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## **Political decolonization and self-determination : the case of the Netherlands Antilles and Aruba**

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Since the independence of Surinam in 1975, the discussions on the right to self-determination within the Kingdom have focused on the right of the individual island territories of the Netherlands Antilles to choose their political status, within the Kingdom or as independent states.

The unity of the Netherlands Antilles has always been under pressure from the force of island separatism. The various origins of the lack of cohesion between the islands have been explained from a historical, sociological and political perspectives by many authors.<sup>1</sup> The Netherlands Antilles is a Country made up of very diverse islands that have few economic ties and are located far apart. The Antilleans are not considered to form a nation. Hardly any attempts at nation building have been made in the past, and politicians and political parties have traditionally represented only their own islands. The centrifugal forces within the Netherlands Antilles became too strong to handle after the Netherlands decided in 1972 that Surinam and the Netherlands Antilles should become independent in the near future. Aruba forced its way out of the Netherlands Antilles, which left the Antilles economically and politically more unstable than before, with an increasing number of islands wishing to leave the sinking ship.

The Netherlands, the Netherlands Antilles and all the islands have explicitly recognized that the population of each island has a right to self-determination. But it remains a point of contention between The Hague and the islands what this right to self-determination entails exactly. Is it an absolute right that can be claimed by an island, and which needs to be respected unconditionally by the Netherlands and the other islands? Or are the choices of the islands subject to a right of veto by their partners in the Kingdom? May the Netherlands set conditions to the exercise of the right to self-determination of an island? And should the international non-disruption principle be taken into account when breaking up the Netherlands Antilles?

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1 See Oostindie & Klinkers 2001c and 2003 for Dutch policies during this period, Reinders 1993 for Antillean political developments, and Sluis 2004 for a review of the inter-island antagonism. See also Van Benthem van den Bergh et al. 1978 and Dalhuisen et al. 1997, p. 146 et seq.

## 8.1 THE RECOGNITION OF THE RIGHT TO SELF-DETERMINATION OF THE ISLANDS

The *Staten* of the Netherlands Antilles recognized the right to self-determination of the individual islands in 1973, but this decision did not lead to substantial status changes, since the opinion of the Netherlands – the ‘silent and impotently ubiquitous common ruler’<sup>2</sup> – was considered crucial to any form of realization of the right to self-determination since the Netherlands could block the amendments to the Kingdom Charter that would have been necessary. In 1980, a Working Group – instituted by the Kingdom government to investigate the possible relations between the Netherlands Antilles and the Netherlands, and between the islands themselves – recommended that the right to self-determination of the individual islands should be recognized by the Netherlands, the Netherlands Antilles and all of the islands.<sup>3</sup>

The Report of the Working Group defines the right to self-determination as the right of the population of each island to determine its own political future. It considers this right to be derived from the principle of popular sovereignty, and connected to the free expression of the political will of a state’s citizens. The Report refers to ‘the many international regulations on that subject, of which the UN Charter can be considered as the most important’.<sup>4</sup>

The Report also listed the desired future status of the islands according to the members which represented the islands. The Aruban members opted for independence in ‘a kind of commonwealth’ with the Netherlands. The members from the other islands opted for continued constitutional relations with the Netherlands, either within or without the Netherlands Antilles. The Dutch members did not express an opinion, but did state that the Netherlands ‘has the right to participate in a decision on its relations with those islands that prefer to maintain constitutional ties with the Netherlands’.<sup>5</sup>

At the Round Table Conference of 1981 the Netherlands, the Netherlands Antilles and all six islands adopted the recommendations of the Working Group as ‘preliminary points of consensus’.<sup>6</sup> It turned out to be impossible to reach a wider agreement on the issue of self-determination.<sup>7</sup> The two Coun-

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2 Laing 1974, p. 142 uses this phrase to describe the influence of the UK in the fragmentation of the British Caribbean.

3 The report of the Working Group was published as: *Naar nieuwe vormen van samenwerking. Rapport van de Koninkrijkswerkgroep*, Staatsuitgeverij: ‘s Gravenhage 1980. The Working Group was instituted by Royal Decree of 2 December 1978, Nr. 75 (*Stcrt.* 1978, nr. 248 and *PB* 1979, nr. 21).

4 Report of the Kingdom Workgroup 1980, p. 45.

5 Report of the Kingdom Workgroup 1980, p. 16 and 45-7.

6 ‘*Voorlopige punten van overeenstemming*’ (preliminary points of consensus), *Kamerstukken II* 1980/81, 16 400 hoofdstuk IV, nr. 25.

7 Oostindie & Klinkers 2001c, p. 105.

tries and the six islands recognized that each island had the right to choose its own political status, based on the right to self-determination.<sup>8</sup>

The recognition of the right to self-determination of the island territories was probably the most important political event for the Netherlands Antilles since 1954. From the start it was perceived as a sword of Damocles hanging over the Country of the Netherlands Antilles. Others have compared the recognition to a Trojan horse, or a ticking time bomb.<sup>9</sup>

At the Round Table Conference of 1983 the Countries and the islands decided that Aruba would be allowed to secede from the Netherlands Antilles and become a separate Country within the Kingdom in 1986, in preparation of independence in 1996. Although the decision that Aruba would become independent was taken by mutual agreement, the general perception was that the Netherlands government had forced Aruba to accept it in exchange for being allowed to leave the Netherlands Antilles. The attitude of the Dutch government in these negotiations has been widely criticized.<sup>10</sup> *Nelissen & Tillema* recount with amazement how the Netherlands government in 1985 defended its refusal to discuss a postponement of the independence of Aruba with reference to paragraph 3 of GA Resolution 1514, which states that 'inadequacy of political, economic, social or educational preparedness should never serve as a pretext for delaying independence'. It was indeed rather opportunist that the Dutch government defended its own policy on the basis of the anti-colonial insistence on independence at all costs, which it had always resisted at the UN.

There existed little doubt that the Arubans did not want independence, at least not in the near future. The date of independence was agreed upon because Aruba wanted to leave the Antilles, and the Netherlands wanted all of the islands to leave the Kingdom as soon as possible. The Netherlands government could therefore be accused of using the internal problems of the Antilles to realize its dream of completing the decolonization of the islands

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8 Point 1.1 of the '*voorlopige punten van overeenstemming*'.

9 Janus 1990, p. 77, and Van Rijn 1999, p. 41. The Dutch government's 1990 proposal on the restructuring of the Kingdom claims that many Antilleans consider the right to self-determination of the islands as a 'time-bomb' (*Kamerstukken II 1989/90*, 21 300 IV, nr. 9, '*Schets voor een gemenebestconstitutie*', p. 6). Janus considered, in another article of 1990, that the time bomb had been defused by Hirsch Ballin's recognition that the islands did not have to become independent (cited in Reinders 1993, p. 281). *Hoeneveld* describes the recognition of the right to self-determination of the islands as opening a door to the 'balkanization' of the Netherlands Antilles (Hoeneveld 2005, p. 65).

10 See for instance Hirsch Ballin 1989, p. 464-5, Croes & Moenir Alam 1990, p. 82. See also Oostindie & Klinkers 2001c, p. 138 who describe the position of the Netherlands on this issue as 'take it or leave it', and p. 141-6 for an inventory of the opinion of a number of politicians on the condition of independence for Aruba. In the Senate of the Dutch parliament, a comparison was made by Senator Van der Jagt between the Dutch attitude towards self-determination and car manufacturer Ford's aphorism that his customers could choose any colour as long as it was black (*Handelingen I 1984/85*, p. 1314).

