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THE NATIVE HAWAIIAN PEOPLE AND INTERNATIONAL HUMAN RIGHTS LAW: TOWARD A REMEDY FOR PAST AND CONTINUING WrONGS*

S. James Anaya**

Whereas, prior to the arrival of the first Europeans in 1778, the Native Hawaiian people lived in a highly organized, self-sufficient, subsistent social system based on communal land tenure with a sophisticated language, culture, and religion;

Whereas a unified monarchical government of the Hawaiian Islands was established in 1810 under Kamehameha I, the first King of Hawaii;

Whereas, from 1826 until 1893, the United States recognized the independence of the Kingdom of Hawaii, extended full and complete diplomatic recognition to the Hawaiian Government, and entered into treaties and conventions with the Hawaiian monarchs to govern commerce and navigation in 1826, 1842, 1849, 1875, and 1887;

....

Whereas the health and well-being of the Native Hawaiian people is intrinsically tied to their deep feelings and attachment to the land;

Whereas the long-range economic and social changes in Hawaii over the nineteenth and early twentieth centuries have been devastating to the population and

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to the health and well-being of the Hawaiian people;

Whereas the Native Hawaiian people are determined to preserve, develop and transmit to future generations their ancestral territory, and their cultural identity in accordance with their own spiritual and traditional beliefs, customs, practices, language, and social institutions;

... ... ...

Whereas it is proper and timely for the Congress on the occasion of the impending one hundredth anniversary of the event, to acknowledge the historic significance of the illegal overthrow of the Kingdom of Hawaii, to express its deep regret to the Native Hawaiian people, and to support the reconciliation efforts of the State of Hawaii and the United Church of Christ with Native Hawaiians; Now, therefore, be it

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled,

... ... ...

The Congress-

(1) on the occasion of the 100th anniversary of the illegal overthrow of the Kingdom of Hawaii on January 17, 1893, acknowledges the historical significance of this event which resulted in the suppression of the inherent sovereignty of the Native Hawaiian people;

(2) recognizes and commends efforts of reconciliation initiated by the State of Hawaii and the United Church of Christ with Native Hawaiians;

(3) apologizes to Native Hawaiians on behalf of the people of the United States for the overthrow of the Kingdom of Hawaii on January 17, 1893 with the participation of agents and citizens of the United
States, and the deprivation of the rights of Native Hawaiians to self-determination;

(4) expresses its commitment to acknowledge the ramifications of the overthrow of the Kingdom of Hawaii, in order to provide a proper foundation for reconciliation between the United States and the Native Hawaiian people; and

(5) urges the President of the United States to also acknowledge the ramifications of the overthrow of the Kingdom of Hawaii and to support reconciliation efforts between the United States and the Native Hawaiian people.¹

I. INTRODUCTION

The recent joint resolution by the United States Congress is a significant development responsive to tireless efforts by the indigenous or Native Hawaiian people, the modern-day descendants of the people living in the Islands before the arrival of Westerners two centuries ago. Native Hawaiians, who as a group do not qualify for federal programs or statutory benefits aimed at Native Americans generally, have pressed demands for redress for historical and continuing wrongs with increasing vigor over the last several years.² The Native Hawaiian movement has prompted initiatives within Congress and by the State of Hawaii toward eventual resolution of Native Hawaiian claims.³ However, despite

³ These include, in addition to the recent joint resolution, S.J. Res. 19, supra note 1, legislative initiatives within Congress, e.g., Native Hawaiian Education Act, Pub. L. No. 100-297, § 4001, 102 Stat. 358; S. Rep. No. 309, 102d Cong., 2d Sess. (1992) (recommending passage of Native Hawaiian Health Care Improvement Act); see also Native Hawaiian Reparations: Hearings Before the Senate Select Comm. on Indian Affairs, 103d Cong., 1st Sess., S411-16.3 (1988), and recent state legislation establishing a framework for dialogue on a form of Hawaiian autonomous governance, e.g., Act 359, 17th Haw. Leg. Res. Session,
the recently enacted joint resolution of Congress acknowledging injustices against the Native Hawaiian people, their claims for meaningful redress remain substantially unresolved.

This Article seeks to demonstrate how the official response to Native Hawaiian claims is a matter of international law, particularly human rights law, and not just a matter subject to whatever domestic law or policy considerations might apply. After a brief sketch of the historical and contemporary conditions of Native Hawaiians in Part II of this Article, Part III discusses the international law principle of self-determination and argues that the principle's substantive elements have been violated. Next, Part IV describes international developments and human rights norms, particularly concerning the world's indigenous peoples, that are related to the principle of self-determination and relevant to Native Hawaiians. Finally, Part V argues that the United States has a duty under international law to take effective action to remedy the violation of Native Hawaiian self-determination through measures that, at a minimum, implement international norms concerning indigenous peoples and that are based on the Native Hawaiians' own collectively formulated preferences.

This Article does not specify the particular measures that should be taken to remedy the past and continuing wrongs afflicting the Native Hawaiian people. Rather, it establishes the grounds and normative framework within international human rights law to develop such measures through negotiation or other appropriate procedures involving the Native Hawaiians themselves.

II. HISTORICAL INJUSTICE AND CONTINUING WRONGS

Events and conditions have weighed heavily on the people indigenous to Hawaii since the British explorer James Cook

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1993.

4 The brief historical sketch presented here is taken from the following sources: SENATE SELECT COMM. ON INDIAN AFFAIRS, IMPROVING THE EDUCATION STATUS OF NATIVE HAWAIIANS, S. REP. NO. 36, 100th Cong., 1st Sess. 12-17 (1987); DUDLEY & AGARD, supra note 2; DAVID GETCHES ET AL., FEDERAL INDIAN LAW 945-52 (3d ed. 1993); NATIVE HAWAIIAN RIGHTS HANDBOOK (Melody Kapilialoha MacKenzie ed., 1991); Daviana Pomaika'i McGregor, The Cultural and Political History of Hawaiian Native People (unpublished manuscript, on file with author).
initiated continuous Western contact with the Hawaiian archipelago in 1778. At that time, there were several hundred thousand people living on the Islands.  

The modern-day descendants of these people, the indigenous or Native Hawaiians, trace their origins through oral tradition to early Polynesians and beyond them to the forces of nature. As recounted by the Hawaiian historian Davianna Pomaika'i McGregor,

The Hawaiian people are the living descendants of Papa, the earth mother and Wakea, the sky father. They also trace their origins through Kane of the living waters found in streams and springs; Lono of the winter rains and the life force for agricultural crops; Kanaloa of the deep foundation of the earth, the ocean and its currents and winds; Ku of the thunder, war, fishing and planting; Pele of the volcano; and thousands of deities of the forest, the ocean, the winds, the rains and the various other elements of nature. . . . This unity of humans, nature and the gods formed the core of the Hawaiian people's philosophy, world view, and spiritual belief system.  

The Hawaiian world view shaped political and social institutions in existence at the time of Western contact. Hawaiians lived within a system of interrelated chiefdoms and communal land tenure. The basic land unit was the communal ahupu'a, which typically included irrigated agricultural land and access to the sea. The cultivation of taro and fishing were at the center of an economy that produced a surplus supportive of a relatively developed social

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5 At the time of initial contact with the Islands, Cook's entourage estimated the population at 400,000. McGregor, supra note 4, at n.5. A recent study places the population at the time of Cook's arrival at between 800,000 and one million. DAVID E. STANNARD, BEFORE THE HORROR: THE POPULATION OF HAWAI'I ON THE EVE OF WESTERN CONTACT 32-37 (1989). See also ROBERT C. SCHMIDT, DEMOGRAPHIC STATISTICS OF HAWAI'I 1778-1965, 3-4 (1968) (estimating that approximately 300,000 persons were living on the Islands upon Cook's arrival but that within 50 years the population fell by 50%).

6 McGregor, supra note 4, at 3.
structure integrating the entire archipelago. As foreigners arrived in greater numbers in the early nineteenth century, the Islands became unified under a single high chief or king, Kamehameha I. Political unification was instrumental in preserving the indigenous land tenure system in the face of the onslaught of foreigners, and it also provided a central leadership with which foreigners could deal.

It was not long before substantial foreign influence came to bear upon the Hawaiian people and their government. Traders seeking commercial advantage and proselytizing missionaries were the first to attempt aggressively to reshape Hawaiian cultural, economic and political life. The Hawaiian land tenure system came under heightened pressure as foreigners sought land for themselves and settled in Hawaii in increasing numbers. Ka Mahele (The Land Division) of 1848 was the transformation of traditional Hawaiian land tenure into a property regime that facilitated the alienation of lands and hence was more suited to Western economic interests. By the late nineteenth century, foreigners, mostly American, owned over a million acres in Hawaii and leased another three-quarters of a million acres of government, or Crown lands, at near nominal rates.

In 1887, a group of American residents with United States military support forced the Hawaiian monarch, King Kalakaua, to sign what has become known as the “Bayonet Constitution.” Under the 1887 Constitution, the King was reduced to a figurehead, and the Hawaiian government was placed in the hands of a United States-dominated cabinet. Any pretense of constitutional regularity was disregarded in 1893 when United States troops invaded Hawaii and helped depose the King’s successor, Queen Liliuokalani, and replace her with a provisional government. American residents

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7 Ka Mahele involved the formal division and quitclaiming of ahupua’a and other lands to the king and to 245 chiefs, followed by the lifting of restrictions on the alienation of property. NATIVE HAWAIIAN RIGHTS HANDBOOK, supra note 4, at 6-9. Further description of Ka Mahele and its ramifications is in JON J. CHINEN, ORIGINAL LAND TITLES IN HAWAII, 55 (1961); LILKALA KAME‘ELEHIWA, NATIVE LAND AND FOREIGN DESIRES: PEHEA LA PONO AI? (1992); Marion Kelly, Land Tenure in Hawaii, 7 AMERASIA J. 57 (1980). See also DUDLEY & AGARD, supra note 2, at 7 (describing Ka Mahele as the result of a king who “succumbed increasingly to the advice of whites in his Cabinet. . . . [The whites] scared an unwilling king and his chiefs into establishing private property”) (citations omitted).
subsequently established the short-lived “Republic of Hawaii” and forced the imprisoned Queen to abdicate officially. The United States formally annexed Hawaii in 1898, despite the fact that the only expression of indigenous Hawaiian opinion on the issue was a petition to Congress, signed by about 29,000 Hawaiians, protesting the annexation.

Thus, Hawaii became a territory of the United States among the ranks of colonial territories of other Western powers driven by the forces of empire. The Organic Act of 1900 set up a territorial government headed by a governor appointed by the United States. Under the territorial government, the remnants of Hawaiian land tenure, other traditional or customary institutions, and cultural practices, including the use of the Hawaiian language, were suppressed. This was in keeping with Western thinking, which regarded non-Western cultures as inferior, coupled with an official policy of assimilating the indigenous Hawaiians into American cultural life. With annexation, furthermore, the Hawaiian Crown and government lands, in which the Hawaiian people were to have an interest following the Māhele, passed to the United States, and the private acquisitive forces of American Manifest Destiny were altogether unleashed.

