

**Volume 7
Summer 1995**

ST. THOMAS LAW REVIEW

**RESTORATION OF THE INDEPENDENT
NATION STATE OF HAWAII UNDER
INTERNATIONAL LAW**

Francis Anthony Boyle

**SYMPOSIUM
TRIBAL SOVEREIGNTY: BACK TO THE FUTURE?**

Volume 7

Summer 1995

RESTORATION OF THE INDEPENDENT NATION STATE OF HAWAII UNDER INTERNATIONAL LAW

Professor Francis Anthony Boyle

I understand that the Sovereignty Commission' is looking into models and examples, of where the native people of Hawaii can go in light of the state legislation that has been adopted, and also in light of the recent federal law that has just been signed into law by President Clinton.² I have been asked to discuss one particular model for the future for Native Hawaiian people to consider. I was not invited here to go through all the possibilities that you might have. The model I discuss here is certainly not the only potential option for the people of Hawaii. It is not for me to tell Native Hawaiian people what to do. You, the native people of Hawaii, must decide for yourselves. But one thing I can do is to describe a particular vision of the future; how you might go about achieving it; what would be the consequences; and what would be the basis of authority for doing it, particularly in light of Public Law 103-150 signed by President Clinton.

When I read the Public Law for the first time, the first thought that occurred to me is that now, after 100 years, the United States government, has finally and officially conceded, as a matter of United States law, that Native Hawaiian people have the right to restore the independent nation state that you had in 1893 when the United States government came and destroyed it. Also as a matter of international law, the Native Hawaiian people have the right to now go out and certainly proclaim the restoration of that state. I am not talking about the State of Hawaii as part of the United States of America. Rather, I

* An earlier version of the author's remarks was delivered to the Hawaiian Sovereignty Advisory Commission on December 28, 1993.

** A.B., 1971, Univ. of Chicago; J.D. (M.C.L.), 1976; A.M., 1978; Ph.D., 1983, Harvard; Professor of Law, University of Illinois College of Law. I express gratitude to Bumpy Kanahele and the members of the Ohana Council for sponsoring me during my stay in Hawaii.

1. See 1993 Haw. Sess. Laws 1009, 1011 (creating the Hawaiian Sovereignty Advisory Commission to advise the Legislature in carrying out the purposes of The Act Relating to Hawaiian Sovereignty).

2. Overthrow of Hawaii Resolution, Pub. L. No. 103-150, 1993 U.S.C.C.A.N. (107 Stat.) 1510.

3. Id

am talking about an independent state under international law, and ultimately a member of the United Nations and other international organizations.

There is a recent example that was pursued by the Palestinian People, who in 1988 decided, of their own accord, to proclaim their own state.⁴ This was a decision taken by the Palestinian People as a whole. It was subject to a majority vote because there was not unanimous consent, but even those who opposed it agreed to be bound by a majority vote. In 1988, the Palestinian people unilaterally proclaimed their own state in a Declaration of Independence. This unilateral Declaration of Independence eventually led to the recognition of the Palestinian state by 125 nation states in the world.⁵ You don't read about that much here in the United States because the United States government is one of the few governments in the world to oppose the Palestinian state. But almost all of Latin America, Africa, and Asia recognize the existence of the state of Palestine. Again, these are indigenous people, like Native Hawaiians, striving for their right of self-determination. Indeed the Palestinians have the amount of votes to be admitted to the United Nations organization as a sovereign independent nation state, yet it is the threat of a United States veto that has prevented the admission of the state into the United Nations organization.⁶ This however, has not prevented the vast majority of the states in the world from recognizing the existence of the Palestinian state. Even most of Europe would accord them formal *de jure* diplomatic recognition if not for the pressure brought to bear by the United States government. Therefore, many of the European states, which are the last holdouts, are today according them *de facto* recognition as an independent state. That is, they are treating the Palestinians as if they are an independent state, without formally coming out and announcing it.

So, this is one model to consider that I will discuss. Not that the plight of the Palestinians are on all fours with Native Hawaiians, but there too, you have a situation of massive violations of fundamental human rights and people living under a regime of military occupation. In their case, for the last forty-five years; in your case, for the last one hundred years. So I will discuss some of the parallels with that process

4. See John Quigley, *Palestine's Declaration Of Independence: Self-Determination And The Right of The Palestinians to Statehood*, 7 B.U. INT'L. L.J. 1 (1989).

5. *Id.*

6. See, e.g., Ved Nanda et al., *Self Determination: The Case of Palestine*, 82 AM. SOC'Y INT' L. L. PROC. 334, 344 (1988).

and what could be the Native Hawaiian process in the event that you were to decide to move in that direction.

I am not here to survey all the possibilities you might have, but I am prepared to comment on them. There are other things you could consider such as autonomy, returning to Article 73 status at the United Nations,⁷ and semi-sovereignty. There are various different types of status. But from my perspective, this is the route that other people in your situation have chosen to go. There is ample authority and precedent under international law for the Native Hawaiians to decide to move in that direction.

I begin by asking, how can this be done, how can you do it? What I am suggesting is that instead of asking the permission of the United States Congress to declare independence, you exercise your right of self-determination that has been afforded to you by the United Nations Charter, which states that, "[t]he purposes of the United Nations are to develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace."⁸

In contemplating this, there are four characteristics, or requirements, to consider in the creation of an independent state.⁹ I submit— as I will point out as I go through the analysis—that the Native Hawaiian people, Kanaka Maoli, have all the requirements you need to go ahead and do this if this is your choice. This is your decision.

The first requirement is that of a fixed territory. Clearly we have the Hawaiian Archipelago. Second is a population, a distinguishable population of people. The Native Hawaiians are such a distinguishable population who would trace their ancestry back before the appearance of Europeans on these lands. Third, there must be a government. Here you have your communal structures, the kupunas—Kekune Blaisdell, my friend—and the kupuna council, that you have traditionally had. You do not need a government along the lines of the federal government of the United States or the State of Hawaii to have a government. Rather, what you need is a way to organize your people to govern

7. U.N. CHARTER art. 73 ("Members of the United Nations which have or assume responsibilities for the administration of territories whose peoples have not yet attained a full measure of self-government recognize the principle that the interests of the inhabitants of these territories are paramount . . .").

8. U.N. CHARTER art. I, 11 2.

9. See Convention on Rights and Duties of States adopted by the Seventh International Conference of American States, Dec. 26, 1933, 165 L.N.T.S. 19, 25 (listing the requirements for an independent state).

your relations with each other, and clearly you have that. The fourth requirement is the capacity to enter into international relations, to deal with other states, and to keep your commitments. As I understand it, there are already states in the Western Pacific region that support the Native Hawaiian people, and would probably be prepared to give you diplomatic recognition as an independent state, if this is your desire. I also suspect, like the Palestinians, there would be a large number of states—certainly in the Third World, that have come out of a colonial situation, in Latin America, Africa, and Asia — that would also be prepared to recognize you as an independent state and enter into diplomatic relations with you. Whether you would someday be allowed into the United Nations, of course, would depend on the U.S. veto. But the U.S. veto does not go on forever. Eventually the United States lifted its veto on the admission of Vietnam to the United Nations, despite the enormous hostility towards the people of Vietnam. Vietnam then became a member nation of the United Nations organization.¹⁰

So, that being said as preliminary, introductory remarks, I would like to go through the Public Law on a line-by-line basis and provide my analysis of it. Indeed, I would encourage all of you, as Native Hawaiians, to study this. It makes it very clear what happened to you. This is now officially recognized as a matter of United States domestic law. You should be able to take this law, any time you are in court, and show it to the judge and the jury, and say, "this is the law; this is what has happened to me and my people and I am basing my conduct, whatever I am doing, on the basis of this law. It cannot be denied any more." As a litigator before the International Court of Justice, I would be able to take this law to the World Court and say, "the United States government has now officially conceded that it illegally invaded and occupied the Kingdom of Hawaii. For this reason, the native people of Hawaii would be entitled to a restoration of their independent status as a sovereign nation state, to go back to what they were before the U.S. invasion, to undo the damage that had been done."

This law is styled as an apology, and one might say that yes, an apology is certainly here and it is long overdue. But it is not enough. When a government commits a severe violation of international law, as happened here, it should not simply apologize and then walk away. Damages are required, reparations, and in extraordinary circumstances,

10. Assemh/y Opens Nev Session: Admission of Djbouti, Vietnam, UN MONTHLY CHRON., Oct. 1977, at 5, 6.

restitution, that is, to return the situation to what it was before the violation.¹¹

This is especially true when you have a treaty violation. In the case of the Kingdom of Hawaii, there were three treaties on point, in law, with the United States government that were violated by means of the invasion. This violated international law at the time, the basic principle- - *pacta sunt servanda* - treaties must be obeyed.¹² It even violated the terms of the United States Constitution at that time.¹³ Treaties were the "supreme law of the land," and the invasion and annexation of Hawaii not only violated international law, but the United States Constitution itself.

It's clear then, that the United States admitted in the law that they overthrew the Kingdom of Hawaii.¹⁴ There is no question or doubt that this was a clearly illegal act, under the standards of international law in existence at that time.