– against the will of the populations. In defence of this Dutch policy it could be said that Aruba had forced the issue to the brink of becoming an international problem,<sup>11</sup> but this does not change the conclusion that the solution chosen was not really acceptable from the perspective of the right to self-determination.

No referenda were held in the Netherlands Antilles during the 1980s, despite the fact that some Curaçaoan politicians had stated at the RTC of 1981 that the secession of Aruba should be approved by the population of the entire Country in a referendum.<sup>12</sup> The Island Council of Curaçao decided that a referendum should be held on the political future of Curaçao in 1985,<sup>13</sup> but such a referendum would not be held until 1993. The *status aparte* of Aruba was realized through an amendment to the Kingdom Charter, which also introduced a new Article providing that the Kingdom order would be terminated with regard to Aruba on 1 January 1996. The Aruban delegates from the *Staten* of the Netherlands Antilles that took part in the debates in the *Staten-Generaal* submitted two amendments to the proposals,<sup>14</sup> one of which would have provided for a referendum in which the people of Aruba would have the opportunity to give its opinion on the independence of the island. These proposals were rejected by the Dutch *Staten-Generaal*.<sup>15</sup>

Even though the Netherlands thus insisted that Aruba's *status aparte* could only be temporary, it yielded a few years later to Aruba's wish to remain part of the Kingdom. It was considered unrealistic to force Aruba to rejoin the Antilles, and the island was allowed to remain a separate Country within the Kingdom indefinitely, albeit with the promise that it would take more care to realize the principles of good government and the rule of law.<sup>16</sup>

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11 Verton 1978, p. 776-7.

12 See Report of the RTC 1981, for instance Elstak (p. 21), Martina (p. 22), and Lourens (p. 30).

13 Oostindie & Klinkers 2001c, p. 157.

14 The delegates have this right under Article 17, para. 4, even though they are not allowed to vote on such amendments. See Nap 2003a, p. 79-80 and Borman 2005, p. 124-5.

15 *Kamerstukken I/II* 1984/85, 18 826 (R1275), nr. 13, 14 and 15. See also Croes 1992, p. 18-19.

16 On 21 October 1993, the Dutch and Aruban governments signed a Protocol in which a considerable number of measures were agreed upon to improve the government of Aruba, including amendments to the Kingdom Charter ('Protocol ter invulling van het Resumé van de bilaterale gesprekken Aruba-Nederland', *Kamerstukken II* 1993/94, 23 224, nr. 5). This Protocol was partially implemented, but after the date of independence of Aruba was struck from the Kingdom Charter in 1995, the Protocol seems to have been forgotten, in spite of the opinion of the governments of the Netherlands and Aruba – and of the Lower House – that the Protocol was legally binding (*Kamerstukken II* 1994/95, 22 593 (R1433), nr. 22).

### 8.1.1 Legal Character of the Recognition of the Right to Self-Determination

The legal scholarship has never expressed any doubts about the legally binding character of the recognition of 1981 and 1983.<sup>17</sup> It could be wondered whether it should be seen as an agreement, or as a collection of declarations, or as a *pactum de contrahendo*, as Janus has suggested.<sup>18</sup> But a more important question is what was recognized exactly in 1981, when the RTC agreed that the island populations had the right to self-determination. In the absence of evidence to the contrary, the assumption should probably be that the parties present at the RTCs had in mind the right to self-determination as guaranteed by international law, which the Netherlands Antilles probably possessed as a whole before 1981. The Report of the Kingdom Working Group had referred to the UN Charter and international law, and the RTC approved the Report and copied large parts of it into its points of consensus. According to *Nelissen & Tillema* the Netherlands 'has made clear that it understands this right [to self-determination] as it has been elaborated upon in the context of the U.N. and the 1966 Human Rights Covenants. Therefore, *de iure* all the options, modalities, rights and duties as they exist in the strict colonial context, apply'.<sup>19</sup>

It is not certain whether this is true, but as I argued in Chapter 6, it should probably be assumed that the Caribbean populations retain the right to self-determination, in the sense of a right to decolonization, until they have been allowed to make a free and informed choice on their political status. This freedom should not be limited to a choice for independence. It is generally assumed by writers on international law that the right to self-determination of colonial peoples can change in content, but only after it has been exercised to achieve a full measure of self-government in the form of independence, free association or integration. As the political status of the islands of the Netherlands Antilles (except Aruba) did not change after 1981, the assumption should be that the right to self-determination has not changed in content, but only in its subject.

The Netherlands was not legally obligated in any way to cooperate with transferring the right to self-determination of the Netherlands Antilles to the separate islands, as it did in 1981, but when the Netherlands decided to cooperate with this transfer, it should have realized that this procedure could not be used to limit the choices of the populations to independence. A choice

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17 See for instance Kapteyn 1982, p. 29, Gorsira 1988, p. 60 et seq., Bongenaar 1991, Van Rijn 1999, p. 56, and Hoeneveld 2005, p. 64.

18 Janus 1993, p. 49 and 60-61. A *pactum de contrahendo* is an agreement which stipulates the basic principles for a definitive agreement to be reached at a later date. At the RTC of 1981, Dutch minister Van der Stee compared the conclusions of the RTC to an international agreement that needed to be ratified by the Netherlands parliament and by the Island Councils of the six islands (Report of the RTC 1981, p. 31).

19 Nelissen & Tillema 1989, p. 190.

for independence could only be made by the people(s) of the Netherlands Antilles, and until that choice had been made, all options for decolonization and self-determination should have remained open, either to the 'people' of the Netherlands Antilles, or to the 'peoples' of the separate islands.

In the legal literature, the freedom of choice of the island populations has been given precedence over the independence policy of the Netherlands government, and the reservation of the Netherlands has been interpreted minimalistically. *Janus* writes that the Netherlands should cooperate with realising such status options as integration with the Netherlands, association or any other option freely chosen by the population, because the essence of the right to self-determination is the need to pay regard to the freely expressed will of the people.<sup>20</sup> Up to this point, there is no disagreement in the legal literature. There also appears to be a consensus that the recognition of 1981/83 was not invalidated by the fact that it was not supported by referenda or other forms of consultation of popular opinion, although this could well have been argued.<sup>21</sup> But the scholarship is not in full agreement on the delineation of this duty of the Netherlands and the islands to cooperate with realizing a desire for status change.

*Borman* thinks that integration or association with the Netherlands should not be an exclusive decision of an island population. Such a status change would require an agreement with the Netherlands, according to *Borman*.<sup>22</sup> *Van Rijn* thinks the Netherlands could not refuse a Caribbean choice for closer or different ties with the Netherlands, although similar to *Janus*,<sup>23</sup> *Van Rijn* thinks that the modalities of such ties should be the subject of negotiations.<sup>24</sup> According to *Hoeneveld*, the Netherlands will have to accept a choice for another status by an island population, if – and to the extent that – such a status conforms to the criteria laid down in Resolution 1541, but unreasonable demands could be ignored.<sup>25</sup> *Nelissen & Tillema* note that self-determination is not an absolute right, and needs to be exercised in a reasonable manner, taking into account the legitimate interests of others. But 'the Dutch will not be entitled to require difficult conditions, like the ones formulated at the 1981-Round Table, to be met first, as this would in fact imply a denial of the Antillean right'.<sup>26</sup> *Gorsira* also emphasizes the freedom of choice of the Caribbean

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20 *Janus* 1993, p. 49.

21 I have deduced this consensus from the fact that none of the writers cited here consider that referenda should have been held.

22 *Borman* 2005, p. 29-30. The argument that 'what has been granted to Aruba, cannot be denied to the other islands' (see *Handelingen II* 1991/92, p. 849 et seq.) has some validity, but each case should be judged on the merits, according to *Borman*.

23 *Janus* 1993, p. 61-1.

