Ho`olāhui: The Rebirth of A Nation

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The right to self-determination is a right recognized in the United Nations Charter and by the international community. Yet, as Ms. Tomasa observes, the indigenous Kānaka Maoli people of Hawai`i have been denied this right by a history and the continuing practice of illegitimate political and economic exploitation by the United States. She argues that the Kānaka Maoli should use the international law of decolonialization and indigenous people's rights to have Hawai`i reclassified as non-self-governing territories that will enable them to exercise self-determination. Ms. Tomasa looks to other Pacific territories to provide the Kānaka Maoli with the framework to successfully complete the process of decolonization.

Self-determination is a name for a social phenomenon which, like all social phenomena, contains the past still active within it, and which, like all social phenomena, also contains within it possible futures which are ours to choose.

Philip Allott1

A. INTRODUCTION

In 1996, the state of Hawai`i used bulldozers to forcibly remove indigenous Hawaiians from Mākua Beach. Hawaiian homes were burned to the ground, personal belongings confiscated and those who outwardly opposed were jailed as squatters. In 1995, a scuffle broke out between unarmed Native Hawaiians and armed federal agents at a native burial site in Sunset Beach, O`ahu. No arrests were made but one Hawaiian was injured.2 In 1993, thirty-five Hawaiians were arrested for trespassing while protesting the 100th Anniversary of the overthrow of the Hawaiian monarchy. Charges were later dropped, but only after massive media coverage.3 In all three instances, Native Hawaiians were without legal remedies under either state or federal law in their struggle for self-determination.

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Self-determination is broadly described as "the expression of will of a community on its political status in relation to other communities or on its own internal political organization [sic]."\(^4\) Importantly for Hawaiians, the international community has recognized the right to self-determination as a fundamental principle since the 1940s.\(^5\) Self-determination was placed in the United Nations Charter as the foundation for universal respect and peace.\(^6\) Up until recent decades, however, the application of self-determination as both a political concept and a legal right has been plagued by "theoretical confusion and political misuse."\(^7\) Fortunately, self-determination evolved and took shape over the decades, solidifying into the legal right of people to reject colonial and analogous subjugation.\(^8\)

In recent years, self-determination has been conceptualized broadly, both in the content of the doctrine and the identification of beneficiaries, with the international community providing structure to ensure a peaceful and graduated path to the desired form of political expression.\(^9\) Presently, the right to self-determination includes the rights to independence,\(^10\) to create a new state, to reject external coercion, to overthrow an existing regime, and to obtain special protection within an existing state.\(^11\) These rights of self-determination are for the benefit of all people.\(^12\)

Notwithstanding the recognition the international community has given to the right of self-determination, the U.S. continues to resist decolonization efforts in the Pacific, especially with respect to its own conquests.\(^13\) Resistance is the result of tension between individualists and collective application of self-determination.\(^14\) Countries that have tradi-

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8. See Lâm, supra note 6, at 117.

9. See generally, Lâm, supra note 6, at 81.

10. See Declaration on Colonial Countries, supra note 5, at 66. The right to self-determination includes the right to independence, which is interpreted as the political and territorial separation from an existing state. The right of self-determination is comprehensive, but the people who retain the right may choose to limit the scope of its exercise.


14. See Michael Holley, Recognizing the Rights of Indigenous People to Their Traditional
tionally colonized, like the U.S. and France, define self-determination as an individual’s right to choose a status and make meaningful choices as normal citizens of the colonizing state. This would result in both native and non-native individuals exercising equally-held political liberties.\(^{15}\) Subjugated people,\(^{16}\) especially indigenous groups, advocate for a collective application of self-determination which is subjectively defined, similar to *jus cogens*,\(^{17}\) which could prevent imposition of oppressive laws by the colonizer. Through the application of collective self-determination and U.N. intervention, many people have become empowered to exercise their right to self-determination; decolonization is finally becoming a reality in the Pacific.

The Native Hawaiians or Kānaka Maoli,\(^{18}\) along with other indigenous Pacific people\(^{19}\) in settled states, face double opposition against subjugation. Generally, the greater the success of the invading society, the greater the deprivation of the invaded.\(^{20}\) This does not mean that indigenous people are entitled to less redress than traditionally colonized peoples; rather, the indigenous experience involves a greater loss as well as greater entanglement within the settler’s society.\(^{21}\) As a result, indigenous people—as distinguished from minorities within a state—are entitled to specific redress for their exceptional and unrivaled losses of independence, culture, and a distinct nationality.

The unique position of indigenous people is especially apparent in Hawai‘i. In the case of the Kānaka Maoli, the Apology Resolution\(^{22}\) illustrates the double barrier against self-determination. Although the U.S.

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15. *See id.* (emphasis added).


17. *See infra* notes 114, 115 and accompanying text. A collectivist approach would treat self-determination as a rule of *jus cogens*. For example, property rights could not be overridden by national legislation, but only through international adoption, adjudication, or arbitration. *See Holley,* supra note 14, at 147.

18. *See MARY KAWENA PUKU’I & SAMUEL H. ELBERT, HAWAIIAN DICTIONARY 127* (revised and expanded ed. 1986) defines “Kanaka Maoli” as a full-blooded Hawaiian person; “Kānaka Maoli” is the plural form. More recently, the definition has been broadened to include a person descended from the pre-1778 inhabitants of Hawai‘i. *See Marion Kelly, Hawai‘i Committee for the Humanities Study, in HAWAIIAN SOVEREIGNTY: MYTHS AND REALITIES 1 (1992).*

19. Independence movements within the Pacific area that have identified issues similar to the independence movement in Hawai‘i include New Caledonia, West Papua, East Timor, Belau and Tahiti. For a detailed discussion of these areas, see Haunani-Kay Trask, *From a Native Daughter: Colonialism & Sovereignty in Hawai‘i* 55-69 (1993).

20. *See Läm,* supra note 6, at 118.

21. *See id.*

22. *100th Anniversary of the Overthrow of the Hawaiian Kingdom, Pub. L. No. 103-150, 107 Stat. 1510 (1993). Pub. L. No. 103-150 is more familiarly known, and hereinafter will be referred to, as the “Apology Resolution.”*
recognized the continuing detrimental effects of U.S. colonization in Hawai‘i, the Apology Resolution failed to specify remedies for the territory and the Kānaka Maoli. Instead, the Apology Resolution included a disclaimer leaving a gap of specific measures or remedies that would provide a “proper foundation for reconciliation.” In spite of the stagnant position of the U.S., however, Hawai‘i and the Kānaka Maoli have relief. Due to the international status of self-determination, the eventual reversion of Hawai‘i and the Kānaka Maoli to their former independent status is neither as distant nor as illusory as it has been in the past.

From the U.N.’s inception, it has pledged itself to the principle of self-determination and the equal rights of peoples. Under this principle, the U.N. has provided for decolonization as a remedy for the destruction and devastation caused by colonialism. This remedy is applicable where an entity which has been recognized as a non-self-governing territory elects the status it desires: independence, free association on the basis of equality, integration, or any other status freely determined by the people. If implemented properly, this process provides a viable means through which the Kānaka Maoli may exercise their right to self-determination.

The international community has also developed and accepted binding norms relating to the right to self-determination for indigenous peoples. Declarations, resolutions, and treaties have established international standards by which all people are able to fully exercise their right to self-determination. Under these norms, the unique position of indigenous people is recognized and given standing. These internationally recognized rights provide an alternative method through which indigenous people, like the Kānaka Maoli, may fully realize their right to self-determination.

This Comment will discuss the legal foundation and application of the right to self-determination within the context of international law. Hawai‘i will serve as a case study illustrating the two methods for actualizing self-determination: (1) the process of decolonization, and (2) indigenous peo-

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23. Id. The disclaimer stated in part that “[n]othing in this . . . is intended as a settlement of any claims against the U.S.”
24. Id.
26. See Apology Resolution, supra note 22. The U.S. recognized the devastation of the Kānaka Maoli’s land, cultural identity, and traditional customs in the Apology Resolution. See id.
28. See W. Ofuatey-Kodjoe, Self-Determination, in 1 UNITED NATIONS LEGAL ORDER 349, 377 (Oscar Schachter & Christopher C. Joyner eds., 1995). Ofuatey-Kodjoe suggests the fourth option as an alternative because if the territory’s choice leads the land to remain in a subjugated condition, the people will be allowed to select again until their choice represents a self-governing state. See id.
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The process of decolonization will be addressed as both a remedial process and a procedure that is questionable as applied to the Kanaka Maoli. Additionally, the rights of indigenous people will be examined as a potential route for the Kanaka Maoli towards self-determination.

Finally, the Comment will discuss and compare similar indigenous Pacific peoples' experiences with the process of decolonization, as applicable to Hawai'i and the Kanaka Maoli. Based upon this examination, it may be desirable for the Kanaka Maoli to choose decolonization procedures that have been successful with other Pacific indigenous people and to advocate for their use in Hawai'i's struggle for self-determination. These case studies also illustrate the potential legal ramifications of self-determination and independence in Hawai'i.

B. BACKGROUND

1. The Past

The Hawaiian Islands were first settled by Polynesian sailors from the Marquesas Islands as early as A.D. 375.30 Centuries of undisturbed civilization enabled Hawaiians, the indigenous people of Hawai'i, to develop their own distinct language, culture, and customs.31 Colonization of Hawai'i and the Kanaka Maoli started with initial contact with the haole32 in January 1778. When Captain James Cook, a British sea captain, discovered Hawai'i en route to Tahiti, an estimated one million Hawaiians inhabited the eight islands altogether.33

After the initial contact in 1778, a growing number of Americans and Europeans frequented Hawai'i. By 1794, Hawai'i was fully thrust into an eighteenth century defined by imperialism and colonialism, and caught between a western world and traditional Hawaiian ways. By 1845, under moral right which the U.S. has to correct the injustices. This particular Comment, however, explores the broader issues of self-determination directly related to the Kanaka Maoli under the U.N. Charter and U.N. Resolutions. The ability for Kanaka Maoli to implement a process of decolonization under either U.N. guidelines or indigenous rights according to principles of international law is also examined. Finally, this Comment explores three Pacific case studies and made a preliminary assessment of the possible implications of independence for Hawai'i and the Kanaka Maoli.

31. See Van Dyke, supra note 13, at 632-33 (citing Independent Commission on International Humanitarian Issues, Indigenous Peoples: A Global Quest for Justice 11 (1987)). Although a universal definition of indigenous people has not been developed, elements to consider in determining whether a person is indigenous include pre-existence, non-dominance, cultural difference, and self-identification as indigenous. See id. at 633.
32. Puku'i & Elbert, supra note 18, at 58, defines "haole" as European, American, or Caucasian.
33. See Michael Dudley & Keoni Agard, A Call for Hawaiian Sovereignty 1 (1990) (citing David E. Stannard, Before the Horror: The Population of Hawai'i on the Eve of Western Contact (1989)).
the influence of foreigners and Calvinist missionaries, Hawai‘i was converted into a booming commercial center. Sandalwood, whaling, and sugar overwhelmed Hawai‘i with western ways of life, as did disease, which ultimately resulted in the dramatic depopulation of the Kānaka Maoli. This foreign influence led to numerous attacks on and subsequent modifications of the Hawaiian language, culture, and legalized “stealing” of land.

