J. KEHAULANI KAUANUI

Hawaiian Nationhood, Self-Determination, and International Law

This measure does not preclude Native Hawaiians from seeking alternatives in the international arena. This measure focuses solely on self-determination within the framework of federal law and seeks to establish equality in the federal policies extended towards American Indians, Alaska Natives and Native Hawaiians.
—U.S. Senator Daniel Kahikina Akaka (2001a)

Let me be clear—It is not my intention, nor the intention of the delegation, to preclude efforts of Native Hawaiians at the international level. The scope of this bill is limited to federal law.
—U.S. Senator Daniel Kahikina Akaka (2001b)

U.S. Senator Daniel Kahikina Akaka's assurances, made in 2001, were in regard to a legislative initiative to recognize a Native Hawaiian nation within the confines of U.S. federal policy on Tribal Nations that still remains before the U.S. Congress. Beginning in the 106th U.S. Congress in 2000 and continuing at least through the 111th Congress in 2011, Akaka, a Native Hawaiian Democrat from the State of Hawaiʻi, introduced this federal legislation in order to secure the recognition of Native Hawaiians as an indigenous people who have a "special relationship" with the United States and thus a right to internal self-determination. Passage of the bill would lay the foundation for a nation-within-a-nation model of self-governance defined by U.S. federal law as "domestic dependent nations" to exercise the right to self-government. The U.S. government has included Kanaka Maoli (indigenous Hawaiians) in over 160 legislative acts relating to Native Americans.[1] However, it has not included Kanaka Maoli in its policy on Native self-determination. Akaka's assertions that passage of the bill would not preclude Kanaka Maoli from seek-

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ing "alternatives in the international arena" have been his standard response to challenges posed to him by individuals and organizations opposed to the legislation because they favor Hawaiian independence from the United States—that is, the restoration of a Hawaiian state under international law. These groups include Hui Pu as well as those who are part of the Hawaiian Independence Action Alliance: the Pro-Kanaka Maoli Independence Working Group, Ka Pakaukau, Komike Tribunal, HONI (Hui o Na Ike), Ka Lei Maile Aliʻi Hawaiian Civic Club, Koani Foundation, ʻOhana Koa, NFIP—Hawaiʻi, Spiritual Nation of Kū—Hui Ea Council of Sovereigns, Living Nation, Settlers for Hawaiian Independence, MANA (Movement for Aloha No Ka ʻAina), as well as the Hawaiʻi Institute for Human Rights.

Akaka's response, however, echoed repeatedly by Hawaiʻi's state and federal officials over the past decade, speaks only to the rights of indigenous peoples under international law (Namuo 2004). But because his mention of "alternatives in the international arena" here and elsewhere is ill-defined, he has led many to infer that Kanaka Maoli could pursue full independence in a postfederal recognition political scenario, if they so desire. What proponents of the Akaka bill refuse to acknowledge is that this strategy differs from the prevalent Hawaiian independence position from the outset. While many proponents of U.S. federal recognition presume that activists in the Kanaka Maoli independence movement merely want continued access to the United Nations as indigenous peoples, the vast majority of proindependence Kanaka Maoli support two entirely different legal strategies under international law, decolonization and deoccupation, neither of which is based on indigeneity. Decolonization is specific to colonized peoples in non-self-governing territories, while deoccupation pertains to occupied states.

The history of the Kingdom of Hawaiʻi, which was recognized as a state by all major global powers throughout the nineteenth century, provides Kanaka Maoli and others with a rare legal claim that shows the current state-driven push for federal recognition to be problematic for outstanding sovereignty claims.[2] This essay critically analyzes the limits of both Akaka's federal proposal for internal self-determination and the rights of indigenous peoples under international law to argue that passage of the Native Hawaiian Government Reorganization Act would indeed threaten the independence claims of the Hawaiian nation, which are not necessarily protected by the Declaration on the Rights of Indigenous Peoples. In other words, I show how the independence claim for the sovereignty of the Hawaiian kingdom exceeds the current rights accorded to indigenous peoples at the United

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Nations because the monarchy was recognized as a state prior to the U.S.-backed overthrow in 1893.

The case of Hawaiʻi illuminates the limitations of international law as a remedy for the politically fraught history of the kingdom and of Kanaka Maoli as an indigenous people. First, I offer some historical background in order to delineate the diplomatic relations of the Hawaiian kingdom and the United States, the U.S.-backed overthrow of the kingdom, and unilaterally imposed U.S. annexation and contested statehood for Hawaiʻi as the fiftieth state of the American Union. Next, I critically examine the prospect for internal self-determination under U.S. domestic policy as proposed in the Native Hawaiian Government Reorganization Act of 2009, also known as the Akaka bill, in order to assess the limits of that model of governance as it is detailed in the legislation. I also explore the ways in which the bill, if passed, could work to preempt and preclude the Hawaiian sovereignty claim under international law.

The next section delineates the terrain of indigenous peoples' rights under international law as distinct from the rights of states. I suggest that although indigenous peoples' rights are expanding, they still pose limits for the Hawaiian sovereignty claim—given the legal genealogy of the Hawaiian kingdom, an independent state—as it currently exists because of the way that international law continues to privilege the rights of states over the rights of peoples. Independence proponents who advocate restoration of the kingdom reject both indigenous self-determination under U.S. policy as well as indigenous self-determination under international law as legal strategies for recuperating Hawaiian sovereignty. Most also reject decolonization under the United Nations Charter, for reasons discussed below, and instead advocate for deoccupation. However, that legal strategy also has shortcomings vis-à-vis the plight of Kanaka Maoli, which I address.

The history of occupation and colonialism has generated a variety of options, but none of them seem sufficient in their current scope since each has serious limitations and demands an alternative approach to begin to address this complicated historical legacy in a way that promotes restorative justice.

From Kingdom to U.S.-Occupied Colony

Official diplomatic relations between the Kingdom of Hawaiʻi and the United States transpired over five decades. The treaties negotiated between the two were made after the U.S. government and other nations had already recog-

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nized the kingdom as an independent state. In 1842 King Kamehameha III dispatched a delegation to the United States and later to Europe that was endowed with the power to secure the recognition of Hawaiian independence by the major world powers of the time. On 19 December 1842 the delegation secured the assurance of President John Tyler of the United States of American recognition of the independence of the Kingdom of Hawaiʻi, and subsequently it secured formal recognition by Great Britain and France.

The treaties between the Kingdom of Hawaiʻi and the United States were not concerned with land or governance; they specified only relations of peace and friendship, commerce, and navigation. The first, signed at Washington on 20 December 1849, delineated protocols for perpetual peace and amity between the countries. It provided for reciprocal commerce and navigation, including the regulation of duties and imports at favored foreign nation rates and permission for U.S. whaling ships to dock at selected Hawaiian ports. The second treaty was negotiated in 1870 and concerned an arrangement between the postal services of the kingdom and the United States. The third treaty, known as the Reciprocity Treaty, was signed in 1875. This agreement for commercial reciprocity meant no export duty was imposed on Hawaiʻi or the United States and allowed for tax-free goods exchanged between the two nations to enter and leave Hawaiian and U.S. ports. In 1884 the two nations negotiated a convention to renew and supplement the treaty of 1875. This allowed the United States privileged access, over other nations, to use Pearl Harbor. The convention specified that the U.S. government had exclusive right to enter the harbor and to establish and maintain there a coaling and repair station for the use of U.S. vessels. Contrary to popular opinion, this supplement to the treaty ceded nothing to the United States in the way of territory. Last, in 1882 the two nations negotiated a convention between the Post Office Department of the United States and the Post Office Department of the Kingdom of Hawaiʻi concerning the exchange of money orders.