24 *Van Rijn* 1999, p. 58.

25 *Hoeneveld* 2005, p. 37-8. It would be unreasonable, according to *Hoeneveld*, to demand from the Netherlands that it would drastically change its constitutional system.

26 *Nelissen & Tillema* 1989, p. 191, cited with approval by *Janus* 1993, p. 61.

populations, but thinks that the Netherlands could nonetheless set conditions before it would be prepared to cooperate with a status change of the islands within the Kingdom, unless such conditions would amount to a repudiation of the islands.<sup>27</sup>

Despite the different approaches that these writers take to this issue, they seem to agree that the freedom of choice of the island populations should be respected, and that a new constitutional status within the Kingdom can only be realized through negotiations, in which the Netherlands are not obligated to accept unreasonable overseas demands. There is of course a fundamental difference between setting conditions to the right to remain a part of the Kingdom, as the Netherlands government appeared to do at the 1981 RTC, and setting conditions to the achievement of a new status within the Kingdom. There is probably little room for conditions of the first type, since the islands may not be pushed into independence against their will (*see* Chapter 4), but conditions of the second type are not be unreasonable *per se*.

The Netherlands and the islands have a long-standing difference of opinion on this subject. I will first describe the opinion of the Netherlands, and then describe the view of the islands as regards the unconditional nature of their right to self-determination.

### 8.1.2 Dutch Attitude towards the Self-Determination of the Islands

The Dutch government has made it a steady policy to acknowledge the right of each island to become independent unconditionally, but to reserve a right of veto, or at least of co-decision, on any other status options. This policy sometimes boiled down to a simple claim that the right to self-determination only means a right to independence. It has often been noted that this attitude towards self-determination is not consistent with the Dutch position at the UN.<sup>28</sup> It has been defended that the principle of *estoppel* precludes the Netherlands from using a different interpretation at home than the one it has consistently defended at the UN.<sup>29</sup> One could wonder whether the criteria for an *estoppel* have really been fulfilled here.<sup>30</sup> But it cannot be denied that the statements of the Netherlands at the UN can or should be used to interpret the intentions of the Netherlands when it recognized the right to self-deter-

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27 Gorsira 1988, p. 59-60.

28 *See* for instance Kapteyn 1982, p. 180, Tillema 1989, Croes & Croes 1989, Nelissen & Tillema 1989, p. 182-4, and Sap 2005. It seems far-fetched to ascribe this difference to the legal fact that at the UN, the Netherlands represents the Kingdom as a whole, whereas in the debates on the future of the Caribbean Countries, it usually speaks as the Country. Politicians and diplomats rarely take account of the fact that there exists a difference between the Kingdom of the Netherlands and the Country of the Netherlands.

29 Nelissen & Tillema 1989, p. 184.

30 *See* Brownlie 2003, p. 615 for these criteria.

mination of the island populations of the Netherlands Antilles, assuming that the international law of decolonization and self-determination still applied to the Netherlands Antilles in 1981 and 1983.<sup>31</sup>

If it is furthermore supposed that the right to self-determination of the Netherlands Antilles has devolved upon the populations of the separate islands, then the limitation put on the freedom of choice by the Netherlands cannot mean that the islands can only choose independence. GA Resolutions 1541 and 2625 clearly provide that a people can also choose for free association, integration or any other political status, and these resolutions must be considered to have the force of law (*see* Chapter 2), also for the Netherlands since it has actively cooperated with the formulation of these Resolutions, and it has cited them (abroad and at home<sup>32</sup>) as containing the standards for self-determination and decolonization.

In this context, it is important to note that it has actually been more common for Dutch politicians to acknowledge that other options than independence also exist for the islands. During the debate on the ICCPR and ICESCR in the Lower House in 1978, it became clear that most MPs, as well as the Kingdom government, considered that the two Covenants granted a right to self-determination to the Netherlands Antilles, which – it was stressed – should not be equated to a right to independence. It also included the right to choose

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31 The situation is somewhat comparable to promises that Administering states have made at the UN that they would not oppose the exercise of the right to self-determination by one of their (former) NSGTs, which are probably binding on them under international law. *See* Clark 1980, p. 45, note 264 who applies the doctrine derived from the Nuclear Test Cases to the statements of the US with regard to Puerto Rico.

32 At the UN, the Netherlands quite consistently defended the freedom of choice of overseas territories. When the GA wanted to set a date for the independence of the British territory of the Seychelles in 1971, the Netherlands stated that: 'inhabitants of dependent territories are entitled to several options in their exercise of the right to self-determination. We cannot force independence on them against their wishes. It is up to the people of those territories and only to them to determine their own destiny' (statement by the Netherlands on 13 December 1971 in the Fourth Committee of the GA, cited in Nelissen & Tillema 1989, p. 184, and Croes & Croes 1989, p. 32). This statement, and other similar to it, have repeatedly been cited in the discussions between the islands and the Netherlands. Elstak, one of the representatives of Curaçao at the RTC of 1981, reminded the Conference of a statement made by the Netherlands in the plenary debate of the UN General Assembly in 1977, in which the Netherlands explained that 'if a territory, in a fully free and democratic decision, chooses to exercise its right to self-determination by opting for another solution than independence, that decision should be respected' (*see* Report of the RTC 1981, p. 21). This interpretation can also be found in the records of the *Staten-Generaal*. *See* for instance the government's explanation attached to the budget for Foreign Affairs of 1973 (*Kamerstukken II* 1972, 12 000 V, Nr. 2, p. 23) where it is stated that as a consequence of the right to self-determination, the international community must accept that some NSGTs will not become independent if the population concerned freely expresses itself in favour of maintaining ties with the mother country. *See also* the debate on the ICCPR and ICESCR *below*.

for free association or integration. Reference was made several times to GA Resolution 2625 (XXV).<sup>33</sup>

The Dutch government has recognized that 'self-determination can also be exercised in a meaningful manner in a constitutional relationship with the Netherlands'.<sup>34</sup> But such a form of self-determination can only be realized, according to the Dutch government, through the established procedures of the Kingdom Charter, which means that any substantial status changes will require the approval of the parliaments of Aruba, the Netherlands Antilles and the Netherlands, and of the Kingdom government.<sup>35</sup> It has often been repeated that the Netherlands, when it recognized the right to self-determination of the islands, reserved a 'right of co-decision' regarding any choice for continued ties with the Netherlands. This reservation could be interpreted to mean that the Netherlands could set conditions to the realization of the right to self-determination, and it has even been interpreted to mean that the Netherlands might veto a choice by an island population.

The most logical way of achieving conformity between the position of the Netherlands and international law, is by interpreting the phrase 'a right of co-decision' to refer to a right to participate in the decision making process. International law does not appear to prohibit the Netherlands (and the islands) from demanding that the concretization of the status option chosen by the population should be reasonable and should take account of its interests and of the Kingdom as a whole.

The Netherlands would thus have stated that the island territories have a right to choose another political status, but if that status involves continued constitutional relations with the Netherlands, the precise meaning of which would have to be negotiated between the island territory, the Netherlands and the other parts of the Kingdom.<sup>36</sup> This interpretation is not fundamentally at odds with the recent practice of the Netherlands government of leaving a decision regarding the future political status of the islands to the islands themselves, but at the same time insisting that any status other than independence can only come about through negotiations with the Netherlands. This interpretation leaves room for each island population to freely choose

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33 See for instance the statement by minister Van der Stee, *Handelingen II* 1978/79, p. 158.

34 *Kamerstukken II* 1992/93, 22 593 (R 1433), nr. 3, p. 1.