In the process of Western encroachment culminating in the 1898 annexation, many Hawaiians found they no longer could farm or gain access to the traditional gathering areas in the mountains and the ocean that once supported them. Other Hawaiians were left landless. As a result, many were forced to move to urban areas to seek employment. They abandoned traditional subsistence living, which had supported the Hawaiian culture for centuries. Many Hawaiians became members of the “floating population crowding into the congested tenement districts of the larger towns and cities of the Territory” under conditions which many believed would “inevitably result in the extermination of the race.”

Stripped of their resource base, Hawaiians faced a cultural crisis and the decimation of their population.
In the century following Western contact, hundreds of thousands of Hawaiians died from a variety of infectious diseases introduced by the white man. Ailments seldom fatal to foreigners were deadly for Hawaiians who had acquired no immunity to these diseases. Under conservative estimates, from 1778 to 1893, the Hawaiian population dropped by at least 87 percent, from approximately 300,000 to less than 40,000. More recent theorists believe that this population decline has been grossly understated.\(^8\)

In 1910, recognizing latent, deteriorating social and economic conditions among indigenous Hawaiians, the United States Congress amended the Organic Act to facilitate homesteading under an 1895 law of the Republic of Hawaii. The 1910 amendment was followed by the Hawaiian Homes Commission Act of 1920,\(^9\) which set aside approximately 200,000 acres of public lands for Native Hawaiian homesteads.\(^10\) Neither piece of legislation, however, had much effect on the overall conditions of indigenous Hawaiians. Despite a backlog of homestead applicants, most of the land set aside by the 1920 Act has yet to be distributed, and what has been is largely unsuitable for agriculture. Observers surmise that the legislation was mostly calculated to benefit large agricultural business by limiting the availability of land necessary to meet the needs of Hawaiian homesteaders and by terminating homesteading by the general public.\(^11\) Subsequent legislation similarly has failed to wrest Native Hawaiians from a severely disadvantaged condition.

The 1959 Statehood Admission Act, by which Hawaii passed from its colonial status and became one of the United States, transferred to the State of Hawaii most of the lands that had been ceded to the

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\(^8\) Native Hawaiian Rights Handbook, supra note 4, at 44 (quoting S. Cong. Rec. 2, 10th Leg. of Territory of Hawaii, 1919 Senate J. 25-26).


\(^10\) Id.

United States at annexation in 1898. The State, however, failed for years to act effectively on its trust obligation specified in the Act to hold the lands in part "for the betterment of the conditions of Native Hawaiians." The State amended its constitution in 1978 in what is generally considered a meager step toward addressing Native Hawaiian concerns over the ceded lands trust. The 1978 constitutional amendments created the Office of Hawaiian Affairs, which is managed by a Native Hawaiian board of trustees elected by Native Hawaiians in a special election. The board receives and expends the portion of income from the trust lands that is allocable to Native Hawaiians.

Plundered by two centuries of Western encroachment and left virtually landless, Native Hawaiians living on the Islands today number around 204,000—about one fifth of the Islands' population. As a group, Native Hawaiians comprise the most economically disadvantaged and otherwise ill-ridden sector of the Islands' population. According to statistical data compiled over the last several years, Native Hawaiians are overrepresented among the ranks of welfare recipients and prison inmates and are underrepresented among high school and college graduates, professionals, and political officials. In a recent survey of data on Hawaiian health conditions, Richard Kekuni Blaisdell, an eminent indigenous Hawaiian medical doctor, concluded:

The above data document the worst health profile for Kanaka Maoli [indigenous Hawaiians] compared
to the other ethnic groups in their homeland. Since Kanaka Maoli are alienated by the Western health care system, the adverse health statistics of the Kanaka Maoli are probably underreported. Other unfavorable socioeconomic indicators, previously identified, suggest long-standing, broad and deep, causal factors in the fabric of the islands' colonial multi-ethnic society, rather than only proximate factors narrowly confined to ill-health.  

Without an effective land base, surviving Native Hawaiian customs—intertwined with land use and stewardship patterns—are suppressed. Access to and protection of sacred sites, including the volcano deity Pele, have been matters of particularly intense struggle for Native Hawaiians. Other remaining aspects of Native Hawaiian cultural life have trouble breathing, much less flourishing, as Native Hawaiians are further subsumed within a majority settler population with its cultural roots elsewhere. Native Hawaiians are governed by Western-oriented institutions that, while essentially democratic, scarcely reflect Native Hawaiians' own distinctive values and traditions and are dominated by the majority settler population. In her recent book, From a Native Daughter, Huanani-Kay Trask with poignant eloquence observes of present-day Hawaii:

On the ancient burial grounds of our ancestors, glass and steel shopping malls with layered parking lots stretch over what were once the most ingeniously irrigated taro lands, lands that fed millions of our people over thousands of years. Large bays, delicately ringed long ago with well-stocked fishponds, are now heavily silted and cluttered with jet skis, windsurfers, and sailboats. Multi-story hotels disgorge over six million tourists a year onto stunningly beautiful (and easily polluted) beaches, closing off access to locals. On the major islands of Hawai‘i, Maui, O‘ahu, and Kaua‘i, meanwhile, military

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19 Blaisdell, supra note 17 (manuscript at 23, on file with author).
airfields, training camps, weapons storage facilities, and exclusive housing and beach areas remind the Native Hawaiian who owns Hawai‘i: the foreign, colonizing country called the United States of America.

... Economically, the statistic of thirty tourists for every Native means that land and water, public policy, law and the general political attitude are shaped by the ebb and flow of tourist industry demands. For Hawaiians, the inundation of foreigners decrees marginalization in our own land.

The State of Hawai‘i, meanwhile, pours millions into the tourism industry, even to the extent of funding a [tourism] booster club. ... Rather than stem the flood, the state is projecting a tidal wave of 12 million tourists by the year 2010, and encouraging rocket-launching facilities and battleship homeporting as added economic “security.”

For my people, this latest degradation is but another stage in the agony that began with the first footfall of European explorers in 1778, shattering two millennia of Hawaiian civilization characterized by an indigenous way of caring for the land, called mālama ‘āina.20

In sum, after long-standing neglect, the United States Congress, with good reason, has turned its attention to the past and present of the Native Hawaiian people.

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III. THE PRINCIPLE OF SELF-DETERMINATION

Self-determination is a foundational principle of international law that bears particularly upon the status and rights of the Native Hawaiian people in light of their history and contemporary conditions. Mention of self-determination within contemporary political discourse often raises the specter of destabilization and even violent turmoil. And indeed, much violence has occurred in the world of late in association with extremist self-determination rhetoric formulated around ethnic chauvinism. With attention to widely shared values and processes of decision that are fairly associated with the concept of self-determination, however, it is possible to identify self-determination as a stabilizing force in the international system and relevant to peaceful resolution of Native Hawaiian claims.

In the following pages, self-determination is identified as a universe of human rights precepts concerned broadly with peoples, including the Native Hawaiian people, and grounded in the idea that all are equally entitled to be in control of their own destinies. The substance of the principle of self-determination is distinguished from remedial prescriptions that may follow violations of the substantive norm. In brief, the substance of self-determination entails two strains: First, self-determination requires that the governing institutional order substantially be the creation of constitutional processes guided by the will of the people, or peoples, governed. Second, self-determination requires that the governing institutional order, independently of the processes leading to its creation or alteration, be one under which people may live and develop freely on a continuous basis. In its remedial aspect also applicable here, self-determination gives rise to remedies that tear at the legacies of empire, discrimination, suppression of democratic participation, and cultural suffocation.

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21 This part draws substantially from the author's previous article, S. James Anaya, A Contemporary Definition of the International Norm of Self-Determination, 3 TRANSNAT'L L. & CONTEMP. PROBS. 131 (1993), in which the theoretical grounding for the conception of self-determination invoked here is set forth more fully.

A. THE CHARACTER AND SCOPE OF SELF-DETERMINATION

1. Generally. The concept of self-determination is part of international law's expanding lexicon of human rights; it extends from philosophical affirmation of the human drive to translate aspiration into reality, coupled with postulates of inherent human equality.23 "Self-determination of peoples" is featured in the United Nations Charter as among the organization's founding principles.24 The International Covenant on Civil and Political Rights, to which the United States also is a party, holds out self-determination as a "right" of "[a]ll peoples, 25 as does the Helsinki Final Act which was signed by the United States as a leading participant in the Conference on Security and Co-operation in Europe.26 Other major international human rights instruments that affirm the principle or right of self-determination include the International Covenant on Economic, Social and Cultural Rights,27


24 U.N. CHARTER art. 1, ¶ 2.


and the Banjul Charter on Human and Peoples’ Rights. Additionally, self-determination is widely acknowledged to be a principle of customary international law and even *jus cogens*, a peremptory norm.

Extending from core values of human freedom and equality, expressly associated with peoples instead of states, and affirmed in a number of international human rights instruments, the principle of self-determination is properly understood to benefit human beings as *human beings* and not sovereign entities as such. But while human beings are the beneficiaries of self-determination, the objects of the principle are the institutions of government under which human beings live.

The principle of self-determination comprises a standard of legitimacy against which institutions of government are measured. In its most prominent modern manifestation within the international system, self-determination has precipitated the demise of
colonial institutions of government and the emergence of a new political order for subject peoples.\textsuperscript{21} Also, the international community, through the United Nations, declared illegitimate South Africa's governing institutional order, with its previously entrenched system of apartheid, on grounds of self-determination.\textsuperscript{32} Self-determination is not separate from other human rights norms; rather, self-determination is a configurative principle or framework complemented by the more specific human rights norms which in their totality enjoin the governing institutional order. As further discussed below, this framework concerns both the procedures by which governing institutions develop and the form they take for their ongoing functioning.

2. Native Hawaiians as Beneficiaries of Self-Determination. Like all human rights norms, self-determination is presumptively universal in scope and thus must be assumed to benefit all segments of humanity.\textsuperscript{33} Self-determination's linkage with the term "peoples" in international instruments,\textsuperscript{34} however, indicates the collective or group character of the principle. Self-determination is concerned with human beings not simply as individuals with autonomous will but, moreover, as social creatures engaged in the constitution and functioning of communities and corresponding institutions of human interaction and control. In its plain meaning, the term "peoples" undoubtedly embraces the Native Hawaiian people, who comprise a distinct community with its own social,


\textsuperscript{33} Burns H. Weston, Human Rights, in HUMAN RIGHTS IN THE WORLD COMMUNITY 14, 17 (Richard P. Claude & Burns H. Weston eds., 2d ed. 1992) ("[I]f a right is determined to be a human right it is quintessentially general or universal in character, in some sense equally possessed by all human beings everywhere, including in certain instances even the unborn.").

