Unfortunately, Emile Vernaudon is only one outstanding case. While Temaru and many of his collaborators are serious and honest leaders with a vision of change, many other civil servants are hardly distinguishable from their predecessors.

The other issue that constantly causes tensions in society is the question of independence. Many people still do not understand what independence would mean, and what chances the country would have once it overcame the dependency on France and became a member of the family of Pacific nations. Most people have been affected by decades of French propaganda, and hardly anyone from Tahiti has ever visited an independent Pacific Island country. Instead they have seen biased reports and documentaries emphasizing how poor and downtrodden these islands are, compared with wealthy Tahiti. The new government has worked hard to de-dramatize the independence issue, by constantly raising the issue and resisting pro-French criticism from French and local people, as well as by increasing cooperation with other Pacific islands. However, much more must be done if the government wants people to rethink their attachment to France and share their president’s vision of a future as Maohi (indigenous Polynesians) within the Pacific community.

LORENZ GONSCOR

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HAWAIIAN ISSUES

In the past year Native Hawaiians faced challenges in the courts, in the US Congress, and in the environment. In the courts, the Office of Hawaiian Affairs triumphed over litigation threatening first to dismantle and then to bankrupt the agency, and the Kamehameha Schools awaits a decision on its Hawaiian-preference admission policy. In the realm of indigenous rights, the “Akaka Bill” was scrutinized and denied a full debate in the US Senate, while the United Nations’ Human Rights Council adopted the Declaration on the Rights of Indigenous Peoples. In environmental matters, Native Hawaiians joined forces against “biopiracy,” and the Northwestern Hawaiian Islands became a national monument.

The latest in a string of lawsuits precipitated by the US Supreme Court’s 2000 Rice v Cayetano decision was defeated in June 2006. In the Rice v Cayetano ruling, the US Supreme Court invalidated the state’s Hawaiians-only voting policy for the Office of Hawaiian Affairs (OHA). In March 2002, sixteen plaintiffs filed
the Arakaki v Lingle case, challenging the constitutionality of the Office of Hawaiian Affairs, the Hawaiian Homes Commission Act (HHCA), and other state and federal Native Hawaiian–focused programs and agencies. Claiming standing solely as taxpayers, the plaintiffs objected to the use of general state and federal income tax revenues for the agencies. They demanded the dissolution of the Office of Hawaiian Affairs, the Hawaiian Homes Commission Act, and other similar programs, arguing that they violated the equal protection clause of the Fourteenth Amendment of the US Constitution.

In November 2003, Hawaiʻi’s US District Court Judge Susan Mollway removed the Department of Hawaiian Homelands (DHHL), Hawaiian Homes Commission, State Council of Hawaiian Homestead Associations, the federal government, and other intervening parties from the suit. The district court dismissed the plaintiffs’ claims because “any challenge to the lessee requirements of the DHHL lease program set up by the HHCA, a state law, necessarily involves a challenge to the Admissions Act (1959),” and the plaintiffs had no standing to sue the United States (Arakaki v Lingle, No 04-15306, US 9th Circuit Court of Appeals: 9–10). In addition, the Native Hawaiian Government Reorganization Act of 2005 was being discussed at the congressional level. So, in January 2004, Judge Mollway dismissed the case against the State of Hawaiʻi and the Office of Hawaiian Affairs, because the courts should not interfere with an existing debate over Hawaiians’ political status (Viotti 2004).

Eleven of the original sixteen plaintiffs (three were dismissed because they were Native Hawaiian, one withdrew, and one passed away) appealed to the Ninth Circuit Court of Appeals (Viotti 2004). In August 2005, the appellate court upheld the lower court’s ruling, but reinstated a portion of the suit challenging the funding of the Office of Hawaiian Affairs from state general funds. The office currently receives about $2.8 million a year from the state general fund, about 9 percent of the agency’s annual operating budget (OHA 2006).

Arakaki v Lingle was dependent on the plaintiffs’ legal standing to challenge state policies. In a May 2006 Ohio case (Cuno v DaimlerChrysler, Inc, 386 F.3d 738 [6th Cir. 2004]), the US Supreme Court ruled that a group of taxpayers, who challenged nearly $300 million in tax breaks for an automobile manufacturing plant, had no legal standing to challenge the tax or spending policies of a state “simply by virtue of their status as taxpayers” (US Chief Justice John Roberts, quoted in Kobayashi 2006). In light of the Ohio ruling, on 14 June 2006, the US Supreme Court rejected the plaintiffs’ legal standing in Arakaki v Lingle and overturned the lower court’s decision.