35 See for instance the Memorandum on the right to self-determination of the islands attached to the letter of 27 October 2000 by state secretary for Kingdom Affairs (De Vries) to the Lower House (reference CW00/82 274, reproduced in Hoeneveld 2005). The Memorandum was not included in the official records of the *Staten-Generaal*, and it was not discussed in parliament, but a delegation of the Lower House echoed its conclusions when it explained to the island government of St. Maarten that the right to self-determination only meant a right to independence.

36 Members of the political parties CDA and VVD stated in the Lower House in 1992 that the islands had the right to choose to stay a part of the Kingdom, but that the way in which such a choice should be realized was a matter for negotiations (*Kamerstukken II* 1991/92, 22 593 (R 1433), nr. 5, p. 4 and 9).

another political status, while the details of such a status can only be determined through negotiations with the other parts of the Kingdom.

In practice, the Dutch government has shown considerable deference to the wishes of the population of the islands.<sup>37</sup> In 1994, it abandoned its plans for a break-up of the Antilles after referenda on the islands showed the population to be clearly opposed to such a break-up. On the other hand, the Netherlands explicitly refused to realize the choice of the population of St. Maarten in the 2000 referendum. This created some scepticism among the Antillean population about the usefulness of holding further referenda.<sup>38</sup> The Referendum Committee on Curaçao tried to remove these doubts by insisting that the Netherlands, as well as the authorities of Curaçao and the Netherlands Antilles, would be legally obligated to realize the choice of the Curaçaoans as an expression of the right to self-determination.<sup>39</sup>

Perhaps the claim of the Referendum Committee was stated too boldly, but as I explained in Chapter 2, the freedom of choice which the right to self-determination aims to guarantee, means that the authorities should try to realize the wishes of the population as best they can. When a choice is made for one of the options of Resolution 1541, there should be exceptional and pressing reasons *not* to cooperate fully with realizing the freely expressed wishes of an overseas population. The view that the outcome of the referendum

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37 The unanimously dismissive Dutch reactions to the outcome of the 2000 referendum on St. Maarten were an exception. In this referendum, 69% votes went to the option of *status aparte* for St. Maarten. The Dutch state secretary for Kingdom Relations announced (before and after the referendum) that this option was simply out of the question. This opinion was supported by the Lower House (*Handelingen II* 2000/01, p. 11-752 to 11-783) and continued by the minister for Administrative Reform and Kingdom affairs that took office in 2003 (De Graaf, see *NRC Handelsblad*, 13 August 2003, 'Status aparte vinden wij geen optie'. The Dutch newspaper *NRC Handelsblad* reported on the referendum under the headline: 'No status aparte for St. Maarten', thereby giving precedence to the opinion of the Dutch government over the outcome of the referendum.

38 See the report by the UN observer on Bonaire.

39 See for example a press release issued on 16 February 2005 by the commission that organized the referendum on Curaçao, in which it explained that all of the authorities within the Kingdom were obligated to realize the outcome of the referendum, since it was held on the basis of the right to self-determination of the people of Curaçao. See the website of the referendum committee: [http://www.referendum2005.an/updates\\_02.html](http://www.referendum2005.an/updates_02.html). The main advisory body of the government of the Netherlands Antilles, the *Raad van Advies*, in its report on the year 2004 also stated that the referenda on the islands were binding because they were an expression of the right to self-determination (*Jaarverslag 2004*, p. 36). In reaction to this discussion, Dutch senator Schouw (D66) noted to his dismay that on Curaçao 'there is talk of a right to self-determination', and stated that the outcome of a referendum on one single islands could not have consequences for the constitution of the Kingdom. In his view, the Netherlands government should reject the outcome of the referendum, and look into only two options: independence or full integration into the Netherlands (*Handelingen I* 2004/05, p. 24-1029). See also the *Amigoe* of 10 and 15 February 2005, and the editorial of 11 April 2005 in *de Volkskrant*.

on Curaçao was binding, is therefore defensible from the perspective of international law.

In 2005, after new referenda had revealed that the population (on four out of five islands) was now in favour of abolishing the Antilles as a single Country, the Dutch government re-opened the negotiations with the islands. The minister for Government Reform and Kingdom Relations (Pechtold) stated in 2005 that he did not consider the outcome of the referenda binding on the Netherlands (as was claimed in the Netherlands Antilles), but that the government of the Netherlands respected them.<sup>40</sup> In a debate in the Lower House minister Pechtold stated in response to one of the MP's concerns that Country status for St. Maarten might be unwise (given its small size and the perception that the island was not ready for self-government):

I share his concern, but we must be careful. At the end of the day, it was the referendum on St. Maarten in 2000 which advocated this direction. Whether it is possible will have to be explored.<sup>41</sup>

Pechtold announced that the Dutch government would cooperate with a constitutional reform of the Netherlands Antilles, if the islands would cooperate with a joint solution to the financial and economic problems of the Netherlands Antilles, and cooperate with improving the level of law enforcement and governance of the islands.<sup>42</sup> This proposal was accepted by the islands and formalized in an agreement of 22 October 2005, and confirmed at a Round Table Conference on 26 November 2005.<sup>43</sup> The agreement states that the Netherlands respects the outcome of the referenda, but it does not refer to the right to self-determination, because the Netherlands and the islands could not come to an agreement about the meaning of this right.

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40 *Handelingen I* 2004/05, p. 1035 (26 April 2005).

41 In Dutch: 'Ik deel zijn zorg, maar wij moeten wel oppassen. Uiteindelijk is het het referendum op Sint Maarten in 2000 geweest dat die richting voorstaat. Of het mogelijk is, moet worden verkend.' See *Handelingen II* 2005/06, p. 624 (12 October 2005).

42 Letter by the minister for Government Reform and Kingdom Affairs (Pechtold) to the Lower House, dated 26 May 2005 (*Kamerstukken II* 2004/05, 29 800 IV, nr. 25).

43 'Hoofdpijnenakkoord tussen de Nederlandse Antillen, Nederland, Curaçao, St. Maarten, Bonaire, St. Eustatius en Saba', signed on Bonaire on 22 October 2005. This agreement was not published in the records of the *Staten-Generaal*, but summarized in a letter of 7 November 2005 by the minister for Government Reform and Kingdom Affairs to the Lower House (*Kamerstukken II* 2005/06, 30 300 IV, nr. 18). It was made available on several websites, for instance on the website of the islands government of Curaçao (<http://curacao-gov.an>). See also the 'Slotverklaring van de start-Ronde Tafel Conferentie van het Koninkrijk der Nederlanden, gehouden op 26 november 2005 in Willemstad, te Curaçao'. The Netherlands and the islands agreed to start a process that could lead to the realization of a new constitutional relation with the islands, but it will demand that the governments of the islands meet with certain standards of good government – to be defined jointly by the Netherlands and the islands – before the Netherlands Antilles can be broken up.

### 8.1.3 The Interpretations of the Islands

Surinam and the Netherlands Antilles in 1952 defined the right to self-determination as follows:

The right to self-determination gives the people the freedom to determine its relation to other countries, whereby it has the right to choose between independence, association with the mother country or with another state, and incorporation.<sup>44</sup>

The Netherlands Antilles and all of the islands have since the 1970s quite consistently recognized that each island has the right to choose its own political status, even if that means leaving the Netherlands Antilles. While the opinion of the governments of the islands and the Netherlands Antilles has varied considerably on the most desirable future status of the Country and the islands, it has never been denied, at least not since the *Staten* motion of 1973, that each island determines its own political status in freedom.