Hawaiian royalty ruled the Kingdom of Hawai‘i from 1794 until the unlawful overthrow of the Hawaiian monarchy in 1893. Prior to 1893, Hawai‘i had been recognized as an independent member of the international community. By the time a constitutional monarchy was established in 1840, Hawai‘i had already negotiated foreign treaties and agreements with great powers including France, Great Britain, and the United States. Moreover, by 1887 more treaties and conventions were established with Belgium, Bremen, Denmark, the German Empire, Hamburg, Hong Kong, Italy, Japan, Netherlands, New South Wales, Portugal, Russia, Samoa, Spain, the Swiss Confederation, Sweden, Norway, and Tahiti. At that time, the Hawaiian Kingdom was respected internationally and treated as an independent and sovereign country.

By the 1890s, political pressures were building from the sugar industry and its investors. This interest group advocated Hawai‘i’s annexation to the U.S. in order to guarantee tariff-free sugar export to the U.S. In January 1893, Hawai‘i’s economy was depressed and Queen Lili‘uokalani appeared likely to introduce a new Constitution which would threaten the

35. The population of the Kānaka Maoli dramatically decreased after initial contact with foreigners. In 1778, the population was estimated at one million, but by the 1820s, only about 200,000 Hawaiians remained, reflecting an 80% decline within the first 45 years of contact. By the time of the overthrow in 1893, there were only an estimated 40,000 Hawaiians. The dramatic decline of the Kānaka Maoli mainly has been attributed to epidemics of western diseases, to which the indigenous population had no immunity. The epidemics started in 1804 with typhoid fever, which was followed by influenza in 1826, whooping cough in 1832, mumps in 1839, leprosy in 1840, smallpox in 1853, diphtheria in 1890, cholera in 1895, and bubonic plague in 1899-1900. See Lilikalā Kame‘elehiwa, Hawai‘i Committee for the Humanities Study, in Hawaiian Sovereignty: Myths and Realities 4 (1992).
36. While private ownership was a foreign concept to Hawaiians, it was the backbone of and a necessity to Western economic activity. In 1848, the Māhele, or division, was enacted wherein all the land once under the common ownership of the Kingdom of Hawai‘i was divided and dispersed in three groups: lands for the commoners, the crown lands (i.e., lands reserved for the king), and government lands. Dudley & Agard, supra note 33, at 4, 7.
37. See Apology Resolution, supra note 22.
39. See id. at 3 (quoting Pōkā Laenui (also known as Hayden F. Burgess), Collection of Papers on Hawaiian Sovereignty and Self-Determination (1992)). Further supporting Hawai‘i’s status as an independent sovereign nation were the facts that Hawai‘i had set up nearly one hundred diplomatic and consular posts internationally and that Hawai‘i was a member of the Universal Postal Union, one of the very first international organizations founded. See id.
40. See generally, Castanha, supra note 38, at 2.
41. See Dudley & Agard, supra note 33, at 17.
sugar coalition.\textsuperscript{42}

On January 14, 1893, U.S. Minister John Stevens and the "Safety Committee"\textsuperscript{43} procured almost 200 armed U.S. Marines who marched into Honolulu and positioned themselves in front of ʻIolani Palace, Queen Liliʻuokalani's residence, "as a precautionary measure to protect American life and property."\textsuperscript{44} Notwithstanding the purpose of the U.S. troops, their presence intimidated the Hawaiian Government, demoralized monarchy supporters, and dissipated any threat of violence. The Hawaiian Government's own troops were no comparison against the better-trained and better-equipped American forces.\textsuperscript{45}

Queen Liliʻuokalani refused to abdicate to the provisional government but instead yielded to the authority of the U.S. under protest. In doing so, the Queen believed that the U.S. government would conduct an investigation, amend the wrongs, and restore Hawaiʻi to her independent, autonomous status.\textsuperscript{46} The Queen was only partially correct. U.S. President Grover Cleveland authorized former Democratic Senator James Blount of

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  \item \textsuperscript{42} In 1887, King David Kalākaua had no other choice but to sign into law the "Bayonet Constitution," achieved by the insistence of two armed, vigilante groups: the Honolulu Rifles and the Hawaiian League. These groups were mainly composed of American sugar interests guided by the ultimate goal of annexation.
  \item The "Bayonet Constitution" robbed Native Hawaiians of their government. The King was reduced to a ceremonial leader, and control of Hawaiʻi changed hands from the monarch to the Cabinet. In addition, the Cabinet's composition was dictated to the King by the Honolulu Rifles and the Hawaiian League, which resulted in a Cabinet composed of Hawaiian League members. Furthermore, the Constitution required all voters to sign an oath supporting the 1887 Constitution and imposed property and income requirements for voting and holding office. These traditionally oppressive requirements resulted in the disenfranchisement of the Kanaka Maoli and left them politically powerless in their own nation.
  \item The new constitution threatened to return the powers of government, including the right to vote, to the Kanaka Maoli. This worried the sugar coalition because if the Kanaka Maoli were allowed to vote, the coalition's ultimate goal of annexation would be less likely to occur. Although it appeared as though Liliʻuokalani would introduce the new constitution, upon hearing that she was going to be charged with committing a revolutionary act, the Queen formally declared and published that she was laying aside the new Constitution. She was willing to abide by the 1887 Constitution to remove any justification for an overthrow. Although the proclamation should have eased any doubts, on January 16, 1893, the Committee asked for and received assistance from U.S. Minister Stevens. See \textit{BUDNICK, supra} note 34, at 64-68.
  \item Id. at 110. The "Committee of Safety" was composed of haole members who were pro-annexation and part of the sugar coalition. See id.
  \item Id. at 111. U.S. Minister Stevens' request to \textit{U.S.S. Boston} Commander Wiltse, dated Jan. 16, 1893.
  \item See id. at 116.
  \item "I, Queen Liliʻuokalani, by the grace of God and under the Constitution of the Hawaiian Kingdom, Queen, do hereby solemnly protest against any and all acts done against myself and the constitutional government of the Hawaiian Kingdom by certain persons claiming to have established a Provisional Government of and for this Kingdom . . . Now, to avoid any collision of armed forces, and perhaps the loss of life, I do under this protest and impelled by said forces, yield my authority until such times as the Government of the United States shall, upon facts being presented to it, undo the actions of its representative [U.S. Minister Stevens], and reinstate me in the authority which I claim as the Constitutional sovereignty of the Hawaiian Islands." See \textit{CASTANHA, supra} note 38, at 5 (citing \textit{QUEEN LYDIA LILIʻUOKALANI, HAWAIIʻS STORY BY HAWAIIʻS QUEEN} 392 (1898)).
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Georgia to investigate the situation in Hawai‘i. Based on the information obtained from Blount's report, on December 18, 1893 in a written address to Congress, Cleveland declared in part:

This military demonstration upon the soil of Honolulu was of itself an act of war, unless made either with the consent of the Government of Hawai‘i or for the bona fide purpose of protecting the imperilled [sic] lives and property of the citizens of the United States. But there is no pretense of any such consent on the part of the Government of the Queen, which at the time was undisputed and was both the de facto and de jure government.

And finally, but for the lawless occupation of Honolulu under false pretexts by the United States forces, and but for Minister Steven's recognition of the provisional government when the United States forces were its sole support and constituted its only military strength, the Queen and her government would never have yielded to the provisional government, even for a time and for the sole purpose of submitting her case to the enlightened justice of the United States. 47

Despite Cleveland's statement, the provisional government declared itself an established government and did not recognize the right of President Cleveland to settle its domestic affairs. 48

The provisional government was under international criticism in that it was recognized as neither a legitimate nor a permanent government. Furthermore, it was a government without the support of its people and without a constitution, or "other fundamental document to afford even the appearance of legitimacy." 49 The provisional government responded to the criticism by drafting a new Constitution. Shortly thereafter, on July 4, 1894 the Republic of Hawai‘i was born.

Despite continued protests by the Queen, a short-lived revolt, and numerous trips to Washington, D.C. by the Queen and the heir to the throne, Princess Kai‘ulani, all efforts to restore the monarchy failed. Eventually, an annexation treaty was negotiated and signed on June 16, 1897. Three years after Hawai‘i established a Territorial government, the Legislature petitioned Congress for statehood. In both 1940 and 1959, referendums were held whereby a majority of Hawai‘i’s residents voted for statehood. 50 Finally, after a delay caused by World War II, Congress approved Statehood for Hawai‘i on March 12, 1959.

As a result of the overthrow, the Kingdom of Hawai‘i lost all its benefits and privileges including the right to "stand as an equal internationally, to make agreements and treaties with other nations and to exhibit the ex-

47. H.R. EXEC. DOC. NO. 47, 53d Cong., 3d Sess. 445-58 (1893). Later references to this document refer to it as the "Blount Report."
49. CASTANHA, supra note 38, at 8.
50. Both referendums were problematic and arguably invalid because they disregarded international norms for referendums. See supra text accompanying notes 118-29.
ternal manifestation of sovereignty." The Kānaka Maoli lost their nation, lost the right to choose a government as well as the ability to formulate culturally sensitive laws, and were robbed of their land and natural resources. As a result of colonialism and the overthrow, the Kānaka Maoli lost their motherland and the ability to exercise self-determination.

2. The Present

If the purpose of the statehood referendums were to enable the inhabitants of Hawai’i to exercise their right to self-determination, the U.S. has frustrated such purpose. This is best illustrated in the case of the Kānaka Maoli. Over a hundred years after the overthrow of the Hawaiian nation, the Kānaka Maoli are still suffering subjugation and limitations imposed by colonialism.

Statehood has continuously denied the Kānaka Maoli free exercise of self-determination. The indigenous people of the islands have a minority voice in elections that comprises only one-fifth of the 1.2 million population. Even if the Kānaka Maoli were politically united, they would still not have a meaningful say in elections and state politics. Out of all the various ethnic groups on the islands, the Hawaiians are the worst off financially, educationally, and socially. They have the highest population in the prisons, and out of prison the highest rate of homelessness. Hawaiians also possess the shortest life expectancy, suffering from the highest mortality rates for all major causes of death.

In 1921, the Department of Hawaiian Homes Land, a Hawai’i state agency, was created to disperse land grants to Hawaiians whose blood quantum is fifty percent or more. The majority of Hawaiian Home Lands are located in arid and rural areas, including Wai‘anae or Waimānalo on O‘ahu where subsistence living for farmers is difficult and the commute into Downtown Honolulu is burdensome. Under state supervision, over 16,000 Kānaka Maoli are on the wait list, and funds have been misused, have lapsed, and have been prioritized for commercial and industrial development rather than for houses and residential infrastructure.