While the State of Hawaiʻi and the Office of Hawaiian Affairs were triumphant in the Arakaki v Lingle case, another prominent Hawaiian institution continues to battle similar litigation challenging the legitimacy of its policies. The Kamehameha Schools ‘ohana (family)—trustees, administration, alumni, students and faculty—and the Hawaiian community wait anxiously as a panel of fifteen judges in the Ninth Circuit Court of Appeals decides the future of the institution.
The question at hand is whether or not Kamehameha’s Hawaiian-preference admissions policy violates US federal anti-discriminatory laws.

The Kamehameha Schools is a private educational institution founded in 1887 by the Last Will and Testament of a Hawaiian princess, Bernice Pauahi Bishop. Her entire estate—more than 350,000 acres—was to be held in trust for the purpose of supporting the schools and educating Native Hawaiian children (Kamehameha Schools 2006c). In a speech at the school’s first Founder’s Day celebration in 1889, Charles Reed Bishop spoke of his late wife’s concern regarding the “rapid diminution” of her people because of increasing westernization in the kingdom. He said she wanted to create the schools to correct this manifest imbalance. Later in the same speech he emphasized that only through proper education would the native people “be able to hold their own” in the face of rapid change and encroaching external forces. To that end, he emphasized the intent of the late princess that “Hawaiians have the preference” in applying to the schools (Charles Reed Bishop, quoted in Kamehameha Schools 2006c).

As heirs to her estate, Native Hawaiian children are given preference for admission to Kamehameha Schools, which is financially supported by the Bishop Estate. The Kamehameha Schools is currently valued at about $7 billion and spends approximately $200 million a year to support three campuses that serve 6,550 students, more than thirty preschools, and other educational outreach services for both Hawaiian and non-Hawaiian children (Kamehameha Schools 2006a).

In June 2003, an unidentified non-Hawaiian applicant (dubbed “John Doe”) filed suit against the Kamehameha Schools because he was denied admission. In Doe v Kamehameha Schools, the plaintiff argued that Kamehameha’s admissions policy violates the anti-discriminatory provisions in section 1981 of the Civil Rights Act. Enacted in 1866, this section of the Civil Rights Act was established to protect newly freed slaves from racial discrimination in the formation and enforcement of contracts. “Doe” argued that admission to a private school is a contract, and that his exclusion was based solely on the fact that he is not Native Hawaiian. The plaintiff requested that the court force the Kamehameha Schools to admit him to any of the three campuses, overturn the Hawaiian-preference admissions policy, and award monetary damages.

Kamehameha’s legal team argued that the admissions policy is legally justified under section 1981 because it seeks to correct past and present imbalances suffered by Native Hawaiians as a result of Western contact and subsequent colonization (see US Public Law 103-150, the “Apology Resolution”). According to Kamehameha attorney Kathleen Sullivan, the Kamehameha Schools and its policy are “entirely legal under our civil rights laws because they redress the continuing harm from a legacy of devastation that Congress has acknowledged and apologized for against the Native Hawaiian people.” Kamehameha Trustee Admiral Robert Kihune added, “There are still thou-
sands of Native Hawaiians who need the educational opportunities provided by Kamehameha Schools to help remedy historical harms that continue even today” (Kamehameha Schools 2006c).

Their argument is supported by five sub-arguments: (1) The Kamehameha Schools is a private institution that receives no federal money; (2) the admissions policy is a remedial effort, as was the original intent of the 1866 Civil Rights Act, to address the socioeconomic and educational disparities faced by the indigenous people of Hawai‘i; (3) the schools were founded when Hawai‘i was an independent nation and the schools were established to address the aforementioned disparities; (4) the US Congress has acknowledged the historical wrongs committed by the US and has enacted “more than 85 statutes that provide funding for programs exclusively benefiting Native Hawaiians;” and (5) “Kamehameha graduates have gone on to leadership positions” in every field and many return to help others in Native Hawaiian communities (Kamehameha Schools 2006b).