An apology is certainly a start, but now we really have to deal with the consequences. What are the implications of this apology, of this law? That is the topic of which I address here. Indeed, the implications, I submit, are what you, the Hawaiian people, make of this. It is for you to decide the implications, not the Congress, not the State of Hawaii government, but rather the Hawaiian people, pursuant to your right of self-determination. What will be the implications of this, as you see it? What do you want?

In a meeting with Judge Nakea,¹⁵ where I spoke on behalf of the Graces,¹⁶ the judge said, "well, yes, but in the United States law, the

11. Case concerning *The Factory at Chorzow*, 1928 P.C.I.J. (ser. A) No. 17, at I (Sept. 13).

12. Vienna Convention on the Law of Treaties, May 23, 1969, art. 26, 1155 U.N.T.S. 331.

13. See U.S. CONSR. art. VI, cl. 2 ("all Treaties . . . shall be The Supreme Law of the Land").

14. Overthrow of Hawaii Resolution, Pub. L. No. 103- 150, 1993 U.S.C.C.A.N. (107 Stat.) 1510, 1512 ("Whereas it is proper and timely for the Congress . . . to acknowledge the historic significance of the illegal overthrow").

15. The Honorable Clifford L. Nakea serves in the 5th Judicial Circuit of the State of Hawaii, District Court.

16. Michael Grace and Sondra Field built a house in the Anahola Beach Park on the island of Kauai. When ordered to vacate the park by the Hawaiian Homes Commission, they refused, were arrested and then convicted in the Hawaii state courts for trespassing. Their dwelling was destroyed. Grace and Field argued that they had title to the occupied property based on their status as citizens of the independent Nation of Hawaii. The federal courts, to whom the Graces had turned arguing a denial of due process, refused to acknowledge their property claim. For a full accounting of the case see *Grace v. Drake*, 832 F.Supp. 1399(D).

United States government has always been able to extinguish the right of native peoples, and the Supreme Court has seen nothing wrong with that." I replied that, "well, that might be the case with respect to Native Americans living in the United States, but here in Hawaii you're in a very different situation. You had these three treaties, one of which was a treaty of friendship, commerce, and navigation,¹⁷ that established good relations between two sovereign states, and they violated that, too."

This issue, a treaty of this nature, came up most recently in the World Court in the Nicaragua case,¹⁸ when the World Court condemned the United States government for violating a treaty of friendship, commerce, and navigation by mining the harbors in Nicaragua. Certainly the World Court can do the same thing—condemn the United States—for overthrowing a monarch and for overthrowing and destroying an entire sovereign nation state.

Here you have the Congress of the United States of America admitting that in one of its own laws. That is very clear, this admission, what we lawyers call an "admission against interest." Congress has admitted what the United States did and it has opened this Pandora's Box. How should this be remedied? Again, the one point to keep in mind here is that it is now for the Hawaiian people to decide the appropriate remedy, not the Congress. The United States government is the criminal. The government admitted what it has done now, for the last 100 years - and that the American presence, then, in Hawaii, for the last 100 years has been nothing more than an illegal, colonial, military occupation regime.

In reading the Public Law it is important to remember the so called "whereas" clauses. These clauses are official findings of fact and law by the United States Congress. These findings bind all state and federal courts here in Hawaii. I was pointing this out this afternoon to Judge Nakea with respect to the case of Mike and Sondra Grace, that the court and judges are bound by these findings of fact. They can no longer be contested or denied. The United States is stuck with them.

Haw. 1991), *aff'd*, 1993 U.S. App. LEXIS 24968 (9th Cir. 1993).

17. Treaty of Friendship, Commerce, and Navigation, Dec. 20, 1849, U.S.-Haw., 103 Consol. T.S. 391. "The cession of the Hawaiian Islands to the United States having been accepted by the resolution approved by the President, July 7, 1898 (30 Stat. 75), the treaties with that country terminated upon the formation of the government for the Islands." WILLIAM MALLOY, *TREATIES, CONVENTIONS, INTERNATIONAL ACTS, PROTOCOLS AND AGREEMENTS BETWEEN THE UNITED STATES OF AMERICA AND OTHER POWERS 1776-1909* 908 (1910).

18. *Military & Paramilitary Activities (Nicar.v. U.S.)*, 1986 I.C.J. 4 (June 27).

The next sentence of this law reads: "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."¹⁹ That concedes that Native Hawaiians, at that time and as of today, still have one requirement for an international state, which I mentioned, a government. You have a means to govern yourselves as a people. Congress has effectively conceded it right there. It still is in existence today. This is a type, a system of government that is historically separate and apart from the State of Hawaii or the United States federal government. It is still there, and it still works today. I have seen it in my visits with the Ohana Council - the people of Hawaii providing shelter, food, housing, education, dispute settlement procedures and mechanisms. The types of things that you did a hundred years ago, before the U.S. invasion, to some extent you are still doing today. It would simply be a matter of expanding those types of functions that you provide for your own people.

In the case of Palestine, this involves building the state from the ground up. The Palestinian People rejected participation, acquiescence, and collaboration with, Israeli military occupation forces. They proceeded to provide to their own people, social services such as health, education, judges, dispute settlement, etc.²⁰ That is building the state from the ground up; that is how you build a state. No one is going to give it to you. I doubt very seriously that tomorrow the U.S. Congress is just going to pass a statute and give you a state. Rather, you must go out and say, "we're creating our state. Here it is, and we ask you to recognize the state, and then the consequences from there."

The next sentence of the law reads: "Whereas, a unified monarchical government of the Hawaiian Islands was established in 1810 under Kamehameha I, the first King of Hawaii."²¹ Again, Congress is admitting that you had a government. You had a state. It was there. It was viable and functioning. It was internationally active. This was not a position the U.S. government maintains with respect to Native Americans.²² Now here the government is wrong too. The United States

19. Overthrow of Hawaii Resolution, Pub. L. No. 103-150, 1993 U.S.C.C.A.N. I (107 Stat.) 1510.

20. See Alon Ben-Meir, *An Intelligent Middle Ground on Which to Build Peace*, CHI. TRIB., Aug. 26, 1987, at 17.

21. Overthrow of Hawaii Resolution, Pub. L. No. 103-150, 1993 U.S.C.C.A.N. I (107 Stat.) 1510.

22. See generally Markus B. Heyder, Note, *The International Law Commission's Draft*

maintains that Native Americans did not have a state-type structure that had to be recognized, because it was somewhat different from the structures of government that Europeans were under on the North American continent.²³ We know the government is wrong. The Native Americans did have a governing structure. The Europeans simply did not want to recognize it, but instead wanted to steal the land.²⁴

Putting that aside, you are in a very different situation here from Native Americans. Congress has conceded what it will not concede for the Native Americans²⁵ - that you had a state, a state just like any other state in existence at that time—just like the United States of America—and that you were entitled to as much respect and dignity. Congress has now conceded this point. I read in the newspaper that during his visit to Hawaii, Secretary of Interior Bruce Babbitt asked, "should Native Hawaiians be treated by the federal government like the Native Americans?" My response to reading that was, "why would you want to do that?" The tape of the San Francisco Tribunal shows that Native Americans are up against genocide and extermination. That is the policy of the federal government with respect to Native Americans. So I do not understand why Native Hawaiians would want to buy into that system, and be treated in that system in a way that ultimately would lead to your extermination. That is certainly the way large numbers of Native Americans see it. That was the purpose of the San Francisco Tribunal. I would encourage you, if you haven't seen it, to look at that tape. So whatever you do, I would certainly caution you against trying to seek the same type of treatment that the federal government has doled out to the Native Americans. We know where that will lead.

On the basis of this statute, moreover, you are entitled to a lot more than they give the Native Americans. That is not to say that, in my opinion, the Native Americans are not also entitled to establish themselves as independent nations, if that is their desire. But the difference

Article on State Responsibility: Draft Article 19 and Native American Self-Determination, 32 *COLLJM. J. TRANSNAT'L. L.* 155 (1994); Susan Lope, Note, Indian Giver: The Illusion of Effective Legal Redress for Native American Land Claims, 23 *Sw. U. L. REV.* 331 (1994).

23. Lope, *supra* note 22, at 333-34. "Discovery . . . initiated the inevitable erosion of the Native American nations." *Id.*

24. See generally Heyder, *supra* note 22.

25. See William J. Murphy, Jurisdiction - Sovereign Immunity - Business Owned by Native American Nation Granted Sovereign Immunity from Suit Arising From Its Private Off-Reservation Transaction, In *Re Greene*, 980 F.2d 590 (9th Cir. 1992), cert denied, 114 S. Ct. 681 (1994), 17 *SUFFOLK TRANSNAT'L L.J.* 599, 601 n.16 (1994) (listing cases in which Congress' power to regulate Native Americans was upheld).

here is that your right to do this, the predicate to do this, has now been recognized by the United States Congress itself,²⁶ whereas the Congress has never recognized this for Native Americans.²⁷ I doubt Congress ever will, because to fully recognize Native American sovereignty would eliminate the whole basis of pseudo-legitimacy upon which the United States Congress rests—land title and everything else. I doubt very seriously that Congress would want to do that.

The next paragraph of the law states that, "from 1826 to 1893, the United States recognized the independence of the Kingdom of Hawaii, extended full and complete diplomatic recognition to the Hawaiian Government, entered into treaties and conventions. . . to govern commerce and navigation and friendship."²⁸ Congress did not draft the word "friendship" into this law.

