

**STUDY ON THE INTERNATIONAL LAW AND POLICY RELATING TO
THE SITUATION OF THE NATIVE HAWAIIAN PEOPLE**

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EXECUTIVE SUMMARY

Native Hawaiians have experienced a history of assault on their political institutions, culture, and way of life, accompanied by the coerced dispossession of ancestral lands. This report outlines the standards and procedures of contemporary international law and policy that are relevant to the situation of Native Hawaiians. Included in the report is a brief assessment of a proposed federal administrative rule for the reconstitution and recognition of a Native Hawaiian governing entity, as well as an exposition of relevant comparative practices concerning indigenous peoples in other parts of the world.

The duty of States (that, is independent States, in particular those that are members of the United Nations) to recognize indigenous peoples and to respect and protect their rights is well established under international law and policy. The United States has the responsibility to recognize and protect these rights and to provide remedies for their infringement. This responsibility applies toward Native Hawaiians, who unquestionably qualify as an *indigenous people* within the contemporary international understanding of the indigenous rubric.

Indigenous Peoples' Rights/Human Rights

The most prominent articulation of the rights of indigenous peoples within the contemporary international human rights framework can be found in the United Nations Declaration on the Rights of Indigenous Peoples, adopted by the UN General Assembly in 2007. The Declaration is anchored in the complementary human rights of equality and self-determination, declaring that indigenous peoples are equal to all other peoples and that, like all other peoples, they “have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.” With this framing, the Declaration ***affirms the collective rights of indigenous peoples in relation to culture, development, education, social services, and traditional territories***; and it mandates respect for indigenous-State historical treaties and modern compacts.

The purpose of the Declaration is to remedy the historical denial of the right of self-determination and related human rights so that indigenous peoples may overcome systemic disadvantage and achieve a position of equality vis-à-vis heretofore-dominant sectors of society. ***It is assumed, however, that the forthcoming remedies will ordinarily be implemented within existing political configurations of State authority and territorial boundaries.***

Several other international instruments and sources of authority address indigenous peoples' concerns in the same normative vein as the UN Declaration on the Rights of Indigenous Peoples. Pursuing remedies for historical and on-going violations of Native Hawaiians' rights as an indigenous people through relevant international forums and procedures can be an effective strategy for advancing the goals and aspirations of the Native Hawaiian people. Continued advocacy efforts at the international level can raise consciousness and awareness of alleged human rights

violations by the United States and encourage and support actions at the domestic level aimed at remedying the harms and continuing threats they pose to Native Hawaiian cultural identity, integrity, and survival.

From the outset it bears emphasizing that the international responsibility of the United States to secure the rights of Native Hawaiians under the contemporary indigenous rights regime is distinct from and yet complementary to the decolonization of the Hawaiian archipelago as a whole, and it is not predicated on a determination of Hawaiian historical sovereignty or that the United States' presence in Hawai'i is today illegal. To illustrate this point, the following table identifies the human rights approach that has been embraced by international law, in comparison with the two other main advocacy theories currently being pursued in Hawaii on the basis of international law arguments:

Approach/Theory	Intended Beneficiaries	Sources of authority invoked	Objective
Indigenous peoples' rights, broader framework of international human rights	Native Hawaiians as an indigenous people	UN Declaration on the Rights of Indigenous Peoples; International human rights instruments and related jurisprudence	Protection and expansion of Native Hawaiian cultural, land, resource and self-governance rights, within the U.S. legal system
Decolonization of Hawai'i	Differing views, but in general all Hawai'i residents with strong roots in the archipelago.	Article 73 of the UN Charter and related UN declarations and practice	A new process for choosing the status of Hawai'i that includes the choice of independence as a nation-state
Historical sovereignty of the Hawaiian Monarch and asserted illegality of U.S. occupation	All Hawai'i citizens (citizens of the Hawaiian monarchy), regardless of ethnic Hawaiian ancestry	The "law of nations," meaning the classic rules of international law governing relations among independent nation-states	"De-occupation" by the United States and international recognition of Hawai'i as an independent nation state

Decolonization

The international indigenous rights regime stands apart from the regime of decolonization that exists on the basis of article 73 of the UN Charter, which pertains to "territories whose peoples have not yet attained a full measure of self-

government.” Both regimes are grounded in the right of self-determination, but the decolonization regime is concerned primarily with doing away with conditions of classical colonialism in the administration of entire territories that are deemed non-self-governing, including, in general, all the inhabitants with substantial roots in the territory; whereas the indigenous rights regime addresses the concerns of indigenous peoples in particular, independently of the decolonization procedures advanced by article 73 in regard to the territorial administrative units in which they live.

A number of Hawaiian advocates have called for re-inscription of Hawai‘i on the General Assembly’s list of non-self-governing territories and a new plebiscite within the standard decolonization framework provided by article 73. In practical terms, however, a new plebiscite would require the cooperation of the United States as the “administering power,” and that cooperation would be highly difficult to obtain at least in the short term, since the United States has staunchly maintained that the statehood remedy of 1959 was valid and sufficient.

In any event, the ***standard decolonization prescriptions could only go so far to address Native Hawaiian concerns*** that might be better addressed by the indigenous rights regime. For indigenous peoples generally, self-determination has many aspects beyond the formal status of the State-defined territories within which they live, including aspects relating to land, culture, and self-governance. These particular aspects of ***indigenous peoples’ concerns are not specifically addressed by the choice of territorial integration, free association, or independence that is offered by the decolonization regime***. Such concerns are, however, the subject of the indigenous rights regime, as manifested especially by the UN Declaration on the Rights of Indigenous Peoples.

“De-occupation”

By contrast to the human rights and decolonization approaches, the calls made by other Hawaiian rights advocates for the restoration of the Hawaiian monarchy rest on the argument that the United States’ assertion of sovereignty over Hawai‘i is *today* invalid as a matter of international law because of its illegal origins. ***Whatever its merits in doctrinal terms, that argument would be highly contested and is problematic within the dynamics of international relations that prefer stability and existing political configurations, dynamics that shape international law and policy in the present day.*** The assertion of contemporary illegal occupation is rejected by the United States, which has long exercised effective sovereign authority over Hawai‘i, and it runs counter to the widespread practice among other States that recognize U.S. sovereignty over Hawai‘i in their diplomatic relations. Hence, as advocates for the restoration of the Hawaiian monarchy have found, no judicial or other bodies within the formal international legal system are readily available to adjudicate the legal argument asserted for the claim, leaving their claim in practical terms to be played out in the political sphere of international relations in which the United States has a strong upper hand.

Interaction Between International Law and Federal Rulemaking

In June of 2014 the U.S. Department of the Interior gave notice of proposed rulemaking for a procedure to reestablish a “Government-to-Government Relationship” with the Native Hawaiian people in conjunction with reestablishing a Native Hawaiian governing entity. Taken at face value the proposed rulemaking has the potential to constitute an important step in the implementation of the United States’ duty under international law to secure the rights of the Native Hawaiian people to self-determination and related collective rights. Regardless of the status of the Hawaiian archipelago (statehood, independence, or other arrangement), under the indigenous rights regime the Native Hawaiian people have individual and collective human rights for which affirmative measures of protection should be in place. Recognition by the United States of Native Hawaiians, in accordance with Native Hawaiians’ own chosen forms of organization, is instrumental to the effective enjoyment of their human rights.

To be sure, legal recognition under the proposed federal rule would not by itself resolve all Native Hawaiian claims. But nor would it prejudice claims based on the international indigenous rights or decolonization regimes, to the extent those claims remain unresolved. It also would be highly unlikely to prejudice claims based on the “de-occupation” argument, so long as Native Hawaiians affirmatively declare that acceptance of the proposed federal rule is limited to the specific, practical objectives of the rule. In fact, against the backdrop of such a declaration, the process contemplated by the proposed rulemaking could actually facilitate practical steps toward the restoration of an independent Hawai‘i, insofar as such a result might actually be practically possible.

States have engaged in a number of different modalities to provide recognition of indigenous peoples and address their claims to self-determination, self-governance and other collective rights. Globally, these mechanisms include and oftentimes combine varying degrees of constitutional, legislative, judicial, and administrative or executive agency recognition of indigenous governing entities at national or regional governmental levels. No one mode or procedure, however, can be said to constitute a best practice, as each must be adapted and refined by the particular indigenous group or entities involved in consultations, litigation, or negotiations with the State.

However, in light of the diverse lessons and experiences drawn from around the world, the type of rule-making process proposed by the Department of the Interior for reestablishing a government-to-government relationship with the Native Hawaiian people may prove to be an advantageous, flexible, and capable mechanism to achieve that end. It may also prove advantageous by disengaging the process of reestablishing a Native Hawaiian governing entity from the pursuit of other objective, such as the resolution of claims to land and related collective rights. The Native Hawaiian people would thus be able to establish and enhance their self-governance

capacity and abilities first and thereby more effectively negotiate over those connected claims in future processes to which they freely agree.

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STUDY ON INTERNATIONAL LAW AND POLICY RELATING TO THE SITUATION OF THE NATIVE HAWAIIAN PEOPLE

The people indigenous to Hawai‘i – Native Hawaiians – have experienced a history of assault on their political institutions, culture, and way of life, accompanied by the coerced dispossession of ancestral lands. The pattern of historical wrongs against Native Hawaiians is punctuated by the overthrow of the Hawaiian monarchy in 1893, which paved the way for the annexation of Hawai‘i by the United States and a condition of cultural, social, economic, and political disadvantage for Native Hawaiians that continues today.

On the occasion of the 100th anniversary of the overthrow, Congress adopted a resolution apologizing for the United States’ role in that event and the consequent “deprivation of the rights of Native Hawaiians to self-determination.”¹ A number of laws and policy initiatives at the federal and state levels now address Native Hawaiian concerns. However, despite the Congressional Apology, Native Hawaiian claims for meaningful redress for historical and continuing wrongs remain substantially unresolved.

This report outlines the standards and procedures of contemporary international law and policy that are relevant to the situation of Native Hawaiians, in accordance with terms of reference agreed upon between the Indigenous Peoples Law and Policy (IPLP) Program at the University of Arizona, which produced this report, and the Office of Hawaiian Affairs, which commissioned this study undertaken by IPLP’s Faculty Co-Chairs, Professors S. James Anaya and Robert A. Williams, Jr. Also included in this report is a brief assessment, in relation to the relevant international law and policy, of a proposed federal administrative rule for the reconstitution and recognition of a Native Hawaiian governing entity, as well as an exposition of relevant comparative practices concerning indigenous peoples in other parts of the world. The report does not provide an evaluation of specific Native Hawaiian claims under international law or legal advice on how to pursue those claims. Rather, its purpose is to provide a backdrop for such an evaluation and for effective and informed decision-making by the Native Hawaiian people as they move forward in their efforts to achieve their self-determination goals and aspirations

I. The duty of States under international law and policy to recognize indigenous peoples and to respect and protect their rights

International law – a universe of authoritative norms and procedures that arise in international relations and that are deemed of concern to those relations and to global order – has long addressed issues concerning the peoples who are indigenous to lands that have been colonized, settled, or encroached upon by others. Having historically provided rules to justify colonialism, international law and associated

¹PL 103-150, sec. (3), Nov. 23, 1993, 107 Stat. 1510.

policy have reversed course since the mid-twentieth century to become, however grudgingly or imperfectly, a force of emancipation for indigenous peoples from historical oppression and its present-day legacies.²

As the following sections will demonstrate, within the human rights framework of contemporary international law and policy, indigenous peoples have the right of self-determination and related collective rights that stem from their distinct identities and historical characteristics. The United States, like other independent States³ that assert territorial boundaries encompassing indigenous peoples, has the responsibility to recognize and protect these rights and to provide remedies for their infringement. This responsibility applies toward the Native Hawaiians, who unquestionably qualify as an *indigenous people* within the contemporary international understanding of the indigenous rubric.⁴

The fulfillment of this responsibility does not come about through direct intervention by international institutions or other actors from outside the realm of national or local authority. Rather, the United Nations and other international actors work to encourage, assist and bring pressure to bear on States like the United States to take the necessary action, through their own governance institutions, to recognize and protect the rights of indigenous peoples.

From the outset it bears emphasizing that the international responsibility of the United States to secure the rights of Native Hawaiians under the contemporary indigenous rights regime is distinct from and yet complementary to the decolonization of the Hawaiian archipelago as a whole, and it is not predicated on a determination of Hawaiian historical sovereignty or that the United States' presence in Hawai'i is today illegal. To illustrate this point, the following table identifies the human rights approach that has been embraced by international law, in comparison with the two other main advocacy theories currently being pursued in Hawai'i on the basis of international law arguments:

² See generally S. James Anaya, *Indigenous Peoples in International Law* (Oxford Univ. Press, 2d ed. 2004) [hereinafter, "Anaya, *Indigenous Peoples*"]; Robert A. Williams, Jr., "The Medieval and Renaissance Origins of the Status of the American Indian in Western Legal Thought," *Southern California Law Review*, vol. 57 (1983), p. 1.

³ When capitalized, the term "States" as used herein refers to independent countries that are formally recognized as such by the United Nations or that generally enjoy diplomatic relations in that capacity within the international arena.

⁴ In general, the term "indigenous peoples" as used within contemporary international legal and political discourse refers to the present-day descendants of the people living in a country prior to the invasive arrival of others and who maintain and desire to maintain an identity distinct from the settler or dominant population that has developed around them. See Anaya, *Indigenous Peoples*, supra note 2, at 85-86. It is noteworthy in this regard that Native Hawaiians have participated actively and regularly in United Nations forums specifically devoted to indigenous peoples' concerns, in particular, the Permanent Forum on Indigenous Issues, the Expert Mechanism on the Rights of Indigenous Peoples and, before it was discontinued, the Working Group on Indigenous Populations. Additionally, Native Hawaiians have on multiple occasions made submissions to the UN Special Rapporteur on the rights of indigenous peoples, a position held by one of the authors, James Anaya, from 2008 to 2014.

Approach/Theory	Intended Beneficiaries	Sources of authority invoked	Objective
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Decolonization of Hawai'i	Differing views, but in general all Hawai'i residents with strong roots in the archipelago.	Article 73 of the UN Charter and related UN declarations and practice	A new process for choosing the status of Hawai'i that includes the choice of independence as a nation-state
Historical sovereignty of the Hawaiian Monarch and asserted illegality U.S. occupation	All Hawaii citizens (citizens of the Hawaiian monarchy), regardless of ethnic Hawaiian ancestry	The "law of nations", meaning the classic rules of international law governing relations among independent nation-states	"De-occupation" by the United States and international recognition of Hawai'i as a independent nation state

Presented below are the foundations and general contours of the now well-accepted indigenous rights regime that is represented by the first row above, followed by comparisons to the two other approaches or theories.

A. The rights of indigenous peoples within the contemporary international human rights framework

International law's concern for indigenous peoples, including Native Hawaiians, arises today primarily within the international program to promote human rights.⁵ International standards that are now articulated in a number of sources build upon general human rights principles with attention to the common set of challenges indigenous peoples characteristically have faced and to the significance of their

⁵ See generally S. James Anaya, *International Human Rights and Indigenous Peoples* (Wolters Kluwer/Aspen Publishers 2009); Patrick Thornberry, *Indigenous Peoples and Human Rights* (Juris Publishing 2002).

communal bonds. These standards respond to historical and continuing wrongs against indigenous peoples, such as those committed against the Hawaiian people, and hence they mark the parameters of required remedial measures and the duty of States to implement them.⁶

1. *The UN Declaration on the Rights of Indigenous Peoples*

The most prominent articulation of the rights of indigenous peoples within the contemporary international human rights framework can be found in the United Nations Declaration on the Rights of Indigenous Peoples.⁷ Adopted by the UN General Assembly in 2007, the Declaration is a product of years of deliberations among indigenous peoples, States, and others. Although the United States (along with just three other States) voted against the Declaration at the General Assembly, it subsequently endorsed the document, through an announcement by President Barack Obama at a White House gathering of indigenous leaders in December 2010. In a paper circulated with the announcement, the Obama administration specifically mentioned initiatives taken with regard to Native Hawaiians while arguing that it was already working toward the goals outlined in the Declaration.⁸

Because it is a resolution of the General Assembly and not a formal treaty, the Declaration is not *itself* legally binding. However, to say that the Declaration is without legal significance would be incorrect, since it represents an authoritative synthesis of the human rights principles found in various treaties, beginning with the United Nations Charter, and their application to indigenous peoples.⁹ Moreover, in regard to its core elements, the Declaration can be seen as expressive of general principles of international law and contributing to the crystallization of customary international law, both categories of law being, like treaties, binding on States.¹⁰

⁶ Parts of the discussion that follows under this subsection are adapted from one of the author's previous works, in particular: S. James Anaya, "The Human Rights of Indigenous Peoples: United Nations Developments," *University of Hawai'i Law Review*, vol. 39 (2013), p. 983; S. James Anaya, "The Human Rights of Indigenous Peoples," in Catarina Krause and Martin Scheinin (eds.), *International Protection of Human Rights: A Textbook* (2d ed., Abo Akedemi University Institute for Human Rights, 2012), p. 301. These works include more comprehensive discussions of the contemporary international regime of indigenous rights.

⁷ United Nations Declaration on the Rights of indigenous Peoples, General Assembly Resolution 61/295, 13 September 2007 [hereinafter "Declaration"].

⁸ See U.S. Dept. of State, Announcement of U.S. Support for the United Nations Declaration on the Rights of Indigenous Peoples – Initiatives to Support the Government-to-Government Relationships & Improve the Lives of Indigenous People (Dec. 16, 2010), p. 4.

⁹ See *infra*, Part I.A.2. See also Indigenous Peoples, U.N. Doc. A/ 68/317 (2013)(Report of the Special Rapporteur on the rights of indigenous peoples), paras. 62-65; Report of the Special Rapporteur on the rights of indigenous peoples, James Anaya, U.N. Doc. A/HRC/9/9 (2008), paras. 18-43.

¹⁰ The International Law Association, a global consortium of international lawyers, judges, and academics, conducted a major study on the rights of indigenous peoples over several years and

The Declaration is anchored in the complementary human rights of equality and self-determination, declaring that indigenous peoples are equal to all other peoples¹¹ and that, like all other peoples, they “have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.”¹² With this framing, the Declaration affirms the collective rights of indigenous peoples in relation to culture, development, education, social services, and traditional territories; and it mandates respect for indigenous-state historical treaties and modern compacts.