Although neither lands nor sovereignty were ceded in any of these treaties by either party, the number of elite foreigners residing in Hawaiʻi eventually grew to the point where they threatened the autonomy of the kingdom. White Americans had migrated to the Hawaiian Islands from the time of the first Christian mission in 1820 sponsored by the American Board of Commission for Foreign Missions. As Lilikala Kameʻeleihiwa (1992) has documented, white Americans and European merchants constituted the foreign population in Hawaiʻi by the 1840s, when the missionaries' descendants pressured King Kamehameha III to privatize communal landholdings. The

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Mahele land division of 1848 increased the wealth of these foreigners, who managed to secure vast extensions of land (Kameʻeleihiwa 1992). In turn, white settlers' presence and power increased on the islands throughout the nineteenth century (Silva 2004; Osorio 2002; Kameʻeleihiwa 1992). Anglo-American legal impositions transformed Hawaiian society throughout that period and made for a distinct form of colonialism accompanied by global movements of capitalism and Christianity that affected the everyday lives of Hawaiians with regard to work, family, marriage, and even sexuality (Merry 2000).

Eventually, the foreign elites formed their own militia, the Honolulu Rifles, associated with the U.S. military (Silva 2004, 122; Osorio 2002, 239–40). In 1887 the Honolulu Rifles seized strategic points in the city, and mounted armed patrols forced the ruling monarch, King Kalakaua, to sign what became known as the Bayonet Constitution, a document that stripped him of his most important executive powers and diminished the Kanaka Maoli voice in government. The king was no longer able to appoint members to the House of Nobles. The Bayonet Constitution created an oligarchy of the *haole* planters and businessmen by primarily empowering white Americans and Europeans. The new constitution gave U.S. citizens the right to vote in Hawaiian elections, while a large sector of the Kanaka Maoli electorate was excluded through rigorous property qualifications and Asians were entirely disenfranchised as aliens (Osorio 2002, 243–45, 251–54; Kent 1993, 55). Every decision would have to have the approval of the cabinet, now made up of foreigners. In addition, the new order prevented the king from dismissing the cabinet himself since the power was given to the legislature, which could dismiss any cabinet with a simple majority vote (Silva 2004, 122–26; Osorio 2002, 194–97).

Although the House of Nobles never properly ratified the Bayonet Constitution, Queen Liliʻuokalani's attempt to promulgate a new constitution to replace it (once she succeeded to the throne after her brother Kalakaua's death) prompted the unlawful overthrow of the kingdom. In 1893 U.S. Minister of Foreign Affairs John L. Stevens, with the support of a dozen white settlers, organized to overthrow Queen Liliʻuokalani. The queen yielded her authority under protest because she was confident that President Benjamin Harrison would endeavor to undo the actions led by one of his ministers. However, this was not the case, and those who overthrew the kingdom established the provisional government. Eventually, after sending an investigator on the matter, the next president, Grover Cleveland, declared the action

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under Stevens an act of war and acknowledged that the coup, backed by U.S. Marines, was unlawful (Cleveland 1893). But he never moved to restore formal recognition to the queen.

As this struggle for control was taking place, the provisional government established the Republic of Hawaiʻi on 4 July 1894, with Sanford Ballard Dole as president (Trask 1993; Silva 2004). Besides asserting jurisdiction over the entire island archipelago, this group seized roughly 1.8 million acres of land—Kingdom Government and Crown Lands—and declared them free and clear of any trust or claim. This de facto government ceded these same lands to the United States when it illegally annexed Hawaiʻi in 1898. This is the land base at stake in the political struggle today, one sorely contested through contemporary legal challenges.

The United States did not annex the Hawaiian Islands by treaty. Rather, it purportedly annexed the archipelago through its own internal domestic law, the Newlands Resolution. This legislation passed in 1898 despite massive indigenous opposition, as documented by Noenoe Silva (1998, 2004). Kanaka Maoli organized into two key nationalist groups, Hui Aloha ʻAina and Hui Kalai ʻAina, each of which submitted petitions representing the vast majority of the indigenous people; the combined signatures amounted to over thirty-eight thousand. Because only one of the two petitions has been recovered, it is unclear how many individuals signed both petitions. However, only forty thousand Kanaka Maoli resided in Hawaiʻi at the time (Silva 1998, 2004). In the two petitions, Kanaka Maoli clearly stated their opposition to becoming part of the United States "in any shape or form."

In 1897 the U.S. Senate accepted these petitions, and in the face of such resistance found it impossible to secure the two-thirds majority vote needed for a treaty. Regardless, under President William McKinley, proannexationists proposed a joint-senate resolution, even though admitting Hawaiʻi in this way, that is, as a new territory and not a state, violated the U.S. Constitution. A joint-senate resolution could pass with only a simple majority in both houses of Congress. The Newlands Resolution passed in 1898 when the U.S. government "annexed" Hawaiʻi. The resolution also mandated that the republic cede absolute title to the public lands formerly belonging to the Hawaiian Kingdom and Crown. The U.S. government incorporated Hawaiʻi as a colonial territory through the Organic Act of 1900, which created specific laws to administer the allegedly public lands. These laws again stated that the lands were part of a special trust under the federal government's oversight (Resolution No. 55, 2nd Session, 55th Congress, July 7, 1898; 30 Sta.

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at L. 750; 2 Supp. R. S. 895). These lands remain the centerpiece in the struggle to restore Hawaiian independence because even though they amount to only slightly less than one-third of the lands throughout the archipelago, they have never fallen into private hands.

From Non-Self-Governing Territory to Fiftieth State of the United States of America

In 1946 the United Nations compiled a list of non-self-governing territories on which the U.S. government included Hawai'i (Trask 1994). Although Hawai'i was on the list and was therefore entitled to a process of self-determination to decolonize, the U.S. government predetermined statehood as the status for Hawai'i by treating its political status as an internal domestic issue. The ballot used in 1959 when the people of Hawai'i voted to become a state of the Union included only two options: integration and remaining a U.S. colonial territory (Trask 1994, 68–87). Among those allowed to take part in the vote, settlers as well as military personnel outnumbered Hawaiians. Citing the internal territorial vote, the U.S. State Department then misinformed the United Nations, which in turn considered the people of Hawai'i to have freely exercised their self-determination and chosen to incorporate themselves as part of the United States (Trask 1994).[3]

By UN criteria established in 1960, but already in debate the previous year and thus known to the United States at the time of the earlier vote, the ballot should have included independence and free association as choices. On 14 December 1960, the United Nations General Assembly issued a Declaration on the Granting of Independence to Colonial Countries and Peoples—Resolution 1514 (XV).[4] Also in 1960, the assembly approved Resolution 1541 (XV), which defined free association with an independent state, integration into an independent state, or independence as the three legitimate options of full self-government.[5] United Nations General Assembly Resolution 1541 refers to territories that are "geographically separate and distinct ethnically and/or culturally" without specifying what "geographically separate" must entail (Barsh 1986, 373). Nonetheless, this chapter of the resolution has been accepted as applicable mainly to overseas colonization, while relegating indigenous peoples to a condition of "internal colonization" (Barsh 1986, 373). At stake is prohibiting the indigenous claim to the same self-determination granted to "blue water" colonies by Resolution 1514, "which can logically lead to independence" (Griswold 1996, 101n14). Hence the phrase "all peoples

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have the right of self-determination" has been mainly applied to inhabitants of territories destined for decolonization rather than to indigenous peoples (Griswold 1996, 93).