In fact, Congress wanted to the word "friendship" but the treaty was friendship and commerce. Here Congress admits that the invasion, overthrow, occupation, and annexation, starting in 1893, violated all these treaties. It violated basic norms of international law, even in existence at that time and that was a pretty bad time, one must admit. States were going to war, people were killing each other, the strong doing what they will, the weak suffering what they must, pretty much like today in the New World Order. But again, here, the United States Congress has taken the position that this behavior was illegal under international law, even in accordance with the minimal standards in effect at that time. Again this distinguishes the case of the Native Hawaiians from the Native Americans, where they have yet to admit that there was anything wrong under international law with the way they treated the Native Americans. If you read all the Supreme Court cases, they say that this is just the right of conquest, and those were the rules in existence at that time.²⁹ But in the case of Native Hawaiians, the

26. Overthrow of Hawaii Resolution. Pub. L. No. 103-150, 1993 U.S.C.C.A.N. (107 Stat.) 1510.

27. "In the context of Native American efforts to regain self-determination, the combination of adverse judicial doctrines and the professed plenary power of Congress over Native Americans frustrates any move toward genuine self-determination by Native American peoples." Heyder. *supra* note 22, at 155.

28. Overthrow of Hawaii Resolution, Pub. L. No. 103-150, 1993 U.S.C.C.A.N. (107 Stat.) 1510.

29. *Contra American Insurance Co. v. Peters* 26 U.S. (1 Pet.) 511 where Justice Marshall, in an 1828 decision involving the rights of the inhabitants of Florida following the cession of that state from Spain to the United States, states "[t]he usage of the world is, if a nation be not entirely subdued, to consider the holding of conquered territory as a mere military occupation, until its fate shall be determined at the treaty of peace." *Id.* at 542.

United States admits that this was not just a question of right of conquest, but of treaty violations. They were violated.

The government acts violated international law. It even violated the terms of the United States Constitution at the time when treaties were the "supreme law of the land."³⁰ So again, legally you are in a much different, much better situation than Native Americans.³¹

"On January 14, 1893, John L. Stevens. . . the U.S. minister . . . conspired with a small group of non-Hawaiian residents of the Kingdom of Hawaii, including citizens of the United States, to overthrow the indigenous and lawful government"³² So again, Congress concedes that the government of the Kingdom of Hawaii was the lawful government at that time, and that an official agent of the United States government conspired to overthrow the government of Hawaii. The United States government is bound by the actions of its agents, of its ministers.³³ The government therefore cannot say, "he did it, and later on we condemned what he did." You know the President did shed a crocodile tear or two over what he did, did he not, right? There was a statement. That is not enough. Of course it isn't. If the minister did it, it is just the same as the President doing it. There is no difference. The President was bound by the actions of his minister. The United States government was bound by the actions of the minister. Thus, it was the United States government that conspired to overthrow the lawful government of the Kingdom of Hawaii. Again, an internationally illegal act at the time it was done.

The next paragraph continues, "pursuant to the conspiracy. . . naval representatives called armed forces to invade the sovereign Hawaiian

30. U.S. CONST. art. VI, cl. 2.

31. The next section of the law is on the Congregational Church. It is an attempt at reconciliation and does not need further elaboration.

32. *Id.*

33. See *Nuclear Tests Case (Austl. v. Fr.)* 1974 I.C.J. 252 (Dec. 20), where the International Court held that:

It is well recognized that declarations made by way of unilateral acts, concerning legal or factual situations, may have the effect of creating legal obligations. Declarations of this kind may be, and often are, very specific. When it is the intention of the State making the declaration that it should become bound according to its terms, that intention confers on the declaration the character of a legal undertaking, the State being thenceforth legally required to follow a course of conduct consistent with the declaration. An undertaking of this kind, if given publicly, and with an intent to be bound, even though not made within the context of international negotiations, is binding.

Id. at 267. (holding France bound to statements made by government ministers). But see *Personnel Management v. Richmond*, 496 U.S. 414 (1990) ("The United States is neither bound nor estopped by acts of its officers or agents in entering into an arrangement or agreement to do or cause to be done what the law does not sanction or permit.").

nation on January 16, 1893, and to position themselves near the Hawaiian government buildings and the (Iolani) Palace to intimidate the Queen (Liliuokalani) and her government."³⁴ Notice the use of the word "invade." Today we prefer to use euphemisms such as "incursion." That is another word for invasion. But here Congress significantly calls an invasion an invasion. That is what it was, a clearly illegal act, an invasion in violation of treaties and international agreements, an invasion in violation of international law, and an invasion in violation of the United States Constitution—the overthrow of a lawful government.

Under international law when you have a violation of treaties of this magnitude, the World Court has ruled that the only appropriate remedy is restitution.³⁵ Damages are not enough. Reparations are not enough - that is the payment of money, or giving you an island over here and saying: Here, you can have that island. That is not enough. Restitution is to restore what you once had, that is the Kingdom of Hawaii, that is your independent nation state. This is the appropriate remedy, if that is what you want for what was done.

The Public Law goes on from here, reciting the sorry history of what happened, the establishment of the provisional government.³⁶ Well, that is not entitled to any legitimacy at all. It was imposed by raw, naked, and brutal military force, at the point of a bayonet, gunboat diplomacy, just as was practiced in many other countries, only here now Congress is finally admitting this.

The next paragraph points out that the establishment of this provisional government was without the consent of the Native Hawaiian people or the lawful government of Hawaii, and violated all of the international treaties and agreements.³⁷ So under international law, you

34. Overthrow of Hawaii Resolution, Pub. L. No. 103-150, 1993 U.S.C.C.A.N. (107 Stat.) 1510.

35. Case concerning the Factory at Chorzow, 1928 P.C.I.J. (ser. A.) No. 17, at 47 (Sept. 13). But see J. Patrick Kelly, *The Changing Process of International Law, and the Role of the World Court*, 11 *Mich. J. INT'L L.* 129, 159 (Fall 1989) ("actual practice indicates that compensation is now governed by the doctrine of unjust enrichment rather than a right of restitution").

36. "Whereas, on the afternoon of January 17, 1883, a Committee of Safety that represented the American and European sugar planters, descendants of missionaries, and financiers disposed the Hawaiian monarchy and proclaimed the establishment of a provisional government." Overthrow of Hawaii Resolution, Pub. L. No. 103- 150, 1993 U.S.C.C.A.N. (107 Stat.) 1510, 1510-11.

37. "Whereas, the United states minister thereupon extended diplomatic recognition to the Provisional government that was formed by the conspirators without the consent of The Native Hawaiian people to the lawful government with Hawaii and in violation of treaties between the two nations and of international law." Overthrow of Hawaii Resolution, Pub. L. No. 103-150, 1993 U.S.C.C.A.N. (107 Stat.) 1510, 1510-11.

would not call this a provisional government - I certainly would not call it that. You would call it a government of military occupation. Certainly I would suggest that that would be an appropriate way to think about it. That is, you had military forces here and then you had a civilian arm of the military occupying regime.

You see the same thing today in the occupied Palestinian lands where the Israeli occupying forces have set up a civilian arm of their military occupation authorities to administer the civil affairs of the Palestinian people.³⁸ These matters, by the way, are currently the subject of the negotiations between the Palestinian Liberation Organization (PLO) and Israel today. The negotiations centered around the withdrawal of the civilian military occupation arm, and the withdrawal of the military occupation forces themselves.³⁹ Indeed, the September 13, 1993 agreement calls for the dissolution of the civilian occupation arm and then the withdrawal of the military occupation forces themselves.⁴⁰

I submit, therefore, that this "provisional government" referred to in the Public Law is really the civilian arm of a military occupation force. That was the predecessor to the current government of Hawaii that administers you today. Again, following the implications of that law, the state government of Hawaii occupies a similar position to that provisional government. Of course you have federal military forces here keeping it in power. Again, somewhat similar to the arrangement in Palestinian lands.

We then come to the very famous statement by your Queen, "that I yield to the superior force of the United States of America,"⁴¹ and you are aware of the rest of the language. She made it very clear that this statement and her later abdication were procured under duress and

38. See J. Timothy McGuire, *International Law, and the Administration of Occupied Territories Two Decades of Israeli Occupation of the West Bank and Gaza Strip*, 8 EMORY INT'L L. REV. 383 (1994).

39. See David I. Schulman, *The Israeli-PLO Accord on the Declaration of Principles on Interim Self-Government Arrangements: The First Step Toward Palestinian Self-Determination*, 7 EMORY INT'L L. REV. 793 (Fall 1993); Gumar Halley, *Issues Confronting the Return of Palestinian Arab Refugees After the 1993 Declaration of Principles on Interim Self-Government Arrangements*, 8 GEO. IMMIGR. L.J. 149 (1994).

40. *Declaration of Principles on Interim Self-government Arrangements*, Sept. 13, 1993, Isr.-P.L.O., art. VI, 32 I.L.M. 1524, 1527. The author served as Legal Advisor to the Palestinian Delegation to the Middle East Peace Negotiations from 1991 to 1993.