The Preamble to the Declaration specifically grounds the instrument in the concern “that indigenous peoples have suffered from historic injustices as a result of, inter alia, their colonization and dispossession of their lands, territories and resources, thus preventing them from exercising, in particular, their right to development in accordance with their own needs and interests.”¹³ By alluding to this history at the outset, the Declaration reveals its character as essentially a remedial instrument.

Article 3 of the Declaration claims for indigenous peoples the same right of self-determination that is affirmed in the common article 1 of the widely ratified international human rights covenants as a right of “all peoples”.¹⁴ The purpose of the Declaration is to remedy the historical denial of the right of self-determination and related human rights so that indigenous peoples may overcome systemic disadvantage and achieve a position of equality vis-à-vis heretofore-dominant sectors of society.¹⁵ With its remedial thrust, the Declaration contemplates change that begins with State recognition of rights of indigenous group survival that are deemed “inherent”, such recognition being characterized as a matter of “urgent need”.¹⁶

It is assumed, however, that the forthcoming remedies will ordinarily be implemented within existing political configurations of State authority and territorial boundaries.¹⁷ Professor Erica Daes, the long-time chair of the UN Working Group on Indigenous Populations, has described remedies for the denial of indigenous peoples’ self-determination as entailing a form of “belated state-building” through negotiation or other appropriate peaceful procedures involving meaningful participation by indigenous groups. According to Professor Daes, the restoration of indigenous self-determination entails a process “through which indigenous peoples are able to join with all the other

concluded in 2012 that key aspects of the Declaration constitute customary international law. International Law Association, Resolution No. 5/2012 (Biennial meeting, Sofia, 2012).

¹¹ Declaration, art. 2.

¹² *Ibid.*, art. 3.

¹³ *Ibid.*, preamble, para. 6.

¹⁴ International Covenant on Economic, Social and Cultural Rights, concluded 16 December 1966, entered into force 3 January 1976, 993 UNTS 3; International Covenant on Civil and Political Rights, concluded 16 December 1966, entered into force 23 March 1976, 999 UNTS 171 [hereinafter “ICCPR”].

¹⁵ See generally, S. James Anaya, “Self-Determination as a Collective Human Right under Contemporary International Law,” in Pekka Aikio and Martin Scheinin (eds.), *Operationalizing the Right of Indigenous Peoples to Self-Determination* (Institute for Human Rights, Abo Akademi University, 2000), pp. 3–18.

¹⁶ Declaration, preamble, para. 7.

¹⁷ See *ibid.*, art. 46.

peoples that make up the State on mutually-agreed upon and just terms, after many years of isolation and exclusion. This process does not require the assimilation of individuals, as citizens like all others, but the recognition and incorporation of distinct peoples in the fabric of the State, on agreed terms.”¹⁸

Accordingly, the Declaration generally mandates that “States, in consultation and cooperation with indigenous peoples, shall take the appropriate measures, including legislative measures, to achieve the ends of this Declaration,”¹⁹ and it further includes particularized requirements of affirmative measures in connection with most of the rights affirmed. Such measures are to be taken with the end of building healthy relationships between indigenous peoples and the larger societies as represented by the States. In this regard, “treaties, agreements and other constructive arrangements” between states and indigenous peoples are valued as useful tools, and the rights affirmed in such instruments are to be safeguarded.²⁰

Among the affirmative measures required are those to secure “autonomy or self-government” for indigenous peoples over their “internal and local affairs”,²¹ in accordance with their own political institutions and cultural patterns;²² as well as measures to ensure indigenous peoples’ “right to participate fully, if they so choose, in the political, economic, social and cultural life of the State.”²³ In this same vein, States have a duty to consult with indigenous peoples, in order to obtain their free, prior and informed consent before adopting legislative or administrative decisions affecting them.²⁴

Also significantly, affirmative measures are required to safeguard the right of indigenous peoples “to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired.”²⁵ And because indigenous peoples have been deprived of great parts of their traditional lands and territories, the Declaration requires States to provide “redress, by means that can include restitution or, when this is not possible, just, fair and equitable compensation,” for the taking of their lands.²⁶ Affirmative measures are also required to restore and secure indigenous peoples’ rights in relation to culture, religion, traditional knowledge, the environment, physical security, health, education, the welfare of women and children, the media, and maintaining traditional relations across international borders.

¹⁸ Erica-Irene A. Daes, “Some Considerations on the Right of Indigenous Peoples to Self-Determination,” *Transnational Law & Contemporary Problems*, vol. 3 (1993), pp. 1–11, at 9.

¹⁹ *Declaration*, art. 38.

²⁰ *Ibid.*, preamble, art. 37.

²¹ *Ibid.*, art. 4.

²² See *ibid.*, art. 5.

²³ *Ibid.*

²⁴ *Ibid.*, arts. 19, 32.2.

²⁵ *Ibid.*, art. 26(1).

²⁶ *Ibid.*, art. 28(1).

2. UN human rights treaties that are binding on the United States, as interpreted by relevant treaty-monitoring bodies

The United States is a party to two of the ten core United Nations human rights treaties, the International Covenant on Civil and Political Rights²⁷ and the International Convention on the Elimination of All Forms of Racial Discrimination.²⁸ These treaties affirm specific rights that, in keeping with the human rights foundations of the Declaration, are relevant to indigenous peoples; and both treaties – as is typical of human rights treaties – explicitly require States to take measures to secure the rights enumerated.²⁹ The UN institutions that are endowed with authority to monitor compliance with these treaties, the Human Rights Committee and the Committee on the Elimination of Racial Discrimination (CERD), respectively, have interpreted these treaties and State obligations under them in consonance with the Declaration.

International Covenant on Civil and Political Rights

As already noted, the right of self-determination is affirmed as a right of “all peoples” in article 1 of the widely ratified International Covenant on Civil and Political Rights. The UN Human Rights Committee weighed in favour of applying article 1 for the benefit of indigenous peoples well before the Declaration explicitly affirmed for them the right of self-determination in the same terms as article 1. The Committee did this initially in commenting upon Canada’s 1999 report under the Covenant, stating that article 1 protects indigenous peoples in their enjoyment of rights over traditional lands, among other aspects of their lives, and it recommended that, in relation to the aboriginal people of Canada, “the practice of extinguishing inherent aboriginal rights be abandoned as incompatible with article 1 of the Covenant.”³⁰ The Committee has since often examined the situations of indigenous peoples in reviewing the periodic reports by State Parties to the Covenant, applying its apparent understanding about the implications of the general right of self-determination, but often without specifically referring to article 1.³¹

²⁷ ICCPR, *supra* note 14.

²⁸ International Convention on the Elimination of All Forms of Racial Discrimination, concluded 21 December 1965, entered into force 4 January 1969, 5. I.L.M. 352 (1966) [hereinafter “ICERD”].

²⁹ See, respectively, ICCPR, art. 2; ICERD, art. 5.

³⁰ Concluding observations and recommendations of the Human Rights Committee: Canada, UN Doc. CCPR/C/79/Add.105 (1999), para. 8.

³¹ See, *e.g.*, Concluding observations of the Human Rights Committee: United States of America, UN Doc. CCPR/C/USA/CO/3 (2006), para. 37 (criticizing the United States for not addressing the Committee’s previous recommendation regarding the “extinguishment” of aboriginal rights and urging the U.S. to take “further steps to secure the rights of all indigenous peoples, under articles 1 and 27 of the Covenant”); Concluding observations of the Human Rights Committee: Canada, UN Doc. CCPR/C/CAN/CO/5 (2006), paras. 8 and 9 (applying article 1 in evaluating Canada’s land policies, which may result in extinguishment of aboriginal rights); Concluding observations of the Human Rights

In pronouncing on the rights of indigenous peoples, the Human Rights Committee has most frequently relied on article 27 of the Covenant, which affirms the rights of members of minorities, in community with the other members of their group, to their own culture, religion and language. In its General Comment on article 27, the Committee held that this provision of the Covenant established affirmative obligations on the part of States with regard to indigenous peoples in particular, and it interpreted article 27 as covering all aspects of an indigenous group's survival as a distinct culture, understanding culture to include economic or political institutions, land use patterns, as well as language and religious practices.³² This interpretation of article 27 is confirmed in the Committee's adjudication of complaints submitted to it by representatives of indigenous groups pursuant to the Optional Protocol to the Covenant.³³

Committee: Brazil, UN Doc. CCPR/C/BRA/CO/2 (2005), para. 6 (applying article 1 in criticizing Brazil's slow demarcation process of indigenous lands); Concluding observations of the Human Rights Committee: Finland, UN Doc. CCPR/CO/82/FIN (2004), para. 17 (applying article 1 in assessing Saami peoples' rights); Concluding observations of the Human Rights Committee: Australia, 24 July 2000, UN Doc. A/55/40, vol. I, paras. 506–507 (applying article 1 in urging Australia to guarantee indigenous people a stronger role in decision-making over their lands and resources).

³² Human Rights Committee, General Comment no. 23 (1994), Article 27 (rights of minorities), UN doc. HRI/GEN/1/Rev.9 (vol. I), pp. 207–210, para. 7.

³³ Optional Protocol to the International Covenant on Civil and Political Rights, 999 UNTS 302 (entered into force 23 March 1976). Among the cases adjudicated by the committee under article 27 concerning indigenous peoples are the following: Bernard Ominayak, Chief of the Lubicon Lake Band v. Canada (Communication no. 167/1984), views adopted 26 March 1990, Report of the Human Rights Committee, vol. II, General Assembly Official Records (GAOR), Forty-fifth session, Suppl. no. 40 (A/45/40), pp. 1–30 (natural resource development on traditional lands violated article 27); Lovelace v. Canada (Communication no. 24/1977), views adopted 30 July 1981, Report of the Human Rights Committee, GAOR, Thirty-sixth session, Suppl. no. 40 (A/36/40), pp. 166–175 (article 27 protects right of an indigenous person to live on reserve in community with other members of her group); Kitok v. Sweden (Communication no. 197/1985), views adopted 27 July 1988, Report of the Human Rights Committee, GAOR, Forty-third session, Suppl. no. 40 (A/43/40), pp. 221–230 (article 27 extends to economic activity “where that activity is an essential element in the culture of an ethnic community”); *I. Länsmann et al. v. Finland* (Communication no. 511/1992), views adopted 26 October 1994, Report of the Human Rights Committee, vol. II, GAOR, Fiftieth session, Suppl. no. 40 (A/50/40), pp. 66–76 (*Länsmann I*; reindeer herding part of Saami culture protected by Article 27); *J.E. Länsmann et al. v. Finland* (Communication no. 671/1995), views adopted 30 October 1996, Report of the Human Rights Committee, vol. II, GAOR, Fifty-second session, Suppl. no. 40 (A/52/40), pp. 191–204, paras. 2.1–2.4, 10.1–10.5 (*Länsmann II*; Saami reindeer herding in certain land area is protected by article 27, despite disputed ownership of land; however, article 27 not violated in this case); *Mahuika et al. v. New Zealand* (Communication no. 547/1993), views adopted 27 October 2000, Report of the Human Rights Committee, vol. II, UN doc. A/56/40 (vol. II), pp. 11–29, para. 9.9 (Maori interest in fishing, including for commercial purposes, protected by article 27); *Äärelä and Näkkäläjärvi v. Finland* (Communication no. 779/1997), views adopted 24 October 2001, Report of the Human Rights Committee, vol. II, GAOR, Fifty-seventh session, Suppl. no. 40 (A/57/40 (vol. II)), pp. 117–130 (reindeer husbandry is an essential element of Saami culture recognized under article 27); *Angela Poma Poma v. Peru* (Communication no. 1457/2006), views of the Human Rights Committee adopted 27 March 2009, UN Doc. CCPR/C/95/D/1457/2006 (access to water for grazing protected by article 27). Compare *Diergaardt et al. v. Namibia* (Communication no. 760/1997), views adopted 25 July 2000, Report of the Human Rights Committee, vol. II, GAOR, Fifty-fifth session, Suppl. no. 40 (A/55/40 (vol. II)), pp.

The Committee has also found that indigenous religious and cultural traditions are protected by articles 17 and 23 of the Covenant, which affirm the rights to privacy and to the integrity of the family. In a case involving people indigenous to Tahiti, the Committee determined that France had violated these articles when its territorial authority allowed the construction of a hotel complex on indigenous ancestral burial grounds.³⁴

International Convention on the Elimination of All Forms of Racial Discrimination

CERD, the treaty-monitoring body that promotes compliance with the International Convention on the Elimination of All Forms of Racial Discrimination, has also regularly considered issues of indigenous peoples. It has done so within the general framework of the non-discrimination norm running throughout that Convention, and not usually in connection with any particular article of the Convention, which like other relevant human rights treaties nowhere specifically mentions indigenous groups or individuals. In its General Recommendation on indigenous peoples, CERD identifies indigenous peoples as vulnerable to patterns of discrimination that have deprived them, as groups, of the enjoyment of their property and distinct ways of life; and it hence calls upon State parties to take special measures to protect indigenous cultural patterns and traditional land tenure.³⁵ CERD applied this understanding of the non-discrimination norm in relation to indigenous peoples in the United States, calling upon the United States “to ensure that activities carried out in areas of spiritual and cultural significance to Native Americans do not have a negative impact on the enjoyment of their rights under the Convention.”³⁶

3. Written instruments and jurisprudence of the inter-American human rights system

140–160, para 10.6 and Individual Opinion by Elizabeth Evatt and Cecilia Medina Quiroga (concurring) (cattle grazing of Afrikaner community not recognized as a protected practice under article 27 because no clear relationship existed between cattle grazing and the distinctiveness of the community’s culture or self-government practices).

³⁴ Hopu and Bessert v. France (Communication no. 549/1993), views adopted 29 July 1997, Report of the Human Rights Committee, vol. II, GAOR, Fifty-second session, Suppl. no. 40 (A/52/40), pp. 70–83.

³⁵ General Recommendation no. 23 (1997), on the rights of indigenous peoples, UN Doc. HRI/GEN/1/Rev.9 (vol. II), pp. 285–286.

³⁶ Concluding observations of the Committee on the Elimination of Racial Discrimination: United States of America, para. 29, UNDoc. CERD/C/USA/CO/6 (2008).

At the regional level, the human rights institutions of the Organization of American States have addressed indigenous peoples' concerns,³⁷ relying on the generally applicable human rights standards affirmed in the two principal written instruments of the inter-American human rights system: the American Convention on Human Rights³⁸ and the American Declaration of the Rights and Duties of Man.³⁹ Although the United States is not a party to the American Convention, it is a member of the Organization of American States (OAS). (And, because the state of Hawai'i is a part of the United States, although not geographically part of the Americas, the human rights protections of the OAS apply to the people of Hawai'i.) The United States is therefore bound to the OAS Charter, and the obligations under the Charter have been deemed to include adherence to the American Declaration of the Rights and Duties of Man.⁴⁰ Even before the adoption of the UN Declaration on the Rights of Indigenous Peoples, the inter-American human rights institutions had begun to develop a body of indigenous rights jurisprudence on based on human rights precepts that are common to both the American Convention and the American Declaration.

Especially noteworthy is the jurisprudence of the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights concerning indigenous land and resource rights, cases decided on the basis of article 21 of the American Convention or article XXIII of the American Declaration, both of which affirm the right to property in general terms. In the case of *Mayagna (Sumo) Awas Tingni Community v. Nicaragua*,⁴¹ the Inter-American Court found that Nicaragua had violated the property rights of the indigenous Mayagna community of Awas Tingni by granting a concession to log within the community's traditional lands to a foreign company and by failing to otherwise provide adequate recognition and protection of the community's traditional land tenure. The Court held for the first time that the

³⁷ For a detailed survey of the indigenous rights jurisprudence of the inter-American institutions up to 2006, see Jo M. Pasqualucci, "The Evolution of International Indigenous Rights in the Inter-American Human Rights System," *Human Rights Law Review*, vol. 6 (2006), pp. 281-322.

³⁸ American Convention on Human Rights, Nov. 22, 1969, O.A.S. Treaty Series No. 36, 1144 U.N.T.S. 123 (entered into force 18 July 1978).

³⁹ American Declaration on the Rights and Duties of Man, adopted by the Ninth International Conference on American States, Mar 30.-May 2, 1948, O.A.S. Res. 30, O.A.S. Doc. OEA/Ser.L/V/1.4, rev. (1965).

⁴⁰ See I/A Court H.R., Advisory Opinion OC-10/89, Interpretation of the American Declaration of the Rights and Duties of Man Within the Framework of Article 64 of the American Convention on Human Rights, 14 July 1989, Ser. A N° 10 (1989), paras. 42-45.

⁴¹ *Mayagna (Sumo) Community of Awas Tingni v. Nicaragua*, Inter-Am. Ct. H.R. (Ser. C) No. 79 (31 Aug. 2001) [hereinafter "*Awas Tingni* case"]. For background on this case, see S. James Anaya and Claudio Grossman, "The Case of *Awas Tingni v. Nicaragua*: A New Step in the International Law of Indigenous Peoples", *Arizona Journal of International and Comparative Law*, vol. 19 (2002), pp. 1-15; S. James Anaya and S. Todd Crider, "Indigenous Peoples, the Environment and Commercial Forestry in Developing Countries: The Case of *Awas Tingni, Nicaragua*," *Human Rights Quarterly*, vol. 18 (1996), no. 2, pp. 345-367.

concept of property articulated in the American Convention on Human Rights⁴² includes the communal property of indigenous peoples arising from traditional tenure, and that the State must take affirmative measures to secure that form of property and adjust as necessary its laws and administrative practices accordingly. In arriving at its conclusions in the *Awás Tingni* case, the Court applied what it termed an “evolutionary” method of interpretation, taking into account modern developments in conceptions about property as related to indigenous peoples and their lands.⁴³

The Court has upheld and expanded upon this interpretation of the right to property of the American Convention in a series of subsequent cases.⁴⁴ In the *Sawhoyamaxa* case,⁴⁵ the Court summarized the principles developed in its jurisprudence on indigenous land rights as follows:

(1) Traditional possession by indigenous people of their lands has the equivalent effect of full title granted by the State; (2) traditional possession gives the indigenous people the right to demand the official recognition of their land and its registration; (3) the members of indigenous peoples who for reasons outside their will have left or lost possession of their traditional lands, maintain their right to the property, even when they do not have legal title, except when the lands have been legitimately transferred in good faith to third persons; and (4) members of indigenous peoples who involuntarily lost possession of their lands, which have been legitimately transferred to innocent third parties, have the right to recover them or to obtain other lands of equal size and quality.⁴⁶

The Inter-American Commission has similarly interpreted the right to property that is affirmed in article XXIII of the American Declaration of the Rights and Duties of Man.⁴⁷ Additionally, the Commission applied the right to due process of article XVIII of the American Declaration, in connection with the right to

⁴² Under article 21 of the American Convention, “Everyone has the right to the use and enjoyment of his property. The law may subordinate such use and enjoyment to the interest of society.... No one shall be deprived of his property except upon payment of just compensation, for reasons of public utility or social interest, and in the cases and according to the forms established by law.”

