The Role of Human Rights in Advancing Justice for Native Hawaiians: Infusing Indigenous Human Rights with Kanaka Maoli Values

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I. INTRODUCTION 79

II. HISTORICAL AND LEGAL BACKGROUND: HAWAIʻI'S PUBLIC LAND TRUST 87

A. Early Native Hawaiian Land Tenure Grounded in a Special Relationship with Land 87

B. Protecting Native Land Rights During a Transition to Private Property in the Hawaiian Kingdom 88

C. Enduring Colonization After the Overthrow Through the Republic of Hawaiʻi 92

D. Native Self-Determination in a New American Era: The Territory of Hawaiʻi 93

E. State of Hawaiʻi and a Public Trust Purpose for Improving Native Hawaiians' Conditions 97

1. Embracing Restorative Justice Through Hawaiʻi's 1978 Constitutional Convention 98

2. Recognized Unrelinquished Claims to Sovereignty and Land 100 Years After the Overthrow of the Hawaiian Kingdom 100

III. FOUR INDIGENOUS VALUES FOR CONTEXTUAL LEGAL ANALYSIS 104

A. Historical Context and Approach 105

B. Developing a Framework 108

1. Moʻomeheu (Cultural Integrity) 110

2. ʻĀina (Lands and Natural Resources) 112

3. Mauli Ola (Social Determinants of Health and Well-Being) 113

4. Ea (Self-Government) 113

IV. INDIGENOUS HUMAN RIGHTS AND RESTORATIVE JUSTICE UNDER INTERNATIONAL LAW 115

A. The United Nations Declaration on the Rights of Indigenous Peoples and Free, Prior and Informed Consent 116

B. An International Human Right to Reparation for Gross Human Rights Violations 122

C. Other Human Rights Instruments and Bodies 126

1. The Human Rights Committee and the International Covenant on Civil and Political Rights 127

2. The Committee on the Elimination of Racial Discrimination and the International Convention on the Elimination of All Forms of Racial Discrimination 129

3. The Organization of American States 132

D. Incorporating Restorative Justice Principles and International Human Rights 143

V. HINDERING RESTORATIVE JUSTICE FOR NATIVE HAWAIIANS: ACT 236'S THREAT TO NATIVE HAWAIIANS AND HAWAI'I'S PUBLIC LAND TRUST 143

A. Overview 144

1. Problematic Aspects of Act 236 144

2. The State of Hawai'i's Approach to Native Hawaiian Interests 145

3. Historic and Ongoing Injustice 146

4. Restorative Justice and Act 236 147

B. Mo'omeheu: The State's Mismanagement of the Public Land Trust and Failure to Provide Adequate Opportunities for Meaningful Consultation with Native Hawaiian Beneficiaries 148

1. BLNR's Mismanagement and Abuse of the Public Land Trust 148

2. The State's Failure to Provide Adequate Opportunities for Meaningful Consultation with Native Hawaiian Beneficiaries 154

C. ʻĀina: Exempting DLNR Leases from HRS § 171 and DLNR's Ability to Fulfill its Duties Pursuant to the Hawaiʻi's Public Land Trust and the Public Trust Doctrine 159

D. Mauli Ola: Evaluating the Impact of Act 236 on the Social Determinants of Health and Well-Being for Native Hawaiians 164

E. Ea: Passing Act 236 Without Native Hawaiian's Free, Prior and Informed Consent 169

VI. CONCLUSION 173

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I. INTRODUCTION

Hānau ka ʻāina, hānau ke aliʻi, hānau ke kanaka.
Born was the land, born were the chiefs,
born were the common people.[1]

He aliʻi ka ʻāina, he kauwā ke kanaka.
The land is a chief, man is her servant.[2]

The symbiotic bond between ʻāina (lands and resources), aliʻi (chiefs), and the Kānaka Maoli (Native Hawaiian people) is illustrated in the two ʻōlelo noʻeau (Hawaiian proverbs) above.[3] Chiefs and the people care for the land,

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[1] MARY KAWENA PUKUI, ʻŌLELO NOʻEAU: HAWAIIAN PROVERBS AND POETICAL SAYINGS 56 (1983) ("The land, the chiefs, and the commoners belong together.").

[2] *Id.* at 62 ("Land has no need for man, but man needs the land and works it for a livelihood.").

[3] Throughout this article, the terms Kānaka Maoli, Kānaka, Maoli, Native Hawaiian, native Hawaiian, Hawaiian, and Kānaka ʻŌiwi are used to refer to the Native Hawaiian people. Maoli scholar and professor Noelani Goodyear-Kaʻōpua explains how the usage of "Kānaka Maoli" to identify Native Hawaiians re-emerged:

which in turn provides for them, creating a state of balance or harmony that requires protection and maintenance for the benefit of all.[4] To maintain pono (perfect order, equity, balance), Native Hawaiians "are instilled, at birth, with particular kuleana" (privileged responsibilities, birthrights) that stem from their familial relationship to ʻāina (lands and natural resources).[5] These rights and responsibilities preserve pono and serve as a pathway for achieving restorative justice and reconciliation for Native Hawaiians.

These special relationships to ʻāina, aliʻi, and other Kānaka (Native Hawaiian people)[6] dictate Native Hawaiians' kuleana. They also inform how Native Hawaiians ʻauamo (shoulder, carry, bear)[7] that kuleana to each other

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> In the late 1980s and 1990s, this way of self-identifying became more and more frequent, as Native Hawaiian people asserted our distinctive identity in our own language. The reemergence of ancestral ways of describing ourselves also disrupts the racialized, U.S. legal definition of "native Hawaiian," which uses blood quantum measurements that do not emerge from Hawaiian culture . . . . [T]he terms "Kanaka Maoli," "Kanaka ʻŌiwi," or simply "Kanaka," "Maoli," or "ʻŌiwi," [] refer to the autochthonous people of the Hawaiian archipelago—the original people who emerged from this place. These terms indicate our genealogical relationship to the lands and waters of our islands and distinguish us from other residents.

Noelani Goodyear-Kaʻōpua, *Introduction*, *in* A NATION RISING: HAWAIIAN MOVEMENTS FOR LIFE, LAND, AND SOVEREIGNTY 2 (Noelani Goodyear-Kaʻōpua et al. eds. 2014); *see generally* Melody Kapilialoha MacKenzie & D. Kapuaʻala Sproat, *A Collective Memory of Injustice: Reclaiming Hawai'i's Crown Lands Trust in Response to Judge James S. Burns*, 39 U. HAW. L. REV. 481, 527–28 (2017) (explaining the statutory differences between the terms "native Hawaiian" and "Native Hawaiian"). While sources quoted or cited in this article may use "native Hawaiian" (lowercase *n*) for purposes limited to the Hawaiian Homes Commission Act, this article does not use the term for those same purposes.

[4] *See* Leon Noʻeau Peralto, *Portrait. Mauna a Wākea: Hānau ka Mauna, the Piko of our Ea*, *in* A NATION RISING: HAWAIIAN MOVEMENTS FOR LIFE, LAND, AND SOVEREIGNTY, *supra* note 3, at 234 (describing the relationship of Native Hawaiians with the mountain known as Maunakea or Mauna a Wākea as "both the Mauna and Kanaka are instilled, at birth, with particular kuleana to each other. This relationship is reciprocal, and its sanctity requires continual maintenance in order to remain pono, or balanced.") (footnote omitted); *see also* LILIKALĀ KAMEʻELEIHIWA, NATIVE LANDS AND FOREIGN DESIRES: PEHEA LĀ E PONO AI? 13 (1992) (explaining that balance was traditionally an integral part of Native Hawaiian religion and politics).

[5] Peralto, *supra* note 4, at 234.

[6] MARY KAWENA PUKUI & SAMUEL H. ELBERT, HAWAIIAN DICTIONARY 127 (rev. and enlarged ed. 1986).

[7] *Id.* at 30.

and to the land itself, along with all its resources and elements—all of which were held in trust for future generations. Just as aliʻi managed resources as trustees on behalf of the makaʻāinana (commoners),[8] today, makaʻāinana are trustees of ʻāina on behalf of future generations of Native Hawaiians.[9] This primordial relationship between Native Hawaiians and ʻāina has been preserved not only through native traditions and customs carefully perpetuated over generations, expressed as the above Hawaiian proverbs, but also, since the late-1970s, through legal provisions encoded in Hawaiʻi's constitution and other local laws. These protections, located in the State's constitution, embody principles of reparative justice and amount to promises to restore and protect Native Hawaiians' relationship with ʻāina.[10]

Today, the State of Hawaiʻi stewards, as trustee, about 1.2 million acres of Public Land Trust ʻāina made up of former Kingdom Crown and Government lands. The State and its agencies are thus charged with legal kuleana to the Public Land Trust and its beneficiaries, especially Native Hawaiians. The State, however, has continually failed to fully and effectively protect Native Hawaiians' specially recognized interests in these lands. Especially given recent legislation, the mishandling of the Public Land Trust offers a poignant example of how fusing Hawaiian values with international human rights norms reveals the continuing injustice meant to be rectified by the State's constitution and local court rulings. That fusion does this by providing a framework for assessing and crafting combined efforts by Hawaiian communities, government, and the public to ensure that Native Hawaiian justice is an integral aspect of future land decisions.

During Hawaiʻi's 2021 legislative session, the House of Representatives and State Senate passed House Bill 499, despite overwhelming opposition by Native Hawaiians and others.[11] Subsequently, Governor David Ige allowed

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[8] *Id.* at 224.

[9] *See Public Land Trust: Justice Delayed is Justice Denied*, KAMAKAKOʻI, https://www.kamakakoi.com/plt (last visited Oct. 15, 2024) (describing the increase of the Office of Hawaiians Affiars ("OHA")'s public land trust revenue allocation to benefit future generations of Native Hawaiians).

[10] In *Ka Paʻakai O Ka ʻĀina v. Land Use Commission*, 94 Hawaiʻi 31, 50, 7 P.3d 1068, 1087 (2000), the Hawaiʻi Supreme Court described the constitutional provisions as a "promise of preserving and protecting customary and traditional rights . . . ." Twenty-three years later, Hawaiʻi's highest court "h[e]ld the State and its agencies to the promise made in 1978" to reaffirm and protect traditional and customary practices. Flores-Case ʻOhana v. Univ. of Haw., 153 Hawaiʻi 76, 80, 536 P.3d 601, 605 (2023) (citing HAW. CONST. art. XII, § 7).

[11] For example, organizations including OHA, Ka Lāhui Hawaiʻi Kōmike Kalaiʻāina, the Democratic Party of Hawaiʻi Hawaiian Affairs Caucus, Native Hawaiian Legal Corporation,

House Bill 499 to become law without his signature as Act 236.[12] Act 236 enables the Board of Land and Natural Resources ("Board" or "BLNR") to extend the duration of certain leases of the Public Land Trust 'āina to non-Hawaiians—lands to which Native Hawaiians have had unrelinquished claims—to a total of one-hundred and five years.[13]

The State's handling of Act 236, in the face of massive Native Hawaiian opposition, uplifts important questions for Hawai'i, its people generally, and its Indigenous population of Native Hawaiians specifically. When Act 236 became law, did the State legislative and executive branches betray the restorative justice values espoused during the 1978 Constitutional Convention?[14] If the 1978 Constitutional Convention "defined Hawaii's

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and the Sierra Club of Hawai'i all submitted written testimony against HB 499 to the Senate Committee on Water and Land. In its testimony to the Committee, OHA asserted that "[c]ritical amendments are necessary to minimally uphold the State's fiduciary obligations and the interests of Native Hawaiians and the public in the disposition of public lands under this measure." *Legislative Testimony, HB499 HD2* (Mar. 15, 2021, 1:00 PM), https://www.capitol.hawaii.gov/sessions/Session2021/Testimony/HB499_HD2_TESTIMONY_WTL_03-15-21_.PDF. Native Hawaiian Legal Corporation emphasized that Native Hawaiian "claims to ownership of the 'ceded' lands remains outstanding and unresolved[.]" *Id*. Many individuals also submitted written testimony in opposition such as Native Hawaiian Scholar and Law Professor Emerita, Melody Kapilialoha MacKenzie; and Maui County Councilwoman, Tamara Paltin. MacKenzie expressed concern regarding HB499's potential impact to "substantially inhibit the [Board of Land and Natural Resources] from fulfilling its fiduciary obligations, and otherwise ensuring the best and most appropriate uses of the Public Land Trust." *Id.*

[12] Act of July 7, 2021, No. 236, 2021 Haw. Sess. Laws 850 (codified at HAW. REV. STAT. ch. 171). Throughout this article, references are made to both HB 499 and Act 236. HB 499 is used to refer to the proposed legislation *during* its legislative process. Act 236 is used to refer to the bill after it became law.

[13] *See* Joint Resolution to Acknowledge the 100th Anniversary of the January 17, 1893 Overthrow of the Kingdom of Hawai'i, and to Offer an Apology to Native Hawaiians on Behalf of the United States for the Overthrow of the Kingdom of Hawai'i, S.J. Res. 19, 103rd Cong., 107 Stat. 1510 (1993) [hereinafter Apology Resolution] (acknowledging "the indigenous Hawaiian people never directly relinquished their claims to their inherent sovereignty as a people or over their national lands to the United States"). The Board is the state agency charged with managing 1.2 million acres of Hawai'i's public lands on behalf of Public Land Trust beneficiaries. BLNR is comprised of seven members and a Chairperson who is the executive head of the Department. For more information about BLNR and its duties, *see* HAW. REV. STAT. § 171-4.

[14] *See* Anita Hofschneider, '*Fragile Aloha': Why Hawai'i's Last Constitutional Convention Was Important*, HONOLULU CIV. BEAT (Sept. 13, 2018), https://www.civilbeat.org/2018/09/fragile-aloha-why-hawaiis-last-constitutional-convention-was-important/ (detailing breakthroughs on Native Hawaiian issues and referencing

political identity,"[15] how does Act 236, and other State conduct disregarding Native Hawaiian claims, change that identity? Did the State of Hawai'i turn its back on its restorative justice commitments to advance greater Native Hawaiian self-determination and self-governance[16] by ignoring Native Hawaiian land claims and allowing a state agency to extend leases to 'āina that an anticipated Native Hawaiian government may also claim?

Act 236 epitomizes how Hawai'i's diverse populace as a whole continues to grapple with Native Hawaiian justice issues. Moreover, there is no consensus within the Native Hawaiian community regarding the best way forward for its collective self-determination. Discourse within that community has focused largely on two options. One is a U.S. domestic option: federal recognition of a Native Hawaiian government[17] akin to federally recognized Indigenous governments with a government-to-government relationship with the United States. Under this framework, Indian tribes also enjoy substantial autonomy from state governments surrounding them as a result of their sovereign immunity and exercise of criminal and civil jurisdiction over their territories.[18] The other is complete

convention delegate and former Governor John Waihe'e who described the Hawai'i legislature as "the most progressive in the nation" for "mandat[ing] employer-sponsored health care "); *see also* Rai Saint Chu, *1978 ConCon Delegate Says a ConCon Now Would Be Too Risky*, HONOLULU STAR-ADVERTISER (Oct. 23, 2018), https://www.staradvertiser.com/2018/10/23/editorial/island-voices/column-1978-concon-delegate-says-a-concon-now-would-be-too-risky/ (describing herself as a progressive lawyer and 1978 Constitutional Convention delegate where accomplishments were made that included Indigenous, environmental, and labor protections).

[15] Chu, *supra* note 14.

[16] *See, e.g.*, HAW. REV. STAT. ch. 6K-9 (providing for the transfer of management and control of Kaho'olawe Island and its surrounding resources to a future "sovereign native Hawaiian entity upon its recognition by the United States and the State of Hawai'i"); Act of July 6, 2011, No. 195, 2011 Haw. Sess. Laws 646 (codified at HAW. REV. STAT. ch. 10H) (recognizing Native Hawaiians as the only Indigenous people of Hawai'i and establishing the Native Hawaiian Roll Commission to register eligible Native Hawaiians for a future Native Hawaiian constitutional convention).

[17] Procedures for Reestablishing a Formal Government-to-Government Relationship with the Native Hawaiian Community, 81 Fed. Reg. 71, 278 (Oct. 14, 2016) (codified at 43 C.F.R. pt. 50); *see* Troy J.H. Andrade, *Legacy in Paradise: Analyzing the Obama Administation's Efforts of Reconciliation with Native Hawaiians*, 22 MICH. J. RACE & L. 273 (2017).

[18] Indigenous Nations with a government-to-government relationship with the United States generally enjoy autonomy from state governments. Worcester v. Georgia, 31 U.S. 515, 519 (1832) (establishing the principle that Indian nations are distinct, independent, political communities with their own inherent sovereignty, and that states cannot impose their laws on tribal lands or interfere with tribal self-governance); McClanahan v. Arizona State Tax

independence from the United States and international recognition of a restored Hawaiian Kingdom[19] based on a theory that the Hawaiian Kingdom

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Comm'n, 411 U.S. 164, 176 (1973) (holding that Arizona could not impose a state income tax on a Native American residing on her reservation whose income derived from reservation sources, and reaffirming the principle that states have limited authority over tribal members on tribal lands); California v. Cabazon Band of Mission Indians, 480 U.S. 202, 211–12 (1987) (holding that California could not enforce its gambling laws upon the Cabazon Band's gaming activities on their reservation). Federally recognized Indigenous governments also have tribal sovereign immunity from lawsuits. Santa Clara Pueblo v. Martinez, 436 U.S. 49, 58 (1978) (upholding tribal sovereign immunity; tribes cannot be sued in federal court without their consent or an explicit Congressional waiver); Kiowa Tribe of Oklahoma v. Mfg. Techs., Inc., 523 U.S. 751, 754 (1998) (reaffirming tribal sovereign immunity, holding that tribes are immune from lawsuits in state courts, including cases arising from commercial activities conducted off the reservation); Michigan v. Bay Mills Indian Cmty., 572 U.S. 782, 788 (2014) (reaffirming again that tribal sovereign immunity protects a tribe from being sued by a state even when a tribe conducts gaming activities on tribally-acquired land outside of its reservation). Tribes exercise criminal jurisdiction over their land base and members and non-member Indians. United States v. Wheeler, 435 U.S. 313, 325–26 (1978) (holding that tribal criminal-prosecutorial authority is inherent in tribes, distinct from federal authority, and not subject to the Double Jeopardy Clause); *but see* Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 195 (1978) (holding that tribes do not have inherent criminal jurisdiction over non-Indians and limiting tribes' criminal jurisdictional reach); United States v. Lara, 541 U.S. 193, 196–99 (2004) (upholding Congressional acknowledgment of tribal inherent criminal jurisdiction over non-member Indians). Tribes also exercise civil jurisdiction over their lands. Montana v. United States, 450 U.S. 544, 565–66 (1981) (holding that tribes did not have inherent civil regulatory authority over non-Indians on non-Indian fee-simple lands within a reservation, with two exceptions).

Federal recognition of a government-to-government relationship between the United States and an Indigenous Government conveys an important and unique status that lowers the judicial scrutiny against federal government actions toward Indigenous Peoples. "As long as the special treatment can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians, such legislative judgments will not be disturbed." Morton v. Mancari, 417 U.S. 535, 555 (1974). In *Mancari*, the Supreme Court recognized that Indian preferences were "political rather than racial in nature." *Id.* at 553 n.24. For an informative and thoughtful examination of the Supreme Court's "method[s] for analyzing the constitutionality of Acts of Congress establishing a favorable or unfavorable treatment towards Indian people[,]" *see* Matthew L.M. Fletcher, *Federal Indian Law as Method*, 95 U. COLO. L. REV. 375 (2024) (explaining that the Supreme Court's "*Mancari* method is the only acceptable method" for analyzing Congressional acts dealing with Indian status classifications "in light of an equal protection challenge under the Constitution."). *Id.* at 376 and 385.

[19] *See generally* Williamson B.C. Chang, *Darkness Over Hawaii: The Annexation Myth is the Greatest Obstacle to Progress*, 16 ASIAN-PAC. L. & POL'Y J. 70 (2015) (questioning the validity of the process the United States used to annex Hawai'i in 1898). Chang acknowledged these two considerations and emphasized the importance of examining the annexation process,

continues to exist under international law. The lack of consensus and meaningful developments, however, poses another important question: how can Native Hawaiians, as an Indigenous People, protect their land claims in the absence of both federal recognition and international recognition? Moreover, how can the State of Hawai‘i safeguard Native Hawaiian interests without a formal government-to-government relationship? In other words, how can Native Hawaiians and the State ‘auamo their kuleana to Hawai‘i’s public lands and its natural and cultural resources, including Native Hawaiians’ rights as Indigenous Peoples?

As Native Hawaiians contemplate how best to advance their interests, protect their rights and perfect their claims, this article examines the efficacy of their pursuit of restorative justice. It does so in part through international law, especially at a time when governments worldwide are increasingly recognizing Indigenous Peoples’ rights. Notably, two United Nations member states, New Zealand and Canada, which previously voted against the United Nations Declaration on the Rights of Indigenous Peoples, are now working to infuse the Declaration into their national laws.[20]

This article concludes that Native Hawaiians will most significantly and appropriately advance their interests as Indigenous People by infusing international human rights principles into accepted Native Hawaiian values of restorative justice and making those principles and values an explicit part of the legal framework for handling Hawai‘i’s lands. In doing so, Native Hawaiians can deploy human rights norms as important tools to further promote restorative justice to begin to heal from the persisting wounds of colonization. Concurrently, the State government can be encouraged—

“[w]hether they seek restoration of the Kingdom of Hawai‘i or Recognition as a Federal Indian Tribe, Native Hawaiians must learn the truth about Annexation.” *Id.* at 72.

[20] Canada and New Zealand, along with the United States and Australia, originally voted against the U.N. Declaration in 2007. The Canadian government, however, has reversed course and is now working towards implementation of the U.N. Declaration. *Implementing the United Nations Declaration on the Rights of Indigenous Peoples in Canada*, DEP’T OF JUST. CANADA, https://www.justice.gc.ca/eng/declaration/index.html, (June 20, 2024) (describing the 2020 introduction and 2021 passage of Bill C-15, the United Nations Declaration on the Rights of Indigenous Peoples Act, to implement the U.N. Declaration). New Zealand Aotearoa is also implementing the U.N. Declaration. *Next Steps in Action Plan for Indigenous Rights Kicks Off*, BEEHIVE.GOVT.NZ: THE OFFICIAL WEBSITE OF THE NEW ZEALAND GOVERNMENT (Oct. 14, 2021), https://www.beehive.govt.nz/release/next-steps-action-plan-indigenous-rights-kicks (describing how the Aotearoa New Zealand government is proceeding with its U.N. Declaration implementation plan during the COVID-19 pandemic).

indeed pressured—to infuse such norms into its policies, procedures, and processes to fulfill its kuleana to Native Hawaiians and the Public Land Trust and deepen its commitments to Native Hawaiian self-determination consistent with international obligations.

This article contributes to the literature by providing a comprehensive analysis of Hawai'i's Act 236 through the lens of Indigenous values of restorative justice—mo'omeheu (cultural integrity), 'āina (land and natural resources), mauli ola (social determinants of health and well-being), and ea (self-governance or autonomy). It uniquely integrates restorative justice principles with international human rights frameworks, highlighting the necessity of balancing legal formalism with contextual understanding to protect Native Hawaiians' rights to lands and resources. By drawing parallels with human rights instruments, human rights bodies, and landmark cases from the Inter-American Human Rights system, the article underscores the importance of Indigenous Peoples' rights to their lands, legal recognition of those rights, and the physical protection of Indigenous territories, lands, and resources. This approach not only enhances the understanding of Act 236's implications but also offers a robust template for evaluating similar legislative measures globally, providing a resource for policymakers, legal scholars, and advocates of Indigenous rights.

To this end, in Part II, this article deconstructs relevant Native Hawaiian history, highlighting the origin of Hawai'i's public lands and the Public Land Trust. This part also shows the unique status of Native Hawaiians in the State of Hawai'i, and highlights some of the State and federal governments' efforts toward restorative justice for Native Hawaiians. Next, Part III recenters Act 236 and frames the remaining sections by deploying contextual legal analysis rooted in Maoli values and aimed toward restorative justice, rather than "equality" in a manner that both complements and challenges traditional legal formalist analysis. Part IV situates the State's approach to public lands—to which Native Hawaiians have unrelinquished claims—within a larger global framework by identifying international human rights instruments and bodies relevant to Indigenous Peoples' restorative justice pursuits. Part V then analyzes issues surrounding Act 236 and Hawai'i's Public Land Trust in the context of international Indigenous human rights and the four Indigenous values for contextual legal analysis. Lastly, Part VI highlights local and non-local developments and identifies opportunities for the State to better fulfill its restorative justice promises to Native Hawaiians by implementing international human rights principles and protections for Indigenous Peoples into its policies and laws.

II. HISTORICAL AND LEGAL BACKGROUND: HAWAIʻI'S PUBLIC LAND TRUST

Just as Native Hawaiians' relationship to ʻāina informs kuleana (responsibilities), so does their relationship to the past (and future).[21] The history of the "crown, government and public lands" is vital context necessary to begin to understand the legal issues surrounding Hawaiʻi's Public Land Trust today. After an overview of Native Hawaiian worldviews and traditional land tenure, the history presented here focuses on the Public Land Trust through four relevant eras: the Hawaiian Kingdom; the Republic of Hawaiʻi; the Territory of Hawaiʻi; and the State of Hawaiʻi. While the Hawaiian Kingdom—as an independent sovereign State comprised of islands united under a single government—existed since 1810, Native Hawaiians were previously organized into smaller regional or island-based chiefdoms.[22] This article focuses primarily on the Kingdom period from the 1830s until the overthrow of the Hawaiian monarchy in 1893. The short-lived and so-called Republic of Hawaiʻi follows the Hawaiian Kingdom era. The United States' subsequent annexation of the Hawaiian Islands, from the Republic in 1898, produced the Territory of Hawaiʻi. The last part of the relevant history focuses on the State of Hawaiʻi, which was established in 1959 and continues today.

A. *Early Native Hawaiian Land Tenure Grounded in a Special Relationship with Land*

A result of the familial connection between Kānaka Maoli and ʻāina (land, or "that which feeds"), and showcasing intimate biocultural knowledge developed since time immemorial, Native Hawaiians developed a complex

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[21] This is illustrated through another ʻōlelo noʻeau (Hawaiian proverb): I ka wā ma mua, ka wā ma hope. Ka wā mamua translates to "the time in front," meaning the past, and ka wā ma hope translates to "the time in back," or the future. Put together, the proverb describes how Kānaka Maoli stand firmly in the present, with their backs to the future and eyes fixed on the past, "seeking historical answers for present-day dilemmas." KAMEʻELEIHIWA, *supra* note 4, at 22.

[22] *See id.* at 2–3; NOENOE K. SILVA, ALOHA BETRAYED: NATIVE HAWAIIAN RESISTANCE TO AMERICAN COLONIALISM 15 (2004) [hereinafter SILVA, ALOHA BETRAYED] (examining "some of the Kanaka Maoli's early (1778–1854) struggles with foreigners over government and land" using "texts written by nineteenth- and early-twentieth-century Kānaka in their mother tongue"); KAMANAMAIKALANI BEAMER, NO MĀKOU KA MANA: LIBERATING THE NATION (2014) (detailing how ruling aliʻi selectively appropriated tools and ideas of the West to create "a hybrid system based on an enduring tradition of Hawaiian governance and intended to preserve, strengthen, and maintain the lāhui").

land tenure system consistent with their understanding that they descended from and belonged to ʻāina. Grounded in their kuleana to Mālama (care for) and Aloha ʻĀina (love the land),[23] land was held in trust for all, including the future generations who stand to inherit and become the next stewards of it.[24] Contemporarily described as the "ahupuaʻa system," Native Hawaiians' land tenure system was comprised of palena ʻāina (place-boundaries within ahupuaʻa), which "delineated the resource access of makaʻāinana and aliʻi on the ground, literally connecting people to the material and spiritual resources of these places."[25] Typically under the management of a konohiki (land manager), ahupuaʻa (land division)—marked by ahu ("sites of worship, signified by stone cairns")[26]—describes one type of land division or unit. Palena ʻāina (or "palena") "were not mapped on paper . . . but maintained on the ground and in the minds of makaʻāinana and aliʻi."[27] Palena delineated place while importantly governing resources rather than access.[28] According to Native Hawaiian professor and scholar Dr. Kamanamaikalani Beamer, diverse palena allowed complex resources and societal systems to flourish:

> The range and variation of palena of ahupuaʻa are demonstrations of the complex ways ʻŌiwi understood and ordered the ʻāina to make society more productive. The diversity of palena—which were created by akua and cared for by kanaka—allowed ʻŌiwi to create land systems that supported greater populations than are present on all islands (other than Oʻahu) today.[29]

B. *Protecting Native Land Rights During a Transition to Private Property in the Hawaiian Kingdom*

In the 1830s, the increasing number of settlers to the Hawaiian Islands drastically altered the availability of resources for Native Hawaiians.[30] In response, Native Hawaiian aliʻi "understood . . . and appropriated [laws] selectively to further their own ends."[31] Maoli leaders wielded written "law

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[23] *See* KAMEʻELEIHIWA, *supra* note 4, at 25.

[24] *See* HAW. CONST. of 1840 (recognizing rights "bestowed [] alike on all men and all chiefs, and all people of all lands").

[25] BEAMER, *supra* note 22, at 32–33.

[26] *Id.* at 40–41.

[27] *Id.* at 36.

[28] *Id.* at 33.

[29] *Id.* at 42.

[30] *See id*. at 104–05.

[31] BEAMER, *supra* note 22, at 104–05.

[]as a tool that could be manipulated nonviolently to maintain effective control domestically while decreasing the likelihood of external intervention[.]"[32] King Kamehameha III transitioned the Hawaiian Kingdom from an absolute monarchy to a constitutional one.[33] In 1842, the United States recognized the Hawaiian Kingdom's independence.[34] Later, in November 1843, monarchs of Great Britain and France jointly declared their recognition of the Hawaiian Kingdom's independence and of the Kingdom as a member of the family of nations.[35] The Hawaiian Kingdom had unique characteristics for a nineteenth-century independent nation-state.[36] Native Hawaiians, as aboriginal subjects of the crown,[37] exercised internal self-

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[32] *Id.* at 105.

[33] Rex v. Booth, 2 Haw. 616, 630 (1863) (describing the evolution of the Hawaiian monarchy at the time of Kamehameha III); *see* SILVA, ALOHA BETRAYED, *supra* note 22, at 36 (describing the need for international recognition due to Hawai'i's vulnerability).

[34] BEAMER, *supra* note 22, at 133 ("President Tyler . . . sent a message to Congress, stating that the United States 'seeks no exclusive control over the Hawaiian government, but is content with its independent existence, and anxiously wishes for its security and prosperity.' . . . [H]is message was a positive step toward a formal declaration.").

[35] SILVA, ALOHA BETRAYED, *supra* note 22, at 37. Lā Kū'oko'a (or "Independence Day") has been celebrated annually since the proclamation was issued on November 28, 1843. *Id.* The State of Hawai'i legislature in 2023 acknowledged Lā Kū'oko'a as a day of rememberance of Hawai'i's historical independence. 2023 Haw. Sess. Laws Act 11; Kaiya Laguardia, *Hawaiian Independence Day is Officially Recognized*, HONOLULU CIV. BEAT (May 17, 2023), https://www.civilbeat.org/2023/05/hawaiian-independence-day-is-officially-recognized/.

[36] Dr. Beamer describes how the Kingdom's inimitability was born from Hawai'i pae 'āina, its people, and their longstanding traditions and customs:

> Hawaiian land concepts are key to understanding the modification of traditional structures by the ali'i in the kingdom . . . These ancient structures were not abandoned; rather they were reformed in ways that can be understood as "modifying traditions." . . .
>
> In one sense, ali'i were borrowing from European models to modify and codify existing political structures. But in another sense, the Hawaiian Kingdom "modernized" to gain respect in the international community and, therefore, to have a better chance of directing its own destiny.