41. *Overthrow of Hawaii Resolution*, Pub. L. No. 103-150, 1993 U.S.C.C.A.N. (107 Stat.) 1510, 1511.

force. In other words, it could not be treated by anyone as a valid surrender of sovereignty by the Native Hawaiian people at all and she made that very clear in this language. So in other words, she was simply bowing to superior power, but not as a matter of right or of law. I have done a similar thing myself in the Bosnia case in the World Court.⁴² I pointed out in a file communicating with the World Court, that the so-called Owen-Stoltenberg plan⁴³ to partition the Republic of Bosnia and Herzegovina, was concluded, or arguably still might be concluded, by means of threats and duress, compulsion and coercion. It was therefore invalid, or would be invalid, under international law and the Vienna Convention on the Law of Treaties.⁴⁴ This type of behavior still goes on today. But your Queen, a very powerful person, made clear that she was simply yielding to superior force, and thus preserving the rights of her people for the future their right of self-determination and their right to restoration of their sovereignty.

The law goes on, with Congress admitting that "[w]ithout the active support and intervention by the United States . . . the insurrection . . . would have failed for lack of popular support and insufficient arms."⁴⁵ I was reading a little letter by the fellow who traces his ancestry to one of the missionaries [Thurston Twigg-Smith] who pulled this thing off which states, "well, we should stop all this debate, these were real genuine patriots, etc., etc.,"⁴⁶ and of course they were entitled to do what they did. Well, apparently he didn't bother to read the law. He can say whatever he wants, but Congress has now made it very clear what happened. He can argue till the cows come home but this is now the law. He had better read it. In fact Congress has condemned

42. See Case Concerning Application of the Convention on the Prevention and Punishment of The Crime of Genocide (Bosnia & Herzegovina v. Yugoslavia). 1993 I.C.J. 325 (Sept. 13). The author served as Bosnia's Agent before the Court.

43. See Alan C. Laifer, Note, Never Again? The 'Concentration Camps' in Bosnia-Herzegovina: A Legal Analysis of Human Rights Abuses, 2 *NE.W EUR. L. REV.* 159, 187 (Spring 1994). The author served as Legal Advisor to President Izetbegovic and the Members of the Bosnian Presidency during these negotiations during the summer of 1993 in Geneva.

44. "A treaty is void if its conclusion has been procured by the threat or use of force in violation of the principles of international law embodied in the Charter of the United Nations." Vienna Convention of the Law of Treaties' *supra* note 12, at art. 52.

45. Overthrow of Hawaii Resolution, Pub. L. No. 103-150, 1993 U.S.C.C.A.N. (107 Stat.) 1510, 1512.

46. "Honolulu advertiser publisher Thurston Twigg Smith, whose grandfather was one of the leaders of the overthrow, defended its legality in an editorial prepared for Sunday's edition." Lou Cannon, Waving (and Lowering) Flag in Hawaii Pride, *WASH. POST*, Jan. 17, 1993, at A33.

what his ancestors did. Now the simple question is, where do the Native Hawaiian people want to go from here?

Well, again, "the U.S. minister raised the flag and declared Hawaii to be a protectorate of the United States."⁴⁷ Of course that's nonsense. They did not protect anything, did they? Was there a need to protect Hawaii from itself, from its own people? Who was threatening Hawaii at that time? It was the United States. They needed protection from the United States, so this is absurd. It was entitled to no legal validity at all at the time and is not now. That is basically what Congress is saying.

The Blount Report states that "military representatives had abused their authority and were responsible for the change in government."⁴⁸ Again, this is further admission that the United States acted illegally under international law. But an admission is not enough. The implication then, of these admissions by Congress, by the Blount Committee, is that there must be restitution.⁴⁹ The Hawaiian people have a right to be returned to the situation they were in, as of January 17, 1893. This is your right if that's what you want. The federal government disciplined the minister and forced him to resign his commission. Well, of course they should have done that, but that should not have been the end of the process. The overthrow should have been reversed. They had the authority to do it; the President could have done it if he had wanted to, he just did not do it. So this is simply eye-washing. It is nice that they finally conceded these points, but it is not enough under international law.

I do not know how the Native Hawaiians feel about it. I suspect maybe they would agree with me that it is certainly not enough. Where it should lead from here is another issue. Again, I'm trying to point out, line by line, that this Resolution clears up all these matters, all debate, all argument, and it makes it very clear here. You have a right to restoration, to restitution, and to proclamation of your state. You do not need the permission of Congress to do this. Congress might not like it, but it is kind of stuck with its own law, is it not?

47. Overthrow of Hawaii Resolution, Pub. L. NO. 103-150, 1993 U.S.C.C.A.N. (107 Stat.) 1510, 1512.

48. *Id.* ("Presidentially established investigation conducted by Congressman James Blount into the events surrounding the insurrection and overthrow").

49. See Mark A. Inciong, Note, *The Lost Truth: Native Hawaiian Beneficiaries Under the Hawaiian Homes Commission Act*, 8 ARIZ. J. INT'L & COMP. L. 174, 191 n.34 (1991) ("The Blount Report . . . found that the overthrow . . . had been illegal . . . and that Liliuokalani [should] be restored to power").

President Cleveland's message to Congress admitted all this. "An act of war, committed with the participation of a diplomatic representative of the United States and without authority of Congress."⁵⁰ The President clearly admitted that this was illegal behavior of the most heinous type. A "substantial wrong" was done, calling for the restoration of the Hawaiian monarchy.⁵¹ Now of course, there was no restoration, but that does not change the legal situation. Today over 100 years later, you have a right to restore it yourselves, if that is what you want to do. You do not need to petition Congress to do it. Congress has given you everything you need right here to do it. The United Nations Charter provides the rest of the authority to do it.⁵²

The Newlands Joint Resolutions⁵³ provided for the annexation of Hawaii. Where is the authority for this? There is none. They stole the land, the country, displaced the government, and now they have annexed it. This very issue was addressed by the Nuremberg Tribunal in 1945, where the German Nazi government tried to maintain that some of the annexations of foreign territory that it had undertaken before and during the Second World War were entitled to legal recognition. The Nuremberg Tribunal itself in 1945 said, "no annexations are valid prior to the conclusion of a peace treaty."⁵⁴

The United States government and the President conceded that they engaged in acts of war, that they are occupying your land and that they put themselves at war with your people.⁵⁵ Now they have annexed it, but the annexation has no validity under international law. If, as part of the peace treaty between Hawaii and the United States you concede them some land that's up to you, that's your choice. Or if you want to give the federal government operating facilities for a base upon the payment of funds and rent or something, that's for you to decide. But, now they have effectively, in this law, invalidated the

50. "Whereas, in a message to Congress on December 18, 1893, President Grover Cleveland reported fully and accurately on the illegal acts of the conspirators." Overthrow of Hawaii Resolution, Pub. L. No. 103-150, 1993 U.S.C.C.A.N. (107 Stat.) 1510, 1511.

51. Overthrow of Hawaii Resolution, Pub. L. No. 103-150, 1993 U.S.C.C.A.N. (107 Stat.) 1510, 1511.

52. U.N. CHARTER, art. I, § 2.

53. Newlands Resolution, Pub. L. No. 55, 30 Stat. 750 (1898).

54. "[I]t was held that, by 1939, the rules on belligerent occupation [that it does not transfer sovereignty] had 'been recognized by all civilised nations and were regarded as being declaratory of the law and customs of war.'" GEORG SHWARZENBERGER, 2 INTERNATIONAL LAW 165 (1965) (citing Nuremberg Judgement, International Military Tribunal, Cmd. 6964 at 65 (1946)).

55. Overthrow of lHawaii Resolution, Pub. L. No. 103-150, 1993 U.S.C.C.A.N. (107 Stat.) 1510.

entire annexation. The whole legal basis for it has now been invalidated.

If the annexation of the land is invalid, then where does the title come from, who has title to the land? It is the Native Hawaiian people who retain title to the lands of Hawaii, as a matter of international law. It is not the federal government, not the state government, but the people themselves. That is the implication here, certainly as I read this section, as an international lawyer. Again these findings of fact and conclusions of law are now officially set forth by Congress. It is only one step, as I am trying to point out here. What are the implications then of these findings of fact and conclusions of law?

The law next reads that, "[t]he Newlands Resolution, the . . . Republic of Hawaii ceded sovereignty over the Hawaiian Islands to the United States."⁵⁶ But, the Republic of Hawaii never had sovereignty over the Hawaiian Islands.⁵⁷ We have already determined that the so called Republic of Hawaii was the civilian occupying arm of a military occupation authority. It had no sovereignty. Military occupation forces, even though they are there and are present, do not exercise sovereignty over the territories they occupy. Sovereignty remains in the hands of the displaced sovereign. This is black letter international law.⁵⁸ This is the issue at stake in the Middle East peace negotiations between the Israelis and Palestinians. The Israelis do not have sovereignty over the West Bank, the Gaza Strip, or East Jerusalem. They are a military occupation authority. They exercise administrative powers, but they do not have sovereignty. They never did. The sovereignty remains in the hands of the Palestinian people and they have proclaimed a state. Again I submit there is a parallel here for Native Hawaiian people. Sovereignty resides in your hands. This so-called Republic never had sovereignty to cede to the United States, and that is pretty clear from just reading through the Resolution and moving one step forward from the analysis set forth here.

