end be wanting. For, quite simply, the ultimate inquiry has less to do with law and more to do with life as opposed to death, selfhood as opposed to dissolution. Because an ethos cannot be traded as a good in a marketplace, a people who even flirts with the idea of doing so has already declared war on itself. And at the risk of overstepping my place as a mere ally to the cause of Hawaiian independence, it is my own small suggestion that if and when Kānaka Maoli employ this tool called law, U.S. or international, they should take great care to bring to the project their full cultural selves, i.e., their integral indivisible sense of what it means, in the very core of their individual and collective psyches and spirits, to be Kānaka Maoli. While one of their eyes can be on the prize of legal redress, the other eye must stay unflinchingly fixed on what most matters—each other, the children, the ancient ones, the bird, moon, sea—as known and loved in a uniquely Kānaka Maoli way, which would refuse the sacrilege of flabbily settling for “the best we can get,” a mantra floated to the islands from another ken and shamelessly peddled as if it could replace the preciously singular ethos (or, to borrow Ani’s word, asili) of the Kānaka Maoli that has been reared on the breast of this particular people, in this particular place, surely, all these years.

And the question falls to the soul like dew to the pasture: What is the going rate of mother’s milk?

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545 See generally Ayi Kwei Armah, Two Thousand Seasons (2000).
546 This sentence is obviously inspired by a near identical one penned by the gifted poet Pablo Neruda in his beloved poem Tonight I Can Write. See Pablo Neruda, Tonight I Can Write, in Twenty Love Poems and a Song of Despair 57 (1978) (“And the verse falls to the soul like dew to the pasture.”).