\textsuperscript{34} See, e.g., supra notes 24-26 and accompanying text (citing documents linking self-determination to "peoples").
cultural, and political attributes rooted in history.\textsuperscript{35}

Many have interpreted the use of the term "peoples" in this connection as restricting the scope of self-determination. The principle of self-determination is deemed concerned only with "peoples" in the sense of a limited universe of narrowly defined, mutually exclusive communities entitled a priori to the full range of sovereign powers including independent statehood. This interpretation, however, is flawed in its underlying vision of a world reduced to a grid of statehood categories—a vision that obscures the human rights character of self-determination and diminishes the relevance of self-determination values in a world in which states are not altogether coextensive with spheres of community. The statehood model for interpreting the term "peoples" corresponds with post-Westphalian Western political theory in that it is not alive to the rich variety of non-state groupings actually found in the human experience, nor to associative patterns leading to enhanced interconnectedness among various segments of humanity.\textsuperscript{36}

Any model of self-determination that does not take into account the existence of multiple patterns of human association and interdependency is at best incomplete and more likely distorted. As a human rights principle incorporating values relevant to modern trends and conditions, self-determination has meaning for the multiple and overlapping spheres of human association and political ordering that characterize humanity. Appropriately understood, therefore, self-determination benefits individuals and groups throughout the spectrum of humanity's complex web of interrelationships and loyalties, not just groups defined by existing or perceived sovereign boundaries. In a world of increasingly overlapping and integrated political spheres, self-determination

\textsuperscript{35} See supra notes 4-6 and accompanying text. Webster's Dictionary defines "peoples" as "a body of persons that are united by a common culture, tradition, or sense of kinship, that typically have common language, institutions, and beliefs, and that often constitute a politically organized group." MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 860 (10th ed. 1993).

concerns human beings in regard to the constitution and functioning of all levels and forms of government under which they live.

The Native Hawaiian people thus are beneficiaries of the principle of self-determination. They are entitled to self-determination under international law not because they meet some statehood-oriented threshold criteria of "peoplehood," but rather, because they are human beings: human beings who, like those among other segments of humanity, possess and value community bonds within a seamless global web of human interaction. As multiple and overlapping structures of local, regional, and global governance evolve, the community bonds of Native Hawaiians are to be valued no less than others.

3. Substantive vs. Remedial Aspects of Self-Determination. Given the prominence of decolonization in the international practice of self-determination, decolonization provides a point of reference for understanding the scope and content of self-determination. It is erroneous, however, to go so far as to equate self-determination with the decolonization regime. Decolonization has entailed a particular category of subjects, prescriptions, and procedures. Decolonization prescriptions do not themselves embody the substance of the principle of self-determination, but rather they correspond with measures to remedy a sui generis deviation from the principle existing in the prior condition of colonialism in its classical form.

Self-determination precepts comprise a world order standard with which colonialism was at odds and with which other institutions of government also may conflict. The substantive content of the principle of self-determination, therefore, inheres in the precepts by which the international community has held colonialism to be illegitimate and which apply universally to benefit all human beings individually and collectively. The substance of the norm—the precepts that define the standard—must be distinguished from the remedial prescriptions that may follow a violation of the norm, such as those developed to undo colonization. To the extent the international community generally promotes self-determination values, it may identify contextual deviations from self-determination beyond those of classical colonialism and

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37 The decolonization regime is discussed infra, notes 58-68 and accompanying text.
promote appropriate remedies.

Accordingly, while the substantive elements of self-determination apply broadly to benefit all segments of humanity, self-determination applies more narrowly in its remedial aspect. Remedial prescriptions and mechanisms developed by the international community benefit groups that have suffered violations of substantive self-determination. As demonstrated subsequently, Native Hawaiians are within the more narrow category of self-determination beneficiaries, which includes groups entitled to remedial measures.

B. SUBSTANTIVE ASPECTS OF SELF-DETERMINATION AND THEIR VIOLATION: THE EXPERIENCE OF COLONIZATION

The Native Hawaiian people have been denied the substantive elements of self-determination. The substance of the principle of self-determination is structured as follows. First, in what may be called its constitutive aspect, self-determination concerns the occasional or episodic procedures that create institutions of government. Secondly, in what may be called its ongoing aspect, self-determination concerns the form, content, and functioning of the governing institutional order itself. The Native Hawaiian people have lived under a governing institutional order—constructed upon patterns of colonization and yet fully responsive to latent inequities—that is deficient in both regards.

1. Constitutive Self-Determination. In self-determination's constitutive aspect, core values of freedom and equality translate into a requirement that institutions of government be created according to the will of the people governed. Constitutive self-determination does not itself dictate the outcome of procedures leading to the creation of or change in the governing institutional order; where such procedures occur, however, constitutive self-determination requires participation and consent such that the end result in the political order reflects the collective will of the people, or peoples, concerned. This aspect of self-determination corresponds with the provision common to the International Human Rights Covenants and other instruments which state that peoples

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38 See infra notes 44-51, 55 and accompanying text.
“freely determine their political status” by virtue of the right of self-
determination.\textsuperscript{39} It is not possible to identify precisely the bounds of international consensus concerning the required levels and means of individual or group participation in all contexts of institutional birth or change. Certain minimum standards, however, are evident.

Colonization was rendered illegitimate in part by reference to the processes leading to colonial rule, processes that today clearly represent impermissible territorial expansion of governmental authority.\textsuperscript{40} The world community now holds in contempt the imposition of government structures upon people, regardless of their social or political makeup.\textsuperscript{41} The world community now accepts President Woodrow Wilson’s admonition, elaborating upon his view of self-determination in the midst of the European turmoil of World War I, that “no right anywhere exists to hand peoples

\textsuperscript{39} International Covenant on Economic, Social and Cultural Rights, supra note 27, art. 1, ¶ 1; International Covenant on Civil and Political Rights, supra note 25, art. 1, ¶ 1. The full text of art. 1, ¶ 1 of the Covenants is quoted at supra note 25. \textit{See also} United Nations Friendly Relations Declaration, supra note 27, at 123 (affirming self-determination by almost identical language).

\textsuperscript{40} For a description of procedures for acquiring title adopted by European states in the colonization of Africa, see SHAW, supra note 29, at 31-58. Colonial patterns were supported by the theory that lands not inhabited by “civilized” peoples—that is, peoples with European characteristics of social and political organization—were deemed vacant, or \textit{terra nullius}, and hence open to occupation by the “civilized.” \textit{Id.} at 31-39. This view is evident in the works of late 19th-early 20th century legal theorists. See, e.g., JOHN WESTLAKE, \textsc{Chapters on the Principles of International Law} 134-35, 383-84 (Ronald F. Roxburgh ed., 3d ed. 1920). \textit{See generally} GERRIT W. GONG, \textsc{The Standard of “Civilization” in International Society} (1984) (outlining concept of “civilized” state).

\textsuperscript{41} See PAUL G. LAUREN, \textsc{Power and Prejudice: The Politics and Diplomacy of Racial Discrimination} 150-65 (discussing government statements at the San Francisco Conference which gave rise to the United Nations Charter); \textit{Declaration on the Granting of Independence to Colonial Countries and Peoples, supra note 27, at 67 (declaring, \textit{inter alia}, that “[t]he subjection of peoples to alien subjugation, domination and exploitation constitutes a denial of fundamental human rights”); United Nations Centre for Human Rights, \textit{The Effects of Racism and Racial Discrimination on the Social and Economic Relations Between Indigenous Peoples and States: Report of a Seminar}, U.N. Doc. HR/PUB/89/5 at 8 (1989) (“The concept of ‘\textit{terra nullius}, ‘conquest’ and ‘discovery’ as modes of territorial acquisition are repugnant, have no legal standing, and are entirely without merit or justification . . . .”)). Under modern conceptions of \textit{terra nullius}, territory is not legally vacant if inhabited by human beings, even if they are not organized as a “sovereign” entity. \textit{See} Western Sahara, 1975 I.C.J. 12, 39-40 (Jan. 3) (finding Western Sahara not \textit{terra nullius} at time of Spanish colonization, a finding not premised on the character of the political organization of the territory).
about from sovereignty to sovereignty as if they were property."  

Today, movement toward the creation or territorial extension of governmental authority normally is regulated by self-determination precepts requiring minimum levels of participation by all affected.

The Hawaiian people are among the segment of humanity that has suffered a violation of constitutive self-determination through colonization in its most blatant form. Beginning with the arrival of James Cook in the Hawaiian archipelago in 1778, the Hawaiian people were subjected to transformative encroachments culminating in the forced annexation of Hawaii by the United States in 1898. President Grover Cleveland, in office during the interim between the United States military invasion of 1893 and the 1898 Annexation Act, signalled the illegitimacy of the United States' occupation and annexation of Hawaii in a statement to Congress opposing annexation:

[T]he military occupation of Honolulu by the United States on the day mentioned was wholly without justification, either as an occupation by consent or as an occupation necessitated by dangers threatening American life and property . . . . Fair minded people with the evidence before them will hardly claim that the Hawaiian Government was overthrown by the people of the Islands or that the provisional government had ever existed with their consent. I do not understand that any member of this government claims that the people would uphold it by their suffrages if they were allowed to vote on the ques-

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42 President Woodrow Wilson, Address to Congress (May 1917), quoted in UMOZURIKE, supra note 23, at 14.
43 This is evident, for example, in the steps of institution building of the European Community and the expansion of its territorial jurisdiction. For background on the development of the European Community, see P.S.R.F. MATHIJSEN, A GUIDE TO EUROPEAN COMMUNITY LAW 1-14 (5th ed. 1990).
44 See supra notes 4-20 and accompanying text (chronicling Hawaiian history since Cook's arrival).
45 See supra notes 7-8 and accompanying text.
President Cleveland's opposition to annexation followed the advice of his Secretary of State William Gresham, who had written:

Should not the great wrong done to a feeble but independent State by the abuse of the authority of the United States be undone by restoring the legitimate government? Anything short of that will not, I respectfully submit, satisfy the demands of justice.

... Our government was the first to recognize the independence of the Islands and it should be the last to acquire sovereignty over them by force and fraud.

In its recent joint resolution, the United States Congress acknowledged that the acts leading to the annexation of Hawaii, which was consummated subsequent to President Cleveland's departure from office, violated international law.

Despite the injustice and illegality of the United States' forced annexation of Hawaii, it arguably was confirmed pursuant to the international law doctrine of effectiveness. In its traditional formulation, the doctrine of effectiveness confirms de jure sovereignty over territory to the extent it is exercised de facto, without questioning the events leading to the effective control. The modern international law of self-determination, however, forges an exception to the doctrine of effectiveness. Pursuant to the principle of self-determination, the international community has deemed illegitimate historical patterns giving rise to colonial rule and has promoted corresponding remedial measures, irrespective of the

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48 S.J. Res. 19, supra note 1.
effective control exercised by the colonial power. Decolonization demonstrates that constitutional processes may be judged retroactively in light of self-determination values—notwithstanding effective control—where, as in Hawaii, such processes remain relevant to the legitimacy of governmental authority or otherwise manifest themselves in contemporary inequities.

2. Ongoing Self-Determination. Not only have the Hawaiian people suffered the indignity and legacies of events associated with Hawaii's forced incorporation into the United States, but the resulting governmental order itself has functioned to deny the Hawaiian people self-determination. Apart from self-determination's constitutive aspect, which conditions the procedures leading to the governing institutional order, ongoing self-determination enjoins the form adopted by the institutional order for its continuous functioning. In essence, ongoing self-determination requires a governing institutional order under which individuals and groups are able to make meaningful choices in matters touching upon all spheres of life on a continuous basis. In the words of the self-determination provision common to the International Human Rights Covenants and other instruments, peoples are to "freely pursue their economic, social and cultural development."

In this respect as well, the international community's condemnation of colonial administration represents a minimum standard. The world community has come to regard classical colonialism as an oppressive form of governance, independently of its origins.