55. Hawaiian Sovereignty #2 (Voice of America radio broadcast # 4-09453, Nov. 13, 1996) (interview with Dr. Kekuni Blaisdell, M.D.).
blasting out coral reefs, and the State Land Use Commission has been accused of violating Sunshine Laws. Additionally, legislative proposals in the Hawai‘i Senate and House have threatened the Kānaka Maoli’s cultural rights and judicial compensation. In the 1997 Legislative Session, the Senate proposed a bill that would essentially eliminate the ability of the Kānaka Maoli to practice their traditional gathering rights. That same year, the House proposed to decrease judicial compensation for the Kānaka Maoli from $33 million to less than $16 million. Both proposals illustrate how statehood continues to subjugate the Kānaka Maoli and their right to self-determination.

3. The Future

As early as 2040, Hawaiians as a distinct people may disappear. Without a meaningful voice in the government, the Kānaka Maoli remain powerless and can only watch as their culture, land, and natural resources deteriorate. Practicing Hawaiian traditions and culture is difficult, if not impossible, with the state and federal governments’ interference in gathering rights, subsistence living, immersion schools, and culture. In order to prevent the disappearance of the Hawaiian culture, effective decolonization and restoration of the Kānaka Maoli’s right to self-determination must occur. Overcoming the inadequacies of the past would entail returning control over the social, cultural, economic, and natural resources to the Kānaka Maoli. This would effectuate a return of self-determination to the Kānaka Maoli, given the spiritual connection of the Kānaka Maoli to their land and natural resources. International law provides the means of preventing the disappearance of the Hawaiian people as a distinct group.

C. THE LEGAL FOUNDATION FOR SELF-DETERMINATION

As a result of colonization first by the Europeans and then by the U.S., Hawaiians have been denied their fundamental and inherent right to self-determination. Their land, cultural identity, and traditional customs have all been devastated, which is acknowledged by the U.S. in the Apology Resolution. Although the Apology Resolution failed to provide spe-
cific measures or remedies providing a "proper foundation for reconcilia-
tion," the international community has established authority which
would enable the Kānaka Maoli to exercise their right to self-
determination. Under their right to self-determination, the Kānaka Maoli
are empowered to determine their own destiny, to control their land and
resources, to exercise self-governance, and to maintain their traditions and
identity.

The right to self-determination includes four claims reflecting both
internal and external factors. The right of self-determination is con-
stantly evolving and is actualized when the people create a legitimate state.
Self-determination is described as the transformation of the will of the
people into a state:

The history of self-determination is bound up with the doctrine of popular
sovereignty . . . . [T]he government should be based on the will of the
people, not on that of the monarch and people not content with the gov-
ernment should be able to secede and organize themselves as they wish.

This description of self-determination is similar to the conclusion
reached by the International Court of Justice in Western Sahara which
commented that "[i]t is for the people to determine the destiny of the ter-
ritory and not the territory the destiny of the people." Therefore, all peo-
ple are entitled to self-determination, which may be asserted against any
entity causing alien subjugation.

Self-determination is the right of people to govern themselves and
express their inherent sovereignty. Without the ability to exercise self-
determination, the right to sovereignty also is essentially denied. How-
ever, self-determination, unlike sovereignty, does not promote a particular
political status. Instead, self-determination supports the right of a people
to determine their own political status.

Sovereignty is understood as the right of people to recognize no

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64. Id.
65. See infra notes 79, 82 and accompanying text.
66. See Kimminich, supra note 11, at 82-100. The right of self-determination includes the
rights to independence, to create a new state, to reject external coercion, to overthrow an existing re-
gime, and to obtain special protection within an existing state. See supra notes 9-12 and accompan-
ying text.
67. Lâm, supra note 6, at 84 (citing A. Rigo Sureda, The Evolution of the Right to Self-
Determination 17 (Sijithoff ed., 1973)).
69. See Tomuschat, supra note 12, at 1-20.
70. See Declaration on Colonial Countries, supra note 5, at 66. The Declaration states in part
that "[t]he subjugation of peoples to alien subjugation, domination and exploitation constitutes a de-
nial of fundamental human rights, is contrary to the Charter of the United Nations and is an impedi-
ment to the promotion of world peace and co-operation." Id. Based on this, the interpretation of
"alien" is essential in determining against whom self-determination may be asserted.
71. See Patrick Thornberry, The United Nations and the Principles of International
authority other than itself in its own territory and to practice that right.  

As expressed by Ka Pākaukau, a coalition of Hawaiian sovereignty groups:

[Sovereignty] is the right possessed by a culturally distinct people inhabiting and controlling a definable territory, to make all decisions regarding itself and its territory free from outside interference. . . . We [as Hawaiians] can achieve sovereignty when nations of the world accept the fact that people make their own decisions and refuse to allow others to decide their fate for them.  

In order for Kānaka Maoli to have the opportunity to achieve sovereignty and to realize self-determination, a process of decolonization must occur.

Self-determination and human rights are alike in that they are both considered fundamental rights and both may be suppressed if the government subjugates the people. As a result, peoples' inherent right to sovereignty through self-determination and human rights may be limited, defined, and suppressed by colonial governments.

1. Human Rights and Self-Determination

a. Universal Declaration of Human Rights

The correlation between human rights and the right to self-determination is explained in the Universal Declaration of Human Rights, which was passed by the U.N.'s General Assembly. This Declaration is an authority on human rights and grants the universal right to a nationality—a right to which no one is to be arbitrarily deprived.  

The U.N. Committee on Human Rights has interpreted this right as applicable to all people. Furthermore, the Declaration established that the will of the people is the basis for the authority of the government, as determined by genuine elections. All groups of people have the right to their own cultural identity and the right to freely choose their government.

b. International Covenants

Other illustrations of the direct connection between human rights and self-determination are contained in the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and

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72. See Lām, supra note 6, at 82.
73. Mackenzie, supra note 51, at 80 (quoting a letter to the Forum by Paul D. Lemke, member of Ka Pākaukau, Garden Isle, Mar. 21, 1990).
75. See id. "The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be held by universal and equal suffrage." Id.
Cultural Rights, both of which were approved by the U.N. in 1966. The inclusion of these principles as covenants is significant because of the written, contractually obligatory nature of the agreement. Additionally, these Covenants are considered international treaties and bind the nations that ratify them. The first article in each Covenant supports self-determination in international law. Although the U.S. Senate has yet to ratify either Covenant, in 1977 U.S. President Carter signed both covenants. Due to Carter's signing, although the U.S. is not bound to the Covenants as treaties, the U.S. may be required to recognize and be bound by the Covenants as *jus cogens*, or international custom.

### 2. Self-Determination as a Legal Right

Self-determination is traditionally interpreted broadly to include not only a people's right to their own culture, but also governance over economic, social, political, and land-right issues. Initially, self-determination was recognized merely as a legal principle, with its foundation in the U.N. Charter. However, self-determination was elevated to the level of a legal *right*, with the international community embracing the idea of universal decolonization in the Declaration on Colonial Countries. This transformation is significant because a legal right is an entitlement, no longer an intangible ideal. Additionally, under self-governance, indigenous people may choose independence, which is a stepping-stone to eligibility in the U.N. and access to the International Court of Justice.

### 3. U.N. Recognition of Self-Determination

The U.N. Charter represents a binding agreement between signatory countries. The Charter and its Articles provide rules that serve as guidelines for the behavior of states towards each other, the primary goal being to maintain international peace and security. Since the Charter contents are considered peremptory norms of behavior, the effect is similar, but not

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80. See MacKenzie, supra note 51, at 97.
81. General principles of law recognized by civilized nations and international custom are sources of international law binding upon all nations. See I.C.J. Stat. Art. 38; see also infra note 115 and accompanying text.
82. See Barsh, supra note 62, at 70.
83. See Declaration on Colonial Countries, supra note 5, at 66.
necessarily equal, to legal authority. The following U.N. Charter Articles are sources of authority for the recognition of self-determination.

a. U.N. Charter Article 1

The U.N. has played a key role in recognizing the right to self-determination under international law. First, the right to self-determination is expressly recognized in the U.N. Charter. Under Article 1 of the Charter, one purpose of the U.N. is to "develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples..." Article 55 of the Charter also commits the U.N. to the right to self-determination by declaring that the U.N. will promote "universal respect for, and observance of, human rights and fundamental freedoms... based on respect for the principle of equal rights and self-determination of peoples." Incidentally, American Indians have cited both Article 55 and Article 1 to support their claims to the right to self-determination.

c. U.N. Charter Article 73

Article 73 of the U.N. Charter binds the U.N. to decolonization by establishing guidelines for "territories whose peoples have not yet attained a full measure of self-government." Here, the signatory countries of the U.N. must place the interests of the non-governing people first.

[There is a] sacred trust to promote the development of self-government, to take due account of the political aspirations of the peoples, and to assist them in their free political institutions according to the particular circumstances of each territory and its peoples and their varying stages of advancement.

The trust relationship discussed in Article 73 was intended as a temporary relationship in which self-governing nations assist non-self-governing territories in achieving self-determination. However, the U.S. has created its own trust relationship which places indigenous people in a permanent dependent position vis-a-vis the U.S. The trust in Article 73 clearly relates to a transient association distinguishable from the trust rela-
tionship the U.S. has created with the Native American Indians, the Native Alaskans, and the constructive trust for the Kānaka Maoli. Article 73 supports self-determination through a trust relationship, but the kind of relationship the U.S. has developed is both different and contrary to the purpose of the Article.

1. "Blue Water" Thesis

Article 73 also contains the widely criticized "blue water thesis," which limits the application of Article 73 for people who were separated by an ocean or sea from their subjugators. Application of such theory would negatively affect indigenous people who possess territories either neighboring or located within the colonizing nation. The rationale and basis for the blue water thesis has been criticized because it excludes many indigenous peoples including the Native North American Indians. The blue water thesis gives indigenous people who do not qualify geographically the status of minorities in their own motherland.

The blue water thesis became obsolete in its own time, as U.N. practice and theory indicate. Several significant U.N. documents from the 1960s are directly contradictory to the blue water thesis. Furthermore, in the last two decades, the practices of individual states and of U.N. agencies have veered away from application of the blue water thesis. However, even if the blue water thesis were applied in the case of Hawai‘i, it would support the Kānaka Maoli’s right to self-determination.

d. U.N. Charter Article 103

Finally, Article 103 of the U.N. Charter validates the claim that the Charter-derived right to self-determination is a rule of general international law which is binding upon all member nations, such as the U.S.

In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.


93. See MacKenzie, supra note 51, at 96.

94. See Lām, supra note 6, at 89.

95. See id.

96. See id. at 90. For example, the Declaration on Colonial Countries and the International Covenant on Human Rights do not include language with respect to the territorial integrity of the states. Id.

97. See id.

98. See Ofuatey-Kodjoe, supra note 28, at 364.

99. U.N. CHARTER, art. 103.
Regardless of whether there are specific ratified treaties or covenants, signatory U.N. states are bound to decolonization principles.

Initially, the right to self-determination in the U.N. Charter was applied to non-self-governing "nationalities," especially those of Eastern Europe. Furthermore, by specifically referencing self-determination, the framers intended to proclaim the equal right of all people to self-determination. As Article 103 of the U.N. Charter states, "equality of rights, therefore, extends in the Charter to [all] states, nations and people."  