Based on these key arguments, Kamehameha’s legal team requested that the case be dismissed.

In November 2003, Federal District Judge Alan Kay ruled against the plaintiff, “Doe,” thereby affirming Kamehameha’s admission policy. Seven months later, in June 2004, the plaintiff appealed Judge Kay’s decision to the US Ninth Circuit Court of Appeals. A panel of three judges heard arguments in November 2004, and in August 2005 ruled 2–1 against Kamehameha (for an analysis of the ruling, see Harvard Law Review 2005). In response, Kamehameha’s legal team petitioned for and was granted an en banc hearing in front of fifteen judges from the appellate court. (In an en banc hearing, the entire membership of an appellate court convenes to reconsider a decision of a smaller panel of the same court.) The new, larger panel of judges heard arguments from both sides on 20 June 2006; they were instructed not to consider the previous ruling in their decision. Until the en banc panel rules, Kamehameha’s Hawaiian-preference admissions policy remains in effect.

While it is too late for the plaintiff to graduate from the Kamehameha Schools, if the en banc panel rules in favor of the plaintiff (barring further appeals to the US Supreme Court), the schools’ admissions policy will not be the only one affected. Overturning the admissions policy would also affect financial aid policies and allow non-Hawaiian students to receive funding from the Kamehameha Schools. Every year, the institution distributes about $15 million in financial aid to Native Hawaiian college students from around the nation (Kamehameha Schools 2006a). The Kamehameha Schools is one of the few remaining Hawaiian institutions, and to many it is a symbol of the health and well-being of Native Hawaiians and the Hawaiian culture. The elimination of one of the Kamehameha Schools’ defining characteristics could generate additional difficulties for Native Hawaiians.

In the broader international context, the United Nations Human Rights Council adopted the UN Declaration on the Rights of Indigenous
Peoples. The Human Rights Council was created by the UN General Assembly in March 2006 to replace the UN Commission on Human Rights. The council consists of forty-seven member countries elected by the General Assembly and is charged with promoting universal respect for and implementation of human rights obligations. In addition, the council must also address violations of human rights, “respond promptly to human rights emergencies . . . serve as a forum for dialogue . . . [and] make recommendations to the General Assembly for further development of international law in the field of human rights” (UN 2006a, 2–3).

On 29 June 2006, thirty member-nations of the Human Rights Council voted to adopt the UN Declaration on the Rights of Indigenous Peoples. The two member-nations that voted against adopting the declaration and most of the twelve member-nations that abstained explained that it was not for lack of support for the rights of indigenous peoples of the world, but that they regretted the lack of time to deal with certain provisions that might conflict with specific national policies (UN 2006b).

The Declaration on the Rights of Indigenous Peoples provides that indigenous peoples “have the right to the full enjoyment . . . of all human rights and fundamental freedoms. . . . are free and equal to all other peoples and have the right to be free from any kind of discrimination. . . . have the right of self-determination. . . . [can] freely determine their political status and freely pursue their economic, social and cultural development. . . . [and] have the right to maintain and strengthen their distinct political, legal, economic, social and cultural institutions, while retaining their rights to participate fully . . . in the political, social and cultural life of the State” (UN 2006b). The next step is adoption by the UN General Assembly.

While on the international front it has been a historic year for human and indigenous rights, in the United States, efforts to address the plight of the indigenous people of Hawai‘i continue to experience opposition on national and local levels. In July 2005, in an effort to force debate and a floor vote on the Native Hawaiian Government Reorganization Act of 2005, S 147 (also known as the Akaka Bill), US Senate Majority Leader Bill Frist filed a petition for cloture. (Cloture refers to the procedure of ending debate in a legislative body and calling for an immediate vote.) But the petition was tabled to allow the Senate to address emergency measures for victims of Hurricane Katrina on the Gulf Coast of the United States. On 6 June 2006, Senate Majority Whip Mitch McConnell filed another petition for a cloture vote on the bill.

In the weeks leading up to the 2006 vote, supporters of the bill were confident they had enough votes to win. However, unfavorable recommendations from the US Commission on Civil Rights (USCCR) and the White House weakened support for the bill and, in turn, the cloture measure. In a May 2006 USCCR report, the body recommended “against the passage of the Native Hawaiian Reorganization Act of 2005 S 147 . . . or any other legislation that would dis-
criminate on the basis of race or national origin and further subdivide the American people into discrete subgroups accorded varying degrees of privilege” (USCCR 2006, 15).