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50 Cf. Western Sahara, 1975 I.C.J. 12, 36 (Jan. 3) (holding right of people of Western Sahara to decolonization not affected by territory's legal status at time of colonization, although status may be relevant to framing of decolonization procedures).

51 See infra notes 58-67 and accompanying text (discussing decolonization).

52 International Covenant on Economic, Social and Cultural Rights, supra note 27, art. 1, ¶ 1; International Covenant on Civil and Political Rights, supra note 25, art. 1, ¶ 1. The full text of art. 1, ¶ 1 of the Covenants is at supra note 25. See also United Nations Friendly Relations Declaration, supra note 27 (affirming self-determination).

53 Despite the divergence of political theory at the height of the decolonization movement in the 1950s and 1960s, a divergence that fueled the polarization of geopolitical forces until recently, there was coincidence in precepts of freedom and equality upon which the international community viewed colonial governance as oppressive. Compare, for example, Stalin's anti-colonial statements in JOSEPH STALIN, MARXISM AND THE NATIONAL-COLONIAL QUESTION 314-22 (Proletarian Publishers 1925), with the policy prescriptions of United States leaders as summarized in W. OFUATEY-KODJOE, THE PRINCIPLE OF SELF-DETERMINATION IN INTERNATIONAL LAW 99-100 (1977).
At least since the middle part of this century, colonial structures have been widely deplored for depriving the indigenous inhabitants of equal status vis-à-vis the colonizers in the administration of their affairs.54

Upon annexation, the Hawaiian people were subjected to classical colonial structures of governance until Hawaii became a state of the United States in 1959. Native Hawaiians, who had become not only impoverished but also vastly outnumbered by the settler population, were rendered more and more at the margins of political power in their own lands under colonial administration.55 With its strongly Western orientation and power center, moreover, the governing institutional order promulgated subsequent to annexation effectively suppressed Hawaiian culture and remaining manifestations of traditional Hawaiian land tenure, and it allowed for the continued diminution of indigenous Hawaiian landholdings.56

C. REMEDIAL ASPECTS OF SELF-DETERMINATION: THE EXPERIENCE OF DECOLONIZATION

The international concern over colonialism and its deviation from the substantive elements of self-determination have given rise to remedial prescriptions and mechanisms. This remedial regime toward decolonization corresponds with the territory of Hawaii becoming a state of the United States. The statehood remedy, however, has not alone provided adequate redress for the indigenous Hawaiians; impediments to the realization of Hawaiian self-determination continue.

1. The Decolonization Regime. As already noted, decolonization manifests the remedial aspect of the principle of self-determination,

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54 See ROBERT H. JACKSON, QUASI-STATES: SOVEREIGNTY, INTERNATIONAL RELATIONS, AND THE THIRD WORLD 85 (1990) (discussing preponderant view of 1950s that colonialism is “an absolute wrong: an injury to the dignity and autonomy of those peoples and of course a vehicle for their economic exploitation and political oppression”).
55 See supra notes 7-12 and accompanying text (delineating colonial administration and structure).
56 See supra notes 8-11 and accompanying text (discussing subjugation of Hawaiian land system and diminishment of indigenous Hawaiian landholdings under United States administration subsequent to annexation).
as distinguished from the principle's substantive elements. The decolonization regime is in relevant part grounded in Chapter XI of the U.N. Charter, which establishes special duties for U.N. members that "have or assume responsibilities for the administration of territories whose peoples have not yet attained a full measure of self-government." Under article 73 of Chapter XI, such members commit themselves:

a. to ensure, with due respect for the culture of the peoples concerned, their political, economic, social, and educational advancement, their just treatment, and their protection against abuses;

b. to develop self-government, to take due account of the political aspirations of the peoples, and to assist them in the progressive development of their free political institutions, according to the particular circumstances of each territory and its peoples and their varying stages of advancement . . . ;

e. to transmit regularly to the Secretary-General for information purposes, subject to such limitation as security and constitutional considerations may require, statistical and other information of a technical nature relating to economic, social, and educational conditions in the territories for which they are respectively responsible . . . .

In its Resolution 1541 of 1960, the U.N. General Assembly clarified that "[t]he authors of the Charter of the United Nations had in mind that [article 73] should be applicable to territories which were

57 See supra note 37 and accompanying text.
58 U.N. CHARTER art. 73.
59 Id.; see also U.N. CHARTER arts. 75-85 (establishing parallel international trusteeship system for a narrower category of territories compromised mostly of those previously administered by the powers defeated in World Wars I & II).
The General Assembly has maintained a list of territories subject to the article 73(e) reporting requirement, and through a committee structure has deliberated upon the reports with a view toward promoting article 73 policies.61

Article 73 and its progeny have not entailed a reversion to the status quo prior to the historical patterns of colonization. Rather, the remedy has led to the creation of altogether new institutional orders viewed as appropriate to implementing self-determination. General Assembly Resolution 1514 confirmed the practice establishing the norm of independent statehood for colonial territories with their colonial boundaries intact, regardless of the arbitrary character of most such boundaries.62 Under the companion Resolution 1541 and related international practice,63 self-determination is also considered implemented for a colonial territory through its association or integration with an independent state,64 as long as the result is the outcome of the freely expressed wishes of the people of the territory concerned.65

The Hawaiian territory appeared on the General Assembly’s list of non-self-governing territories until Hawaii became one of the United States in 1959. Hawaiian statehood followed a plebiscite in which voters were asked to choose between the status quo and...
statehood. Shortly after statehood, the United States communicated to the U.N. Secretary-General the following:

Since 1946, the United States has transmitted annually to the Secretary-General information on the Territory of Hawaii pursuant to Article 73e of the Charter. However, on August 21, 1959, Hawaii became one of the United States under a new constitution taking effect on that date. In the light of this change in the constitutional position and status of Hawaii, the United States Government considers it no longer necessary or appropriate to continue to transmit information on Hawaii under article 73e.

The General Assembly subsequently agreed that the United States' obligation to report on Hawaii under article 73 had expired with Hawaii becoming a state in conjunction with a plebiscite, and Hawaii accordingly was removed from the list of non-self-governing territories.

2. The Inadequacy of the Statehood Remedy. Although Hawaii's territorial status gave way to statehood within the framework of world decolonization, the statehood remedy is deficient from the standpoint of indigenous Hawaiians. First, the procedures leading to statehood were not in keeping with precepts of constitutive self-determination: the statehood plebiscite did not afford indigenous Hawaiians a meaningful opportunity to choose. Plebiscite procedures allowed the majority settler population to overpower the voice of the Native Hawaiian people who were uniquely interested in a Hawaii reconstituted in accordance with self-determination values. Under plebiscite rules, all United States citizens who had been

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resident in Hawaii for one year were allowed an equal vote.\textsuperscript{69} International practice outside the Hawaiian context has proscribed settler participation in decolonization plebiscites, where settler participation could potentially nullify the indigenous vote.\textsuperscript{70} The plebiscite, furthermore, did not offer an adequate range of choices. The choice between the status quo and statehood was perhaps meaningful to those who assumed a priori United States sovereignty over Hawaii, but it was much less meaningful as an act of self-determination to indigenous Hawaiians on whom United States rule had been imposed. Given these factors, the plebiscite leading to statehood failed to cure the taint in the legitimacy of the United States' claim to sovereignty over Hawaii and its indigenous people.

Statehood has failed otherwise to remedy the historical injustices suffered by Native Hawaiians or to result in a condition of ongoing self-determination for them, despite the displacement of classical colonial structures of governance. Among the Islands' inhabitants, Native Hawaiians continue to figure disproportionately at the bottom tier of social and economic indicators as the result of the colonial patterns beginning over two hundred years ago.\textsuperscript{71} And, they are yet to have lands restored in a quantity that would provide a viable economic or cultural base.\textsuperscript{72} In other respects, the governing institutional order resulting in the aftermath of statehood has not provided Native Hawaiians the accommodations necessary to exercise and freely develop their culture, including religious practices and traditional governance, or allowed them to


\textsuperscript{70} For example, the General Assembly's Special Committee on Decolonization recommended measures to ensure that the "expatriate" vote in Bermuda would not "decisively influence the question of the future status of the Territory." Decolonization-Committee of 24 Adopts Decisions on Bermuda, Solomons, Tokelau, Pitcairn, U.N. Monthly Chron., July 1977, at 23; cf. G.A. Res. 2353, U.N. GAOR, 22d Sess., 1641st plen. mtg., U.N. Doc. A/7013 (1967) (against holding referendum for Gibraltar to determine its future status due to overwhelming settler population there).

\textsuperscript{71} See supra notes 17-19 and accompanying text (discussing statistics indicating decline in health, population, and economic status of Native Hawaiians).

\textsuperscript{72} See supra notes 8-14 and accompanying text (discussing impact of Western encroachment on Native Hawaiian land).
exercise their fair share of political power. The continuing denial of Native Hawaiian self-determination and of the Hawaiians' corresponding remedial entitlements is particularly evident in light of international processes and developing norms concerning the rights of indigenous peoples, the focus of the following part of this Article.

IV. INDIGENOUS PEOPLES WITHIN CONTEMPORARY INTERNATIONAL LAW AND INSTITUTIONS

Native Hawaiians are among the subjects of a developing body of international norms concerning indigenous peoples, a body of norms that is an adjunct to the principle of self-determination and related human rights precepts. This developing body of law is substantially the result of activity beginning in the early 1970s and involving international organizations and indigenous peoples themselves.

A. RECENT DEVELOPMENTS LEADING TO NEW AND EMERGENT INTERNATIONAL NORMS CONCERNING INDIGENOUS PEOPLES

Over the last two decades, the international community has established indigenous peoples or populations as special subjects of international concern within its burgeoning human rights program. In 1971, the U.N. Sub-Commission on Prevention of Discrimination and Protection of Minorities initiated a study on the "Problem of Discrimination against Indigenous Populations." The study, which was issued originally as a series of partial reports from 1981 to 1983, made a series of findings and recommendations general-

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73 See supra note 20 and accompanying text (describing suppression of Native Hawaiian political and cultural life).
ly supportive of indigenous peoples' efforts to seek redress for past deprivations of their human rights and to secure legal protection for their continued survival as distinct communities with historically based cultures, political institutions, and entitlements to land.77

The U.N. study, together with the advocacy of indigenous peoples’ representatives, prompted the U.N. Economic and Social Council to establish in 1982 the U.N. Working Group on Indigenous Populations,78 which reviews developments concerning indigenous peoples and has drafted a declaration on indigenous rights for eventual consideration by the U.N. General Assembly.79 Following the lead of the U.N. Working Group, the International Labour Organisation (ILO), a specialized agency affiliated with the U.N., adopted in 1989 its Convention on Indigenous and Tribal Peoples (No. 169),80 which already has been ratified by a number of states and has received favorable consideration in others.81 In a further development, the General Assembly of the Organization of American States, on November 18, 1989, asked “the Inter-American Commission on Human Rights to prepare a juridical instrument relative to the rights of indigenous peoples.”82 Additionally, the Inter-American Commission on Human Rights and the U.N. Human Rights Committee have become increasingly engaged in adjudicating indigenous peoples’ claims.83 The international focus on indigenous peoples has been heightened by the U.N. General Assembly’s designation of 1993 as “The International Year for the