Since 1960 only peoples recognized as colonized have had the right to freely determine their political status. For example, in the case of East Timor in 1999, the East Timorese finally had the opportunity to vote on their political status through a UN-sponsored plebiscite, and they voted to fully decolonize from Indonesia. Although the East Timorese are an indigenous people, it was the status of East Timor as a colony of Indonesia since 1975 (and before that of Portugal since the mid-sixteenth century) that qualified them for the right to full self-determination, not their status as an indigenous people per se. It seems reasonable to infer that the right of the East Timorese to full self-determination is due to the blue water doctrine under international law, which defines colonial territories plainly as those far from the colonial metropoles asserting rule over them.

At the same time, the United Nations recognized Hawai'i as a non-self-governing territory from 1946 to 1959, during which time Kanaka Maoli and others were eligible for full decolonization. Some argue, therefore, that the most straightforward legal argument in support of independence is the decolonization model. The Pro–Kanaka Maoli Independence Working Group, Ka Pakaukau, and the Komike Tribunal have consistently worked to educate the Hawaiian community about the aborted option under the decolonization model and have advocated that contemporary Kanaka Maoli should be entitled to a plebiscite to exercise their right to self-determination and determine what model of governance they prefer. However, many sovereignty activists who advocate for kingdom restoration reject this strategy of reinscription on the list of non-self-governing territories. They make a distinction between a colonial territory (e.g., Guam, a U.S. territory) and an occupied state such as the Hawaiian kingdom. As an alternative, those organized to restore the Hawaiian kingdom government advocate for de-occupation rather than decolonization and rely on the international laws of occupation by drawing on regulations created during The Hague Convention IV of 1907, specifically Article 43 (Sai 2001).[6] Accordingly, those who identify as subjects of the kingdom are demanding that the recovery process as well as all charges against the United States, be guided by The Hague Regulations, not by the UN Charter providing for self-determination (Sai 2001). In other words, they avoid an analysis of colonialism because they assume that to talk about colonialism in Hawai'i is to legitimate Hawai'i as a

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former U.S. colony rather than an occupied state. Because the kingdom had already secured recognition of its independence in 1842, deoccupation supporters declare their status as kingdom nationals of a nation that has already achieved self-determination. Since the U.S. Congress unilaterally annexed Hawai'i through its own domestic law, supporters of deoccupation argue that the kingdom was never really annexed and therefore its territory continues to be merely occupied by the United States. Unfortunately, this political discourse of achievement has been framed in a way that is demeaning to indigenous peoples who have not formed states and reveals a reluctance to emphasize oppression specific to Kanaka Maoli living under U.S. domination. Many proponents of kingdom restoration, much like the neoconservatives opposed to the Akaka bill, have dismissed indigenous self-government as race-based government, and they have done so by casting the kingdom as a "colorblind" government because non–Kanaka Maoli were included as kingdom subjects.[7]

To complicate matters further, there is no acknowledgment that American colonialism arguably began long before the formal takeover of Hawai'i by the United States, let alone that the assimilationist policies imposed on Kanaka Maoli throughout the twentieth century are colonial in nature. Any discussions of decolonization—including those in the cultural arena not dependent on UN protocols, such as indigenous language revitalization in response to years of indigenous language suppression, to cite just one example—are too quickly dismissed in legal terms. The problem then takes the form of a battle over international law rather than focusing on the white supremacist practices and policies that are part and parcel of the colonial subordination of Kanaka Maoli, whether one considers Hawai'i a former U.S. colony or not. The myriad of oppressions faced by the vast majority of Kanaka Maoli include high infant mortality and low life expectancy; disproportionate rates of diabetes, hypertension, heart disease, cancer, depression, and suicide; intergenerational trauma; criminalization and high rates of incarceration; as well as other social ills linked to indigenous land dispossession and poverty induced by colonial status.

The formation of Hawai'i as the fiftieth state of the Union has been used to silence the possibility of decolonization from the United States. Here, it seems that the blue water doctrine holds no effective meaning, even though Hawai'i is over two thousand miles from California and nearly five thousand miles from Washington, D.C. Therein lies the paradox. While Hawai'i was a distant U.S. colony during the first half of the twentieth century, it was an

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independent state before the U.S. takeover, which complicates conventional and legal notions of self-determination in discussions of most indigenous peoples. And yet, it is clear that Kanaka Maoli are also an indigenous people.

Internal Self-Determination: The Akaka Bill Proposal

One of the main rationales offered by Akaka for his legislative proposal for federally organizing a Native Hawaiian governing entity is the U.S. congressional Apology Resolution of 1993 (Public Law 103–150), in which the U.S. government apologized to the Hawaiian people for the U.S. military's role in the overthrow. This joint-senate resolution, signed by President William J. Clinton came about as a result of efforts by Akaka, who worked to have the resolution passed during the one-hundred-year anniversary of the overthrow. Although the apology includes a disclaimer at the end, stating that nothing it contains can be used to settle a case against the United States, it still is a finding of fact. The apology maintains that "the indigenous Hawaiian people never directly relinquished their claims to their inherent sovereignty as a people or over their national lands to the United States, either through their monarchy or through a plebiscite or referendum" (U.S. Public Law 103–150, 103d Congress Joint Resolution 19).[8] The apology also calls for some form of reconciliation and self-governance for Native Hawaiians. It specifically states that Congress "expresses its commitment to acknowledge the ramifications of the overthrow of the Kingdom of Hawaii, in order to provide a proper foundation for reconciliation between the United States and the Native Hawaiian people; and . . . urges the President of the United States to also acknowledge the ramifications of the overthrow of the Kingdom of Hawaii and to support reconciliation efforts between the United States and the Native Hawaiian people" (U.S. Public Law 103–150, 103d Congress Joint Resolution 19). Akaka has framed his legislative proposal, the Native Hawaiian Government Reorganization Act of 2009, as the step toward reconciliation supported in the Apology Resolution. But it was also prompted by the case of *Rice v. Cayetano*, in which the U.S. Supreme Court ruled Hawaiian-only voting conducted by the state Office of Hawaiian Affairs for trustee elections unconstitutional.[9] Shortly after the ruling, Akaka set up a Task Force on Native Hawaiian Issues and then proposed legislation to federally recognize a Native Hawaiian governing entity as a domestic dependent nation with the aim of creating an internal government that would be immune to legal challenges to the 14th and 15th constitutional amendments. As a result, many

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Native Hawaiians staffing state agencies such as the Office of Hawaiian Affairs and the Department of Hawaiian Home Lands, which are dependent on state and federal funding for specifically indigenous projects like Papa Ola Lokahi (Native Hawaiian Healthcare) and Nā Pua No'eau (Center for Gifted and Talented Native Hawaiian Children), and the vast majority of Hawaiian civic clubs support the legislation.