"The Republic of Hawaii also ceded 1,800,000 acres of crown, government, and public lands of the Kingdom of Hawaii, without the consent of or compensation to the Native Hawaiian people, or their

56. Id. at 1512.

57. Miiilami B. Trask, Historical and Contemporary Hawaiian Self-Determination: A Native Hawaiian Perspective, 8 ARIZ. J. INT'L COMP. L. 77, 91-95 (1991).

58. "[A]nnexation of occupied territory is a violation of international law . . . Title to the territory in question must not change until there is either complete subjugation (debellatio) or a peace treaty has been put into effect." GFRHARD VON GLAHN, LAW AMONG NATIONS 768 (1992).

sovereign government."⁵⁹ The Republic had no authority to do this, for the reasons I have already spelled out here. The government of the Republic of Hawaii was a military occupation authority, the civilian arm, without any sovereign claims to the land under the laws of military occupation and the laws of war. So they had no power to cede anything. The title to the land rested and still rests, under international law, with the Native Hawaiian people.

I tried to make this point in my discussion with Judge Nakea. How can it be said that the Graces trespassed on their own land? You cannot trespass on your own land. The trespassers then become the State of Hawaii, the land developers, the golf courses, and the resorts. Then, what this law does is point out that the whole situation is completely turned around on its head. It now changes the whole way that these authorities should be looking at the matter. The federal government is the trespasser and the criminal. You are simply the Native Hawaiians asserting your rights under international law. Now this arrangement, as it were, this reversal of positions between who is the criminal and who is the victim, and between who is asserting their rights and who is violating their rights, has been effectively conceded by Congress.

In this regard, I would encourage all Native Hawaiians to know what your rights are. Get a copy, a little hand copy, of the Universal Declaration of Human Rights⁶⁰ and carry it around with you. Your rights are in there.

With respect to what Bumpy Kanahele and his people are doing out on the beaches, in the settlements, Article 25 of the Declaration provides that "everyone has the right to a standard of living adequate for the health and well-being of themselves and their family, including food, clothing, housing, medical care and necessary social services."⁶¹ They have a right to have housing, that is clear. The State of Hawaii has no right to throw you out of your own homes. Even if those homes are nothing more than tents on a beach, they are still your homes. Where is the government's right now, if they ever had any, after the passage of this law? I don't see it. It is no longer there.

59. Overthrow of Hawaii Resolution, Pub. L. No. 103-150, 1993 U.S.C.C.A.N. (107 Stat.) 1510, 1512.

60. Universal Declaration of Human Rights, G.A. Res. 217 (111), U.N. GAOR, 3d Sess., at 71, U.N. Doc. A/810 (1948).

61. *Id.* at art. 25.

The same right exists with respect to attempts to destroy your temples and places of worship. Article 18 of the Declaration provides that "everyone has the right to freedom of thought, conscience, and religion. This right includes freedom to manifest his religion or belief in teaching, practice, worship, and observance."⁶² So where is the right of the State of Hawaii, or a real estate developer, or a resort developer, to destroy any of your temples, when these are your temples, this is your land, and your right to worship is guaranteed in the Universal Declaration? I don't see that right any more and indeed it will be very hard for them to argue that now that this law has been passed. I won't go through the applicability of all the Universal Declaration of Human Rights to the activities of Native Hawaiians here in relations of the state and federal governments. Again I would encourage you to get this from Amnesty International. They have them available. Read through it, and understand what your rights are, and proceed to assert them in your dealings with the state and federal government.

"Whereas, the Congress . . . annexed Hawaii . . . and vested title to the lands in Hawaii in the United States."⁶³ This is clearly illegal. We have already seen it. The annexation was invalid. The United States cannot get title from the Republic of Hawaii because the Republic never had title in the first place. They had no sovereignty. They were nothing more than a military occupation power, and a military occupation power cannot validly transfer title to land. Again, black letter international law.⁶⁴ That is why, today, the United States government condemns the illegal settlements in occupied Palestinian land. You cannot transfer title; the occupying power cannot sell land legally. I mean they can do it, but that doesn't make it lawful. It is invalid. It is illegal. So an occupying power cannot sell land, they do not control title, sovereignty. They can administer, but that is all, arguably, that they can do. In theory, they are obliged to leave, not to stay.

The law goes on to state: "Whereas, the Newlands Resolution effected the transaction between the Republic of Hawaii and the United States government."⁶⁵ The Newlands Resolution is entitled to no validity

62. *Id.* at art. 18.

63. Overthrow of Hawaii Resolution, Pub. L. No. 103-150, 1993 U.S.C.C.A.N. (107 Stat.) 1510, 1512.

64. "Belligerent occupation does not transfer sovereignty. Instead it transfers to the occupant the authority to exercise some rights of sovereignty." VON GLAHN, *supra* note 58, at 774. See also SHWARZINBERGER, *supra* note 54, at 163-78.

65. Overthrow of Hawaii Resolution, Pub. L. No. 103-150, 1993 U.S.C.C.A.N. (107 Stat.) 1510, 1512.

at all, since it is based on an illegal invasion, a violation of treaties, and a violation of the principle of *pacta sunt servanda*.⁶⁶ Many, many violations of law have accrued as a result of this.

Congress admits that "the indigenous Hawaiian people never directly relinquished their claims to . . . inherent sovereignty.. . through a plebiscite or a referendum."⁶⁷ This gets back to the question of what happened, back in, what '59, right? What validity was that entitled to? Well, now Congress is saying, none. I would say even before this, none, because you did not have a plebiscite conducted by the United Nations organization itself. This would have been a requirement if Article 73 of the U.N. Charter had been carried out.⁶⁸ The United States did not do that. Congress is effectively conceding now that the so-called vote is meaningless, as a matter of international law and of United States domestic law. So you are not bound by it. Rather, I am suggesting that you are now free to determine your own fate pursuant to the principle of self-determination in Article 1, Paragraph 2 of the United Nations Charter.⁶⁹

Moving further through the Public Law, we encounter more admissions. "Whereas, the long-range economic and social changes in Hawaii over the nineteenth and early twentieth centuries have been devastating to the population and to the health and well-being of the Hawaiian people."⁷⁰ Well that is an understatement. The Hawaiian people have been subjected to the international crime of genocide, as determined and defined by the 1948 Genocide Convention,⁷¹ and the 1987 Genocide Convention Implementation Act,⁷² the Proxmire Resolution. That is clear. That was one of the findings of the San Francisco Tribunal. That was one of the key findings of the Tribunal held here this summer concerning Hawaii (Ka Ho'okolokolonui Kanaka Maoli). Having argued genocide myself to the International Court of Justice, and having convinced them that genocide is going on in Bosnia-

66. See Martin Hession, *The Legal Framework of European Community in International Environmental Agreements*, 2 *NEW EUR. L. REV.* 59, 103 (Spring 1994).

67. *Overthrow of Hawaii Resolution*, Pub. L. NO. 103-150, 1993 U.S.C.C.A.N. (107 Stat.) 1510, 1512.

68. U.N. CHARTER art. 73.

69. U.N. CHARTER art. I. 11 2.

70. *Overthrow of Hawaii Resolution*. Pub.L. NO. 103-150, 1993 U.S.C.C.A.N. (107Stat.) 1510, 1512.

71. *Convention on the Prevention and Punishment of the Crime of Genocide*, Jan. 12, 1951, 78 U.N.T.S. 277.

72. *Genocide Convention Implementation Act of 1987*, Pub. L. NO. 100-106, 102 Stat. 3045 (1987).

Herzegovina,⁷³ I submit that there would be no difficulty in convincing the World Court that genocide has been practiced by the United States government against Native Hawaiians. Now, that is bad enough, but where does that lead you? I suggest that where it leads you is back to the creation of a State. One of the few and only protections a people have from being exterminated, by means of genocide, is their own state and ultimately, United Nations membership.

This is what happened to the Jews. From 1939 to 1945 they did not have a state. They did not have membership in the League of Nations. So everyone looked the other way and they were exterminated. Today, the situation is being replayed with the Bosnians. The Bosnians do have a state and they do have U.N. membership.⁷⁴ This is the one thing they have that is keeping them from going the same way as the Jews. The Palestinians recognize this, too. They had to proclaim a state in order to protect themselves from being annihilated. So a state, an independent sovereign nation state, is one way a people who are threatened with extermination by means of genocide, can attempt to protect themselves. According to the statistics that Kekune Blaisdell presented to the San Francisco tribunal, the Native Hawaiian people are threatened with extinction by the year 2030. This is something that has to be given very serious consideration. What is the best way to protect the existence of your people, as a people? Is it to accept the same status as Native Americans, which I guess Secretary Babbitt is considering graciously giving you? Or is it to proclaim your own state, and then ultimately seek international recognition and finally U.N. membership? Well again, this is for you to decide. You have to consider the alternatives because ultimately it is your future and that of your children and your children's children that is at stake.

In the final "whereas" clause, Congress states, "it is proper and timely for Congress to acknowledge the historic significance of the illegal overthrow."⁷⁵ Before this, Congress talked only about an overthrow, but did not concede it was illegal, although it violated all these treaties. But now Congress says that it was illegal. In other words, in this law, Congress is agreeing with what I am saying here. It was

73. See Case Concerning Application of the Convention on the Prevention and Punishment of The Crime of Genocide (*Bosnia & Herzegovina v. Yugoslavia*), 1993 I.C.J. 325 (Sept. 13).