⁴³ *Awás Tingni* case, *supra* note 41, para. 146-49.

⁴⁴ See *Sawhoyamaxa Indigenous Community v. Paraguay*, Inter-Am. Ct. H.R. (Ser. C) No. 146, para. 2 (29 Mar. 2006) [hereinafter “*Sawhoyamaxa* case”]; *Yakye Axa Indigenous Community v. Paraguay*, Inter-Am. Ct. H.R. (Ser. C) No. 125 (17 June 2005); *Moiwana Community v. Suriname*, Inter-Am. Ct. H.R. (Ser. C) No. 145 (8 Feb. 2006); *Saramaka People v. Suriname*, Inter-Am. Ct. H.R. (Ser. C) No. 172 (28 Nov. 2007).

⁴⁵ *Sawhoyamaxa* case, *supra* note 44.

⁴⁶ *Ibid.*, para. 128.

⁴⁷ See, e.g., *Maya Indigenous Cmty. of Toledo Dist. v. Belize*, Case No. 12.053, Inter-Am. C.H.R. Report No. 40/04 (12 Oct. 2004) (customary land tenure gives rise to property rights and duty of Belize to recognize and protect the rights).

property, in the case of *Mary and Carrie Dann v. United States*.⁴⁸ The Commission held that the United States violated the right to due process, in addition to the rights to property and equal protection, because of deficiencies in the procedures by which U.S. authorities had addressed Western Shoshone land claims and deemed their rights in land “extinguished.” In interpreting the American Declaration in the *Dann* case, the Commission was explicit in its reliance on developments and trends in the international legal system regarding the rights of indigenous peoples.⁴⁹

4. *Other relevant international sources of authority, in particular International Labour Organization Convention No. 169*

Several other international instruments and sources of authority address indigenous peoples’ concerns in the same normative vein as the UN Declaration on the Rights of Indigenous Peoples. Prominent among these is International Labour Organization (ILO) Convention No. 169 on Indigenous and Tribal Peoples in Independent Countries of 1989 (Convention No. 169),⁵⁰ a multilateral treaty that has been ratified by almost all Latin American countries and several others.⁵¹ Although the United States has not ratified this treaty, it is significant as a precursor to the Declaration and for its contribution to consolidating contemporary understanding about the rights of indigenous peoples within the realm of contemporary international human rights.⁵²

Convention No. 169 preceded the Declaration in recognizing the collective rights of indigenous “peoples” as such, and not just rights of individuals who are indigenous. Although in terms not as far reaching as the UN Declaration, the collective rights affirmed in Convention No. 169 include the right of indigenous peoples to maintain their distinctive cultural identities,⁵³ the right to determine their own priorities for development,⁵⁴ rights of ownership over traditional lands,⁵⁵ and the right as groups

⁴⁸ *Mary and Carrie Dann v. United States*, Case No. 11.140, Inter-Am. C.H.R. Report No. 75/02, paras. 140-142 (27 Dec. 2002) [hereinafter “*Dann* case”].

⁴⁹ *Ibid.*, paras. 124-28. The Commission noted that “a review of pertinent treaties, legislation and jurisprudence reveals the development over more than 80 years of particular human rights norms and principles applicable to the circumstances and treatment of indigenous peoples.” *Ibid.*, para. 125.

⁵⁰ Convention (No. 169) Concerning Indigenous and Tribal Peoples in Independent Countries, concluded 27 June 1989, entered into force 5 September 1991 [hereinafter “Convention No. 169”].

⁵¹ As of February 2015, the parties to the Convention include Argentina, Bolivia, Brazil, Central African Republic, Chile, Colombia, Costa Rica, Denmark, Dominica, Ecuador, Fiji, Guatemala, Honduras, Mexico, Nepal, Netherlands, Nicaragua, Norway, Paraguay, Peru, Spain, and Venezuela.

⁵² See generally Lee Swepston, “A New Step in the International Law on Indigenous and Tribal Peoples: ILO Convention No. 169 of 1989,” *Oklahoma City University Law Review*, vol. 15 (1990), p. 677; Russell L. Barsh, “An Advocate’s Guide to the Convention on Indigenous and Tribal Peoples,” *Oklahoma City University Law Review* vol. 15 (1990), p. 209.

⁵³ Convention No. 169, art. 5.

⁵⁴ *Ibid.*, art. 7.

⁵⁵ *Ibid.*, art. 14.

to retain their own customs and institutions.⁵⁶ Along with affirming these rights the Convention obligates States to protect them through appropriate measures developed in consultation with the indigenous peoples concerned.⁵⁷ With its affirmations of collective rights, the Convention represented a substantial innovation in international human rights law, which until then had almost exclusively been articulated in terms of individual rights.

In the Convention a savings clause is attached to the usage of the term “peoples” to avoid implications of a right of self-determination, even though in other international instruments “all peoples” are deemed to have such a right.⁵⁸ At the time the Convention was adopted in 1989, the issue of whether or not indigenous peoples have a right of self-determination remained especially contentious. Shortly after the Convention was adopted by the International Labour Organization, the secretariat of the ILO took the position that the qualifying language of the Convention regarding use of the term “peoples ...did not limit the meaning of the term, in any way whatsoever” but rather simply was a means of leaving a decision on the implications of the term to United Nations processes.⁵⁹ In any case, the qualifying language in no way undermines the collective nature of the rights that are affirmed in the Convention.

Yet in part because of the qualified use of the term *peoples*, and because several advocates of indigenous groups saw the Convention as not going far enough in the affirmation of indigenous rights, several representatives of indigenous peoples joined in expressing to the ILO dissatisfaction with the new Convention upon its adoption. But since the ILO adopted Convention No. 169 in 1989, indigenous peoples’ organizations and their representatives increasingly have taken a pragmatic view and expressed support for its ratification. With its binding and specific character, the Convention has provided indigenous peoples in ratifying countries with a strong grounding to press local authorities to adopt policies and concrete measures that are protective of their rights, consistent with the terms of the Convention.

B. The fulfilment of the United States’ duty under international law to respect and protect the rights of the Native Hawai‘ian people

As can be seen, various international sources of authority recognize the rights of indigenous peoples and establish for States the duty to respect and protect those rights, within the broader system of international human rights law and policy. This duty is applicable to the United States in relation to the Native Hawai‘ian people, by virtue of international treaties to which the United States has subscribed, as well as

⁵⁶ *Ibid.*, art. 8(2).

⁵⁷ *Ibid.*, art. 6.

⁵⁸ *E.g.*, as specified at note 14, *supra*, common article 1 of the International Covenant on Civil and Political Rights, and the International Covenant on Economic Social and Cultural Rights.

⁵⁹ Statement of Lee Swepston of the International Labour Office to the UN Working Group on Indigenous Populations, 31 July 1989.

under customary or general principles of international law that are reflected in the UN Declaration on the Rights of Indigenous Peoples and multiple other sources.

In practical terms, the fulfillment of the United States' international obligations toward the Native Hawaiian people entails establishing, in cooperation with them, the legal and other mechanisms to implement their collective rights, including mechanisms for the recognition of Native Hawaiian representative and governance institutions. Such recognition is instrumental to the effective exercise of indigenous peoples' self-determination and self-governance, as well to the effective enjoyment of collective rights over lands and resources and other internationally affirmed rights of indigenous peoples. Hence, the failure of States to provide legal recognition to indigenous peoples in accordance with their own chosen forms of organization is a violation of their human rights, as affirmed by the Inter-American Court of Human Rights in the *Sanhoyamaxa* case.⁶⁰

As described in Part IV of this report, across the globe States have enacted special legislative or administrative measures to recognize indigenous peoples and their rights. Within the indigenous rights regime, as seen in actual practice, there is no one formula for State recognition of indigenous peoples and their rights. What is ultimately important from the standpoint of applicable international law and policy is that the specific legislative or administrative measures conform to the aspirations of indigenous peoples themselves and to the broadly formulated international standards.⁶¹

With regard to federal States, like the United States, international law generally does not distinguish between levels or units of government for the purposes of assigning responsibility. Thus, the United States cannot validly plead its internal constitutional order to avoid international responsibility for acts or omissions that in fact can be attributable to its political subdivisions like the state of Hawai'i.⁶² However, international human rights law does provide deference to States for their determinations of the way in which they implement their obligations through relevant domestic authorities and levels of government. Thus, in accordance with how the U.S. constitutional order assigns different or overlapping roles to the federal and Hawai'i state government in regard to Native Hawaiian affairs, both levels of government have roles to play in establishing the mechanisms for implementing the United States' international obligations toward the Native Hawaiian people. In the end, the necessary federal-state cooperation will have to be in place to ensure that the required mechanisms are implemented for the full and adequate recognition and protection of the rights of the Native Hawaiian people.

⁶⁰ See *Sanhoyamaxa* case, *supra*, note 44, paras. 159-175.

⁶¹ See Anaya, *Indigenous Peoples*, *supra* note 2, pp. 187-190.

⁶² See James Crawford (ed.), *Brownlie's Principles of Public International Law* [hereinafter *Brownlie's*] (Oxford Univ. Press, 8th ed. 2012), pp. 547-548.

C. The relationship of the indigenous rights regime to the decolonization regime and the case of Hawai‘i

The international indigenous rights regime just discussed stands apart from the regime of decolonization that exists on the basis of article 73 of the UN Charter, which pertains to “territories whose peoples have not yet attained a full measure of self-government.”⁶³ Both regimes are grounded in the right of self-determination, but the decolonization regime is concerned mostly with doing away with conditions of classical colonialism in the administration of entire territories that are deemed non-self-governing; whereas the indigenous rights regime addresses the concerns of indigenous peoples in particular, independently of the decolonization procedures advanced by article 73 in regard to the territorial administrative units in which they live. Hence, the decolonization regime applies to territories that are under classical colonial rule; while, by contrast, the indigenous rights regime applies to culturally differentiated indigenous peoples within both colonial territories and territories that are deemed fully self-governing as independent or parts of independent States. Both have as their objective advancing self-determination, but in relation to a different but sometimes overlapping set of circumstances.

Article 73 of the Charter requires States to advance the self-government of colonial territories under their administration and to report to the UN Secretary-General on those measures. The UN General Assembly has maintained a list of non-self-governing territories subject to article 73, along with supervisory committees. General Assembly Resolution 1514 confirmed the practice establishing the norm of independent statehood for colonial territories with their colonial boundaries intact, regardless of the arbitrary character of most such boundaries.⁶⁴ Under the companion resolution 1541 and related practice, self-determination is also considered implemented for a colonial territory through its association or integration with an independent state, as long as the result is the outcome of the freely expressed wishes of the people of the territory concerned.⁶⁵

Hawai‘i appeared on the General Assembly’s list of non-governing territories until becoming a state of the United States in 1959. Hawaiian statehood followed a plebiscite conducted by the United States in which voters were asked to choose between the status quo and statehood. Shortly after statehood, the United States communicated to the UN Secretary-General that, in light of Hawaiian statehood, “the United States Government considers it no longer necessary or appropriate to

⁶³ Regarding such non-self-governing territories, article 73(b) of the UN Charter bestows upon the UN Member States, *inter alia*, the obligation “to develop self-government, to take due account of the political aspirations of the peoples, and to assist them in the progressive development of their free political institutions, according to the particular circumstances of each territory and its peoples and their varying stages of advancement.”

⁶⁴ General Assembly Resolution 1514, U.N. Doc. A/4684 (1960).

⁶⁵ General Assembly Resolution 1541, U.N. Doc. A/4651 (1960). See also General Assembly Resolution 742(VIII) (1953).

continue to transfer information on Hawai‘i under article 73e.”⁶⁶ The General Assembly subsequently agreed that the United States’ obligation to report on Hawai‘i under article 73 had expired with Hawai‘i becoming a state in conjunction with the plebiscite,⁶⁷ and Hawai‘i accordingly was removed from the list of non-self-governing territories.

The legitimacy of this outcome has been highly questioned, particularly because the choice provided in the plebiscite leading to statehood within the United States did not include the choice of independent statehood and because all United States citizens who were considered residents of Hawai‘i under U.S. law, including many who had been there for just one year, were allowed an equal vote.⁶⁸ Hence, a number of Hawaiian advocates have called for re-inscription of Hawai‘i on the General Assembly’s list of non-self-governing territories and a new plebiscite within the standard decolonization framework. In practical terms, however, a new plebiscite would require the cooperation of the United States as the “administering power,” and that cooperation would be highly difficult to obtain at least in the short term, since the United States has staunchly maintained that the statehood remedy of 1959 was valid and sufficient. The need for U.S. cooperation in the decolonization of a territory under its administration is illustrated by the case of Guam, which has been on the General Assembly’s list of non-self-governing territories since 1946. UN supervision for Guam has consisted largely of monitoring conditions in the territory and encouraging movement by the U.S. and local governments toward decolonization objectives, while the United States has maintained that the political status of Guam is an internal matter.⁶⁹

Even if the United States could be pressured into organizing or acquiescing in a new plebiscite, it would be difficult, if not impossible to argue successfully for limiting voting eligibility so as to substantially exclude the majority settler population with substantial roots in Hawai‘i, as the recent experiences of Guam as well as New Caledonia demonstrate. In Guam the indigenous Chamorro people today comprise approximately 37% of the island’s population, according to U.S. Census Bureau estimate.⁷⁰ Chamorro activists favoring independence worry that defining eligibility for voting too broadly for an anticipated plebiscite on the island’s status will frustrate the Chamorros’ ability to control the plebiscite’s outcome. Non-Chamorro citizens residing in Guam, citing the U.S. Supreme Court ruling in *Rice v. Cayetano*,⁷¹ maintain

⁶⁶ Memorandum by the Government of the United States of America Concerning the Cessation of Transmission of Information Under Article 73e of the Charter with Regard to Hawaii, U.N. Doc. A/4226, Annex I, at 2- 3 (1959).

⁶⁷ General Assembly Resolution 1496, U.N. Doc. A/4343 (1959).

⁶⁸ See *Native Hawaiian Rights Handbook* (Melody Kapilialoha Mackenzie ed. 1991), p. 104, n. 183.

⁶⁹ See Special Committee on the Situation with regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples, Guam – Working Paper of the Secretariat, U.N. Doc. AC.109/2014/14 (2014).

⁷⁰ See American Indian Child Welfare Association, American Indian/Alaska Native Fact Sheet For The U.S. Territory Of Guam <http://www.nicwa.org/states/documents/GuamFactSheet.pdf>

⁷¹ 528 U.S. 495 (2000).

that any attempt to limit their voting rights in such a plebiscite would be in violation of the United States Constitution.⁷² Guam's Commission on Decolonization for the Implementation and Exercise of Chamorro Self-Determination, established by Guam's legislature in 1997, has defined eligible voters in a planned non-binding plebiscite on independence for Guam as "those persons who became U.S. citizens by virtue of the authority and enactment of the 1950 Organic Act of Guam and descendants of those persons."⁷³ This formulation provides for a voting population that includes non-indigenous persons who can trace their roots to Guam in 1950, in addition to the ethnically Chamorro population.⁷⁴ Still, it has been challenged as having the effect of maintaining a discriminatory preference in voting, in violation of the Fourteenth and Fifteenth Amendments to the U.S. Constitution and federal civil rights statutes.⁷⁵

In New Caledonia, as in Guam, questions over who would be eligible to vote in an anticipated decolonization referendum or plebiscite have been a source of controversy. A territory under French administration, New Caledonia was re-inscribed on the General Assembly's list of non-self-governing territories in 1986.⁷⁶ At present the indigenous Kanak people comprise approximately 40% of the territory's population. Leaders of the Kanak independence movement wanted to limit the vote on self-determination to the original inhabitants of the territory. France, however, rejected that position, claiming that disenfranchising the white settler population would violate guarantees of equality and democratic development in the French Constitution, as well as article 1 of the United Nations Charter which guarantees "equal rights and self-determination of all peoples ... without distinction as to race, sex, language or religion." The Kanaks have found themselves in the

⁷² See Jon M. Van Dyke, Carmen Di Amore-Siah, & Gerald W. Berkley-Coats, "Self-Determination for Non Self-Governing Peoples and for Indigenous Peoples: The Cases of Guam and Hawaii," *University of Hawaii Law Review*, vol. 18 (1996), p.623, at 627.

⁷³ The Guam Election Commission Registrar Manual states, "Every person who is a Native Inhabitant of Guam, as defined above, or who is descended from a Native Inhabitant of Guam is entitled to register with the Guam Decolonization Registry." In the Manual, "Native Inhabitants of Guam" are defined as "those persons who became U.S. Citizens by virtue of the authority and enactment of the 1950 Organic Act of Guam and descendants of those persons." Guam Election Commission Registrar Manual (Last ed., Jan. 2012), p. 18.

⁷⁴ In contrast to the definition of "Native Inhabitants" for the purposes of the Guam Decolonization Registry, the Chamorro Registry, created by Guam's legislature to keep track of the progress of Chamorro people in Guam and around the world, provides that "native inhabitants" are those who were inhabitants of Guam before 1899 and were not absent from Guam except temporarily, and those born in Guam before 1800 or their descendants. See Na'puti, Tiara R. and Hahn, Allison H., "Plebiscite Deliberations: Self-Determination & Deliberative Democracy in Guam," *Journal of Public Deliberation*, vol. 9 (2013), p. 91, at n. 13.

⁷⁵ *Davis v. Guam* (US Court of Appeals for the Ninth Circuit) Case No. 13-15199, (05/08/2015) (holding that the plaintiff had standing to challenge Guam's registration restriction and that the case was ripe). See also *Davis v. Guam*, 2013 WL 204697 (Civil Case No. 11-00035, District Court of Guam, Order passed on Jan 9, 2013).