BEAMER, *supra* note 22, at 104.

[37] This article does not substantially differentiate between a *subject* and a *citizen.* Generally, however, "[t]he term 'subject' . . . referred to the vassals of a lord, bound by the duty of allegiance to respect him as their master." Maximilian Koessler, *"Subject," "Citizen," "National," And "Permanent Allegiance*," 56 YALE L.J. 58, 59 (1946) (citations omitted). "The term 'citizen' supplanted 'subject' in this country and others . . . by a process of lexicographic delineation." *Id.* at 60. Koessler further explained, "[I]n the period immediately

determination and self-governance within the Hawaiian Kingdom, which also developed a multi-ethnic citizenry.[38]

The 1848 Māhele—"a division of nearly all the lands in the Hawaiian Kingdom"—was a landmark event that continues to shape Hawai'i and its laws, lands, and resources.[39] It also proved pivotal in the context of Hawai'i as a developing nation-state. The Declaration of Rights and Laws of 1839 and the Constitution of 1840 "codified the concepts that the lands of the kingdom were jointly owned by" the mō'ī, ali'i, and the maka'āinana, "though with differing degrees of interest."[40] Thus, to establish a hybridized private property system, the Māhele was designed to settle the constitutionally granted and vested rights of three groups: mō'ī, ali'i, and maka'āinana.[41] Dr. Beamer explained, while the Māhele ushered in private property concepts, it left maka'āinana land rights intact.

> The Māhele—which established distinct land bases for the mō'ī, the government, and the chiefs and ultimately made large-scale private ownership possible—was nevertheless subject to the rights of maka'āinana to make their claims for land. One way to conceptualize this principle is to imagine all the Hawaiian 'aina as a cake with three distinct layers. The Māhele was the instrument to remove the layers of the king and chiefs, leaving the maka'āinana layer in perpetuity.[42]

Native Hawaiians' kuleana to their familial homelands nonetheless remained integral to Maoli culture, life, and identity. Kamehameha III, therefore, set aside Government Lands for the benefit of the chiefs and people, and he held designated Crown Lands, which were "reserved to the

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before the American Revolution, there was no such difference in connotation between 'subject' and 'citizen' as would predicate reserving the status of 'citizen' to the people of a republic and 'subject' to those under the sovereignty of a monarch." *Id.*

[38] *See generally Rex*, 2 Haw. 616 (demonstrating aboriginal Hawaiian internal self-determination and self-governance through prohibition law that restricted alcohol sales to aboriginal Hawaiians, but not non-aboriginal Hawaiian subjects and showing that the Hawaiian Kingdom's citizenry included non-aboriginal Hawaiians); Naone v. Thurston, 1 Haw. 220 (1856) (showing also, through a unique tax law case that the Kingdom's citizenry was multi-ethnic, Thurston was a non-aboriginal Hawaiian subject born on Hawaiian Kingdom soil to immigrant missionary parents).

[39] BEAMER, *supra* note 22, at 142.

[40] *Id.*

[41] *Id.*

[42] *Id.*

sovereign" and "provided a source of income and support for the crown and, in turn, were a resource for the Hawaiian people[.]"[43] The principles underlying the Māhele "marked a continuation of the trust concept that the sovereign held the lands on behalf of the gods and for the benefit of all."[44]

After transitioning to a private property system through the 1848 Māhele,[45] the Kingdom government formally recognized native tenant rights by 1850.[46] "Deeds executed during [this transitional process] conveying land contained the phrase '*ua koe ke kuleana o na kānaka*,' or 'reserving the rights of all native tenants,' in continuation of the reserved tenancies which characterized the traditional Hawaiian land tenure system."[47] The subsequent Kuleana Act of 1850 addressed the interests of native tenants, whose interests remained undefined following the Māhele.[48] Together, the Māhele and the Kuleana Act "perpetuated and codified many traditional Hawaiian relationships between people and property."[49] Recent scholarship has recognized that "the Māhele

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[43] Melody Kapilialoha MacKenzie, *Public Land Trust*, *in* NATIVE HAWAIIAN LAW: A TREATISE 76, 79 (Melody Kapilialoha MacKenzie et al., eds., 2015) [hereinafter MacKenzie, *Public Land Trust*].

[44] *Id.*

[45] The mechanism for this transition is better known as the Māhele. One translation for Māhele is "division." PUKUI & ELBERT, *supra* note 6, at 219; *see also* BEAMER, *supra* note 22, at 142–53 ("Both the Kuleana Act and the Māhele can be seen as hybrid laws created through the authority of Kauikeaouli and the ali'i of his time . . . The Māhele process can be viewed as a process that protected Hawaiian interests in three main ways: (1) by awarding lands 'subject to the rights of native tenants,' (2) by codifying ancient place names and divisions, and (3) by institutionalizing traditional ahupua'a resource rights into law through the sections of the Kuleana Act."); Jocelyn B. Garovoy, *"Ua Koe Ke Kuleana O Na Kanaka" (Reserving the Rights of Native Tenants): Integrating Kuleana Rights and Land Trust Priorities in Hawai'i*, 29 HARV. ENV'T. L. REV. 523, 526 (2005) ("[B]etween 1845 and 1848 King Kamehameha III divided up land among the Kingdom, high-ranking chiefs, and the territorial government, in what is known as *Ka Mahele* (literally, 'The Division')[.]") (italics in original).

[46] Act of Aug. 6, 1850, Granting to the Common People Allodial Titles for Their Own Lands and House Lots, and Certain Other Privileges, *reprinted in* 1850 PENAL CODE OF THE HAWAIIAN ISLANDS 202–04 (Honolulu, Henry M. Whitney, Gov't Press 1850). MacKenzie explains "[t]he 1850 Kuleana Act also protected the rights of tenants to gain access to the mountains and the sea and to gather certain materials." Melody Kapilialoha MacKenzie, *Historical Background*, *in* NATIVE HAWAIIAN LAW: A TREATISE, *supra* note 43, at 2, 16 [hereinafter MacKenzie, *Historical Background*]; *see also* Act of July 11, 1851, 1851 STATUTE LAWS OF HIS MAJESTY KAMEHAMEHA III, KING OF THE HAWAIIAN ISLANDS 98–99 (amending the 1850 Kuleana Act to not require permission before gathering permitted items).

[47] Garovoy, *supra* note 45, 527.

[48] BEAMER, *supra* note 22, at 142.

[49] *Id.* at 152.

process may have secured ‘ōiwi rights as well as title to lands rather than being a means of severing traditional relationships to ‘āina.”[50]

Hawai‘i’s lands remained under Maoli control for another forty-five years until the 1893 overthrow of the Hawaiian Kingdom. In January 1893, following Queen Lili‘uokalani’s attempt to enact a new constitution that her people were demanding, a group of settler politicians and businessmen—traitorous subjects of the Crown and with U.S. military assistance—overthrew the Queen and her people’s Kingdom; the Queen yielded her authority under protest to the United States with the expectation that it would restore her.[51] While the Maoli people “immediately organized in protest[,]” the traitorous group “then occupied a government building, Ali‘iolani Hale, and declared themselves to be the provisional government of Hawai’i.”[52] Then, in 1894, “President Sanford Dole and his colleagues moved to establish a permanent government in order to legitimize their power and control over the resources in Hawai‘i.”[53] Despite continued Kānaka protests, the provisional government announced the Republic’s establishment on July 4, 1894.[54]

C. *Enduring Colonization After the Overthrow Through the Republic of Hawai‘i*

The goal of the leaders of the so-called Republic of Hawaii was to annex the Hawaiian Islands to the United States. Native Hawaiian resistance to annexation may have been a reason why the “republic” made it difficult for Native Hawaiians to vote.[55] As a result, the Republic of Hawai‘i lasted just long enough for the United States to annex the Hawaiian Islands, not through a treaty of annexation[56] but rather, through a mere joint resolution of

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[50] *Id.* at 143.

[51] MacKenzie, *Historical Background*, *supra* note 46, at 21; BEAMER, *supra* note 22, at 193–94; SILVA, ALOHA BETRAYED, *supra* note 22, at 129–30, 167–68; *see also* Apology Resolution, *supra* note 13.

[52] SILVA, ALOHA BETRAYED, *supra* note 22, at 130.

[53] *Id.* at 136.

[54] *Id.* at 130, 137–38.

[55] *See generally* Noenoe K. Silva, *I Kū Mau Mau: How Kānaka Maoli Tried to Sustain National Identity Within the United States Political System*, 45 AM. STUD. 9, 18 (2004); SILVA, ALOHA BETRAYED, *supra* note 22, at 137. For example, under the provisional government, “[p]eople again were required to sign an oath of loyalty to the republic in order to vote, sit on a jury, or hold any job with the government.” SILVA, ALOHA BETRAYED, *supra* note 22, at 137.

[56] Native Hawaiians protested American annexation of their islands. *See* SILVA, ALOHA BETRAYED, *supra* note 22, at 202.

Congress in 1898.[57] The Republic of Hawai‘i ceded whatever sovereignty it had to the United States.

In the annexation process, the Republic conveyed to the United States whatever title it held to Hawaiian Kingdom Crown and Government lands. Crown lands previously, "were the exclusive property of the [monarch] and were subject to the rights of native tenants." [58] Government lands were also "subject always to the rights of [native] tenants" when those lands were initially granted to the government by Kamehameha III.[59] Because all lands remained subject to native tenants' rights, the Māhele and other Kingdom Law enacted by mō‘ī (monarch) helped "secure[] ‘Ōiwi rights as well as title to lands" even as lands were "ceded" between changing governments.[60]

D. *Native Self-Determination in a New American Era: The Territory of Hawai‘i*

In 1898, based on the Joint Resolution of Annexation, 1.8 million acres of Hawaiian Government and Crown Lands were purportedly placed under U.S. federal control.[61] According to the Joint Resolution, the United States assumed "absolute fee and ownership of all public, Government, or Crown lands . . . belonging to the Government of the Hawaiian Islands, together with every right and appurtenance thereunto appertaining[.]"[62] The Resolution also "implicitly recognized the trust nature" of these lands, which was later affirmed by an 1899 U.S. attorney general opinion interpreting the Resolution language.[63]

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[57] Joint Resolution to Provide for Annexing the Hawaiian Islands to the United States, J. Res. 55, 55th Cong., 30 Stat. 750 (1898). The Joint Resolution, also called the Newlands Resolution, passed by a simple majority in each house, "supposedly making Hawai‘i a territory of the United States." SILVA, ALOHA BETRAYED, *supra* note 22, at 160. Professor Williamson B.C. Chang analyzes the U.S. Congressional debates and subsequent actions leading to the Joint Resolution and points out the flaws in the process, concluding that Hawai‘i was not validly annexed via the Joint Resolution. Chang, *supra* note 19, at 70.

[58] BEAMER, *supra* note 22, at 170–71.

[59] MacKenzie, *Historical Background*, *supra* note 46, at 14.

[60] BEAMER, *supra* note 22, at 143; PUKUI & ELBERT, *supra* note 6, at 251.

[61] MacKenzie, *Public Land Trust*, *supra* note 43, at 79.

[62] Joint Resolution to Provide for Annexing the Hawaiian Islands to the United States, J. Res. 55, 55th Cong., 30 Stat. 750 (1898).

[63] MacKenzie, *Public Land Trust*, *supra* note 43, at 79–80. The Joint Resolution provides, in relevant part:

> [A]ll revenues from or proceeds of the. . . . [public lands], except as regards such part thereof as may be used or occupied for the civil, military,

Although the United States annexed Hawai'i by joint resolution in 1898, two years passed before Congress provided a government for the Territory of Hawai'i through the Hawaii Organic Act.[64] While Native Hawaiians vociferously protested American annexation,[65] the Organic Act forced Native Hawaiian leaders to reevaluate their efforts to restore the Hawaiian monarchy and work within the U.S. system.[66]

> or naval purposes of the United States, or may be assigned for the use of the local government, shall be used solely for the benefit of the inhabitants of the Hawaiian Islands for educational and other purposes.

Joint Resolution to Provide for Annexing the Hawaiian Islands to the United States, J. Res. 55, 55th Cong., 30 Stat. 750 (1898).

[64] Hawaiian Organic Act, ch. 339, 31 Stat. 141 (1900).

[65] According to a translation of a Hawaiian language newspaper, one Native Hawaiian leader, James Kaulia, urged Native Hawaiians to "[p]rotest forever the annexation of the Hawai'i, until the very last aloha 'Āina [lives]." SILVA, ALOHA BETRAYED, *supra* note 22, at 147 (citing KE ALOHA AINA, 11 Sept. 1897). Silva elaborates on Native Hawaiians' staunch opposition to annexation that resulted in coalition building:

> The Hui Aloha 'Āina for Women, the Hui Aloha 'Āina for Men, and the Hui Kālai'aina, along with the queen, formed a coalition to oppose the treaty. Together, these three organizations represented a majority of Kanaka Maoli. The Kanaka Maoli strategy was to challenge the U.S. government to behave in accordance with its stated principles of justice and government of the people, by the people, and for the people . . . To this end, the hui began to organize mass petition drives.

Id. at 146. Silva also notes that "[t]he existence of the antiannexation petitions and the large organizations that protested annexation are now part of history for many Kānaka Maoli, mainly because of the knowledge brought forth during the centennial observations in summer 1998." *Id.* at 163. Formally dissenting and relying on international law, Queen Lili'uokalani wrote "a strongly worded protest" against the annexation to U.S. President McKinley:

> I declare such treaty to be an act of wrong towards the native and part-native people of Hawaii, an invasion of the rights of the ruling chiefs, in violation of the international rights both towards my people and towards friendly nations with whom they have made treaties, the perpetuation of the fraud whereby the constitutional government was overthrown, and finally an act of gross injustice to me.

Id. at 172 (quoting Letter from Queen Lili'uokalani, Hawaiian Kingdom, to William McKinley, U.S. President (June 17, 1897)). Silva details that Lili'uokalani also "reminded [McKinley] that her 'people, about forty-thousand in number, have in no way been consulted by those . . . who claim the right to destroy the independence of Hawaii.'" *Id.*

[66] "When we realized that the restoration of the Queen was impossible, we decided to work towards getting voting rights for the *lāhui Hawai'i*." Noenoe Silva, *Translations of*

After achieving voting rights in the Territory, Native Hawaiians successfully sought greater political control (compared with the Republic of Hawai‘i era) through the first elections for the Territory of Hawai‘i government. Through their reorganized political party, the Independent Home Rule Party, Native Hawaiians "claimed majorities in both chambers [of the Territorial Legislature], winning nine of fifteen seats in the Senate and twenty-two of thirty in the House of Representatives."[67]

While Native Hawaiians in the Territory of Hawai‘i era exercised greater local political influence than under the Republic of Hawai‘i, that influence was limited.[68] The Organic Act gave the U.S. President the authority to handpick the Governor[69] and Supreme Court Justices[70] of the Territory. Native Hawaiians (and other citizens) also could elect only a non-voting Congressional Representative.[71] Prominent Native Hawaiian leaders favored statehood status for Hawai‘i because it provided an opportunity for greater political influence than what was available to Native Hawaiians during the Territory of Hawai‘i period.[72]

Articles from the Hawaiian Nationalist Newspaper Ke Aloha Aina, 2 ‘OIWI: NATIVE HAWAIIAN J. 118, 134 (2002) [hereinafter Silva, *Translations of Articles*].

[67] Ronald Williams Jr., *Race, Power, and the Dilemma of Democracy: Hawai‘i's First Territorial Legislature, 1901*, 49 HAWAIIAN J. HIST. 1, 21 (2015) [hereinafter Williams Jr., *Race, Power*].

[68] For a more detailed discussion on the political limitations of the Territory of Hawai‘i, *see* Davianna Pōmaika‘i McGregor & Melody Kapilialoha MacKenzie, Mo‘olelo Ea O Nā Hawai‘i: History of Native Hawaiian Governance in Hawai‘i 351 (Aug. 19, 2014) (unpublished manuscript) (on file with author).

[69] Hawaiian Organic Act, art. 3, § 66, 31 Stat. 141 (1900).

[70] *Id.* at art. 4, § 82, 31 Stat. 141.

[71] *Id.* at art. 5, § 85, 31 Stat. 141.

[72] For instance, Robert Wilcox had noted, "I hope that in a short time we will have statehood[.]" Silva, *Translations of Articles*, *supra* note 66, at 134 (translating the words of Robert Wilcox who was elected as the first Congressional Delegate for the Territory of Hawai‘i). In addition to Wilcox, Hawai‘i statehood was the apparent goal of the Independent Home Rule Party. Dr. Davianna McGregor explained,

> One of the most prominent tenets of the [Independent Home Rule Party] platform was to strive to secure statehood for Hawai‘i. They pledged themselves to support whichever political party that would work for statehood. Having acknowledged U.S. control over Hawai‘i, statehood would provide Hawai‘i's people the widest latitude for homerule. As a state, Hawai‘i's majority could elect their own governor and a full congressional delegation. If these positions were elected, the Hawaiians

During the Territorial period, Native Hawaiians "successfully" advocated for the passage of the Hawaiian Homes Commission Act ("HHCA").[73] The HHCA was notable because it provided over 200,000 acres for eligible native Hawaiians[74] for homesteading purposes. Under the HHCA, eligible Native Hawaiians could be granted ninety-nine-year leases for land, at a dollar per year.[75] The trust nature of the lands, and the necessity of restoring the relationship between Kānaka Maoli and ʻāina, and in turn the well-being of the Native Hawaiian people, was recognized in the HHCA.

Outnumbered by other voters, Native Hawaiian political influence waned before Hawai'i achieved statehood. By 1940, Native Hawaiians, as a group, no longer represented "the largest number of voters in Hawai'i."[76]

Undoubtedly, one of the major justifications for annexing Hawai'i was U.S. national defense. Since Hawai'i's public lands were now controlled by the United States, Congress and the President had the power to use them, and large tracts of land were set aside for military use. This policy of using Hawai'i's lands for military purposes greatly accelerated during World War II, which served as a major turning point in the social, political, and economic development of the islands.[77]

> who controlled the majority of votes would, in essence, choose the governor and the congressional delegation.

Davianna Pōmaikaʻi McGregor, Kupaʻa I Ka ʻAina: Persistence on the Land 205–06 (Dec. 1989) (unpublished Ph.D. dissertation, University of Hawai'i) (on file with author) [hereinafter McGregor, Kupaʻa].

[73] Hawaiian Homes Commission Act, 1920, Pub. L. No. 67-34, 42 Stat. 108 (1921).

[74] Eligible "native Hawaiians" means those of not less than fifty-percent Hawaiian ancestry. *Id.* Native Hawaiian political leaders intended for all Native Hawaiians to benefit under the HHCA, but opponents, including non-Hawaiian plantation and ranching interests, sought to limit the beneficiaries and the result was a fifty-percent Native Hawaiian blood quantum. Troy J.H. Andrade, *Belated Justice: The Failures and Promise of the Hawaiian Homes Commission Act*, 46 AM. INDIAN L. REV. 1, 12–27 (2022) [hereinafter Andrade, *Belated Justice*] (examining the role of racism in developing, imposing, and justifying the fifty-percent blood quantum requirement).

[75] Hawaiian Homes Commission Act, 1920, Pub. L. No. 67-34, 42 Stat. 108 (1921). Native Hawaiians, however, were concerned about the quality of these lands described as "land that a goat couldn't live on" and "the worst agricultural land[.]" Andrade, *Belated Justice*, *supra* note 74, 12–15; *see also* Paul Nāhoa Lucas, Alan T. Murakami, & Avis Kuuipoleialoha Poai, *Hawaiian Homes Commission Act*, *in* NATIVE HAWAIIAN LAW: A TREATISE, *supra* note 43, at 176, 186 [hereinafter Lucas, Murakami & Poai].

[76] McGregor & MacKenzie, *supra* note 68, at 453.

[77] By World War II, "almost half the total land area of the islands was in the hands of fewer than 80 private owners. Government ownership accounted for most of the rest." GEORGE

E. *State of Hawai'i and a Public Trust Purpose for Improving Native Hawaiians' Conditions*

Hawai'i statehood became a reality in 1959,[78] almost sixty years after Native Hawaiians made statehood a part of the Independent Home Rule Party platform.[79] Consistent with the United States' domestic policy of termination of American Indian tribal status at the time, as a condition of statehood, the federal government transferred its trust responsibility for administering the HHCA to the new State of Hawai'i.[80] The federal government transferred most of the lands that had been "ceded" to it by the Republic to the new State and required that the lands, their proceeds, and income, would be utilized for one or more of five limited purposes.

When Hawai'i was admitted as a state upon the enactment of the 1959 Admission Act, about 1.4 million acres of the public lands were transferred from U.S. control to the new state.[81] The federal government retains control over 373,719.58 acres of land, with another 30,176.18 acres being leased to the United States for a sixty-five-year term for one dollar.[82] Describing some of the conditions of statehood, Section 5(f) of the Admission Act outlines the State's responsibilities as trustee of Government and Crown Lands, including the betterment of conditions of native Hawaiians:[83]

> The lands granted to the State of Hawai'i . . . and public lands retained by the United States . . . and later conveyed to the State . . . together with the proceeds from the sale or other disposition of any such lands and the income therefrom, shall be held by said State as a public trust for the support of the public schools and other educational institutions, *for the betterment of the conditions of native Hawaiians, as defined in the Hawaiian Homes Commission Act, 1920, as amended*,

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COOPER & GAVAN DAWS, LAND AND POWER IN HAWAI'I 3 (1985). The state government held thirty-nine percent, and the Federal government ten percent. *Id.*

[78] Hawai'i Admission Act, Pub. L. No. 86-3, 73 Stat. 4 (1959).

[79] McGregor, Kupa'a, *supra* note 72, at 205–06.

[80] Hawai'i Admission Act, Pub. L. No. 86-3, §4, 73 Stat. 4, 5 (1959).

[81] MacKenzie, *Public Land Trust*, *supra* note 43, at 79.

[82] *Id.* at 83.

[83] The term "native Hawaiian" is distinguished from "Native Hawaiian"; the difference being the use of capitalization in the latter. When lowercase *n* "native Hawaiian" is used, it refers to a specific group of "Native Hawaiians" who have fifty-percent or more blood quantum. "Native Hawaiians" refers to people with Native Hawaiian ancestry without regard to "blood quantum." *See supra* note 74 and accompanying text.

> for the development of farm and home ownership on as widespread a basis as possible[,] for the making of public improvements, and for the provision of lands for public use.[84]

Section 5(f) further clarifies that these lands—along with their proceeds and income—must be managed and disposed of consistent with at least one of the five listed trust purposes "and their use for any other object shall constitute a breach of trust for which suit may be brought by the United States."[85]

1. *Embracing Restorative Justice Through Hawai'i's 1978 Constitutional Convention*

In 1978, less than twenty years after statehood, the State of Hawai'i amended its constitution through a constitutional convention and vote by the electorate and embraced restorative justice principles broadly. New sections of Hawai'i's Constitution were ratified by Hawai'i's voters and added to better implement the Admission Act's trust provisions. Codified under Article XII, these new sections 1) provided that "[t]he lands granted to the State of Hawai'i by Section 5(b) of the Admission Act . . . [were to] be held by the State as a public trust for native Hawaiians and the general public[;]"[86] 2) established OHA,[87] and 3) "made clear that OHA was to hold in trust the

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[84] Hawai'i Admission Act, Pub. L. No. 86-3, § 5(f), 73 Stat. 4, 6 (1959).

[85] *Id.*

[86] HAW. CONST. art. XII, § 4.

[87] *Id.* at § 5. OHA is a semi-autonomous state agency that works towards the betterment of the conditions of Native Hawaiians. Delegates to the 1978 Constitutional Convention designed OHA as a mechanism for Native Hawaiians self-determination and self-governance as well as a unique and autonomous agency. *See* HAWAIIAN AFFS. COMM., STANDING COMM. REP. NO. 59, *reprinted in* 1 PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF HAWAI'I OF 1978, 643 (1980). The Convention's Hawaiian Affairs Committee believed Native Hawaiians should be granted "the right to determine the priorities which will effectuate the betterment of their condition and welfare by granting to the board of trustees powers to 'formulate policy relating to affairs of native Hawaiians.'" *Id.* at 645. "The committee recognize[d] the right of native Hawaiians to govern themselves and their assets by their assumption of the trust responsibility imposed on the State to better their condition." *Id.* at 646. That Native Hawaiians would exclusively elect the trustees to OHA was viewed as "enhanc[ing] representative governance and decision-making accountability and . . . [would] strengthen the fiduciary relationship between" trustees and Native Hawaiian beneficiaries. *Id.* at 644. The delegates in committee most likely drew comparisons between their aspirations for OHA and the State of Hawai'i's poor administration and implementation of the HHCA. Unfortunately, Hawai'i's reparative justice efforts were undermined in 2000 when the U.S. Supreme Court, in *Rice v. Cayetano*, struck down voter eligibility requirements for voting for

income and proceeds derived from a pro rata portion of the trust established for lands granted to the state by section 5(b) of the Admission Act."[88] The Hawai'i legislature reaffirmed the State's trust responsibilities to Native Hawaiians by statutorily describing one of OHA's purposes as "[s]erving as a receptacle for reparations."[89] The Admissions Act neither specified a formula for the allocation of the public land trust proceeds, nor did it define what pro rata share OHA should receive, although the State legislature subsequently designated OHA's share as twenty percent.[90] Several other amendments specific to Native Hawaiians were added, recognizing the Hawaiian language as an official language of the State of Hawai'i,[91] ensuring sufficient funding for administration of the HHCA,[92] and protecting traditional and customary Native Hawaiian practices.[93] Court decisions have strongly reaffirmed relevant laws related to these amendments, particularly traditional and customary rights.[94]

These constitutional amendments, ratified by Hawai'i's electorate in 1978, embraced restorative justice principles and were aimed to address historical injustices faced by Native Hawaiians by implementing the Admission Act's trust provisions more effectively. The new sections under Article XII established the lands granted by the Admission Act as a public trust for

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trustees of the OHA as violative of the 15th Amendment to the U.S. Constitution. 528 U.S. 495 (2000).

[88] MacKenzie, *Public Land Trust*, *supra* note 43, at 90–91.

[89] HAW. REV. STAT. § 10-3**.**

[90] MacKenzie, *Public Land Trust*, *supra* note 43, at 91.

[91] HAW. CONST. art. XV, § 4; *see also* Kamanaonāpalikūhonua Souza & K. Ka'ano'i Walk, *'Ōlelo Hawai'i and Native Hawaiian Education*, *in* NATIVE HAWAIIAN LAW: A TREATISE, *supra* note 43, at 1256, 1273–74.

[92] "The legislature shall make sufficient sums available for . . . the administration and operating budget of the department of Hawaiian home lands[.]" HAW. CONST. art. XII, § 1; *see also* Lucas, Murakami & Poai, *supra* note 75, at 201 (explaining the relevant amendment was in response to "the severe lack of funding for programs and the administration of the [Hawaiian Homes Commission Act]").

[93] HAW. CONST. art. XII, § 7.

[94] *See generally* David M. Forman & Susan K. Serrano, *Traditional and Customary Access and Gathering Rights*, *in* NATIVE HAWAIIAN LAW: A TREATISE, *supra* note 43, at 776, 779–854; *see also* Nelson v. Hawaiian Homes Comm'n, 127 Hawai'i 185, 197–203, 277 P.3d 279, 291–97 (2012) (acknowledging "judicially discoverable and manageable standards" for "what constitutes 'sufficient sums' for administrative and operating expenses . . . ."); Clarabal v. Dep't of Educ., 145 Hawai'i 69, 71, 446 P.3d 986, 988 (2019) (holding the State of Hawai'i is "constitutionally required to make all reasonable efforts to provide access to Hawaiian [language] immersion education").

Native Hawaiians and the general public, created OHA, and clarified OHA's role in managing trust income and proceeds.

The legislature further affirmed these commitments by defining OHA's purpose as a receptacle for reparations and subsequently setting OHA's share at twenty percent. Additionally, amendments supported Native Hawaiian cultural redevelopment by recognizing the Hawaiian language as an official state language and protecting traditional and customary Native Hawaiian practices, and attempted to make returning Native Hawaiians to lands under the HHCA by ensuring funding for the HHCA. These past developments show the State Constitution's and Hawai'i's people's commitment to restorative justice.

2. *Recognized Unrelinquished Claims to Sovereignty and Land 100 Years After the Overthrow of the Hawaiian Kingdom*

A century after the overthrow, the U.S. Congress issued its landmark 1993 Apology Resolution, further inspiring efforts to protect Native Hawaiians' interests in the Public Land Trust. Importantly, the Apology Resolution declares that "the indigenous Hawaiian people never directly relinquished their claims to their inherent sovereignty as a people or over their national lands to the United States, either through their monarchy or through a plebiscite or referendum."[95]

In part, as a result of these efforts, the "contours of the state's fiduciary duties"[96] were challenged in *Office of Hawaiian Affairs v. Housing and Community Development Corp. of Hawai'i* (*OHA v. HCDCH I*),[97] and *Hawai'i v. Office of Hawaiian Affairs*.[98] *OHA v. HCDCH I* began in 1994, when the state started processing the transfer of two parcels of trust lands to private developers for residential housing.[99] This transfer was the first proposed after the passage of the 1993 Apology Resolution and similar state legislation.[100] The plaintiffs—OHA and four individual plaintiffs—filed suit against the agency and its board members, the state, and the governor to stop the transfer of the two parcels and the transfer of any lands from the Public Land Trust. "Alternatively, the plaintiffs asked the court to declare that the

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[95] Apology Resolution, *supra* note 13, at para. 29.

[96] MacKenzie, *Public Land Trust*, *supra* note 43, at 115.

[97] 117 Hawai'i 174, 177 P.3d 884 (2008), *rev'd and remanded sub nom.* Hawai'i v. Off. of Hawaiian Affs., 556 U.S. 163 (2009).

[98] 556 U.S. 163 (2009).

[99] *OHA v. HCDCH I*, 117 Hawai'i at 180–81, 177 P.3d at 890–91.

[100] *Id.* at 187–88, 177 P.3d at 897–98; MacKenzie, *Public Land Trust*, *supra* note 43, at 115.

defendants were not permitted to sell or transfer lands from the public land trust, or, if the defendants prevailed, to declare that transferring or selling trust lands would not limit future claims by Native Hawaiians to the lands."[101]

The Hawai'i Supreme Court published a unanimous decision prohibiting the state from alienating trust lands until the claims of the Native Hawaiian people to those lands had been resolved.[102] The court's decision was based on its interpretation of the 1993 Apology Resolution and related state law.[103] The Apology Resolution and the related state law's texts embodied both the federal and state governments' commitments to restorative justice for Native Hawaiians, especially in their dealings with Native Hawaiian lands.[104] The court held that the Resolution carried the force of law because of legislative deliberations and proceedings that preceded its enactment and, thus, it was more than a simple policy statement. Further, the court held that the Apology Resolution acknowledged that Native Hawaiians retained unrelinquished claims to the lands.[105] The court also "recognized that money reparations in

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[101] MacKenzie, *Public Land Trust*, *supra* note 43, at 115–16 (citation omitted); *accord OHA v. HCDCH I*, at 181, 177 P.3d at 891.

[102] *OHA v. HCDCH I*, 117 Hawai'i at 181, 177 P.3d at 891.

[103] *Id.* at 193, 177 P.3d at 903 ("The [court's] interpretation is also supported by related state legislation enacted at around or subsequent to the adoption of the Apology Resolution . . . In Act 359, [for example,] . . . entitled 'A Bill for an Act Relating to Hawaiian Sovereignty,' the legislature made findings similar to those expressed in the Apology Resolution. 1993 Haw. Sess. L. Act 359, §§ 1–2 at 1009–11.