81 States that have ratified the Convention include Norway, Mexico, Colombia, and Bolivia.
83 See infra note 103 and accompanying text (discussing findings of “special legal protections” of indigenous peoples in recent cases).
World's Indigenous People.84

Through these processes, indigenous peoples and their supporters have been successful in moving states and other relevant actors to an ever closer accommodation of their demands. While the movement can be expected to continue as indigenous peoples continue to press their cause, there already has emerged a new constellation of international norms specifically concerned with indigenous peoples. These norms are expressed or reflected in the 1989 ILO Convention on Indigenous and Tribal Peoples (No. 169), in statements by the U.N. Working Group on Indigenous Populations and other authoritative non-governmental actors, and, increasingly, in the diplomatic statements and behavior of the numerous governments that have participated actively in the ILO and Working Group procedures. Insofar as the content of these norms and expectations of compliance with them are rooted in a preponderance of international opinion, they are customary law and hence generally binding upon the constituent units of the world community regardless of treaty ratification or other formal act of assent to the norms.85

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85 Customary norms arise when a preponderance of states and other authoritative actors converge upon a common understanding of the norms' content through expression or actions, and generally expect future behavior in conformity with the norms. Professors McDougal, Lasswell and Chen describe customary law as "generally observed to include two key elements: a 'material' element in certain past uniformities in behavior [including communication] and a 'psychological' element, or opinio juris, in certain subjectivities of 'oughtness' attending such uniformities of behavior." MYRES S. MCDOU GAL ET AL., HUMAN RIGHTS AND WORLD PUBLIC ORDER 269 (1980) (footnote omitted). See also Louis B. Sohn, Unratified Treaties as a Source of Customary International Law, in REALISM IN LAW-MAKING: ESSAYS ON INTERNATIONAL LAW IN HONOUR OF WILLEM RIP HAGAN (Adriaan Bos & Hugo Siblesz eds., 1986) (discussing how multilateral dialogue in the context of treaty negotiations may give rise to customary law in advance of ratification of the negotiated treaty).

B. INDIGENOUS PEOPLES AND SELF-DETERMINATION

The international concern for indigenous peoples is based effectively on the identification of a sui generis deviation from the self-determination standard, one that is in addition to the sui generis deviation embodied in classical colonialism. Indeed, the rubric of indigenous peoples or populations is generally understood to refer to culturally cohesive groups that, like the Native Hawaiian people, suffer inequities within the states in which they live as the result of historical patterns of empire and conquest and that, despite the contemporary absence of colonial structures in the classical form, suffer impediments or threats to their ability to live and develop freely in their original homelands. The developing constellation of indigenous rights norms, accordingly, in large measure comprises a remedial regime, although the constellation also contains prescriptions that detail the substantive elements of self-determination in the specific context of indigenous peoples.

The latest U.N. Working Group draft declaration on indigenous peoples' rights contains specific recognition of the right of indigenous peoples to self-determination. The 1993 draft, borrowing from the self-determination language of the International Human Rights Covenants, states:

Indigenous peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

See U.N. Indigenous Study, supra note 75, Add. 4, ¶ 379, which contains the following definition:

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

This express affirmation of indigenous self-determination has yet to command a broad consensus among governments participating in the standard-setting work of the U.N. Working Group, mostly as a result of the misguided tendency to equate the word self-determination with decolonization procedures or with an absolute right to form an independent state. The rhetorical sensitivity, however, does not entail an aversion to the normative precepts underlying the term self-determination if those precepts are understood not to require a state for every “people.” Government statements to the U.N. Working Group and other international bodies are consistent with the widely held belief that indigenous groups and their members are entitled to be full and equal participants in the creation of the institutions of government under which they live and, further, to live within a governing institutional order in which they are perpetually in control of their own destinies.\(^{88}\)

Insofar as indigenous peoples have been denied self-determination thus understood, the international indigenous rights regime prescribes remedial measures that may involve change in the political order and hence, in keeping with constitutive self-determination, are to be developed in accordance with the aspirations of indigenous peoples themselves. Thus, ILO Convention No. 169 requires the development of “special measures” to safeguard indigenous “persons, institutions, property, labour, cultures and environment,”\(^{89}\) and specifies that the measures be consistent with “the freely-expressed wishes of the peoples concerned.”\(^{90}\) Also, the Convention requires that consultations with indigenous peoples “be undertaken, in good faith . . . with the objective of achieving agreement or consent.”\(^{91}\)

Professor Erica-Irene A. Daes, the chairperson of the Working Group, describes the requirements of self-determination in the

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\(^{89}\) ILO Convention No. 169, supra note 80, art. 4, ¶ 1.

\(^{90}\) Id. art. 4, ¶ 2.

\(^{91}\) Id. art. 6, ¶ 2.
context of indigenous peoples as entailing a form of belated state-building through negotiation or other appropriate peaceful procedures involving meaningful participation by indigenous groups. According to Professor Daes, self-determination entails a process through which indigenous peoples are able to join with all the other peoples that make up the State on mutually-agreed upon and just terms, after many years of isolation and exclusion. This process does not require the assimilation of individuals, as citizens like all others, but the recognition and incorporation of distinct peoples in the fabric of the State, on agreed terms.

In a case illustrative of the contemporary international indigenous rights regime, the Inter-American Commission on Human Rights promoted such belated state-building as a means of remedying the effective denial of self-determination suffered by the Miskito and other Indians of the Atlantic Coast region of Nicaragua. Effectively equating self-determination with decolonization procedures, the Commission found that the Indians were not self-determination beneficiaries. However, defying its own formalism, the Commission acknowledged the inequitable condition of the Indians dating from their forced incorporation into the Nicaraguan state and found that their ability to develop freely in cultural and economic spheres was suppressed by the existing governing
institutional order.\textsuperscript{66}

The Commission found the Indians were entitled to "special legal protection" grounded in relevant human rights precepts and accordingly prescribed the elaboration of a new political order for the Indians\textsuperscript{67}—in effect, a remedy to implement an ongoing condition of self-determination where it had been denied. And, in accordance with precepts of constitutive self-determination, which also had been denied, the Commission further held that such a remedy "can only effectively carry out its assigned purposes to the extent it is designed in the context of broad consultation, and carried out with the direct participation of the ethnic minorities of Nicaragua, through their freely chosen representatives."\textsuperscript{68}

C. THE CONTENT OF INTERNATIONAL NORMS CONCERNING INDIGENOUS PEOPLES: ELABORATIONS UPON THE PRINCIPLE OF SELF-DETERMINATION\textsuperscript{69}

As indicated by the foregoing discussion, there is a developing body of international norms concerning indigenous peoples that contains substantive and remedial prescriptions grounded in the principle of self-determination and related human rights precepts. The norms establish the benchmarks for ensuring indigenous peoples of ongoing self-determination, including the minimum range of choices to which indigenous peoples are entitled in remedial-constitutive settings (that is, remedial procedures that require change in the governing institutional order). The international norms concerning indigenous peoples, which thus elaborate upon the requirements of self-determination, generally fall within the following categories: cultural integrity, lands and resources, social welfare and development, and self-government. These norms, the underpinnings and contours of which are discussed subsequently, comprise minimum standards for the development of remedial measures for the benefit of Native Hawaiians.

1. Cultural Integrity. A central aspect of self-determination,
particularly in its ongoing aspect, is the ability of groups to maintain and freely develop their cultural identities. The notion of respect for cultural determinism has long been a feature of bilateral as well as multilateral treaties.\textsuperscript{100} Especially noteworthy today is article 27 of the United States-ratified International Covenant on Civil and Political Rights.\textsuperscript{101} Article 27 affirms in universalist terms the right of persons belonging to "ethnic, religious or linguistic minorities . . . to enjoy their own culture, to profess and practice their own religion, [and] to use their own language."\textsuperscript{102}

The cultural integrity norm, particularly as embodied in article 27, has been the basis of decisions favorable to indigenous peoples by the U.N. Human Rights Committee and the Inter-American Commission on Human Rights of the Organization of American States. Both bodies have held the norm to cover all aspects of an indigenous group's survival as a distinct culture, understanding culture to include economic or political institutions, land use


Beyond the European context, the Anti-Genocide Convention, the first U.N. sponsored human rights treaty, upholds that all cultural groupings have, at a minimum, a right to exist. Convention on the Prevention of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277, 280 (entered into force Jan. 12, 1951) (defining, at art. II, genocide as "acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group as such"). See also The Convention Against Discrimination in Education, Dec. 14, 1960, art. 5, 429 U.N.T.S. 93, 100 (entered into force May 22, 1962) (recognizing "the right of members of national minorities to carry on their own educational activities, including the maintenance of schools and, depending on the educational policy of each State, the use or the teaching of their own language"); Declaration of the Principles of International Cultural Cooperation, Proclaimed by the General Conference of the United Nations Educational, Scientific and Cultural Organization, 14th Sess., Nov. 4, 1966, art. 1, reprinted in UNITED NATIONS, HUMAN RIGHTS: A COMPILATION OF INTERNATIONAL INSTRUMENTS 410, U.N. Doc. ST/HR/1/rev.3 (1988) (affirming, inter alia, that "[e]ach culture has a dignity and value which must be respected and preserved").

\textsuperscript{101} International Covenant on Civil and Political Rights, supra note 25, art. 27.

\textsuperscript{102} Id.
patterns, as well as language and religious practices.\textsuperscript{103} International practice related to the U.N. Working Group and to the negotiation and adoption of the text of ILO Convention 169 is in accord with this interpretation of the norm of cultural integrity in the context of indigenous peoples.\textsuperscript{104}

\textsuperscript{103} In the case concerning the Indians of Nicaragua discussed previously, see supra notes 94-98 and accompanying text, the Inter-American Commission on Human Rights found, citing article 27, that the "special legal protections" accorded the Indians for the preservation of their cultural identity should extend to "the aspects linked to productive organization, which includes, among other things, the issue of ancestral and communal lands." \textit{Miskito Case, supra} note 94, at 81, ¶ 15. \textit{See also} Res. No. 12/85, Case No. 7615, Inter-Am. C.H.R. 24, 29-31 (1985) in \textit{ANNUAL REPORT OF THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS 1984-85, OEA/Ser.L/V/II.66, Doc. 10, Rev. 1} (1985) (1985 Inter-American Commission on Human Rights decision on the Yanomami of Brazil) (invoking article 27, even though Brazil is not a party to the Covenant, and holding Brazil to a broad cultural integrity norm protective of the Yanomami’s cultural traditions, including those associated with their ancestral lands); Ominayak, Chief of the Lubicon Lake Band v. Canada, \textit{Report of the Human Rights Committee}, U.N. Doc. A/45/40, Vol. II, Annex IX(A) (1990) (finding a violation of article 27 by the permitting of oil and gas exploration in lands upon which the Lubicon Lake Band relied for economic and cultural survival); Kitok v. Sweden, \textit{in Report of the Human Rights Committee, supra}, ¶ 9.6 (holding article 27 to cover economic activity, such as reindeer husbandry where “that activity is an essential element in the culture of an ethnic community”).