During the 1980s, representatives of the islands mainly used the right to self-determination to argue that the Netherlands was not allowed to push the islands out of the Kingdom. Aruba, even while accepting independence as a condition for its *status aparte*, continued to consider it a violation of international law to force the island to become independent against its will.<sup>45</sup>

After the Netherlands in 1990 abandoned its attempts to convince the islands to become independent, the islands started using the right to self-determination as a basis for claiming another position within the Kingdom. It was usually acknowledged that such a constitutional reform could not be achieved in complete freedom, but should take account of the interests of the parts of the Kingdom, and required an agreement with the Netherlands and the other islands. The government of St. Maarten, for instance, claimed that the creation of an 'association' between St. Maarten and the Netherlands 'is not necessarily a matter without encumbrance, but a form of co-operation by consent and on an equal basis'. The island government furthermore stated

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44 Statement by the Governing Council of the Netherlands Antilles and the Surinam mission, cited in Van Helsdingen 1957, p. 197 (my translation, SH). According to *Van Helsdingen*, this definition was derived from a statement by the US representative at the Sixth GA of the UN.

45 The opinion of Aruba, or at least of the *AVP* (one of the major political parties of the island), on the right to self-determination is explained in detail in Croes & Croes 1989. Aruba's prime minister Eman interpreted the right to self-determination in a debate in the Lower House in 1993 as 'an exclusive right that belongs to an entity that is not yet independent to determine independently and in complete freedom its future political status, the exercise of which does not have to lead to independence at all. The population may decide on this issue in freedom, because this right cannot be made subject to conditions by the mother country' (*Handelingen II* 1993/94, p. 4338/39).

that the powers and authority of the Kingdom government would have to be determined by an agreement.<sup>46</sup>

A more radical view was expressed when the negotiations on the new status of the five islands were re-opened in 2005, and the Netherlands government announced that it would only cooperate with creating new entities within the Kingdom if certain conditions were met.<sup>47</sup> An Antillean committee that was installed to prepare a Round Table Conference in 2005, claimed, with reference to GA Resolutions 1514 and 2625, that the nature of the right to self-determination meant that a choice for an 'association' could not be made dependent on the fulfilment of conditions set unilaterally by the metropolitan state if those conditions would lead to the forced transfer of powers to that state. Otherwise, the right to self-determination would become 'completely hollow and illusory'. Any transfer of powers to the state should occur in complete freedom, whereby the associated territory could request guarantees or limitations to protect its identity.<sup>48</sup>

The prime minister of the Netherlands Antilles shortly thereafter published a legal advice on the right to self-determination which also claimed that the Netherlands could not set direct – or indirect – conditions for the exercise of the islands' right to self-determination.<sup>49</sup>

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46 The opinion of St. Maarten was published through two booklets: 'Saint Martin Referendum June 23<sup>rd</sup>, 2000. Executing the Right of Self-Determination' (brochure prepared by the Work-Group for Constitutional Affairs, Sub-Group Constitutional Relations, February 2001), and 'Saint Martin as a Country within the Kingdom of the Netherlands' (prepared by the Work Group on Constitutional Affairs for the Island Council of the Island Territory of Saint Martin in 2002).

47 Letter by the minister Government Reform and Kingdom Relations (De Graaf) to the Lower House, dated 17 December 2004 (*Kamerstukken II*, 2004/04, 29 800 IV, nr. 18).

48 Report of the Antillean committee of preparation for the Round Table Conference of 2005 ('*Toekomst in zicht*'), dated 12 August 2005, p. 8. The report was adopted by the government and the *Staten* of the Netherlands Antilles. Members of the *Staten* had defended a similar interpretation in 1992 during a meeting with members of the Dutch *Staten-Generaal* (*Kamerstukken II* 1991/92, 22 593 (R 1433), nr. 5, p. 9).

49 Legal advice of the directorate for Legislation and Legal Affairs of the Netherlands Antilles to the prime minister on the right to self-determination (undated). The advice was made public through various channels in September 2005. The prime minister communicated its conclusions in talks with Dutch ministers, see *Amigoe* of 1 September 2005. This interpretation may have been inspired by fears that the Netherlands would use the break-up of the Antilles (and its desperate financial situation) to increase its control over the governments of the individual islands. The new status of Curaçao and St. Maarten would – it was feared – be less autonomous than the *status aparte* of Aruba. The Netherlands indicated that it would want a bigger say in the areas of law enforcement and the public spending of the new Countries. The prime minister of the Antilles stated that he would welcome the support of the Netherlands in these areas, but the current problems of the islands should not form a pretext for denying them their desired status (*Amigoe* of 1 September 2005). This interpretation of the right to self-determination (with regard to Curaçao) is also defended in Sap 2005.

There are a number of flaws in the legal reasoning used to support the conclusion that the Netherlands should cooperate unconditionally with realizing the outcome of the referenda. First, it is not certain whether the current relation of the Netherlands Antilles with the Netherlands should be viewed as a form of free association in the sense of Resolution 1541 (see Chapter 6) and it is even less certain whether the populations of Curaçao and St. Maarten chose for free association when they voted for the status of 'Country within the Kingdom' in the referenda of 2000 and 2005.<sup>50</sup>

Second, even if Country status is seen as a form of free association, international law does not prohibit the principal state from setting conditions before entering into a free association. Resolution 1541 limits the freedom of the principal state in (post-) colonial relations, but it does not obligate the principal state to accept unconditionally any form of free association that might be proposed by the overseas territory.

Third, the right to self-determination should be exercised in good faith. It would certainly not become completely hollow and illusory if it were exercised while taking account of the rights and interests of the population of the metropolitan state, the other islands of the Netherlands Antilles, and Aruba.

Fourth, Resolution 1514 proclaims that an overseas territory should be allowed to take possession of all powers, but this means that an overseas territory should be free to become independent. Resolution 1514 does not proclaim that when a territory chooses *not* to become independent it can still unilaterally define its relation to the metropolitan state, nor has any other UN Resolution ever declared that the right to self-determination should be interpreted in this way.

The theory that the Netherlands cannot set any conditions to a new status for the islands therefore does not appear to hold water. The right to self-determination of the islands guarantees a freedom of choice, but this freedom is not absolute and should be used in a reasonable manner, taking into account the interests of the other parts of the Kingdom, as has often been recognized in the islands. The question remains, however, what kind of conditions could be set to the realization of a choice by an island population, and which limits to the freedom of choice could be considered 'reasonable'.

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50 Both in the referendum in Curaçao (2005) and the referendum in St. Maarten (2000), the option of free association was not included on the ballot for the referenda, despite requests to that end. The status of 'Country within the Kingdom' was generally interpreted to mean that the island would obtain the same *status aparte* as Aruba currently has under the Kingdom Charter. See also the Report of 12 August 2005, cited *above*, on p. 9, and the decision of the Island Council of Curaçao of 15 April 2005 which ratified the results of the referendum, and declared that Curaçao's new status should be 'at least the same as the *status aparte* of Aruba'.

#### 8.1.4 Limits to the Freedom of Choice?

On the basis of GA Resolutions 1541 and 2625 the population of the islands must be considered free to choose for a free association with the Netherlands, or to become an integral part of the Netherlands, or to choose some other status which might better suit their situation. The Netherlands cannot veto such a choice in itself but it can decide on how it will perform the tasks for which an island may request Dutch support, as long as this does not violate the legal principles which should guide the metropolitan states in the process of decolonization. In this sense the outcome of the referenda should be considered as legally binding, unless it could be shown that the referenda did not accurately gauge the opinion of the population – for instance because the turn-out was too low, or because the information provided to the population was inaccurate, biased or incomplete, or because the formulation of the options was flawed.<sup>51</sup>

Currently, the most important difference of opinion concerning the content of the right to self-determination revolves around the long-standing desire of Curaçao and St. Maarten to obtain a *status aparte* as Countries within the Kingdom, similar to Aruba. The referenda of 2000 and 2005 on St. Maarten and Curaçao resulted in victories for the option of *status aparte*, and the islands therefore claimed that this status should be granted to them on the basis of their right to self-determination. Country status for these two islands would inevitably lead to the end of the Country of the Netherlands Antilles, which would – at least potentially – create a number of problems for the three islands that would be left behind: Bonaire, St. Eustatius and Saba. These three smaller islands would be affected by the disappearance of the Netherlands Antilles, because they certainly cannot take over all of the tasks of the central government, and they will have to find a way of making sure that the public services currently provided by the Netherlands Antilles are maintained at an acceptable level for their inhabitants.