The Akaka bill sets up the process for the formation of a governing entity to be approved by the U.S. government. The entity would be formed by a commission of nine members appointed by the secretary of the interior, whose duty first and foremost would be to report to the secretary.[10] The legislation allows for the recognition only of a Native Hawaiian governing entity and not of the rights of that entity, which would be subject to later negotiation between the U.S. federal government, the Native Hawaiian entity, and the Hawai'i state government.

The bill was first introduced in 2000 in the 106th Congress, where it did not survive committee, and during each subsequent Congress it has been defeated by Republican opposition (Kauanui 2005b). Conservatives' refusal to support the measure became more pronounced when the administration of George W. Bush took a position against the legislation, opposition which lasted throughout that administration. Although throughout that period the legislation gained committee approval in both the House and the Senate, it remained stalled when it came to a floor debate. Despite multiple revisions and reintroductions of new drafts aimed at satisfying the concerns of the Department of the Interior and appeasing Republican critics, who called the proposal a plan for "race-based government," the legislation never progressed to a vote.[11]

Under the new leadership of President Barack Obama there is widespread support for the bill. Since the start of the 111th Congress on 3 January 2009 three sets of proposals have been made, all titled the Native Hawaiian Government Reorganization Act of 2009: S. 381 and H.R. 862, introduced on 4 February 2009; S. 708 and H.R. 1711, introduced on 25 March 2009; and S. 1011 and H.R. 2314, introduced on 7 May 2009. S. 1011 was given a hearing before the U.S. Senate Committee on Indian Affairs on 6 August 2009 and H.R. 2314 was given a hearing before the U.S. House Committee on Natural Resources. At the time of this writing both await a floor debate and vote.[12]

Those who support independence oppose federal recognition because at the very most it would allow for no more than a domestic dependent entity under the full and exclusive plenary power of Congress. Most immediately,

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federal recognition would set up a process for extinguishing most claims to land title—except for whatever the state of Hawaiʻi and the federal government may be willing to relinquish in exchange for that recognition—and even then the U.S. federal government would hold it in trust. What is at stake here is the 1.8 million acres of former Kingdom Crown and Government Lands and the obliteration of the Hawaiian nation's title to them. As the U.S. Supreme Court case of 2009 regarding these lands shows, there is absolutely no guarantee that any future Native Hawaiian governing entity would hold any of these lands.[13]

Counter to Akaka's assurances, there is also the likelihood that passage of the bill could foreclose the sovereignty claim for Hawaiian independence under international law. The legislation appears to be a preemptive attempt to squash outstanding sovereignty claims unsuccessfully extinguished by Hawaiʻi's being admitted as the fiftieth state of the American Union. If the bill passes, the will of the people will seem to have been expressed—as a form of self-determination in support of federal recognition—in a way that would make international intervention much more far-fetched, given the likelihood that the world community would see the Hawaiian question as even more of a U.S. domestic issue than it does today. In any case, it would certainly entrench the Hawaiian sovereignty claim further within the U.S. government since the Native Hawaiian governing entity, as proposed in the Akaka bill, would be subordinate to both the Hawaiʻi state government and the U.S. federal government.

Alternatively, supporters of federal recognition insist that nothing in the Akaka bill would compromise Hawaiʻi's national claims under international law. But they do not attend to the ways in which the United States asserts its plenary power to keep indigenous sovereigns both domestic and dependent. In this context it is important that a provision included in S. 708 was swiftly removed from the later version, S. 1011. Section 11 of S. 708. was titled "Disclaimer" and stated, "Nothing in this Act is intended to serve as a settlement of any claims against the United States, or to affect the rights of the Native Hawaiian people under international law." Despite this change, neoconservative opponents to the bill have sought to spread misinformation about the legislation. This had led Akaka to provide further assurances in direct contradiction to those he once provided to supporters of Hawaiian independence. In a hearing before the U.S. Senate Committee on Indian Affairs, he repeatedly asserted that the bill does not allow Hawaiʻi to secede from the United States (Akaka 2009).

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This legislation limits Hawaiian self-determination because of its fundamental legal distinction between Indian tribes and foreign nations under the U.S. Constitution and federal law with specific regard to the unextinguished sovereignty of the Hawaiian kingdom. The name alone represents what is problematic for Hawaiian sovereignty and nationhood under international law. Embedded in its title, the "Native Hawaiian Government Reorganization Act of 2009," is a fundamental historical lie: there can be no attempt to *re*organize a Native Hawaiian government because the Kingdom of Hawaiʻi was an internationally recognized state that in the nineteenth century afforded citizenship status to more than just indigenous Hawaiian people. This name misconstrues the nature of the government-to-government relationship the United States had with the kingdom. The bill should be named more accurately as the "Native Hawaiian Government Organization Act."

The bill asserts that "the Constitution vests Congress with the authority to address the conditions of the indigenous, native people of the United States," drawing on Article I, Section 8, Clause 3 of the U.S. Constitution, which reads as follows: "The Congress shall have power . . . to regulate commerce with foreign nations, and among the several states, and with the Indian tribes." The U.S. Supreme Court has ruled time and time again that this clause, known as the Commerce Clause, means the U.S. federal government has total and complete power over tribal nations (Wilkins 1997). Section (3) of the bill also states that "the United States has a special political and legal relationship to promote the welfare of the native people of the United States, including Native Hawaiians." In other words, the U.S. government calls it "special" because it regards tribal nations as internal nations that are both domestic and dependent because they are forced to exist within the broader legal boundary asserted by the U.S. government. Yet the U.S. government never legally regarded the Hawaiian kingdom as domestic or dependent. Under the U.S. Constitution, the Kingdom of Hawaiʻi was regarded as a foreign nation, an independent sovereign state.

The U.S. Congress has repeatedly delegated its authority to the executive branch of the U.S. government. With regard to Indian tribes, it delegates its authority specifically to the U.S. Department of the Interior. This matters for the purposes of the bill since the legislation proposes to create and empower the U.S. Office for Native Hawaiian Relations, within the U.S. Department of the Interior, to coordinate the "special political and legal relationship between the United States and that Native Hawaiian governing entity." Foreign nations do not have any relationship to the U.S. Department of the Interior

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precisely because that department is concerned with areas considered by the U.S. government to be internal to the United States, areas such as Indians tribes, U.S. Island Territories, and National Parks. Foreign nations relate to the U.S. Department of State.

Section 4, which details the purpose of the bill, claims that it will "provide a process for the reorganization of the single Native Hawaiian governing entity and the reaffirmation of the special political and legal relationship between the United States and that Native Hawaiian governing entity for purposes of continuing a government-to-government relationship." At the same time, it makes it clear how the legislation limits the scope of self-determination: "Native Hawaiians have—(A) an inherent right to autonomy in their internal affairs; (B) an inherent right of self-determination and self-governance; (C) the right to reorganize a Native Hawaiian governing entity; and (D) the right to become economically self-sufficient" (Section 4, part 5).