\textsuperscript{104} Ambassador España-Smith of Bolivia, Chairman of the ILO Conference Committee that drafted Convention No. 169, summarized the consensus of the Committee as ultimately reflected in the text:

The proposed Convention takes as its basic premise respect for the specific characteristics and the differences among indigenous and tribal peoples in the cultural, social and economic spheres. It consecrates respect for the integrity of the values, practices and institutions of these peoples in the general framework of guarantees enabling them to maintain their own different identities and ensuring self-identification, totally exempt from pressures which might lead to forced assimilation, but without ruling out the possibility of their integration with other societies and life-styles as long as this is freely and voluntarily chosen.

While in principle the cultural integrity norm can be understood to apply to all segments of humanity, the norm has developed remedial aspects particular to indigenous peoples in light of their historical and continuing vulnerability. As the international community has come to consider indigenous cultures as equal in value to all others, the cultural integrity norm has developed to entitle indigenous groups like the Native Hawaiian people to affirmative measures to remedy the past undermining of their cultural survival and to guard against continuing threats in this regard. It is not sufficient, therefore, that states simply refrain from coercing assimilation of indigenous peoples or abandonment of their cultural practices. ILO Convention No. 169 provides:

Governments shall have responsibility for developing, with the participation of the peoples concerned, coordinated and systematic action to protect the rights of these peoples and to guarantee respect for their integrity.  

The 1993 Working Group Draft Declaration echoes the requirement of "effective measures" to secure indigenous culture in its many manifestations. Comments to the Working Group by governments and relevant non-governmental actors, as well as trends in government initiatives domestically, indicate broad acceptance of the cultural integrity norm along with its requirement of affirmative action in the context of indigenous peoples.

Government representatives have been quick to point out the


ILO Convention No. 169, supra note 80, art. 2, ¶ 1.
106 1993 Working Group Draft Declaration, supra note 87, art. 13 (with particular regard to religion); id. art. 14 (historiography, language, philosophy, and literature); id. art. 15 (education); see also id. art. 12 (restitution of cultural and intellectual property).
107 See Anaya, Indigenous Rights Norms, supra note 85, at 21-23 & nn. 80-98 (discussing comments in the drafting process and government reports on domestic initiatives); see also U.N. Indigenous Study, supra note 75, Add.3, ¶ 12 (1983) ("The fact that the State has clear positive responsibilities in matters of cultural rights is generally recognized today.").
diversity among indigenous groups in the context of efforts to articulate prescriptions protective of indigenous rights. That diversity, however, does not undermine the strength of the cultural integrity norm as much as it leads to an understanding that the norm requires diverse applications in diverse settings. In all cases, the operative premise is that of securing the survival and flourishing of indigenous cultures through mechanisms devised in accordance with the preferences of the indigenous peoples concerned.

2. Lands and Natural Resources. The importance of lands and resources to the survival of indigenous cultures is widely acknowledged. Relevant to indigenous peoples' linkage with lands and natural resources is the self-determination provision common to the International Human Rights Covenants, which affirms: "In no case may a people be deprived of its own means of subsistence." This prescription intersects with the idea of property, a long established feature which, in various formulations, is common to societies throughout the world.


109 See, e.g., supra note 103 (discussing Inter-American Human Rights Commission and U.N. Human Rights Committee cases); see also U.N. Indigenous Study, supra note 75, Add.4, at 39:

It must be understood that, for indigenous populations, land does not represent simply a possession or means of production. ... It is also essential to understand the special and profoundly spiritual relationship of indigenous peoples with Mother Earth as basic to their existence and to all their beliefs, customs, traditions and culture.

110 International Covenant on Civil and Political Rights, supra note 25, art. 1, ¶ 2; International Covenant on Economic, Social and Cultural Rights, supra note 27, art. 1, ¶ 2.

111 The concept of property includes the notion that human beings have rights to lands and chattels that they, by some measure of legitimacy, have reduced to their own control. See generally RENÉ DAVID & JOHN E.C. BRIEFLY, MAJOR LEGAL SYSTEMS IN THE WORLD TODAY: AN INTRODUCTION TO THE COMPARATIVE STUDY OF LAW 290-95 (3d ed. 1985) (containing a comparative discussion of "ownership" in the Soviet legal system); 2 WILLIAM BLACKSTONE, COMMENTARIES (on property in the British Common Law). Legal systems have varied in prescribing the rules by which the rights are acquired and in defining these rights. The most commonly noted dichotomy is between the system of private property rights in Western societies and classical Marxist systems in which the state retains formal ownership of all real estate and natural resources while granting rights of use. For sources reflecting many of the dimensions of this dichotomy, see: Randy Bergman & Dorothy C. Lawrence,
Property has been affirmed as an international human right. The Universal Declaration of Human Rights states that "[e]veryone has the right to own property alone as well as in association with others," and that "[n]o one shall be arbitrarily deprived of his property." These precepts are repeated in the American Convention on Human Rights.

In contemporary international law, modern notions of cultural integrity and self-determination join property precepts in the affirmation of indigenous land and resource rights, as evident in ILO Convention No. 169. In its article 14(1), Convention No. 169 affirms:

The rights of ownership and possession of [indigenous peoples] over the lands which they traditionally occupy shall be recognised. In addition, measures shall be taken in appropriate cases to safeguard the right of the peoples concerned to use lands not exclusively occupied by them, but to which they have traditionally had access for their subsistence and traditional activities.

Article 15, furthermore, specifies the right "to participate in the use, management and conservation" of the natural resources

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New Developments in Soviet Property Law 28 COLUM. J. TRANSNAT'L L. 189 (1990) (discussing recent economic and political reforms in Soviet Union that altered traditional notions of State ownership and control of property); Edward J. Epstein, The Theoretical System of Property Rights in China's General Principles of Civil Law: Theoretical Controversy in the Drafting Process and Beyond, 52 LAW & CONTEMP. PROBS. 177 (1989) (discussing property rights in China and the effect China's General Principles of Civil Law may have on these rights); Symposium, Property: The Founding, the Welfare State, and Beyond: The Eighth Annual National Federalist Society Symposium on Law and Public Policy-1989, 13 HARV. J.L. & PUB. POL'Y 1, 1-165 (1990) (discussing various topics in property law, such as property and the Constitution, regulation of property, and intellectual property). The common feature of the property regimes discussed in these articles, however, is that people do acquire and retain rights of a proprietary nature in relation to other people, and respect for those rights should be valued.

114 ILO Convention No. 169, supra note 80.
115 Id. art. 14, ¶ 1.
pertaining to their lands.\footnote{Id. art. 15, ¶ 1.}

The land rights provisions of Convention No. 169 are framed by article 13(1), which states:

In applying the provisions of this Part of the Convention governments shall respect the special importance for the cultures and spiritual values of the peoples concerned of their relationship with the lands or territories, or both as applicable, which they occupy or otherwise use, and in particular the collective aspects of this relationship.\footnote{Id. art. 13, ¶ 1.}

Use of the words "traditionally occupy" in article 14, as opposed to use of the past tense of the verb, suggests that the occupancy must be connected with the present in order for it to give rise to possessory rights. In light of the article 13 requirement of respect for cultural values related to land, however, a sufficient present connection with lost lands may be established by a continuing cultural attachment to them, particularly if dispossession occurred recently.

Also relevant in this regard is article 14(3), which mandates "[a]dequate procedures . . . within the national legal system to resolve land claims by" indigenous peoples.\footnote{Id. art. 14, ¶ 3.} This provision is without any temporal limitation and thus empowers claims originating well in the past. Article 14(3) is a response to the historical processes that have afflicted indigenous peoples, including the Native Hawaiians, by trampling on their cultural attachment to ancestral lands, disregarding or minimizing their legitimate property interests, and leaving them without adequate means of subsistence. In light of the acknowledged centrality of lands and resources to indigenous cultures and economies, the requirement to provide meaningful redress for indigenous land claims implies an obligation on the part of states to provide remedies that include for indigenous peoples the option of regaining lands and access to
natural resources.\footnote{A concurring analysis of the land rights provisions of Convention No. 169 is provided in the following article by the legal officer of the International Labour Organization primarily involved in the drafting of the Convention: Lee Sweptson, A New Step in the International Law of Indigenous and Tribal Peoples: ILO Convention No. 169 of 1989, 15 OKLA. CITY U. L. REV. 677, 696-710 (1990).}

indigenous rights declaration include efforts to build on the already recognized rights. It is evident that indigenous land rights norms, rooted in otherwise accepted precepts of property, cultural integrity, and self-determination, have made their way not just into conventional international law, but also into customary law.

3. Social Welfare and Development. As just indicated, indigenous peoples' interests in a secure land base are both cultural and economic. Related to these interests are entitlements of social welfare and development: entitlements also grounded in the U.N. Charter and adjoined to the principle of self-determination. Chapter IX of the Charter, under the heading "International Economic and Social Co-operation," states in part:

*Article 55*

With a view to the creation of conditions of stability and well-being which are necessary for peaceful

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122 See 1990 Analytical Commentary, supra note 104, at 10-15 (discussing commentary by government and indigenous observers on the land rights provisions of the first revised text of the draft declaration on indigenous rights).

Reflecting the direction of developing global consensus on indigenous land and resource rights, the 1993 Draft Declaration of the Working Group includes the following:

*Article 26*

Indigenous peoples have the right to own, develop, control and use the lands and territories, including the total environment of the lands, air, waters, coastal seas, sea-ice, flora and fauna and other resources which they have traditionally owned or otherwise occupied or used. This includes the right to the full recognition of their laws, traditions and customs, land-tenure systems and institutions for the development and management of resources, and the right to effective measures by States to prevent any interference with, alienation of or encroachment upon these rights.

*Article 27*

Indigenous peoples have the right to the restitution of the lands, territories and resources which they have traditionally owned or otherwise occupied or used; and which have been confiscated, occupied, used or damaged without their free and informed consent. Where this is not possible, they have the right to just and fair compensation. Unless otherwise freely agreed upon by the peoples concerned, compensation shall take the form of lands, territories and resources equal in quality, size and legal status.

and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote:

a. higher standards of living, full employment, and conditions of economic and social progress and development;

b. solutions of international economic, social, health, and related problems; and international cultural and educational co-operation.

....

Article 56

All members pledge themselves to take joint and separate action in co-operation with the Organization for the achievement of the purposes set forth in Article 55. 123

Building upon the Charter provisions, the International Covenant on Economic, Social, and Cultural Rights 124 affirms an array of social welfare rights and corresponding state obligations that are to benefit “everyone.”125 Emphasized in the Covenant are rights to health, education, and an adequate standard of living. The United Nations Educational, Scientific, and Cultural Organization, the Food and Agricultural Organization of the United Nations, the World Health Organization, and the International Labour Organization have been the sources of a number of additional instruments or programs establishing generally applicable standards and policies within the realm of social welfare concerns.

Linked with those rights of social welfare that generally are articulated as benefitting the individual is the right to develop-

123 U.N. CHARTER arts. 55, 56.
124 International Covenant on Economic, Social, and Cultural Rights, supra note 27.
125 E.g., id. art. 6, ¶ 1 (regarding the “right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts”).
ment, which has been deemed to extend also to "peoples." In December of 1986, the U.N. General Assembly adopted by an overwhelming majority the "Declaration on the Right to Development." The Declaration defines the right to development as "an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized." The greater part of the Declaration is occupied with articulating a series of duties on the part of states to promote and ensure the realization of the right to development through international cooperation and domestic programs.