⁷⁶ General Assembly Resolution no. 41/41, Dec 2, 1986, U.N. Doc. A/RES/41/41.

position of having to compromise on their demands for a Kanak-only referendum, agreeing to a voting formula that allows non-Kanak residents with roots in New Caledonia of over a generation to vote in any plebiscite elections.⁷⁷

Apart from the question of who might participate in a new plebiscite on Hawai'i within the decolonization regime, the standard decolonization prescriptions could only go so far to address Native Hawaiian concerns that might be better addressed by the indigenous rights regime. It is evident that indigenous Hawaiians have particular concerns that a redetermination of the overall political status of the Hawaiian archipelago would not resolve. For indigenous peoples generally, self-determination has many aspects beyond the formal status of the State-defined territories within which they live, including aspects relating to land, culture and self-governance. These particular aspects of indigenous peoples' concerns, including as they relate to Native Hawaiians, are not specifically addressed by the choice of territorial integration, free association or independence that is offered by the decolonization regime. Such concerns are, however, the subject of the indigenous rights regime, as manifested especially by the UN Declaration on the Rights of Indigenous Peoples.

The decolonization and indigenous rights regimes, while distinct, are complementary for indigenous peoples like Native Hawaiians who have lived in non-self-governing territories after the UN Charter came into force in 1945. Decolonization seeks to ensure self-governing status and thereby advance self-determination for the whole of the territory, whereas the indigenous rights regime exists to ensure self-determination and related human rights protections particularly for culturally differentiated, still vulnerable peoples who are indigenous to the territory. Both regimes are aimed at remedying the historical suppression of sovereignty and related patterns of oppression, such as occurred in Hawai'i. But whether or not decolonization procedures are deemed to have been adequately employed in the context of Hawai'i, the standards of indigenous rights articulated in the Declaration and other sources continue to apply. Hence, regardless of the status of the Hawaiian archipelago (statehood, independence, or other), under the indigenous rights regime the Native Hawaiian people enjoy rights for which affirmative measures of protection should be in place.

D. Comparison with the argument for the restoration of the historical sovereignty of the Hawaiian monarchy

Rather than, or in addition to, relying on the human rights-based standards of indigenous rights or on the decolonization regime, a number of advocates and scholars have argued for the restoration of the Hawaiian monarchy and full independent statehood, invoking classical legal doctrine governing the relations

⁷⁷ See Alan Braman, "The Noumea Accords: Emancipation or Colonial Harness?" *Texas International Law Journal*, vol. 36 (2001), p. 277, at 285-87, 292, n. 12.

among independent States. This argument is grounded in the States-rights frame of international law (or the law of nations, as the discipline was often called in the late nineteenth-early twentieth centuries), as opposed to international law's contemporary human rights frame. Resting on a highly formalistic understanding of the law of nations, the argument claims for Hawai'i the sovereign prerogatives of an independent State under the monarchy that originated in King Kamehameha I and continued through successive heirs to the throne. Within this argument, the United States' presence in the Hawai'i, which came about with the overthrow of the monarchy, represents an illegal occupation and hence the law of nations requires "de-occupation" and effective restoration of the monarchy.

This law of nations argument for the restoration of the Hawaiian monarchy merits discussion, given the interest in this approach by certain Native Hawaiian activists. They find encouragement for their claims in the recognition by various States, including the United States, of the Hawaiian monarchy as an independent sovereign in the late nineteenth century and the 1993 Congressional Apology for the "illegal" overthrow of the monarchy.⁷⁸ The difficulty with the argument, however, is in establishing the restoration of the monarchy as the appropriate, much less required, remedy for the conceded historical wrongs.

The Congressional Apology calls for acknowledgement of the "ramifications of the overthrow for the Kingdom of Hawaii" and "reconciliation between the United States and the Native Hawaiian people."⁷⁹ Such reconciliation finds support and normative parameters within international law's human rights framework and its contemporary regime of indigenous rights, as indicated above and explained in depth by one of the authors of this report in a previous work.⁸⁰ In this regard it should be noted that, while the Congressional Apology atoned for the role of the United States in the overthrow of the Hawaiian monarchy, the apology and commitment to reconciliation was made to the Native Hawaiian people, not the nation-state of Hawai'i or all of the Hawaiian monarchy's citizens. This reflects Congress's understanding of its obligations specifically to Native Hawaiians as an indigenous people.

By contrast to the human rights approach, Native Hawaiian rights advocates who call for the restoration of the Hawaiian monarchy rest on the argument that the United States' assertion of sovereignty over Hawai'i is *today* invalid as a matter of international law because of its illegal origins. This argument would be highly contested and is problematic within the dynamics of international relations that shape international law in the present day. The assertion of contemporary illegal occupation is rejected by the United States, which has long exercised effective sovereign authority over Hawai'i, and it runs counter to the widespread practice among other States that recognize U.S. sovereignty over Hawai'i in their diplomatic relations.

⁷⁸ PL 103-150, preamble, Nov. 23, 1993, 107 Stat. 1510.

⁷⁹ *Ibid.*, para. (4).

⁸⁰ See S. James Anaya, "The Native Hawaiian People and International Human Rights Law: Toward a Remedy for Past and Continuing Wrongs," *Georgia Law Review*, vol. 28 (1994), no. .2, pp. 309-364.

When a preponderance of States, international organizations, and other relevant international actors recognize a State's boundaries and corresponding sovereignty over territory, and the State in fact exercises effective authority over the territory, there is a strong systemic tendency within international relations and dispute resolution to uphold the recognized sovereignty as a matter of traditionally held foundational principle.⁸¹ The prominent international legal scholar Malcolm Shaw, writing within the logic of State-centered international law doctrine, or law of nations, surmises that the effective exercise of sovereignty along with its general recognition "may validate situations of dubious origins."⁸² Furthermore, the assertion of illegal U.S. occupation is against dominant trends in contemporary international law that favor stability, pragmatism and equitable consideration of changed circumstances over time.⁸³

Hence, as advocates for the restoration of the Hawaiian monarchy have found, no judicial or other bodies within the formal international legal system are readily available to adjudicate the legal argument asserted for the claim, leaving their claim in practical terms to be played out in the political sphere of international relations in which the United States has a strong upper hand.⁸⁴ Still, apart from such

⁸¹ This tendency is animated by the principle of territorial integrity that favors recognized States, and in particular UN Member States, in accordance with article 2 of the UN Charter. This principle may be mitigated, but not so much by competing claims of sovereignty as by the right of self-determination within the decolonization and human rights frameworks, in accordance with article 73 of the Charter and numerous provisions of the Charter requiring States to respect and cooperate for the protection of human rights.

⁸² Malcolm Shaw, *Title to Territory in Africa* (1986), p. 23. This proposition holds especially with regard to such "dubious origins" of asserted sovereignty arising prior to the post-UN Charter international law of self-determination, in light of the doctrine of inter-temporal law (under which acts are to be judged according to the law at the time of their occurrence). Professor Cassese observes: "It is well known that under classical international law [that is, the law of nations,] the legal modes of acquisition of territory included *colonial conquest* (if the two cumulative conditions of intent to appropriate the territory and actual display of sovereign authority are met)." Antonio Cassese, *Self-Determination of Peoples: A Legal Reappraisal* (Cambridge Univ. Press, 1995), p. 186. Professor Cassese further states that, even in the modern era, a "breach of the principle of self-determination can be subsequently validated by the recognition or acquiescence of other member States of the international community. This, it is submitted, holds true in such cases as Goa (1961) and West Irian (1969) [with] the subsequent attitudes of third States and the United Nations." *Ibid.*, p. 188. To be sure, the view that effectiveness or recognition can cure illegal or dubious acts is subject to question; but even if a continuing defect in territorial sovereignty is conceded, it does not follow that the appropriate remedy is the restoration of the status quo ante.

⁸³ See *Brownlie's*, *supra* note 61, pp. 220-236 (surveying the various modes of acquisition of title to territory, while emphasizing the need to avoid rigid application of doctrine and referring to policies favoring international order and stability); Charles De Visscher, *Theory and Reality in Public International Law* (1970), p. 226 (referring to the "fundamental interest of the stability of territorial situations from the point of view of order and peace," which he gleans for the decision of the International Court of Justice in the *Anglo-Norwegian Fisheries* case).

⁸⁴ For example, the case of *Larsen v. Kingdom of Hawaii* (arbitral award reprinted in *Hawaii Journal of Law and Politics* (vol.1) (2004), p. 299), represents an effort to assert the claim of illegal U.S.

formal institutions, the argument deserves a comprehensive assessment that takes into account competing views. That type of assessment, however, is beyond the scope and terms of reference of the present report.

It bears stressing, nonetheless, that the alternative approach that relies on the international regime of indigenous rights, which is grounded in human rights as opposed to States rights, does not run into the same hurdles that stem from a direct challenge to the sovereignty of the United States over Hawai‘i. Ordinarily, the internationally recognized rights of indigenous peoples are to be exercised and protected within existing configurations of State authority, as evident by the framing of the UN Declaration on the Rights of Indigenous Peoples. Obviously, without posing a direct challenge to United States sovereignty over Hawai‘i, the indigenous rights regime does not readily support full restoration of the Hawaiian monarchy within an independent Hawai‘i. However, that regime could support a Native Hawaiian-led process toward restoration of the monarchy with some level of authority and shared sovereignty, by virtue of the rights of self-determination and self-government that are recognized in the UN Declaration and other sources. Moreover, the indigenous rights regime addresses many of the related concerns raised by advocates in emphasizing the illegality of the monarchy’s overthrow, including concerns over loss of land and resources, threats to culture and religion, and disparities in health and education.

II. The proposed federal administrative rule for the reestablishment and federal/state recognition of a Native Hawaiian governing entity

As pointed out above (Part I.B), the international human rights obligations of the United States toward the Native Hawaiian people must be fulfilled through effective, appropriate action by relevant authorities at the federal and state levels. In June of 2014, the U.S. Department of the Interior gave advance notice of proposed rulemaking for a procedure to reestablish a “Government-to-Government Relationship” with the Native Hawaiian people in conjunction with reestablishing a Native Hawaiian governing entity.⁸⁵ In our view, taken at face value the proposed rulemaking has the potential to constitute an important step in the implementation of the United States’ duty under international law to secure the rights of the Native Hawaiian people to self-determination and related collective rights. On the other hand, the proposal would not by itself resolve all Native Hawaiian claims nor, to that

occupation before the Permanent Court of International Arbitration in The Hague. The tribunal recognized the *historical* sovereign status of Hawai‘i, but ultimately it dismissed the case because the United States was not a party, and the tribunal never made a determination of the legality of U.S. presence in Hawai‘i today.

⁸⁵ U.S. Dept. of Interior, Advance Notice of Proposed Rulemaking; Solicitation of Comments – Procedures for Reestablishing a Government-to-Government Relationship with the Native Hawaiian Community, 43 CRF Part 50, RIN 1090-ABO5 (June 16, 2014) [hereinafter “Advance Notice of Proposed Rulemaking”].

extent, would it prejudice those other claims that could be based on the indigenous rights or decolonization regimes. As explained below, acceptance of the proposal could be used to argue that acquiescence to U.S. sovereignty over Hawai'i has occurred and thus theoretically could prejudice the "de-occupation" claim; however, any inference of acquiescence could be overcome by a unilateral declaration by Native Hawaiians affirming that acceptance of the proposed federal rule is limited to the specific, practical objectives of the rule.

A. Compatibility with the United States' international human rights obligations

The Department of the Interior's proposal is predicated on acknowledging the historical sovereignty and governance institutions of the Native Hawaiian people, and the suppression of that governance authority by the United States. It refers to the Apology issued by Congress in 1993 for the overthrow of the Hawaiian Kingdom, and to recognition by Congress that "Native Hawaiians have a cultural, historic, and land-based link to the indigenous people who exercised sovereignty over the Hawaiian Islands, and that group has never relinquished its claims to sovereignty or its sovereign lands."⁸⁶

The stated goal of the proposed rulemaking is "to more effectively implement the special political and trust relationship between Native Hawaiians and the United States, which Congress has long recognized, and to better implement programs and services that Congress has created to benefit the Native Hawaiian community."⁸⁷ With this goal, the essence of the proposal is to assist the Native Hawaiian community in "reorganizing its government."⁸⁸ This goal is to be achieved either through a federally assisted process, or through "a process established by the Native Hawaiian community and facilitated by the State of Hawaii ... consistent with federal law."⁸⁹

The reference to a "trust relationship" and to consistency with federal law may raise concerns, given the way that a federal trusteeship has historically been applied to exert dominance over indigenous peoples in the United States and the limitations of federal law in respect of indigenous rights. However, with shifts in federal policy following international trends, federal trusteeship toward indigenous peoples has for decades been employed as a protective mechanism for their recognized rights and against further unwanted encroachments on indigenous self-determination (although it has not always effectively functioned as such). As for the reference to consistency with federal law, that reference is in relation to the alternative of a state-assisted process for the reestablishment of a Hawaiian government, and hence it should be

⁸⁶*Ibid.*, p. 11, quoting 114 Stat. 2968 (2000).

⁸⁷ *Ibid.*, p. 15.

⁸⁸ *Ibid.*

⁸⁹ *Ibid.*

taken as no more than a restatement of constitutional federal supremacy over state authority. Otherwise, it is mere tautology since any federal administrative rule must adhere to federal law.

The question remains, how might the proposed administrative rule be conducive to providing redress for historical and ongoing wrongs against Native Hawaiians in a manner consistent with the United States' obligations under international law. The answer to that question lies in the manner in which such a proposed rule would be devised and ultimately implemented. First of all, the consultations being undertaken by the Department of the Interior in regard to the proposed rule must conform to the international standard for consultations with indigenous peoples, and hence those consultations must have as their objective the consent or agreement of the Native Hawaiian people to the process of government reorganization to be implemented by the rule.

It should be stressed that the proposal as it appears in the Department of the Interior's announcement is in an embryonic state, and that the Department is soliciting views by Native Hawaiians on all aspects of the process for reestablishment of a Native Hawaiian governing entity, including participation in the process and the conditions for establishing a "government to government" relationship with the United States. Also importantly, the announcement stipulates:

If the Department were to proceed with an administrative rule to assist the Native Hawaiian community in reorganizing a Native Hawaiian government, the rule would not determine who ultimately would be a citizen or member of that government.... Presumably, a Native Hawaiian government would exercise its sovereign prerogative and, operating under its own constitution or other governing document, could define its membership criteria ...⁹⁰

On their face, the above characteristics of the proposed rulemaking could contribute to the kind of indigenous control over the definition of indigenous peoples' own chosen institutions of self-governance and membership that contemporary international law and policy call for and support. Further, the kind of assistance to be provided by the federal or state governments for the reconstitution of a Native Hawaiian government is in keeping with the duty of States to take affirmative measures to implement indigenous peoples' rights. Once constituted, the Native Hawaiian governance entity could act as an effective conduit for Native Hawaiian self-determination, depending upon a series of factors yet to be determined, including the scope of its authority, financing for its operations, and the subsequent definition of federal and state law and policy regarding its functioning.

⁹⁰ *Ibid.*, p. 16.

B. The disposition of claims left unresolved by the proposed administrative rulemaking

To be sure, although it could be a step in providing redress for the historical and continuing deprivation of Native Hawaiian self-determination, the proposed federal administrative rule, if adopted, would not itself resolve all outstanding Native Hawaiian claims. Claims over land and sacred sites, for example, would not be directly addressed by the process of reestablishing a Native Hawaiian government that is contemplated by the proposal.

Correspondingly, as a matter of international law the unresolved claims of Native Hawaiians will not be prejudiced by the adoption of the proposed federal rule, unless a waiver of those claims is inferred from acceptance of the rule, which is unlikely. In general, “[a]bandonment of claims may occur by unilateral acts of waiver or acquiescence implied by conduct, or by agreement.”⁹¹ However, the waiver of a claim is not to be lightly inferred,⁹² especially when it comes to claims for the infringement of fundamental interests or human rights. Native Hawaiian acceptance of a federal rule of the kind contemplated by the Department of the Interior’s announcement could not alone be reasonably construed as implying a waiver of outstanding human rights claims that are not directly addressed by the rule. Furthermore, international practice shows that efforts to pursue remedies within the international decolonization regime are not prejudiced by acceptance of arrangements of self-governance that do not entirely fulfill the ends of decolonization.⁹³

Native Hawaiian acceptance of the proposed federal rule could be used to imply acquiescence to the sovereignty of the United States over Hawai‘i, which undoubtedly is a premise of the proposal. Such acquiescence, however, would not prejudice claims based on the status and human rights of Native Hawaiians as indigenous peoples, nor would it prejudice a claim for redress within the decolonization regime, since neither set of claims relies on establishing the invalidity of U.S. assertions of sovereignty.⁹⁴

By contrast, implied acquiescence to U.S. sovereignty could be interpreted as prejudicing the claim for restoration of the Hawaiian monarchy and an independent Hawai‘i, insofar as that claim relies on the assertion that the U.S. presence in Hawai‘i is today illegal. But any inference of acquiescence could be overcome by a unilateral declaration by the proponents of the claim affirming that acceptance of the proposed

⁹¹ *Brownlie’s*, supra note 61 at 700.

⁹² See, e.g., Case Concerning Certain Phosphate Lands in Nauru, ICJ Reports (1992), 247-250, paras. 12-21.

⁹³ Examples of such international practice are found in the cases of Guam and New Caledonia, discussed in Part I.C.

⁹⁴ As Professor Cassese has explained, “The new law of self-determination [which undergirds both the modern indigenous rights and decolonization regimes] has not resulted in the *invalidation* of [the colonial era] legal basis of title *ipso facto*.” The obligations arising under the decolonization regime “do not produce [and hence do not depend on] the immediate legal effect of rendering the legal title over colonial territories null and void.” Cassese, supra note 82, p. 186.

federal rule is limited to the specific, practical objectives of the rule and does not imply a general acceptance of U.S. sovereignty over Hawai'i or a waiver of any claim challenging that sovereignty. Especially against the backdrop of such a declaration, the process contemplated by the proposed rulemaking could actually facilitate practical steps toward the restoration of an independent Hawai'i, since it would place in the hands of Native Hawaiians the definition of the form that a reconstituted Native Hawaiian government will take. If Native Hawaiians were to choose through that process reconstitution of the Hawaiian monarchy, or any other form of government, that government could exercise effective powers upon which to strengthen the case for renewed international recognition of an independent Hawai'i with a functioning government that is reconstituted from the historical Hawaiian sovereign.

III. Relevant international forums and procedures to pursue remedies for historical and on-going violations of the rights of the Native Hawaiian people

The international system provides certain limited avenues by which indigenous peoples can seek assistance for obtaining redress for violations of internationally-recognized rights that remain unresolved by State actors. Relevant international institutions and procedures do not displace State authority; rather they function to promote action by States to provide remedies in accordance with their obligations under international law when they have failed to do so and to build good practices. Pursuing remedies for historical and on-going violations of Native Hawaiians' rights as indigenous peoples through relevant international forums and procedures can be an effective strategy for advancing the goals and aspirations of the Native Hawaiian people. Continued advocacy efforts at the international level can raise consciousness and awareness of alleged human rights violations by the United States and encourage and support actions at the domestic level aimed at remedying the harms and continuing threats they pose to Native Hawaiian cultural identity, integrity and survival.