[104] The Apology Resolution formally apologized to the Native Hawaiian people for the United States' role in the overthrow of the Hawaiian Kingdom and expressed its support for reconciliation efforts with the Native Hawaiian people and involving different entities, including the United States. "The Congress . . . expresses its commitment to acknowledge the ramifications of the overthrow of the Kingdom of Hawaii, in order to provide a proper foundation for reconciliation between the United States and the Native Hawaiian people . . . ." Apology Resolution, *supra* note 13. Using terms consistent with restorative and reparative justice for Indigenous Peoples, the State of Hawai'i also acknowledged the harmful impact of the 1893 overthrow and subsequent U.S. annexation of the Hawaiian Islands: "[a]s a result [of the overthrow and annexation], the indigenous people of Hawai'i were denied the mechanism for expression of their inherent sovereignty through self-government and self-determination, their lands, and their ocean resources." 1993 Haw. Sess. L. Act 359, §§ 1–2 at § 1(9).

[105] "[T]he Apology Resolution and related state legislation . . . give rise to the State's fiduciary duty to preserve the corpus of the public lands trust, specifically the ceded lands, until such time as the unrelinquished claims of the native Hawaiians have been resolved." *OHA v. HCDCH I*, 117 Hawai'i at 195, 177 P.3d at 905. Legal scholars Eric Yamamoto and Sara Ayabe observed that this decision was the first time "a court in the United States imposed major legal consequences onto a government's reconciliation commitment." *See* Eric K.

lieu of the lands themselves would not be an adequate remedy because of the inextricable bond between the Native Hawaiian people and the ‘āina (land).”[106] Thus, the court ultimately held that the plaintiffs had met all the requirements for an injunction “pending final resolution of native Hawaiian claims through the political process.”[107] The State then sought the U.S. Supreme Court’s review of the decision.[108]

In 2009, the Court reversed and remanded. After first clarifying its jurisdiction over the case, the Supreme Court concluded that the Apology Resolution’s two substantive provisions did not provide any basis to bring a claim against public land trust transfers.[109] The U.S. Supreme Court disagreed with the Hawai‘i Supreme Court’s conclusion that the Resolution’s clauses demonstrated Congress’ acknowledgment of the continuity of Native Hawaiians’ claims to trust lands.[110] Instead, the Court held that the clauses had no operative effect—nor did they alter the State’s rights and obligations—absent clear and manifest legislative intent.[111] Because the Hawai‘i Supreme Court decision also rested on State law, the U.S. Supreme Court remanded the case to the Hawai‘i Supreme Court.[112]

Shortly after the U.S. Supreme Court decision in 2009, and as the Hawai‘i legislative session neared its closing, the plaintiffs (except one individual) announced their agreement to dismiss the lawsuit, without prejudice, contingent on the passage of proposed legislation.[113] The result, Act 176, gave the legislature greater control over the sale or gift of public trust and other lands by requiring two-thirds legislative approval.[114] It also required that the state provide detailed reporting to OHA and the legislature about its land transfers, noting that “Act 176 was intended to provide needed oversight by providing a more comprehensive process for the transfer of state-owned

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Yamamoto & Sara D. Ayabe, *Courts in the “Age of Reconciliation”:* Office of Hawaiian Affairs v. HCDCH, 33 U. HAW. L. REV. 503, 508 (2011) (footnote omitted).

[106] MacKenzie, *Public Land Trust*, *supra* note 43, at 117 (citing *OHA v. HCDCH I*, 117 Hawai‘i at 214, 177 P.3d at 924).

[107] *OHA v. HCDCH I*, 117 Hawai‘i at 217, 177 P.3d at 927.

[108] MacKenzie, *Public Land Trust*, *supra* note 43, at 117. In 2008, the U.S. Supreme Court granted the State’s petition for certiorari to review the Hawai‘i Supreme Court’s decision. Hawai‘i v. Off. of Hawaiian Affs., 556 U.S. 163, 171 (2009).

[109] *Id.* at 171–72.

[110] *Id.* at 174–76.

[111] *Id.* at 175–76.

[112] *Id.* at 177.

[113] MacKenzie, *Public Land Trust*, *supra* note 43, at 119.

[114] *Id.* at 120.

land, giving the legislature more supervision over such transfers, and ensuring that key information about sales or exchanges of land was shared with the legislature and OHA."[115]

Today, the State of Hawai'i—as trustee—remains the largest landholder in Hawai'i, and the Management and Disposition of Public Lands are governed by Chapter 171 of the Hawai'i Revised Statutes ("HRS").[116] HRS section 171-18 outlines the State's public land trust duties.[117] Pursuant to HRS section 171-3, the Department of Land and Natural Resources ("DLNR"), headed by BLNR, must "manage, administer, and exercise control over public lands, the water resources, ocean waters, navigable streams, coastal areas (excluding commercial harbor areas), and minerals and all other interests therein and exercise such powers of disposition thereof as may be authorized by law."[118] Section 171-35 governs lease provisions generally, providing that every lease issued by the Board shall contain, *inter alia*, "the specific [uses] to which the land is to be employed[,]" "[t]he improvements required[,]" and "[r]estrictions against alienation as set forth

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[115] *Id*. A subsequent law passed in 2014 requires only a simple majority of the legislature for public-to-private land exchanges. *Id.*

[116] Public lands are:

> [A]ll lands or interest therein in the State classed as government or crown lands previous to August 15, 1895, or acquired or reserved by the government upon or subsequent to that date by purchase, exchange, escheat, or the exercise of the right of eminent domain, or in any other manner[.]

HAW. REV. STAT. § 171-2.

[117] *See* HAW. REV. STAT. § 171-18; Ching v. Case, 145 Hawai'i 148, 170, 449 P.3d 1146, 1168 (2019) ("Article XI, section 1 of the Hawai'i Constitution places upon the State a fiduciary duty analogous to the common law duty of a trustee with respect to lands held in public trust."). Section 171-18 reaffirms the state's trust duties that were first recognized in the 1959 Admission Act to ensure that the public lands (and the income or proceeds derived from them) are held

> as a public trust for the support of the public schools and other public educational institutions, for the betterment of the conditions of native Hawaiians as defined in the Hawaiian Homes Commission Act, . . . for the development of farm and home ownership on as widespread a basis as possible, for the making of public improvements, and for the provision of lands for public use.

HAW. REV. STAT. § 171-18.

[118] HAW. REV. STAT. § 171-3(a). The Board's general duties are outlined in section 171-7, and section 171-18 outlines the public land trust provision. *See* HAW. REV. STAT. § 171-18.

in section 171-36[.]"[119] Lease restrictions are outlined in the following section, 171-36, which limited leases of public lands to sixty-five years.[120] The State, through BLNR, currently holds in trust approximately 1.2 million acres of public lands, including the natural and cultural resources they contain, for the benefit of present and future generations.

The historical and legal background of Hawai‘i's Public Land Trust shows that the loss of Native Hawaiian land and sovereignty is deeply intertwined with ongoing struggles for justice and self-determination. This historical context lays the groundwork for a deeper exploration of how contemporary legal decisions, like Act 236, intersect with Indigenous values and the pursuit of restorative justice. By situating Act 236 within this broader cultural and legal framework, Part III offers a more nuanced understanding of its potential impacts, guiding us toward a restorative approach that seeks to heal past wrongs while ensuring Native Hawaiians' future well-being.

III. FOUR INDIGENOUS VALUES FOR CONTEXTUAL LEGAL ANALYSIS

A comprehensive legal analysis of Act 236 necessitates not only examining the statutory text but also considering the historical, cultural, and restorative justice contexts associated with Hawai‘i's Public Land Trust.[121]

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[119] HAW. REV. STAT. § 171-35.

[120] Until the passage of Act 236, even where the statute permitted lease extensions, it made clear that the aggregate term of the original lease and the extension should not exceed sixty-five years. HAW. REV. STAT. § 171-36.

[121] Perspectives on statutory interpretation provide meaningful guidance for understanding Act 236. While examining the impact of Justice Scalia's legal formalism approach, Jonathan R. Siegel succinctly explained the utility of employing both formalist and non-formalist analyses. "[O]ne must always deploy both textual *and* extratextual arguments in statutory cases. Advocates should *start with the text*, no doubt. But they should remember that most judges do not fully embrace the textualist ideal and *they should also include extratextual arguments*." Jonathan R. Siegel, *Legal Scholarship Highlight: Justice Scalia's Textualist Legacy,* SCOTUS BLOG (Nov. 14, 2017, 10:48 AM) (emphases added), https://www.scotusblog.com/2017/11/legal-scholarship-highlight-justice-scalias-textualist-legacy/. Retired federal appellate court judge Richard A. Posner also emphasized the limits of solely deploying a textualist-formalist approach for interpreting statutes, "meaning cannot be extracted from a text merely by taking the language of the text and applying the rules of logic to it. All sorts of linguistic and cultural tools must be brought to bear on even the simplest text to get meaning out of it." Richard A. Posner, *Legal Formalism, Legal Realism, and the Interpretation of Statutes and the Constitution*, 37 CASE W. RSRV. L. REV. 179, 187 (1986).

More specific to Native Hawaiians, Kanaka Maoli legal scholars D. Kapua‘ala Sproat and MJ Palau-McDonald also discussed the importance of complementing formalist analysis: "[e]ven sympathetic decisionmakers misconstrue 'justice' in complex cases because they lack the tools to *expand their analyses beyond formalism's narrow constraints* . . . ." D. Kapua‘ala

By situating Act 236 within this broader framework, we can critically assess its implications on Native Hawaiians' relationship with Public Land Trust ʻāina. This method allows us to explore whether the State's actions align with its restorative justice commitments made during the 1978 Constitutional Convention and enshrined in subsequent statutes.

A. *Historical Context and Approach*

Given the history of Hawaiʻi's Public Land Trust, it is important to consider *how* to approach management and land-use decisions and actions that will impact Native Hawaiians' relationship, and claims, to ʻāina under the State of Hawaiʻi's control. To critically evaluate rights claims and best prioritize strategies for Native Hawaiians, this article deploys a critical restorative justice framework for analysis. Complementing at times, and challenging at other times, the formalist approach to law,[122] contextual legal analysis examines "the actual dynamics of decision-making, paying special attention to the value choices and interests implicated in adjudicatory decisions."[123] It also "exposes how a mechanistic approach to law and legal processes at times prevents society from comprehending the real injustice to

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Sproat & MJ Palau-McDonald, *The Duty to Aloha ʻĀina: Indigenous Values as a Legal Foundation for Hawaiʻi's Public Trust*, 57 HARV. C.R.-C.L. L. REV. 525, 551 (2023) (emphasis added).

[122] Judge Richard A. Posner described the formalist approach to law as "premised on a belief that all legal issues can be resolved by logic, text, or precedent, without a judge's personality, values, ideological leanings, back-ground and culture, or real-world experience playing any role." RICHARD A. POSNER, REFLECTIONS ON JUDGING 1 (2013) [hereinafter POSNER, REFLECTIONS]; *see generally* Joseph Singer, *Legal Realism Now*, 76 CALIF. L. REV. 465, 496–99 (1988) (recognizing formalism by its other name, "mechanical jurisprudence" and explaining how formalists were "willing[] to ignore the actual intent of the parties, their particular characteristics, abilities, and needs, and the social context in which the event or transition occurred"). Legal formalism may perhaps be better understood when contrasted from legal realism. Legal realism emphasizes "the consequences of judicial rulings," and "is pragmatic . . . [by] consider[ing] systemic as well as case-specific consequences and thus avoids shortsighted justice . . . and is analytical and empirical rather than merely intuitive and political." POSNER, REFLECTIONS, *supra* note 122, at 5. Critical legal studies and critical race theory later emerged, and critical race theory began to respond to the limitations of legal justice for racial minorities, but its insight is unable to fully illuminate legal controversies for Native Hawaiians and other Indigenous Peoples. D. Kapuaʻala Sproat, *Wai Through Kānāwai: Water for Hawaiʻi's Streams and Justice For Hawaiian Communities*, 95 MARQ. L. REV. 127, 166 (2011) [hereinafter Sproat, *Wai Through Kānāwai*].

[123] Sproat, *Wai Through Kānāwai*, *supra* note 122, at 135.

historically disadvantaged groups, including" Native Hawaiians.[124] Looking beyond the scope of "traditional" legal analysis, this article further explores: What is really at stake? Who benefits and who is harmed by laws and legal processes? How are power and status implicated in legal decision making? What is at stake when legal rules are "blindly" applied? What are, or could be, the actual impacts of law and the legal process? And, what institutional and public constraints limit decisionmakers and their actions?[125] This approach integrates history to contextualize the law and expose "what is really going on" to produce more just results, "not by conceptualizing the legal process as the inevitable march toward justice, but rather by acknowledging that law, as it intersects with politics, can be both subordinating and, at times, an opening toward restoration and self-determination."[126]

Because Native Hawaiians are uniquely situated given colonialism's long-term impacts, "justice is less about equality and more about self-determination[.]"[127] For Indigenous legal scholar Rebecca Tsosie, "Indigenous self-determination provides the baseline requirement for an effective theory of reparative [or restorative] justice."[128] Accordingly, this

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[124] D. Kapuaʻala Sproat & N. Mahina Tuteur, *Framing Chapter*, *in* NATIVE HAWAIIAN LAW: A TREATISE (forthcoming 2nd ed.).

[125] *See* Sproat, *Wai Through Kānāwai*, *supra* note 122, at 162, 207 (asking critical questions and applying contextual inquiry to water issues impacting Native Hawaiians); *see also* JUAN PEREA ET AL., RACE AND RACES: CASES AND RESOURCES FOR A DIVERSE AMERICA 3–4 (2000) (articulating tools of critical inquiry); Eric Yamamoto, *Critical Race Praxis: Race Theory and Political Lawyering Practice in Post-Civil Rights America*, 95 MICH. L. REV. 821, 869 (1997) (offering a critical race praxis framework that integrates progressive race theory with frontline justice practice); Eric K. Yamamoto, *Critical Procedure: ADR and the Justices' "Second Wave" Constriction of Court Access and Claim Development*, 70 SMU L. REV. 765, 781 (2017) (suggesting a critical procedure analytical framework for assessing procedural reforms in alternative dispute resolution).

[126] Sproat, *Wai Through Kānāwai*, *supra* note 122, at 136.

[127] *Id.* at 167. Professor Rebecca Tsosie, writing about Native Hawaiian justice issues, states, "[p]olitical equality, under this analysis, requires equality of Nations, and not equality of citizens." Rebecca Tsosie, *Engaging the Spirit of Racial Healing Within Critical Race Theory: An Exercise in Transformative Thought*, 11 MICH. J. RACE & L. 21, 43 (2005). While analyzing environmental justice, Eric Yamamoto and Jen-L Lyman also stated, "for some indigenous peoples, environmental justice is mainly about cultural and economic self-determination . . . ." Eric K. Yamamoto & Jen-L W. Lyman, *Racializing Environmental Justice*, 72 U. COLO. L. REV. 311, 311 (2001).

[128] Rebecca Tsosie, *Indigenous Peoples and the Ethics of Remediation: Redressing the Legacy of Radioactive Contamination for Native Peoples and Native Lands*, 13 SANTA CLARA J. INT'L. L. 203, 253 (2015).

framework and its four realms, which embody the human rights principle of self-determination, are necessarily grounded in Native Hawaiians' unique history and cultural values, including the Indigenous concept and practice of restorative justice.[129]

Restorative justice entails repairing damage wrought by injustice and instituting corrective changes, and can support legal, political, and moral justice claims.[130] In an Indigenous Nations context, Navajo Nation Supreme Court Chief Justice Emeritus Robert Yazzie described restorative justice as "[r]eturning people to good relations with each other in a community."[131] Yazzie also discussed the importance of harmony or balance (*hozho*) to law (*beehaz'aanii*) in Navajo doctrine and ideology, and that in the process of working towards *hozho* "we are taught *what ought to be* and what ought not to be."[132] Critical contextual analysis, in exploring important questions such

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[129] *See* G.A. Res. 61/295, United Nations Declaration on the Rights of Indigenous Peoples (Sept. 13, 2007) [hereinafter UNDRIP].

[130] Eric Yamamoto, Miyoko Pettit, and Sara Lee briefly stated, "Reparative justice norms are codified in the 2005 United Nations Human Rights Commission's 'Basic Principles and Guidelines on the Right to a Remedy and Reparations for Victims of Gross Violations of Human Rights Law and Serious Violations of International Humanitarian Law.'" Eric K. Yamamoto et al., *UNFINISHED BUSINESS: A Joint South Korea and United States* Jeju 4.3 Tragedy *Task Force to Further Implement Recommendations and Foster Comprehensive and Enduring Social Healing Through Justice*, 15 ASIAN-PAC. L. & POL'Y J. 1, 22 (2014) (citing C.H.R. Res. 2005/35, U.N. Doc. E/CN.4/2005/L.10/Add.11 (Apr. 19, 2005)); *see generally* G.A. Res. 271 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948); G.A. Res. 2200A (XXI) International Covenant on Civil and Political Rights (Dec. 16, 1966) [hereinafter ICCPR]; Organization of American States, American Declaration of Rights and Duties of Man, May 2 1948, E/CN.4/122 U.N.T.S.; G.A. Res 39/46 (No. 51), Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Dec. 10, 1984); Torture Victim Protection Act of 1991, Pub. L. No. 102-256, 106 Stat. 93 (1992) (codified at 28 U.S.C. § 1350); *see also* S. James Anaya, *International Human Rights and Indigenous Peoples: The Move Toward the Multicultural State*, 21 ARIZ. J. INT'L & COMP. L. 13 (2004) (setting forth the broad contours and many of the sources of the international human rights regime relevant to Indigenous Peoples).

[131] Robert Yazzie, *Life Comes From It: Navajo Justice Concepts*, 24 N.M. L. REV. 175**,** 185 (1994) (contrasting Navajo "horizontal" justice with Anglo-European "vertical" justice).

[132] *Id.* at 175 (emphasis added). While this article used the terms "harmony" and "balance" to describe *hozho*, Navajo Nation Supreme Court Associate Justice Emeritus, Raymond D. Austin, explains, "the hózhó doctrine's all-encompassing and pervasive nature makes it difficult to accurately define in English." RAYMOND D. AUSTIN, NAVAJO COURTS AND NAVAJO COMMON LAW: A TRADITION OF SELF-GOVERNANCE 53 (2009). Parallels can be found between the Navajo fundamental value of *hozho* (harmony or balance) and Native Hawaiians' value of "pono." Native Hawaiian scholar and cultural practitioner, Dr. Lilikalā

as those mentioned above, helps inform us *what ought to be* in an effort to achieve restorative justice.

B. *Developing a Framework*

The critical analytical framework employed in this article can be traced to international human rights scholar, advocate, and law professor S. James Anaya's work on the development of contemporary international human rights norms, pertaining to Indigenous Peoples, in the 1990s.[133] While detailing the contemporary development of international law's recognition of Indigenous Peoples' rights, Anaya described the 1989 International Labour Organization Convention on Indigenous and Tribal Peoples, Convention 169 ("ILO Convention 169"), as possessing "extensive provisions advancing indigenous *cultural integrity*, *land and resource* rights, and non-discrimination in *social welfare* spheres; in addition, it generally enjoins states to respect indigenous peoples' *aspirations in all decisions affecting them*."[134] In describing these developments, as relevant to Indigenous Peoples, Anaya elaborated, "[t]he modern discourse of peace and human rights is reminiscent of the classical era of naturalist jurisprudence in which law was determined on the basis *of what ought to be* rather than simply on the basis of *what is*[,]"[135] which appears consistent with Indigenous notions of restorative justice as discussed *supra* by Chief Justice Emeritus Yazzie.

Kame'eleihiwa explained the importance of balance in Native Hawaiian society, "in traditional times, the Hawaiian polity was religious and Hawaiian religion, at the level of the Chiefs, was political. The two were inseparably intertwined and their purpose was to keep the universe in a state of *pono*, or 'perfect equilibrium. '" KAME'ELEIHIWA, *supra* note 4, at 13.

[133] *See generally* S. James Anaya, *Indigenous Rights Norms in Contemporary International Law*, 8 ARIZ. J. INT'L & COMP. L. 1, 5 (1991) [hereinafter Anaya, *Indigenous Rights Norms*].

[134] *Id.* at 7 (emphases added and internal citations omitted); *see* Convention Concerning Indigenous and Tribal Peoples in Independent Countries (No. 169), International Labour Conference, June 27, 1989 [hereinafter ILO Convention No. 169].

[135] Anaya, *Indigenous Rights Norms*, *supra* note 133, at 4 (emphasis omitted). In tracing that development, Anaya identified Francisco de Vitoria, from this classical era, as an important figure for the recognition of aboriginal peoples' rights, explaining that "Vitoria's admonishments concerning the American Indians were recast as statements of morality as opposed to law" and further explained that international law at the time basically accepted the colonization of aboriginal peoples and their territories. *Id.* at 3.

The perspectives of Vitoria's work appear mixed. *Compare* Indigenous law scholar and professor Robert A. Williams Jr's. critique explaining that while Vitoria argued Indians had inherent rights "common to all rational men" that could not easily be violated, Robert A. Williams Jr., *The Medieval and Renaissance Origins of the Status of the American Indian in Western Legal Thought*, 57 S. CAL. L. REV. 1, 76–77 (1983) (referencing F. VITORIA, DE INDES

Anaya subsequently rearticulated those important characteristics of ILO Convention 169 in the context of Native Hawaiians. He explained, "[t]he 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*."[136] Native Hawaiian Law scholar, D. Kapua'ala Sproat, weaved these international human rights norms with a historical and developmental analysis of legal formalism, legal realism, critical legal analysis, and critical race theory to develop a contextual legal framework. That framework was used to examine a complex water law adjudicatory decision impacting Indigenous Native Hawaiians.[137] The framework also "encourage[s] academic discourse and critical thinking about not only what the law is, but *what it* [*ought to*] *be*."[138] Sproat's analysis revealed that applying legal formalist approaches to Indigenous Peoples' issues often "legitimized colonialism, the confiscation of land, the destruction of culture, and the destabilization of self-government."[139] While applying strict legal formalist analysis appears neutral and as though "decision-makers [are] simply applying the 'rule of law[,]'" the reality is philosophical and ideological influences shape judicial decisions.[140]

ET DE IVRE BELLI RELECTIONES 138–39 (1917)), Vitoria provided the legal justification for European colonialism that was later used against American Indians and bound Indigenous Peoples to European-centric international law even if they did not consent to it, ROBERT A. WILLIAMS, JR., THE AMERICAN INDIAN IN WESTERN LEGAL THOUGHT: THE DISCOURSES OF CONQUEST 106–107 (1992), *with* Pablo Zapatero Miguel, *Francisco de Vitoria and the Postmodern Grand Critique of International Law*, *in* AT THE ORIGINS OF MODERNITY: FRANCISCO DE VITORIA AND THE DISCOVERY OF INTERNATIONAL LAW 178–93 (2017) (critiquing the critics and arguing "a new blend of misinterpretations . . . create a new artificial . . . divide fuelled by postmodern approaches to international law, in which Vitoria is taken out of context . . .").

[136] S. James Anaya, *The Native Hawaiian People and International Human Rights Law: Toward a Remedy for Past and Continuing Wrongs*, 28 GA. L. REV. 309, 342 (1994) [hereinafter Anaya, *Native Hawaiian People*] (emphases added).

[137] *See generally* Sproat, *Wai Through Kānāwai*, *supra* note 122.

[138] N. Mahina Tuteur, *Reframing Kānāwai*, 7 INDIGENOUS PEOPLES' J. L. CULTURE, & RESISTANCE 59, 60 (2022) [hereinafter Tuteur, *Reframing Kānāwai*].

[139] Sproat, *Wai Through Kānāwai*, *supra* note 122, at 154. Sproat further exposes how the Supreme Court has used formalist analysis in *Johnson v. M'Intosh*, 21 U.S. 543 (1823), and *Rice v. Cayetano*, 528 U.S. 495 (2000), and negatively impacted Indigenous Peoples. *Id.* at 156–60.

[140] *Id.* at 160–61 (discussing the histories of legal formalism, legal realism, and legal realists' critiques of legal formalism).

Recognizing the role of political preferences in legal decision making, legal realism and critical legal theory exposed how the law actually worked. Critical race theory's examination of the law's institutionalized exclusion of certain groups and the benefits conferred upon other groups is an important component for Sproat's contextual legal framework for Indigenous Peoples issues.[141]

This contextual legal framework expands on previous theories by evaluating four values (or "realms"), "of restorative justice embodied in the human rights principle of self-determination. These realms are: (1) mo'omeheu (cultural integrity); (2) '[ā]ina (lands and natural resources); (3) mauli ola (social determinants of health and well-being); and (4) ea (self-[government])."[142] Inextricably intertwined with each other, all four realms are also recognized under international human rights principles as salient dimensions of restorative justice.[143] And together, they "interrogat[e] whether legal actions and decisions further the harms of colonization or, instead, seek to repair them according to Indigenous communities' sense of what is needed."[144]

1. *Mo'omeheu (Cultural Integrity)*

Culture plays a central role in society, and, for Indigenous Peoples in particular, culture is holistic and intergenerational in its scope;[145] Indigenous culture encompasses language, values, music, art, dance, religion, sacred sites, and more.[146] While Anaya recognized the importance of cultural integrity to the human race generally,[147] he explained that cultural integrity as a human rights norm, "has developed remedial aspects particular to indigenous peoples in light of their historical and continuing vulnerability."[148] This has specific ramifications for Native Hawaiians entitling them as an Indigenous People "to affirmative measures to remedy

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[141] *Id.* at 166.

[142] Tuteur, *Reframing Kānāwai*, *supra* note 138, at 73 n.73 (explaining her use of Hawaiian language words for each of the norms: "[t]o make these values relevant to the Native Hawaiian community and this specific body of law, I use 'Ōlelo Hawai'i knowing that these terms are embedded with meanings and significance beyond their mere definitions"); Sproat, *Wai Through Kānāwai*, *supra* note 122, at 173.

[143] *See* Anaya, *Native Hawaiian People*, *supra* note 136, at 342–60; G.A. Res. 61/295, United Nations Declaration on the Rights of Indigenous Peoples (Sept. 13, 2007).

[144] Sproat & Tuteur, *supra* note 124, at 12.

[145] Tuteur, *Reframing Kānāwai*, *supra* note 138, at 73.

[146] *See id.* at 74.

[147] Anaya, *Indigenous Rights Norms*, *supra* note 133, at 16 n. 63.

[148] Anaya, *Native Hawaiian People*, *supra* note 136, at 345.

the past undermining of their cultural survival and to guard against continuing threats[.]"[149]

Anaya's discussion of remedial affirmative measures is grounded in the International Covenant on Civil and Political Rights, which recognizes the right of individuals, "in community with the other members of their group, to enjoy their own culture . . . ."[150] In the same year as Anaya's discussion, the U.N. Human Rights Committee explained that State parties are "under an obligation to ensure that the existence and the exercise of this right [to enjoy one's own culture] [is] protected against their denial or violation."[151] The right to one's own culture includes spirituality or religion and language.[152] The Committee noted that "culture manifests itself in many forms," which includes unique ways of life for indigenous peoples and their relationship to land and natural resources.[153] The Committee further explained what State parties may be expected to do, consistent with the Covenant: "[t]he enjoyment of those rights may require positive legal measures of protection and measures to ensure the effective participation of members of minority communities in decisions which affect them."[154] Guided by the right to enjoy one's own culture and the obligations and expectations of the world's nation-states, the first realm of mo'omeheu focuses on whether an action or decision appropriately supports and restores "cultural integrity as a partial remedy for past harms, or perpetuate[s] conditions that continue to undermine cultural survival."[155]

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[149] *Id.* at 345.

[150] ICCPR, *supra* note 130, at art. 27; *see* discussion *infra* Part IV.

[151] Hum. Rts. Comm., *CCPR General Comment 23: Article 27*, U.N. Doc. CCPR/C/21/Rev.1/Add.5, ¶ 6.1 (Apr. 26, 1994) [hereinafter U.N. HRC, General Comment 23].

[152] *Id.* at ¶ 5.2.

[153] *Id.* at ¶ 7.

[154] *Id.*

[155] Sproat, *Wai Through Kānāwai*, *supra* note 122, at 179 (citing Anaya, *Native Hawaiian People*, *supra* note 136, at 346); *see* Wallace Coffey & Rebecca Tsosie, *Rethinking the Tribal Sovereignty Doctrine: Cultural Sovereignty and the Collective Future of Indian Nations*, 12 STAN. L. & POL'Y REV. 191, 197 (2001) ("[T]he central challenge of cultural sovereignty is to reach an understanding of sovereignty that is generated from *within* tribal societies and carries a cultural meaning consistent with those traditions."). The United Nations Declaration on the Rights of Indigenous Peoples affirmed that Native Peoples retain the right to "practise and revitalize their cultural traditions and customs[,] . . . includ[ing] the right to maintain, protect and develop the past, present and future manifestations of their cultures." UNDRIP, *supra* note 129, at art. 11. Article 8(2) also prohibits any action "which has the aim or effect of

2. *'Āina (Lands and Natural Resources)*

The second value is 'āina, which translates to land or "that which feeds." 'Āina refers to all lands, waters, and resources that sustain Kānaka Maoli, and it also refers to the reciprocal relationship between people and the natural environment to which they belong.[156] 'Āina—along with the aloha and kuleana attached to it—is at the core of Maoli culture, spirituality, and identity. These ancestral resources and relationships also serve as a foundation for Native Hawaiian sustenance, well-being, and political empowerment.[157]

International human rights instruments recognize the intersection of Indigenous Peoples' culture and their lands, territories and resources. Recall that the International Covenant on Civil and Political Rights acknowledges the unique relationship between Indigenous Peoples and their lands, through the Human Rights Committee's General Comment No. 23. The right to enjoy one's own culture "may consist in a way of life which is closely associated with territory and use of its resources. This may particularly be true of members of indigenous communities constituting a minority."[158]

The treaty-monitoring body for the International Convention on the Elimination of All Forms of Racial Discrimination recognized that Indigenous Peoples throughout the world have been discriminated against, have had their rights violated, and as a result, the preservation of their culture and identities are in jeopardy.[159] The United Nations Committee on the Elimination of Racial Discrimination affirmed that the Convention applies to Indigenous Peoples, and called on national governments to acknowledge and protect Indigenous Peoples' rights to "own, develop, control and use their communal lands, territories traditionally . . . owned or otherwise inhabited or used without their free and informed consent, to take steps to return those lands and territories."[160] Also guided by human rights rules and principles, this second realm helps evaluate whether an action "perpetuates the

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depriving them of their integrity as distinct peoples, or of their cultural values or ethnic identities." *Id.* at art. 8(2).

[156] Tuteur, *Reframing Kānāwai*, *supra* note 138, at 75.

[157] Sproat & Palau-McDonald, *Duty to Aloha 'Āina*, *supra* note 121, at 570.

[158] U.N. HRC, General Comment 23, *supra* note 151, at ¶ 3.2.

[159] Comm. for the Elimination of Racial Discrimination, General Recommendation No. 23, U.N. Doc. A/52/18, annex V, ¶ 3 (Aug. 18, 1997) [hereinafter U.N. CERD, General Recommendation 23].