4. U.N. Practice Supporting Self-Determination

a. Declaration on Granting of Independence to Colonial Countries and Peoples

Beyond the reference to self-determination in the Articles of the U.N. Charter, self-determination as a legal right is further defined and supported by U.N. practices. In supporting self-determination, the U.N. has adopted various resolutions. Although not necessarily initially binding, the resolutions may subsequently become enforceable. For example, the Declaration on Colonial Countries has subsequently become legally binding on member states. This document states in part:

1. The subjection of peoples to alien subjugation, domination, and exploitation constitutes a denial of fundamental human rights, is contrary to the Charter of the United Nations, and is an impediment to the promotion of world peace and cooperation.

2. 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.

The Declaration on Colonial Countries also provides limitations exactly defining who can legitimately claim the right to self-determination. People entitled to self-determination under the Declaration are those who at the time of the claim are under alien domination and, therefore, are denied their right to self-determination. Additionally, later references to the territorial integrity of peoples reaffirms the scope of applicability to territorially-based peoples, as opposed to dispersed individual minori-

100. See Ofuatey-Kodjoe, supra note 28, at 352-53. The author interpreted the meaning of self-determination through the Atlantic Charter, in which Roosevelt and Churchill intended "people" to be applied to Eastern European countries. However, in 1942, this application was expanded to include all colonized people. Id.
102. See Ofuatey-Kodjoe, supra note 28, at 350.
103. See supra note 83 and accompanying text.
104. Declaration on Colonial Countries, supra note 5, at 67.
105. See Ofuatey-Kodjoe, supra note 28, at 357.
ties.\textsuperscript{106}

\textit{b. U.N. Resolution 1541}

Building on the implications of the Declaration on Colonized Countries, Resolution 1541 (XV)\textsuperscript{107} was adopted to supply an even more authoritative definition for affected groups of people. The Resolution clarified which people would qualify for the process of decolonization under its provisions. The General Assembly established that “dependent peoples” within the context of Chapter XI of Resolution 1541, included groups of people under the subjugation of a “geographically” and “ethnically” foreign country.\textsuperscript{108} More importantly, however, Resolution 1541 provided the international community with a foundation for procedures and established U.N. policies regarding action on decolonization.

Resolution 1541 is significant in that it brought the process of decolonization into reality. Previously, the Declaration on Colonized Countries indicated only the ambitions of the U.N. There were no processes established to ensure that the goals were being actualized. Resolution 1541 enabled decolonization to take form. It provides not only guidelines, but mandatory elements which sincerely attempt to eradicate colonization in a meaningful way.

After the Declaration on Colonial Countries and Resolution 1541, in 1970 the U.N. culminated its efforts at implementing decolonization by adopting the Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the U.N.\textsuperscript{109} This Declaration reinforced the basic principles of self-determination and the purpose of the U.N. Charter. Notably, the Declaration solidified the principle that any people not empowered to exercise self-determination is a non-self-governing territory.\textsuperscript{110} The substantive content of the Declaration has led it to be considered the “most authoritative interpretation of the right to self-determination under the U.N. Charter and customary international law.”\textsuperscript{111} The Declaration rejected limitation of self-determination to colonial populations but rather expanded the right to include all groups whose self-government is compromised by external subjugation.\textsuperscript{112}

\begin{thebibliography}{9}
\bibitem{106} See id.
\bibitem{108} See Ofuatey-Kodjoe, \textit{supra} note 28, at 349.
\bibitem{110} See id.
\bibitem{111} Ofuatey-Kodjoe, \textit{supra} note 28, at 360.
\bibitem{112} See id.
\end{thebibliography}
c. Jus Cogens

Similar to the abolition of slavery and genocide, self-determination has evolved into a *jus cogens* within the international community through U.N. practice and declarations on basic human rights.\(^\text{113}\) *Jus cogens* is a limited doctrine binding all countries to a norm without derogation.\(^\text{114}\) In order for a peremptory norm to be established, the principle must be considered so fundamental that the international community unanimously agrees on it. Thus, a basic concept such as banning nuclear testing would not create a *jus cogens* in light of the vast difference of opinion on the subject. However, self-determination, unlike nuclear testing, may be considered a peremptory norm of international law.\(^\text{115}\)

In the period after WWII, colonization was viewed as a threat to life, liberty and universal peace. Rebuilding from a failed foundation established on colonization, the international community first acknowledged and then supported self-determination as a legal right. Currently, self-determination has evolved into a right so basic that it is considered a fundamental human right. The peremptory norm of self-determination has been firmly established through U.N. practice and universal standards developed by the international community.\(^\text{116}\) The Kānaka Maoli, who are

\(^{113}\) See THORNBERRY, supra note 71, at 184. The rubric of “Human Rights, Democracy and Rule of Law,” according to the U.N. Charter, is that “[h]uman rights and fundamental freedoms are the birthright of all human beings, are inalienable and are guaranteed by law. Their protection and promotion is the first responsibility of government.” Id.

\(^{114}\) Peremptory norms of *jus cogens* can be modified only by a subsequent norm of general international law having the same character. Vienna Convention on the Law of Treaties, May 23, 1969, art. 53, 1155 U.N.T.S. 344.

\(^{115}\) A brief overview of international law is necessary to understand which sources are binding. *Jus cogens* is a legal theory of a concept which is a “peremptory norm” of international law, or a concept so universally acknowledged that all nations will be held accountable. Examples include genocide, slavery, and racial discrimination. There are four recognized sources of international law which are binding on the international community: (1) “authentic” interpretation of the United Nations Charter agreed to by all parties, (2) affirmations of recognized customary law, (3) general principles of law accepted by states, and (4) International Court of Justice. I.C.J. Stat. Art. 38. Every legal rule that is asserted must fit into one of these categories in order to be considered valid law. Oscar Schachter, The U.N. Legal Order, in 1 U.N. LEGAL ORDER, 1, 5 (Oscar Schachter & Christopher J. Joyner eds., 1995).

New law is often called custom. See id. This is because new laws that are codified are usually based on general principles of law already recognized. Like the established sources of international law, *jus cogens* depends on the time and level of acceptance of the concept. However, unlike general principles of law, *jus cogens* may develop out of non-binding U.N. Resolutions; the important factor is the nature of the resolution causing the doctrine to become binding. See, e.g., Declaration on Colonial Countries, supra note 5, at 66 (Resolution 1514 initially was not binding but the concepts of self-determination are considered so basic, it is now authoritative law).

The International Court of Justice has limited legal force. The decision of the court “has no binding force except between the parties and in respect of that particular case.” I.C.J. Stat. Art. 59. The form of law is significantly different from the American form of common law and *stare decisis*. However, to maintain credibility, it is inevitable that the Court keeps its rulings relatively consistent with variations, depending on the particular facts of the case.

\(^{116}\) See generally Schachter, supra note 115, at 4.
legally entitled to self-determination, may now examine how to exercise this right and implement the remedial process of decolonization.

D. ACTUALIZING SELF-DETERMINATION

There are two remedial methods the Kanaka Maoli may use to achieve their right to self-determination. The Declaration on Colonial Countries and Resolution 1541 provide the Kanaka Maoli with one path to self-determination. These U.N. resolutions provide the internationally accepted method for decolonization and the requisite qualifications for eligibility for the process. Additionally, the unique rights of indigenous people provide an alternative path for the Kanaka Maoli to achieve self-determination. Both options are legitimate and internationally-recognized means for the Kanaka Maoli to achieve self-determination.

1. The Process of Decolonization

a. Annexation to Statehood: Hawai‘i as a Non-Self-Governing Territory

From annexation in 1898 until statehood in 1959, Hawai‘i was considered a U.S. territory. Since the inception of the U.N. in 1946, the U.N. Charter required the U.S. to transmit information regarding the territories it held under a colonial relationship. The report was to consist of “information... relating to economic, social, and educational conditions in the territor[y].” This primarily referred to typical human rights statistics. The U.S. was obligated to transmit the information for as long as Hawai‘i remained a non-self-governing territory or until the territory had achieved self-government by opting for one of the three options in existence at the time: (1) complete independence from any other state, (2) free association with another state, or (3) complete integration within another state.

After a second statehood vote in 1959, the U.S. reported to the U.N. a change in the government. According to the U.S., on August 21, 1959, Hawai‘i became one of the United States under a new constitution that went into effect on that day. As a result, the U.S. Government was no longer under the obligation to transmit information under Article 73(e). The communication by the U.S. did not elaborate on how the U.S. had acquired Hawai‘i or the circumstances of the election.

117. POKĀ LAENUI, ANOTHER VIEW ON THE SUBJECT OF HAWAIIAN SOVEREIGNTY AND SELF-DETERMINATION 44 (Commissioned Report to the Hawai‘i State Legislature 1994). At the time Hawai‘i was on the list of non-self-governing territories, other U.S. territories included Alaska, American Samoa, Guam, Panama Canal Zone, Puerto Rico, and the Virgin Islands. Id.
118. U.N. CHARTER, art. 73, para. c.
119. U.N. CHARTER, arts. 87, 88.
b. Criticism of the 1959 Vote

Hawai‘i’s removal from the list of non-self-governing territories is troubling because the 1959 election cannot be considered a true exercise of the right to self-determination. For several reasons, the structure of the election did not provide a meaningful opportunity for the electorate to select a government. First, although there were several forms of government available to a territory, the Hawai‘i election proposed only one option. The question on the ballot was “[w]ill Hawai‘i immediately be admitted into the Union as a State?”

It is unrealistic to expect the electorate to be aware of and understand the various structures of government. In light of the lack of options, it is impossible for the electorate to have exercised a meaningful choice.

Second, the structure of the election enabled the majority settler population to overpower the vote of the Kānaka Maoli. Qualified voters consisted of American citizens who were residents of Hawai‘i for at least one year. As a result of the one year Hawai‘i residency requirement, the U.S. was able to acquire thousands of votes from U.S. servicemen who were stationed in Hawai‘i at the time of the vote. Ultimately, the Kānaka Maoli who had a unique interest in self-determination and self-government were outnumbered and outvoted.

Third, equally as troublesome as the first two reasons were the funding and the administration of the election. The U.S. Government funded, administered, and counted the votes in an election where there was an obvious American interest. Concerns regarding the impartiality, propriety, and conflict of interest of the U.S. Government existed in the 1959 election. Similarly, the 1996 Native Hawaiian Vote has been criticized on almost identical issues.