Within the framework of the foregoing precepts, a special rubric of entitlements and corresponding duties has developed with regard to indigenous peoples. These norms are aimed at remedying two distinct but related historical phenomena that result in most indigenous communities living in an economically disadvantaged condition. The first such phenomenon entails the progressive plundering of indigenous peoples' lands and resources over time, processes that have impaired or, as in the case of Native Hawaiians, devastated indigenous economies and subsistence life and left indigenous people among the poorest of the poor. The second

127 G.A. Res. 41/128, U.N. GAOR, 41st Sess., Supp. No. 53, at 186, U.N. Doc. A/41/53 (1986) (adopted by a vote of 146 in favor, 1 against, and 8 abstentions). Although the United States (alone) voted against the declaration, its express reason concerned not the essential normative thrust of the declaration, but rather alleged "imprecise and confusing" language, the declaration's linkage between disarmament and development, and disagreement with a perceived emphasis on transfers of resources from the developed to the developing world as the primary means of achieving development. Rich, supra note 126, at 52.
129 Id. arts. 2-8, 10.
130 See generally JULIAN BURGER, REPORT FROM THE FRONTIER: THE STATE OF THE WORLD'S INDIGENOUS PEOPLES 17-33 (1987) (describing "Life at the Bottom" for the world's indigenous peoples). In particular regards to Native Hawaiians, see supra notes 2-20 and accompanying text.
corresponds with patterns of discrimination that have tended to exclude members of indigenous communities from enjoyment of the social welfare benefits generally available in the states within which they live.\textsuperscript{131}

In response to these historical phenomena, ILO Convention No. 169 establishes "as a matter of priority" the "improvement of the conditions of life and work and levels of health and education of [indigenous] peoples," and it mandates "[s]pecial projects . . . to promote such improvement."\textsuperscript{132} The Convention, furthermore, specifies duties on the part of states to ensure the absence of discriminatory practices and effects in areas of employment, vocational training, social security and health, education, and means of communication.\textsuperscript{133} The Convention emphasizes, in accordance with core precepts of self-determination, that the special programs devised to ensure the social welfare and development of indigenous peoples are to be established in cooperation with the indigenous peoples concerned\textsuperscript{134} and in accordance with their own collectively formulated priorities.\textsuperscript{135} The 1993 Working Group Draft Declaration follows in the same vein of Convention No. 169, stating that indigenous peoples are entitled "to have access to adequate financial and technical assistance, from States and through international cooperation, to pursue freely their political, economic, social, cultural and spiritual development."\textsuperscript{136}

The provisions of Convention No. 169 and the 1993 Working Group Draft Declaration just noted represent a certain consensus that extends well beyond the members of the Working Group and the states that have ratified Convention No. 169. Although there is some controversy about the outer bounds of state obligation to promote indigenous social welfare and development, little or no controversy is evident over the proposition that some level of state

\textsuperscript{131} See generally U.N. Indigenous Study, supra note 75, Add. 4, ¶¶ 54-119, 163-190, U.N. Sales No. E.86.XIV.3 at 7-9, 14-15 (describing discriminatory rendering of government services in areas of health, housing, education, and employment).

\textsuperscript{132} ILO Convention No. 169, supra note 80, art. 7, ¶ 2.

\textsuperscript{133} Id. arts. 20-31.

\textsuperscript{134} E.g., id. art. 20, ¶ 1 (stating that "special measures" regarding conditions of employment are to be adopted "in co-operation with the peoples concerned").

\textsuperscript{135} See id. art. 7, ¶ 1 ("The peoples concerned shall have the right to decide their own priorities for the process of development as it affects their lives, beliefs, institutions . . . .").

\textsuperscript{136} 1993 U.N. Working Group Draft Declaration, supra note 87, art. 38.
obligation exists in this regard. In reports on domestic initiatives to the U.N. Working Group and other international bodies, states increasingly have indicated their assent to duties to take steps and commit resources to advance the social welfare and development of indigenous individuals and communities. 137

4. Self-Government. Self-government is the overarching political dimension of ongoing self-determination, a dimension that extends in favor of indigenous peoples including Native Hawaiians no less than others. Along with variance in political theory, conceptions about the normative elements of self-government vary. It is possible, however, to identify a core of widely held conviction about the self-government concept. That core consists of the idea that government is to function according to the will of the people governed. Self-government stands in opposition to institutions that disproportionately or unjustly concentrate power over the reigns of government, whether the concentration is centered within the relevant community—as in cases of despotic or racially discriminatory rule—or outside of the community—as in cases of foreign domination. 138 Conceptions of self-government increasingly are

137 See, e.g., 1991 Statement of the Australian Minister of Aboriginal Affairs, supra note 121, at 2, 10-13 (reporting measures to implement and "[f]oster a commitment from [Australian] governments at all levels to cooperate to address progressively aboriginal disadvantage and aspirations in relation to land, housing, law and justice, cultural heritage, education, employment, health, infrastructure, economic development and other relevant matters"); 1993 Statement of Observer Government of Brazil, supra note 121, at 4-5 (discussing government agency actions to address health care concerns of indigenous communities); Miriama Evans, New Zealand Statement on Recent Developments Before the U.N. Working Group on Indigenous Populations, 11th Sess. (July 27, 1993) (discussing health care reforms and initiatives to benefit the indigenous Maori and reporting government support for Maori educational programs).

138 The international community recognized classical colonial institutions of government as contrary to self-government, subjecting people to “alien subjugation, domination and exploitation,” Declaration on the Granting of Independence to Colonial Countries and Peoples, supra note 27, ¶ 1, and hence the term “non-self-governing territories” was appropriated to designate the beneficiaries of decolonization. U.N. Charter Chapter XI, discussed supra notes 58-59 and accompanying text, concerns obligations of member states with regard to “Non-Self-Governing Territories,” which were generally understood at the time of the Charter’s adoption to include territories of a classical colonial type. See OFUATEY-KODJOE, supra note 53, at 104-13.
conditioned by precepts of democracy and corollary notions of decentralized government. In the particular context of indigenous peoples, notions of democracy (including decentralized government) join with precepts of cultural integrity to create a sui generis self-government norm. The norm upholds the accommodation of spheres of governmental or administrative autonomy for indigenous communities, while at the same time upholding measures to ensure their effective participation in all decisions affecting them left to the larger institutions of government.

ILO Convention No. 169 upholds the right of indigenous peoples to “retain their own customs and institutions,” and requires that “the methods customarily practised by the peoples concerned for dealing with offences committed by their members shall be respected.” Similarly, the 1993 Working Group Draft Declaration states: “Indigenous peoples have the right to promote, develop and maintain their institutional structures and their distinctive juridical customs, traditions, procedures and practices, in accordance with internationally recognized human rights standards.”

Independently of the extent to which indigenous peoples have retained culturally specific institutions, they are entitled to develop autonomous governance appropriate to their circumstances on

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140 Emphasis within Western democratic theory and the importance of local government within a larger political framework is longstanding. See Mark Tushnet, Red, White, and Blue: A Critical Analysis of Constitutional Law 4-17 (1988) (discussing dominant strands of political theory adopted by framers of U.S. Constitution). See generally Federalism and Decentralization: Constitutional Problems of Territorial Decentralization in Federal and Centralized States (Thomas Fleiner-Gerster & Silvan Hutter eds., 1987) (collecting reports from Regional Conference of International Association of Constitutional Law in Murten, Switzerland, 1984). The idea of decentralized governance is reflected not only in Western societies, but also in the traditional institutions of indigenous communities, including traditional Native Hawaiian institutions. See supra note 7 and accompanying text.

141 ILO Convention No. 169, supra note 80, art. 8, ¶ 2.
142 Id. art. 9.
143 1993 U.N. Working Group Draft Declaration, supra note 87, art. 33.
grounds instrumental to securing ongoing self-determination. In general, autonomous governance for indigenous communities is instrumental to their capacities of control over the development or revitalization of the multifaceted aspects of their distinctive cultures, including those aspects related to land and resource use. In the context of Native Hawaiians, Michael Dudley and Keoni Agard echo the demand for "nationhood" and "sovereignty"—that is, some form of autonomous political status for Native Hawaiians—as a means of securing space for the education of children in Hawaiian ways, for the revitalization of the Hawaiian language, for the reclaiming of the Native Hawaiian spiritual heritage and connection with the natural world, and, in general, for the natural evolution of Hawaiian culture cushioned from the onslaught of outside influences that have thus far had devastating effects.¹⁴⁴

Autonomous governance, furthermore, is a means of enhancing democracy. Because of their non-dominant positions within the states where they live, indigenous communities and their members typically have been denied full and equal participation in the political processes that have sought to govern them. Even as indigenous individuals have been granted full rights of citizenship and overtly racially discriminatory policies have diminished, the persistent condition of indigenous groups is typically that of economically disadvantaged numerical minorities.¹⁴⁵ This condition, shared by Native Hawaiians, is one of political vulnerability.¹⁴⁶ To devolve governmental authority to indigenous communities is to diminish their vulnerability in the face of powerful majority or elite interests and to enhance the responsiveness of government to the unique interests of indigenous communities and their members.

Hence, the latest Working Group draft declaration states:

¹⁴⁴ DUDLEY & AGARD, supra note 2, at 89-99.
¹⁴⁵ See BURGER, supra note 130, at 17-33 (describing "Life at the Bottom" for world's indigenous peoples); see also U.N. Indigenous Study, supra note 75, Add. 4, ¶ 54-301 (describing social and economic conditions of indigenous peoples).
¹⁴⁶ The U.N. Indigenous Study, supra note 75, observes that "[v]arious factors, economic and social ones for the most part, everywhere influence the effectiveness of political rights," id. Add. 4, ¶ 255, and concludes that political "representation of indigenous peoples remains inadequate and is sometimes purely symbolic," id. Add. 4, ¶ 261.
Indigenous peoples, as a specific form of exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, including culture, religion, education, information, media, health, housing, employment, social welfare, economic activities, land and resources management, environment and entry by non-members, as well as ways and means for financing these autonomous functions.\textsuperscript{147}

Manifesting the growing consensus of global opinion and expectation in this regard, several states in recent years have reported to international bodies the use of constitutional, legislative, and other official measures to reorder governing institutional matrixes in response to indigenous peoples' demands for autonomous governance and recognition of their culturally specific institutions of social and political control.\textsuperscript{148}

\textsuperscript{147} 1993 U.N. Working Group Draft Declaration, supra note 87, art. 31.