In response, the State of Hawai’i disputed the idea that § 147 creates a “race-based” government and argued that Native Hawaiians have a special, political relationship with the US federal government, as demonstrated by numerous legislative acts (Bennett 2006). Although Native Hawaiians have frequently been grouped with other federally recognized Native American and Native Alaskan nations, they have yet to be likewise recognized. The state’s response to the USCCR report says that “there is simply no legal or moral distinction between Native Hawaiians and American Indians or Alaska natives that would justify denying Native Hawaiians the same treatment” (Bennett 2006, 3).

At the same time, Hawai’i’s Governor Linda Lingle sent a letter to Republican Congressman and Senate Majority Leader Bill Frist that echoed the state’s response. The governor characterized the USCCR report as a “misguided action . . . [of] a deeply polarized Civil Rights Commission . . . based on a grossly flawed understanding of the history of Hawai’i and of the law itself.” She also emphasized the inequality of treatment of Native Hawaiians, stating, “It is a very simple matter of justice and fairness that Native Hawaiians receive the same treatment that America’s other indigenous peoples enjoy” (Lingle 2006, 1).

Despite these criticisms, the White House issued a letter from the US Department of Justice opposing § 147, concurring with the USCCR recommendation, and calling tribal recognition for Native Hawaiians “inappropriate” (USDJ 2006). The Senate cloture vote took place immediately after this, on 8 June 2006. Despite their best efforts, the bill’s supporters fell four votes short of the sixty needed to pass the measure. The Akaka Bill is effectively dead for the remainder of the 2006 US congressional session.

While the US federal government debates in Congress the issues surrounding the status of the Native Hawaiian people, Native Hawaiians continue to debate within the community about the best way to address their issues. Many of the Native Hawaiian groups that oppose the Akaka Bill and federal recognition say that the domestic-dependent nation status that would be created by the passage of the bill is not enough. They maintain that the only remedy for the violations of Hawaiian national sovereignty committed by the United States is full independence, and have sought help from the United Nations in this matter (see Lance Paul Larson v Hawaiian Kingdom in the UN Court of Arbitration at The Hague). Further, they argue that federal recognition would merely mean additional interference in the internal affairs of the Kingdom of Hawai’i.

The day before the cloture vote, Hui Pū, a consortium of Native Hawaiian groups, staged a demonstration opposing the Akaka Bill by occupying ‘Iolani Palace and hanging inverted Hawaiian flags. Both ‘Iolani Palace and the national Hawaiian flag continue to be symbols of Hawaiian nationhood. ‘Iolani Palace was built
by King David Kalākaua in 1882 and was the seat of the Hawaiian government; today, it is a museum. The national Hawaiian flag was appropriated by the State of Hawai‘i. It is important to note that the inversion of a flag is an international symbol of distress, in this case, of the Hawaiian nation itself.

Native Hawaiians have also joined other indigenous peoples in the fight against biopiracy. Biopiracy refers to the “commercial development of naturally occurring biological materials, such as plant substances or genetic cell lines, by a technologically advanced country or organization without fair compensation to the peoples or nations in whose territory the materials were originally discovered” (American Heritage Dictionary 2004).

Around the world, universities as well as biotechnology, agrochemical, and pharmaceutical companies are exploiting indigenous knowledge. Zymogenetics, Inc, a Seattle-based biotechnology company, caused an uproar in Brazil when it patented chemical compounds secreted by a native Amazon tree frog used by the indigenous tribes in shamanistic rituals. If the US patents on Basmati rice and grains obtained in 1997 by RiceTec, a transnational corporation, are enforced internationally under World Trade Organization rules, it could seriously affect the livelihoods of Indian and Pakistani farmers (Primal Seeds nd). In Hawai‘i in 2002, a University of Hawai‘i (UH) researcher was granted patents on three varieties of kalo (Colocasia esculenta).