[160] *Id.* at ¶ 5.

subjugation of ancestral lands, resources, and rights, or attempts to redress historical injustices in a significant way."[161]

3. *Mauli Ola (Social Determinants of Health and Well-Being)*

The third realm, mauli ola, "encompasses a holistic understanding of ʻŌiwi mental, physical, and spiritual health and well-being as the balance between akua, [k]ānaka, and ʻ[ā]ina."[162] As Native Hawaiian legal scholar Mahina Tuteur further explains, this value considers "various social determinants, which include the complex and interconnected systems, circumstances, environments, and institutions, that contribute to or harm the health, economic self-sufficiency, and education of individuals and communities."[163] Considering the interconnectedness of culture and ʻāina or land and resources to Indigenous Peoples' health and well-being, the human rights rules and principles discussed above are also relevant here. Thus, this realm of contextual legal inquiry evaluates whether an action has "the potential to improve health, education, [] living standards," and other social conditions.[164] This analysis asks whether an action improves social determinants of health and well-being or perpetuates the status quo.[165]

4. *Ea (Self-Government)*

Ea, meaning "life," "breath," and "sovereignty,"[166] refers to political independence. "A shared characteristic in each of these translations is that ea is an active state of being. Like breathing, ea cannot be achieved or possessed; it requires constant action day after day, generation after generation."[167] "Through the dispossession of Native lands and resources, the Maoli community has been deprived of its inherent right to cultural and political sovereignty, which are essential to the practice of self-governance."[168]

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[161] Sproat, *Wai Through Kānāwai*, *supra* note 122, at 181.

[162] Tuteur, *Reframing Kānāwai*, *supra* note 138, at 76–77.

[163] *Id.* at 77.

[164] *Id*.

[165] *Id.*

[166] Native Hawaiian scholar Dr. Noelani Goodyear-Kaʻōpua distinguished Euro-American concepts of sovereignty from a close Native Hawaiian term for it and explained, "ea is based on the experiences of people on the land, relationships forged through the process of remembering and caring for wahi pana, storied places." Goodyear-Kaʻōpua, *supra* note 3, at 4.

[167] *Id.*

[168] Tuteur, *Reframing Kānāwai*, *supra* note 138, at 78–79.

While the protection and exercise of rights to culture and land do not negatively impact a nation-state's sovereignty and territorial integrity,[169] the existence and protection of these rights require action. Native Hawaiians do not have a recognized, organized Native Hawaiian governing body to more fully exercise Native Hawaiians' right to self-determination and self-governance. Therefore, cultural rights and rights to land and resources may require the surrounding national or state government to provide some degree or mechanism of Indigenous self-determination or self-governance by "ensur[ing] the effective participation of [Native Hawaiians] in decisions which affect them."[170] Additionally, the Committee for the Elimination of Racial Discrimination, in affirming the applicability of the International Convention for the Elimination of All Forms of Racial Discrimination to Indigenous Peoples, urged States to ensure "that no decisions directly relating to [Indigenous Peoples'] rights and interests are taken without their informed consent."[171] Consent, given or withheld, is generally pursued or obtained through consultation.[172] For Indigenous Peoples without a formally recognized governing entity through which the Indigenous Nation expresses its self-determination and self-governance, ensuring "effective participation" and obtaining their "consent" for decisions directly affecting them may allow those Indigenous Peoples to exercise their self-determination and self-governance within the existing political and legal structures surrounding them. Within this context, the fourth realm necessarily evaluates whether an action "perpetuates historical conditions imposed by colonizers or will attempt to redress the loss of self-governance."[173]

To critically examine law and policy issues through a "contextual inquiry" lens, this article deploys a human rights approach to restorative justice, one that embraces necessary context to reveal the full extent of injustice and harms committed against communities. Thus, for Native Hawaiians and the

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[169] U.N. HRC, General Comment 23, *supra* note 151, at ¶ 3.2.

[170] *See id.* at ¶ 7. The International Covenant on Civil and Political Rights, in Article 1, recognizes the right of "all peoples" to self-determination. ICCPR, *supra* note 130, art 1. The Human Rights Committee described Indigenous Communities as "Indigenous Peoples." U.N. HRC, General Comment 23, *supra* note 151, at ¶¶ 3.2, 7.

[171] U.N. CERD, General Recommendation 23, *supra* note 159, at ¶ 4(d).

[172] *See* Mauro Barelli, *Free, Prior, and Informed Consent in the UNDRIP: Articles 10, 19, 29(2), and 32(2), in* THE UN DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES: A COMMENTARY, 247, 249–52 (Jessie Hohmann & Marc Weller eds., 2018) (discussing free, prior and informed consent and consultations in the context of the U.N. Declaration on the Rights of Indigenous Peoples).

[173] Sproat, *Wai Through Kānāwai*, *supra* note 122, at 185.

State of Hawai‘i alike, evaluation of these four realms—and whether actions exacerbate or redress harms caused by colonization—aids in assessing how best to ‘auamo their kuleana and protect Maoli rights and interests in the Public Land Trust. Here, these realms are used to illuminate and assess Act 236’s impacts on Native Hawaiians’ rights and claims to ‘āina.

IV. INDIGENOUS HUMAN RIGHTS AND RESTORATIVE JUSTICE UNDER INTERNATIONAL LAW

International human rights standards provide opportunities to re-examine Native Hawaiian issues and concerns beyond local and national norms. This section highlights how international human rights instruments and bodies integrate restorative justice principles to address the historical and ongoing impacts of colonization. It suggests an approach that is suited to advocate for Native Hawaiians’ rights and claims. This article examines rights to self-determination, self-governance, culture, and free, prior and informed consent. It underscores essential measures required for meaningful reparations and restorative justice. Hawai‘i’s legal framework for Native Hawaiians, particularly the Public Land Trust, embraces restorative justice principles. This creates a crucial opportunity to shape interactions and decision making according to international human rights norms of self-determination for Indigenous Peoples.

This part reviews relevant human rights instruments and bodies as part of a global framework for assessing the impact of Act 236 on Native Hawaiians’ claims to lands. It begins by discussing the obligation of States toward Indigenous Peoples under the United Nations Declaration on the Rights of Indigenous Peoples, with an emphasis on free, prior and informed consent. This highlights *how* the State of Hawai‘i might consider its approaches to important land issues. Next, this part highlights the United Nations’ recognition of the need to repair historical and ongoing harms to Indigenous Peoples. It offers a framework for how Hawai‘i can address reparations for Native Hawaiians. Lastly, this part considers other Indigenous human rights developments for the guidance they provide relevant to the intersection of the human rights to culture and property. In doing so, it examines how human rights bodies acknowledge Indigenous Peoples’ property rights within national systems that may privilege fee simple title to land rather than traditional ownership or possession. The human rights principles and standards, described below, illuminate the four values of mo‘omeheu (culture), ‘āina (land and natural resources), mauli ola (social determinants of health and well-being), and ea (self-government).

A. *The United Nations Declaration on the Rights of Indigenous Peoples and Free, Prior and Informed Consent*

Adopted by the General Assembly in 2007, the United Nations Declaration on the Rights of Indigenous Peoples (hereinafter "U.N. Declaration") "is the most comprehensive international instrument on the rights of indigenous peoples" and "establishes a universal framework of minimum standards for the survival, dignity and well-being of the Indigenous Peoples of the world[.]"[174] It articulates the rights of Native Hawaiians as an Indigenous People, as well as the United States' obligations to protect Native Hawaiians' collective human rights[175] Though there are other human rights instruments and decisions that pre-existed the U.N. Declaration that can also be used,[176] the U.N. Declaration offers an appropriate starting point because of its specific focus on protecting and recognizing Indigenous Peoples' human rights.[177]

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[174] *United Nations Declaration on the Rights of Indigenous Peoples*, UNITED NATIONS, https://www.un.org/development/desa/indigenouspeoples/declaration-on-the-rights-of-indigenous-peoples.html (last visited July 1, 2024).

[175] *See* WALTER R. ECHO-HAWK, IN THE LIGHT OF JUSTICE: THE RISE OF HUMAN RIGHTS IN NATIVE AMERICA AND THE UN DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES 275 (2013) ("Native Hawaiians are still waiting on Congress to follow-up on the [A]pology [Act], with an act of atonement for suppressing the inherent sovereignty and depriving the self-determination rights of the Native Hawaiian people, by enacting restorative legislation to recognize and confirm some measure of their indigenous right to self-determination.").

[176] Māori Law Professor and Human Rights expert Dr. Claire Charters explains,

> Many of the rights expressed in the Declaration reflect rights and freedoms included in widely ratified human rights treaties . . . . For example, rights to non-discrimination, culture, property and, importantly for this inquiry, the right to self-determination contained in Article 1 of the International Covenant on Civil and Political Rights (ICCPR) . . . . World-renowned international lawyers that comprise the International Law Association concluded that the Declaration "includes several key provisions which correspond to existing State obligations under customary international law[.]"

Claire Charters, *Use It or Lose It: The Value of Using the Declaration on the Rights of Indigenous Peoples in Māori Legal and Political Claims*, *in* INTERNATIONAL INDIGENOUS RIGHTS IN AOTEAROA NEW ZEALAND 143 (Andrew Erueti ed., 2017).

[177] *See* Erica-Irene Daes, *The UN Declaration on the Rights of Indigenous Peoples: Background and Appraisal*, *in* REFLECTIONS ON THE UN DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES 38 (Stephen Allen & Alexandra Xanthaki eds., 2011). Additionally, Aguon describes the U.N. Declaration as the first human rights instrument that "formally and unequivocally recognized the world's indigenous peoples as 'peoples' under international law, with the same human rights and freedoms as other 'peoples.'" Julian Aguon, *Native Hawaiians*

Indigenous rights advocates have helped international human rights law develop in meaningful ways.[178] In general, international human rights law envelops Indigenous Peoples' rights. "[T]he now orthodox view [is] that the [United Nations] Declaration [on the Rights of Indigenous Peoples] elaborates classic human rights."[179] Native American legal scholar and activist Walter Echo-Hawk suggests that the "central purpose of the [United Nations] Declaration [on the Rights of Indigenous Peoples] is restorative justice—to repair the persistent denial of indigenous rights by entrenched forces implanted by the legacy of colonialism."[180] Echo-Hawk asks how we can "situate Native [] claims and grasp the distinctive notions of reparative justice that are placed before us by the Declaration?"[181]

The U.N. Declaration's preamble acknowledges "that indigenous peoples possess collective rights which are indispensable for their existence, well-being and integral development as peoples[.]"[182] According to Anaya, Indigenous Peoples' land rights are rooted in general human rights principles:

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and International Law, *in* NATIVE HAWAIIAN LAW: A TREATISE, *supra* note 43, at 355, 395 [hereinafter Aguon, *International Law*] (internal citations omitted).

[178] Andrew Erueti, *A Mixed-Model Interpretive Approach to the Declaration*, *in* INTERNATIONAL INDIGENOUS RIGHTS IN AOTEAROA NEW ZEALAND 24–38 (Andrew Erueti ed., 2017) (describing the 1982 establishment of the Working Group on Indigenous Populations, its work, and the shift away from a decolonization model for advancing Indigenous rights and towards a human rights model).

[179] *Id.* at 23.

[180] *Id.* at 99. He declares that "[r]estorative justice is the best way to respond to human suffering resulting from a historical wrong." *Id.* at 259.

[181] ECHO-HAWK, *supra* note 175, at 251.

[182] UNDRIP, *supra* note 129, Preamble, ¶ 7. It is important to note that the U.N. Declaration is not binding, however, the non-binding nature of the declaration "does not detract from [its] potential for driving cultural and political transformations." Daes, *supra* note 177, at 38. Julian Aguon also explains that, although U.N. declarations may not be binding, they generally "illuminate and record the position of the international community on any given subject . . . and are frequently invoked as[] evidence of the practice of states, which is a source of customary international law." Aguon, *International Law*, *supra* note 177, at 399; *see also*, Mvskoke Media, *14th Annual William C. Canby Jr. Lecture*, YOUTUBE (Mar. 16, 2022), https://www.youtube.com/live/HF4gpVbd_es?si=JKC6rE7OpV_IufQZ (lecture by Kristen A. Carpenter, Council Tree Professor of Law, Director of the American Indian Law Program, University of Colorado) (emphasizing the importance of focusing on implementing the United Nations Declaration on the Rights of Indigenous Peoples and stating "to say the U.N. Declaration is not binding is simply imprecise. . . . As a matter of international law, this is a declaration versus a treaty. It's implemented through an entire framework of diplomacy . . . versus a monitoring body.").

> Indigenous peoples' collective rights over traditional lands and resources . . . can be seen as derivative of the universal human right to property, as concluded by the inter-American human rights institutions, or as extending from the right to enjoy culture, as affirmed by the U.N. Human Rights Committee in light of the cultural significance of lands and resources to indigenous peoples.[183]

Indigenous Peoples' collective rights are essentially human rights.

The U.N. Declaration specifically acknowledges both Indigenous Peoples' rights and States' obligations in furtherance of those rights. It "recognizes for [Indigenous Peoples] rights that they should have enjoyed all along as part of the human family . . . and promotes measures to remedy the rights' historical and systemic violation."[184] A non-exhaustive list of Indigenous Peoples' rights include: the right to "maintain, protect and develop the past, present and future manifestations of their cultures, such as archaeological and historical sites, artefacts, designs, ceremonies[;]"[185] the right to self-determination;[186] the right to self-governance;[187] and the right to "participate in decision-making in matters which would affect their rights, through

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[183] S. James Anaya, *Why There Should Not Have to Be a Declaration on the Rights of Indigenous Peoples*, Keynote Address to the 52d Congress of Americanists, (Jul. 2006), *in* INTERNATIONAL HUMAN RIGHTS AND INDIGENOUS PEOPLES 58, 62–63 (2009) [hereinafter Anaya, *Declaration on the Rights of Indigenous Peoples*].

[184] *Id.* at 63.

[185] UNDRIP, *supra* note 129, at art. 11. States are obligated to "provide redress through effective mechanisms . . . with respect to their cultural, intellectual, religious and spiritual property taken without their free, prior and informed consent or in violation of their laws, traditions and customs." *Id.*

[186] *Id.* at art. 3. Indigenous Populations were not previously viewed as having a right to self-determination. The United Nations Charter recognizes "self-determination of peoples[.]" U.N. Charter art. 1, ¶ 2. The International Covenant on Civil and Political Rights, discussed *infra* Section IV(C)(1), recognizes that "[a]ll peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development." ICCPR, *supra* note 130, at art. 1. The right was predominantly discussed in terms of colonies, "colonial peoples," and territories, but not Indigenous Populations. *See* Marc Weller, *Self-Determination of Indigenous Peoples: Articles 3, 4, 5, 23, and 46(1), in* THE UN DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES: A COMMENTARY, *supra* note 172, at 115, 117–118. Over time, however, and through the efforts of Indigenous Peoples advocates, use of the term "Indigenous Populations" gave way to "Indigenous Peoples." As James Anaya explained, the right to self-determination became applicable to Indigenous Peoples more broadly. Anaya, *Declaration on the Rights of Indigenous Peoples*, *supra* note 183, at 189.

[187] UNDRIP, *supra* note 129, at art. 4.

representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions."[188] These acknowledged rights are essential for the restoration of justice and the repair of historical and ongoing harms inflicted upon Indigenous Peoples and their lands. Restorative justice principles emphasize healing, reconciliation, and the active involvement of Indigenous communities in the processes that address their grievances. By upholding these rights, States and Indigenous Communities can move towards meaningful reparations and a better future for Indigenous Peoples.

The U.N. Declaration emphasizes the importance of Indigenous Peoples' free, prior and informed consent in several articles.[189] More specifically, article 32 of the U.N. Declaration stresses the importance of obtaining Indigenous Peoples' free, prior and informed consent on projects that will impact their lands and natural resources before governments approve those projects, and requires States to:

> consult and operate in good faith with the indigenous peoples concerned *through their own representative institutions* in order to obtain their free and informed consent *prior* to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.[190]

This requirement aligns with restorative justice principles, which focus on rectifying historical wrongs and ensuring that Indigenous Communities have an active and empowered role in decisions that affect their lives and territories. By adhering to these principles, States and Indigenous Communities can promote healing, equity, and the restoration of Indigenous Peoples' rights and autonomy.

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[188] *Id.* at art. 18.

[189] *See id.* at arts. 10, 11(2), 19, 28(1), 29(2), 32(2). An early basic understanding among participants at a United Nations workshop in 2001 was that the principle of Indigenous Peoples' free, prior and informed consent referred to "the right of indigenous peoples, as land and resource owners, to *say 'no'* to proposed developments projects at any point during negotiations with governments and/or extractive industries." Parshuram Tamang, *An Overview of the Principle of Free, Prior and Informed Consent and Indigenous Peoples in International and Domestic Law and Practices*, 9 AUSTRALIAN INDIGENOUS L. REP. 111, 112 (2005).

[190] *Id.* at art. 32(2) (emphases added).

Free, prior and informed consent refers to consultation processes satisfying several elements. Consultation processes are to be free of "coercion and pressure[,]" and conducted before *any* action or development project is undertaken; when "development projects affect[ ] Indigenous peoples' lands, consultations should be conducted sufficiently in advance of any authorization or commencement of activity and more specifically during the exploratory or planning phase of the corresponding project" and development plans should start *after* consultations are completed.[191]

Consultations must also be informative so that affected communities know the scope, effects, and risks of proposed development projects on their lives, resources, and culture.[192] The U.N. Declaration specifically states that such consultations are conducted through Indigenous Peoples' "own representative institutions."[193] One commentator who observed a session of the working group for the U.N. Declaration when it was a draft, explained that Article 32(2) would "not be satisfied by mere consultation of indigenous peoples, rather there is an emphasis on the need for informed consent on the part of the indigenous communities involved."[194] Free, prior and informed consent, however, "should not be read as conferring an overreaching right to veto on indigenous peoples[.]"[195]

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[191] Barelli, *supra* note 172, at 250.

[192] *Id.* at 250–51.

[193] UNDRIP, *supra* note 129, at art. 32(2).

[194] Stefania Errico, *The Draft UN Declaration on the Rights of Indigenous Peoples: An Overview*, 7 HUM. RTS. L. REV. 741, 752–53 (2007).

[195] Barelli, *supra* note 172, at 254. The United States' interpretation, upon announcing its support for the U.N. Declaration, was that its free, prior and informed consent provisions "call[ed] for a process of meaningful consultation with tribal leaders, but not necessarily the agreement of those leaders, before the actions addressed in those consultations were taken." U.S. DEP'T OF STATE, ANNOUNCEMENT OF U.S. SUPPORT FOR THE UNITED NATIONS DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES 5 (2011), https://2009-2017.state.gov/documents/organization/154782.pdf.

Dr. Cathal M. Doyle discusses some of the complexities surrounding the principle of free, prior and informed consent. Dr. Doyle describes the opposition of Australia, Canada, New Zealand, and the United States to the inclusion of free, prior and informed consent in the U.N. Declaration and explains that those "States acknowledge the potential for Article 32 to be interpreted as affording indigenous peoples a veto over development projects impacting on their lands, territories and natural resources." CATHAL M. DOYLE, INDIGENOUS PEOPLES, TITLE TO TERRITORY, RIGHTS AND RESOURCES: THE TRANSFORMATIVE ROLE OF FREE PRIOR AND INFORMED CONSENT, 161–62 (2015) (internal citations omitted). Dr. Doyle reviews how different States have approached and implemented free, prior and informed consent domestically. He suggests that certain commitments toward implementation "possibly represent[ ] sources of legal obligations . . . ." *Id.* at 163–64. While recognizing the varying

The duty to obtain Indigenous Peoples' free, prior and informed consent is not without limits. While free, prior and informed consent may be required when forced relocations[196] or the storage or disposal of hazardous materials[197] are at issue, it may not be required when extractive projects are involved.[198] Exceptions to the general rule requiring consent may be limited to situations where Indigenous Peoples' land and resource rights are not substantially affected *or* when "the extractive activity would only impose such limitations on indigenous peoples' substantive rights as are permissible within certain narrow bounds established by international human rights law."[199] Additionally, processes that genuinely *seek to obtain* consent may not necessarily require consent. When States make good faith efforts to obtain an Indigenous community's free, prior and informed consent, and the Indigenous community involved withholds its consent and refuses to participate in consultations, "the State's obligation to consult is discharged[,]" according to then-U.N. Special Rapporteur, James Anaya.[200] James Anaya makes clear, however, that "when proposed extractive projects *might* affect indigenous peoples or their territories, it is *simply good practice* for the States or companies that promote the projects to acquire the consent or agreement of the indigenous peoples concerned."[201]

Although there tends to be a focus on extractive industries regarding Indigenous Peoples' free, prior and informed consent, an apparent shift has been occurring in support of consent that may extend to non-extractive activities. "[W]here activities directly impact indigenous peoples' right to 'use, enjoy, control, and develop their traditional lands,' there is a norm developing that recognizes that full consent, rather than just meaningful

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degrees of recognition of Indigenous Peoples' right to give their free, prior and informed consent among States, Doyle asserts, "[a]s indigenous rights become entrenched within national legislative frameworks, the requirement for consent will logically follow." *Id.* at 278.

[196] UNDRIP, *supra* note 129, at art. 10.

[197] *Id.* at art. 29(2).

[198] *See* James Anaya (Special Rapporteur on the Rights of Indigenous Peoples), *Extractive Industries and Indigenous Peoples*, ¶¶ 27–32, U.N. Doc. A/HRC/24/41 (July 1, 2013) [hereinafter Anaya, *Extractive Industries*] (discussing both the general rule "requiring" Indigenous Peoples' consent and limited narrow exceptions when dealing with extractive activities).

[199] *Id.* at ¶ 31.

[200] *Id.* at ¶ 25. Anaya also cautions that while "the State's obligation to consult [may be] discharged[,]" it raises questions, such as "what consequences for decisions about the project follow from the indigenous opposition and withholding of consent." *Id.*

[201] *Id.* at ¶ 29 (emphases added).

consultation, is required."[202] "[E]ffective participation in decision-making is a mechanism to effectively guarantee the rights of indigenous and tribal peoples which may be affected by extraction *or* development plans and projects pursued within their lands and territories."[203]

Experts have suggested that the U.N. Declaration "should not be read in isolation from other parts of international law, . . . the Declaration must be seen as . . . further developing and strengthening the legal position of indigenous peoples in interacting with the societies . . . within which they live."[204] Indeed, the U.N. Declaration's articles can be complemented with other human rights instruments and human rights bodies' decisions that reflect restorative justice principles, as described more fully below.

B. *An International Human Right to Reparation for Gross Human Rights Violations*

In the 1990s, United Nations Special Rapporteur Theo van Boven recognized the importance of reparations for Indigenous Peoples. His final report underscored the necessity of "adequate provision [to] be made to entitle groups of victims or victimized communities [including Indigenous Peoples] to present collective claims for damages and to receive collective reparation accordingly."[205] The Special Rapporteur acknowledged the importance of land and natural resources to Indigenous Peoples' well-being and added, "[e]xisting and emerging international law concerning the rights of indigenous peoples lays special emphasis on the protection of these collective rights and stipulates the entitlement of indigenous peoples to compensation in the case of damages resulting from exploration and

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[202] Akilah Jenga Kinnison, *Indigenous Consent: Rethinking U.S. Consultation Policies in Light of the U.N. Declaration on the Rights of Indigenous Peoples*, 53 ARIZ. L. REV. 1301, 1328 (2011).

[203] INTER-AMERICAN COMMISSION ON HUMAN RIGHTS, INDIGENOUS PEOPLES, AFRO-DESCENDENT COMMUNITIES, AND NATURAL RESOURCES: HUMAN RIGHTS PROTECTION IN THE CONTEXT OF EXTRACTION, EXPLOITATION, AND DEVELOPMENT ACTIVITIES 89 (2015) (emphasis added).

[204] Willem van Genugten & Federico Lenzerini, *Legal Implementation and International Cooperation and Assistance: Articles 37-42, in* THE UN DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES: A COMMENTARY, *supra* note 172, at 539, 572.

[205] Theo van Boven (Special Rapporteur on the Right to Reparation to Victims of Gross Violations of Human Rights), *Final Rep. on Study Concerning the Right to Restitution, Compensation and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms*, U.N. Doc., ¶ 14, E/CN.4/Sub.2/1993/8 (July 2, 1993) (discussing human rights violations against individuals and collectivities and the interrelatedness of the two, including Indigenous Peoples).

exploitation programmes pertaining to their lands . . . ."[206] Here, van Boven shows that the trajectory of international law, by the early 1990s, articulated legal protections and compensatory measures for addressing Indigenous Peoples' harms consistent with the goals of restorative justice, fostering reconciliation, and equitable redress for Indigenous Communities.

Theo van Boven's final report included proposed principles and guidelines for a right to reparations.[207] These proposed principles and guidelines served as the foundation[208] for the United Nations' Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law ("U.N. Principles on Reparation"), which provides a human rights framework for reparative justice by incorporating restorative justice principles.[209] This subsection provides a brief discussion of the U.N. Principles on Reparation and its relevance to restorative justice for Native Hawaiians.

The United Nations General Assembly demonstrated its commitment to restorative justice when it adopted the U.N. Principles on Reparation near the end of 2005.[210] These Principles on Reparation, according to legal scholar Eric Yamamoto, Sandra Kim, and Abigail Holden, "specify forms of reparation for victims of gross human rights violations, including restitution,

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[206] *Id.* at ¶ 17.

[207] *Id.* at 56–58.

[208] Marten Zwanenburg, *The Van Boven/Bassiouni Principles: An Appraisal*, 24 NETH. Q. HUM. RTS. 641–45 (2006) (detailing the history leading to the U.N. General Assembly's 2005 adoption of the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights and Serious Violations of International Humanitarian Law, and tracing it to Theo van Boven's earlier and final reports for the U.N. Sub-Commission on the Prevention of Discrimination and Protection of Minorities).

[209] G.A. Res. 60/147, Basic Principles and Guidelines on the Rights to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, Preamble, ¶ 1 (Dec. 16, 2005) [hereinafter U.N. Principles on Reparation] (acknowledging other human rights instruments' provisions "providing a right to a remedy for victims of violations of international human rights law" including art. 8, Universal Declaration of Human Rights; art. 2, International Covenant on Civil and Political Rights; and art. 6 of the International Convention on the Elimination of All Forms of Racial Discrimination); *see also* Dinah Shelton, *Reparations for Indigenous Peoples: The Present Value of Past Wrongs*, *in* REPARATIONS FOR INDIGENOUS PEOPLES: INTERNATIONAL AND COMPARATIVE PERSPECTIVES 64–65 (2008).

[210] U.N. Principles on Reparation, *supra* note 209.

compensation, rehabilitation, and guarantees of non-repetition."[211] Reparations, as Rebecca Tsosie explains, "restore what has wrongfully been taken and . . . atone for injury"[212] and "embodies an ideal of 'restorative justice.'"[213] Additionally, "[r]estorative justice aims to 'repair the injustice,' to make up for it and institute future changes to correct the injustice."[214]

The U.N. Principles on Reparation's text incorporates restorative justice principles into a reparative justice framework. The U.N. General Assembly's adoption of the U.N. Principles on Reparation includes reparative justice language that recognizes victims' rights to remedies such as the right to "[a]dequate, effective and prompt reparation for harm suffered[,]" and "[a]ccess to relevant information concerning violations and reparation mechanisms."[215] The Principles on Reparation provide that victims of gross human rights violations[216] should be restored "to the original situation before" the violation occurred,[217] such victims should be compensated for their harms,[218] rehabilitative care should be provided,[219] and guarantees of

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[211] Eric K. Yamamoto, Sandra Hye Yun Kim, & Abigail M. Holden, *American Reparations Theory and Practice at the Crossroads*, 44 CAL. WEST. L. REV. 1, 53 (2007) [hereinafter Yamamoto et al., *American Reparations*] (citing Human Rights Comm., Res. 2005/35, U.N. Doc. E/CN.4/2005/L.10/Add.11 (Apr. 19, 2005)) (describing this development of this human rights framework at the United Nations Human Rights Commission level prior to its adoption by the General Assembly and its relevance to African-Americans' reparations for slavery); U.N. Principles on Reparation, *supra* note 209, at ¶¶ 18–23; *see also* MARTHA MINOW, BETWEEN VENGEANCE AND FORGIVENESS: FACING HISTORY AFTER GENOCIDE AND MASS VIOLENCE 102–17 (1998) [hereinafter MINOW, BETWEEN VENGEANCE AND FORGIVENESS] (discussing, in various contexts, compensation, restitution and apologizing for human rights violations).

[212] Rebecca Tsosie, *Acknowledging the Past to Heal the Future: The Role of Reparations for Native Nations*, *in* REPARATIONS: INTERDISCIPLINARY INQUIRIES 43, 50 (Jon Miller & Rahul Kumar eds., 2007) [hereinafter Tsosie, *Role of Reparations*].

[213] *Id.* (citing MINOW, BETWEEN VENGEANCE AND FORGIVENESS, *supra* note 211, at 91–117).

[214] *Id.* at 50–51.

[215] U.N. Principles on Reparation, *supra* note 209, at ¶ 11.

[216] "[T]he most serious breaches of international human rights law, as unacceptable offenses to human dignity, are repudiated by the entire international community as the most intolerable crimes against humankind." Federico Lenzerini, *Reparations for Indigenous Peoples in International and Comparative Law: An Introduction*, *in* REPARATIONS FOR INDIGENOUS PEOPLES: INTERNATIONAL AND COMPARATIVE PERSPECTIVES 3, 5 (Federico Lenzerini ed., 2008) (discussing both the traditional approach, and a Special Rapporteur-suggested approach to the term "gross violations").

[217] U.N. Principles on Reparation, *supra* note 209, at ¶ 19.

[218] *Id.* at ¶ 20.

[219] *Id.* at ¶ 21.

non-repetition of the violation should exist.[220] These forms of reparations advocate for restoring victims to their original condition before the violation, compensating for harms, providing rehabilitative care, and ensuring non-repetition of violations, which are deeply aligned with restorative justice principles generally.

Understanding the U.N. Principles on Reparation provides a foundational backdrop for applying these principles to marginalized groups, such as Indigenous Peoples and Native Hawaiians specifically. The U.N. Principles on Reparation, rooted in the work of Special Rapporteur Theo van Boven, highlight the global commitment to addressing and rectifying historical injustices. These principles, which include restitution, compensation, rehabilitation, and guarantees of non-repetition, align closely with the concept of restorative justice. By focusing on collective harms and the necessity for reparations, these principles offer a pathway for Indigenous Peoples, including Native Hawaiians, to seek redress for historical and ongoing violations of their rights.

The U.N. Principles on Reparation embrace Indigenous Peoples within its definition of "victims" by acknowledging collective harms. "[V]ictims are persons who individually or *collectively* suffered harm . . . ."[221] These harms "includ[e] physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that constitute gross violations of international human rights law . . . ."[222] By applying these principles to Indigenous Peoples' harms specifically, Indigenous Communities and States can make meaningful progress towards justice.

Tsosie explored the enduring impact of historical injustices upon Indigenous Peoples in the United States and highlighted the need for reparations to address the complex and intertwined issues resulting from the longstanding harms of colonization:

> Native peoples in the United States continue to suffer from a profound legacy of historical injustice that has political,

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[220] *Id.* at ¶ 23. The Principles also discuss the importance of taking measures to acknowledge the harms victims suffered, which may include public apologies. *Id.* at ¶ 22.

[221] *Id.* at ¶ 8 (emphasis added). *See also* INT'L COMM'N OF JURISTS, THE RIGHT TO A REMEDY AND REPARATION FOR GROSS HUMAN RIGHTS VIOLATIONS: A PRACTITIONER'S GUIDE 43–46 (Revised ed. 2018) (discussing both "collective victims" and "collective harms" as relevant to Indigenous Peoples as recognized in several other instruments, and distinguishing the collective rights of Indigenous Peoples from the rights of groups of individuals).

[222] U.N. Principles on Reparation, *supra* note 209, at ¶ 8.