In The Hague, it is not only feared that the break-up of the Netherlands Antilles will create a responsibility for the Netherlands to take care of the smaller islands, and it is moreover feared that the autonomous governments of Curaçao and St. Maarten might be less effective than the current central government of the Netherlands Antilles, which may perhaps cause problems that could force the Kingdom (or in reality the Netherlands) to intervene.

It is recognized to some extent in The Hague that what has been granted to Aruba cannot be denied to Curaçao.<sup>52</sup> Seeing that Curaçao is larger than Aruba, and has been the administrative centre of the Dutch islands for a long time, it could not reasonably be argued that it could not handle the responsibil-

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51 Some media reports indicated that the referenda on some of the islands were not perfect, but to determine whether this is true would require further research.

52 See for instance *Kamerstukken II* 1992/93, 22 593 (R 1433), nr. 8, p. 8.

ities that have been attributed to Aruba, without calling into question the *status aparte* of Aruba, or in fact the basic framework of the Kingdom itself. But St. Maarten is considerably smaller than Aruba, both in area and in population. Some politicians in The Hague think that St. Maarten should be denied Country status because it would be incapable of taking on the responsibilities connected with that status.<sup>53</sup>

Perhaps it could be maintained that an island could be refused Country status if it is clearly not capable of exercising the tasks of a Country according to the criteria of the Kingdom Charter. But since there are a number of independent states that are equal in size, or even smaller than St. Maarten,<sup>54</sup> it cannot be argued that it is impossible *per se* for such an island to perform the tasks of a Country within the Kingdom, unless it could be defended that more is required to be an autonomous part of the Kingdom of the Netherlands than it is to be an independent microstate. Of course, the Netherlands could respond that it would not want to be held internationally responsible for some of the situations that occur in existing microstates. And to some extent, it will always remain an unattractive proposition for the Netherlands to be internationally responsible for a number of small and distant islands, while it has hardly any say in the government of those islands. This situation was created in 1954 with the full consent of the Netherlands,<sup>55</sup> but this does not necessarily mean that the Netherlands is obligated to grant Curaçao and St. Maarten Country status, plus accept responsibility for the orphaned islands of Bonaire, St. Eustatius and Saba. The right to self-determination does not really provide a clear solution, except that there exists an obligation to try and realize the choices of the populations in a reasonable manner.

What is 'reasonable' will depend on the particulars of the case, and has to be determined on the basis of general principles and with regard to all the relevant facts and circumstances.<sup>56</sup> But to prevent a situation where 'might equals right' – which is a real risk in an unequal relation – it should be possible to refer concrete conflicts regarding the interpretation of the Kingdom Charter or the political status of an island to an impartial and independent organ, for instance a constitutional court, which should have the authority – similar to the International Court of Justice – to settle conflicts (or recommend solutions)

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53 See for instance the remarks by member of the Lower House De Vries (*PvdA*) in 2005, *Kamerstukken II* 2005/06, 30 300 IV, nr. 6, p. 2. The Dutch minister for Government Reform and Kingdom Relations (Pechtold) stated that he shared these doubts about Country status for St. Maarten, see *Handelingen II* 2005/06, p. 624.

54 For example Tuvalu (11,000 inhabitants), San Marino (29,000), and Monaco (32,000).

55 The Kingdom Charter has had to suffer much verbal abuse in the Netherlands for this reason. See for instance the letter by Emmer to the editor of *de Volkskrant* (15 September 2005) regarding the 'incredibly foolish Kingdom Charter' (*'het oliedomme Koninkrijksstatuut'*). See also Jansen van Galen 2004.

56 See Brownlie 2003, p. 25-6 for references to literature on the subject of the role of equity in international law.

*ex aequo et bono* since conflicts between the Countries sometimes concern issues on which the law is vague, undeveloped or non-existent.<sup>57</sup> Aruba and the Netherlands already agreed in 1993 to create a new procedure for the settlement of conflicts between the governments of the Kingdom in which the *Raad van State* would have the final word. But this agreement was never executed.<sup>58</sup>

In order to put an end to the 'difficult conferencing' of politicians on constitutional affairs, *Munneke* has proposed to codify the right to self-determination of the islands, and to create a procedure that would create a direct link between the population of each island and the metropolitan legislator. In his view, the population of each island should be allowed to choose (in a referendum) between independence, association with the Netherlands, or accession to the legal order of the Netherlands. If an island would choose for association or accession, the Dutch legislator would regulate the tasks that should be performed by the Netherlands, but this legislation would not go into force until the population had confirmed its choice in a second referendum.

This proposal would create a constitutional guarantee that the people would have the final say on any status change.<sup>59</sup> From the point of view of self-determination this is obviously to be welcomed. But his proposal would also create a strong role for the Dutch legislator, who could design the new status as it saw fit, after which the population could only reject the proposal, presumably to return to the *status quo* which it had rejected in the first referendum. *Munneke* assumes that the Netherlands would claim a stronger role in law enforcement, securing the rule of law and good government, which – in his view – are much in need of improvement in the Caribbean Countries.<sup>60</sup> Since the Netherlands could bypass the local politicians by putting the newly designed status directly before the people, this procedure would offer the Netherlands government an opportunity to decrease the influence of the overseas politicians on the government of the islands, if the population would approve it.

*Munneke* also aimed to decrease the influence of Caribbean politicians in another way. He proposed to incorporate the procedure for self-determination in the Constitution of the Netherlands, and to abolish the legal order of the Kingdom Charter. In his view, the loss of equivalent status which the Charter formally guarantees, would be no more than a psychological disadvantage to the islands. The political status of the islands could – in the future – only be changed by the Dutch legislator with the approval of the population in

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57 The authority to settle conflicts *ex aequo et bono* (i.e. on the basis of equity or fairness) has been attributed to the International Court of Justice in Article 38, para. 1 (c) of its Statute.

58 'Protocol ter invulling van het Resumé van de bilaterale gesprekken Aruba-Nederland', *Kamerstukken II* 1993/94, 23 224, nr. 5.

59 *Munneke* 1993, p. 858.

60 See *Munneke* 1994 and *Munneke* 2001.

a referendum, while in the current situation the *Staten* of the Caribbean Countries have a right of veto on amendments to the Kingdom Charter.

It is not certain whether this proposal, which is modeled on the French Constitution, would really be an improvement in every respect. The French Constitution has enabled the islands of Saint-Martin and Saint-Barthélemy to choose a new status, but this led to 'difficult conferencing' between Paris and local politicians on the details of the new status. Perhaps this should simply be accepted as an inevitable side effect of overseas relations, as it seems to occur in every relation described in this study. It would be an improvement, however, if it were constitutionally guaranteed that the populations of the islands are consulted on major status changes (*see* Chapter 7).