74. Status of the U.N Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crime; Against Humanity, 33 I.L.M. 1394 (1994).

75. Overthrow of Hawaii Resolution, Pub. L. No. 103-150, 1993 U.S.C.C.A.N. (107 Stat.) 1510, 1513.

illegal. If you had any doubt, now even Congress is agreeing. It was an illegal overthrow. It had no validity at all. The fruits of this overthrow are entitled to no recognition as being valid today. That calls into question the title to all the land here. Who's land is it? Well, it seems to me, from what Congress seems to be saying, the land is that of the Native Hawaiians.

The Resolution then addresses reconciliation efforts, about support for the reconciliation efforts.⁷⁶ Well, of course I am in favor of reconciliation. But there is more to it than that. Under international law, if you have a violation of this nature the appropriate remedy is not simply reconciliation, apology, or reparations, but is restitution.⁷⁷ That is, to set right the harm that has been done—to restore the situation to what it had been before the violation in 1893. There is a very famous case by the World Court, the Chorzow Factory⁷⁸ case, that would be the authority for this. In other words, sure, have reconciliation, but what about restoration? That clearly is what you are entitled to.

We now move to this Section 1, acknowledgment and apology.⁷⁹ The law again repeats, "illegal overthrow," so it is not simply my interpretation of the significance of the various "whereas" clauses. The "whereas" clauses were "resolved by the Senate and House of Representatives of the United States of America, in Congress and Senate, and signed by the President."⁸⁰ This operative provision of the law recognizes the illegal overthrow and "acknowledges the historical significance of this event which was ultimately the suppression of the inherent sovereignty."⁸¹

The law, in effect, says that the Native Hawaiian people still have sovereignty. The sovereignty inheres in you. Now it is for you to decide what to do with this sovereignty, because the State of Hawaii and the federal government, are, as I have explained, the civilian arms of the military occupation authority. Military occupation authorities do not have sovereign powers. The sovereignty resides in the people. That is clearly the implication of Section I of the operative provision of the statute.

76. Id.

77. Case Concerning the Factory at Chorzow, 1928 P.C.I.J. (ser. A) No. 17, at I (Sept. 13.).

78. Id.

79. Overthrow of Hawaii Resolution, Pub. L. No. 103-150, 1993 U.S.C.C.A.N. (107 Stat.) 1510, 1513.

80. Id.

81. Id.

Paragraph 3 apologizes for the overthrow "with the participation of agents of the United States."⁸² The U.S. government again is responsible for the actions of its ministers, Congress now called these people "agents." So their conduct, their illegal conduct, binds the United States government. Which means the United States government, then, is under an obligation to undo the harm that was done. But even if they do not, the Native Hawaiian people have a right to act to undo that harm. And if you doubt that, the rest of the sentence reads, "the deprivation of the rights of Native Hawaiians to self-determination."⁸³

So in other words, Congress has conceded that the Native Hawaiian people have a right to self-determination. What does that right include? Well, as I have said, self-determination of peoples under the U.N. Charter provides a right to a state of your own and to membership ultimately, someday, in the United Nations organization,⁸⁴ just like the 188 other states that are currently members of the United Nations today.

Paragraph 4 expresses its commitment to acknowledge the ramifications.⁸⁵ What are the ramifications? Well, that is the subject of my discussion here. If you followed the analysis that I presented before, then I put forward here what I believe are the ramifications, the implications, of the overthrow of the Kingdom of Hawaii. Now, whether that is the direction you want to go, that is for you to decide, not me.

Then finally, in the definitional section, Congress defines Native Hawaiians as "any individual who is a descendant of the aboriginal people, prior to 1778 . . . occupied and exercised sovereignty, in the area that now constitutes the state of Hawaii."⁸⁶ This again, affirms that the native people of Hawaii were, and by implication still are, the sovereign authority in these lands. It is not the state, not the federal government, but the Native Hawaiian people themselves.

Based then on this public law, and going through it line by line, I would express the opinion that today the Kanaka Maoli have the right to exercise self-determination as a people in accordance with the U.N. Charter: To proclaim an independent state, if that is your desire, to join the world community of states as an independent nation state. This also

82. Id.

83. Id.

84. U.N. CHARTER art. 1. 11 2.

85. Overthrow of Hawaii Resolution. Pub. L. NO. 103-150, 1993 U.S.C.C.A.N. (107 Stat.) 1510, 1513.

86. Id.

means that you have the right to determine your political status, your type of governmental organization to govern yourselves through customary systems, and to freely pursue your economic, social, and cultural development in accordance with Article I of the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights.⁸⁷ The United States government is a party to that first treaty. That treaty also recognizes the right of Native Hawaiians to freely dispose of your natural wealth and resources, without prejudice to obligations arising out of international economic cooperation. This is your land. These are your natural resources. Whatever powers are exercised by the state and federal governments are those of a colonial occupation military regime. But the sovereignty still resides in the hands of the Native Hawaiian people. You have the territory necessary for a state. That is, the Hawaiian Archipelago, the lands that you had before the invasion of 1893. You would be entitled to claim a twelve mile territorial sea and a 200 mile exclusive economic zone, in accordance with customary international law and the Law of the Sea Treaty of 1982.⁸⁸

The second requirement of an independent state are the people. Again Congress has recognized the Kanaka Maoli people are a group of people with sovereign powers. You have lived here forever. You are the original inhabitants and occupants of these islands. You have always been in possession of your land. And so you would be entitled to reestablish an independent sovereign nation state in that land. Possession is nine-tenths of the law. You are still here; you are still living in your homes; you are still occupying your land. It might be true that the state and federal governments are illegally dispossessing you. But, you are still going back in there; you are still building settlements; you are still occupying it, and you are staying there. That is all that international law requires. As I have suggested, that certainly is your right under the Universal Declaration of Human Rights.⁸⁹

Who would be your citizens? Well certainly the citizens would be those who are descendants of the Kanaka Maoli, who occupied and exercised sovereignty in Hawaii prior to the Europeans in 1778. You would trace your ancestors back. Again, it would be your right to

87. International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200 (XXI), U.N. GAOR, 21st Sess., Supp. No. 16 at 49, U.N. Doc. A/6316 (1966).

88. United Nations Convention on the Law of the Sea, opened for signature Dec. 10, 1982, U.N. Doc. A/CONF.62/122, reprinted in 21 I.L.M. 1261 (1982).

89. Universal Declaration of Human Rights, G.A. Res. 217 (111), U.N. Doc. A/810, at 71 (1948), reprinted in 2 DUSAN J. DJONOVICH, UNITED NATIONS RESOLUTIONS (1973).

determine who your citizens are. I take it you would reject this blood percentage that has been set up by the United States government. This is reminiscent of Nazi laws, that were applied to decide who was Aryan. Those laws, in turn, were patterned on laws in the American South, on miscegenation, who was a black and who was a white.⁹⁰ A state is free to determine who its own citizens are. Certainly you would be free to determine that all those who could trace their ancestors back to 1778 would automatically become citizens of the new state.

Now, what about those who are living here, who are not able to trace their ancestors back? What about them? This is an issue that has confronted several states today. For example, in the Baltics, Lithuania, Latvia and Estonia, there are large numbers of Russian citizens who were left behind as a result of the Russian/Soviet occupation for the last fifty years. This is about half the amount of time you are dealing with here. The three Baltic states have taken different approaches. For a period of time, I advised the Republic of Lithuania under President Landsbergis, who was the hero and leader of their independence movement. He subsequently lost an election and the people voted the communists back in, so I no longer advise them. But the Lithuanians have taken a very generous approach to those Russians who remain, trying to integrate them into their society.⁹¹

Certainly the Hawaiian state could take the position that you'll set up a procedure to provide citizenship to all people who are habitual residents of the new state of Hawaii, as of a certain date. This would mean that those who have lived here continuously five years, ten years—whatever cut off point you want—are also themselves entitled to become citizens of this state on a level of equality with everyone else. Unlike the Native Hawaiians who would automatically become citizens, the habitual residents would have to apply for citizenship.

Again, there are precedents here in the way the Palestinians are dealing with these issues. They too have a diaspora population. You have large numbers of Hawaiians all over the world who had to leave. Approaching it in this way would enable you to allow all them to claim Hawaiian citizenship, if that is the case, if that's what they want to do, and to return. The Palestinians did it that way. They set up a state, and said that they were setting up a state for all

90. RACIAE DETERMINATION AND THE FEAR OF MISCEGENATION (John D. Smith ed., 1993).

91. See Stephen Kenyer, Soviet Turmoil: Issue of Citizenship For Ethnic Russians is Dwindling Latvians, N.Y. TIMES, Sept. 7, 1991, at A1 ("The Lithuanian . . . authorities are preparing to offer citizenship to all residents who want it").

Palestinians everywhere in the world. In theory, those who want to be citizens of the state can claim it and be admitted. Also there are a large number of Jewish settlers living in occupied Palestine. The Palestinians have taken the position that they are prepared to accept a certain number of Jewish settlers as citizens of their state on a basis of equality with everyone else, provided that they are prepared to be peaceful, law abiding citizens, treated as equals.