Sections 5 and 6 of the bill give the U.S. Department of Defense free rein. Whereas Section 5 requires the proposed U.S. Office of Native Hawaiian Relations to consult with the Native Hawaiian Governing Entity "before taking any actions that may have the potential to significantly affect Native Hawaiian resources, rights, or lands," it makes an exception for anything having to do with the needs, wants, and desires of the U.S. Department of Defense: "This section shall have no applicability to the Department of Defense or to any agency or component of the Department of Defense." This means that U.S. militarism in and from Hawaiian waters and lands can continue without end and that neither the Office nor the Native Hawaiian Governing Entity could do anything to stop it according to U.S. law. Similarly, Section 6, after outlining the composition and duties of the Interagency Coordinating Group set up to coordinate federal programs that address the conditions of Native Hawaiians and are administered by federal agencies other than the Department of the Interior, reiterates that "this section shall have no applicability to the Department of Defense or to any agency or component of the Department of Defense."

Section 8 reaffirms the delegation of U.S. government authority to the State of Hawai'i in order to address the condition of Native Hawaiians under the Hawai'i state admissions act. With regard to negotiations, this section specifies that after the Native Hawaiian governing entity is created, *both* the United States and the State of Hawai'i may enter into negotiations with the Native Hawaiian governing entity. This sets the bill apart from other forms of federal recognition of Native nations, which do not typically give state

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governments any part in the negotiations, with the exception of matters related to Indian gaming. This bill allows the State of Hawaiʻi to sit at the table to negotiate matters including the transfer of lands, natural resources, and other assets and the protection of existing rights related to such lands or resources; the exercise of governmental authority over any transferred lands, natural resources, and other assets, including land use; the exercise of civil and criminal jurisdiction; the delegation of governmental powers and authorities to the Native Hawaiian governing entity by the United States and the State of Hawaiʻi; any residual responsibilities of the United States and the State of Hawaiʻi; and grievances regarding assertions of historical wrongs committed against Native Hawaiians by the United States or by the State of Hawaiʻi. None of these things are guaranteed in the bill—not land, not jurisdiction, not assets, not governmental power. They are all open to negotiation once representatives of a Native Hawaiian governing entity sit down with federal and state agents. There is no equal footing here; all negotiations must take place within the framework of U.S. federal law and policy with regard to Indian tribes and under U.S. plenary power, where the U.S. government asserts total and complete power, and in this case the State of Hawaiʻi will have an equal role.[14]

Notably, Section (e) of the bill states, "Nothing in this Act alters the civil or criminal jurisdiction of the United States or the State of Hawaiʻi over lands and persons within the State of Hawaiʻi." It further states, "The status quo of Federal and State jurisdiction can change only as a result of further legislation, if any, enacted after the conclusion, in relevant part, of the negotiation process established in section 8(b)." In other words, when the representatives of the Native Hawaiian governing entity sit at the table to negotiate with federal and state agents, they cannot negotiate for civil or criminal jurisdiction over any land. In order for them to do so, more legislation would need to be passed.

This section of the bill also includes a disclaimer: nothing in the act can create a cause of action against the United States or any other entity or person, or alter "existing law, including existing case law, regarding obligations on the part of the United States or the State of Hawaiʻi with regard to Native Hawaiians or any Native Hawaiian entity." It further states that nothing in the bill can create any new obligation to Native Hawaiians under federal law, and it specifically outlines and protects the federal government through sovereign immunity against lawsuits for breach of trust, land claims, resource-protection or resource-management claims, or similar types of claims

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brought by or on behalf of Native Hawaiians or the Native Hawaiian governing entity. And it asserts that the State of Hawaiʻi "retains its sovereign immunity, unless waived in accord with State law, to any claim, established under any source of law, regarding Native Hawaiians, that existed prior to the enactment of this Act."

This last section, among others, especially raised concerns within the Native Hawaiian Bar Association (NHBA). On 11 June 2009, the NHBA submitted testimony to the House Committee on Natural Resources regarding the House version of the Akaka bill (H.R. 2314). Although the NHBA expressed its support for the bill, its testimony outlined some major concerns. The first is the role of the U.S. Department of Defense as it relates to the Office of Native Hawaiian Relations and the Native Hawaiian Interagency. The second is the role of the U.S. Department of Justice (DOJ) because, unlike earlier versions of the bill, the current legislation does not include a provision authorizing the designation of a DOJ representative to assist in the implementation and protection of the rights of Native Hawaiians and their political, legal, and trust relationship with the United States. The third concern was the section of the bill relating to "claims and sovereignty immunity." The NHBA notes,

> We believe it is unnecessary and premature to include provisions on claims and sovereign immunity prior to federal recognition of a Native Hawaiian Government and recommend that these provisions under section 8(c) be taken out of the bill. Such provisions could be contemplated during implementation legislation after federal recognition is conferred and negotiations between the Native Hawaiian Governing Entity and the State of Hawaiʻi and Federal Government are completed. The bill's provisions on claims and federal sovereign immunity appear to be overly broad and may prohibit lawsuits by individual Native Hawaiians for claims that could be pursued by any other member of the general population.

In response, Rep. Neil Abercrombie of Hawaiʻi suggested the legislation be revisited to assess whether another revision was needed.[15]

Although the U.S. Senate Committee on Indian Affairs proceeded to hold a hearing for the companion bill to H.R. 2314, S. 1011, the intervention by the NHBA may serve to slow down the process to allow more critical analysis of the proposal overall, at least among those in the Kanaka Maoli communities both within the islands and throughout the U.S. continent. However, should the Akaka bill pass, Kanaka Maoli would be shut out of the decolonization

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model, which would technically leave open the venue for redress offered by the United Nations Declaration on the Rights of Indigenous Peoples. But, as we shall see below, for a variety of reasons this is an unsatisfactory alternative.

Self-Determination and the Rights of Indigenous Peoples

On 13 September 2007, the United Nations General Assembly adopted the Declaration on the Rights of Indigenous Peoples. The result of nearly three decades of activism, it is the most comprehensive international human rights document addressing the rights of indigenous peoples all over the world. Indigenous peoples worldwide have worked for decades to ensure that their *preexisting* human rights are recognized and upheld by global nation-states, especially since the domestic laws in most settler states have not protected their ability to assert their self-determination. Key issues of struggle include the right of ownership and control of territory and resources, protection of sacred sites and lands, self-governance, and decision-making authority vis-à-vis the dominant population. Central to all of these is the question of indigenous peoples' right to self-determination under international law. Because the basic criteria defining colonies under international law include foreign domination and geographical separation from the colonizer, indigenous peoples up until now have been at a disadvantage in terms of the application of decolonization protocols, an issue heatedly debated throughout the world community because indigenous peoples are often considered to be subject to internal colonization.

This limitation reflects the long-term battle over whether indigenous peoples should be considered peoples in the context of Chapter XI of the United Nations Charter of 1945, which includes the Declaration Regarding Non-Self-Governing Peoples in Article 73 and within United Nations General Assembly Resolution 1514, which reads, "All peoples have the right to self-determination; by virtue of that right, they freely determine their political status and freely pursue their economic, social, and cultural development."[16] Regarding the question of self-determination for indigenous peoples, the still-cited report by José Martinez Cobo, commissioned by the United Nations, states, "Self-determination constitutes the exercise of free choice by indigenous peoples, who must, to a large extent, create the specific content of this principle, in both its internal and external expressions, which do not necessarily include the right to secede from the State in which

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they may live and to set themselves up as sovereign entities. *This right may in fact be expressed in various forms of autonomy within the State*" (emphasis added).