Aruba has a special position in this debate, because amendments to the Kingdom Charter require the consent of its *Staten*, while the Netherlands Antilles cannot be broken up without Charter amendments. Aruba recognized the right to self-determination of the islands of the Netherlands Antilles in 1981 and 1983, and it promised in 1993 that it would cooperate with Charter amendments if the Antilles would be dissolved.<sup>61</sup> It must be assumed that Aruba is under the same obligation as the Netherlands to cooperate with the exercise of the right to self-determination of the Antillean islands.

#### 8.1.5 Conclusion

It must be assumed that the content of the right to self-determination of the six islands is the same as the former right to self-determination of the Netherlands Antilles as a whole, at least in relation to the Netherlands. The islands have not agreed to the limiting interpretation proposed by the Netherlands, and the freedom of choice of the island populations, which is guaranteed by international law, cannot be limited by a unilateral declaration of the Netherlands. The fact that the recognition of 1981/83 was not supported by referenda or other forms of consultation of popular opinion has not been considered by the governments of the Kingdom, nor in the legal literature, as invalidating this recognition. The referenda held between 2000 and 2005 showed a large part of the population of the Netherlands Antilles to be in favour of breaking up the Country and creating a separate status for each island.

The position of the Netherlands in negotiations concerning a new political status for an island depends on the choice of the island. A choice for integration would mean that the Netherlands should take on more responsibilities for the government of the island, in which case the Netherlands may determine to a large extent how it will perform its new tasks. At the other end of the scale, a choice for independence would mean that the Netherlands will be freed

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61 See the Protocol cited in the previous footnote.

from all responsibilities for the government of the island, leaving it entirely to the island itself to determine how its government will be run. The islands currently seem only interested in status options that lie somewhere in between these extremes. The Netherlands seeks assurances that the responsibilities of the Kingdom in the Caribbean will be safeguarded after the dissolution of the Netherlands Antilles. General legal principles such as good faith, equity and proportionality should guide the authorities of the Kingdom, the Countries and the islands in the fulfilment of their obligation to realize as well as possible the 'free and genuine expression of the will of the people'. To this end, the Kingdom Charter should guarantee that the population is consulted when major status changes are contemplated.

## 8.2 THE NON-DISRUPTION PRINCIPLE

It has often been wondered whether the non-disruption principle (or *uti possidetis*)<sup>62</sup> precludes the Kingdom from cooperating with the break-up of the Netherlands Antilles.<sup>63</sup> The principle of non-disruption in the context of decolonization could be seen as a corollary to the principle that only 'a people' as a whole has the right to self-determination. Several GA Resolutions emphasize that colonies should not be divided into smaller units before becoming independent. 'Colonies' here means the administrative units established by the colonial power, which may have no correspondence to the historical and ethnical realities which existed before, during and after the colonial era. The entities created by the colonial powers should perhaps be considered as states in an embryonic form, already possessing territorial integrity. Resolution 1514 (XV) of 1960 provides that: 'Any attempt aimed at the partial or total disruption of the national unity and the territorial integrity of a country is incompatible with the purposes and principles of the Charter of the United Nations'.<sup>64</sup>

It is far from certain to what extent this rule also applies to self-determination units which are not independent states yet, and which have no intention of becoming independent in the near future, such as the Netherlands Antilles. In practice, states and the UN organs have often co-operated with, or at least accepted, the division of dependencies if it was done with the approval of the territories themselves. In the history of the Trust Territories such divisions have been common practice. It happened only twice that a Trust Territory

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62 For the principle of *uti possidetis*, see Cassese 1995, p. 190 et seq.

63 See for instance Kapteyn 1982, p. 28 et seq., and Gorsira 1988, p. 59.

64 GA 2625 (XXV) of 1970 includes a similar provision in its section on self-determination: 'Every State shall refrain from any action aimed the partial or total disruption of the national unity and territorial integrity of any other State or country'.

became independent within its colonial boundaries.<sup>65</sup> NSGTs more often became independent as a whole, without joining another territory or state, but here also, substantial changes were allowed to be made. In cases where there did not exist agreement among the different parts of the NSGT about a break-up, the GA has sometimes called on the administering state to ensure the integrity of territories that were on the verge of independence.<sup>66</sup>

A quick look at the first list of NSGTs of 1946 reveals that many of these territories have been broken up or joined with other territories. The Comoros were separated from Madagascar, and subsequently Mayotte from the Comoros; Niue was separated from the Cook Islands; Saint Martin and Saint Barthélemy from Guadeloupe; Aruba from the Netherlands Antilles; the Cayman Islands were separated from Jamaica, as were the Turks and Caicos Islands (which were subsequently adjoined to the Bahamas, from which they were again separated before that country became independent); the Leeward Islands were split up into St. Kitts-Nevis-Anguilla (from which Anguilla was later separated), Antigua, Montserrat, and the British Virgin Islands;<sup>67</sup> the High Commission Territories of the Western Pacific became the Solomon Islands, Pitcairn and the Gilbert and Ellice Islands, which last colony was again broken up to become the independent states of Kiribati and Tuvalu; the British Indian Ocean Territory was created by separating the Chagos Archipelago from Mauritius in 1965; and the Cocos (Keeling) Islands and Christmas Island, which were administered by the UK as part of Singapore, were transferred to Australia.

During the first two decades after 1945, these separations were decided by the Administering states, although they were often desired by the islands themselves. The more recent separations were approved by the populations or the governments of the islands. None of these separations was explicitly approved by the UN, but only in the case of the separation of Mayotte from

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65 Of the 11 Trust Territories, only Togoland (became Togo in 1960), Nauru (1968) and Western Samoa (became Samoa in 1962) have become independent states within the boundaries as they were administered as Trust Territories. The French Cameroons and Tanganyika at first also became independent within the colonial borders, but were soon thereafter joined with other territories. The other Trust Territories were either divided up or joined with other territories, in each case with the approval of the UN.

66 See Clark 1980, p. 79, and p. 80, note 423, with references to the cases of Fernando Poo (part of Equatorial Guinea), Mayotte, and Banaba (part of the Gilbert Islands). See also Buchheit 1978 for the cases of Bangladesh and Biafra. Administering states have also often resisted fragmentational tendencies without the interference of the UN, see for instance the cases of Rodrigues (forced by the UK to remain a part of Mauritius), Barbuda (*idem* in relation to Antigua), and Tobago (*idem* in relation to Trinidad). See Lowenthal 1980 on these cases. The Netherlands has also resisted the Aruban wish for a separate status for many decades, with Aruba making appeals to the UN, but in vain.

67 The British Caribbean territories were all joined together to form the West Indies Federation in 1956, which was dissolved only two years later.

the Comoros,<sup>68</sup> and the Chagos Archipelago from Mauritius did the GA clearly object.<sup>69</sup> The Decolonization Committee was allowed to observe the referendum on the 'secession' of the Ellice Islands,<sup>70</sup> and closely followed the case of Anguilla,<sup>71</sup> but in neither case did it recommend that the islands should stay together.

These examples show that the principle of non-disruption appears to have only limited meaning with respect to the right to self-determination and decolonization of small island territories, despite the apodictic language of paragraph 6 of Resolution 1514.

The example of the Comoros does suggest that states and UN organs consider that not only the population of the 'seceding' part of the territory has to agree to a break-up, but also the population of the rest of the territory. However, this rule is not clearly supported by other cases. It has been more common for the administering state to be led mainly by the desires of the dissident island(s), more or less forcing the other islands to agree to a break-up. The secession of Anguilla was criticized by some governments, since it was accomplished in the face of resistance by the government in St. Kitts, but the criticism was far from unanimous, and not very strong.

The case of Aruba is somewhat comparable to that of Anguilla, and the reaction of the Netherlands was also somewhat similar to that of the UK. It could be argued that the secession of Aruba was inconsistent with the principle of non-disruption, because the break-up of the Country was not approved by the population in a referendum. The government of the Netherlands Antilles, and of the separate island territories agreed to the secession of Aruba, but no referendum was held (apart from the referendum of 1977 on Aruba<sup>72</sup>).