Academics, as well as the Kānaka Maoli, have
questioned the objectivity of a voting process that is ultimately controlled by the U.S. Government.\footnote{126}{Pat Omandam, \emph{Sovereignty Vote Invalid, Says Princeton Specialist}, \textit{HONOLULU STAR-BULLETIN}, Dec. 12, 1996, at A6.}

Finally, the U.S. maintained a strong military presence within the territory when the election was conducted. The U.S. Government rationalized the necessity of the military by the existing international concerns of communism and a nuclear arms race.\footnote{127}{HAWAIIAN SOVEREIGNTY ADVISORY COMMISSION REPORT, \emph{ supra note 124}, at 46.} However, the basis for the military presence was later proved to be false,\footnote{128}{See id.} and the strong presence of the U.S. military most likely unduly influenced the vote.

c. \textit{Failure of the 1959 Vote to Materialize Self-Determination}

Assuming the 1959 vote was valid and conducted in conformity with international standards, statehood has failed to correct the damages incurred by colonialism. The Kānaka Maoli have remained subjugated because of their continued denial of self-determination. Whether it be the government’s placing of geothermal industries at sites of religious worship in Puna or building of federally funded highways over ancient Hawaiian burial sites in Hālawa Valley, the Kānaka Maoli are losing the fight to save their culture. If the process of decolonization is intended to facilitate self-determination through control over one’s culture, economics, politics, and land, it is safe to say that the Kānaka Maoli are struggling to exercise self-determination.\footnote{129}{See Barsh, \emph{ supra note 62}, at 70.}

The Kānaka Maoli’s right to control their own culture, politics, economics, and land is still subject to American subjugation. In most cases, the Kānaka Maoli’s rights are limited at best. After fifty years of using the island of Kahoʻolawe for bombing practice, in May 1994 the U.S. government turned over Kahoʻolawe to the state. In 1998, visits to the island remain limited to twice a year and even then only under supervision. Although the plans were to use Kahoʻolawe as a Hawaiian cultural sanctuary,\footnote{130}{See Kit Smith, \emph{Hawaiian-Owned, Mainland Firms Join to Clean Isles}, \textit{HONOLULU ADVERTISER}, Apr. 10, 1995, \textit{available in 1995 WL 8345971}.} clean-up of the island continues today.

Kānaka Maoli who live in Waiʻahole, on the windward side of Oʻahu, are also engaged in a “David versus Goliath” battle concerning the right to water.\footnote{131}{Pat Omandam, \emph{Group Defies Court, Risks Arrest}, \textit{HONOLULU STAR-BULLETIN}, June 22, 1995, \textit{ available in 1995 WL 8392431}.} Nearly 80 years ago, Leeward plantation owners built a ditch which channels water from the Windward mountains to the drier plains of the Kūnia sugar fields, located in leeward Oʻahu. Today, Waiʻahole resi-
students fight for every gallon of water which is rightfully, but not legally, theirs. The Waiahole Ditch controversy epitomizes the common struggle of Native Hawaiian farmers for access to their natural resources. Both Kaho'olawe and Waiahole illustrate state-imposed limitations which interfere substantially with the Kānaka Maoli's ability to practice their culture.

Along with these types of state-imposed limitations, the Kānaka Maoli are constantly subjected to legislation which threatens to diminish or altogether eliminate their ability to exercise cultural rights. For example, in the 1997 Nineteenth Legislative Session, a bill was proposed that would require Native Hawaiians to register, to prove their genealogy, and to pay a registration fee in order to practice their native customary rights. Proposals like Senate Resolution No. 8 threaten and impede the ability of the Kānaka Maoli to practice traditional and customary practices and to exercise self-determination according to the Hawaiian culture.

Similarly, the scarcity of land in Hawai'i has permanently connected land with economics. Accordingly, from 1848 to the present, the Kānaka Maoli have been constantly struggling with the government for land and compensation for its use. Land litigation involving the Kānaka Maoli often includes the use of land for traditional and customary gathering rights and compensation for ceded lands. Although the Hawai'i Supreme Court recognized traditional and customary native Hawaiian rights in its most recent case on that issue, it did not specify the extent of such rights. In the same vein, the Kānaka Maoli have held overnight rallies at the Hawai'i State Capitol to protest legislative proposals that threaten to decrease judicial compensation for ceded lands. The ability of the Kānaka Maoli to practice their culture and receive just compensation is continuously threatened by ambiguous judicial opinions and by the Hawai'i State Legislature's circumvention.

The "rights" which the state affords to the Kānaka Maoli are insuffi-
cient to promote survival of their culture and traditions. Additionally, legislation which threatens to eliminate the ability of Kānaka Maoli to freely practice their culture is essentially colonization. Given the failure of statehood to remedy the harm inflicted upon the Kānaka Maoli and the persistence of conditions which deprive the Kānaka Maoli of effective self-determination, it is appropriate for Hawai‘i to be placed back on the list of non-self-governing territories and to start a process of decolonization. Those who oppose Hawai‘i’s placement back on the list argue that the right of self-determination neither advances nor includes the right to secession. The next section discusses this inherent tension and how it is resolved under international law.

d. Principle Against Secession

The right to self-determination creates a tension between the people’s exercise of that right and the territorial integrity of the state. In order to reconcile this tension, the Declaration on Colonial Countries reinforces territorial integrity with self-determination and secession. A state wishing to preserve its territorial integrity must show that it is in compliance with the principle of self-determination. The right of secession within self-determination is:

- a complex, continuing process of regrouping personal allegiances, redefining boundaries. Knowledge that the option of separation exists provides a sense of equality and potential power needed to preserve an existing state, for those truly oppressed, the rights will provide the only means of effectuating self-determination.

By contrast, the international community denies that the right to self-determination includes the right to secession. Opponents of secession argue that the drafters of the U.N. Charter explicitly emphasized that the principle of self-determination implies the right of self-government of peoples, not the right of secession. Also supporting this view is the Declaration on Friendly Relations, which states that nothing should be construed as authorizing or encouraging the dismemberment or impairment of the territorial integrity or political unity of sovereign and independent states.

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136. See Anaya, supra note 122, at 363.
137. See Lām, supra note 6, at 120-21.
138. Additionally, Resolution 1541 clarified the right of self-determination as recognized in the Declaration on Colonial Countries, to include the right to independence, which is defined as political and territorial separation or secession from an existing state. See Lām, supra note 6, at 92.
139. See id. at 91.
140. Id. at 93 (quoting Note, The Logic of Secession, 89 YALE L.J. 809 (1980)).
Under this analysis, since Hawai‘i is already a state, any movement toward secession from the Union is condoned neither by the U.N. Charter nor international custom. However, the prohibition against secession is premised on the condition that the states conduct themselves “in compliance with the principles of equal rights and of self-determination of peoples.” Thus, this premise may provide an exception to the U.N.’s prohibition against secession if there is proof that the state is violating the right to self-determination of some people within its territory. Furthermore, many indigenous people assert that secession does not apply to them because their territories were invaded and incorporated into states without their consent. If a state has denied the right to self-determination, then what results is colonialism, which mandates eradication.

In summary, secession is neither condoned nor encouraged by the international community. Under certain circumstances, however, it may be the only way to exercise the independence option included in the right to self-determination. In response to the tension and potential conflict in this area, the U.N. has established a Special Committee to determine the legitimacy of colonization and subjugation claims.

I) The 1998 Puerto Rico “Plebiscite” and Hawai‘i

In order for self-determination to become a reality for the Kānaka Maoli, Hawai‘i needs to be placed back on the list of non-self-governing territories. Opponents to Hawai‘i’s classification as a non-self-governing territory argue that the 1959 election was an exercise of self-determination and Hawai‘i is therefore barred from claiming status as a non-self-governing territory. However, as illustrated in the case of Puerto Rico, the Special Committee has power to legitimize claims and restore territories on the list of non-self-governing territories. Thus, Hawai‘i should take note of the circumstances which have supported Puerto Rico’s renewed status as a non-self-governing territory.

Colonization in Puerto Rico began over 500 years ago with Christopher Columbus. It is the U.S.’s largest and oldest colony. As in the case of Hawai‘i, the U.S. reported to the U.N. that Puerto Rico had exer-

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143. Id.
147. See Van Dyke, supra note 13, at 637.
cised its self-determination and had selected commonwealth status. But in the 1980s, the Special Committee repeatedly received reports that the U.S. committed fraud against the U.N. by reporting that the people of Puerto Rico had freely selected such status. Allegedly, tens of thousands who supported independence were made victims of systematic discrimination and persecution by the U.S.\(^{150}\) As a result, the Special Committee decided to keep the question of Puerto Rico’s new commonwealth status under continuing review, which may have opened the door for Hawai‘i to restore its own name on the list of non-self-governing territories.\(^{151}\)

Nearly 100 years after Puerto Rico became a territory of the U.S.—and after three status plebiscites in 1952, 1967, and in 1993—H.R. 856 (the “United States-Puerto Rico Political Status Act”) was expected to be heavily debated in the U.S. House of Representatives on March 4, 1998.\(^{152}\) H.R. 856 proposes a federally authorized plebiscite on the island in December 1998 and a commitment to a ten-year transitional period towards statehood.\(^{153}\) Currently, Puerto Rico is a U.S. commonwealth and still considered colonized because the U.S. continues to run the island’s affairs.\(^{154}\) Critics of H.R. 856 point out that under U.N. Resolution 1541, the U.N. should supervise any plebiscite. The plebiscite has the potential to become a status plebiscite, which violates international law.\(^{155}\) Additionally, the present choices of “statehood, sovereignty or commonwealth” appear illusory. The bill provides that if commonwealth status is selected, every ten years another vote will be administered until a majority is found for one of the other options.\(^{156}\)

If Puerto Rico’s choices in any of the three “plebiscites” were valid, the case would be closed. However, H.R. 856 proves that Puerto Rico was not given a choice in 1952 when they were asked to choose between colony and commonwealth, or in 1967 and 1993 when the three options were presented without adequate definition.\(^{157}\) Under international standards, Hawai‘i, like Puerto Rico, should be placed back on the list of non-self-governing territories and afforded a plebiscite. If conducted in conformity with international standards, the process of decolonization provides a viable means through which the Kānaka Maoli may achieve self-determination. The 1959 election cannot be recognized as a valid exercise

\(^{150}\) See LAENUI, supra note 117, at 46.

\(^{151}\) See id.


\(^{153}\) See id.

\(^{154}\) See Gonzalez, supra note 149, available in 1998 WL 5923107.


\(^{156}\) Gonzalez, supra note 149, available in 1998 WL 5923107.

\(^{157}\) See id.
of self-determination, especially since statehood has led to the continued subjugation of the Kānaka Maoli. Since the Hawai‘i election was not conducted in conformity with international standards and the Kānaka Maoli remain unable to exercise self-determination, it is appropriate for, and within the ability of, the U.N. to place Hawai‘i back on the list of non-self-governing territories.

2. Indigenous Rights

The rights of indigenous people in their motherland have gained extraordinary legal recognition throughout the world. As voiced by indigenous groups, specific rights of indigenous peoples have evolved with inadequate protection. Importantly, indigenous people are distinct people with extraordinary interests and rights. This is contrasted with the classification of indigenous people as a population which, consistent with the blue water thesis, would equate indigenous people to minorities. Although indigenous rights are relatively new on the international scene, there has already emerged new norms which are rooted in customary law and thus binding upon the international community regardless of treaty ratification.

The international treatment of indigenous rights was initiated by broadly drafted international treaties for the benefit of all people, including ethnic minorities. These treaties were the basis of later documents which specifically addressed indigenous rights. The International Labor Organization Convention No. 169 was one of the first international documents to address indigenous rights, advocating for free participation in self-definition, self-government, and territorial and cultural rights. Indigenous rights fully took shape in the Draft Declaration on Rights of Indigenous People, which specifically recognized the right of indigenous people to self-determination. Finally, the work of the Inter-American Commission on Human Rights has established the right of self-determination pursuant to human rights law and implemented it.