There is no consensus on whether indigenous peoples have the right to full self-determination—an option that would allow for the development of nation-states that are independent of their former colonizers, like the postcolonial Third World—or whether that right is limited to internal self-determination within the existing nation-states in which they are included. The use of the term *peoples*, which signifies legal rights under international law over and above the term *people*, has been the most contentious part of this debate. This form of discrimination can be traced to the Law of Nations, which institutionalized the international legal discrimination against indigenous peoples (Newcomb 2008).

The establishment in 1982 of the Working Group on Indigenous Populations (WGIP), under the United Nations Economic and Social Council, led the effort to draft a specific instrument under international law that would protect indigenous peoples worldwide. The WGIP was informed by early organizations, such as the International Indian Treaty Council, formed in 1977, which was the first organization of indigenous peoples to be reorganized as a Non-Governmental Organization (NGO) with Consultative Status to the United Nations Economic and Social Council. Another example is the American Indian Law Alliance, founded in 1989, which also has special consultative status with the Economic and Social Council of the United Nations.

Initially, the WGIP submitted a first draft of a declaration on the rights of indigenous peoples to the Sub-Commission on the Prevention of Discrimination and Protection of Minorities, which was eventually approved in 1994.[17] The draft was sent to the United Nations Commission on Human Rights for further discussion. The declaration was stalled for many years because of concerns by states with regard to some of its core statements, namely, the right to self-determination of indigenous peoples and the control over natural resources existing on indigenous peoples' traditional lands. By 1995 an open-ended intersessional working group was formed with the understanding that some version of the declaration would be adopted by the General Assembly within the International Decade of the World's Indigenous Peoples (1995–2004). The United Nations Commission on Human Rights extended the mandate of the WGIP into the Second International Decade of the World's Indigenous Peoples (2005–2015) and also urged it to

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present for UN adoption a final draft declaration on the rights of indigenous people.

The Human Rights Council of the United Nations was the first to adopt the Declaration on the Rights of Indigenous Peoples, in June 2006, and offered a recommendation that it be adopted by the General Assembly.[18] In the vote of the General Assembly, the declaration was passed with a vote of 143 in favor, 4 against, and 11 abstentions. Notably, the 4 votes against the adoption came from white settler states, all with a strong indigenous presence in terms of political resistance to First World domination: Australia, Canada, New Zealand, and the United States. Many attribute the opposition of these states to governmental fears that indigenous peoples would secede and seek independence, acts which potentially threaten to disrupt the contiguous land mass of the settler nation-states that encompass them.

Regarding the issue of self-determination, however, the newly adopted Declaration on the Rights of Indigenous Peoples is ambiguous. On the one hand, Article 3 states, "Indigenous peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social, and cultural development." But on the other hand, the last article, Article 46, states, "Nothing in this Declaration may be . . . construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States." For example, the U.S. government would surely be threatened if the Navajo Nation were to seek independence, given that the asserted boundaries of the states of New Mexico, Colorado, Utah, and Arizona fall within the Diné's traditional territory. Given these two seemingly contradictory articles, how are we to understand what the right to self-determination means and to what extent that right can be realized by indigenous peoples?

Article 26 states the following with regard to traditional lands:

1. Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired.
2. Indigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired.
3. States shall give legal recognition and protection to these lands, ter-

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> ritories and resources. Such recognition shall be conducted with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned.

Parts 1 and 2 here are explicit in terms of the right to land. They could certainly be cited in support of the Hawaiian sovereignty proponents in the reclamation of the Hawaiian Kingdom Crown and Government Lands controlled by the state government of Hawaiʻi under the United States, as well as other lands in the archipelago heretofore unalienated under the kingdom during the Mahele land division of 1848, which privatized traditional communal lands. The question remains how the claim to traditional lands by indigenous peoples can be asserted in light of the article meant to protect the territorial integrity of states.

Since Kanaka Maoli (among the vast majority of kingdom heirs) live in a historically occupied state, the question of territorial integrity could be evoked by those supporting an independent Hawaiian state, not simply the settler state of the United States.[19] The principle of territorial integrity is usually operative vis-à-vis other states: that is, one state is prohibited from invading and accessing another state's territory, although this happens nonetheless. Article 46 can be used as political leverage to advocate for the territorial integrity of the Kingdom of Hawaiʻi as a state. The U.S. government violated the Hawaiian state's territorial integrity when it supported an illegal overthrow and unilaterally annexed Hawaiʻi in contravention to U.S. federal law, its treaties with the kingdom, and international law operative at the time. Hence, deoccupation supporters demand that the U.S. government withdraw from Hawaiʻi. Still, the U.S. government casts independence claims as attempts at secession, a complete misnomer.

Prior to the passage of the declaration many governmental officials assumed that the right of indigenous groups to self-determination would lead to secession, and this assumption was used to deny indigenous peoples this right (Lâm 1992). Even members of the WGIP and the UN special rapporteurs have shared this assumption of states (Lâm 1992). Maivân Clech Lâm suggests that it is possible for indigenous peoples to exercise self-determination without threatening the territorial integrity and sovereignty of the surrounding state, especially since most have visions of becoming autonomous without becoming nation-states. In fact, most seek mutually negotiated free association (Lâm 1992; Griswold 1996, 98). Situations differ depending on the state in question and its location. For example, most indigenous movements

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throughout North and South America continue to fight for an expansion of cultural, political, and territorial autonomy within the respective settler states that encompass them. Within these debates is the continuous contestation over the concepts of sovereignty, self-determination, self-government, and autonomy, which differ in meaning and intention within different contexts.

In the context of the United States, even if indigenous peoples have no vision of becoming nation-states, the most basic components of fuller autonomy would likely disrupt the territorial integrity of the surrounding state. For example, if the U.S. government were to honor and abide by all of the treaties it signed with indigenous nations; return most of the National Parks to the indigenous peoples from whom they were taken; federally recognize all tribal nations and entities who seek this U.S. domestic model of acknowledgment (which includes over two hundred tribal entities that have submitted their petitions and remain on the Bureau of Indian Affairs' waiting list); and restore all previously terminated tribes with federal acknowledgment, one can certainly imagine a major reordering of society in a way that would affect the existing state and the territory the U.S. government currently claims as its own. None of these four actions need be tied to the goal of indigenous nations becoming nation-states; however, the likelihood that the federal government would act on any of these matters at this moment in time seems quite far-fetched. Indeed, indigenous possession is a contradiction inherent in the U.S. nation-state and its very foundations.

Today, international lawyers who favor nation-states argue that indigenous peoples do not have an unqualified right to self-determination under international law, while those who favor indigenous peoples argue that they do (Lâm 1992). There is no consensus regarding this model, which is why so many indigenous activists have devoted much time and effort to advocating that the United Nations and the Organization of American States (OAS) adopt the Declaration on the Rights of Indigenous Peoples affirming that indigenous peoples have an *unqualified* right to self-determination.