\textsuperscript{148} See, e.g., 1991 Statement of Observer Government of Brazil, supra note 121, at 3-4 ("[T]he Federal Government [of Brazil] is doing its utmost in the implementation of special policies aimed at ensuring indigenous people . . . autonomous organization of their communities."); 1991 Review of Developments, supra note 121, at 3-5 (outlining Colombian government's steps to afford indigenous groups "the necessary conditions to organize themselves in accordance with their own usages and customs and to strengthen indigenous participation in decision making on policies and programmes affecting them"); 1991 Statement of Observer Delegation of Canada, supra note 121, at 4-5 (government program by which country's first nations "can negotiate self-government through new legislative arrangements that reflect more closely their particular circumstances" and "discussions [involving indigenous representatives] leading toward the constitutional entrenchment of aboriginal self-government"); Denis Marantz, Canadian Delegation, Statement Before the World Conference on Human Rights on the Subject of Indigenous Peoples, Vienna, at 1 (June 22, 1993) (describing efforts at constitutional recognition of aboriginal self-government and legislation for self-government negotiations across Canada, initiatives aimed at "transferring to the aboriginal peoples of Canada. . . increased responsibility for planning and managing their own affairs"); 1991 Statement of the Australian Minister of Aboriginal Affairs, supra note 121, at 1-2 (describing "consolidation of the Aboriginal and Torres Strait Islander Commission," as "a significant step toward aboriginal self-determination and self-management"); Lois O'Donoghue, Chairperson of the Aboriginal and Torres Strait Islander Commission in Australia, Statement Before the U.N. Working Group on Indigenous Populations, 9th Sess. (July 29, 1991) (describing Commission scheme under which national elections were held for aboriginal regional councils whose major responsibilities are to develop regional plans and budgets, to set regional priorities, and to represent aboriginal and
While the norm of indigenous self-government upholds the development of autonomous institutions for Native Hawaiians, it also upholds their effective participation in the larger political order. The 1993 Working Group draft affirms that "[i]ndigenous peoples have the right to participate fully, if they so choose, at all
levels of decision-making in matters which may affect their rights.”\textsuperscript{149} Similarly, ILO Convention No. 169 requires effective means by which indigenous peoples “can freely participate . . . at all levels of decision-making” affecting them.\textsuperscript{150} It is evident that this requirement applies not only to decision-making within the framework of domestic or municipal processes but also to decision-making within the international realm. United Nations bodies and other international institutions increasingly have allowed for, and even solicited, the participation of indigenous peoples’ representatives in their policymaking and standard-setting work in areas of concern to indigenous groups.\textsuperscript{161}

The dual thrust of the normative regime concerning indigenous peoples’ self-government—on the one hand autonomy and on the other participatory engagement—reflects the view, apparently held by indigenous peoples themselves, that they are not to be considered a priori unconnected from larger social and political structures. Rather, indigenous groups—whether characterized as communities, peoples, nations or other—are appropriately viewed as simultaneously distinct yet parts of larger units of social and political interaction, units which may include indigenous federations, the states within which they live, and the global community itself. This view challenges traditional Western conceptions of mutually exclusive states as the primary factor for locating power and community and promotes a political order that is less state-centered and more centered on people living in a world of distinct yet increasingly integrated and overlapping spheres of community and authority.

The establishment of self-government for indigenous peoples, therefore, means the consensual development of a nuanced political order that accommodates to both inward- and outward-looking associational patterns. International law does not require or allow

\textsuperscript{149} 1993 \textit{U.N. Working Group Draft Declaration}, supra note 87, art. 19.

\textsuperscript{150} ILO Convention No. 169, supra note 80, art. 6, ¶ 1(b).

\textsuperscript{161} Thus, indigenous peoples and their organizations have been permitted to participate in discussions within the United Nations concerning the development of an indigenous rights declaration and related topics. \textit{See} Williams, supra note 79, at 676-85 (describing Working Group processes). Similarly, the International Labour Organization relaxed its rules of procedure in order to allow indigenous groups limited direct participation in the development of ILO Convention No. 169 of 1989. Swepston, supra note 119, at 686-87.
for any one particular form of structural accommodation for all indigenous peoples—indeed, the very fact of the diversity of indigenous cultures and their surrounding circumstances belies a singular formula. The underlying objective of the self-government norm, however, is that of allowing indigenous peoples to achieve meaningful self-government through political institutions that reflect their specific cultural patterns and that permit them to be genuinely associated with all decisions affecting them on a continuous basis. Constitutive self-determination, furthermore, requires that such political institutions not be imposed upon indigenous peoples but rather be the outcome of procedures that defer to their preferences.

V. CONCLUSION: THE DUTY OF THE UNITED STATES TO PROVIDE AN ADEQUATE REMEDY AND IMPLEMENT RELEVANT HUMAN RIGHTS NORMS

The norms just discussed and the underlying principle of self-determination are binding upon the United States. The United States is party to the U.N. Charter and the International Covenant on Civil and Political Rights, both of which expressly affirm the principle of self-determination. The Charter, the Covenant, and other international treaties to which the United States is a party include related human rights norms. Particularly relevant are the cultural rights guarantees expressed in article 27 of the Covenant and developed through authoritative interpretive processes. The United States is bound to uphold new and developing international norms concerning indigenous peoples, insofar as those norms form part of the principle of self-determination or are derivative of related treaty norms. The United States is furthermore bound insofar as the norms concerning indigenous peoples are part of general or customary international law. Customary norms are binding upon the constituent units of the world community regardless of any formal act of assent to those norms.

An integral part of a state's obligations in regards to international human rights law is the duty to provide an adequate remedy
where substantive norms are violated.\textsuperscript{152} This duty is emphasized in the 1993 U.N. Working Group Draft Declaration, which states: "Indigenous peoples have the right to have access to prompt decision through mutually acceptable and fair procedures for the resolution of conflicts and disputes with States, as well as to effective remedies for all infringements of their individual and collective rights . . . ."\textsuperscript{153}

It is evident that the Native Hawaiian people have suffered a violation of self-determination in both its constitutive and ongoing aspects. The Native Hawaiian people were forcibly incorporated into the United States and subjected to colonial administration. The international community promoted a regime to remedy the widespread violation of self-determination occasioned by such colonial patterns in their classical form. Within the framework of the decolonization regime, the territory of Hawaii became a state of the United States. The statehood remedy, however, was inadequate from the standpoint of indigenous Hawaiians.

The Native Hawaiian voice was overpowered by the settler population in the decisionmaking procedure leading to incorporation of Hawaii as a state, such that the legitimacy of United States authority over the Native Hawaiians and their lands remains questionable. Furthermore, Native Hawaiians have continued to suffer inequities linked to the historical patterns of colonization, and the governing institutional order has persisted in thwarting the ongoing self-determination of Native Hawaiians. This can be seen especially in light of international developments leading to a contemporary awareness of and understanding about the elements of self-determination in the particular context of indigenous peoples.

The United States is under a duty to ensure action to effectively remedy the infringement of the human rights of Native Hawaiians through legislation, programmatic reforms, reparations or other appropriate means. It is beyond the scope of this Article to evaluate procedures already initiated in response to demands by

\textsuperscript{152} For a discussion of state responsibility to effectively remedy violations of human rights under conventional and customary international law, see Theodor Meron, Human Rights and Humanitarian Norms As Customary Law 136-245 (1989).

\textsuperscript{153} 1993 U.N. Working Group Draft Declaration, supra note 87, art. 39.
Native Hawaiians. The point to be made here is that the official response to the demands of Native Hawaiians is governed by international law, not just by domestic standards. In order to pass international muster, remedial measures must at a minimum implement contemporary norms concerning indigenous peoples, which include prescriptions relating to rights of cultural integrity, lands and resources, social welfare and development, and self-government.

Remedial measures, furthermore, should be the outcome of procedures devised in accordance with underlying precepts of constitutive self-determination, and hence such procedures should entail meaningful participation on the part of the Hawaiian people and deference to their choices from among justifiable options. Negotiation is a preferred procedure for the development and implementation of remedial measures in the context of indigenous peoples. Negotiations involving truly representative leaders of indigenous peoples provide a potential framework for the voices of indigenous communities to be heard and their preferences to be realized. Negotiation or other procedures responsive to Native Hawaiian demands must be undertaken in good faith with the objective of achieving agreement with the Native Hawaiian people on the remedial measures to be taken, and the procedures must be backed by the authority necessary to translate their outcome into practice.

Considerations of state sovereignty form a backdrop for the elaboration of remedial measures and influence the degree to which remedies may be subject to international scrutiny. The limitations of the international doctrine of sovereignty in its state-centered formulation are essentially twofold. First, sovereignty upholds a substantive preference for the status quo of political ordering through its corollaries protecting state territorial integrity and political unity. Second, the doctrine limits the capacity of the international system to regulate matters within the spheres of authority asserted by states recognized by the international community. This limitation upon international competency is

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154 These corollaries are included in, inter alia, U.N. CHARTER art. 2, ¶ 4; United Nations Friendly Relations Declaration, supra note 27, Declaration on the Granting of Independence to Colonial Countries and Peoples, supra note 27, ¶ 6.
reflected in the U.N. Charter's admonition against intervention "in matters which are essentially within the domestic jurisdiction of any state."\textsuperscript{55}

In a global community that remains organized substantially by state jurisdictional boundaries, sovereignty principles continue, in some measure, to advance human values of stability and ordered liberty, and they guard the people within a state against disruptive forces coming from outside the state's domestic domain. But since the atrocities and suffering of the two world wars, international law will not uphold sovereignty principles that serve as accomplices to the subjugation of human rights or act as a shield against international concern that coalesces to promote human rights. This, of course, is the lesson of decolonization and the modern human rights movement within the international system.

Thus, where there is a violation of self-determination and human rights, as is the case of Native Hawaiians, presumptions in favor of territorial integrity or political unity of existing states may be offset to the extent required by an appropriate remedy.\textsuperscript{56} Furthermore, heightened international scrutiny is justified in the degree to which violations of human rights are prone to lingering unchecked by decisionmakers within the domestic realm.

A level of international scrutiny has already fallen over the treatment of indigenous peoples in general and Native Hawaiians in particular. Most notably, the U.N. Working Group on Indigenous Populations monitors the human rights conditions of indigenous peoples throughout the world. At its annual meetings in Geneva, the Working Group has regularly heard from indigenous Hawaiian leaders. Their accounts of the deprivation of Native Hawaiian self-determination have prompted the chair of the Working Group to visit Hawaii and investigate the situation.

International scrutiny relevant to the human rights of Native Hawaiians first came to bear through the decolonization regime. The U.N. General Assembly has maintained a list of non-self-

\textsuperscript{55} U.N. CHARTER art. 2, \S 7.

\textsuperscript{56} Cf. United Nations Friendly Relations Declaration, supra note 27, ("Nothing in the foregoing paragraphs shall be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples . . . .") (emphasis added).
governing territories subject to reporting procedures under article 73 of the Charter, and the General Assembly has monitored the reporting particularly as it has related to corresponding decolonization objectives. The territory of Hawaii appeared on the General Assembly’s list until Hawaiian statehood, when the United States declared itself no longer obligated to submit reports concerning Hawaii. Given the failure of the statehood remedy to fully roll back the scourge of colonialism for indigenous Hawaiians and the persistence of conditions that deprive Native Hawaiians of effective self-determination and self-government, it would be appropriate for Hawaii to be placed back on the General Assembly’s list and for the Assembly, through its relevant committees, to resume its scrutiny of United States action in this regard.

In any case, the United States must take effective measures to remedy the historical and continuing wrongs suffered by Native Hawaiians, measures that are in accordance with the choices of Native Hawaiians themselves and that, at a minimum, implement corresponding international human rights norms. Under international law, all peoples have the right to self-determination—and no less among them, the Native Hawaiian people.