So there are precedents for the new state of Hawaii to take a similar position for those non-Native Hawaiians who live here. That is, telling non-natives residents that you are setting up an inclusive state and want them to stay and to apply for citizenship in the new state. It could be done in a way that they would not have to renounce their U.S. citizenship if that's what the Native Hawaiians decide. That could be a big issue with the current generation of non-Native Hawaiians living here. It probably would not be a big issue for the next generation. They would be Hawaiian at birth, entitled to citizenship at birth, and probably whether they would claim U.S. citizenship would not be all that important. But for those who are here who are U.S. citizens, it would be possible to allow them to become dual nationals. That is, they would apply for Hawaiian citizenship without having to give up U.S. citizenship. This would be fully consistent with United States law.

I was born in the United States, but I applied for Irish citizenship. My family is Irish, I have Irish citizenship and an Irish passport. The Irish have been subjected to genocide, too. We know what it is all about. We are a diaspora people too. We have people all over the world. So we have an inclusive form of citizenship that allows people to claim it without having to give up whatever other citizenship they have as well. The Native Hawaiian state could approach the question of citizenship in a similar way.

I have already discussed that the system of government, again the third requirement that you would need, and I believe you have it, for an independent state. You have your Kupuna system. As I said, Congress has recognized "a highly organized, self-sufficient, social system based on communal land tenure, maintaining order through mediation."⁹² That is all you need, and you have that. So you would simply work that out, the implications of that system on a nation state basis, that is, the new Hawaiian state basis. That would be the way the new

92. Overthrow of Hawaii Resolution. Pub. 1.. No. 103-150, 1993 U.S.C.C.A.N. (107 Stat.) 1510.

Hawaiian state would be governed, not the current situation as you see it today.

The final requirement is the capacity to enter into international relations. Again here, if you were to declare an independent state, you would probably obtain recognition in that capacity from a fairly large number of states. I could not predict the number of states that would recognize you. I don't know. You would have the same problems encountered in the creation of the Palestinian state. We⁹³ did not know how many states would recognize the Palestinian state back in August of 1988, before it was created. But as of December 1993, 125 states recognize the state of Palestine. Someday the state of Israel will recognize the state of Palestine. The state of Palestine already recognizes the state of Israel. There can be peace and reconciliation between those two peoples as well.

I cannot predict how long this would take, what would be the consequences, or how many states will recognize you. However, I take it that the plight of the Hawaiian people is generally well known in the world, and there's a great deal of sympathy. For a variety of reasons, the Palestinians have had an uphill struggle and battle in obtaining that recognition. So, it might be that you would be able to obtain recognition quickly, especially if you pursue this process in accordance with principles of peaceful, non-violent struggle. I submit that is the most effective technique you have today. If you doubt me, you should read Gandhi's book, *Satyagraha*, about non-violent civil resistance.⁹⁴ The book explains how Gandhi threw the mighty British Empire out of India without using force. People power is what we call it today. I submit that the Native Hawaiian people would be able to do the same thing, moving in this direction and adopting the techniques of peaceful, non-violent action, such as those called for by Gandhi.

In conclusion, I reiterate that this discussion is not presented as a solution to any problems. My assignment here, as I understood, it was to sketch, briefly, one outline, one alternative, that the Native Hawaiian people can consider among other available alternatives. Ultimately, it is your choice—not the choice of the United States Congress, not the choice of the State of Hawaii. And with all due respect to the Commissioners here, it is the choice of the Native Hawaiian people. They

93. The author served as the legal advisor to the Palestine Liberation Organization on the creation of the Palestinian State from 1987 to 1989.

94. M.K. GANDHI, *NON-VIOLENT RESISTANCE (SATYAGRAHA)*, (Schocken ed., 1971) (1951).

have the right to self-determination. They have the inherent sovereignty. Their rights have now even been recognized by the United States Congress itself. So, it is no longer just me giving an opinion as a law professor. But rather, the opinion presented here is based upon these formal findings of fact and law by the United States Congress.

Recent actions continue to provide the Hawaiian sovereignty movement greater power and legitimacy. Since these remarks were presented in Hawaii in December, 1993, new developments have continued to demonstrate the importance of the Hawaii sovereignty issue.

The plebiscite to be conducted late this year will allow about 274,000 Native Hawaiians to cast a ballot deciding whether or not they want to elect delegates to a convention that may recommend some form of native Hawaiian government.⁹⁵

The Ohana Council, however, condemns this upcoming vote as "a direct interference with the recognized inherent right of the people and their process of self-determination, a deliberate attempt to confuse the issue and suppress the rightful process of restitution and restoration."⁹⁶ The Ohana Council declared its independence (for both its 10,000 members and all native Hawaiians) from the United States in January 1994, proclaiming itself the Nation of Hawaii.⁹⁷

95. Joy Aschenbach, Aloha to a New Nation?, SACRAMENTO BEE, Feb. 12, 1995, at F01. The results from the December balloting will be announced on January 17, 1996, on the 103d anniversary of the overthrow of the Kingdom of Hawaii by American businessmen and sugar planters. The ballot issued by the Hawaiian Sovereignty Advisory Commission, may be voted on by any adult of Hawaiian origin, even if not currently residing in Hawaii and even if incarcerated. Rick Carroll, Hawaiian Natives Want to Say 'Aloha' to U S: But Reliance on Tourism Makes Return to Old Ways Impossible, WASH. TIMFS, Dec. 23, 1994, at A6. Cf HAW. REV. STAT. 10-2 (1994), defining "Hawaiian" as "any descendant of the aboriginal peoples inhabiting the Hawaiian Islands which exercised sovereignty and subsisted in the Hawaiian Islands in 1778, and which peoples thereafter have continued to reside in Hawaii." Section 10-2 defines "Native Hawaiians" as:

any descendant of not less than on-half part of the races inhabiting the Hawaiian Islands previous to 1778, as defined by the Hawaiian Homes Commission Act, 1920, as amended; provided that the term identically refers to the descendants of such blood quantum of such aboriginal peoples which exercised sovereignty and subsisted in the Hawaiian Islands in 1778 and which peoples thereafter continued to reside in Hawaii.

See also *Hooihull v. Ariyoshi*, 631 F. Supp. 1153 (D. Haw. 1986) (Office of Hawaiian Affairs definition of "Hawaiian" to include all persons who are descendants of aboriginal Hawaiians is constitutional as it has a rational basis and reasonably furthers legitimate legislative purpose) (cited in *Trustees of Hawaiian Affairs v. Yamasaki*, 737 P.2d 446 (Haw. 1987)).

96. *Id.* (quoting Nation of Hawaii leaders). But see John Hughes, Career Options for 50th State, CHRISTIAN SCI. MONITOR, May 5, 1994, at 18 ("No serious observer believes that the sovereignty debate will result in the secession of Hawaii, or even part of it, from the United States [H]ow would a sovereign nation support itself economically? But substantial support exists for some kind of compensation for the overthrow of the monarchy.").

97. The Nation of Hawaii declared its independence from the United States on January 16, 1994.

In the spring of 1994, following President Clinton's formal apology to native Hawaiians in November 1993, the United States Navy returned the island of Kahoolawe, which had been taken during World War II. The federal government signed quitclaim deeds (one in English and one in Hawaiian) returning the island, which will hold the island in trust for the Hawaiian Sovereign Nation. Congress has since authorized \$400 million for restoration of the island long used as a bombing and target range.⁹⁸

There is much yet to be done, however. In October 1994, the Intermediate Court of Appeals of Hawaii rejected claims by Native Hawaiians that the state courts lacked jurisdiction over members of the Kingdom of Hawaii, a sovereign nation.⁹⁹

If Native Hawaiians wish to establish their sovereignty, then this court opinion is not determinative of the recognition at stake. This is simply another state action that would not be binding upon an independent state. The recognition of the illegal overthrow has already been made by the United States. Because the overthrow was illegal, the present governing system could be rejected by the native Hawaiians. The law now exists, admitting the illegality of government action. It is now up to the Native Hawaiian people to decide how to proceed.

16, 1994. *Hawaii's Search for Sovereignty*, CHRISTIAN SCI. MONITOR, Oct. 17, 1994, at 9. The Proclamation of Independence is reproduced here as an appendix. See *infra* app.

98. See Aschenbach, *supra* note 95; Christopher Merrill, *A Little Justice in Hawaii: Kahoolawe Lives!*, THE NATION, Sept. 5, 1994, at 235.

99. *Hawaii v. French*, 883 P.2d 644 (Haw. Ct. App. 1994); *Hawaii v. Lorenzo*, 883 P.2d 641 (Haw. Ct. App. 1994). The *Lorenzo* court cited 1993 Haw. Sess. Laws 1009, 1010, Act 359, § 1, which recognized that following the overthrow, "the indigenous people of Hawaii were denied the mechanism for expression of their inherent sovereignty through self-government and self-determination, their lands, and their ocean resources." The court further noted that the stated purpose of Act 359 is to "facilitate the efforts of native Hawaiians to be governed by an indigenous sovereign nation of their own choosing." *Lorenzo*, 883 P.2d at 643 (citing 1993 Haw. Sess. Laws 1009, 1010, Act 359, § 1). Notwithstanding the court's recitation of the Act, it concluded that "while the legislature has tacitly recognized the illegal overthrow, Act 359 indicates that the State of Hawaii does not recognize that the Kingdom exists at the present time. *Id.* The court left that burden to the defendant, and held that he had not presented any factual basis for concluding that the Kingdom exists. *Id.* at 643-44.