> legal, *social*, *economic*, *moral and spiritual dimensions*. These are integrated in such a way that the concept of reparations, for Native people, must simultaneously address the dispossession of their *lands*, *natural resources*, ancestral remains, and *cultural property*, as well as the *suppression of their political autonomy and their cultures*.[223]

Tsosie's articulations of reparations for Indigenous Peoples complements the human rights framework of the U.N. Principles for Reparation.[224] Acts of restitution, compensation, rehabilitation, and assurances of non-repetition of human rights violations are important to reparations for Indigenous Peoples for the human rights violations they have suffered.[225] Together, Tsosie's articulations and the U.N. Principles bring into focus the importance, appropriateness, and adequacy of employing the four Indigenous values for contextual legal analysis.

The U.N. Principles on Reparation and the four Indigenous values analysis provide guidance to the State for reevaluating Native Hawaiians' collective harms that result from the State's past and ongoing handling and mismanagement of lands that Native Hawaiians have unrelinquished claims to, and for considering potential measures to restore Native Hawaiians to their pre-harm condition, which may also include compensation for those harms. Reparations, under the U.N. Principles, also provide potential opportunities for Native Hawaiians to facilitate their own rehabilitation, and for the State to provide assurances that the human rights violations will not be repeated. The violations in this case are lease extensions to lands that Native Hawaiians have unrelinquished claims to, without any consultation with Native Hawaiians or even attempting to obtain Native Hawaiians' free, prior and informed consent.

C. *Other Human Rights Instruments and Bodies*

The United States is a party to two important human rights treaties that provide meaningful global context for examining Native Hawaiian land issues. One is the International Covenant on Civil and Political Rights

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[223] Tsosie, *Role of Reparations*, *supra* note 212, at 52 (emphasis added).

[224] *See* van Boven, *supra* note 205, at ¶ 17 (recognizing the importance of land and natural resources to the life and well-being of Indigenous Peoples, the protection of the collective right to lands and natural resources, and compensation).

[225] *See* Yamamoto et al., *American Reparations*, *supra* note 211, at 52–54.

("ICCPR").[226] The United Nations monitoring body of the ICCPR is the Human Rights Committee. The United States is also a party to the International Convention on the Elimination of All Forms of Racial Discrimination ("ICERD").[227] The Committee on the Elimination of Racial Discrimination ("CERD") is the monitoring body for the ICERD. These two human rights treaties require national governments, parties to the treaties, to report "on implementation of treaty norms[.]"[228] The ICCPR and the ICERD have both proved important in protecting Indigenous Peoples' rights.

1. *The Human Rights Committee and the International Covenant on Civil and Political Rights*

The Human Rights Committee "is the body of independent experts that monitors implementation of the International Covenant on Civil and Political Rights by its State parties" and is "established under article 28 of the Covenant."[229] The Human Rights Committee examines "government reports bearing upon the rights of indigenous peoples and [ ] encourag[es] official policies and behavior in line with contemporary norms[.]"[230] Other State parties may report "another State Party [that] is not giving effect to" the ICCPR.[231]

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[226] *See* National Report Submitted in Accordance with Paragraph 5 of the Annex to Human Rights Council Resolution 16/21, United States of America, ¶ 8 & n.7, U.N. Doc. A/HRC/WG.6/36/USA/1 (2020) [hereinafter USA HRC 2020 Report Annex] (describing and listing the human rights treaties the United States of America is a party to, including the International Covenant on Civil and Political Rights and the International Convention on the Elimination of All Forms of Racial Discrimination); *see also* UNITED NATIONS, TREATY SERIES: TREATIES AND INTERNATIONAL AGREEMENTS REGISTERED OR FILED AND RECORDED WITH THE SECRETARIAT OF THE UNITED NATIONS 543 (1992), https://treaties.un.org/doc/Publication/UNTS/Volume%201676/v1676.pdf [hereinafter U.N. Treaties & Agreements].

[227] USA HRC 2020 Report Annex, *supra* note 226, at ¶ 9; G.A. Res. 2106 (XX) International Convention on the Elimination of All Forms of Racial Discrimination art. 8 (Dec. 21, 1965) [hereinafter ICERD].

[228] *See* Anaya, *Declaration on the Rights of Indigenous Peoples*, *supra* note 183, at 186.

[229] *See Treaty Bodies: Human Rights Committee*, U.N. HUM. RTS. OFF., https://www.ohchr.org/en/hrbodies/ccpr/pages/ccprindex.aspx (last visited Oct. 16, 2024); UNITED NATIONS HUM. RTS. OFF. OF THE HIGH COMM'R, REPORTING UNDER THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS: TRAINING GUIDE 8 (2021), https://www.ohchr.org/sites/default/files/Reporting-ICCPR-Training-Guide.pdf.

[230] S. JAMES ANAYA, INDIGENOUS PEOPLES IN INTERNATIONAL LAW 229 (2nd ed. 2004).

[231] ICCPR, *supra* note 130, at art. 41(1)(a) (describing how the First Optional Protocol to the ICCPR allows for individual complaints, but the United States is not a party to the First Optional Protocol).

State parties to the ICCPR agree, in Article 27, that, "[i]n those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language."[232] The Human Rights Committee has explained its interpretation of Article 27 in a General Comment. In one part of that comment, the Human Rights Committee acknowledged the ICCPR distinguishes between "right[s] belonging to peoples" and "rights conferred on individuals."[233] In that portion of the comment, the Human Rights Committee discussed the right of self-determination, a right belonging to peoples. Elaborating on what this means for Indigenous Peoples, Anaya described the Human Rights Committee as "indicating [that] the applicability of the right of peoples to self-determination [was] beyond the decolonization context and [was also] apart from ascribing attributes of independence or statehood[.]"[234] In other words, self-determination was not apparently limited to peoples and territories that went through formal decolonization processes, and peoples of independent States, but now also applied to Indigenous Peoples living in areas, lands, and territories that have not gone through formal decolonization processes,[235] which includes American Indians in the continental United States, and Native Hawaiians in Hawai'i.

The Human Rights Committee, through the General Comment, discussed Indigenous Peoples' cultural rights and emphasized the need for States to provide legal protections for those rights:

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[232] *Id.* at art. 27.

[233] Hum. Rts. Comm., *General Comment Adopted by the Human Rights Committee Under Article 40, Paragraph 4, of the Internation Covenant on Civil and Political Rights*, ¶ 3.1 , U.N. Doc. CCPR/C/21/Rev.1/Add.5 (Apr. 26, 1994) [hereinafter *CCPR Gen. Com. 23*].

[234] Anaya, *Declaration on the Rights of Indigenous Peoples*, *supra* note 183, at 189 (citing Hum. Rts. Comm., *General Comment No. 12: Article 1 (Right to Self-determination), The Right to Self-determination of Peoples*, U.N. Doc. A/39/40, Annex VI (Mar. 13, 1984)); *see also* Weller, *supra* note 186, at 118 (describing a history of the right to self-determination and how the right was being "appl[ied] to colonial peoples," which referred to "cases listed as non-self-governing territories at the United Nations").

[235] In describing the work of the United Nations Working Group of the Draft Declaration between 1995 and 2006, Māori scholar Andrew Erueti explained, "there was *a shift in focus away* from the decolonisation model *towards a* human rights model whereby all of the rights in the Declaration were considered to be elaborations of human rights." Erueti, *supra* note 178, at 33 (emphases added).

> With regard to the exercise of the cultural rights protected under article 27, the Committee observes that culture manifests itself in many forms, including *a particular way of life associated with the use of land resources, especially in the case of indigenous peoples*. That right may include such traditional activities as fishing or hunting and the right to live in reserves protected by law . . . . The enjoyment of those rights may require positive legal measures of protection and measures to ensure the effective participation of members of minority communities in decisions which affect them.[236]

The Human Rights Committee's emphasis on the need for comprehensive legal protections and inclusive decision making processes to address and repair the past and ongoing damage to Indigenous Peoples and their lands is impactful because these actions are essential for promoting healing, restoring cultural practices, and ensuring long-term justice and equity. States parties "report[] on the measures they have adopted which give effect to the rights recognized herein and on the progress made in the enjoyment of those rights[,]"[237] and the United States has shown a practice for reporting on its measures by submitting its ICCPR article 40 reports.

2. *The Committee on the Elimination of Racial Discrimination and the International Convention on the Elimination of All Forms of Racial Discrimination*

Similar to the Human Rights Committee, CERD also consists of independent experts that monitors State parties' implementation of ICERD.[238] CERD does not rely exclusively on States parties' reports. CERD's other monitoring mechanisms include an early-warning procedure and inter-State complaints.[239]

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[236] U.N. HRC, General Comment 23, *supra* note 151, at ¶ 7 (emphasis added).

[237] ICCPR, *supra* note 130, at art. 40(1).

[238] *See Committee on the Elimination of Racial Discrimination*, UNITED NATIONS HUM. RTS. OFF. OF THE HIGH COMM'R, https://www.ohchr.org/EN/HRBodies/CERD/Pages/CERDIntro.aspx (last visited Oct. 24, 2024).

[239] *Id.* The early-warning procedure is designed to "address existing structural problems from escalating into conflicts . . . ." *ANNEX III, Prevention of Racial Discrimination, Including Early Warning and Urgent Procedures: Working Paper Adopted by the Committee on the Elimination of Racial Discrimination*, U.N. Doc. A/48/18/Annex III, B. ¶ 8(a) (1993) [hereinafter U.N. Doc. A/48/18/Annex III]. There are also "[u]rgent procedures to respond to

CERD, in General Recommendation 23, urged States to recognize and preserve Indigenous Peoples' cultures, guarantee equality and non-discrimination, support sustainable development, ensure Indigenous Peoples have opportunities to give their informed consent, and protect cultural practices and languages:

> The Committee calls in particular upon States parties to:

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problems requiring immediate attention to prevent or limit the scale . . . of serious violations of the Convention." *Id.* at B. ¶ 8(b). If a State Party is not giving effect to the provisions of this Convention, [another State Party] may bring the matter to the attention of the Committee." ICERD, *supra* note 227, at 49.

Two requests for early warning measures and urgent action procedures were submitted to the United Nations Committee on the Elimination of Racial Discrimination that are relevant to Native Hawaiians. Cultural Survival, an Indigenous rights organization, submitted its request in 2019 while Kahea: The Hawaiian-Environmental Alliance submitted its request in 2023. Cultural Survival, *"Request for Early Warning Measures and Urgent Action Procedures to the United Nations Committee on the Elimination of Racial Discrimination"* (Mar. 22, 2019) https://www.culturalsurvival.org/sites/default/files/EWUA_Hawai%27i_2019.pdf; Kahea: The Hawaiian-Environmental Alliance, *"Request for Early Warning Measures and Urgent Action Procedures to the United Nations Committee on the Elimination of Racial Discrimination"* (July 14, 2023), https://static1.squarespace.com/static/63ea71a91605c527cc8888e4/t/64b17616a8ca93701f2b5ad1/1689352081015/CERD_EWUAP_TMT.pdf. Subsequent to Cultural Survival's 2019 request, the United Nations Committee on the Elimination of Racial Discrimination informed the United States Department of State about the request "regarding the construction of the Thirty Meter Telescope, on the Mauna Kea Mountain in the State of Hawai'i of the United States of America, and its impact on the rights of indigenous peoples, the Native Hawaiians." Letter from Noureddine Amir, Chair, Comm. on the Elimination of Racial Discrimination, to Mark J. Cassayre, Permanent Representative of U.S. to the U.N. Off. Geneva (May 10, 2019), https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/DownloadDraft.aspx?key=KbseUklCOZUq9+qNmCtvRXuNxheHvrAWbNu+w3G92Bm9SazR/0PgHG6hAeuxleNAgYHrAFnPVQwfJ+qGIc54Ig==. The Committee on the Elimination of Racial Discrimination expressed concern that Cultural Survival's allegations, "if verified, would amount to the failure of ensuring that indigenous peoples can exercise their rights to practise and revitalize their cultural traditions and customs" and that "the situation could constitute a breach of the State party duty to recognize and protect the rights of indigenous peoples to own, develop, control and use their communal lands, territories and resources." *Id.* at 2. The Committee also emphasized special attention to its General Recommendation 23 (1997) (discussed *infra*) and its 2014 concluding observations to the United States. U.N. Comm. on the Elimination of Racial Discrimination, *Concluding Observations on the Combined Seventh to Ninth Period Reports of the United States of America*, ¶ 24 U.N. Doc. CERD/C/USA/CO/7-9 (Sept. 25, 2014).

> (a) Recognize and respect indigenous distinct culture, history, language and way of life as an enrichment of the State's cultural identity and to promote its preservation;
>
> (b) Ensure that members of indigenous peoples are free and equal in dignity and rights and free from any discrimination, in particular that based on indigenous origin or identity;
>
> (c) Provide indigenous peoples with conditions allowing for a sustainable economic and social development compatible with their cultural characteristics;
>
> (d) Ensure that members of indigenous peoples have equal rights in respect of effective participation in public life and that no decisions directly relating to their rights and interests are taken without their informed consent;
>
> (e) Ensure that indigenous communities can exercise their rights to practice and revitalize their cultural traditions and customs and to preserve and to practice their languages.[240]

CERD's call to States parties, specifically provisions (a), (c), and (e), reflect restorative justice principles by emphasizing the recognition, respect, and preservation of Indigenous cultures, as well as the promotion of sustainable development and the revitalization of cultural practices. These provisions underscore the need for active measures to restore justice for Indigenous Peoples by recognizing their cultural contributions, supporting sustainable development that respects their traditions, and promoting the revitalization of their cultural practices and languages.

CERD also advocated for the return of Indigenous Peoples' lands that were taken without their free and informed consent and the implementation of other reparative actions when the return of those lands is not possible:

> The Committee especially calls upon States parties to recognize and protect the rights of indigenous peoples to own, develop, control and use their communal lands, territories and resources and, where they have been deprived of their lands and territories traditionally owned or otherwise inhabited or used without their free and informed consent, to take steps to return those lands and territories. Only when this is for factual reasons not possible, the right to restitution

[240] U.N. CERD, General Recommendation 23, *supra* note 159, at ¶ 4.

> should be substituted by the right to just, fair and prompt compensation. Such compensation should as far as possible take the form of lands and territories.[241]

This CERD statement from General Recommendation 23 also embodies restorative justice principles by acknowledging historical wrongs, emphasizing the importance of consent, advocating for tangible reparative actions, and promoting healing and equity. CERD, through the Recommendation, advances restorative justice by addressing the need for concrete steps to return lands to Indigenous Peoples, thereby supporting their rights and fostering reconciliation. Here too, States parties agree to "report on the legislative, judicial, administrative or other measures which they have adopted and which give effect to the provisions of this Convention[.]"[242]

3. *The Organization of American States*

"The Organization of American States [("OAS")] is the world's oldest regional organization, dating back to the First International Conference of American States, held in Washington D.C., from October 1889 to April 1890[]"[243] and the United States is a founding member.[244] OAS member states endeavor to promote solidarity and collaboration, between and among member states, while also protecting "their sovereignty, their territorial integrity, and their independence."[245] "[P]romot[ing] and consolidat[ing] representative democracy" is one of the OAS's essential purposes.[246] "In stressing democratic government, the OAS also began to work for human rights."[247]

The Inter-American Commission on Human Rights ("Inter-American Commission") and the Inter-American Court of Human Rights ("Inter-

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[241] *Id.* at ¶ 5.

[242] ICERD, *supra* note 227, at art. 9(1).

[243] *Who We Are*, ORG. OF AM. STATES, http://www.oas.org/en/about/who_we_are.asp (last visited Apr. 21, 2023).

[244] *See United States of America*, ORGANIZATION OF AMERICAN STATES, http://www.oas.org/en/member_states/member_state.asp?sCode=USA#Inicio (describing the United States' entry into the Inter-American System as occurring in 1889). For the list of 35 OAS member states, *see Member States*, ORGANIZATION OF AMERICAN STATES, http://www.oas.org/en/about/member_states.asp (last visited Nov. 1, 2024).

[245] Charter of the Organization of American States (A-41), Ch. I, Art. 1, http://www.oas.org/en/sla/dil/docs/inter_american_treaties_A-41_charter_OAS.pdf [hereinafter OAS Charter].

[246] *Id.* at ch. I, art. 2(b).

[247] BARBARA LEE BLOOM, THE ORGANIZATION OF AMERICAN STATES 18 (2008).

American Court"), both a part of the Organization of American States, have used the American Declaration on the Rights and Duties of Man ("American Declaration") and the American Convention on Human Rights ("American Convention") to address Indigenous Peoples' issues.[248] Although not binding, the American Declaration is used "as an authoritative statement of the human rights obligations that all OAS member states assume as parties of the OAS Charter" when OAS member states are not party to the American Convention.[249]

a. *Inter-American Commission on Human Rights*

The OAS' Inter-American Commission is part of a system that "has become an important conduit for the promotion of indigenous peoples' rights."[250] The Inter-American Commission "promote[s] the observance and protection of human rights and . . . serve[s] as a consultative organ of the [OAS] in these matters."[251] As such, the Inter-American Commission on Human Rights is a potential venue for Native Hawaiians to have their human rights concerns heard.[252]

The Inter-American Commission recognized Indigenous Peoples' property rights through Article XXIII of the American Declaration.[253] James Anaya and Maia S. Campbell explained that "the Inter-American

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[248] Anaya, *Declaration on the Rights of Indigenous Peoples*, *supra* note 183, at 253.

[249] *Id.* at 264.

[250] *Id.* at 251.

[251] OAS Charter, *supra* note 245, at ch. XV, art. 106.

[252] While the Inter-American Commission on Human Rights may be a venue, the Inter-American Court of Human Rights is not an option as the U.S. government has not accepted the Inter-American Court's jurisdiction. Although the United States may not be within the Inter-American Court's jurisdiction, the Inter-American Court's human rights decisions meaningfully impact the Inter-American Commission. Additionally, there are also certain procedural requirements that must be satisfied in order for the Inter-American Commission to consider a petition. For instance, petitioners must exhaust domestic remedies unless an exception applies. *Rules of Procedure of the Inter-American Commission on Human Rights*, IACHR, (effective Aug. 1, 2013), art. 31.1. Petitions must be "lodged within a period of six-months following . . . the decision that exhausted the domestic remedies." *Id.* at art. 32.1. Petitions are generally not considered if the substantive subject matter "is pending . . . before an international governmental organization of which the State concerned is a member . . . ." *Id.* at art. 33.1.a.

[253] *See* Organization of American States, American Declaration on the Rights and Duties of Man, art. XXIII, O.A.S. Doc. OEA/Ser.L.V/I.82 doc. 6 rev. 1 (1948) ("Every person has a right to own such private property as meets the essential needs of decent living and helps to maintain the dignity of the individual and of the home.").

Commission reaffirmed the existence of an 'autonomous' property right irrespective of state recognition."[254] The Commission "made clear that 'the property rights of indigenous peoples are not defined exclusively by entitlements within a state's formal legal regime, but also include that indigenous communal property that arises from and is grounded in indigenous custom and tradition.'"[255]

The Inter-American Commission also elaborated upon Indigenous Peoples' property rights, under the American Declaration, and clarified consent obligations of OAS member states (prior to passage of the U.N. Declaration on the Rights of Indigenous Peoples):

> Articles XVIII and XXIII of the American Declaration [on the Rights and Duties of Man] specially oblige a member state to ensure that any determination of the extent to which indigenous claimants maintain interests in the lands to which they have traditionally held title and have occupied and used is based upon a process of fully informed consent on the part of the indigenous community as a whole. This requires, at a minimum, that all of the members of the community are fully and accurately informed of the nature and consequences of the process and provided with an effective opportunity to participate individually or as collectives. In the Commission's view, these requirements are equally applicable to decisions by the State that will have an impact upon indigenous lands and their communities, such as the granting of concessions to exploit the natural resources of indigenous territories.[256]

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[254] S. James Anaya & Maia S. Campbell, *Gaining Legal Recognition of Indigenous Land Rights: The Story of the Awas Tingni Case in Nicaragua in* HUMAN RIGHTS ADVOCACY STORIES 150 (D. Hurwitz et al. eds., 2009).

[255] *Id.* at 151 (citing Maya Indigenous Community of Toledo District, Belize, Case No. 12.053 (Belize), Inter-Am. C.H.R. Report No. 40/04 (merits decision of Oct. 12, 2004), ¶ 117).

[256] *Maya Indigenous Community*, at ¶ 142. Article XVIII concerns judicial equality in courts. Article XXIII recognizes the right to property. The Inter-American Commission's language here focuses on "a process of fully informed consent on the part of the indigenous community as a whole," whereas the U.N. Declaration refers to Indigenous Peoples' free, *prior*, and informed consent. *Id.* The Inter-American Commission, however, also emphasizes the importance of providing affected Indigenous Peoples with "an effective opportunity to participate" in the process. *Id.* Since its Maya Indigenous Communities of Toledo District report, the Inter-American Commission has further explained that effective participation also refers to prior consultation with Indigenous Peoples. INTER-AMERICAN COMM'N ON HUM.

Ensuring Indigenous Peoples' fully informed consent and active participation in decisions affecting their lands is strongly consistent with restorative justice's emphasis on repairing harm, restoring autonomy, and fostering equitable relationships. By mandating informed consent and inclusive decision making, these principles help address past and ongoing injustices, promoting healing, accountability, and respect for Indigenous self-determination. This approach ensures that Indigenous Peoples' voices are central in the stewardship and use of their lands and resources, and advancing the goal of meaningful restitution and justice.

b. *Inter-American Court of Human Rights*

The American Convention on Human Rights formed the Inter-American Court,[257] which "renders legally binding judgments on human rights cases within its jurisdiction."[258] The Inter-American Court's jurisdiction, however, is limited to OAS member states that "recognize or have recognized such jurisdiction[.]"[259] The United States is not a party to the American Convention and has not recognized the Inter-American Court's jurisdiction.[260] While the Inter-American Court, unlike the Inter-American Commission, may not be a venue available to Native Hawaiians, there are decisions that should be mentioned here to understand more broadly how international human rights law is developing.

RTS., *supra* note 203, at 85 (citing The Case of the Saramaka People v. Suriname, Inter-Am. Ct. H.R. (ser. C) No. 172, ¶ 127–28 (Judgment on the Preliminary Exceptions, Merits, Reparations and Costs of Nov. 28, 2007), The Case of the Kichwa Indigenous Peoples of Sarayaku v. Ecuador, Inter-Am. Ct. H.R. (ser. C) No. 245, ¶ 159–67 (Judgment on the Merits and Reparations of June 27, 2012)).

[257] The American Convention on Human Rights established the Inter-American Court of Human Rights, along with the Inter-American Commission on Human Rights, as the OAS organs that deal with "matters relating to the fulfillment of the commitments made by the States Parties to [the American] Convention." American Convention on Human Rights, ch. VI, art. 33, Nov. 22, 1969, O.A.S.T.S. No. 36 [hereinafter American Convention].

[258] Anaya, *Declaration on the Rights of Indigenous Peoples*, *supra* note 183, at 252.

[259] American Convention, *supra* note 257, at ch. VIII, sec. 2, art. 62(3).

[260] There are also certain procedural requirements that must be satisfied in order for the Inter-American Commission to consider a petition. For instance, petitioners must exhaust domestic remedies unless an exception applies. IACHR, *Rules of Procedure of the Inter-American Commission on Human Rights* (effective Aug. 1, 2013), art. 31. Petitions must be "lodged within a period of six-months following . . . the decision that exhausted the domestic remedies." *Id.* at art. 32(1). Petitions are generally not considered if the substantive subject matter "is pending . . . before an international governmental organization of which the State concerned is a member . . . ." *Id.* at art. 33(1)(a).

i. *The Mayagna Awas (Sumo) Tingni Indigenous People*

Mayagna Awas (Sumo) Tingni Community v. Nicaragua involved "a small Mayagna Sumo Indigenous community called the Awas Tingni who live in the . . . eastern part of Nicaragua"[261] that use traditional "farming techniques and the skills of hunting and freshwater fishing that have sustained them."[262] The Indigenous Community is organized "under a traditional leadership structure based on custom[.]"[263] Roughly 650 individuals comprise this small Indigenous Community.[264] The dispute was over the Nicaraguan government's failure to demarcate the Indigenous Community's land and protect their interests in that land.[265] While there is no published decision from the Inter-American Commission,[266] the Inter-American Court's decision provides insight since the Commission "filed a complaint against Nicaragua before the Inter-American Court of Human Rights."[267] When the Commission filed its complaint, it "essentially [argued] the same violations of international human rights that were articulated by Awas Tingni in its

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[261] Megan Davis, *THE AWAS-TINGNI DECISION:* Case of the Mayagna (sumo) Awas Tingni Community v The Republic of Nicaragua, 5 INDIGENOUS L. BULL. 15 (2002).

[262] Anaya & Campbell, *supra* note 254, at 117; *see also* Mayagna (Sumo) Awas Tingni Community v. Nicaragua, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 79, ¶ 103(e) (Aug. 31, 2001) (describing the Awas Tingni's subsistence activities).

[263] Complaint of the Inter-American Commission of Human Rights, Submitted to the Inter-American Court of Human Rights in the Case of the Awas Tingni Mayagna (Sumo) Indigenous Community Against the Republic of Nicaragua, 19 ARIZ. J. INT'L & COMP. L. 17, 23 (2002).

[264] Petition by Mayagna Indian Community of Awas Tingni ¶ 10, Mayagna Indian Community of Awas Tingni v. Nicaragua, Inter-Am. Comm'n H.R. (Oct. 2, 1995).

[265] *Mayagna (Sumo) Awas Tingni Community*, at ¶ 2. This case started with the Inter-American Commission. *See id.* at ¶ 1 (stating that "[t]he case in question had originated in petition No. 11,577, received at the [Inter-American] Commission's Secretariat on October 2, 1995"); *see also* American Convention, *supra* note 257, at art. 61 (recognizing States Parties and the Inter-American Commission as the only parties with "the right to submit a case to the [Inter-American] Court").

[266] According to article 50 of the American Convention, when friendly settlements between parties are not reached, a Commission report is produced and transmitted only to the concerned parties, "which shall not be at liberty to publish it." American Convention, *supra* note 257, at art. 50(1) & (2); *see also* Anaya & Campbell, *supra* note 254, at 130 (detailing facts following failed mediation efforts that included the Commission completing an investigation and delivering a confidential (non-published) report to the Nicaraguan government that "[found] it responsible for violating the human rights of the members of the Awas Tingni community, including the right to property . . .").

[267] S. James Anaya & Claudio Grossman, *The Case of Awas Tingni v. Nicaragua: A New Step in the International Law of Indigenous Peoples*, 19 ARIZ. J. INT'L & COMP. L. 1, 8 (2002).

earlier petition to the Commission," which included violations of the rights to property and judicial protection.[268]

The Inter-American Court used both formalist and contextualist approaches to analyze whether Nicaragua violated the Mayagna Awas Tingni Community's right to property under Article 21 of the American Convention when the State "grant[ed] the SOLCARSA corporation a logging concession on lands traditionally occupied by the [Mayagna Awas Tingni] Community" without formal title deeds to those lands and Nicaragua considered those traditionally occupied lands to be State lands as a result.[269] The court's formalist approach is evident in its analysis of the procedural aspects and textual guarantees of Article 21.

The court interpreted the language of Article 21, which outlined the right to the use and enjoyment of property and the conditions under which deprivation of property is permissible.[270] The court defined "property" to include all material and intangible elements that can be part of a person's patrimony.[271] This precise definition demonstrated a focus on the literal and traditional understanding of property within legal norms, as a starting point.

The Inter-American Court, however, also transitioned to a contextualist approach while relying on the text of Article 29(b) of the American Convention, which prevents a narrowly restrictive interpretation of rights,[272] "No provision of this Convention shall be interpreted as . . . restricting the enjoyment or exercise of any right or freedom recognized by virtue of the laws of any State Party or by virtue of another convention to which . . . [a] state[] is a party[.]"[273] The court interpreted property rights within the broader framework of Indigenous Peoples' communal land tenure systems, and grounded this interpretation in international human rights principles.[274]

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[268] *Id.*

[269] Mayagna (Sumo) Awas Tingni Community v. Nicaragua, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 79, ¶ 140(j) (Aug. 31, 2001).

[270] *Id.* at ¶¶ 142–44.

[271] *Id.* at ¶ 144.

[272] *Id.* at ¶ 147.

[273] American Convention, *supra* note 257, at art. 29(b).

[274] The Inter-American Court explained that human rights treaty terms are not restricted by domestic law definitions and that human rights treaties adapt to circumstances:

> The terms of an international human rights treaty have an autonomous meaning, for which reason they cannot be made equivalent to the meaning given to them in domestic law. Furthermore, such human rights treaties

James Anaya and Maia S. Campbell describe the Inter-American Court as adopting the view that the international human right to property:

> embraces the communal property regimes of indigenous peoples as defined by their own customs and traditions. The Court thus held that "possession of the land should suffice for indigenous communities lacking real title to property of the land to obtain official recognition of that property." In arriving at this conclusion the Court employed what it termed an "evolutionary" method of interpretation, taking into account normative international developments both within and outside of the Inter-American system.[275]

This approach underscores the importance of interpreting property rights in a way that respects and protects the cultural heritage and collective rights of Indigenous Peoples.

By blending formalist and contextualist approaches, the Inter-American Court established a robust legal foundation for its decision while ensuring that the unique circumstances and rights of the Awas Tingni Community were considered. The court's instruction for Nicaragua to "abstain from any acts that might lead [State] agents . . . or third parties acting with its acquiescence . . . to affect the existence, value, use or enjoyment of the [Indigenous Community's] property . . . where the[y] . . . live and carry out their activities" until the State demarcates and titles the community's land,[276] and its emphasis on developing procedures "in accordance with the customary laws, values, customs, and mores"[277] exemplify this balanced

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> are live instruments whose interpretation *must adapt to the evolution of* the times and, specifically, to current living conditions.

Mayagna (Sumo) Awas Tingni Community, at ¶ 146 (emphasis added).

[275] Anaya & Campbell, *supra* note 254, at 139–40 (internal citations omitted). The Inter-American Court's recognized Indigenous Peoples' customs and traditions as a basis of communal property regimes, and also acknowledged the unique relationship Indigenous Communities have with their lands, which is not just economic but also cultural and spiritual. Mayagna (Sumo) Awas Tingni Community v. Nicaragua, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 79, ¶ 148-53 (Aug. 31, 2001).

[276] *Mayagna (Sumo) Awas Tingni Community*, at ¶ 173(4). The Inter-American Court's language here is not unlike the Hawai'i Supreme Court's language in *OHA v. HCDCH I*, when it prohibited the alienation of public trust lands until Native Hawaiian claims were resolved. Off. of Hawaiian Affs. v. Hous. & Cmty. Dev. Corp. (*OHA v. HCDCH I*), 117 Hawai'i 174, 181, 177 P.3d 884, 891 (2008), *rev'd and remanded sub. nom.* Hawai'i v. Off. of Hawaiian Affs., 556 U.S. 163 (2009).

[277] *Mayagna (Sumo) Awas Tingni Community*, at ¶ 138.

approach, ensuring that legal protections are both formally sound and contextually relevant. This dual analysis ultimately supports the goal of restorative justice for the Awas Tingni Community by combining strict legal interpretation with a deep understanding of Indigenous cultural contexts.

ii. *The Yakye Axa Indigenous People*

Another case involves the Yakye Axa, an Indigenous Community of hunter-gatherers[278] comprised of ninety families in Paraguay.[279] Yakye Axa traditional lands (which "include[] what are known as the Loma Verde, Maroma, and Ledesma estates"[280]) were sold near the end of the nineteenth century.[281] In the latter part of the twentieth-century, however, the Anglican Church resettled Yakye Axa members on other lands.[282] The natural resources and environments in these resettled areas were different than the Indigenous peoples' places of origin, and "did not improve living conditions" since it did not provide adequate food production.[283] Due to these conditions, the Yakye Axa Indigenous Community sought "to return to their [traditional] territory, which [was now a ranch and] whose managers did not allow their return."[284]

As a result, many Yakye Axa families were "forced to live in destitute conditions alongside a nearby highway" for nearly twenty years in Paraguay.[285] The Yakye Axa's displacement from their traditional lands "has caused special and grave difficulties to obtain food, primarily because the area where the temporary settlement is located does not have appropriate conditions for cultivation or to practice their traditional subsistence activities,

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[278] Yakye Axa Indigenous Cmty. v. Paraguay, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 125, ¶ 50.3 (June 17, 2005).