The Indigenous Caucus at both the United Nations and the OAS had consistently taken the position that indigenous peoples are colonized and therefore fall under the decolonization model. UN documents and international practice demonstrate that self-determination is a right available to all peoples. But there was widespread controversy over when a group of persons constitute a people who are entitled to self-determination under international law. When the U.S. National Security Council took a position on indigenous peoples before the United Nations Commission on Human Rights

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and its Working Group on the Draft Declaration on Indigenous Rights, along with a similar OAS draft declaration, the council stated that the United States urged the use of the term *internal self-determination* for indigenous peoples. In other words, the U.S. position was that using the term *self-determination* was advisable only if it was defined in a way that meant that the right to self-determination signified indigenous peoples' right to negotiate their respective political statuses within the framework of the existing nation-state. The debate over indigenous peoples' demand for the use of the term *peoples* was crucial to activist demands under international law. The U.S. government has continuously opposed the use of the term *peoples*, which marks distinction to peoplehood and attendant collective rights to sovereignty. However, with the adoption by the United Nations of the Declaration on the Rights of Indigenous Peoples, such opposition may potentially change—especially if the declaration becomes a convention with the full force of international law.

Conclusions

The complex history of Hawai'i and its multiple transitions from sovereign kingdom to occupied colonial territory to fiftieth U.S. state presents a unique challenge as we think through the options for decolonization that are available to Kanaka Maoli and other heirs of the kingdom. Given the layers of history and foreign intervention, there is no clear or easy way to resolve this problem, especially so long as the U.S. government continues to dominate nations across the globe with its political and military power. The history of both American colonialism and U.S. occupation has generated a variety of options—but none of them seem sufficient in their current scope since each has serious limitations.

As we saw in the discussion of the Akaka bill, the status of domestic dependent nation that would be granted Native Hawaiians through a process of federal recognition neither recognizes the kingdom's history of sovereign existence nor takes into account the unjust occupation and overthrow of the monarch by the U.S. government. At the same time, relying on presently existing international law regarding indigenous peoples also has the limitation that, in its present state, it still gives priority to existing nation-states and puts the preexisting rights of indigenous peoples as nations on the back burner. While this may change, for the moment neither of these options gives Kanaka Maoli or other heirs of the kingdom the satisfaction of recognizing their previously independent status.

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Yet, as we also saw briefly, the deoccupation model, while taking account of such independent status, also denies the internal colonialism in terms of culture, language, and territory to which the Kanaka Maoli have been specifically subjected. It seems as though recognition of the previous sovereignty of the kingdom currently rests on the denial of internal forms of domination. In the end, therefore, there does not seem to be one alternative that both recognizes the kingdom's history of sovereignty and provides Kanaka Maoli with the cultural and territorial restitution to which they aspire. Furthermore, although Kanaka Maoli constituted the majority of the kingdom's subjects prior to the overthrow in 1893, Kanaka Maoli and other heirs of the kingdom together are a demographic minority in Hawai'i's current population. This begs the question as to how the kingdom government would be restored if independence became a feasible political goal, since within the contemporary world community minority-led governments are viewed as unacceptable. In response to this problematic, the normative solution under international law that would have all citizens equally enfranchised without any differential status for Kanaka Maoli and other heirs raises the possibility that Kanaka Maoli would once again be a vulnerable indigenous minority under an independent Hawaiian government and thus have to rely on the indigenous rights provided under current international law, as it is now in any case.

In an "Urgent Open Letter to U.S. President Barack Obama" dated 13 April 2009, a self-selected group of Kanaka Maoli, *kupuna* (elders), *kumu* (educators), and representatives wrote on behalf of the Kanaka Maoli people as well as of other heirs of the Kingdom of Hawai'i. Signatories also included a number of our *kako'o* (supporters) who were invited to add their names.[20] The letter's primary purpose was to inform the president of the signatories' categorical opposition to the proposed legislation. It also proposed an alternative bilateral approach to begin to address the complex legacy detailed in this essay in a way that promotes restorative justice. The letter read in part as follows:

> The Bill arrogantly attempts to unilaterally characterize the historical transgressions of the United States against our people and kingdom, and to unilaterally specify their remedy. We insist otherwise. U.S. crimes against our Kanaka Maoli people and other Kingdom heirs from 1893 on require, for their redress, that a mechanism composed of U.S. agents and wholly independent representatives of Kanaka Maoli and Kingdom heirs

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be bilaterally set up by your Administration and us to make findings of fact and conclusions of international law that could serve as a road-map for the resolution of the political and legal issues now outstanding between our two parties.

As this essay has made clear, the complex histories of colonialism, occupation, and discrimination to which Native peoples have been subject across the globe have no single solution, precisely because each case has its own particular characteristics. Given the especially fraught history of the Hawaiian case, the combination of international law and honest bilateral dialogue might be the only venue open for redress. But it is also my hope that, if brought to fruition, such dialogue might provide an example of what could be possible for indigenous nations in other parts of the world.

Notes

This essay began as a presentation delivered at the Native American Studies Symposium "Narrating Native American History in the Americas," University of Wisconsin, Madison, 7–10 April 2005. I would like to thank Florencia Mallon and Ned Blackhawk for inviting me to present my work there, as well as the following individuals and institutions that created opportunities for me to present various working versions of this piece: Jessica Cattelino and Miranda Johnson for inviting me to present at the Comparative Colonialisms workshop hosted by the Anthropology Department of the University of Chicago; Aileen Moreton-Robinson for inviting me to present an earlier version for the inaugural lecture for the Indigenous Studies Research Network, Queensland University of Technology in Brisbane, Australia; and Alyssa Mt. Pleasant for inviting me to present at the American Studies colloquium at Yale University.

1. Congress has enacted numerous special provisions of law for the benefit of Native Hawaiians in the areas of health, education, labor, and housing. Along with American Indians and Alaska Natives, Native Hawaiians have been included in over 160 federal acts for Native Americans since 1903. To some degree, then, the U.S. Congress has recognized that a special relationship exists between the United States and the Native Hawaiian people when it extended some of the same rights and privileges accorded to American Indian, Alaska Native, Inuit, and Aleut communities. Relevant legislation includes the Native American Programs Act of 1974 (42 USC 2991 et seq.), the American Indian Religious Freedom Act (42 USC 1996), the National Museum of the American Indian Act (20 USC 80q et seq.), the Native American Graves Protection and Repatriation Act (25 USC 3001 et seq.), the National Historic Preservation Act (16 USC 470 et seq.), and the Native American Languages Act (25 USC 2901

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et seq.). Also, under Title VIII of the Native American Programs Act of 1975, Native Pacific Islanders are defined as Native Americans. There are also several Hawaiian-specific federal acts, comparable to those providing for American Indians and Alaskan Natives, such as the Native Hawaiian Health Care Act and the Native Hawaiian Education Act. In all of these acts Hawaiians are defined by the most inclusive definition: "Any individual who is a descendent of the aboriginal people who, prior to 1778, occupied and exercised sovereignty in the area that now constitutes the State of Hawaii."