The bulk of authority regarding the rights of indigenous peoples has overwhelmingly drawn upon human rights concepts, such as non-discrimination and self-determination, in articulating these rights. As a result, the international community has developed minimum standards as to the right of political, religious, and cultural autonomy. The international community has also recognized indigenous people as entitled to possess control over ancestral lands and resources, treaty rights, and most importantly the right to determine the terms of their existence within a larger

158. See Van Dyke, supra note 13, at 635.
160. See supra notes 93-95 and accompanying text (regarding blue water thesis).
161. See Anaya, supra note 122, at 338.
162. See CANTON, supra note 159, at 1273.
state or society.\textsuperscript{163}

Although the U.N. Charter does not specifically mention indigenous rights, it does set forth the principle of equal treatment regardless of racial distinction.\textsuperscript{164} Based on this fundamental principle, community norms have started to establish international custom, as demonstrated in several international sources.

\textit{a. International Treaties}

Besides the recognition of indigenous rights by international organizations, references to these rights are made in international treaties. For example, the International Covenant on Civil and Political Rights affirms the right of persons belonging to "[ethnic] minorities... to enjoy their own culture, to profess and practice their own religion, [and] to use their own language."\textsuperscript{165} This language has been used by the U.N. Human Rights Committee and by the Inter-American Commission on Human Rights to successfully enforce the rights of indigenous people.\textsuperscript{166} Along the same lines, the International Covenant on Economic, Social, and Cultural Rights also established many social welfare rights and corresponding obligations of the state for the benefit of all.\textsuperscript{167}

The standards adopted by the international community through customary norm impose affirmative measures for the express purposes of remedying the past denial of indigenous rights and of guarding against future abuse.\textsuperscript{168} As a party to the U.N. Charter and a signatory country of the Covenants,\textsuperscript{169} the U.S. is bound to such documents and to the developing norms which relate to or derive from these treaties. In addition, the U.S. is bound to customary international norms related to these treaties. Moreover, the U.S. is bound to customary international norms regarding indigenous peoples, since under \textit{jus cogens} such customary norms are binding upon the states regardless of whether or not any formal adoption has taken place.\textsuperscript{170}

\textit{b. ILO No. 169}

In 1989, the International Labor Organization (ILO) adopted the Convention Concerning Indigenous and Tribal Peoples in Independent Countries, ILO Convention No. 169. Convention No. 169 was one of the first international sources to specifically address the rights of indigenous peo-

\textsuperscript{163}. See \textit{id}.
\textsuperscript{164}. U.N. CHARTER art. 1, paras. 2, 4.
\textsuperscript{165}. \textit{Id.} at art. 27.
\textsuperscript{166}. See \textit{supra} note 120 and accompanying text.
\textsuperscript{167}. See Anaya, \textit{supra} note 122, at 351.
\textsuperscript{168}. See \textit{id.} at 345.
\textsuperscript{169}. See \textit{supra} note 78-81 and accompanying text.
\textsuperscript{170}. See Anaya, \textit{supra} note 122, at 351.
The Convention provides indigenous peoples with the right to self-definition, participation in self-government, and protection of territorial and cultural rights.

In providing these rights, the Convention required the development of "special measures," which were to safeguard the rights of indigenous people so that they would be able to live and develop on their own as distinct communities. One provision that is especially timely and applicable to Hawai‘i is the recognition of land access rights for subsistence and traditional activities. It directly relates to the content in *Public Access Shoreline Haw. vs. Nansay, Haw., Inc.* and Senate Resolution No. 8. The Convention explicitly provides for the right of the Kanaka Maoli to practice their customary and traditional gathering rights.

Finally, although Convention No. 169 does not specifically mention self-determination, it does require the state to implement effective means through which indigenous peoples can freely participate at all levels of decision-making that affect them. Free participation may be substantially less significant than self-determination, but the Convention is arguably a stepping-stone towards self-determination. While the Convention does have shortcomings, its principles are grounded in the developing body of customary norms which uphold the rights of indigenous peoples with respect to cultural integrity, land, natural resources, and self-determination.

c. Draft Declaration on the Rights of Indigenous People

In 1982, the U.N. Economic and Social Council established a Working Group on Indigenous Populations. Unlike Convention No. 169, the Draft Declaration on the Rights of Indigenous People proposes extensive

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172. See id. at art. 4, para. 1; see also id. at art. 5, para. (a).


174. See Convention Concerning Indigenous and Tribal Peoples in Independent Countries, supra note 171, at art. 8, para. 2.

175. See Anaya, supra note 122, at 357 (citing ILO Convention No. 169, supra note 171, at art. 6, para. 1(b)).

176. The Convention seems to grant indigenous peoples the right to autonomy or self-rule. This has been criticized because neither of these rights is recognized under international law, but is rather a domestic status accommodated by some states. This describes a set of governmental activities that a sovereign state allows a non-sovereign entity to pursue at their discretion. It typically involves the non-sovereign electing their own officers, as the Office of Hawaiian Affairs has done.

Unlike self-determination, autonomy denotes a specific political status rather than the theory or principles such as free choice, which generate it. A sovereign operates by right, the non-sovereign operates by grant. See Lm, supra note 6, at 94-95.

expansion of the rights of indigenous people. The Draft Declaration encompasses far more than the ILO Convention and specifically recognizes the right of indigenous people to self-determination.

The Draft Declaration covers all rights related to self-determination: rights to culture, to land, and to self-government. In order to ensure full coverage and familiarity, the Draft Declaration used the language from the widely-recognized International Human Rights Covenants:

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.

Interpreted broadly, Article 7 of the Draft Declaration states that indigenous people shall be free from cultural genocide. It also mandates governments to prevent actions which would ultimately take away indigenous peoples' distinct culture or identity. Moreover, provisions in the Draft Declaration provide indigenous people with the right to maintain a spiritual relationship with their land and natural resources. Furthermore, any land or resource improperly taken or used is to be returned and just compensation provided. Finally, according to the Draft Declaration, indigenous peoples have the right to self-government in their own affairs.

While the Draft Declaration is just that, a draft, it is nonetheless representative of the final opinion of a body of respected jurists. They are the same jurists who, for more than a decade, presided over the debate on self-determination of indigenous peoples in which more than 200 parties participated annually. Thus, the document captures the emerging international consensus on the issue of self-determination of indigenous people.

There was once a time when self-determination was only acknowledged between two explicitly consenting nations. Now the international community appears ready to recognize the right of indigenous people to self-determination, along with everything it entails.

d. Inter-American Commission on Human Rights

Indigenous rights have also benefitted from the work of the Inter-American Commission on Human Rights. The Commission investigated...
the status of the Mitskito and other Indian tribes in Nicaragua. The investiga-
tion led the Commission to grant special legal protection to the tribes. As did the Declaration on Colonial Countries, the Commission ordered the
government to allow the tribe to exercise their self-determination. The Com-
misson found the right to self-determination under the authority of
human rights law, which is applicable to indigenous people by analogy. The right was expanded to include indigenous Indian tribes.

E. SELF-DETERMINATION IN THE PACIFIC

Whether due to the Declaration of Colonial Countries or to the
emerging rights of indigenous peoples, the U.S. has a duty to provide an
effective remedy which will allow the Kānaka Maoli to exercise their right of self-determination. The Kānaka Maoli are not able to exercise self-
determination today, and the statehood elections of 1940 and 1959 were not adequate remedies. In particular, they did not provide the Kānaka Maoli with the opportunity to exercise any meaningful choice. It is there-
fore appropriate for Hawaiʻi to be placed back on the list of non-self-
governing territories and for the U.S. to work with the Kānaka Maoli to
remedy the situation.

To effectuate a constructive remedy, it is vital that the U.S. take into
consideration the special circumstances of the Kānaka Maoli and Hawaiʻi in structuring the process. The experiences of Kiribati, Tuvalu, and New Caledonia provide useful examples that the U.S. and the Kānaka Maoli may use to pattern a remedy that would enable the Kānaka Maoli to exer-
cise their self-determination.

I. Kiribati

In 1979, the Gilbert Islands declared its independence from the
United Kingdom and became known as the Republic of Kiribati (hereinafter “Kiribati”). Inhabited for over 3000 years, Kiribati consists of 33 is-
lands which was under British rule from 1892 to 1979. Kiribati was dev-
astated by both colonization and WWII, when the Japanese and the British destroyed homes and villages in a struggle for the islands as a Pacific base. Like Hawaiʻi, Kiribati was first exposed to nā haole through whaling, shipping and missionaries. Although for the most part the indigenous peo-
ple were able to maintain ownership over their land, massive mining ex-

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188. See supra notes 9, 11 and accompanying text.
189. See Anaya, supra note 122, at 342.
190. The comparative analysis in this section is intended as a broad overview. For an in-depth examination of the individual case studies, refer to the sources cited in the notes.
191. “Nā haole” is the plural form of haole. See PUKU‘I & ELBERT, supra note 18.
192. Decolonisation Issue on Kiribati (Gilbert Islands), 34th Sess., Annex IV at 30, U.N. Doc. A/AC.109/L.1293 (1979). Since 1917, the sale of land to non-Gilbertese has been prohibited and leases longer than 99 years to non-Gilbertese have required government permission. Hence, virtually
exploited the phosphate resources and had a negative impact on both the people and the land.

Kiribati was considered a colonized state when, after WWII, the U.N. ordered the decolonization of territories. In 1967, the British Government passed the first Constitution, from which the Gilbert Islands benefitted. In the years that followed, amendments were enacted which enabled greater Gilbertese participation in and control over the government. Kiribati eventually adopted a form of government similar to England's, but it enabled the Gilbertese to maintain their own cultural identity and to preserve their own traditional customs.\(^{193}\)

The experiences of Kiribati are significant to Hawai'i because of their similar Pacific culture and history. Both territories are relatively small, and the economic base supported by the colonial power will be difficult to replace. In order to lessen the negative economic impact, Kiribati has turned to traditional subsistence living.\(^{194}\) Additionally, Kiribati has acknowledged the possibility of modifying its governmental structure to one which is more in tune with its traditions.\(^{195}\) As for the future, Kiribati will continue to develop its marine resources and its 200-mile exclusive economic zone (hereinafter “EEZ”). Kiribati's peaceful and gradual transition from a colonial territory to an independent nation has been considered a successful process of decolonization by the U.N.\(^{196}\)

2. Tuvalu

Like Kiribati, Tuvalu is an island nation-state which successfully achieved independence from both the British colonizer and the numerically-stronger ethnic majority. Formerly known as the Ellice Islands, Tuvalu, along with Kiribati, had been under British rule since 1892. Although Tuvalu followed a path towards independence similar to that of Kiribati, Tuvalu’s experience in achieving self-determination is distinguishable because of a close relationship between the Tuvalu and Kiribati residents and the potential for internal hostilities.\(^{197}\) As a result, Tuvalu

all land in Kiribati is owned by islanders. See id.