[279] *Yakye Axa Community*, CEJIL: CENTRO POR LA JUSTICIA Y EL DERECHO INTERNACIONAL, https://cejil.org/en/case/yakye-axa-community/ (last visited Jan. 16, 2025) (describing the Yakye Axa Community as "consist[ing] of 319 people, grouped in approximately 90 families") [hereinafter *Yakye Axa Community*, CEJIL].

[280] *Yakye Axa Indigenous Cmty*, at ¶ 50.5. The court also acknowledged that place names within the territory reflect "[t]raditional occupation . . . by the indigenous peoples of the" area. *Id.* at ¶ 50.4.

[281] *Id.* at ¶ 50.10.

[282] *Id.* at ¶¶ 50.12, 50.13.

[283] *Id.* at ¶¶ 50.14, 50.15.

[284] *Yakye Axa Community*, CEJIL, *supra* note 279.

[285] *Paraguay: Land Dispute Victory for Displaced Indigenous Community*, AMNESTY INT'L (Feb. 3, 2012), https://www.amnesty.org/en/latest/press-release/2012/02/paraguay-land-dispute-victory-displaced-indigenous-community/.

such as hunting, fishing, and gathering."[286] Yakye Axa children often fall ill and have limited access to food, parents are unemployed, and "members of the community cannot farm because their current settlement is on a fringe of land that the authorities classify as a 'public road' and also because they have been forbidden from hunting, gathering firewood and water from their lands."[287]

Consistent with traditional formalist and contextual inquiry approaches discussed *supra* in Part III, the Inter-American Court, also deployed both formalist and contextual analyses in *Yakye Axa Indigenous Community*. The court grounded its decision in specific legal texts and established principles. The Inter-American Court referenced Article 21 of the American Convention, which defines property,[288] and recognized property to include both material and intangible assets, reaffirming a broad legal basis for the rights of Indigenous Communities to their traditional lands and resources, as it did in *Mayagna (Sumo) Awas Tingni*.[289] The Court then correlated this with the Paraguayan Constitution, which explicitly recognizes Indigenous Peoples' cultural identity "and links it with their respective habitats, granting them, also, a number of specific rights, which provide a basis for this Court to define the scope of Article 21 of the Convention[.]"[290] The court also explained, "merely abstract or juridical recognition of indigenous lands, territories, or resources, is practically meaningless if the property is not physically delimited and established."[291] By anchoring its reasoning in these legal provisions, the Inter-American Court ensured that its decision was firmly rooted in the established legal framework, exemplifying a formalist approach that emphasized adherence to legal texts and precedents.

Both individual private and Indigenous communal property rights holders have recognized rights, and Indigenous Communities do not necessarily prevail over the State or private interests.[292] Under this formalist approach, States may impose lawful, necessary, and proportional limitations on

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[286] Yakye Axa Indigenous Cmty. v. Paraguay, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 125, ¶ 164 (June 17, 2005).

[287] *Id.* at ¶ 8.

[288] *Id.* at ¶ 123 (quoting American Convention, *supra* note 257, at art. 21).

[289] *Id.* at ¶ 137 (citing Mayagna (Sumo) Awas Tingni Community v. Nicaragua, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 79, ¶ 144 (Aug. 31, 2001)).

[290] *Id.* at ¶ 138 (describing Articles 62 through 66 of the Paraguayan Constitution).

[291] *Id.* at ¶ 143.

[292] *Id.* at ¶¶ 143, 149.

property rights when those limitations are intended to serve "a legitimate goal in a democratic society."[293]

The Inter-American Court also adopted contextual analysis by considering the unique cultural and historical contexts of the Indigenous Community involved. The court highlighted the deep cultural and spiritual connections that Indigenous Peoples have with their land, emphasizing that their relationship with their territory is integral to their cultural identity and way of life.

> The culture of the members of the indigenous communities directly relates to a specific way of being, seeing, and acting in the world, developed on the basis of their close relationship with their traditional territories and the resources therein, not only because they are their main means of subsistence, but also because they are part of their worldview, their religiosity, and therefore, of their cultural identity.[294]

The court's discussion about the broader implications of land rights for the survival and cultural heritage of Indigenous Communities demonstrates a holistic approach that goes beyond strict legal formalism to consider the lived realities and historical injustices faced by Indigenous Peoples. The court was careful to explain the balancing of interests and rights national governments must do when there are "clashes between private property and claims for ancestral property" by Indigenous communities:

> [T]he States must assess, on a case by case basis, the restrictions that would result from recognizing one right over the other. Thus, for example, the States must take into account that indigenous territorial rights encompass a broader and different concept that relates to the collective right to survival as a people, with control over their habitat as a necessary condition for reproduction of their culture, for their own development and to carry out their life aspirations. Property of the land ensures that the members of the indigenous communities preserve their cultural heritage.
>
> . . . Disregarding the ancestral right of the members of the indigenous communities to their territories could affect other

[293] *Id.* at ¶ 144.
[294] *Id.* at ¶ 135.

> basic rights, such as the right to cultural identity and to the very survival of the indigenous communities and their members.[295]

This contextual analysis allowed the court to evaluate the impact of its decisions on the cultural and social fabric of the indigenous communities, ensuring a more nuanced and equitable application of the law.

The Inter-American Court also discussed Paraguay's recognition of the right to communal property in its legal system but also acknowledged the country's failure to take necessary legal steps to ensure that the Yakye Axa Community could effectively use and enjoy their traditional lands.[296] This approach goes beyond merely stating legal principles and considers the practical implications of these principles for the Indigenous Community's ability to engage in traditional practices and maintain their culture. By emphasizing the failure to implement legal rights in a way that supports the community's cultural and practical needs, the court acknowledged the broader socio-cultural impacts and the importance of translating legal recognition into real-world outcomes. This aligns with the principles of contextual analysis, which seeks to understand the effects of legal decisions within their broader social, cultural, and historical contexts.

In its unanimous orders, the Inter-American Court required the State of Paraguay to take several specific actions. Paraguay was required to identify the Indigenous Community's traditional territory and "grant it to them free of cost" within three years.[297] The court also ordered Paraguay to provide the Indigenous community "with the basic services and goods required for their subsistence" as long as the Indigenous community is landless,[298] and establish a fund, within one year, for land to be granted to the Indigenous community.[299]

The Inter-American Court's recognition of collective rights to control land reflects restorative justice regarding Indigenous culture, particularly in cases where lands were taken or misused by governments, and resulted in cultural harm. By acknowledging that Indigenous Communities' territorial rights are essential for the collective survival, cultural heritage, and life aspirations of

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[295] *Id.* at ¶¶ 146, 147.

[296] *Id.* at ¶ 155 (concluding that Paraguay's failure to "ensure [the Yakye Axa Community's] effective use and enjoyment . . . of their traditional lands . . . has threatened the free development and transmission of their traditional practices and culture . . .").

[297] *Id.* at ¶ 242(6).

[298] *Id.* at ¶ 242(7).

[299] *Id.* at ¶ 242(8).

Indigenous Peoples, the court underscores the importance of restoring control over their lands. This approach taken by the court aligns with restorative justice principles by addressing historical injustices, promoting cultural preservation, and supporting the self-determination and development of Indigenous Communities.

D. *Incorporating Restorative Justice Principles and International Human Rights*

International human rights instruments and bodies incorporate restorative justice principles to address the deep-seated impacts of colonization on Indigenous Peoples. These principles are crucial for healing and reconciliation. They also provide a global framework to evaluate the State government's handling of Native Hawaiian rights, ensuring that local actions align with international standards. These instruments illuminate the importance of employing the four Indigenous values for contextual legal analysis. They emphasize the rights to self-determination, self-governance, cultural integrity, and property. As seen, these rights often necessitate moratoria on state actions regarding Indigenous Peoples' lands. Additionally, they stress the obligation to pursue free, prior and informed consent in decisions affecting Indigenous Peoples' lands and resources, which are key to the existence of Indigenous Peoples. These instruments and bodies also promote healing, reconciliation, and the restoration of justice for Indigenous Communities. Greater implementation of these principles can help Indigenous Peoples achieve autonomy and protection of their cultural and territorial rights, moving towards a future of equity and respect.

V. HINDERING RESTORATIVE JUSTICE FOR NATIVE HAWAIIANS: ACT 236'S THREAT TO NATIVE HAWAIIANS AND HAWAIʻI'S PUBLIC LAND TRUST

This section builds on the international human rights principles and restorative justice values discussed in Part IV. It explores the specific challenges Act 236 poses to Native Hawaiian rights and Hawaiʻi's Public Land Trust. While the previous section highlighted the global and legal frameworks that underscore the importance of Indigenous self-determination, cultural integrity, and land rights, this section will critically analyze how Act 236 undermines these principles. This Act allows extended lease terms on Public Land Trust lands, exacerbating historical injustices. It disregards Indigenous cultural and spiritual connections to the land, and hinders the State's ability to fulfill its fiduciary obligations to Native

Hawaiians. This section will demonstrate that the enactment and implementation of Act 236 not only contradicts Hawai'i's commitment to restorative justice but also threatens to perpetuate the marginalization of Native Hawaiian communities.

A. *Overview*

The 2021 Hawai'i legislature passed HB 499 and it became law on July 6, 2021, as Act 236. It poses a threat to Hawai'i's commitment to restorative justice and to Native Hawaiians' recognized interest in the Public Land Trust. Act 236 authorizes the Board to extend certain leases of public lands for commercial, mixed-use, industrial, resort, or government use.[300] Leases of public lands under HRS Chapter 171 were limited to sixty-five years, but Act 236 later authorized BLNR to extend leases for an additional forty years.[301]

1. *Problematic Aspects of Act 236*

This lease extension provision is problematic for several reasons. Again, the vast majority of 'āina that comprise the Public Land Trust are Hawaiian Kingdom Crown and Government Lands—lands and resources of Native Hawaiian sovereigns taken by the United States via the illegal overthrow—that is held by the State in trust for limited purposes, including the betterment of the conditions of Native Hawaiians. In essence, Act 236 transforms lessees into pseudo-owners of Native Hawaiian land, allowing them to control, manage, and develop that land for more than a century. These extensions also allow current lessees to bypass Chapter 171's public bidding process and related environmental and other protections. Lease extensions under Act 236 would facilitate century-long leases that bind BLNR's hands in fulfilling its constitutional duties to Native Hawaiians and the general public under Hawai'i's Public Trust Doctrine.[302] Long before the bill's passage, Native

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[300] 2021 Haw. Sess. Laws Act 236 §171 at 851 (codified at HAW. REV. STAT. § 171-36.5).

[301] *Id.*

[302] The 1978 Constitutional Convention amended the State's constitution "to clarify the policy of the State with regard to resources" and promote the protection of Hawai'i's natural resources. Env't, Agric., Conservation & Land Comm., Stand. Comm. Rep. No. 77, *reprinted in* 1 PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF HAWAI'I OF 1978, at 686 (1980), https://digitalcollections.hawaii.gov/docs/concon/1978/1978%20Con%20Con%20Journal%20Vol-1%20Journal.pdf. Since then, the State's constitution has required that:

> For the benefit of present and future generations, the State and its political subdivisions shall conserve and protect Hawaii's natural beauty and all natural resources, including land, water, air, minerals and energy sources, and shall promote the development and utilization of these resources in a

Hawaiian communities emphasized that such a law is tantamount to alienating Public Land Trust ʻāina, violates constitutionally guaranteed rights, wholly betrays the intent of those constitutional provisions, renders insignificant the statutory protections crafted to operationalize the constitution, and effectively prevents Native Hawaiian claims to these lands from ever being resolved.[303] Individual constituents and community organizations opposed the bill's passage through heartfelt participation in the committee hearings, articulate opposition testimony, and calls to legislators to stop the bill.[304]

2. *The State of Hawai'i's Approach to Native Hawaiian Interests*

Act 236 epitomizes how the State approaches Native Hawaiians and their interests in and kuleana to Hawaiʻi's Public Land Trust. Contextual legal analysis, through the four realms of restorative justice for Native Hawaiians, exposes that the provisions of Act 236 were not enacted into law to promote "justice" or what "ought to be," but instead reflected "a series of value choices that consistently benefitted [private stakeholders] at the expense of Native communities, resources, and culture."[305] Equally significant, the State's administrative and legislative processes transgress basic international human rights standards. For example, BLNR's administrative rules do not offer or implement procedures for protecting Native Hawaiians' rights. This is particularly evident in the lack of consultation and consent processes on land issues impacting Native Hawaiians.[306]

> manner consistent with their conservation and in furtherance of the self-sufficiency of the State.
>
> All public natural resources are held in trust by the State for the benefit of the people.

Id. at 685–86. The language "[f]or the benefit of present and future generations" was included by framers to "affirm[] the ethical obligations of this generation toward the next" and ensure that the law is "consistent with the concept that the Constitution should provide for the future." *Id.* at 686. Article XI, section 1, as held by the Hawaiʻi Supreme Court, "adopt[s] the public trust doctrine as a fundamental principle of constitutional law in Hawaiʻi." In re Water Use Permit Applications (*Waiāhole I*), 94 Hawaiʻi 97, 132, 9 P.3d 409, 444 (2000).

[303] *See Legislative Testimony*, *supra* note 11 (providing examples of community testimony submitted in opposition to House Bill 499).

[304] *See id.*

[305] *See* Sproat, *Wai Through Kānāwai*, *supra* note 122, at 192.

[306] *But see infra* Section V.B.2 (discussing how the Hawaiʻi Supreme Court requires state agencies to "preserv[e] and protect[] customary and traditional rights . . .").

3. *Historic and Ongoing Injustice*

In the ongoing battle against the permanent loss of Hawaiian Crown and Government Lands that comprise the Public Land Trust, bills targeting the public lands and impacting Native Hawaiian rightsholders are introduced during legislative sessions.[307] Act 236 exacerbates the historic injustice of land loss against Native Hawaiians. Considering that Hawai'i law explicitly recognizes Native Hawaiians as the only Indigenous People of the Hawaiian Islands,[308] provides a pro-rata portion of Public Land Trust revenues to better conditions of Native Hawaiians,[309] protects traditional and customary Native Hawaiian practices,[310] and supports Native Hawaiian self-determination and self-governance,[311] it is disconcerting that in practice Hawai'i law, processes, and decisionmakers still fall woefully short of adequately protecting Native Hawaiians' international Indigenous human rights.

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[307] For example, in 2011 Governor Neil Abercrombie signed Senate Bill 1555 into law as Act 55, which created the Public Land Development Corporation (PLDC). Act of May 20, 2011, ch. 55, 2011 Haw. Sess. Laws 134. Act 55 sought to "create a vehicle and process to make optimal use of public land for the economic, environmental, and social benefit of the people of Hawaii." *Id.* People rejected Act 55 for several reasons including environmental, cultural, and Native Hawaiian concerns:

> PLDC staff are battling criticism that the agency's rules don't do enough to protect the environment or Hawaii's cultural resources. And a growing chorus of Native Hawaiian leaders and supporters of the sovereignty movement are raising alarm about the *power of the corporation to develop ceded lands that are supposed to be held in trust for Native Hawaiians*.

Sophie Cocke, *Hawai'i Lawmakers Vow to Clamp Down on Public Land Corp*., HONOLULU CIV. BEAT (Sept. 11, 2012) (emphasis added), https://www.civilbeat.org/?p=17057hawaii-lawmakers-vow-to-clamp-down-on-public-land-corp/. Act 55 was ultimately repealed in 2013. Act of April 22, 2013, ch. 38, 2013 Haw. Sess. Laws 65.

[308] Act of July 6, 2011, ch. 195, 2011 Haw. Sess. Laws 646 (codified at HAW. REV. STAT. § 10H).

[309] Act of June 16, 1980, ch. 273, 1980 Haw. Sess. Laws 525 (codified and amended at HAW. REV. STAT. § 10-13.5).

[310] HAW. CONST. art. XII, § 7.

[311] *Id.* at § 5 (establishing OHA); *see also* Act of July 6, 2011, ch. 195, 2011 Haw. Sess. Laws 646 (codified at HAW. REV. STAT. ch. 10H) (recognizing Native Hawaiians as the only indigenous people of Hawai'i and establishing the Native Hawaiian Roll Commission to register eligible Native Hawaiians for a future Native Hawaiian constitutional convention); HAW. REV. STAT. § 6K-9 (providing for the transfer of management and control of Kaho'olawe Island and its surrounding resources to a future "sovereign native Hawaiian entity upon its recognition by the United States and the State of Hawaii").

4. *Restorative Justice and Act 236*

An Indigenous human rights approach, coupled with the four values of contextual legal inquiry, is crucial for understanding Act 236's impact on Native Hawaiians and their lands. This framework not only highlights the State's continued failures in managing the Public Land Trust but also bridges theory and practice to advance restorative justice for Kānaka Maoli. The analysis reveals that the State, as a fiduciary, disregards the counsel of Native Hawaiians, the very beneficiaries of the Public Land Trust. For example, current administrative rules lack provisions for meaningful consultation with Native Hawaiian beneficiaries, and the State failed to secure their free, prior and informed consent before enacting Act 236. This discussion also offers a foundation for future actions, guiding the State towards managing the Public Land Trust in alignment with international Indigenous human rights standards and restorative justice principles.

Applying this restorative justice framework to Act 236 will reveal what is actually going on. Act 236 and its passage is starkly inconsistent with the State of Hawai'i's promises, in 1978, of Native Hawaiian cultural restoration and "recogniz[ing] the right of native Hawaiians to govern themselves and their assets . . . to better their condition."[312] As has been mentioned and will be shown, these four realms of restorative justice for Native Hawaiians—built upon an international human rights edifice—are intertwined and influence each other. The discussions on cultural integrity (mo'omeheu), land and resources ('āina), social determinants of health and well-being (mauli ola), and self-governance (ea) below overlap with each other; negative impacts on one value or realm also impact other values or realms.

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[312] Hawaiian Affs. Comm., Stand. Comm. Rep. No 59, *reprinted in* 1 PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF HAWAI'I OF 1978, 646 (1980); *see also supra* note 10 and accompanying text (discussing the Hawai'i Supreme Court's description of the constitutional provisions as promises in *Ka Pa'akai*). Making good on these State promises are also important in a post-*Rice v. Cayetano* era. *See* Rice v. Cayetano, 528 U.S. 495, 499 (2000) (finding that limiting voter eligibility for Trustees of OHA to Native Hawaiians was unconstitutional). OHA is a state agency established from the 1978 Constitutional Convention as a mechanism for Native Hawaiians to exercise a limited form of self-determination and self-governance. *See* Off. of Hawaiian Affs. Comm., Stand. Comm. Rep. ch. 59, *reprinted in* 1 PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF HAWAI'I OF 1978, 644–47 (1980).

B. *Mo'omeheu: The State's Mismanagement of the Public Land Trust and Failure to Provide Adequate Opportunities for Meaningful Consultation with Native Hawaiian Beneficiaries*

When examining government decisions or actions in the realm of mo'omeheu, under the restorative justice framework, the analysis looks to whether those decisions or actions support or restore Native Hawaiians' cultural integrity. In employing the framework to examine Act 236's impact on cultural integrity generally, this article scrutinizes the State's history of Public Land Trust lands management and the absence of consultations with Native Hawaiians when Act 236 will impact the lands to which they have unrelinquished claims.

1. *BLNR's Mismanagement and Abuse of the Public Land Trust*

The first value of mo'omeheu (cultural integrity) examines whether the passage of Act 236 appropriately supports and restores Native Hawaiians' "cultural integrity as a partial remedy for past harms, or perpetuates conditions that continue to undermine cultural survival."[313] Act 236's stated purpose is to allow the BLNR to extend certain leases to lands from the Public Land Trust "for lessees who commit to substantial improvement to the existing improvements."[314] When considering a potential lease extension, the BLNR must determine: 1) whether the proposed development "is of sufficient worth and value to justify the" lease extension, 2) the time needed and the expected date for completing improvements, and 3) the appraised minimum rent.[315] Absent from the text of Act 236 is any mention of "culture" or "cultural integrity." Because Act 236 authorizes the BLNR to extend current long term leases up to 105 years, an examination of the State's land and resource management practices help illuminate the State's impact on Native Hawaiian cultural integrity relevant to the lands it manages.

The State's long-standing abuse and mismanagement of public lands highlight its failure to meaningfully repair harms to Native Hawaiians in the realm of mo'omeheu (cultural integrity). In *Ching v. Case*, the Hawai'i Supreme Court acknowledged the State's duty to "mālama 'āina" (care for the land) within the Public Land Trust.[316] The court noted that the State

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[313] *See* Sproat, *Wai Through Kānāwai*, *supra* note 122, at 179.

[314] Act of July 6, 2021, ch. 236, 2021 Haw. Sess. Laws 850, 851 (codified at HAW. REV. STAT. § 171-36.5).

[315] *Id.*

[316] Ching v. Case, 145 Hawai'i 148, 162, 449 P.3d 1146, 1160 (2019) (describing the State's "sixty-five year lease of three parcels of land in the Pōhakuloa area with the United States for military training purposes"). Quoting the Circuit Court, the Hawai'i Supreme Court

"failed to conduct any inspections prior to December 2014" to ensure the United States complied with crucial land management provisions that were intended to protect the public from live or blank ammunition, prevent unnecessary environmental damage, and ensure waste removal.[317]

Clarence Kū Ching and Mary Maxine Kahāʻulelio sued the DLNR, in 2014, for "breach[ing] its trust duty 'to protect and maintain the[] public trust lands' in the [Pōhakuloa Training Area]."[318] Ching and Kahāʻulelio are Native Hawaiian cultural practitioners with ancestral connections to Pōhakuloa on Hawaiʻi Island,[319] held in trust by the State of Hawaiʻi.[320] The State leased nearly 23,000 acres of land to the U.S. military for a sixty-five-year term.[321] The lease required the military to "remove and deactivate all live or blank ammunition" after training exercises and prevent harm to people and prevent unnecessary environmental damage.[322] The DLNR also had the

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reaffirmed that, due to the Public Land Trust status of these lands, "the State has 'the highest duty to preserve and maintain the trust lands.'" *Id.* The court also noted, "[t]hroughout its findings of fact and conclusions of law, the circuit court referred to this obligation as the duty to 'malama 'aina,' which the court translated as 'to care for the land.'" *Id.* at 162 n. 26, 499 P.3d at 1160 n. 26; *see also* Sproat & Palau-McDonald, *Duty to Aloha ʻĀina*, *supra* note 121, at 526 ("explor[ing] the Hawaiʻi Supreme Court's articulation of the legal duty to aloha ʻāina in *Ching v. Case*."). Sproat and Palau-McDonald, relying on nineteenth century Hawaiian language newspapers, explain that aloha ʻāina is "the 'magnetic pull within the hearts of a people, compelling them to live sovereignly in their own homeland." *Id*. at 525 (citing Joseph Kahoʻoluhi Nāwahīokalaniʻōpuʻu, *Ke Aloha Aina; Heaha Ia?*, KE ALOHA AINA, May 25, 1895, at 7). While acknowledging the circuit court and State Supreme Court's "recogni[tion] [of] a 'duty to 'malama 'aina,'" Sproat and Palau-McDonald also explain that the term used "is relatively new and is likely a product of the 1960s or 1970s" and that Native Hawaiians had "articulated and perpetuated this practice as aloha ʻāina[.]" *Id.* at 526 n.8.

[317] Ching, 145 Hawaiʻi at 164 n.31, 449 P.3d at 1162 n.31 (describing the Circuit Court's findings).

[318] *Id.* at 154, 449 P.3d at 1152. The court acknowledged that Ching and Kahāʻulelio's complaint did "not alleg[e] that the United States had violated the terms of its lease, but" that the State violated its trust duty by not taking the necessary action when it was aware of the federal government's lease term violations. *Id.*

[319] *Id.* at 155, 161, 162, 449 P.3d at 1153, 1159, 1160.

[320] *Id.* at 152, 449 P.3d at 1150.

[321] *Id.*

[322] *Id.* at 153, 449 P.3d at 1152 (citing paragraphs 9 and 14 of the lease). Recognizing the limited amount of land available for public use and the importance of watersheds, the federal government agreed to prevent unnecessary damage and destruction, preserve the natural state of the area, and to "avoid pollution or contamination of" all waters. *Id.* at 152–53, 449 P.3d at 1150–51. The United States also agreed, in the event the State of Hawaiʻi required it to, "remove weapons and shells used in connection with its training activities" provided that

duty to manage public use of the land and the right to inspect the premises to ensure compliance.[323] However, for thirty years, from 1984 to 2014, the State failed to properly monitor the federal government's use of the land and address lease violations[324] until Ching and Kahā'ulelio brought their claims forward.[325] *Ching* underscores the broader issue of the State's mismanagement of lands held in trust, an issue that has been challenged in other significant legal actions as well. One such legal action is discussed below.

In 2017, OHA filed a lawsuit against the State of Hawai'i and the University of Hawai'i alleging mismanagement of Mauna Kea,[326] which is part of the ceded lands trust and the Public Trust, for which the State has fiduciary duties,[327] and relied on "scathing audits," by the State Office of the Auditor.[328] OHA's complaint restated a 1998 Audit's finding that the "[University of Hawai'i's] management of the Mauna Kea Science Reserve is inadequate to ensure the protection of natural resources[,]" that the academic institution also "neglected historic preservation, and the cultural value of Mauna Kea was largely unrecognized[,]" and that the [Department of Land of Natural Resources] needs to improve its protection of Mauna Kea's natural resources."[329] Additionally, "both [the university and the department] failed to develop and implement adequate controls to balance []

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technical and economic capabilities for doing so existed, and that the cost of shell removal did "not exceed the fair market value of the land." *Id*. at 153, 449 P.3d at 1151(citing paragraph 29 of the lease).

[323] *Id.* (citing paragraphs 18 and 19 of the lease).

[324] *Id.* at 179–80, 449 P.3d at 1177–78.

[325] *Id.* at 163, 449 P.3d at 1161 (finding that "[a] third inspection occurred on December 23, 2014, *after* the litigation in this case had begun, and this inspection resulted in a report that 'contained much more information' than those created from the two previous inspections").

[326] Complaint for Declaratory and Injunctive Relief, Accounting, Restitution, and Damages, Off. of Hawaiian Affs. v. State, No. 17-1-1823-11 (1st Circ. Ct. Haw., Nov. 7, 2017) [hereinafter Off. of Hawaiian Affs., Complaint]; *see also* Chad Blair, *OHA Sues State, UH Over 'Longstanding Mismanagement' of Mauna Kea*, HONOLULU CIV. BEAT (Nov. 8, 2017), https://www.civilbeat.org/2017/11/oha-sues-state-uh-over-longstanding-mismanagement-of-mauna-kea/.

[327] Off. of Hawaiian Affs., Complaint, *supra* note 326, at 4–6 (describing the history and transfers of Hawaiian Kingdom government and crown lands as ceded lands and the State's fiduciary duties of these trust lands).

[328] *Id.* at 12–15, 18.

[329] *Id.* at 13 (emphases omitted) (quoting OFFICE OF THE AUDITOR, STATE OF HAWAI'I, *Overview in* NO. 98-6, AUDIT OF THE MANAGEMENT OF MAUNA KEA AND THE MAUNA KEA SCIENCE RESERVE, *iii, iii, iv* (Feb. 1998), https://files.hawaii.gov/auditor/Reports/1998/98-6.pdf [hereinafter 1998 AUDIT]).

environmental concerns with astronomy development."[330] Given its findings about the State's management of Mauna Kea, the 1998 Audit made recommendations for the University of Hawai'i, the Institute for Astronomy, and the Department of Land and Natural Resources.[331]

A subsequent 2005 follow-up audit identified several land management issues. Even though improvements were made since the previous audit, the "[University of Hawai'i's] management of the Mauna Kea Science Reserve still falls short."[332] The follow-up audit found that certain management issues had not been resolved and that "[s]uch issues . . . increase the likelihood of harm to [Mauna Kea's] vulnerable environment."[333] The University of Hawai'i also had not completed "the inventory of cultural and natural resources to document the importance of providing increased protection to

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[330] *Id.* at 13 (emphases omitted) (second bracket in original) (citing 1998 AUDIT *supra* note 329, at 15). The 1998 Audit concluded:

> Over thirty years have passed since construction of the first telescope on Mauna Kea. During this period, little was done to protect its natural resources. The university, as the leaseholder, should have provided sufficient protection to the natural resources and controlled public access and use. These requirements have not been adequately met. The Department of Land and Natural Resources, in its role as landlord, should have overseen the university's activities and enforced permit conditions and regulations in protecting the State's interests. Neither state agency has been proactive in maintaining the conservation district.

1998 AUDIT, *supra* note 329, at 34–35.

[331] *Id.* at 35–37.

[332] Off. of Hawaiian Affs., Complaint, *supra* note 326, at 14 (emphases omitted) (quoting OFF. OF THE AUDITOR, STATE OF HAWAI'I, NO. 05-13, FOLLOW-UP AUDIT OF THE MANAGEMENT OF MAUNA KEA AND THE MAUNA KEA SCIENCE RESERVE, 13 (Dec. 2005), https://files.hawaii.gov/auditor/Reports/2005/05-13.pdf [hereinafter 2005 FOLLOW-UP AUDIT]).

[333] *Id.* at 15 (ellipses in original) (citing 2005 FOLLOW-UP AUDIT, *supra* note 332, at 13). Some of these issues were previously mentioned as part of the recommendations in the 1998 Audit. *See* 1998 AUDIT, *supra* note 329, at 35–37. The 2005 follow-up audit states,

> [w]e found that, although the master plan addresses most of the recommendations of our prior audit, the plan lacks certainty and clarity. . . . Additionally, we found that the master plan's design review process is unclear and has been a source of uncertainty for the Office of Mauna Kea Management and its board.

2005 FOLLOW-UP AUDIT, *supra* note 332, at 23.

the mountain."[334] The 2005 follow-up audit also pointed out that the Department of Land and Natural Resources appeared to have delegated its responsibilities and duties as a landowner (and implicitly as a trustee) to the University of Hawai'i,[335] which resulted in a "lax attitude" that "allow[ed] the [University of Hawai'i] to oversee its own activities and not provide a mechanism to ensure compliance with lease and permit requirements."[336]

The 2014 Follow-Up Audit of the Management of Mauna Kea and the Mauna Kea Science Reserve, Report No. 14-07 showed continued mismanagement. The 2014 Audit found that even though the University was granted rulemaking authority in 2009, "'UH ha[d] yet to adopt administrative rules [to] implement[] its management responsibilities,' and 'UH issued unauthorized permits . . . for commercial tour activities, [which] put[] Mauna Kea's resources and UH's Mauna Kea revenues at risk.'"[337] The 2014 Follow-Up Audit further explained, "[w]ithout administrative rules, UH still lacks enforcement authority to effectively protect the mountain from public activities and ensure public health and safety within the summit area."[338] This Follow-Up Audit also made six recommendations for the University of Hawai'i covering the adoption of much needed administrative rules, fees, commercial tour use permits, the completion of a Comprehensive Management Plan, advancing its general lease renewal efforts by working with the Department of Land and Natural Resources, and amending subleases to include stewardship provisions.[339] The Audit also had two recommendations for the Department of Land and Natural Resources that focused on "working with [the University] to renew general leases" and to "[u]se additional stewardship-related conditions contained within the TMT observatory permit as a template in all new observatory permits issued for the summit of Mauna Kea."[340]

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[334] 2005 FOLLOW-UP AUDIT, *supra* note 332, at 25–26.