2. The United States and members of the international community also recognized the Kingdom of Hawai'i's independence through treaty relations with the major powers of the world, including not only the United States (1849, 1870, 1875, 1883, and 1884), but also Austria-Hungary (1875), Belgium (1862), Denmark (1846), France (1846 and 1857), Germany (1879), Great Britain (1836, 1846, and 1851), Italy (1863), Japan (1871 and 1886), the Netherlands (1862), Portugal (1882), Russia (1869), Samoa (1887), Spain (1863), the Swiss Confederation (1864), and Sweden and Norway (1852).

3. The fiftieth anniversary of U.S. statehood for Hawai'i, in 2009, marked an opportunity for scholars to investigate the details of the vote issued by the colonial administration in the Hawaiian Islands at the time. Some of the issues that need research attention include the executive decisions that allowed both U.S. military and other non-Hawaiian residents to vote (regardless of whether or not they were descendants of the Kanaka Maoli and non-Hawaiians residing in the Islands prior to the unlawful U.S. annexation), and a careful study of the reports issued by the U.S. representative to the United Nations, who reported that Hawaiians had already exercised self-determination in the vote of 1959 and therefore should be removed from the UN list of non-self-governing territories.

4. See www.un.org/Depts./dpi/decolonization/declaration.htm.

5. In 1962 the General Assembly established a special committee, now known as the Special Committee of 24 on Decolonization, to examine the application of the declaration and to make recommendations on its implementation. http://www.un.org/Depts/dpi/decolonization/declaration.htm.

6. See also http://www.hawaiiankingdom.org/.

7. Here, too, the proponents of kingdom restoration engaging in this problematic critique do not acknowledge that indigenous governing systems by and large have always managed to incorporate outsiders too, even if they do not do so under the auspices of a state government. Moreover, there seems to be little understanding that contemporary tribes that have been granted U.S. federal recognition, for example, may limit their citizenry to those of who are their specific indigeneity, but this may also be because the U.S. government maintains that its trust obligation is limited to those who have ancestry from any given Native Nation and not non-Natives.

8. Unfortunately, as discussed below, in the U.S. Supreme Court ruling in *State*

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of Hawaii v. Office of Hawaiian Affairs, et al., the court ruled that the apology was merely symbolic and had no legal effect when it comes to the question of land title.

9. For a critical account of this legal case, see Kauanui (2002).

10. This process of appointments already set the proposal apart from the Indian Reorganization Act of 1934.

11. For a critical analysis of the neoconservative forces on the Islands that organized against the legislation because they regarded it as a proposal for race-based government, see Kauanui (2008).

12. For information on S. 1011 and H.R. 2314 and their predecessors, see http://thomas.loc.gov/cgi-bin (accessed 11 August 2009).

13. On 31 March 2009 the U.S. Supreme Court issued its ruling in *State of Hawaii v. Office of Hawaiian Affairs, et al.* The State of Hawaiʻi asked the high court whether or not the state has the authority to sell, exchange, or transfer 1.2 million acres of land formerly held by the Hawaiian monarchy as Crown and Government Lands. Prior to the state's appeal to the U.S. Supreme Court, the Hawaiʻi Supreme Court unanimously ruled that the state should keep the land trust intact until Kanaka Maoli's claims to these lands are settled and prohibited the state from selling or otherwise disposing of the properties to private parties; it did so based on an Apology Resolution of 1993 issued by Congress to the Hawaiian people. The U.S. Supreme Court reversed the judgment of the Hawaiʻi Supreme Court and remanded the case for further proceedings with the stipulation that the outcome not be inconsistent with the U.S. Supreme Court's opinion. The contested land base constitutes 29 percent of the total land area of what is now known as the State of Hawaiʻi and almost all the land claimed by the state as public lands. These lands were unilaterally claimed by the U.S. federal government when it unilaterally annexed the Hawaiian Islands through a joint resolution by the U.S. Congress in 1898, after they had been "ceded" by the Republic of Hawaiʻi, which had established itself a year after the armed and unlawful overthrow of the Hawaiian monarchy under Queen Liliʻuokalani in 1893. The Court insists that the apology does not change the legal landscape or restructure the rights and obligations of the state. The ruling states that the apology would "raise grave constitutional concerns if it purported to 'cloud' Hawaiʻi's title to its sovereign lands more than three decades after the State's admission to the union." The Court further opined that "Congress cannot, after statehood, reserve or convey submerged lands that have already been bestowed upon a State." But if the Apology Resolution has no teeth in the court of the conqueror, how is it that the Newlands Resolution that unilaterally annexed Hawaiʻi does?

14. This part of the legislation should worry Native Nations across Indian Country since it gives state governments a central role alongside the Native governing entity and the federal government. Although Akaka, ever since his proposal was first introduced in 2000, has continuously asserted that his measure seeks to establish equality in the federal policies extended toward American Indians, Alaska Natives, and Native

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Hawaiians, the most recent version of the legislation makes it clear that that is not at all the case. Section 9, titled "Applicability of Certain Federal Laws," actually spells out the inapplicability of certain federal laws—those pertaining to federally recognized Indian tribes that would not apply to the Native Hawaiian governing entity. All of these laws that exclude the Native Hawaiian governing entity happen to be laws that greatly benefit tribal nations. The Native Hawaiian governing entity would not be allowed to claim rights under the Indian Gaming Regulatory Act. The Native Hawaiian governing entity would not be allowed to have the secretary of the interior take land into trust on behalf of the Native Hawaiian governing entity. This is important because only land held in trust by the federal government on behalf of Native Nations is allowed to be used by Indian tribes as part of their sovereign land base where they can assert jurisdiction. The Native Hawaiian governing entity would not be allowed to rely on the Indian Trade and Intercourse Act to challenge how the State of Hawai'i acquired the Kingdom of Hawai'i Crown and Government Lands. No other Native Hawaiian group would be eligible for recognition under the Federal Acknowledgment Process. The Native Hawaiian governing entity would not be eligible for Indian Programs and Services.

15. Some within the Native Hawaiian community in Hawai'i have speculated that Abercrombie's responsiveness to the NHBA's concerns may be appropriately linked to his campaign for election as Hawai'i's state governor in 2010.

16. www.un.org/aboutun/charter.

17. www.un.org/esa.

18. www.ohchr.org.

19. Thanks to Andrea Carmen, executive director of the International Indian Treaty Council (the first organization of indigenous peoples to be reorganized as a nongovernmental organization), who, in an interview for my radio show, "Indigenous Politics: From Native New England and Beyond," explained that Article 46 can be interpreted for the benefit of Hawaiian independence from the United States. Carmen also noted that the article became a catchall for states and that it was inserted after 2004 when countries that supported the declaration, including Mexico, Guatemala, Peru, and others, prompted such a move. It was adopted by the Human Rights Council in 2006. For more information, listen to the interview, which aired on 13 January 2009 and is archived online: http://indigenouspolitics.mypodcast.com.

Also featured on a different program of my show was Tonya Gonnella Frichner, founder and president of the American Indian Law Alliance. This program includes a comprehensive account of the activist history that led to the passage of the declaration as well as a critical analysis of the politics of careful negotiations that led to the compromises over these seemingly contradictory articles of the declaration.

See http://indigenouspolitics.mypodcast.com.

20. For a list of the signatories, see the letter as it appeared in *Counterpunch*: http://www.counterpunch.org/blaisde11041520009.html.

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