A. Procedures for obtaining a decision or recommendation for redress within the international human rights system

International mechanisms such as the United Nations Permanent Forum on Indigenous Issues, established in 2000 by the UN Economic and Social Council,⁹⁵ and the UN Expert Mechanism on the Rights of Indigenous Peoples, established in 2007 as a subsidiary body of the UN Human Rights Council,⁹⁶ have proven receptive to participation and access by Native Hawaiian rights advocates, as part of the broader interest that these institutions have in indigenous issues. Native Hawaiian

⁹⁵ See generally <http://undesadspd.org/indigenouspeoples.aspx>.

⁹⁶ See generally <http://www.ohchr.org/EN/Issues/IPeoples/EMRIP/Pages/EMRIPIndex.aspx>.

advocates may wish to continue that participation in those particular forums as a way of raising awareness about their concerns, but they cannot expect any action on their claims by those bodies given the limitations of their respective institutional mandates. Other international mechanisms, however, are capable of issuing decisions or specific and targeted recommendations for redress. Beyond simply raising awareness, in some cases these other mechanisms have the potential to engage States directly, hold them accountable, and provide authoritative support for claims for redress, reparations or compensation that have been denied by domestic legal and political systems. Formal recommendations and decisions by the mechanisms discussed below have the potential to build the case for, and to put pressure on or encourage, States to reform their domestic laws and policies, and recognize and accommodate legitimate claims for violations of indigenous peoples' rights.

1. The United Nations Human Rights Council

The UN Human Rights Council is the principal United Nations intergovernmental body responsible for human rights. Its role includes strengthening the promotion and protection of human rights around the globe. The Council has a number of subsidiary bodies and mechanisms that have been used by Native Hawaiians along with indigenous peoples from around the world to advance their cause and raise awareness about infringement of their internationally affirmed rights.⁹⁷

Two Council mechanisms in particular—the communications procedure of the UN Special Rapporteur on the rights of indigenous peoples and the Council's confidential complaint procedure—hold the potential for obtaining a specific decision or recommendation for redress under relevant international human rights standards.

a. United Nations Special Rapporteur on the rights of indigenous peoples

“Special procedures” is the term given to the mechanisms of the Human Rights Council to monitor, advise and publicly report on human rights situations in specific countries or territories (country mandates), or on specific human rights concerns of global significance (thematic mandates). The Council established the mandate of Special Rapporteur on the rights of indigenous peoples in 2001. In the capacity of an independent human rights expert, the Special Rapporteur examines the human rights situations of indigenous peoples throughout the world, promotes good practices, and conducts thematic studies on specific topics of special importance to

⁹⁷ For general information on Human Rights Council, see <http://www.ohchr.org/EN/HRBodies/HRC/Pages/HRCIndex.aspx>.

protecting the rights of indigenous peoples.⁹⁸

An important part of the Special Rapporteur's mandate includes responding to specific allegations of indigenous peoples' human rights violations.⁹⁹ The Special Rapporteur's communications procedure accepts complaints and inquiries from indigenous peoples and organizations. Where those communications raise serious concerns of human rights violations, the Special Rapporteur can intervene by drawing the attention of the government concerned or by attempting to prompt relevant authorities into corrective action.¹⁰⁰ The Special Rapporteur may formally contact the concerned government requesting information, and, when adequate information has been collected, possibly comment on the allegations and make recommendations for preventive or remedial actions. The Special Rapporteur may examine specific situations in the context of reporting on country situations, as the former Special Rapporteur did when he received information about Native Hawaiian concerns and addressed those concerns in his report on the situation of indigenous peoples in the United States.¹⁰¹ The Special Rapporteur followed up on his initial comments on unresolved claims of Native Hawaiians, in a detailed letter to the United States.¹⁰²

b. Human Rights Council Confidential Complaint Procedure

The Council's confidential communications/complaint procedure for "gross and systemic violations" of human rights allows persons or organizations to submit complaints to "address consistent patterns of gross and reliably attested violations of all human rights and fundamental freedoms occurring in any part of the world and

⁹⁸ See Human Rights Council Resolutions 15/14 (2010) and 29/9 (2013); <http://www.ohchr.org/EN/Issues/IPeoples/SRIndigenousPeoples/Pages/Mandate.aspx>.

⁹⁹ The Human Rights Council has authorized the Special Rapporteur on the rights of indigenous peoples to "gather, request, receive and exchange information and communications from all relevant sources, including Governments, indigenous peoples and their communities and organizations, on alleged violations of the rights of indigenous peoples." Human Rights Council Resolution 15/14, para. 1(b).

¹⁰⁰ *Ibid.*

¹⁰¹ In his 2012 country report on the United States to the Human Rights Council, UN Special Rapporteur James Anaya drew specific attention to the situation of Native Hawaiians, noting that Native Hawaiians "are uniquely vulnerable...having experienced a particular history of colonial onslaught and resulting economic, social and cultural upheaval. They benefit from some federal programmes available to Native Americans, but they have no recognized powers of self-government under federal law. And they have little by way of effective landholdings, their lands largely having passed to non-indigenous ownership and control with the aggressive patterns of colonization initiated with the arrival of the British explorer James Cook in 1778." Report of the Special Rapporteur on the rights of indigenous peoples, James Anaya – The situation of the indigenous peoples in the United States of America, U.N. Doc. A/HRC/21/47/Add. 1 (2012), para. 64.

¹⁰² See Report on observations on communications sent and replies received by the Special Rapporteur on the Rights of Indigenous Peoples, James Anaya, U.N. Doc. A/HRC/27/52/Add.4 (2014), para. 160.

under any circumstances.”¹⁰³ The complaint procedure aims to address systemic “patterns” of human rights violation; it does so through a confidential procedure, the outcome of which is not made public.

Because it is a Charter-based procedure, like the communications procedure of the Special Rapporteur, it is not linked to State ratification of any particular treaty, but rather functions on the basis of any applicable human rights norms. Complainants must exhaust all domestic remedies before lodging a complaint with the Human Rights Council. While this procedure’s required confidentiality has led some human rights advocates to question its efficacy, the opportunity to present evidence of systematic abuses of human rights can help focus the attention of the UN’s most important human rights body and its institutional mechanisms on a member-State’s gross failures to protect the human rights of its own citizens, increasing pressure and criticisms for reform and accommodation.¹⁰⁴

2. UN treaty-monitoring body procedures-UN CERD

Each of the ten core United Nations human rights treaties has a corresponding monitoring body (or, in one case, a committee and a subcommittee) that reviews State implementation of the treaty.¹⁰⁵ As noted earlier, the United States has ratified the International Covenant on Civil and Political Rights, which is monitored by the Human Rights Committee, and the International Convention on the Elimination of All Forms of Racial Discrimination, which is monitored by the UN Committee on the Elimination of Racial Discrimination (CERD). As previously discussed in Part I, both committees have regularly considered issues related to the human rights concerns of indigenous peoples. Although bound to the substantive terms of the two treaties and to the periodic reporting requirements under them, the United States is not subject to the optional complaint procedures entrusted to these committees, because the United States has not agreed to those procedures. In the case of CERD, the United States has not issued a declaration under article 14 of the Convention recognizing the competence of CERD to adjudicate human rights complaints against it.

However, indigenous peoples, groups and individuals, including the Western Shoshone in the United States, have instead been able to use the urgent action/early warning procedure developed by CERD to draw attention to alleged violations of their rights as indigenous peoples.¹⁰⁶ As a formal recommendation made to a treaty-

¹⁰³ <http://www.ohchr.org/EN/HRBodies/HRC/ComplaintProcedure/Pages/HRCComplaintProcedureIndex.aspx>.

¹⁰⁴ See Patrick J. Flood, “The UN Human Rights Council: Is Its Mandate Well-Designed,” 15 *ILSA J. Int’l & Comp. L.* vol. 15 (2008-09), p. 471, 481.); Marisa Viegas Silva, “The United Nations Human Rights Council: Six Years On,” *SUR-Int. J. on Hum Rts.*, vol. 18 (2013), p. 97, 105.

¹⁰⁵ See <http://www.ohchr.org/EN/HRBodies/Pages/TreatyBodies.aspx>.

¹⁰⁶ See Decision 1(68), (10 March 2006) of the Committee on Elimination of Racial Discrimination under its urgent action/early warning procedures: “the Committee considered the situation of the

bound UN Member State to comply with its human rights obligations respecting indigenous peoples, CERD's procedure can be utilized by Native Hawaiians for calling attention to urgent situations brought about by historical and on-going violations of their rights, under CERD's expansive understanding of the non-discrimination norm of the Convention (see Part I.A.2).

Under this procedure, indigenous peoples, organizations and communities can submit information to CERD about pending conflicts or imminent threats to human rights. CERD's early warning procedure is designed to prevent existing problems from escalating into conflict. Its urgent action procedure aims to respond to problems requiring immediate attention to prevent or limit the scale or number of serious violations of the Convention. Requests under the procedure can be submitted to CERD at any time and do not need to correspond with its regularly scheduled sessions.¹⁰⁷

3. Petitions to the Inter-American Commission of Human Rights

As discussed in Part I, the inter-American human rights system of the Organization of American States (OAS) has been particularly active and influential in the progressive development and recognition of indigenous peoples' rights in international law and policy. The OAS was established in 1948 with a Charter proclaiming the commitment of its 35 Member States, including the United States, "to promote the observance and protection of human rights and to serve as a consultative organ of the Organization in these matters."¹⁰⁸

The Inter-American Commission on Human Rights, whose influential jurisprudence on indigenous rights is discussed in Part I of this report, was established by an amendment to the OAS Charter to promote the observance of human rights in the region. The Commission is a seven-person expert body whose members are elected by the OAS Member States.¹⁰⁹

Western Shoshone indigenous peoples in the United States and urged the State party to take immediate action to initiate a dialogue with the representatives of the Western Shoshone peoples." <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=6996&LangID=E>
In the case of the Western Shoshone, the urgent action/early warning procedure was useful in garnering attention, building global alliances and raising awareness on the issue however the United States has yet to implement the decision. A lack of political will and the converging interests of extractive industries have made it difficult to achieve compliance with the decision. In contrast, the current U.S. administration appears more receptive to resolving the claims of Native Hawaiians, and hence may be more open to following a decision by CERD. See generally <http://www2.ohchr.org/english/bodies/cerd/early-warning.htm>

¹⁰⁷ See Rule 94, Rules of Procedure of the Committee on the Elimination of Racial Discrimination, CERD/C/35/Rev.3 (1 January 1989).

¹⁰⁸ See Article 106 of the OAS Charter.

¹⁰⁹ The work of the Inter-American Commission revolves around three principal activities: dealing with individual petitions, monitoring the human rights situations of Member States and addressing

The Commission is tasked with protecting the fundamental human rights enumerated in the American Convention on Human Rights and the American Declaration of the Rights and Duties of Man (1948). As noted earlier, although the United States is not a party to the American Convention, the American Declaration applies to it by virtue of its membership in the OAS.¹¹⁰

Included in the Commission's mandate is the power to consider individual human rights complaints ("petitions") regarding violations of the American Declaration.¹¹¹ If the Commission determines that the complaint is admissible, it can issue reports and recommendations, and may follow-up with procedures to encourage State compliance, for example by requesting written information from the State on implementation measures or by scheduling compliance hearings and meetings.¹¹²

The Commission's practice of issuing final written reports and recommendations on important cases brought by indigenous petitioners throughout the Americas, including in the case of *Mary and Carrie Dann v. United States*,¹¹³ generates a permanent record of an authoritative decision by a widely-respected international human rights body after considerable investigation, clarification of issues, and in-person hearings. Reports, findings and recommendations issued by the Commission on complaints filed by indigenous petitioners concerning historic and on-going violations of their rights can be a catalyst and energizer for the creation of transformative remedies.¹¹⁴

Again, just as with the United Nations system, there are limitations on this process depending on the level of commitment and engagement by the State. The United States maintains the position that Commission decisions are non-binding and merely advisory. At the same time, U.S. State Department representatives actively engage with the Commission by responding to complaints and participating in public hearings on individual petitions and thematic matters. The value of using the inter-American system lies in the ability to communicate with the State and have opportunities for face-to-face meetings with government officials who may otherwise be inaccessible. Furthermore, the Commission can initiate and facilitate a friendly

thematic areas. See, <http://www.oas.org/en/iachr/mandate/what.asp>; Tom J. Farer, "The Inter-American Commission on Human Rights: Operations and Doctrines," 9 *IJLL* 251 (1981), p. 154.

¹¹⁰ The American Declaration affirms many of the same rights as those in the UN Universal Declaration of Human Rights: <http://www.oas.org/en/iachr/mandate/Basics/declaration.asp>.

¹¹¹ See Article 19 and 20 of the Statute of the Inter-American Commission on Human Rights.

¹¹² Article 48 of the Rules of Procedure of Inter-American Commission on Human Rights.

¹¹³ *Dann* case, *supra* note 48.

¹¹⁴ The Commission issued the report and presented to the Inter-American Court of Human Rights (whose jurisdiction does not extend to the United States) the case that established the landmark precedent on indigenous land rights, the *Anas Tingni* case, discussed at text accompanying note 41, *supra*. Other important cases reported on by the Commission are referred to at text accompanying notes 43-49, *supra*. See generally S. James Anaya and Robert A. Williams, Jr., "The Protection of Indigenous Peoples' Rights over Lands and Natural Resources under the Inter-American Human Rights System," *Harv. Hum. Rts. J.*, vol. 14 (2001), p. 33.

settlement of the matter or participate in the development of implementation plans or compliance measures with respect to its decisions and recommendations.

4. Exhaustion of Domestic Remedies and Access to Relevant International Forums

The principle of exhaustion of domestic remedies, which requires a petitioner to use any available domestic procedures of a judicial character to obtain a remedy for human rights violations before approaching international bodies, is generally applicable only to formal complaint procedures such as that for petitions to the Inter-American Commission on Human Rights.¹¹⁵ The exhaustion requirement is not applicable to non-adjudicatory or mostly precautionary procedures like the urgent action/early warning procedure of UN CERD or the UN Human Rights Council special procedures mechanisms, such as the communications procedure of the Council's Special Rapporteur on the rights of indigenous peoples. Further, the requirement only requires exhaustion of existing domestic procedures that are judicial in nature; petitioners need not exhaust efforts to establish new legislation or develop new avenues of domestic redress.

Even with the formal complaint procedures established by the Inter-American Commission that normally require petitioners to demonstrate they have already pursued and exhausted the remedies of the domestic legal system, in many contexts indigenous petitioners have been able to show that there are no effective or available domestic remedies of a judicial character. In such cases, the Commission has invoked the well-recognized exception in international law to the normal exhaustion requirements.¹¹⁶

¹¹⁵ Article 31 of the Rules of Procedure of the Inter-American Commission incorporates the principle of exhaustion of domestic remedies and its exceptions. The rationale of the exhaustion rule is that the State in issue should be given an opportunity to remedy alleged violations of human rights internally before answering to international forums. See IACHR Report No. 17/06, Petition 531-01, Admissibility, Sebastian Claus Furlan and Family vs. Argentina (March 2, 2006), para 32. For the exhaustion rule in general, see Velasquez Rodríguez Case, Preliminary Objections (Judgment of July 29, 1988, Series C: Decisions and Judgments N. 4,) para 59-60. See generally Riccardo Pisillo Mazzeschi, "Exhaustion of Domestic Remedies and State Responsibility for Violation of Human Rights," *Italian Y.B. Int'l L.*, vol. 10,(2000), p.17, 17, 36; A.A. Cangado Trindade, "Origin and Historical Development of the Rule of Exhaustion of Local Remedies in International Law," *Rev. BDI*, vol. 12 (1976), p.499, 526; A. O. Adede, "A Survey of Treaty Provisions on the Rule of Exhaustion of Local Remedies," *Harv. Int'l. L. J.*, vol. 18 (1977), p. 1, 14.

¹¹⁶ See, e.g., Hul'qumi'num Treaty Group v. Canada (Admissibility) ("Admissibility Report") Inter-Am.C.H.R., Report No. 105/09, Petition 592-07, October 30 (holding that if the ruling of the highest court shows that pursuing remedy is of no use, exhaustion of remedies is not required); The Kalina and Lokono Peoples vs. Suriname (Admissibility), Report No. 76/07, Petition 198/07 (October 15, 2007) (holding that to be effective, there must be just laws in the Member State, and the judicial remedy must be fair); The Kichwa Peoples Of The Sarayaku Community And Its Members Vs. Ecuador, (Admissibility) Report No. 64/04, Petition No. 167/03 (October 13, 2004) (holding that to require exhaustion, the domestic remedy must be adequate.)

As noted earlier, the United States has so far failed to provide full and adequate redress for its admitted violations of Native Hawaiian rights to self-determination and other collective rights that are affirmed by international law. Moreover, neither of the recent directly applicable U.S. Supreme Court cases, the 2000 decision in *Rice v. Cayetano*¹¹⁷ and the 2009 decision in *Hawaii v. Office of Hawaiian Affairs*,¹¹⁸ has provided, or even suggested, an appropriate remedy. In *Rice v. Cayetano*, the Court declined to address the issue of whether the rules and principles of United States federal Indian law that recognize and protect the inherent rights to self-determination and self-government of American Indian tribes apply to Native Hawaiians under United States law,¹¹⁹ and in *Hawaii v. Office of Hawaiian Affairs*, the Court arrived at the narrow conclusion that the 1993 Congressional Apology did not strip the state of its purported authority to sell ceded lands. Taken together, these cases leave open the argument that Native Hawaiians are without effective domestic remedies of a judicial character for conditions that, rooted in historical circumstances, constitute ongoing violations of their human rights. Therefore, depending on the careful formulation of a complaint and the specific rights violations alleged, the exhaustion requirement might not necessarily stand as a barrier to pursuing remedies within the inter-American human rights system.

B. UN Decolonization procedures

As discussed in Part I.C., the United Nations decolonization regime promotes the self-determination of peoples subject to classical conditions of colonialism. The UN General Assembly's Special Political and Decolonization Committee (the Fourth Committee), and the Special Committee on the Situation with regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples (also known as the Committee of 24) are the UN supervisory bodies that oversee decolonization processes for territories listed as non-self-governing under article 73 of the UN Charter.