[335] *Id.* at 29–30 (describing DLNR as "[having] passively allowed the university to fulfill the department's role of landowner" and "[i]n December 2005, the department transferred the authority to permit commercial operations on Mauna Kea to the university").

[336] *Id.* at 29.

[337] Off. of Hawaiian Affs., Complaint, *supra* note 326, at 18 (ellipses and modifications in original) (emphases omitted) (quoting OFF. OF THE AUDITOR, STATE OF HAWAI'I, NO. 14-07, FOLLOW-UP AUDIT OF THE MANAGEMENT OF MAUNA KEA AND THE MAUNA KEA SCIENCE RESERVE, 15 (Aug. 2014), https://files.hawaii.gov/auditor/Reports/2014/14-07.pdf [hereinafter 2014 FOLLOW-UP AUDIT]).

[338] 2014 FOLLOW-UP AUDIT, *supra* note 337, at 15–16.

[339] *Id.* at 36–37.

[340] *Id.* at 37.

The State's lax land management practices demonstrate significant inconsistencies with restorative justice principles and have a detrimental impact on Native Hawaiians' cultural integrity. Restorative justice emphasizes repairing harm, restoring relationships, and ensuring equitable treatment, all of which are undermined by the State's failures in managing Public Land Trust lands and resources.

The State's inadequate monitoring and management of lands, as seen in *Ching v. Case*, show a neglect of fiduciary duties to protect and maintain Public Land Trust lands. This neglect resulted in lease violations by the United States military over decades and directly harmed cultural and natural resources integral to Native Hawaiian practices. This type of conduct is inconsistent with restorative justice, which demands proactive measures to prevent harm and restore affected communities. The State's long-standing neglect in monitoring and managing the lands, as evidenced in *Ching v. Case*, is not only a breach of fiduciary duty but also runs counter to the principles of restorative justice. The *Ching* decision underscores that the State has a duty to aloha ʻāina, a duty that is deeply embedded in both Hawaiʻi's legal framework and Native Hawaiian values.[341] By failing to conduct inspections prior to December 2014, the State disregarded its obligations to ensure compliance with critical land management provisions meant to protect both the public and cultural resources.[342] The contextual framework of restorative justice offers a pathway to operationalize the court's decision and to align the state's actions with the values already embedded in Hawaiʻi's laws. Specifically, this approach could help to restore the deep connection between Native Hawaiians and their ancestral lands, as recognized in the *Ching* decision.[343]

The mismanagement of Mauna Kea, highlighted by multiple audits and the OHA's lawsuit, further reveals the State's failure to uphold its obligations.

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[341] Sproat & Palau-McDonald, *Duty to Aloha ʻĀina*, *supra* note 121, at 526 (explaining that "[o]ver the intervening century, aloha ʻāina has maintained its cultural significance, and, indeed interest in it has increased as aloha ʻāina has *evolved from a cultural value into a legal requirement*") (emphasis added) (citations omitted). As a result of "the *Ching* decision, aloha ʻāina is also a legal duty imposed on state and local decisionmakers as fiduciaries of the Public Trust and Public Land Trust that is available for enforcement by beneficiaries . . . ." *Id.* at 527.

[342] Ching v. Case, 145 Hawaiʻi 148, 164 n.31, 449 P.3d 1146, 1162 n.31 (2019) (acknowledging "there was an unrebutted presumption that the State had failed to conduct any inspections prior to December 2014 to monitor or confirm the United States' compliance" with critical lease provisions).

[343] *Id.* at 177 n.49, 449 P.3d 1175 n.49 (citing Off. of Hawaiian Affs. v. Hous. & Cmty. Dev. Corp. of Haw. (*OHA v. HCDCH I*), 121 Hawaiʻi 324, 333, 219 P.3d 1111, 1120 (2009)).

The audits reveal persistent issues, such as the University's inadequate management, failure to protect natural and cultural resources, and unauthorized permits that endanger Mauna Kea's environment. These actions demonstrate a disregard for the cultural significance of Mauna Kea to Native Hawaiians and violate restorative justice principles that call for respect, protection, and restoration of Indigenous Peoples' lands and cultural sites.

The State's practices also undermined Native Hawaiians' cultural integrity by allowing environmental degradation and failing to ensure that land use projects respect and preserve cultural practices. Restorative justice requires that Indigenous Communities have a voice in the management of their lands, resources, and cultural sites. The absence of meaningful consultation and the imposition of decisions without Native Hawaiians' free, prior and informed consent further erode trust and perpetuate historical injustices.

The State of Hawai‘i's lax land management practices are at odds with restorative justice principles the State embraced in its constitution and, as discussed, international human rights instruments expressly or tacitly embrace. The State, evidence reveals, declines to enforce its own land lease agreements and even when its own land management shortcomings are reported on by the State Auditor, the State of Hawai‘i does not move quickly enough to address those mismanagement issues. The State fails to protect Native Hawaiian cultural integrity, neglects its fiduciary responsibilities, and perpetuates harm rather than repairs it. In order to realign itself with its restorative justice commitments, the State must implement culturally sensitive land management practices that actively involve and respect Native Hawaiian communities, ensuring their cultural survival and restoring their rights to land and resources.

2. *The State's Failure to Provide Adequate Opportunities for Meaningful Consultation with Native Hawaiian Beneficiaries*

Analyzing Act 236's potential impacts under the realm of mo‘omeheu (cultural integrity) also requires an examination of how the State approaches its actions and decisions that will directly impact Native Hawaiians' cultural integrity. More specifically, the realm of mo‘omeheu requires an analysis of the potential impact of converting long term tenants into pseudo-owners of public lands and what actions, if any, the State may take to better ensure that Native Hawaiians may enjoy and develop their culture relevant to those leased lands.

Among Native Hawaiians' ongoing concerns regarding BLNR's management of the Public Land Trust is that Hawai‘i administrative rules do

not provide meaningful processes to consult with Native Hawaiians or for obtaining Native Hawaiians' free, prior and informed consent on BLNR decisions and actions affecting Indigenous interests in lands, territories, or resources. Without adequate prior consultation, Native Hawaiians and representative organizations (including the OHA) have been forced into lengthy and costly contested case hearings[344] when Native Hawaiians have a property interest that may be impacted by the DLNR's decisions. Unless Hawai'i's BLNR voluntarily conducts a contested case hearing, it will only conduct such a hearing on the basis of a written petition.[345] Contested case hearings, however, are conducted only *after* a general public hearing "on the same subject matter."[346] And, at times, the "general public hearing" does not afford Hawaiian groups adequate time to present their findings and assessments (testimony is often limited to a few minutes). Moreover, a complicated petition for a contested case hearing must be filed within short timeframes and follow specific formalities, often requiring assistance of legal counsel.[347]

The relevant administrative rules make clear that contested case hearings are generally conducted *after* development project plans have already been created and most likely without consultations conducted sufficiently in advance. Admitted parties, for contested case hearing purposes, include

> [a]ll persons [1] who have some property interest in the land, [2] who lawfully reside on the land, [3] who are adjacent property owners, or [4] who otherwise can demonstrate that they will be so directly and immediately affected by the *requested action* that their interest in the proceeding is clearly distinguishable from that of the general public[.][348]

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[344] "'Contested case' means a proceeding in which the legal rights, duties or privileges of specific parties are required by law to be determined after an opportunity for agency hearing." HAW. REV. STAT. §91-1.

[345] HAW. CODE R. § 13-1-28(a).

[346] *Id.* at § 13-1-28(b).

[347] *Id.* at § 13-1-29(a); *compare* § 13-1-29(a) (requiring contested case hearing petitions to be submitted within ten calendar days from the board meeting date when the "matter was scheduled for disposition"), *with* Barelli, *supra* note 172, at 250 (acknowledging that "States should not exercise undue time pressure on Indigenous peoples, who, instead, should have enough time to gather information through members of the community or third parties and subsequently discuss them").

[348] HAW. CODE R. § 13-1-31(b)(2) (emphasis added).

That a "requested action" is made to the BLNR for approval *before* persons (who will be "directly and immediately affected by the requested action") are recognized as having an interest in the decision indicates that *prior* consent is not required under Hawai'i law or administrative rules.[349] Consultations intended to obtain Native Hawaiians' free, prior and informed consent could, and in the context of Indigenous human rights should, be used to protect Native Hawaiians' interests in traditional and ancestral lands so as to not directly and immediately affect Native Hawaiians' property interests.

The *Ka Pa'akai O Ka 'Āina v. Land Use Commission* and *Flores-Case 'Ohana v. University of Hawai'i* decisions provide context for understanding the Hawai'i Supreme Court's approach to the State's obligations to protect Native Hawaiians' traditional and customary practices in contested case hearings, the intersection of those obligations with administrative rulemaking, and the relevance of implementing consultations with Native Hawaiians for purposes of obtaining their free, prior and informed consent. *Ka Pa'akai* involved an upscale luxury resort developer that petitioned the State Land Use Commission ("LUC") to reclassify more than a thousand acres of conservation lands on Hawai'i Island to an urban district classification so that it could construct "a 36-hole golf course, an 11-acre commercial center, a 3-acre recreation club, a golf clubhouse" and luxury homes.[350] A coalition of Native Hawaiian organizations, Ka Pa'akai O Ka 'Āina, petitioned for a contested case hearing and "asserted that their native Hawaiian members' traditional gathering, religious, and cultural practices would be adversely affected by the proposed development[.]"[351] Some of these traditional practices were specified as "fishing, gathering salt, 'opihi, limu, kūpe'e, Pele's Tears, and hā'uke'uke[,]" and the proposed development would negatively impact coalition members' ability to access these natural and cultural resources.[352] The Land Use Commission consolidated and granted their petitions.[353] After conducting several hearings over the course of sixteen months, the LUC granted the luxury developer's petition to reclassify the land.[354]

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[349] The admitted parties' category of persons with "some property interest" may actually be sufficiently broad to include Native Hawaiians. *Id.*

[350] Ka Pa'akai O Ka'Aina v. Land Use Comm'n, 94 Hawai'i 31, 35, 7 P.3d 1068, 1073 (2000).

[351] *Id.* at 36, 7 P.3d at 1073.

[352] *Id.* at 43, 7 P.3d at 1080.

[353] *Id.* at 36, 7 P.3d at 1073.

[354] *Id.*

When the case reached the Hawai‘i Supreme Court, the court concluded that the State constitution "obligates the LUC to protect the reasonable exercise of customarily and traditionally exercised rights of native Hawaiians . . . ."[355] Most importantly, the court provided a three-part analytical framework (referred to as *Ka Pa‘akai* analysis) to "effectuate the State's obligation to protect native Hawaiian customary and traditional practices while reasonably accommodating competing private interests . . . ."[356] An abridged version of the court's analytical framework requires the LUC, at minimum, to 1) identify resources and the "extent to which traditional and customary native Hawaiian rights are exercised in the petition area[,]" 2) how the proposed action would impact the resources and traditional and customary rights, and 3) feasible actions taken to "reasonably protect native Hawaiian rights if they are found to exist."[357] The court developed this framework "to accommodate the competing interests of protecting native Hawaiian culture and rights . . . and economic development and security . . . ."[358] The court vacated the LUC's approval of the developer's permit because the LUC failed its affirmative constitutional duty to preserve and protect Native Hawaiian traditional and customary rights to the extent feasible.[359]

Over twenty years later, the Hawai‘i Supreme Court held that the *Ka Pa‘akai* framework—and therefore the State's affirmative duty to protect traditional and customary Native Hawaiian rights—also applies during administrative rulemaking. The Flores-Case ‘Ohana, is a Native Hawaiian family that lives on Hawai‘i Island and "engages in traditional and cultural practices throughout Mauna Kea."[360] In 2018, nearly ten years after the Legislature granted the University of Hawai‘i administrative rulemaking authority for Mauna Kea, and about four years after the State Auditor's scathing 2014 Follow-up Audit,[361] the University of Hawai‘i finally drafted rules. They opened a public comment period, proposed new draft rules, and held a second public comment period. In 2020, the Governor signed the rules

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[355] *Id.* at 46, 7 P.3d at 1083.

[356] Ka Pa‘akai O Ka‘Aina v. Land Use Comm'n, 94 Hawai‘i 31, 46–47, 7 P.3d 1068, 1083–84 (2000).

[357] *Id.* at 47, 7 P.3d at 1084.

[358] *Id.* at 46, 7 P.3d at 1083.

[359] *Id.* at 52–53, 7 P.3d at 1089–90.

[360] Plaintiff-Appellant's Opening Brief Re Reserved Question from the Circuit Court of the Third Circuit at 5, Flores-Case ‘Ohana v. Univ. of Haw., No. 3CCV-20-0000255, 153 Hawai‘i 76, 526 P.3d 601 (2023).

[361] 2014 FOLLOW-UP AUDIT, *supra* note 337.

into law.[362] The Flores-Case 'Ohana filed suit against the State in part because the rules "ban[ned] public activities, including Native Hawaiian traditional and customary practices, in any area used for 'educational or research purposes[.]'"[363]

In *Flores-Case*, the Hawai'i Supreme Court required the implementation of the *Ka Pa'akai* analysis in administrative rulemaking based on the State's obligation to protect traditional and customary practices, found "in article XII, section 7 of the Hawai'i Constitution[.]"[364] The court held that administrative agencies must consider how proposed administrative rules will impact Native Hawaiian traditional and customary practices:

> agencies must engage in a contemporaneous analysis of the relevant factors prior to adopting a rule. That analysis should identify Native Hawaiian traditional and customary rights or practices affected by the proposed rule, if any, consider the scope and extent to which those rights or practices will be impaired, and explain how the proposed rule reasonably protects those rights and practices as balanced with the State's own regulatory right.[365]

Responding to arguments against extending *Ka Pa'akai* beyond the contested case hearing context, the court acknowledged differences between when State agencies act in a quasi-judicial manner and when State agencies act as a quasi-legislative body.[366] The court explained that the *Ka Pa'akai* analysis "can and should be broadly applied to rulemaking; the State has an 'affirmative duty . . . to preserve and protect traditional and customary native Hawaiian rights,' and doing so requires identifying the scope and extent of impacted rights and the feasible steps taken to protect them."[367]

The *Flores-Case 'Ohana* decision does not expressly require consultations with impacted Native Hawaiian individuals, collectivities, or organizations. Nor does it require that impacted Native Hawaiians give their free, prior and informed consent before a State agency makes decisions or takes actions that could impact them. Nonetheless, the *Flores-Case* decision may leave open

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[362] Flores-Case 'Ohana v. Univ. of Haw., 153 Hawai'i 76, 526 P.3d 601 (2023).

[363] Plaintiff-Appellant's Opening Brief Re Reserved Question from the Circuit Court of the Third Circuit at 4, Flores-Case 'Ohana v. Univ. of Haw., No. 3CCV-20-0000255, 153 Hawai'i 76, 526 P.3d 601 (2023).

[364] Flores-Case 'Ohana, 153 Hawai'i at 79, 526 P.3d at 604.

[365] *Id.*

[366] *Id.* at 84, 526 P.3d at 609.

[367] *Id.* at 83–84, 526 P.3d at 608–09.

the possibility for the State to implement meaningful consultation because the court described the application of *Ka Pa'akai* to administrative rulemaking as simply "'requiring [ ] minimal prerequisites [to] facilitate[ ] precisely what the 1978 Constitutional Convention delegates sought; 'badly needed judicial guidance' and the 'enforcement by the courts of these rights[.]'"[368]

Restorative justice for Native Hawaiians requires a thorough analysis of Act 236 and the State subsequent action's impacts on Native Hawaiians' cultural integrity. Act 236's passage brings to light the concerns about the inadequacy of State agency consultations that lead to costly and time-consuming contested case hearings for Native Hawaiians. *Ka Pa'akai* rearticulated the State's obligation to protect Native Hawaiian traditional and customary practices in land use decisions, and provided a framework for balancing these rights with development. *Flores-Case 'Ohana* extends this obligation to protect those practices into State administrative rulemaking, and requires analyses of impacts on Native Hawaiian practices. As the restorative justice framework illustrates, *Ka Pa'akai*, *Flores-Case 'Ohana,* and international human rights standards, as applied to Indigenous Peoples, together, emphasize the State's obligation to protect Native Hawaiian cultural integrity through informed and inclusive decision making.

C. *'Āina: Exempting DLNR Leases from HRS § 171 and DLNR's Ability to Fulfill its Duties Pursuant to the Hawai'i's Public Land Trust and the Public Trust Doctrine*

The 'āina (land and natural resources) value calls into question whether Act 236 or its passage "perpetuates the subjugation of ancestral lands, resources, and rights, or attempts to redress historical injustices in a significant way."[369] When the DLNR first reported on Act 236 leases to the BLNR in January 2022, the department had "not received applications for lease extensions under Act 236" but a single lessee had expressed interest in an Act 236 lease extension and others are anticipated.[370]

Under Act 236, extensions may not exceed forty years,[371] however, considering that "the maximum initial lease term allowed under Chapter 171,

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[368] *Id.* at 79–80, 526 P.3d at 604–05 (external citation omitted).

[369] *See* Sproat, *Wai Through Kānāwai*, *supra* note 122, at 181.

[370] KEVIN E. MOORE, STATE OF HAW. DEP'T OF LAND & NAT. RES. LAND DIV., REPORT TO THE BOARD OF LAND AND NATURAL RESOURCES ON ISSUES ENCOUNTERED BY LAND DIVISION IN PROCESSING APPLICATIONS FOR LEASE EXTENSIONS STATEWIDE, 6 (Jan. 14, 2022).

[371] 2021 Haw. Sess. Laws, at 850.

Hawai'i Revised Statutes (HRS), was and is 65 years . . . ."[372] this means, under Act 236, a lessee could maintain control of Public Land Trust 'āina for up to 105 years. As a result, Act 236 can be viewed as perpetuating the subjugation of lands and resources that Native Hawaiians have unrelinquished claims to because it allows lessees to maintain control over Public Land Trust 'āina for an extended period, effectively sidelining Native Hawaiian interests. This prolonged control diminishes opportunities for Native Hawaiians to exercise their rights to these lands. It also hinders the State's ability to restore and manage these lands in ways that address historical injustices.[373] Act 236 does not explicitly incorporate measures to ensure that lease extensions are aligned with the betterment of conditions for Native Hawaiians, which may perpetuate the status quo of land mismanagement and fail to address Native Hawaiian concerns. Moreover, Native Hawaiians' ongoing concerns with the State of Hawai'i's mismanagement of the Public Land Trust, and the lack of any indication in Act 236 to address those concerns, signal continued subjugation of those lands.

The State of Hawai'i controls public lands to which Native Hawaiians have unrelinquished claims. Native Hawaiians have expressed concerns about the State's management of these lands, and opposed HB499 (which became Act 236). International human rights instruments provide insight into Indigenous Peoples' right to free, prior and informed consent regarding lands and resources, which can guide the protection of Native Hawaiian interests and support the State in fulfilling its restorative justice promises. The American Declaration emphasizes the importance of obtaining "fully informed consent on the part of the indigenous community as a whole" regarding "decisions by the State that will have an impact upon indigenous lands and their communities . . . ."[374] The U.N. Declaration has several provisions dealing with free, *prior* and informed consent. In the context of "the adoption of legislative measures, [*prior*] means that Indigenous peoples should be consulted in advance during various stages of the relevant drafting

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[372] MOORE, *supra* note 370, at 2.

[373] Recall the Hawai'i Supreme Court held that the State had a "fiduciary duty to preserve the corpus of the public lands trust . . . until such time as the unrelinquished claims of the native Hawaiians have been resolved." Off. of Hawaiian Affs. v. Hous. & Cmty. Dev. Corp. of Haw. *(OHA v. HCDCH I*), 117 Hawai'i 174, 195, 177 P.3d 884, 905 (2008).

[374] Maya Indigenous Community of Toledo District, Belize, Case No. 12.053 (Belize), Inter-Am. C.H.R. Report No. 40/04 (merits decision of Oct. 12, 2004), ¶ 142; *see also supra* Section IV.C.3.a.

process."[375] With Act 236, there is no indication that the State of Hawai'i attempted to obtain Native Hawaiians' free, prior and informed consent, or that they were consulted throughout the drafting process.

By allowing forty-year lease extensions of public lands to private individuals, the State could enable those with leases that were initially approved sixty-five years prior, to maintain a continuous and uninterrupted interest in Native Hawaiian trust lands for over a century. This raises multiple issues and also frustrates the restorative justice process. For example, because the Public Land Trust must be preserved to the greatest extent possible until the unrelinquished claims of the Native Hawaiian community are resolved, lease extensions impede and otherwise frustrate restorative justice efforts.

Act 236 does not seek to ease or make less burdensome the process through which an individual or entity can obtain public land leases. Rather, it allows for DLNR and private entities to completely forego the very legal process created to protect public lands for Native Hawaiians and the public pursuant to the Public Land Trust and the Public Trust Doctrine. Act 236 would instead allow DLNR to authorize a lessee's continued occupation of public lands so long as the private lessee agrees to make substantial improvements on the property within a certain time. Given these conditions, Native Hawaiians and others who opposed this initiative fear that Act 236 invites misuse of public lands by corporate and military interests in particular. Many such interests have already enjoyed exclusive use of public lands for over half a century, and Act 236 could permit their exclusive use for another four decades without requiring that the condition and best uses of these public lands be reassessed. For example, as described above, the Hawai'i Supreme Court recently ruled that the DLNR's failure to adequately monitor and otherwise enforce conditions on Public Land Trust 'āina leased to the U.S. Military violated its fiduciary duties as a trustee.[376]

Act 236 creates exceptions to Chapter 171 that, since applicable statewide, would render the statute useless as it pertains to lessees eligible for lease extensions and the public lands they occupy. For instance, Act 236 amends Chapter 171 so that it requires that the Board review and approve a lessee's plans and specifications for the total developments proposed and determine, *inter alia*: "(1) Whether the development proposed in the development agreement is of sufficient worth and value to justify the [lease extension]"

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[375] Barelli, *supra* note 172, at 250.

[376] *See* Ching v. Case, 145 Hawai'i 148, 177–86, 449 P.3d at 1146, 1175–84 (2019).

and "(2) The estimated period of time necessary to complete the improvements and expected date of completion of the improvements[.]"[377] Chapter 171, however, already required that every lease issued by the Board contain the "improvements required[,] provided that a minimum reasonable time be allowed for the completion of improvements."[378] Requiring improvements in exchange for a lease extension, where improvements are already required under original leasing conditions, and nothing more, provides zero assurance to beneficiaries that these trust lands are being properly managed.

Legislators and testifiers in support of HB499 (which became Act 236) argued the bill's necessity on the basis that lessees ought to be incentivized to "reinvest in properties on public lands to ensure that properties evolve to meet the demands of businesses, residents, and the community at large."[379] Unless these leases are extended, supporters argued, private lessees will not upkeep or make improvements on the leased properties. Without permitting lease extensions, leasehold improvements are merely "'wasting assets' in the latter half of a lease term."[380] The language and tone of testifiers that would directly benefit from HB499 implied that lessees—in part, because of the bill—might feel so entitled by the privileges afforded to them by Act 236 that they invariably seek to repeatedly extend their leases based on this flawed logic.

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[377] H.B. 499, 31st Leg., Reg. Sess. (Haw. 2021).

[378] *See* HAW. REV. STAT. § 171-35. Perhaps this is why Senator Gil Riviere (Hawai'i Senate District 23) suggested on the Senate Floor that DLNR ought to reopen leases of public lands consistent with the normal leasing process. According to Senator Riviere, rather than providing lease extensions that evade current law, state agencies ought to maintain the leasing process as is. *See* Haw., S. Floor Debate, 31st Leg., Reg. Sess. (Apr. 27, 2021) (statement of Sen. Gil Riviere regarding H.B. 499); Hawai'i State Senate, *Senate Floor Session 04-27-2021 10am*, YOUTUBE (Apr. 27, 2021), https://www.youtube.com/live/JFMIl4_2x5E?t=2804s.

[379] *Hearing on H.B. 499 Before the H. Comm. on Finance*, 31st Leg., Reg. Sess. (Haw. 2021) (statement of Pacific Resource Partnership).

[380] *Hearing on H.B. 499 Before the H. Comm. on Finance*, 31st Leg., Reg. Sess. (Haw. 2021) (statement of James McCully, McCully Works). Supporters' testimonies also reveal who this bill is intended to benefit (corporate interests that can afford to make substantial improvements) and who this bill will inevitably discriminate against (the small, local business owners' supporters claim this bill will benefit). *See id.*

With century-long leases being tantamount to the sale of a fee,[381] Act 236, in essence, allows for the alienation of public lands without proper, lawful procedure. According to OHA:[382]

> By authorizing the extension of commercial, industrial, resort, and government public land leases – many of which may already have been held by their respective lessees for the better part of a century – for up to 40 years, *this bill may invite century-long leases that substantially inhibit the BLNR from fulfilling its fiduciary obligations, and otherwise ensuring the best and most appropriate uses of lands subject to the public trust and public land trust*.[383]

Under Act 236, long-term lessees can remain on public lands as pseudo-owners, provided they have enough funds for improvements. These lessees are not held accountable to the Public Land Trust or the Public Trust Doctrine, laws meant to protect Hawai'i's public lands and resources. As a result, Act 236 hinders the return and restoration of 'āina as well as self-determination efforts which are inextricably linked to having a land base.

An actual lease extension request to continue using 130 acres of Public Land Trust 'āina as an 18-hole golf course demonstrates that wealthy commercial interests will retain exclusive control these lands.[384] This highlights how Act 236 fails to incorporate values of restorative justice crucial for Indigenous Peoples' self-determination. The lease extension

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[381] *See* Reid Peyton Chambers & Monroe E. Price, *Regulating Sovereignty: Secretarial Discretion and the Leasing of Indian Lands*, 26 STANFORD L. REV. 1061, 1078 (1974) ("Through the lease instrument—often for 99 years—the fiction of Indian retention is retained, but the impact on the tribe is often inconsistent with the form. In this context, 99-year leases are tantamount to the sale of the fee.").

[382] OHA "represents [Native Hawaiians] concerning government control over valuable [public trust lands] . . . OHA . . . monitors the state's use of [trust] lands and spends millions annually on programs addressing social, economic, and cultural needs of Kanaka Maoli." Sharon K. Hom & Eric K. Yamamoto, *Collective Memory, History, and Social Justice*, 47 UCLA. L. REV. 1747, 1766–67 (2000); *see also* HAW. CONST. art. XII, §§ 5–6; 1997 Haw. Sess. Laws 240.

[383] *Hearing on H.B. 499 Before the H. Comm. on Water and Land*, 31st Leg., Reg. Sess. (Haw. 2021) (statement of Off. of Hawaiian Affs.) (emphasis added).

[384] BARRY CHEUNG, STATE OF HAWAII, DEPARTMENT OF LAND AND NATURAL RESOURCES, LAND DIVISION, AUTHORIZE THE DEPARTMENT OF LAND AND NATURAL RESOURCES, LAND DIVISION TO NEGOTIATE A DEVELOPMENT AGREEMENT FOR A 40-YEAR EXTENSION OF LEASE TERM, GENERAL LEASE NO. S-4095 OLOMANA GOLF LINKS, INC., LESSEE; WAIMANALO, KOOLAUPOKO, OAHU HAWAII, TAX MAP KEY: (1) 4-1-013:010 (May 26, 2023).

request appears to meet Act 236's formal requirements, such as commercial use and substantial improvements costing at least thirty percent of the market value.[385] However, it does not address Native Hawaiians' broader contextual and restorative justice concerns.

The forty-year lease extension request for a golf course, qualifying as commercial use[386] involves proposed improvement totaling $2,725,640, representing 32.3% of the appraised market value of $8,434,000 for existing improvements.[387] While the extension seeks to enhance golf course facilities, extending the lease for another forty years will result in these lands being outside Native Hawaiian control for 105 years. This demonstrates the lease extension's failure to meaningfully redress historical injustices related to land loss and self-governance.

In a restorative justice context, Act 236 falls short by preferencing and prioritizing commercial interests in Public Land Trust lands that Native Hawaiians have unrelinquished claims to, without considering Native Hawaiians' reparative interests in those lands. The anticipated lease extensions will essentially convert commercial lessees into pseudo-owners, giving them control over these lands for up to 105 years, effectively isolating them from Native Hawaiians. This long-term isolation prevents Native Hawaiians from exercising self-determination and self-governance over these lands. It also blocks their ability to decide how those lands are used and whether those uses align with traditional or culturally appropriate practices that could enhance cultural integrity and positively impact Native Hawaiian health and well-being. The lease extension documents do not explicitly address cultural practices or cultural integrity, nor do they indicate efforts to obtain Native Hawaiians' free, prior and informed consent through meaningful consultations. This omission undermines attempts to align with the value of cultural integrity. Act 236 thus fails at furthering the State's commitment to address the historical injustice of Native Hawaiians' loss of lands and resources.

D. *Mauli Ola: Evaluating the Impact of Act 236 on the Social Determinants of Health and Well-Being for Native Hawaiians*

Recognizing that Indigenous Peoples have a unique relationship with land that is crucial to their existence, it is perhaps no surprise that studies show access to lands (and land management practices) impact Indigenous Peoples'

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[385] *See* HAW. REV. STAT. § 171-36.5(f).

[386] CHEUNG, *supra* note 384, at 4.

[387] *Id.*

health and well-being.[388] Applying the value of mauli ola (social determinants of health and well-being) to Act 236 assesses whether the Act or its passage "improves social welfare conditions or perpetuates the status quo of Natives bringing up the bottom of most, if not all, socio-economic indicators."[389]

As explained previously, Act 236 allows for the continuation of long-term leases. These lease extensions transform commercial lessees into pseudo-owners of public lands,[390] lands that were recognized as Hawaiian Kingdom Crown and Government lands *before* being transferred to the United States years following the 1893 overthrow.[391] These lands hold deep ancestral and spiritual significance to Native Hawaiians. In the year after the U.N. General Assembly recognized Indigenous Peoples' rights and adopted the U.N.

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[388] *See* Laurie-Ann Lines, Yellowknives Dene First Nation Wellness Division, & Cynthia G. Jardine, *Connection to the Land as a Youth-Identified Social Determinant of Indigenous Peoples' Health*, 19 BMC HEALTH SERV. RSCH. 176-1 (2019) (recognizing among the research study results that an "overall emerging theme was that a connection to the land is an imperative determinant" of the Indigenous youth participants of the study); Rosalie Schultz, Tammy Abbott, Jessica Yamaguchi, & Sheree Cairney, *Indigenous Land Management as Primary Health Care: Qualitative Analysis from the Interplay Research Project in Remote Australia*, 18 BMC HEALTH SERV. RSCH. 960-1, 2 (2018) (recognizing the health benefits of Indigenous land management (ILM) and describing ILM as "involv[ing] employment of Indigenous people to manage lands and seas, using both customary and modern techniques" and also reliant on "Indigenous people's knowledge and skills, including languages and cultural expertiese"). Through the four values of restorative justice framework deployed in this article, the research of Schultz, Abbott, Yamaguchi, and Cairney shows the interconnections between cultural integrity, lands and resources, health and well-being, and self-governance. *Id.*

[389] *See* Sproat, *Wai Through Kānāwai*, *supra* note 122, at 182–83; Schultz, Abbott, Yamaguchi & Cairney, *supra* note 388, at 2 ("Indigenous peoples throughout the world, including in Australia, experience poorer health than the dominant peoples in their countries as a result of colonization, appropriation of peoples' lands and continuing discrimination."); *see also Legislative Testimony*, *supra* note 11 (describing herself as a Master of Public Health student in Health Policy & Management, Nicole Kahielani Peltzer asserted that HB499, if passed, would "have a strong, negative impact on Native Hawaiian health disparities . . .").