194. In difficult times and where Western medicine has failed, the Gilbertese have turned to traditional medicines and methods of curing. In addition, teaching children traditional Gilbertese skills and knowledge to strengthen the children in mind and spirit has been viewed favorably. See generally, Itaia, supra note 193, at 183, 185.


197. As a condition to separation from Kiribati, the British decided that if Tuvalu were to separate from Kiribati, no assets would be transferred from Kiribati to Tuvalu. Tuvalu would have no claim to the phosphate royalties and would only gain the Ellice Islands as part of its territory. These conditions were devastating to the inhabitants of the Ellice Islands because a vote for independence would leave the territory almost bankrupt. See Tito Isala, Secesssion and Independence, in TUVALU, A HISTORY 153, 159 (Hugh Laracy ed., 1983).
had to overcome not only the British colonizer but also the residents of the
Republic of Kiribati.\footnote{198}{The inhabitants of Tuvalu increasingly believed that Kiribati would replace the British as the "colonizer" upon independence. \textit{See id.} at 165.}

The people of Tuvalu desired independence due to their concern over
the cultural diversity between themselves and Kiribati.\footnote{199}{\textit{See id.} at 167.} Additionally, they feared that Tuvalu’s cultural identity and influence within the government would be lost if they continued to live with the numerically stronger Kiribati.\footnote{200}{\textit{See id.} Kiribati consists of 33 islands, many of which are occupied. Tuvalu is much smaller consisting of only 8 islands and a fraction of Kiribati’s population. \textit{See id.}} After several violent confrontations and accusations of discrimination, in 1974 Tuvalu voted 92% in favor of separation from Kiribati.

To ensure impartiality, a neutral British civil servant was appointed as referendum administrator. Various procedures were implemented to ensure a meaningful choice for the voting population. Eligible voters were allowed to vote at various locations, regardless of where they had registered. Moreover, voting did not occur simultaneously on all the islands, but instead were staggered to allow the administrator to personally observe each polling station. Finally, to obtain maximum voter participation, late voter registration was permitted and the voter’s roll was validated so that no one entitled to vote would be turned away because of lack of registration.\footnote{201}{\textit{See id.} at 158.}

These procedures assured that the plebiscite was conducted in conformity with international standards. The U.N. also sent their own observers to monitor the plebiscite. The election was conducted without incident or accusation of impropriety.\footnote{202}{\textit{See id.}} Although Hawai’i has a significantly larger population than Tuvalu’s, the U.S. and Hawai’i may still use Tuvalu’s experience as a model of a successful and objective plebiscite. The unique polling procedures and the presence of election observers were simple precautions which ensured a valid and meaningful election.

3. \textit{New Caledonia}\footnote{203}{The movement for self-determination in New Caledonia is particularly complicated and incendiary. The footnotes for “New Caledonia” are particularly lengthy in order to provide the reader with a general background to understand the environment of the Kanaks’ movement. Unfortunately, this section is limited to a broad overview dealing generally with the upcoming plebiscite in 1998. For a deeper analysis of the Kanak independence movement, the cited sources are an excellent beginning.}\

Kiribati, Tuvalu, New Caledonia, and Hawai’i are similar in that they are all Pacific nation-states which have been subjected to colonialism. However, unlike Britain’s position vis-a-vis Kiribati and Tuvalu, France remains reluctant to release New Caledonia. France’s control over New
tively enabling the Kanaks to exercise their right to self-determination. Although a majority of Kanaks support independence, like the Känaka Maoli, they have been reduced to a minority in their own land. The Kanaks were outnumbered, and chances of success on referendums were slim without the support of at least some of the settlers.\(^{210}\) Very much opposed to previous referendums, the Kanaks argued for a unique status in light of their colonial experience and their continued alienation from the benefits of the Territory. France rejected the argument that the Kanaks alone should be allowed to determine whether New Caledonia shall be independent from France.\(^{211}\)

In 1988, the French government and the Kanak independence parties compromised by signing the Matignon Accord. The Accord provides a ten-year period of education and peace in the hope of reaching a middle-ground towards self-determination. Progress was to be assessed in 1992 by the three parties involved: the two main independence parties FLNKS and RPCR, and France. Furthermore, over the span of the education period, three separate reviews of the electoral lists were to be held by a panel composed of representatives from all three parties.\(^{212}\) Most importantly, however, a strict residency requirement was applicable to all residents of New Caledonia. It required continuous residence in New Caledonia during the ten-year accord for voting privileges in the 1998 referendum.\(^{213}\)

For the most part, the Kanaks are on their own in their struggle for self-determination and independence. Although there is widespread opposition to French nuclear testing in the Pacific, the feeling is not strong enough to support the complete removal of France’s presence in the region.\(^{214}\) Furthermore, despite the Matignon Accord, there is still no way for the Kanaks to achieve independence without support from the other settlers of New Caledonia who traditionally favor France. In light of France’s control over the economy, the increase in immigration into New Caledonia, and the desire of other foreign settlers for job security, independence is going to be a tough battle with most likely an unjust result.

4. Hawai‘i’s Relationship to Self-Determination in the Pacific

Hawai‘i has much to learn from the case studies of the Pacific Territories that have undergone the process of decolonization. Pacific Territo-

\(^{210}\) See Methven, supra note 207, at 21-22.
\(^{211}\) See id. at 22.
\(^{212}\) See Fraser, supra note 204, at 60.
\(^{213}\) See id.
\(^{214}\) See John Connell, New Caledonia or Kanaky? 397 (1987).
Caledonia and the numerous settler and immigrant population on the island makes New Caledonia a perfect case study for Hawai‘i.

The French took possession of New Caledonia in 1853 to bolster their naval interests, and from 1864 to 1896 established it as a penal colony.\(^{204}\) Almost immediately, the French imposed an apartheid system which dispossessed the Kanaks, the indigenous people of New Caledonia, of their tribal lands by herding them into small infertile reservations.\(^{205}\) Although the Kanaks did not allow themselves to be conquered without a struggle,\(^{206}\) they were overcome by the colonial power. The continuous manipulation and subjugation of the Kanaks’ life and the return of a first generation of educated Kanaks are important factors which lead to the independence movement.

Unlike Kiribati and Tuvalu, both of which received support from the colonizing power in their quest for self-determination, the Kanaks have not had France’s support. In fact, the Kanaks stand in opposition to the French Government and the Caldoche.\(^{207}\) The Kanaks, however, are at the mercy of the French because neither the Kanaks nor the U.N. can implement decolonization for the benefit of the Kanaks.\(^{208}\)

New Caledonia’s struggle for self-determination has been marked by violence and death over the past twenty years. In response to the escalation of violence, France has conducted several referendums on independence.\(^{209}\) However, the previous referendums were not successful in effec-

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\(^{204}\) HELEN FRASER, NEW CALEDONIA ANTI-COLONIALISM IN A PACIFIC TERRITORY 3 (1983).


\(^{206}\) The Kanaks staged massive revolts in 1878 and 1917 which resulted in thousands of Kanaks killed. PALIKA COMMITTEE FOR EXTERNAL RELATIONS, NEW CALEDONIA PARADISE LOST, BOOKLET I, 11 (1978). “PALIKA” is another word for the Kanak Liberation Party.

Citizenship, franchise, and education were all withheld from the Kanaks until the 1950s. Kanaks were second-class citizens separated from the settlers and continuously plagued with colonization. Kanaks had to get permission from the police to go into town and had their dress code regulated by the French. Previously, a woman Kanak was only allowed to dress in a frock, which was introduced by missionaries throughout the Pacific. The Kanak women were not given a right to wear jeans or “white women clothes.” OUNEI, supra note 205, at 3-4.

\(^{207}\) Although the precise definition of “Caldoche” is unclear, it has been used to describe long-term French settlers with at least one parent born in the territory. About ten years ago, there were an estimated 62,000 Melanesians, 52,000 Europeans, and 18,000 Tahitians, Indonesians and Indochinese who resided in New Caledonia. See Philip Methven, NEW CALEDONIA A DISEARTENING PROSPECT, IN THE CHANGING PACIFIC: FOUR CASE STUDIES 21, 27 (Coral Bell ed., 1987).

\(^{208}\) Both the colonizer and the Caldoche, which constitute an overwhelming majority of the population desire to maintain the status quo of colonization in New Caledonia. Although the U.N. voted twice in favor of referring New Caledonia to the Committee on Decolonization, nations supporting the Kanaks face retaliation to pro-decolonization votes. After the two successful votes, France substantially decreased economic aid and broke off ministerial contacts with various nations who voted in support of the Kanaks. See id. at 27.

\(^{209}\) Numerous members of the leading Kanak independence party “FLNKS” have been killed and have become martyrs for the movement. In the 1987 referendum, in a showing of opposition 83.2% of the Kanaks registered to vote abstained. See FRASER, supra note 204, at 46. The referendum was plagued by more than abstention from the Kanaks. It was also inconsistent with the re-
ries share commonalities in their cultures and traditions. Similar to what Hawai‘i will have to face, these nations had to struggle to balance their Pacific cultures with established Western influence. Regardless of the outcome or the path which was used to achieve it, the Kānaka Maoli will benefit from learning from the experiences of their Pacific brothers and sisters in their path of achieving self-determination.

Although Kiribati and Tuvalu did not have to fight against their colonizer for independence, both had to rebuild their nations from an entirely dependent relationship with their British colonizer. Like Hawai‘i, Kiribati was a Pacific port for whaling and shipping. Despite the immigration and integration of foreigners, fortunately, the people of Kiribati were able to maintain ownership of their land by implementing laws prohibiting sale of land and long-term leases to non-Gilbertese. This is an important lesson for the Kānaka Maoli, given the amount and effects of foreign land ownership in Hawai‘i. Kiribati’s land ownership laws should serve as a possible guideline, if independence becomes a reality. Moreover, like Kiribati, Hawai‘i can draw on traditional gathering practices and subsistence living to lessen the negative economic impact of independence by subsidizing the household.

Tuvalu’s experience, although closely related to Kiribati, is likewise independently significant to the Kānaka Maoli and Hawai‘i. Like the Kānaka Maoli, the residents of Tuvalu were able to maintain a cultural identity separate from the majority population of Kiribati. Tuvalu inhabitants were also able to successfully advocate and implement a separate plebiscite despite their numerical inferiority and the multi-cultural atmosphere in the island group. Tuvalu’s accomplishment in maintaining their cultural identity despite their minority status as well as the plebiscite should serve as a model for potential voting procedures that will ensure a more objective and meaningful choice in the Kānaka Maoli’s situation.

Although Kiribati and Tuvalu provide noteworthy experiences which would be useful to Hawai‘i’s situation, New Caledonia’s struggle against the French is the most insightful for Hawai‘i. Both the Kanaks and the Kānaka Maoli have been colonized since the late 19th century, and very late in the 20th century, both are seeking to assert their right to self-determination. In addition, both France and the U.S. are colonial powers that have traditionally resisted decolonization remedies encouraged by the U.N. Both the Kanaks and the Kānaka Maoli are facing double opposition—from the colonizing power and from the numerically-stronger settlers in their respective territories.