¹¹⁷ *Rice v. Cayetano*, 528 U.S. 495 (2000).

¹¹⁸ *Hawaii v. Office of Hawaiian Affairs*, 129 S.Ct. 1436 (2009).

¹¹⁹ In its opinion in *Rice*, at 518-19, the Court stated the following: "If Hawaii's restriction were to be sustained under *Mancari* we would be required to accept some beginning premises not yet established in our case law. Among other postulates, it would be necessary to conclude that Congress, in reciting the purposes for the transfer of lands to the State – and in other enactments such as the Hawaiian Homes Commission Act and the Joint Resolution of 1993 – has determined that native Hawaiians have a status like that of Indians in organized tribes, and that it may, and has, delegated to the State a broad authority to preserve that status. These propositions would raise questions of considerable moment and difficulty. It is a matter of some dispute, for instance, whether Congress may treat the native Hawaiians as it does the Indian tribes. [...] We can stay far off that difficult terrain, however." (Emphasis added.)

As noted above, Hawai'i was listed as a non-self-governing territory, beginning in 1946.¹²⁰ The United States, however, removed Hawai'i from the list in 1959 upon Hawai'i's admission to statehood following the controversial plebiscite that offered only a yes-no option on Hawai'i's entering the union as the fiftieth state.¹²¹

Many Native Hawaiian advocates have argued forcefully that because of the irregularities and alleged outright illegalities in the decolonization process, the UN General Assembly should re-inscribe Hawai'i on its list of non-self-governing territories. However, it bears remembering that the UN decolonization regime is designed to ensure self-governing status and thereby advance self-determination for the people of the whole of the territory, not just for particular indigenous peoples living within the territory. Further, re-inscription would not guarantee the necessary cooperation by the United States, as the "administering power," to reopen decolonization procedures.¹²²

In fact, the United States has stated explicitly that the non-self-governing territories over which it operates as the administering power (which today are American Samoa, Guam, and the U.S. Virgin Islands) are subject to the domestic laws and policies of the United States, and will remain so unless and until it says otherwise.¹²³ It is also United States policy that "Administering Powers alone have the authority to determine when the obligations under Article 73(e) of the UN Charter have ceased."¹²⁴ The United States regularly votes against or abstains and ignores General Assembly resolutions, which, by addressing matters related to the governance of non-self-governing territories, in its view "interfere with [its] authority".¹²⁵

Nevertheless, if re-inscription were achieved, it could potentially provide a level of oversight by the United Nations, through its committees on decolonization, focused on the particular concerns of Native Hawaiians, even in the absence or apart from a move toward a new plebiscite or referendum to reconsider the political status of Hawai'i. In its oversight of the listed territories of Guam and New Caledonia, the Committee of 24 has paid particular attention to the concerns of the territories' indigenous peoples, who in terms of population are minorities amid settler

¹²⁰ See General Assembly Resolution. 66(I), U.N. GAOR, 14th Sess., U.N. Doc. A/64 (Dec. 14, 1946).

¹²¹ See An Act to provide for the Admission of the Hawaii into the United States, Pub. L. No. 86-3, 73 Stat. 4 (1959).

¹²² See notes 68-69 and accompanying text, *supra*.

¹²³ See, e.g., "Explanation of Vote on the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples by the Specialized Agencies and the International Institutions Associated with the United Nations (25 July 2013), available at <http://usun.state.gov/briefing/statements/212483.htm>.

¹²⁴ See, e.g., Bureau of International Organization Affairs, Report Annex: United States Participation in the United Nations 2009 (30 September 2010), available at <http://www.state.gov/p/io/rls/rpt/148540.htm>.

¹²⁵ *Ibid.* See also United States Participation in the United Nations-2004, available at <http://www.state.gov/documents/organization/54454.pdf>.

populations. Re-inscription of Hawai‘i as a non-self-governing territory by the General Assembly would be politically difficult, although not necessarily impossible given the justification for it and in light of the relatively recent re-listing of French Polynesia over the objection of France.¹²⁶

French Polynesia, the principal island of which is Tahiti, was, like Hawai‘i, originally considered by the General Assembly to be a non-self-governing territory under the UN decolonization regime.¹²⁷ However, after 1946, when the General Assembly issued its first resolution concerning the transmission of information under article 73(e) of the UN Charter,¹²⁸ the Government of France refused to comply with its reporting requirement vis-à-vis the islands.¹²⁹ Beginning in 1947, French Polynesia no longer appeared on the list of non-self-governing territories. In fact, it did not return to the list for three-quarters of a century, during which time France conducted almost 200 nuclear tests at the Moruroa and Fangataufa atolls in the Tuamotu Archipelago. In 2013, at the urging of the majority Tahitian (or Maohi) indigenous people of the islands, and with the active backing by a number of Pacific Island countries, sufficient votes within the General Assembly were mustered for French Polynesia to be relisted, despite the objections of France, whose position on the matter was supported by the United States. In an official statement, the French Ministry of Foreign Affairs called the General Assembly’s resolution a “flagrant interference”.¹³⁰ Nonetheless, UN supervision under the decolonization regime, with particular attention to the territory’s indigenous people, has been reinstated for French Polynesia, with the support of the majority of UN Member States. Whether such an outcome could be achieved for Hawai‘i is open to question.

IV. Comparative practices with respect to mechanisms utilized by States to recognize indigenous peoples and their rights and address their claims

Whatever the relevance or utility of international procedures for indigenous peoples in any given case, the State is ultimately responsible – both as a matter of international human rights law and as a matter of practical necessity – to provide domestic redress for violations of indigenous peoples’ rights and to secure the means and protective measures for the exercise of those rights. This final Part of the report provides a brief overview of relevant contemporary examples of the different types of

¹²⁶ See General Assembly Resolution 67/265 (May 1, 2013). The Resolution, which refers directly to articles 3 and 4 of the UN Declaration on the Rights of Indigenous peoples, affirms “the inalienable right of the people of French Polynesia to self-determination and independence ...”

¹²⁷ As a “French Establishment in Oceania.” See A/RES/66 (1) (14 December 1946).

¹²⁸ *Ibid.*

¹²⁹ See A/RES/67/265 (23 August 2013).

¹³⁰ Ministry of Foreign Affairs, Résolution adoptée par l’Assemblée générale des Nations unies sur la Polynésie française (17 May 2013), available at <http://www.diplomatie.gouv.fr/fr/politique-etrangere-de-la-france/onu/evenements-et-actualites-lies-aux/actualites-21429/article/resolution-adoptee-par-l-assemblee>.

approaches and procedures that have been utilized by States to address indigenous peoples' claims to self-determination and other collective rights. These examples can only begin to suggest the many important issues for Native Hawaiians to consider in developing their own ideas as appropriate for the protection and exercise of their rights. Nonetheless, they do provide general guidance on the types of mechanisms that have been used by States to recognize indigenous people rights, and they provide insights into important lessons indigenous peoples have learned in their practical efforts to secure their rights.

A. Overview of differing modalities

States have engaged in a number of different modalities to provide recognition of indigenous peoples and address their claims to self-determination, self-governance and other collective rights. Globally, these mechanisms include and oftentimes combine varying degrees of constitutional, legislative, judicial and administrative or executive agency recognition of indigenous governing entities at national or regional governmental levels.

The United States, for example, has historically relied on treaties, congressional legislation and executive agency action for purposes of recognizing American Indian tribes as indigenous self-governing entities with sovereign authority to control membership decisions and other internal matters through governmental bodies chosen by the people of the tribes themselves.¹³¹ The first brief case study in this Part on the Southern Ute Tribe demonstrates that the “tribal self-determination model” of United States federal Indian law and policy of the last fifty years can be used successfully by tribes to achieve many of their self-determination goals and aspirations.

The second case study on the Maine Indian Settlement Act demonstrates the problems and setbacks experienced by Maine's indigenous peoples who were recognized by the United States government through Congressional recognition legislation following their successful land claim against the state of Maine in 1975. That legislation departed in significant respects from the long-established tribal self-determination model of United States Indian law and policy in recognizing some, but not all of the self-determination and other collective rights belonging to federally recognized Indian tribes in the continental United States.

As previously discussed in this report (Part I.C.), New Caledonia's indigenous minority Kanak people have been able to secure significant self-determination and other collective rights for themselves within the broader framework of New Caledonia's moves toward greater autonomy and independence under the United Nations' decolonization regime since its re-inscription on the General Assembly's non-self-governing territories list in 1986. The short case study on the Kanak focuses

¹³¹ See David H. Getches, Charles F. Wilkinson, Robert A. Williams, Jr. & Matthew Fletcher, *Federal Indian Law: Cases and Materials* (West, 6th ed. 2011), pp. 8-29.

specifically on the reforms engendered by the landmark agreement known as the Nouméa Accord, which establishes a process for the gradual decolonization and self-determination of New Caledonia as a whole, but also has provided the framework for a host of measures securing greatly expanded self-determination rights for the Kanak people.

The Maori in New Zealand have been able to secure important rights to lands and resources through parliamentary legislation, including the establishment of the Waitangi Tribunal as an adjudicative body empowered to investigate and recommend redress for breaches of the 1840 Treaty of Waitangi. Maori rights to self-determination are specifically recognized through legislation that grants reserved seats for Maori representatives in the national Parliament.¹³² The case study on the Maori provides an example of a Polynesian indigenous people with a highly dispersed communal land base who have sought to achieve their self-determination goals through legislatively enacted treaty settlements recommended by the Waitangi Tribunal and vigorous participation in New Zealand's parliamentary system, resulting in other important legislation recognizing Maori rights.

Canada's 1982 constitution, along with historical and modern treaties and a comprehensive statutory regime that includes the 1876 Indian Act, all work to establish rights to recognition, limited forms of self-government, control over membership and elections and rights to land and resources for its First Nations and other indigenous peoples.¹³³ The case study on the British Columbia Treaty Commission focuses on the experiences of First Nations indigenous peoples under Canada's comprehensive land claims process that attempts to address their self-determination, property and other collective rights through a negotiated "treaty" settlement.

Norway, Sweden and Finland have all established separate Saami parliaments, which, to varying degrees, advance the Saami indigenous peoples' rights to self-determination and other collective rights.¹³⁴ This final case study provides another example of highly dispersed indigenous peoples making significant strides toward their self-determination goals, in this case through their own parliamentary systems of government.

¹³² Xanthaki, D. OSullivan, "Indigenous Participation in Elective Bodies: The Maori in New Zealand," *Int'l J. on Minority & Group Rts.*, vol. 16 (2009), p. 181, at 190.

¹³³ *Ibid.* at pp. 953-980.

¹³⁴ Malgosia Fitzmaurice, "The New Developments Regarding the Saami Peoples of the North," *International Journal on Minority and Group Rights*, vol. 16 (2009), p. 67, 80; Konstantia Koutouki and Doris Farget, "Contemporary Regulation of Public Policy Participation of the Saami and Roma: A Truncated Process," *International Journal on Minority and Group Rights* 427, 446 (2012); Barbara Ann Hocking, "Evaluating Self-determination of Indigenous Peoples through Political Processes and Territorial Rights: The Status of the Nordic Saami from an Australian Perspective," *Finnish Y.B. Int'l L.*, vol. 11 (2000), p. 289, 298-301. 2000).

B. Examples and lessons learned

1. Southern Ute Tribe of Colorado

The Southern Ute Indian Tribe, which consists of two bands (the Mouache and the Caputa) is a federally-recognized tribe of approximately 1,400 persons whose ancestral lands were located in present-day Colorado, Utah and New Mexico. The Southern Ute Indian Reservation was established by treaty in 1868 and initially covered almost one-third of present-day Colorado. Under the terms of the 1874 Brunot Agreement,¹³⁵ the Tribe ceded millions of acres to the federal government while reserving its right to continue to hunt on those lands “so long as the game lasts.” The Reservation now consists of just over 1,000 square miles in southwestern Colorado.¹³⁶

Up through the 1960s, the area’s enormous natural resource wealth was managed exclusively by the federal government: the United States granted highly-profitable exploration and extraction leases to large oil and gas corporations, and collected significant royalties, without ever engaging in meaningful consultation with the Tribe, which received on average less than \$500,000 per year. However, beginning in the 1970s, the United States dramatically turned away from its express legislative policy of terminating tribes along with the federal government’s trust responsibilities, and embraced a new policy of self-determination, announced by President Richard Nixon in 1970 and implemented into law by the Indian Self-determination and Education Assistance Act of 1975.¹³⁷

It was against this backdrop in 1974 that the Southern Ute Tribe decided to take control of its own economic and environmental destiny. The Tribe issued a moratorium on the granting of oil and gas leases on its reservation lands. Over time, the Tribe established its own energy production company, built its own wells, and slowly started purchasing others. Today, the Southern Ute Indian Tribe is a major energy supplier and producer of natural gas in the United States, while operating businesses in 14 states.¹³⁸

Those businesses include not only production and transportation of oil and gas, but also real estate development, housing construction, biotech, and gaming. The Tribe’s Permanent Fund invests its energy royalties and related business profits in

¹³⁵ Brunot Agreement (1874), available at <http://ocs.fortlewis.edu/forestPlan/roundtable/brunotAgreement.pdf>.

¹³⁶ Under an agreement reached in 2008 with the Colorado Division of Wildlife (now Colorado Parks and Wildlife), the Tribe asserted and, for the first time in more than 130 years, began to exercise its hunting rights on lands outside the Reservation.

¹³⁷ See David H. Getches, Charles F. Wilkinson, Robert A. Williams, Jr. & Matthew Fletcher, *Federal Indian Law: Cases and Materials* (West, 6th ed. 2011), pp. 216-224.

¹³⁸ See Jonathan Thompson, “The Ute Paradox,” *High Country News*, July 12, 2010, at <https://www.hcn.org/issues/42.12/the-ute-paradox>. See also “Statement of Matthew Box, Vice-Chairman, Southern Ute Indian Tribe, in U.S. House of Representatives, “The Evolving West: Oversight Hearing before the Committee on Natural Resources” (28 February 2007), at 49.

securities that generate the revenue used to pay for government and social services. The Tribe's Growth Fund operates and manages its ever-expanding and diversified portfolio of companies and investments.¹³⁹ The Tribe's health, educational and cultural programs and institutions are state-of-the-art, and any member of the Tribe who wishes to earn a post-secondary degree is eligible for a full scholarship that covers all tuition and living expenses. The Tribe's Southern Ute Community Action Programs, Inc. is one of the largest non-profit organizations on the Western Slope of Colorado, and serves both tribal members and non-members.

The experience of the Southern Utes in utilizing the advantages of the United States "tribal self-determination" model demonstrates that with access to and control over a significant and economically valuable natural resource base and a federally recognized treaty-defined reservation, indigenous peoples in the United States can flourish and achieve many of their most important self-determination goals and aspirations. The Southern Utes of course, were able to take advantage of the full range of laws and policies benefitting Indian tribes in the U.S. because of the long-established recognition of their rights in treaties and statutes enforced and protected under the rules and principles of federal Indian law. On the other hand, what happens when a group of indigenous peoples who have never been recognized as possessing any of the rights belonging to federally recognized Indian tribes are granted only some, but not all of those rights in modern settlement legislation enacted by Congress is illustrated by the experience of Maine's indigenous tribal peoples under the Maine Indian Claims Settlement Act, discussed in the next section of this Part.

2. Maine Indian Claims Settlement Act

The United States government, by treaty, statute and administrative regulation, recognizes some 566 Indian nations as exercising self-determination and other collective rights over their reservation lands, their membership, and, in limited instances, even over the criminal and civil conduct of non-members who come onto their reservations. Like the Southern Ute Tribe discussed above, most of these Indian tribal nations were recognized by treaties with the United States, negotiated in the 18th and 19th centuries, and protected and enforced by U.S. courts as the supreme law of the land under the U.S. Constitution.¹⁴⁰

Congress ended all treaty making with Indian tribes in 1871. However, in the late 20th century, several tribes that had never negotiated historical treaties with the U.S. were successful in bringing federal court actions that resulted in Congressional legislation recognizing them as Indian tribes with rights over a designated, federally established and protected reservation land base.

¹³⁹ See <http://www.sugf.com/>.

¹⁴⁰ See David H. Getches, Charles F. Wilkinson, Robert A. Williams, Jr. & Matthew Fletcher, *Federal Indian Law: Cases and Materials* (West Publ., 6th ed. 2011), pp. 8-29.

The Maine Indian Claims Settlement Act was the first and most significant of these Congressional recognition acts. It grew out of a successful 1975 landmark federal district court case from the state of Maine demanding recognition of a federal trust relationship over tribal lands, *Joint Tribal Council of Passamaquoddy Tribe v. Morton*.¹⁴¹ Within months of the ruling, the federal government announced that the Passamaquoddy Tribe and the Penobscot Indian Nation would be eligible for special services, such as education and health care, typically provided to federally recognized tribes.¹⁴²

Several years of intense negotiations followed the decision, resulting in Congressional passage of the Maine Indian Claims Settlement Act of 1980.¹⁴³ The Act extinguished all indigenous title in Maine. In return, the tribes received \$81.5 million, with \$27 million placed in trust and the remaining \$55 million allocated towards the tribes' purchase of up to 300,000 acres of land in the state. However, as part of the settlement process leading to the establishment of the tribes' federally recognized reservations, governing entities, and membership control, Congress significantly departed from many of its prior good practices in protecting tribal self-governing authority from state jurisdictional encroachments on the reservation.¹⁴⁴

Departing significantly from federal Indian law's model of tribal immunities from invasive state laws and regulations, the tribes' governing authorities were declared municipalities of the state of Maine. While strictly defined internal tribal matters such as membership and child welfare were exempted from state law or regulation, the tribes were subjected to all responsibilities as a municipality under Maine law, as interpreted by Maine's courts, legislated by Maine's legislature, and executed and implemented by Maine's executive branch of state-level government.

The tribes were also required to pay an amount of money as "payments in lieu of taxes" to the State of Maine under the Act, another significant departure from federal Indian law's recognition of tribal immunity from state taxation and revenue-raising authority. At the same time, tribal representation in the Maine legislature is only by way of observer status, with no voting rights;¹⁴⁵ this despite Maine's exercise of supreme jurisdictional authority over the tribes in most areas of self-governance. Additionally, any federal law enacted after 1980 for the general benefit of Indian tribes would not apply to Maine's tribes, unless specifically made applicable to the state by Congress.