[390] *See* Chambers & Price, *supra* note 381 (indicating essentially that ninety-nine-year lessees are similar to fee-simple title holders).

[391] *See* discussion *supra* Section V.A.1; *see also* the expert testimony from law professor David H. Getches when he described "ceded" lands claims as special because "ceded" lands can be "*trac[ed] back to a disposition of the Hawaiian people at the time of the overthrow. This is highly unusual to be able to trace this much land still in public ownership back to the time of dispossession, the very root of these claims*." Off. of Hawaiian Affs. v. Hous. & Cmty. Dev. Corp. of Haw. *(OHA v. HCDCH I)*, 117 Hawai'i 174, 214, 177 P.3d 884, 924 (2008) (emphasis in original) (referencing the trial court).

Declaration , the Hawai'i Supreme Court acknowledged Native Hawaiians' special relationship with 'āina:

> *['Ā]ina, or land, is of crucial importance to the [n]ative Hawaiian [p]eople -- to their culture, their religion, their economic self-sufficiency and their sense of personal and community well-being. ['Ā]ina is a living and vital part of the [n]ative Hawaiian cosmology, and is irreplaceable*. The natural elements -- land, air, water, ocean -- are interconnected and interdependent. *To [n]ative Hawaiians, land is not a commodity; it is the foundation of their cultural and spiritual identity as Hawaiians*. The ['ā]ina is part of their ohana, and they care for it as they do for other members of their families. *For them, the land and the natural environment is alive, respected, treasured, praised, and even worshiped*.[392]

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[392] *Id.* (emphases in original). The unique significance of lands to Indigenous Peoples has been articulated specifically with regards to Native Hawaiians and to Indigenous Peoples more broadly. The two Native Hawaiian proverbs at the beginning of this article reflect the special and unique relationship between Native Hawaiians and their traditional lands. PUKUI, *supra* note 1, at 56, 62. Professor Jon M. Van Dyke also explained how Native Hawaiians traditionally viewed their relationship and responsibility to land and how it was different from foreigners' relationship with land: "The 'Āina could not be owned, or even really possessed, in the way westerners view private property. Instead, the [chiefs] and [commoners] cultivated a relationship with the 'Āina based on different values. . . . [T]he respect for and careful management of the 'Āina sustained the traditional system of land tenure." JON M. VAN DYKE, WHO OWNS THE CROWN LANDS OF HAWAI'I? 18 (2008).

More broadly, "indigenous peoples have emphasized that the spiritual and material foundations of their cultural identities are sustained by their unique relationships to their traditional territories." Robert A. Williams, Jr., *Encounters on the Frontiers of International Human Rights Law: Redefining the Terms of Indigenous Peoples' Survival in the World,* 1990 DUKE L.J. 660, 689 (1990). These unique relationships have also been recognized within the Inter-American Human Rights system. The Inter-American Court acknowledged that for Indigenous Peoples, "the land is not a mere instrument of agricultural production, but part of a geographic and social, symbolic and religious space, with which the history and current dynamics of those peoples are linked." Mayagna (Sumo) Awas Tingni Community v. Nicaragua, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 79, ¶ 83(d) (Aug. 31, 2001). Three judges also wrote separately to explain the importance of the relationship between Indigenous Communities and their lands relevant to their existence:

> Without effective use and enjoyment of [their lands], [the Indigenous Community] would be deprived of practicing, conserving and revitalizing their cultural habits, which give a meaning to their existence, both

Lease extensions that make it possible for current sixty-five-year commercial lessees to continue their exclusive use for an additional forty years mean that Native Hawaiians will not have access to those particular extended-lease lands for over a century. This is despite their recognized unrelinquished claims to "their national lands[,]"[393] which they have a special and recognized connection to. The exclusion of these leased lands from Native Hawaiian use or management under Act 236 prevents them from restoring, redeveloping, and reconnecting with their lands. This ongoing disconnection from ʻāina perpetuates Native Hawaiians' disconnection and undermines the mental, physical, and spiritual health of the community.[394]

The passage of Act 236 and its implications for lease extensions of public lands failed to consider the holistic health and well-being of Native Hawaiians. The lack of meaningful consultation and the exclusion of Native Hawaiian perspectives in the decision-making process related to Act 236 directly harm their social determinants of health and well-being. For instance, the long-term lease extensions prioritize commercial[395] and corporate interests over the cultural and communal needs of Native Hawaiians. This continuation of existing power structures fails to address the systemic inequities and environmental injustices that have historically affected Native Hawaiian communities.

> individual and communitarian. The feeling which can be inferred is in the sense that, just as the land they occupy belongs to them, they in turn belong to their land. They thus have the right to preserve their past and current cultural manifestations, and the power to develop them in the future.

Mayagna (Sumo) Awas Tingni Community, at ¶ 8. The U.N. Declaration also recognized Indigenous Peoples' right to "maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories, . . . and other resources . . . ." UNDRIP, *supra* note 129, at art. 25.

[393] *See* Apology Resolution, *supra* note 13 (recognizing, at the Congressional and Executive levels, that Native Hawaiians have not relinquished sovereignty over their lands). While Native Hawaiians as an Indigenous People may not have access to, or management of, these lands, this article recognizes that a pro-rated portion of revenue generated from those lands are expected to be provided to OHA.

[394] *See* Lines et al., *supra* note 388, at 1 (recognizing that for Indigenous Peoples, "health is a holistic concept that extends beyond individual behaviours and genetics" and "includes unique structural . . . determinants such as history, political climate, economics and social contexts").

[395] *See* CHEUNG, *supra* note 384, at 1 (recommending the BLNR authorize the DLNR to negotiate a development agreement for a forty-year lease extension of the Olomana golf course).

International human rights principles emphasize the importance of free, prior and informed consent and the active participation of Indigenous Peoples in decisions affecting their lands and resources.[396] Act 236's failure to obtain Native Hawaiians' consent or engage them in the legislative process, and for lease extension requests, contravenes these principles. As such, the act does not align with the holistic understanding of mauli ola, which requires a balanced relationship between the Native Hawaiian people and their land.

From a restorative justice perspective, any legislative action should aim to repair historical harms and improve the social conditions of Native Hawaiian communities. Act 236 enables extended leases without adequately addressing the needs and rights of Native Hawaiians. Land dispossession has profound and lasting impacts on Native Hawaiian health and well-being. The continued exclusion from their ancestral lands exacerbates existing health disparities among Native Hawaiians.[397] Historical trauma, rooted in land loss, has contributed to higher rates of chronic diseases such as obesity, diabetes, and cardiovascular issues within Native Hawaiian populations.[398] Additionally, the disconnection from ʻāina (land) has led to increased mental health challenges, including depression and anxiety, particularly among youth.[399] The inability to engage in traditional practices tied to the land further erodes cultural identify and community wellness. By extending leases without addressing these critical aspects of health and well-being, Act 236 misses an essential opportunity to contribute positively to the restoration of Native Hawaiian communities. The exclusion of Native Hawaiian voices in the development and implementation of Act 236 perpetuates a legacy of disenfranchisement and marginalization. Restorative justice necessitates that Indigenous Communities have a say in the management of their ancestral lands to ensure that their cultural practices, health, and well-being are upheld and protected.

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[396] *See* UNDRIP, *supra* note 129, at arts. 10, 11(2), 19, 28(1), 29(2), 32(2); Barelli, *supra* note 172, at 249–52; Maya Indigenous Community of Toledo District, Belize, Case No. 12.053 (Belize), Inter-Am. C.H.R. Report No. 40/04 (merits decision of Oct. 12, 2004) (explaining the relevance of articles XVIII and XXIII of the American declaration to Indigenous Peoples' free, prior and informed consent).

[397] *See* Lorinda Riley, *Addressing Native Hawaiian Historical Trauma: Opportunities for Increased Economic, Environmental, and Social Advancement*, 1 SOCIETAL IMPACTS 1 (2023) (discussing Native Hawaiians' health disparities after western contact and the overthrow of the Hawaiian Kingdom monarchy).

[398] *Id.* ("The Department of Native Hawaiian Health attributes these disparities to historical trauma stemming from the illegal overthrow of the Hawaiian Kingdom.").

[399] *See id.*

Act 236, as currently implemented, does not align with the principles of mauli ola. It fails to improve the social determinants of health and well-being for Native Hawaiians and instead perpetuates historical injustices and systemic inequities. For Act 236 to support restorative justice, it should instead incorporate measures that ensure meaningful consultation, prioritize the health and well-being of the Native Hawaiian people, and address disparities rooted in historical dispossession and marginalization. Only then can the legislation contribute to a balanced and holistic approach that respects and promotes the interconnected health and well-being of Native Hawaiians and their ancestral lands.

E. *Ea: Passing Act 236 Without Native Hawaiian's Free, Prior and Informed Consent*

Ea, a significant Native Hawaiian value informing restorative justice, evaluates whether the passage of Act 236 "perpetuates historical conditions imposed by colonizers or will attempt to redress the loss of self-governance."[400] Act 236 cannot be viewed as an attempt to redress Native Hawaiians' loss of self-governance or their self-determination over Public Land Trust ʻāina for three main reasons. First, neither Native Hawaiians, nor a recognition of their unrelinquished rights in leased Public Land Trust ʻāina are mentioned in the text of Act 236. Second, Native Hawaiians, as an Indigenous People, were not provided with a meaningful opportunity to give their free, prior and informed consent to the Legislature's decision to authorize the DLNR to grant lease extensions up to an additional forty years. Lastly, the Act's language fails to indicate a possibility for setting aside lands from anticipated expiration to leases for the benefit and use of Indigenous Native Hawaiians. Indeed, it can be viewed, intentionally or inadvertently, as a state-private effort to undermine prospects for Native Hawaiian self-governance.

As described above, when State of Hawaiʻi lawmakers introduced what would become Act 236 (House Bill 499)—legislation that would permit the extension of current leases of Public Land Trust ʻāina, to which Native Hawaiians maintain unrelinquished claims[401]—there was no consultation

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[400] *See* Sproat, *Wai Through Kānāwai*, *supra* note 122, at 185.

[401] Congress, through the Apology Resolution, acknowledged that "the indigenous Hawaiian people never directly relinquished their claims to their inherent sovereignty as a people or over their national lands to the United States . . . ." Apology Resolution, *supra* note 13. The Hawaiʻi Supreme Court also held that "the Apology Resolution and related state legislation . . . give rise to the State's fiduciary duty to preserve the corpus of the public lands

process to obtain Native Hawaiians' free, prior and informed consent.[402] The 2021 legislative session did not afford Native Hawaiians an adequate opportunity as Hawai'i's Indigenous People or as beneficiaries of the Public Land Trust to meaningfully participate in the drafting or passage of a bill that would impact their lands, rights, and the pursuit of restorative justice for a century. Although public participation was accepted through written and oral testimony at committee hearings, the Hawai'i State Legislature remained largely inaccessible to constituents and did not offer meaningful public participation and consultation; it also ignored overwhelming Native Hawaiian opposition.[403]

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trust, specifically the ceded lands, until such time as the unrelinquished claims of the native Hawaiians have been resolved." Off. of Hawaiian Affs. v. Hous. & Cmty. Dev. Corp. of Haw. (*OHA v. HCDCH I*), 117 Hawai'i 174, 195, 177 P.3d 884, 905 (2008).

[402] Act 236's amendments to HAW. REV. STAT. § 171(a) would only be applicable "for leases that have not been assigned or transferred within ten years prior to receipt of an application for a lease extension submitted pursuant to this section[.]" HB499 would amend the statute so that HAW. REV. STAT. § 171(b) reads:

> Before entering into a development agreement, the lessee or the lessee and developer shall submit to the board the plans and specifications for the total development proposed. The board shall review the plans and specifications and determine:
>
> (1) Whether the development proposed in the development agreement is of sufficient worth and value to justify the extension of the lease;
>
> (2) The estimated period of time necessary to complete the improvements and expected date of completion of the improvements; and
>
> (3) The minimum revised annual rent based on the fair market value of the lands to be developed, as determined by an appraiser for the board and, if deemed appropriate by an appraiser, the appropriate percentage of rent where gross receipts exceed a specified amount.

H.B. 499, 31st Leg., Reg. Sess. (Haw. 2021).

[403] *Compare HB499 HD2 SD2 CD1*, HAWAI'I STATE LEGISLATURE, https://capitol.hawaii.gov/measure_indiv.aspx?billtype=HB&billnumber=499&year=2021 (showing the legislative status for House Bill 499, which became Act 236, during the 2021 legislative session and further showing a general process where the bill was sent only to legislative committees, voted on by legislative committee members, and eventually voted on by each legislative chamber before becoming law without the Governor's signature), *with* Barelli, *supra* note 172, at 250 ("States should not exercise undue time pressure on Indigenous Peoples, who, instead, should have enough time to gather information through members of the community or third parties and subsequently discuss them.").

According to DLNR, the Act "is intended to support long-term tenants wishing to continue their businesses past the 65-year maximum lease term allowed under current law."[404] In strong support of this bill, DLNR representatives proclaimed that extending DLNR's authority, which would apply on a statewide basis, to grant lease extensions to private landholders "is in the best interests of the State[.]"[405] State House and Senate committees largely agreed with the DLNR. The House Committee on Water and Land found that HB499 "will support long term tenants who wish to continue their businesses past the sixty-five-year lease restrictions, while promoting the upkeep of these properties by lessees."[406] Similarly, the Senate's equivalent committee of the same name concluded that the bill would promote investments and improvements:

> Faced with the uncertainty of continued tenancy, lessees have little incentive to make major investments in infrastructural improvements and therefore the infrastructure on these properties has been deteriorating. Authorization of lease extensions, like those proposed by this measure, may resolve issues surrounding the future of a tenancy and thereby promote investment in improvements located on currently leased public lands.[407]

Despite claims that Act 236 was in the State's best interest, legislators and corporate interests ignored overwhelming opposition from Native Hawaiians and the public. Although grassroots individuals and community organizations outnumbered the bill's supporters by over twenty-to-one and submitted hundreds of pages of testimony in opposition to HB499 and its Senate companion bill, their input was effectively silenced. Opponents argued that Act 236 would grant tremendous authority to BLNR, which will undoubtedly impact Hawai'i's public lands for generations to come. As Healani Sonoda-Pale, on behalf of Native Hawaiian grassroots organization Ka Lāhui Hawai'i, testified:

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[404] *Hearing on H.B. 499 Before the H. Comm. on Water and Land*, 31st Leg., Reg. Sess. (Haw. 2021) (statement of Suzanne D. Case, Chairperson, DLNR). In this testimony, DLNR also recommended that the "amendment to the bill [also] allow for extensions of leases for mixed-development use in addition to commercial, industrial, resort, or government uses." *Id.*

[405] *Hearing on H.B. 499, H.D. 2, Before the H. Comm. on Finance*, 31st Leg., Reg. Sess. (Haw. 2021) (statement of Suzanne D. Case, Chairperson, DLNR).

[406] H. Stand. Comm. Rep. No. 26, in 2021 House Journal, at 582.

[407] S. Stand. Comm. Rep. No. 1151, in 2021 Senate Journal, at 1329.

> Allowing non-elected members of a government board to extend leases beyond the maximum 65 years would set up lessees as pseudo owners of public landowners and set a bad precedent. Furthermore, this measure does not provide for any process where public input can be provided on past, current, and future land stewardship.[408]

The public's ability, or lack thereof, to participate in the lease extension process is particularly disconcerting given the State's history of failing to respect and otherwise uphold protections for Native Hawaiian beneficiaries' rights under the Public Land Trust. Although the DLNR and the BLNR may exercise its discretion under the proposed amendments, community organizations reminded legislators that "past practices and decisionmaking raise substantial concerns regarding whether and how such discretion will be exercised" and provided a shortlist of the state's failures and its "pattern of disregard for the public interest."[409] These failures raise "significant doubts as to whether such discretion will be used appropriately" if authorized under Act 236.[410]

The State of Hawai'i's actions, as discussed above and implications of Act 236, fundamentally transgress the State's adopted restorative justice principles for Native Hawaiians. Analysis of the State's mismanagement of the Public Land Trust, as highlighted in cases like *Ching v. Case* and the Mauna Kea management audits, removes the veil to show the State's consistent neglect of its fiduciary duties and a failure to repair lasting harms of colonization. Act 236, which allows for extended leases of public lands without meaningful consultation or the free, prior and informed consent of Native Hawaiians, perpetuates historical injustices and undermines Native Hawaiian self-determination, self-governance, cultural integrity and connections to 'āina. The State's actions favor private interests over the claims, interests, and aspirations of Native Hawaiians, thus failing to address the historical injustices and continuing to alienate Native Hawaiian lands. In

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[408] *A Bill for an Act Relating to Lease Extensions on Public Land: Hearing on H.B. 499 Before the S. Comm. on Water and Land*, 31st Leg., Reg. Sess. (Haw. 2021) (statement of M. Healani Sonoda-Pale, Public Affairs Officer, Ka Lāhui Hawai'i Kōmike Kalai'āina) ("Were these lessees to go through a public process others would have an opportunity to bid on the property, public input would be allowed, and in some cases environmental assessments taken into account on how well they have cared for the public land they were entrusted with.").

[409] Joint Letter on HB499 HD2 SD2 CD1 from Kanaeokana et al. to Members of the Haw. State Legislature (Apr. 2021).

[410] *See id.*

order to make meaningful progress towards restorative justice for Native Hawaiians, it is important for the State to implement rigorous, culturally sensitive land management practices that actively involve and respect Native Hawaiian communities early in the decision making and planning processes, ensure their cultural survival, and recognize and restore their rights to land and resources.

VI. CONCLUSION

This article examines the implications of Act 236 on Native Hawaiian cultural integrity (moʻomeheu), land and natural resources (ʻāina), social determinants of health and well-being (mauli ola), and self-governance (ea). The analysis concludes that the Act poses significant threats to principles of restorative justice for Native Hawaiians, which are embodied in Hawaiʻi's Constitution and elaborated upon by Hawaiʻi's courts. Analyzing Act 236 through these intertwined realms of contextual legal inquiry reveals significant deficiencies. Specifically, it highlights the State's mismanagement of the Public Land Trust and its failure to meaningfully consult Native Hawaiian beneficiaries. This brings us to a broader discussion on the management of public lands, incorporating international human rights standards and best practices from other jurisdictions. These broader discussions provide opportunities to contextualize Hawaiʻi's approach within a global framework and to explore how the principles of restorative justice can guide the State of Hawaiʻi in better managing the Public Land Trust for the benefit of Native Hawaiians.

The infusion of international human rights principles into legal frameworks is crucial for addressing historical injustices faced by Indigenous Communities. By incorporating international human rights standards, contextual legal analysis provides a more comprehensive understanding of justice and complements formalist analysis[411] by ensuring that legal outcomes are aligned with global human rights norms and the specific needs and rights of Indigenous Peoples.

As described above, the U.N. Principles on Reparation provide a framework for reparations that include restitution, compensation, rehabilitation, satisfaction, and guarantees of non-repetition. They emphasize

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[411] *See* Sproat & Tuteur, *supra* note 124 (explaining that the second edition of the Native Hawaiian Law treatise "employ[s] [both] traditional modes of legal description and analysis" *and* "engages in contextual inquiry" because "traditional methods sometimes fail to yield deeper insights into law and justice (or injustice) . . .").

the necessity of restoring victims to their previous condition before the violation occurred and ensuring that the harms suffered are adequately addressed through effective remedies. Implementing these principles involves recognizing the harm done *and* actively working to repair it through tangible actions. This approach is crucial for advancing restorative justice for Native Hawaiians by ensuring that their rights to land, culture, health and well-being, and self-governance are not only recognized but also protected and restored. The State of Hawai'i, by adopting these principles, can create policies and practices that ensure Native Hawaiians are consulted and their consent obtained, aligning state actions with global human rights norms and making a significant stride towards healing and justice.

Governments around the world are increasingly adopting restorative justice principles and human rights frameworks to protect Indigenous Peoples' rights to land and resources. Canada[412] and New Zealand,[413] for

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[412] Canada appears to be on a long path towards restorative justice for its Indigenous Peoples after passing the United Nations Declaration on the Rights of Indigenous Peoples Act, which "provides a roadmap for the Government of Canada and First Nations, Inuit and Métis to work together to implement the UN Declaration based on lasting reconciliation, healing and cooperative relations." *United Nations Declaration on the Rights of Indigenous Peoples Act Implementation at the Canadian Security Intelligence Service*, GOV'T OF CAN., https://www.canada.ca/en/security-intelligence-service/corporate/publications/united-nations-declaration-on-the-rights-of-indigenous-peoples-act-implementation.html. Under the Act, the Canadian government will, "in consultation and cooperation with Indigenous peoples, take all measures necessary to ensure that the laws of Canada are consistent with the Declaration." S.C. Res. 2021, ¶ 5 (Can.) (Sept. 13, 2007); *see also id.* at ¶ 4 (describing the purposes of the act as (1) affirming the U.N. Declaration as a universal human rights instrument "with application in Canadian law" and (2) providing an implementation framework).

[413] The government of Aotearoa/New Zealand also appears to be in pursuit of restorative justice for its Indigenous Peoples since embarking on an effort to implement the United Nations Declaration domestically. Russell Palmer, *Government Begins Drafting Indigenous Rights Plan*, RADIO N.Z. (Apr. 22, 2022, 10:57 AM), https://www.rnz.co.nz/news/political/465708/government-begins-drafting-indigenous-rights-plan (reporting on Māori consultation feedback regarding implementation of the U.N. Declaration on the Rights of Indigenous Peoples within Aotearoa/New Zealand).

Aotearoa/New Zealand has moved forward with the formation of a Declaration Working Group and conducting consultations in preparing an actual Declaration Plan. Te Puni Kōkiri: Ministry of Māori Development, *UN Declaration on the Rights of Indigenous Peoples*, N.Z. GOV'T (Oct. 20, 2022), https://www.tpk.govt.nz/en/a-matou-whakaarotau/te-ao-maori/un-declaration-on-the-rights-of-indigenous-peoples (describing the U.N. Declaration, the plan to implement the Declaration, and the Declaration Working Group advising on the content and form of the plan, its implementation and interacting with Indigenous stakeholders); *see also* Palmer, *supra* (describing the initial consultations as consisting of "69 workshops with 370

instance, are incorporating the U.N. Declaration on the Rights of Indigenous Peoples into their domestic laws. Agencies and entities within the United States[414] are also exploring ways to consult with Indigenous Communities and obtain their consent on projects that impact them. Inter-American Human Rights system reports and decisions have required national governments to adopt "legislative, administrative, and any other measures necessary" to effectuate Indigenous Peoples' property rights[415] and to "abstain from any acts that might lead the agents of the State itself, or third parties acting with its acquiescence or its tolerance, to affect the existence, value, use or enjoyment of the property located" in the areas of the affected Indigenous Community.[416] Directives like these, along with guidance regarding the applicability of human rights principles to Indigenous Peoples are designed to help national, state, and local governments to better implement human rights protections.

The State of Hawai'i has a unique opportunity to learn from these other instances involving Indigenous Communities, national governments, and human rights. This opportunity allows the State to reimagine state and local laws and policies that translate into substantive protections that advance restorative justice and promote healing on the ground and in Native Hawaiian Communities. Hawai'i's commitment to restorative justice is crucial as it provides a significant opportunity to operationalize international human

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participants over the past six months" and as "the first phase in developing a plan to support the declaration . . .").

[414] There appears to be *some* movement among the states of the Union towards restorative justice for Indigenous Peoples. Washington State's Office of the Attorney General "'adopt[ed] a consultation and consent policy regarding Washington's 29 federally-recognized tribes. Going forward my office will obtain free, prior and informed consent *before* initiating a program or project that directly affects tribes in our state.'" Frank Hopper, *State Attorney General Announces Free, Prior and Informed Consent Policy with Washington Tribes*, INDIAN COUNTRY TODAY (May 21, 2019), https://ictnews.org/news/state-attorney-general-announces-free-prior-and-informed-consent-policy-with-washington-tribes?redir=1 (emphasis added). Longer term goals include the implementation of Attorney General Ferguson's policies more broadly throughout the state government. *Id.* Subsequently, Washington State University expressed its "commit[ment] to meaningful Tribal consultation in support of Tribal sovereignty and the inclusion of their voices in teaching, research, and programming." *EP41 – Policy on Tribal Engagement, Consultation, and Consent for Joint WSU-Tribal Research Activities and Projects*, WASH. STATE U. (Oct. 11, 2021), https://policies.wsu.edu/prf/index/manuals/executive-policy-manual/ep41/.

[415] Mayagna (Sumo) Awas Tingni Community v. Nicaragua, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 79, ¶ 173(3) (Aug. 31, 2001).

[416] *Id.* at ¶ 173(4); *see also supra* Section IV.C.3.

rights norms at the local level.[417] The State of Hawai'i is the fiduciary over Public Land Trust resources and Native Hawaiians are recognized beneficiaries. As a result of this fiduciary-beneficiary relationship, the State of Hawai'i is in a position to reevaluate its approaches to Native Hawaiian issues and re-envision a way forward that takes heed of the human rights bodies' decisions and guidance for protecting Indigenous Peoples' human rights. The State and local governments can implement guidelines, policies, processes, and procedures for protecting Kānaka Maoli international Indigenous human rights in Hawai'i.

Hawai'i's State legislative and executive branches can implement consultation policies and practices with the Native Hawaiian community that actively seek to obtain their free, prior and informed consent in ways that are consistent with existing Hawai'i law and that respect international human rights norms. For example, the State of Hawai'i is already required to "protect all rights, customarily and traditionally exercised for subsistence, cultural and religious purposes[.]"[418] The Hawai'i Supreme Court gave the State a minimally-basic analytical framework for protecting those traditional and customary rights against private property interests in *Ka Pa'akai*.[419] The language the court used is consistent with international Indigenous human rights principles. The court explained, "[w]e therefore provide this analytical framework in an effort to effectuate the State's obligation to protect native Hawaiian customary and traditional practices while reasonably accommodating competing private interests[.]"[420] The court required the Land Use Commission, when reviewing district boundary reclassification petitions, to

> at a minimum-make specific findings and conclusions as to the following: (1) the identity and scope of "valued cultural, historical, or natural resources" in the petition area, including the extent to which traditional and customary native Hawaiian rights are exercised in the petition area; (2)

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[417] *See* Sproat & Palau-McDonald, *Duty to Aloha 'Āina*, *supra* note 121, at 528.

[418] HAW. CONST. art. XII, § 7.

[419] Ka Pa'akai O Ka Aina v. Land Use Comm'n, 94 Hawai'i 31, 46, 7 P.3d 1068, 1083 (2000).

[420] *Compare id.* at 46–47, 7 P.3d at 1083–84 (recognizing the State of Hawai'i's obligation to protect Indigenous Native Hawaiians' traditional and customary practices, and the rights of private landowners), *with* Yakye Axa Indigenous Cmty. v. Paraguay, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 125, ¶¶ 145–49 (June 17, 2005) (requiring states to balance private property interests with Indigenous Peoples' collective interests in property).

> the extent to which those resources-including traditional and customary native Hawaiian rights-will be affected or impaired by the proposed action; and (3) the feasible action, if any, to be taken by the LUC to reasonably protect native Hawaiian rights if they are found to exist.[421]

Recall also that the Hawai‘i Supreme Court, in *Flores-Case ‘Ohana*, reaffirmed its *Ka Pa‘akai* holding and extended the requirement for that analytical framework to the State administrative rulemaking process.[422]

Enhancing the *Ka Pa‘akai* analysis to include international Indigenous human rights principles, like free, prior and informed consent, into the practices of State government agencies will transform a procedural safeguard into a more impactful process for Native Hawaiians. Consultation processes aimed at obtaining Native Hawaiians' free, prior and informed consent for decisions affecting them can enhance the fiduciary-beneficiary relationship. Such processes can also positively impact the four intertwined realms of restorative justice: mo‘omeheu (cultural integrity), ‘āina, (land and resources), maoli ola (social determinants of health and well-being), and ea (self-governance). Early and meaningful consultation processes with Native Hawaiians, and Native Hawaiian entities or organizations, have the potential to include expert knowledge from Native Hawaiian cultural practitioners about how State and local policies, actions, or projects will impact Native Hawaiian cultural integrity, and provide government agencies with opportunities to revise or abandon policies, actions or projects to adequately support and restore cultural integrity.[423] These consultations are likely to have a more positive impact on the realm of land and natural resources, primarily because of the cultural significance of lands and resources to Native Hawaiians. This approach would provide opportunities for the Native Hawaiian community, particularly Indigenous experts in Native Hawaiian land and resource management practices, to share their knowledge. Their expertise would help the State reevaluate its approach to restorative justice for Native Hawaiians and better address the historical injustices related to land and natural resources. Consultation processes, especially when there is

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[421] *Ka Pa‘akai*, 94 Hawai‘i at 47, 7 P.3d at 1084.

[422] *See* Flores-Case ‘Ohana v. Univ. of Haw., 153 Hawai‘i 76, 79, 526 P.3d 601, 604 (2023).

[423] *See* Schultz, Abbott, Yamaguchi & Cairney, *supra* note 388, at 7 (discussing the importance of Indigenous Land Management practices incorporating Indigenous knowledge and language that positively impact Indigenous health and well-being).

an honest effort to obtain Native Hawaiians' free, prior and informed consent and with a goal towards restorative justice, have the potential to support greater Native Hawaiian self-determination and self-governance, including over lands and resources, by inviting Native Hawaiians early in a process that seeks to determine land usage.

In implementing Act 236, DLNR can most effectively advance restorative justice for Native Hawaiians by paying close attention to each of these four realms while developing its policies, procedures, and rules for extending current sixty-five-year leases for Public Land Trust land for another forty years. In pursuit of the State's embrace of restorative justice for Native Hawaiians, DLNR has an opportunity to implement Indigenous values based on the human rights principle of self-determination. In doing so, it can better assess whether the content and form of policies, procedures, and rules used to determine whether it will extend a sixty-five-year lease for another forty years strengthens cultural integrity for Native Hawaiians, provides some form of redress for the loss of their lands and natural resources, advances health and well-being, and more strongly supports forms of Native Hawaiian self-determination and self-governance. Alternatively, the State could also ground its "fiduciary duty to preserve the corpus of the public lands trust, specifically, the ceded lands"[424] in international human rights principles. These principles, instruments, and decisions recognize Indigenous Peoples' rights to their lands and resources. The State should also "abstain from *any acts* that [would result in the] . . . State . . . , or third parties acting with its acquiescence . . . , to affect the existence, value, use or enjoyment of the [lands] . . . ."[425] These lands, formerly Hawaiian Kingdom Crown and Government lands, are subject to Native Hawaiians' unrelinquished claims. Therefore, the State should not extend leases on them.

The significance of the contextual analysis of Hawai'i's Act 236 extends well beyond the local context. It serves as a case study for other jurisdictions grappling with similar issues of Indigenous Peoples' land rights, cultural preservation, and self-governance. The insights gained from Hawai'i's experience can inform global efforts to implement international human rights standards and promote restorative justice for Indigenous Peoples. By examining Hawai'i's successes and challenges, other states and nations can learn valuable lessons about creating policies that recognize, restore, and

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[424] Off. of Hawaiian Affs. v. Hous. & Cmty. Dev. Corp. of Haw. (*OHA v. HCDCH I*), 117 Hawai'i 174, 217, 177 P.3d 884, 927 (2008).

[425] *See* Mayagna (Sumo) Awas Tingni Community v. Nicaragua, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 79, ¶ 173(4) (Aug. 31, 2001).

protect Indigenous Peoples' rights. This broader perspective underscores the importance of integrating Indigenous values and human rights principles into public land management to foster restorative justice for Indigenous Peoples—locally and globally.