The issues relating to independence are substantially identical. Both

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216. *See Declaration on Colonial Countries, supra* note 5, at 66; *see also supra* notes 13, 19 and accompanying text.
the Kanaks and the Kānaka Maoli are minorities in their own land. Both France and the U.S. have conducted referendums that violate international procedures. Furthermore, in spite of earlier concessions of citizenship and minute land grants, both the Kanaks and the Kānaka Maoli have been denied their right to self-determination as to culture, land, and self-government. Although the Matignon Accord provided some concessions for the Kanaks, it is unlikely that the Accord will enable the indigenous people to remedy their colonial oppression and to exercise self-determination. No matter how long the election is postponed, an unjust result seems inevitable for the Kanaks. New Caledonia's economy and governmental structure is entirely dependent on France. For years, the Kanaks and their culture have been under western subjugation and thought.217 It is through this colonization which France has already been able to secure the majority of votes necessary to defeat any independence movement by the Kanaks.

Regardless of the outcome of the 1998 election, the Kānaka Maoli will learn from the Kanaks what to avoid. The Kanaks' experience raises several issues which the Kānaka Maoli may need to address as a preliminary matter. First, the numerous Kānaka Maoli sovereignty groups need to come together and present a unified front. For many years, various Kanak sovereignty groups left out the indigenous people, which actually slowed down the independence movement and presented another barrier for the Kanaks to overcome. For a long time, Kanaks remained divided and conquered.

Second, the indigenous vote must reflect the unique interest and circumstances of the minority indigenous population. The 1998 plebiscite in New Caledonia represents one possible method of addressing the indigenous minority. Other suggestions, although equally problematic and criticized, include to more heavily weigh the indigenous vote if the general population votes, to only allow Kānaka Maoli to vote, or to only allow descendants of citizens of the Kingdom of Hawai‘i to have a vote. Additionally, Kānaka Maoli should not delay a plebiscite since timing is crucial to keeping up the momentum both locally and internationally. Regardless of the method adopted, the ultimate test remains whether the voting method adopted will enable the indigenous minority—the Kānaka Maoli—to have a meaningful voice.

Finally, the Kānaka Maoli should follow the Kanaks' lead and engage in a written agreement with the colonial power. A written agreement is the starting point for obtaining a commitment from the U.S. Even though the Matignon Accord did not enable the Kanaks to achieve self-determination, an agreement of some sort is important because, like the Kanaks, the Kānaka Maoli cannot implement the decolonization process on their own.

217. See supra note 206.
The experiences of Kiribati, Tuvalu, and New Caledonia all significantly contribute to the fight against colonialism towards self-determination. The Kānaka Maoli should incorporate the positive elements from Kiribati and Tuvalu's successful decolonization experiences. More importantly, from the Kanaks' experience, the Kānaka Maoli should note what to refuse and when to resist. Taken together, these experiences may provide the Kānaka Maoli with a successful path towards self-determination.

F. LEGAL IMPLICATIONS OF INDEPENDENCE FOR HAWAI‘I

If Hawai‘i is placed back on the list of non-self-governing territories and the barriers to an objective referendum are overcome, a majority vote for independence will impact both the Kānaka Maoli and the settlers within the territory. Numerous legal implications would follow. In addition to the cultural and social impacts, the legal changes that independence would impose on Hawai‘i may benefit all inhabitants in the archipelago. This section introduces a preliminary review of several legal implications that would follow from an independent Hawai‘i.

1. Exclusive Economic Zone

The greatest of Hawai‘i’s assets is her location in the middle of the Pacific Ocean. Like Kiribati, as a separate nation Hawai‘i would be entitled to a 200-mile Exclusive Economic Zone (“EEZ”), pursuant to Article 57 of the Convention on the Law of the Sea, 1982.

In 1996, the International Tribunal for the Law of the Sea was granted jurisdiction over disputes arising under the U.N. Convention on the Law of the Sea (“UNCLOS”). The UNCLOS was an expression of economic and social cooperation as articulated in the U.N. Charter, and it established ocean management through the EEZ. The UNCLOS’ inclusion of the EEZ was nothing new but rather a codification of an already existing and recognized customary principle of the international law of the sea. The EEZ legitimizes extended-jurisdiction claims by states as to waters surrounding their state and all living resources within those waters.

220. See id.
222. See id.
224. See Karen Hopfl, Go Fish! Individual Transferable Quotas and International Possibilities in
States are entitled to exploit the vast majority of the world’s oceanic fishery resources by securing these offshore resource rights. If applied to Hawai‘i, Hawai‘i would have one of the largest EEZs in the world, and Hawaiian jurisdiction and police power would be expanded beyond Hawai‘i’s relatively small land area. This would entitle Hawai‘i to reap the economic benefits that the U.S. currently absorbs. Not only would Hawai‘i be entitled to control the marine resources within this area, Hawai‘i would also be able to benefit economically from the fishing industry. Moreover, Hawai‘i would be entitled to formulate laws with respect to conservation, exploration, construction, and scientific marine research. This control over marine scientific research could increase returns from generation of knowledge and sound resource management. Given the Kānaka Maoli’s culture, an EEZ would enable Hawai‘i to be at the international forefront with respect to formulation of marine environmental protection and preservation law.

2. Immigration and Citizenship

In addition to the consequences of Hawai‘i’s having its own EEZ, direct control by Hawai‘i over immigration is necessary for Hawai‘i to maintain control over its population. Presently, U.S. regulation of immigration does not provide adequate protection for Hawai‘i. Hawai‘i’s land, water, and social services resources are continuously depleted due to overpopulation and inadequate financial planning. Control over immigration would help remedy the situation.

Similarly, options regarding citizenship would be available. Residents of Hawai‘i would be asked to choose whether to become citizens of the nation of Hawai‘i or to remain citizens of the U.S. Depending on the relationship between the two nations, there may also be the possibility of dual citizenship. The availability and management of public benefits, such as social security, Medicare, Medicaid, and taxes, are factors that would influence the individual’s choice.

3. Foundation for a New Economic Base

Like Kiribati and Tuvalu, Hawai‘i will be challenged to develop an economic base. However, Hawai‘i seems to be in a better economic position than the smaller countries of Kiribati and Tuvalu. Currently, there is a well-developed metropolitan community which is able to facilitate the de-
velopment of offshore banking, much like in the Cook Islands. Alternatively, Hawai‘i could agriculturally diversify or develop educational centers for the Mauna Kea Observatory, Hawai‘i’s rainforests, and the active volcanoes.

4. Land Issues

Due to the limit in quantity, land in Hawai‘i is valuable and commercially profitable. A significant amount of land on the islands is part of the Kānaka Maoli’s rights, as indigenous peoples, to “traditional lands.” Until the issue is explored more adequately, independence would force Hawai‘i to determine the extent of private land ownership and to balance it with the Kānaka Maoli’s rights to exercise their traditional and customary practices. Furthermore, issues of adequate compensation for the use of ceded lands and of the fate of the lands now occupied by the U.S. military would largely affect the residents of Hawai‘i. Finally, given the large amount of development and foreign investors in Hawai‘i, like in Hong Kong, land preservation in the future in an independent Hawai‘i would be uncertain. What is certain is that land ownership and land rights will likely remain a highly litigated and legislated issue.

5. International Status

Perhaps the most important factor will be Hawai‘i’s status as an independent nation. Hawai‘i would once again have the ability to negotiate and participate in international treaties. However, as in France’s relationship with New Caledonia, it is unlikely that the U.S. will completely sever ties with Hawai‘i. Nonetheless, with the ability to negotiate with and bind the U.S. to treaties, Hawai‘i will be able to develop contractual relations and to receive support from other nations. Hawai‘i’s independent status would also enable the residents of Hawai‘i to have a direct voice as to what relations Hawai‘i would have with the world. Presently, U.S. elections within the territory are often discounted as meaningless because of the small impact Hawai‘i has on the electorate college. Independence would change that and bring about meaningful elections.

G. Conclusion

Over a hundred years after the overthrow of the Hawaiian nation, the indigenous people of Hawai‘i remain colonized and subjugated in their motherland. Although the former ideals of cultural genocide and racial

230. See generally Holley, supra note 14. Holley’s article focuses on the recognition of the rights of the indigenous people in Guatemala to their “traditional lands.”

231. See Connell, supra note 214, at 27. Here the author hypothesizes that regardless of whether New Caledonia attains independence, France has maintained strong ties economically and politically with other former colonies and that the situation with New Caledonia is not likely to be different. Id.
subjugation are slowly being eradicated because of decolonization and indigenous peoples’ rights, progress with the U.S. remains slow.

Generally, self-determination is the vehicle through which people exercise their inherent sovereignty.232 Once considered a theory of law, self-determination has been a constantly evolving legal right which is now the foundation of the U.N. Charter. Thus, signatory countries like the U.S. are bound to enforce the right to self-determination pursuant to the U.N. Charter, international customs, or treaties and covenants.

The Kānaka Maoli should strive for the use of either the process of decolonization or indigenous people’s rights to achieve decolonization and to exercise their right to self-determination. First, the process of decolonization, under the Declaration on Colonial Countries and Resolution 1541, enables subjugated people to engage in a plebiscite to freely select their method of self-governance. In 1940 and 1959, the Territory of Hawai‘i went through two statehood referendums, neither of which was conducted within international guidelines. As a result of the elections, the Kānaka Maoli have not been able to practice their customary rights, and they have struggled against the western majority in western courts and in the state legislature.

The statehood referendums were invalid because they did not allow the Kānaka Maoli to exercise self-determination. As illustrated in the case of Puerto Rico, the U.N. has the power to correct continued subjugation and to place territories back on the list of non-self-governing territories. Given the circumstances of the election and the continued denial of rights, Hawai‘i should be replaced on the list of non-self-governing territories that will enable the Kānaka Maoli to exercise self-determination.

Second, indigenous rights are also recognized as a means by which indigenous people may exercise self-determination. Indigenous people possess a unique interest and extraordinary rights in their native land. Indigenous rights are rooted in human rights law, and the international community is bound to recognize indigenous rights pursuant to international custom.

In this period of the eradication of colonization, other Pacific territories provide the Kānaka Maoli with the framework to successfully compel decolonization. Although examination of Kiribati and Tuvalu provides the Kānaka Maoli with great optimism for independence, New Caledonia seems more similarly situated to Hawai‘i. The Kanaks in New Caledonia may appear to be losing the fight, but their struggle has nonetheless provided the Kānaka Maoli with valuable information that will assist the Kānaka Maoli in their struggle for self-determination.

U.S. control and subjugation of the Kānaka Maoli’s right to self-

232. See generally THORNSBERRY, supra note 71, at 175 (self-determination is the right of all people to govern themselves).
determination is in effect colonialism, which mandates eradication. Although the U.S. has resisted decolonization efforts, the legal dimension of self-determination will eventually prevail, so long as the destructive energies are channeled through an international mechanism that paces, but does not forbid, change.233

233. See Lâm, supra note 6, at 121.