Decades of litigation, protests, and wrangling between tribal and Maine state officials over such vital matters as environmental and water quality control, criminal and civil jurisdiction over the reservation and economic development rights,

¹⁴¹ *Joint Tribal Council of Passamaquoddy Tribe v. Morton*, 528 F. 2d 370 (1975).

¹⁴² See generally Diana Scully, Executive Director, *Maine Indian Tribal Settlement Commission, Maine Indian Claims Settlement: Concepts, Context, and Perspective*, p. 2-8 (February 14, 1995).

¹⁴³ The Maine Indian Claims Settlement Act, Pub. Law 25 U.S.C. 1721-1735.

¹⁴⁴ See generally text and accompanying notes in Part IV.B.1., *supra*.

¹⁴⁵ Stephen Brimley, "Native American Sovereignty in Maine," *Maine Pol'y Rev.* (Fall/Winter, 2004), p. 20-24.

including casino gaming, have ensued since passage of the Act in 1980. While Maine's tribes have benefited from funding and program support from the federal government, enabling them to establish and maintain their own health, police, environmental and education departments, their members continue to face proportionally higher rates of unemployment, significant health disparities, and lower rates of educational attainment and adequate housing than the overall population in Maine.¹⁴⁶

Maine's tribal leaders have repeatedly called for a complete and comprehensive review of the 1980 Settlement Act to identify what they insist are vitally needed revisions to the legislation that will improve conditions on their reservations and achieve the promise of self-determination they had hoped for through Congressional enactment of the legislation. But it is unlikely that Maine's non-Indian politicians and policy makers will surrender the political advantages and sovereign legal authority they secured when Congress first enacted the Maine Indian Claims Settlement Act. As Maine's Attorney General noted at the time the legislation was being shaped and debated:

[T]he framework of laws in this Act is by far the most favorable state-Indian jurisdictional relationship that exists anywhere in the United States. As a general rule, States have little authority to enforce state laws on Indian Lands. Tax laws, water and air pollution laws, zoning laws, health laws, contract and business laws and criminal laws—all those state laws are usually unenforceable on state Indian Lands ... I believe such a result would be intolerable. The proposal before you not only avoids such a situation, but recovers for the State much of the jurisdiction over the existing reservations that it has lost in ... recent litigation.¹⁴⁷

There are numerous lessons of importance for Native Hawaiians to learn from the experience of Maine's tribes with Congressional legislation recognizing them as possessing, some, but not all of the rights possessed by federally recognized Indian tribes. As Maine's tribes have learned, once enacted into federal legislation, the jurisdictional powers and authority of an indigenous governing entity recognized by a Congressional act may be extremely difficult to change, even when subsequent experience clearly shows that the legislation itself works to frustrate an indigenous people's claims to self-determination and other collective rights under international law. Of critical import is the fact that the state, directly affected by such legislation, in this case the state of Hawai'i, will have far more significant input and say over the final shape and contours of any such Congressional legislation through its own

¹⁴⁶ See *id.*

¹⁴⁷ Quoting Maine's then Attorney General William Cohen, at [http://www.wabanaki.com/me_land_claim.htm#Federal and State Recognition](http://www.wabanaki.com/me_land_claim.htm#Federal_and_State_Recognition) .

members in Congress. At the same time the indigenous group most directly affected by the legislation, Native Hawaiians, will have no guarantee that amendments and corrective legislation will be enacted by Congress at their insistence or request in the future, regardless of their experiences under the new legislative regime, or their assertions that the legislation itself violates their rights to self-determination and other collective rights under international law.

There are indeed examples of major pieces of indigenous rights and self-government legislation that have been rewritten and revised, and thereby improved, through later amendments. The Alaska Native Claims Settlement Act,¹⁴⁸ which was enacted in 1971, has been amended on several occasions, most significantly in 1987,¹⁴⁹ when numerous outstanding issues were addressed, including matters related to the transferability of stock in the Native corporations established by the Act, the stock ownership eligibility of Alaska Natives born after 1971, and the protection of corporation lands from taxation. The first modern treaty in Canadian history, the landmark Nisga'a Final Agreement,¹⁵⁰ which was signed in 1999 and enacted into law in 2000, was amended at the request and with the consent of the Nisga'a Nation in 2014.

The experience of Indian tribes in the state of Maine, however, suggests that a bad bill can in fact make for bad legislation that stays that way. Maine tribes have found themselves confronting numerous contentious issues, jurisdictional conflicts, and drawn-out court cases with the state since passage of the Maine Indian Claims Settlement Act in 1980 that established and recognized self-governing entities for the Passamaquoddy Tribe and the Penobscot Indian Nation. Yet, no significant corrective amendments or reforms to the legislation called for by the tribes have ever been passed by Congress. One result has been that Maine's tribes have now appealed to the UN human rights system, alleging that the prohibitions and exclusions from rights and benefits recognized for historical treaty tribes under the Maine Indian Claims Settlement Act are discriminatory and work to seriously hinder the exercise of their rights to self-determination and other collective rights under international law.¹⁵¹

In light of these cautionary lessons, the type of rule-making process proposed by the Department of the Interior for reestablishing a government-to-government relationship with the Native Hawaiian community may actually be far more advantageous, flexible, and capable of modification and refinement in the future for Native Hawaiians than any final version of legislation likely to emerge from Congress in the near future.

¹⁴⁸ Alaska Native Claims Settlement Act, 43 U.S.C. 1601 et seq.

¹⁴⁹ Alaska Native Claims Settlement Act Amendments of 1987, Pub. Law 100-241 101 Stat. 1788. See also, e.g., ANCSA Land Bank Protection Act of 1998, Pub. Law 105-333 112 Stat. 3129.

¹⁵⁰ Nisga'a Final Agreement, available at <http://www.nkn.ca/files/u28/nis-eng.pdf>

¹⁵¹ See Indian Country Today, "Tribes Ask for UN Help for Fighting Anti-Indian Laws in Maine," August 22, 2013, at

<http://indiancountrytodaymedianetwork.com/2013/08/22/maine-commission-seeks-un-action-states-tribal-human-rights-violations-150990>

*3. The Kanak people in New Caledonia*¹⁵²

As previously noted in this report (Part I.C.), New Caledonia has been moving toward greater autonomy and independence under the United Nations' decolonization regime since its re-inscription on the General Assembly's non-self-governing territories list in 1986. But the bulk of the reforms achieved under French autonomy legislation and carefully negotiated agreements with France and the territorial government of New Caledonia seek to secure and guarantee the self-determination and collective rights of the general population of the territory. Significantly, however, the Kanak people, who in terms of population are a minority within New Caledonia's multi-ethnic population (approximately 37 per cent of the total population of the territory), have been able to secure significant self-determination for themselves and other collective rights within the broader framework of New Caledonia's moves toward decolonization.

The landmark agreement known as the Nouméa Accord establishes a process for the gradual decolonization and self-determination of New Caledonia as a whole. Signed in 1998 between the Government of France, the New Caledonia pro-independence Kanak coalition (FLNKS) and the New Caledonia pro-unity and primarily white settler movement (RPCR), the Accord became law through incorporation into the French Civil Code and amendment to the French Constitution.

The agreement provides for the irreversible transfer of governmental functions from France, except for certain reserved powers in the fields of defense, security, administration of justice, and finance. Major governmental institutions are to be controlled by the people of New Caledonia, including a new Congress of New Caledonia comprised of representatives of the three Provincial Assemblies. Under the Accord, Congress appoints the Government of New Caledonia, led by a chief executive as President of that government.

The Accord establishes a timeline for a referendum on the question of independence of New Caledonia from France, to be held by 2019. The Accord also defines New Caledonian citizenship, premised on residence prior to 1988, which secures the right to vote in special elections such as the upcoming independence referendum.

Under the Accord, New Caledonia is able to engage in international cooperation with countries of the Pacific Ocean region. At least until its independence referendum, its present status is in between that of an autonomous

¹⁵² This section of the report has been adapted from the comprehensive analysis of the human rights situation relating to the Kanak indigenous people in New Caledonia contained in the Report of the Special Rapporteur on the rights of indigenous peoples, James Anaya – The situation of Kanak people in New Caledonia, France, U.N. Doc. HRC/18/35/Add.6 (2011). See also Alan Braman, "The Noumea Accords: Emancipation or Colonial Harness?" *Tex. Int'l L. J.*, vol. 36 (2001), p. 277, at 282, 285-87, 291.

country and *collectivité d'outre-mer* (overseas collectivity) of France with its own territorial congress and government. Meanwhile, New Caledonia still remains part of the French Republic, with two representatives in the French National Assembly and two senators in the French Senate. Inhabitants of New Caledonia are French citizens, carry French passports, and take part in the legislative and presidential French elections.

With the Nouméa Accord, New Caledonia and France have entered into a process that falls within the framework of the United Nations decolonization regime, but at the same time moves to secure the rights of the Kanak population as indigenous peoples in particular. Most relevant to the situation of Native Hawaiians, the Accord has enabled the indigenous Kanak people to achieve important measures for the exercise of their self-determination and other collective rights, within the broader context of the highly adaptive framework provided by New Caledonia's decolonization process.

Significantly, the Accord acknowledges the Kanak people as the original indigenous inhabitants of the territory, and recognizes Kanak identity and customary institutions. Measures to advance Kanak cultural expression, economic investment and capacity building are also part of the agreement. The Accord also establishes a Kanak Customary Senate and specifically recognizes the legitimacy of the Kanak system of customary institutions and laws that govern relations within and among Kanak clans and communities. An advisory body, the Customary Senate is made up of 16 members, two from each of the eight customary areas of New Caledonia. Congress must consult the Customary Senate on all issues affecting Kanak identity. In the event of a stalemate between the two bodies, however, the New Caledonia Congress prevails.

The Customary Senate possesses the power to propose and call for a vote on new laws related to Kanak identity. In addition, members of the Customary Senate sit on the Economic and Social Council, an advisory body that must be consulted whenever Congress debates any issues of an economic or social character. There is, however, no obligation on the part of the Congress to follow proposals made by the Customary Senate, and it lacks binding decision-making powers.

Under the Kanak customary justice system, which is recognized under the Accord, disputes are settled by a consensus process among lower chiefs or headmen, and referred, if necessary, to leading chiefs among the Kanaks. Under the French system of justice that is merged with New Caledonia law, Kanak people are provided with the option of utilizing customary authorities regarding civil matters such as marriage, adoption, inheritance, and some land issues. However, their jurisdiction is sharply limited by France, especially in criminal matters. The State provides for customary advisers to help judges understand customary law and the State's role in settling disputes whenever the parties are from different Kanak tribes or clans with different customary justice systems. And Kanaks can always voluntarily choose to take their disputes to the State civil court.

Efforts are also being made to address low levels of Kanak participation in government and public administration, especially among higher-level positions. The

Accord commits France to provide technical assistance and funding for advancing the preservation, continuity and learning of Kanak culture, and additional agreements have been negotiated to protect and promote Kanak cultural heritage. France, for example, has agreed to inventory Kanak cultural artifacts in museums and to promote their appropriate use or disposition.

As New Caledonia prepares for the anticipated referendum on its status and relation to France, it will be crucial for both Kanak and non-Kanak citizens to appreciate that self-determination has many discrete and separate aspects and dimensions that extend beyond and are separate from questions of statehood or the formal political status of New Caledonia as a whole. The Kanak people's acceptance of the Nouméa Accord can itself be seen as a major step toward their exercise of self-determination.

There are a number of important lessons for Native Hawaiians to learn from New Caledonia and the Kanak experience. Central among these is that re-inscription on the UN non-self-governing territories list does not necessarily lead to a process of decolonization that guarantees an indigenous minority's self-determination over the entire de-colonizing territory to the exclusion of the majority settler population. However, while non-Kanaks will be permitted to vote in the independence referendum and will in any event enjoy full citizenship within the territory, special arrangements have been put in place to address the particular concerns of the Kanak people, who now – like Native Hawaiians – constitute a numerical minority within the territorial unit in which they live. It is clear that these or other similar arrangements will have to be in place whatever the ultimate political status of the whole of New Caledonia is. Even so, the example of New Caledonia shows how an indigenous minority such as the Kanaks can skillfully utilize the decolonization process, though not under their exclusive control, to significantly advance and better secure important rights to self-determination and other collective rights, while at the same time reviving and revitalizing customary modes of self-government, cultural expression, and law-making authority. Particularly worthy of note here is the complementarity of the decolonization and indigenous rights regimes, with both being employed for the benefit of New Caledonia as a whole and for the Kanak people in particular.

4. Maori of New Zealand¹⁵³

The founding of the modern State of New Zealand, which today is an independent country, dates back to 1840, when the government of Great Britain and representatives of the islands' indigenous people, the Maori, agreed to the Treaty of

¹⁵³ This discussion of Maori self-governance in New Zealand is adapted from the Report of the Special Rapporteur on the Rights of Indigenous Peoples, James Anaya – The situation of Maori people in New Zealand, U.N. Doc. HRC/18/35/Add.4 (31 May 2011) and also draws upon the Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, Rodolfo Stavenhagen – Mission to New Zealand, U.N. Doc. E/CN.4/2006/78/Add.3 (13 March 2006).

Waitangi. What the parties agreed to in that treaty has always been open to interpretation and dispute, as the Treaty was conducted in Maori and English, and was written up in both languages, though the Maori version was written down by *pakeha* (white) Christian missionaries, using “Missionary Maori.”¹⁵⁴ Nonetheless, the English language version of the Treaty was indisputably relied upon by Great Britain to establish its sovereignty over New Zealand, while the Maori were indisputably guaranteed “full exclusive and undisturbed possession of their Lands and Estates, Forests, Fisheries, and other properties which they may collectively or individually possess so long as it is their wish and desire to retain the same in their possession.”¹⁵⁵

Between 1840 and 1987, a period of almost a century and a half, the Treaty of Waitangi was largely ignored, as Maori lands and resources were divided into separate plots and sold to non-Maori settlers. In 1987, however, following decades of Maori activism and protests, a landmark decision by the New Zealand Court of Appeal in the case of *New Zealand Maori Council v. Attorney-General* described the Treaty of Waitangi as “part of the fabric of New Zealand society” and called it “the country’s founding constitutional instrument.”¹⁵⁶

To this day, precise interpretation of the Treaty remains the subject of intense controversy, as the meaning of particular words that appear in its two language versions are said to differ in important respects. Partly due to these interpretive differences, recent legislation referring to the Treaty has tended to point to the Treaty’s broad principles. New Zealand’s courts in turn have sought to clarify these principles in their application of the Treaty. These major principles, which are understood to be evolving, include, among others, (1) partnership, which requires both parties, Maori and the Government of New Zealand to act reasonably, honorably and in good faith; (2) active protection, which requires the Government of New Zealand to protect Maori interests (although the degree to which this obligation exists is said to depend on the particular circumstances of each situation and on the vulnerability of the *taonga*, i.e., resources, involved); and (3) redress, which requires the Government of New Zealand to take active and positive steps to remedy breaches of the Treaty and, where necessary, to provide fair and reasonable compensation.¹⁵⁷

The settlement of grievances for breaches of the Treaty is carried out through two principal, complementary mechanisms: the Waitangi Tribunal and Treaty settlement negotiations with the Government. The purpose of the Waitangi Tribunal is to determine the validity of individual Maori claims against the government and to

¹⁵⁴ See David H. Getches, Charles F. Wilkinson, Robert A. Williams, Jr. & Matthew Fletcher, *Federal Indian Law: Cases and Materials* (West Publ., 6th ed. 2011), pp. 980-985.

¹⁵⁵ Treaty of Waitangi (1840) (art. 2), available at <http://www.nzhistory.net.nz/politics/treaty/read-the-treaty/english-text>.

¹⁵⁶ *New Zealand Maori Council v. Attorney General*, [1987] 1 NZLR 641, available at <http://www.nzlii.org/nz/cases/NZCA/1987/60.pdf>.

¹⁵⁷ See <http://www.justice.govt.nz/tribunals/waitangi-tribunal/treaty-of-waitangi/tribunals/waitangi-tribunal/documents/public/treaty-principles-appendix-99>.

recommend to the government how it should provide redress for valid claims. The redress of many significant grievances arising from breaches of the Treaty of Waitangi have been facilitated through the Tribunal, which often has functioned to set the stage for direct negotiations between Maori and the government.

To date, over NZ\$1 billion has been committed to final and comprehensive settlements as well as to several partial settlements, which collectively cover more than sixty percent of the country's total land area. Several of these settlements have resulted in shared Maori-State management of natural resources. The Waikato-Tainui Settlements of 1995 and 2008, for example, have resulted in the Waikato-Tainui *imi* (tribe)¹⁵⁸ acquiring joint decision-making authority over New Zealand's Waikato River.¹⁵⁹ Through its governing body, Waikato-Tainui Te Kauhanganui Inc., the Waikato-Tainui operate the Waikato Raupatu River Trust, which represents its interests in environmental regulatory and policy-making contexts and provides lead environmental assessments and advice.¹⁶⁰ Waikato-Tainui Te Kauhanganui Inc. also manages a lands trust, which offers a wide range of tribal development programs and services; an investment and development company, whose portfolio includes retail, residential, commercial, industrial and rural properties as well as a fishery; and its own college.¹⁶¹

Despite these successes, it is also important to note that without the consent of the Maori, the Treaty of Waitangi Act of 1975 was amended in 2006 to set September 1, 2008 as a cut-off date for the submission of "historical" claims (those related to "things the Crown did or failed to do" before September 21, 1992). Although Maori groups and individuals may still submit "new" claims, they may no longer approach the Tribunal for redress for older grievances. Moreover, even when the Tribunal does issue recommendations, the government often ignores and even criticizes them. Due to the fact that most of its recommendations are advisory rather than binding under New Zealand law, neither the executive nor the legislature consider themselves obliged to implement or even acknowledge them. The Tribunal's recommendations are binding on the Crown only when those recommendations concern the return or resumption of certain lands, including lands that are subject to a Crown forestry license and lands or interests in lands that were transferred to or vested in a state enterprise or tertiary institution (e.g. college or university) or Crown corporation under specific legislation.¹⁶²

¹⁵⁸ The Waikato-Tainui *imi* consists of 30+ *hapu* (sub-tribes) and 60+ *marae* (family groupings) comprising approximately 60,000 persons.

¹⁵⁹ New Zealand, Office of Treaty Settlements, "Background Reports for the United Nations Special Rapporteur" (12 July 2010), at 12.

¹⁶⁰ See <http://www.wrrt.co.nz/>.

¹⁶¹ See www.waikatotainui.com.