After an epidemic of the taro leaf blight destroyed over 90 percent of the taro crop in American Sāmoa and Sāmoa in 1993–1994, the University of Hawai‘i began research to produce a variety of taro resistant to the disease, which is caused by a fungus (Phytophthora colocasiae) (Trujillo and others 2002, 1; ASCC 2000, 1). In 1995, UH researchers crossed Hawaiian “Maui Lehua” and Palauan “Ngeruuch” taro cultivars and successfully derived three disease-resistant varieties—Pauakea, Pa‘lehua [sic], and Pa‘akala—for which they were issued patents in 2002 (Trujillo and others 2002, 1; US patents 12342, 12361, 12772). As a result, since 2002, rights to cultivate the three varieties had to be purchased from the university.

In January 2006, Native Hawaiians began voicing opposition to the patents. According to Hawaiian tradition, Hāloa, the elder brother to the first human being, became the first kalo plant and holds great significance in Hawaiian theology. Farmers, Hawaiians, and others joined Moloka‘i activist Walter Ritte in demanding that the University of Hawai‘i drop the patents. Kaua‘i farmer Chris Kobayashi said that kalo farmers had been working with the university on similar projects, but the idea of ownership was never raised (TenBruggencate 2006a). On 10 January 2006, Ritte and Kobayashi sent a letter to Andrew Hashimoto, the dean of the UH College of Tropical Agriculture and Human Resources, requesting that the school abandon the patents. On 23 February 2006, they sent an identical letter to David McClain, then interim UH president.

The protests received some media coverage and support from external groups. The Center for Food Safety,
a nonprofit public interest and environmental advocacy membership organization, issued a press release supporting Native Hawaiian efforts to reclaim taro (CFS 2006). (There was some confusion at this time about the nature of the derivation; the new varieties were created using traditional cross-breeding techniques and were not genetically manipulated.) However, Ritte and Kobayashi received no official reply from the university. They increased pressure on the university by holding a rally and erecting a stone altar with a carved figure of a man holding Häloa (kalo) on the front lawn of the UH administration building on 29 April 2006. To force a dialogue, activists delayed a UH Board of Regents meeting on 18 May by chaining the doors of the UH medical school, where the regents were scheduled to meet. Ritte announced, “You cannot own our taro” (KITV 4 News Online 2006). When Ritte and others opposed to the kalo patents were finally able to speak directly to the regents, the protest ended peacefully.

The university offered to transfer the patents to Native Hawaiians, but activists refused, saying, “Nobody should own any life form” (Niesse 2006). On 21 June 2006, the university agreed to drop the patents, placing the kalo varieties back into the public domain. In response, Ritte stated, “Today is a victory. . . . The university has taken a big step by listening to the people they should be listening to. It’s a huge example for other people to follow” (Essoyan 2006).

A worldwide concern, biopiracy combines both individual and collective intellectual property rights and genetic engineering issues. The world’s indigenous cultures have been utilizing and developing biological materials for centuries. The idea that a company or individual can patent these materials or the processes that created them for profit to the exclusion of native communities is alarming. In a related issue, scientists and biopharmaceutical companies have also been experimenting with the genetic manipulation of organisms. In fact, in the United States, Hawaiʻi is second only to Nebraska in field trials of “biopharmaceuticals—crops that produce dangerous drugs like vaccines, hormones, contraceptives, and other biologically active compounds” (Kanehe 2005).

Both biopiracy and genetic manipulation of organisms are relatively new fields and as such face few regulatory measures. They prompt serious moral and ethical questions that have yet to be answered on a global scale. For example, will similar research or practices be conducted in nature reserves and other conservation areas around the world? If so, what will the consequences be for these ecosystems? In 2006, the United States established the largest sanctuary in the world in the Northwestern Hawaiian Islands; might it, too, be vulnerable to such potentially harmful practices?

On 15 June 2006, President George W Bush established the Northwestern Hawaiian Islands Marine National Monument (Bush 2006a). According to a White House press release, it is “the largest single area dedicated to conservation” in US history “and the largest protected marine area in the world.” From 50 miles east of Nihoa Island to 50 miles west of Kure Atoll,
the 1,200-mile stretch includes about 140,000 square miles of atolls, reefs, and landmasses. The newest national monument is “more than 100 times larger than Yosemite National Park, larger than 46 of the 50 states, and more than seven times larger” than all US National Marine Sanctuaries combined (Bush 2006b).