*PROCLAMATION RESTORING THE INDEPENDENCE OF THE
SOVEREIGN NATION STATE OF HAWAII JANUARY 16, 1994*

Today the Kanaka Maoli proclaim our Right of self-determination as a People in accordance with Article I (2) of the United Nations Charter, and join the World Community of States as an independent and Sovereign Nation state. We hereby re-establish our Independent and Sovereign Nation State of Hawaii, that was illegally taken from the Kanaka Maoli on January 17, 1893.

By virtue of our Right to self-determination the Kanaka Maoli claim the Right to freely determine our political status and freely pursue our economic, social and cultural development in accordance with common Article I of the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights.

The Kanaka Maoli claim the Right, for our own ends, to freely dispose of our natural wealth and resources . . . including our lands and our waters without prejudice to any obligations arising out of international economic cooperation, based upon the principle of mutual benefit and international law.

We the Kanaka Maoli, claim all the Land, and Natural Wealth, Resources and Minerals, and Waters, which has always resided and will always reside within the Hands of the Kanaka Maoli, to be ours forever, originally under communal land tenure.

Hawaii comprises 132 islands, reefs and shoals, stretching 1,523 miles (2,451 kilometers) southeast to northwest across the Tropic of Cancer between 154 40' and 178 25'W longitude, and 18 54' to 28 15'N latitude, consisting approximately of a total land area of 6, 425 square miles (16,642 square kilometers), including I percent of less than six square miles of land area, made up of islands off the shores of the main islands and the Northwestern Hawaiian Islands, from Kure Atoll in the north to Nihoa in the South. The Hawaiian Islands form an Archipelago, which extends over a vast area of the Pacific Ocean, possessing a 12 mile Territorial Sea, and the 200 mile Exclusive Economic Zone, in accordance with generally recognized Standards of International Law.

In the Independent and Sovereign Nation State of Hawaii lives the Kanaka Maoli. We have lived here forever, since time immemorial. We are the original inhabitants and occupants of these Islands. We have always been in possession of our land and are thus entitled to re-establish our Independent and Sovereign Nation State.

The current citizens of the Independent and Sovereign Nation State of Hawaii consist of all those who are descendants of the Kanaka Maoli prior to the arrival of the first westerners in 1778, and those persons who have lived in Hawaii prior to the illegal Overthrow, invasion and occupation of January 17, 1893, in the area which now constitutes the Archipelago of Independent and Sovereign Nation State of Hawaii.

The Independent and Sovereign Nation State of Hawaii will establish procedures for according citizenship by means of naturalization to all people who are habitual residents of Hawaii as of today's date.

The Kanaka Maoli fully support and subscribe to all of the Rights of the 1948 Universal Declaration of Human Rights for all of the people living in our Independent and Sovereign Nation State of Hawaii.

The Independent and Sovereign Nation State of Hawaii adheres to the generally recognized principles of international law, including the terms of the United Nations Charter. We will apply for Membership in the United Nations Organization in due course. We will conclude other international treaties and agreements at the appropriate time. In the meantime, we call upon the foreign military occupation forces in the Independent and Sovereign Nation State of Hawaii, to withdraw from our Sovereign Territory immediately.

Since time immemorial, the Kanaka Maoli, has maintained their close relationship to the 'aina (land) and its natural surroundings, through practice wholistically spiritual in nature and in harmony with natural law. The natural belief and practice that the 'Aina was considered "sacred" for the well-being of the human sustenance of life.

Prior to the first European invasion, of 1778, Hawaii was known to have unique culture and system of government. Through customs and

traditional practices, The Kupuna (Elders), were highly regarded and respected, as the keepers of the wisdom and knowledge, in a highly organized self-sufficient and sustainable social system, based on a communal land tenure system, and were always consulted upon to maintain order and ho'oponopono.

The Kanaka Maoli of today, embody within their governmental structure, traditional customs and culture, the Aha Kuka O Na Kupuna (Council of Elders), based on mutual respect and practice, and family order. Their advice on many decisions, is highly regarded for the basis of all authority and principles as handed down through generations in their teachings. Their natural ability and practice of Natural Law was understood to be commonly known and exercised, by their deep spiritual connection to nature, its use, application and practice of the Law of Nature, then and now. The Kanaka Maoli believe that all things have life, be it animate or inanimate, because everything has been derived and created from one Source, the Creator.

Today the Kanaka Maoli, respectfully continue to seek the guidance of our Kupuna, be it Spiritually, Mentally and Physically, on authority and decisions that affect our lives, to restore our customs and teachings of our culture, language, and knowledge, from being exploited, desecrated, and on the verge of eventually becoming extinct. For all these reasons, the Kupuna Council will serve as the Provisional Government of the Independent and Sovereign Nation State of Hawaii, until such time when the Kanaka Maoli will convene a constitutional convention.

Despite the historical injustices and abuse, that has documented a time and dark chapter of the lives of the Kanaka Maoli, so unimaginable to the conscience of humanity, and to all human life as a whole, we have come to realize, that in the course of this modern times, we could never depart and separate our undying love and connection, "sacred ties," with the Spirit of this Land, Aloha 'Aina, which is the heart and life of all living things, as taught and handed down from the ancient wise ones (Kupuna). For we must protect it from such invasion and exploitation, to liberate it from alien destructive forces, to preserve our cultural heritage for future generations, from the devastation of extinction.

The Kanaka Maoli, has continued to exercise, practice and occupy their lands, despite foreign powers, denying them their inalienable rights to self-determination and Independence, and Statehood. Thus were well recognized principles of international laws violated. Thus were the national identity, land, resources, Right to Sovereignty over their Territory violated, and a peaceful people Overthrown, by the invasion of foreign powers, who continue to occupy, exploit and destroy our way of life.

Today, the Kanaka Maoli, have united at this very historic and symbolic place, the Iolani Palace, wherein we remember the last days and the tragic moment in our history, that have affected the safety and well being of our people, to which our beloved Kupuna and Queen Liliuokalani, and her commitment to restore the rights of our People, have been stolen. Her dedicated endurance against the foreign powers, who have committed such acts of aggression and force, threats of fear and imprisonment, knowingly in violation of numerous treaties, agreements and principles of international customs and law, has never faltered, for the Love of her people, and those who stood on truth and justice, shall now prevail here today, and forever.

We here today have the same commitment. It is the duty and obligation of every Kanaka Maoli, young and old, to stand ready to restore and defend our natural rights, territorial integrity and independence without prejudice, and reject and resist all unlawful acts, injustice and complicity, violence and terrorism against our political independence, and also reject such use and violence against the territorial integrity against other peaceful states.

If not for those, who have continued the struggle for peace, justice and honor; who have passed in spirit, continue standing beside us here today,

If not for those who have sacrificed their families and lives; who have desired to go to prison, rather than be forced to adhere to unjust principles and acts, and have gone through the crossroads of temptation. If not for those of us who have awaited this day; who have considered the facts and evidence of such acts of oppression, subjugation and fear, and the lost of their honor, dignity and pride.

We the Kanaka Maoli, have historically been the victims of crimes against humanity and genocide as defined by the Nuremberg Charter and the Genocide Convention.

We, the Kanaka Maoli, today, have the duty to heal their wounds, and restore their integrity, for they have given their lives for us to be here today, that all Kanaka Maoli can once again determine to protect the future and destiny of our children, and their heritage.

The Independent and Sovereign Nation State of Hawaii, proclaims its commitment to the purposes and principles of the United Nations Charter. The Kanaka Maoli have long been recognized as a peaceful loving Nation, and to live in peaceful co-existence with other peaceful Nation States, based on equality, truth and justice, and for the respect of their undying Spirit of Aloha, and for the Rights of Humanity.

We proclaim that, despite of the continued interference of our rights to self-determination, Rights of Sovereignty, and Right of Independence, by the foreign occupying powers, we stand this day, in all honor, dignity and respect, of this sacred land, to restore our Independent and Sovereign Nation State of Hawaii.

We pledge that our commitment will continue until the illegal occupation ends, and the revival of our Culture of our Independent and Sovereign Nation State has been fortified, with the Spirit of Aloha totally restored, and the spirit of justice, freedom and liberation, shall once again bring peace on earth for all humanity.

We call upon our great people, and all Nations of the World, to unite and act this day, to declare and proclaim our inalienable Sovereignty of the Nation State of Hawaii, fully restored and functional, and arise in the uniting of freedom and dignity in our homeland, which is the homeland of the free, now and forever.

Therefore, the Kupuna, in General Council Assembled, by the Authority recognized and vested in the Aha Kuka O Ka Ohana, in the name of the Kanaka Maoli people, to preserve and to forevermore cultivate the Heritage and Culture of the Kanaka Maoli, do solemnly publish, declare and proclaim, that the Independent and Sovereign Nation State

of Hawaii, free and absolved from any other political connection from any other Nation State, and whomsoever disregards the principles and Rule of the Law of Nations, Justice, Integrity and Morality of Character and Humanity, who by force and acts of aggression, illegally occupy's our Territory.

We have therefore concluded, that the facts are self-evident. That to continue under any colonial regime would cause the destruction and extinction of our culture and people. Our firm commitment for the protection of our divine heritage, We mutually pledge our Lives, Our Fortunes, our Sacred Honor, in the Spirit of Aloha.