¹⁶² See <http://www.justice.govt.nz/tribunals/waitangi-tribunal/documents/public/guide-to-wt-2012>, at 10. If the Tribunal makes a binding recommendation for the return or resumption of land, that recommendation is an interim recommendation for 90 days, during which time the claimant(s) and the Crown may enter into negotiations to settle the claim. If a settlement is reached within the 90-day period, the Tribunal must cancel or at least modify its recommendation so that it reflects the

In addition, many Maori groups claim that even when the government is prepared to act on the Tribunal's recommendations, it simply cannot do so objectively or fairly, because the party that ultimately determines how breaches of the Treaty should be remedied is the very same government that breached the Treaty in the first place. The government alone gets to decide how and when it will settle the claims against it. In the words of its official policy, "Redress must be fair, affordable, and practicable in today's circumstances."¹⁶³ Many Maori have expressed concern that the value of the settlements that have been reached is grossly disproportionate to the value of the lands and resources that have been taken from them in breach of the Treaty. For example, the government will not consider offering rights over oil and gas as a basis of redress, which the Tribunal has held to be in violation of the Waitangi principles.¹⁶⁴

Maori exercise their rights to self-determination through a variety of ways, at the community governance level, through their unique corporate and business enterprises and governance structures, as in the case of the Waikato-Tainui, and also at the level of national electoral politics. Maori have had special representation in the New Zealand Parliament through Maori electorates, which are known colloquially as "Maori seats," since 1867. Every part of the country belongs simultaneously both to a general electorate and to a Maori electorate. Today, there are seven Maori electorates. Even though the Electoral Act of 1993 makes the number of these reserved seats directly proportional to the number of Maori registered on the Maori electoral roll, not all Maori register, and many of those who do register choose to register instead on the general electoral roll. There is also a Maori Party, founded in 2004, that today has two elected members.

Maori of New Zealand, like the Saami in the Nordic countries discussed below, find themselves in a long and continuous struggle for self-determination as a people dispersed throughout a country in which they constitute a relatively small minority of the overall population. The lessons to be derived from the Maori experience for Native Hawaiians are many. Despite being ignored for 150 years, the Treaty of Waitangi is today an important source of legal rights for Maori. By providing a national platform for investigation, debate and critical assessment of the historical and contemporary claims of Maori as an indigenous people, the Waitangi Tribunal process combines with a unique voting rights scheme in New Zealand's national Parliament to secure important rights of self-determination for Maori through an indigenous rights regime approach.

settlement. If no settlement is reached within the 90-day period, the Tribunal's interim recommendation becomes a final recommendation that is binding on the Crown.

¹⁶³ New Zealand, Office of Treaty Settlements, *Healing the Past, Building a Future: A Guide to the Treaty of Waitangi Claims and Negotiations with the Crown*, summary edition (Wellington), p. 15.

¹⁶⁴ Waitangi Tribunal, "The petroleum report, Wai 796" (Wellington, Legislation Direct, 2003), p. 79.

5. *The British Columbia Treaty Commission Process*

In Canada, recognition of indigenous peoples' self-determination and other collective rights, including their rights to lands and resources, has been secured through the country's 1982 constitution, along with historical and modern treaties and a comprehensive statutory regime that includes the 1876 Indian Act. However, only a small handful of First Nations (Canada's term for its indigenous peoples who are neither Inuit nor Métis) ever signed treaties with the government in the far western province of British Columbia, which was colonized and settled relatively late in comparison to the rest of Canada's provinces.

For more than a century, Canada's provincial and federal governments steadfastly denied that British Columbia's 200-plus First Nations without treaties held any recognized property or self-determination rights over the lands that they had occupied and controlled under their own traditions, laws and customs for thousands of years. Instead, British Columbia's First Nations were told that their "aboriginal title and rights" (in the domestic legal terminology used for First Nations) had been extinguished by prior legislative and administrative actions on the part of the provincial and federal governments. Faced with this intractable position of the government, they found themselves relegated to tiny reserve lands, administered under Canada's 19th-century colonial-era Indian Act. Under that Act, government officials hold the unilateral power to approve or override all First Nations band government decisions with virtually little guidance provided under the Act on how this broad discretionary power is to be used.¹⁶⁵

After nearly two decades of drawn-out litigation efforts brought by individual First Nations (costing these impoverished communities millions of dollars in attorneys' fees), several court rulings were handed down by Canada's Supreme Court that suggested that 's First Nations' property and self-determination rights in their traditional lands indeed might still exist in some form in the province.¹⁶⁶ The provincial and federal governments at this point had little choice but to finally abandon their long-held position of refusing to negotiate the existence of indigenous peoples' long-asserted claims to rights on the basis of traditional use and occupancy of their ancestral lands and resources.

In December 1990, all sides finally agreed to participate in tripartite treaty negotiations between First Nations, the province, and the federal government.¹⁶⁷ That agreement led to the passage of implementing legislation, the *British Columbia Treaty Commission Act*¹⁶⁸ and the *Treaty Commission Act*.¹⁶⁹

¹⁶⁵ See generally David H. Getches, Charles F. Wilkinson, Robert A. Williams, Jr. & Matthew Fletcher, *Federal Indian Law: Cases and Materials* (6th ed. 2011), 953-980.

¹⁶⁶ *Calder v. British Columbia (Attorney General)*, [1973] S.C.R. 313; *Guerin v. Canada*, [1984] 2 S.C.R. 335; *R. v. Sparrow*, [1990] 1 S.C.R. 1075.

¹⁶⁷ British Columbia Treaty Commission, "British Columbia Treaty Commission Agreement," available at http://www.bctreaty.net/files_3/bctcagreement.html .

¹⁶⁸ S.C. 1995 c. 45

After a quarter-century of intense and protracted negotiations and hundreds of millions of dollars in loans owed by First Nations to the government in order to participate in the British Columbia Treaty Commission (BCTC) process, only four treaties have been agreed to and finalized in British Columbia recognizing First Nations' claims to ownership, control and self-government rights over their traditional lands. In fact, only 65 First Nations representing 104 of the 203 *Indian Act* Bands in British Columbia are even participating in the treaty negotiations process. The majority of British Columbia's First Nations band governments have either refused to participate or have withdrawn from the BCTC process, citing the federal and provincial governments' unilaterally imposed and inflexible mandates at the negotiating table.¹⁷⁰

The coordinated provincial and federal government negotiating mandates in the BCTC process include a requirement that First Nations agree to the effective extinguishment of most of their claims to aboriginal title and rights in their traditional lands. First Nations are justifiably reluctant to surrender all their claims to self-determination, ownership and control, and other collective rights over the vast majority of their traditional lands, in exchange for a treaty securing only a small percentage of their original claims to land and territory.

Additionally, the governments have refused to negotiate on the return of traditional lands seized in the past from British Columbia First Nations and granted in fee simple to private parties.¹⁷¹ First Nations participating in the BCTC treaty process must agree that any treaty they accept represents a "full and final" settlement of all their claims, and they must also accept an "indemnity" clause requiring their governments to indemnify the State, post-treaty, in the event that any member might bring a legal challenge or cause of action relating to, for example, the illegal taking of lands.¹⁷²

One of the most objectionable elements of the negotiating mandates for First Nations involved in the BCTC process is the governments' refusal to recognize an inherent aboriginal right of self-government in First Nations. Under the BCTC process, First Nations must agree to a municipal model of governmental powers in order to get the governments' agreement to a treaty settlement.

Finally, until First Nations secure a treaty from the governments, or bring a successful court challenge to government actions (in Canada, such challenges can typically take from 15-20 years to bring to final resolution, and can cost tens of millions of dollars in legal fees and court costs), the governments permit clear-cutting forestry operations and natural resource development to occur on lands claimed by First Nations under the treaty process without adequate consultation, compensation, or offers of restitution.

¹⁶⁹ R.S. 1996, c. 461,

¹⁷⁰ See <http://www.bctreaty.net/files/updates.php>

¹⁷¹ *Ibid.* at 11 (App. 25).

¹⁷² B.C. Treaty Commission, *Amendment of Funding Amounts Agreement Number Two* (2006/2007 fiscal year) (App. 24).

The Hul'qumi'num Treaty Group (HTG), located on British Columbia's heavily populated southeastern Vancouver Island coast, has brought a human rights complaint against Canada before the Inter-American Commission on Human Rights that has reached the merits stage. The Commission has already issued an admissibility report in favor of the six First Nations comprising the HTG, finding that the BCTC treaty process was not an effective remedy for alleged violations of the Hul'qumi'num indigenous peoples' rights as protected under the American Declaration on the Rights and Duties of Man. As the Commission found:

[S]ince 1994, the HTG, through the treaty negotiation process of the BCTC, has brought to the attention of official authorities the central facts contained in the petition, to wit: ... the BCTC process has not allowed negotiations on the subject of restitution or compensation for HTG ancestral lands in private hands, which make up 85% of their traditional territory. Since 15 years have passed and the central claims of HTG have yet to be resolved, the IACHR notes that the third exception to the requirement of exhaustion of domestic remedies applies due to the unwarranted delay on the part of the State to find a solution to the claim. Likewise, the IACHR notes that by failing to resolve the HTG claims with regard to ancestral lands, the BCTC process has demonstrated that it is not an effective mechanism to protect the right alleged by the alleged victims. Therefore, the first exception to the requirement of exhaustion of domestic remedies applies because there is no due process of law to protect the property rights of the HTG to its ancestral lands.¹⁷³

The experience of the nearly 199 British Columbia First Nations band governments that have refused so far to sign a treaty agreement with Canada under the BCTC process can teach Native Hawaiians a valuable lesson in their pursuit of a remedy for the United States' violations of their right to self-determination and other collective rights. Governments like Canada oftentimes attempt to confront and coerce indigenous peoples with the choice of giving up their acknowledged rights as the price of an agreement recognizing only a small fraction of their legitimate claims. The pressures imposed on indigenous peoples to accept such a compromise, when faced with the prospect of no agreement, continuing poverty, and political disempowerment, while natural resource development and other activities continue apace on their traditional lands, can be enormous.

In contrast to the British Columbia treaty process in Canada, the type of rule-making process proposed by the United States Department of the Interior for re-

¹⁷³ Inter-American Commission on Human Rights, Report No. 105/09, Petition 529-07, Admissibility, Hul'qumi'num Treaty Group v. Canada (30 October 2009), at para. 37, available at <http://www.cidh.oas.org/annualrep/2009eng/Canada592.07eng.htm>.

establishing a government-to-government relationship with the Native Hawaiian people disengages the process of reestablishment of a Native Hawaiian governing entity from other claims to property and collective rights they might possess. The Native Hawaiian people would thus be able to establish and enhance their self-governance capacity and abilities first and thereby more effectively negotiate over those connected claims in future processes to which they freely agree.

6. The Saami of the Nordic Countries

The Saami are the indigenous inhabitants of the Sápmi region of northern Europe, which spans the northern parts of Norway, Sweden and Finland as well as Russia's Kola Peninsula.¹⁷⁴ Despite now being incorporated into four different States, the Saami continue to exist as one people, united by a common identity based on shared language and culture. Even in the comparatively remote and sparsely populated Sápmi region that spans Nordic countries, the Saami constitute a small minority, approximately 5%, of the total population.¹⁷⁵

Although the Saami have continued to practice their traditional forms of resource management, including reindeer husbandry, centered around local organizations known as *siidas*, the Saami have struggled in the face of imposed assimilation and other discriminatory attitudes and policies to preserve their ways of life. In recent years, however, the Nordic States have begun to recognize their responsibility to protect the traditional livelihoods and related rights of the Saami, and the Saami themselves have sought a louder voice, and greater role, in politics and policy-making at both the national and international levels in their struggles to achieve their self-determination goals and aspirations as indigenous peoples.

In Norway, Sweden and Finland, the Saami are formally recognized as an indigenous people with rights to cultural autonomy, and that recognition extends to Saami legislative bodies known as Saami parliaments, or *Samediggi*. Under the domestic law of these Nordic countries, the Saami parliaments operate as consultative bodies on matters related to Saami language, culture, health and education. In 2000, the Saami Parliamentary Council, a body comprised of representatives from the three Saami parliaments, as well as Saami from Russia, was established for the purpose of dealing with cross-border issues affecting the Saami.

Besides the Saami parliaments, the rights of the Saami in each of these countries is protected by other legislation as well. In Norway for example, the country

¹⁷⁴ This discussion of Saami self-governance in Norway, Sweden, and Finland is adapted from the Report of the Special Rapporteur on the Rights of Indigenous Peoples, James Anaya – The situation of the Sami people in the Sápmi region of Norway, Sweden and Finland, U.N. Doc. HRC/18/35/Add.2 (6 June 2011).

¹⁷⁵ It is estimated that the overall population of the Saami today is between 70,000 and 100,000 persons, with about half of that total, between 40,000 and 60,000, residing in present-day Norway, another 15,000-20,000 residing in present-day Sweden, approximately 9,000 residing in present-day Finland, and about 2,000 residing in present-day Russia.

with the largest number of Saami, the Finnmark Act (2005) transferred approximately ninety-five percent (about 18,000 square miles) of Norway's Finnmark County directly to the area's inhabitants, which manage it through an agency known as the Finnmark Estate. Three of the Finnmark Estate's six board members are appointed by the Saami Parliament, and the head of the board is elected by the Sami Parliament and the local Finnmark County Council in alternating years. The Act was a response to the gradual recognition, in the context of a major national controversy surrounding a proposed hydro-electric dam project that would have created an artificial lake and thereby inundated an important Saami village, that the Saami, through their traditional use of the County's lands and waters, had acquired ownership rights therein. The Act's formal purpose is to "to facilitate the management of land and natural resources in the county of Finnmark in a balanced and ecologically sustainable manner for the benefit of the residents of the county and particularly as a basis for Sami culture, reindeer husbandry, use of non-cultivated areas, commercial activity and social life."¹⁷⁶

Norway's Reindeer Husbandry Act (1978, amended in 2007), provides individual Saami with an exclusive right to herd reindeer within specific pasture areas, so long as they can demonstrate a personal link to a traditional reindeer-herding family. This reindeer husbandry right is a usufruct right that applies to given territories regardless of what those territories' formal ownership status is. In other words, the Saami have a right to herd reindeer on their traditional lands even where those lands are now privately owned by non-Saami. The Reindeer Husbandry Act as of 2007 also encourages the use of the *sáidas* as an organizational institution, thereby bringing Norwegian law into closer conformity with traditional Saami land management practices. The Saami reindeer grazing area covers approximately 40 percent of Norway's landmass.

The experience of the Saami suggests that important elements of the self-determination rights belonging to an indigenous people may be achieved even within the confines of a State in which they constitute a very small minority. With their own representative parliaments within the larger States that surround them, the Saami's rights as indigenous peoples are protected in numerous ways under the constitutions and laws of their respective countries. The approach has enabled the Saami to achieve many of their evolving self-determination goals and aspirations while providing a platform for strengthening and expanding upon their collective rights as indigenous peoples under the contemporary indigenous human rights regime.

¹⁷⁶ Act of 17 June 2005 No. 85 relating to legal relations and management of land and natural resources in the county of Finnmark (Finnmark Act), available at http://www.galdu.org/govat/doc/the_finnmark_act_act_17_june_2005_no_85.pdf.

C. Conclusion on comparative practices utilized by States to recognize indigenous peoples and their rights

As can be seen by this brief survey, modes of recognition utilized by States to address indigenous peoples' claims to self-determination and other collective rights vary widely throughout the world. No one mode or procedure can be said to constitute a best practice, as each must be adapted and refined by the particular indigenous group or entities involved in consultations, litigation, or negotiations with the State.

The experience of the Southern Utes in utilizing the advantages of the United States "tribal self-determination" model demonstrates that with access to and control over their own significant natural resource base and a federally recognized treaty-defined reservation land base, indigenous peoples in the United States can flourish and achieve many of their most important self-determination goals and aspirations. The experience of Maine's indigenous tribal peoples under the Maine Indian Claims Settlement Act, on the other hand, shows what happens when a group of indigenous peoples who have never been recognized as possessing any of the rights belonging to Indian tribes are granted only some, but not all of those rights in modern settlement legislation enacted by Congress. Once enacted into federal legislation, the jurisdictional powers and authority of an indigenous governing entity recognized by a Congressional act may be extremely difficult to change, even when subsequent experience clearly shows that the legislation itself works to frustrate an indigenous people's claims to self-determination and other collective rights under international law.

The example of New Caledonia shows how an indigenous minority such as the Kanaks can skillfully utilize the decolonization process, even if it is not under their exclusive control. The decolonization regime in New Caledonia has enabled the Kanack people to significantly advance and better secure important rights to self-determination and other collective rights, while at the same time reviving and revitalizing customary modes of self-government, cultural expression, and law-making authority.

Maori of New Zealand constitute a relatively small minority of the overall population, much like Native Hawaiians in Hawai'i. The national platform provided by the Waitangi Tribunal process combines with a unique voting rights scheme in New Zealand's national Parliament to secure important rights of self-determination for the Maori as indigenous peoples using the indigenous rights approach.

The experience of Canada's First Nations in British Columbia demonstrates the limitations of a negotiated settlement process that links indigenous peoples' claims to ancestral lands and resources with efforts aimed at constituting a governance entity. Governments can oftentimes attempt to confront and coerce indigenous peoples with the choice of giving up their acknowledged rights as the price of an agreement recognizing only a small fraction of their legitimate claims in such negotiations.

The experience of the Saami suggests that important elements of the self-determination of an indigenous people may be achieved even within the confines of a State in which they constitute a very small minority through their own representative parliaments within the larger States that surround them. The Saami parliaments provide an important platform for strengthening and expanding upon the rights of the Saami as an indigenous people under the contemporary indigenous human rights regime.

In light of these diverse lessons and experiences drawn from around the world, the type of rule-making process proposed by the Department of the Interior for reestablishing a government-to-government relationship with the Native Hawaiian community may prove to be an advantageous, flexible, and capable mechanism for achieving that end. This type of mechanism may also be advantageous in that it can disengage the process of reestablishing a Native Hawaiian governing entity from other objectives, such as the resolution of claims to land and resources. The Native Hawaiian people would thus be able to establish and enhance their self-governance capacity and abilities first and thereby more effectively negotiate over those connected claims in future processes to which they freely agree. Finally, a government-to-government relationship of the type contemplated by the proposed federal rule would in all likelihood strengthen, and would almost certainly not impede, the ability of the Native Hawaiian people to utilize international law and politics to advocate for improved conditions and for a future where Hawai'i's land and society better reflect the values of its first people.