The creation of the Northwestern Hawaiian Islands Marine National Monument is the culmination of over a century of concern about the area’s invaluable, yet finite resources. It began as early as 1900 with concerns about the endangered avian population on Midway. In 1903, President Theodore Roosevelt created the Midway Islands Naval Reservation, and, in 1909, the Hawaiian Islands Bird Reservation. The former became the Midway Atoll National Wildlife Refuge in 1996, and the latter became the Hawaiian Islands National Wildlife Refuge in 1940. In 2000, President Bill Clinton created the Northwestern Hawaiian Islands Coral Reef Ecosystem Reserve. In September 2005, Hawai‘i Governor Linda Lingle established all state waters in the Northwestern Hawaiian Islands as a state marine refuge (up to three miles from shore).

The Northwestern Hawaiian Islands Marine National Monument will “preserve access for Native Hawaiian cultural activities; provide for carefully regulated educational and scientific activities; enhance visitation in a special area around Midway Island; prohibit unauthorized access to the monument; phase out commercial fishing over a five-year period; and ban other types of resource extraction and dumping of wastes” (Bush 2006b).

This immense new monument is at the center of heated debate regarding marine resource management and administration. One of the major issues under examination is commercial fishing. Some environmental and Native Hawaiian groups are in favor of a complete ban on fishing in the area. Others who depend on the reef for fish feel their livelihoods are being threatened and instead advocate for “continued sustainable fishing” (Wes-Pac 2006). The Ocean Conservancy, based in Washington DC, and KAHEA, an alliance of Kanaka Maoli (Native Hawaiian) cultural practitioners, environmental activists, and others, favor a total ban on commercial fishing. The Ocean Conservancy predicts that unless bottom-fishing is prohibited in the area, “fish stocks would reach the danger threshold by next year and would fall into the ‘overfished’ category by 2010” (Waite 2005). KAHEA seeks to protect hundreds of unique species in this delicate ecosystem as well as preserve Hawaiian ancestral ties to the islands and surrounding reefs.

In the past, management of the area was shared by the Western Pacific Regional Fishery Management Council (WesPac) and the National Oceanic and Atmospheric Administration’s (NOAA) Pacific Islands Fisheries Science Center. Citing the collapse of the lobster fishery in the 1990s due to overfishing, the Ocean Conservancy and other environmentally concerned organizations have accused both WesPac and NOAA of mismanaging the area. In addition, the Ocean Conservancy has charged WesPac, which is the main advocate for commercial fishing in the area, with having conflicting interests, as...
many of the council leaders are themselves fishermen.

Locally, the fishing community is divided on the issue. Native Hawaiian Maui fisherman Bobby Gomes, one of eight allowed to fish the Northwestern Hawaiian Islands, said that the ban will affect his livelihood: “This is my job. I’ve dedicated my whole life to fishing. . . . How am I going to support my family?” He added, “I’m born and raised here. I’m Hawaiian. I feel they’ve taken away our land and now they are taking away our oceans” (Blakeman 2006). However, another Hawaiian fisherman, Isaac Harp, said the government should ban all fishing and instead raise the money to buy out bottom-fishing boat owners and offer them alternative employment, such as collecting marine debris or escorting researchers into the area (TenBruggencate 2006b). Native practitioners, like those in Kāhea, say that the Northwestern Hawaiian Islands are “celebrated in stories of creation as the place where Hawai‘i began” and that “these ancient islands are often described as the kupuna, or ancestors” (Kāhea Web site [2006]).

The Arakaki v Lingle case has concluded, but we may yet see other, comparable cases in the future. The fate of the Kamehameha Schools’ admissions policy is still uncertain, but whatever the outcome, the fight will continue. The Akaka Bill, or something similar, may reappear on the congressional schedule prompting more discussion of Hawai‘i’s history and the status of Native Hawaiians within (or without) the United States. Meanwhile, a more robust Human Rights Council has managed to fortify indigenous rights in the international arena. And biopiracy is now an unfortunate fact of life. Hawai‘i and the world must continue to be vigilant on all these issues.

TRACIE KU‘UIPO
CUMMINGS LOSCH

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Māori Issues

The Foreshore and Seabed Act 2004, passed into law against almost unanimous opposition and protest from Māori, has continued to have ongoing repercussions both nationally and internationally. Māori are the group most directly affected by the act’s provisions, yet our submissions and protests were ignored, with our spokespeople and leaders vilified as they sought international support against