The application of the right to self-determination and decolonization to these cases would imply that a break-up of a territory that falls under GA Resolutions 1514 and 1541 cannot proceed without the consent of – at least the majority of – the entire population, since such a break-up clearly affects

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68 See GA Res. 31/4 of 21 October 1976. In that same year, France was out-voted 14 to 1 in the Security Council on the issue of Mayotte, and was forced to use its veto to prevent the adoption a condemning Resolution (S/PV. 1888 para. 247).

69 See GA Res. 2066 (XX) of 1965, and Houbert 1980, p. 154, and De Smith 1968, p. 611-12.

70 See the Report of the UN Visiting Mission to the Gilbert and Ellice Islands, reproduced in the Report of the Decolonization Committee of 1974, Vol. V, Chapter XXI, Annex I (UN Doc. A/9623/Add.5). See also Macdonald 1982 and Drower 1992, p. 167 et seq.

71 The Decolonization Committee heard petitioners from Anguilla in 1967 (UN Doc. A/AC.109/SC.4/SR.85-87, 24-25 August 1967). It expressed 'grave concern' about the deployment of British troops in Anguilla in 1969 (UN Doc. A/7623/Rev.1, Vol. IV, Chapter XXIII, para. 17). See also the statements by Hungary and Tanzania in the Fourth Committee, GAOR (XXIV) 4<sup>th</sup> Committee, 1851<sup>st</sup> Meeting, para.15-7 and para. 29. For the problem of Anguilla, see Fisher 1968, Brisk 1969, Barbier 1974, p. 619 et seq., De Smith 1974, p. 73, and Freymond 1980.

72 See Chapter 6 for this referendum.

the future political status of the territory. Resolutions 1514 and 2625 (and many others) moreover condemn actions that violate the national unity of a territory.

It seems logical to assume that when a people is entitled to freely determine its own political status, it should also be able to choose to end its existence entirely by dissolving into a number of new peoples and to attribute parts of its territory to each new people that is thus created. International law does not forbid this when it happens in an independent state, and it probably does not either when it concerns a dependency, as long as the right to self-determination is not violated.<sup>73</sup>

UN-supervised referenda could be considered obligatory in cases such as these, as *Franck & Hoffman* write.<sup>74</sup> But the international practice outlined above shows that many break-ups of island territories were realized without referenda, and in those cases where a referendum was held, it was often only in the seceding part of the territory and not on all of the islands.<sup>75</sup>

#### 8.2.1 The Non-Disruption Principle and the Break-Up of the Netherlands Antilles

*Gorsira* and *Hoeneveld* argue that the non-disruption principle no longer applied after the right to self-determination of the six islands had been recognized.<sup>76</sup> The problem with this argument is that the recognition of the right to self-determination of the separate island territories was not approved by the population.<sup>77</sup> *Kapteyn* considers that the non-disruption principle did apply to the secession of Aruba, but thinks that the Netherlands cannot be blamed for disrupting the 'national unity' of the Country of the Netherlands Antilles, because it consistently opposed the secession of Aruba for many decades.<sup>78</sup> This may be an acceptable interpretation of GA Resolution 1514. The Netherlands and other states are not allowed to undertake any attempt to disrupt 'the national unity and the territorial integrity' of a country, but this probably does not mean that the Netherlands Antilles itself is not allowed to undertake such attempts, seeing that the prohibition of 1514 is aimed at states and aims to protect the Netherlands Antilles. If the Country itself decides to forego this

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<sup>73</sup> In a similar sense, see Clark 1980, p. 78-83.

<sup>74</sup> *Franck & Hoffman* 1976, p. 336-7.

<sup>75</sup> See for instance the cases of the Gilbert Islands, the Northern Mariana Islands, Aruba and Anguilla, where referenda on the issue of secession were held on the seceding islands, but not in the rest of the territory.

<sup>76</sup> *Gorsira* 1988, p. 59, and *Hoeneveld* 2005, p. 65.

<sup>77</sup> The Dutch government appears to think that the non-disruption principle still applies to the Netherlands Antilles. In 2004, the Dutch minister for Kingdom Affairs wrote to the Executive Council of Bonaire that the non-disruption principle prohibited the Dutch government from involving itself with the planned referendum on the island and from providing a subsidy (which Bonaire had requested).

<sup>78</sup> *Kapteyn* 1982, p. 29.

protection, it should be allowed to do so. But only with the support of the population since the right to self-determination is clearly affected.<sup>79</sup>

This issue was debated in the Lower House in 1978, when the Kingdom legislator was preparing to approve the application of the UN Human Rights Covenants of 1966 (the ICCPR and ICESCR) to the entire Kingdom. The Kingdom government was of the opinion that the non-disruption principle meant that it could not cooperate with the independence of Aruba against the wishes of 'those concerned' – presumably the government and the *Staten* of the Netherlands Antilles, of which Aruba was then still a part.<sup>80</sup> According to Aruba, however, the non-disruption principle did not apply because the Netherlands Antilles did not represent a nation.<sup>81</sup> Representatives of Aruba submitted a proposal to the Lower House that would recognize this.<sup>82</sup> The Lower House instead adopted a statement declaring that Article 1 of the Covenant should not prejudice the negotiations on the new legal order of the Kingdom, as it was up to the constituting parts of the Kingdom to take a sovereign decision on that matter.<sup>83</sup>

79 Franck & Hoffman 1976, p. 336-7 also consider this the most important criterion. Clark 1980, p. 80-83 is less certain, but also tends towards this conclusion. Crawford 2006, p. 620 states that the plebiscite of 1977 in Aruba was not permitted to justify its secession from the Antilles, but it is not clear from the text of the second edition of *Crawford's* study whether the author was aware that Aruba achieved separate status in 1986.

80 *Kamerstukken II* 1978/79, 13 932 (R 1037), nr. 14, p. 2. The government made a somewhat inappropriate comparison between the situation of Aruba and that of West New Guinea, and stated that it could not 'again' cooperate with the transfer of sovereignty – against the wishes of the population – to part of a country. According to a memorandum prepared by the Dutch Ministry of Foreign Affairs shortly before the debate in the Lower House on the Covenants, it was 'unthinkable' that the UN would accept a secession of Aruba from the Netherlands Antilles on the basis of the right to self-determination. The Netherlands Antilles were on their way to independence and had a government which represented the entire country. Encouraging the secession of one island from such a country would represent too dangerous a precedent for other countries with a federal or similar structure. (Memorandum of 1 September 1977 (unpublished), cited in Oostindie & Klinkers 2001c, p. 482.)

81 *Handelingen II* 1978/79, p. 89-162. See also Hoeneveld 2005, p. 57-8.

82 Proposal submitted by Croes and Figaroa on 21 September 1978, see *Kamerstukken II* 1978/79, 13 932 (R1037), Nr. 16. It was later withdrawn by its sponsors when it became clear it did not enjoy majority support. Several members of the Lower House, as well as the minister for Netherlands Antillean Affairs, considered that Aruba had 'a' right to self-determination. Some members also claimed that Article 1 would not prevent Aruba from exercising its right to self-determination because the Article did not refer to the principle of non-disruption. Others, however, thought that the Article *did* include that principle, and this appears to have been the opinion of the government as well.

83 Proposal submitted by Roethof c.s. on 21 September 1978, see *Kamerstukken II* 1978/79, 13 932 (R1037), Nr. 17. The proposal was adopted without a vote, see *Handelingen II* 1978/79, p. 162. The Lower House thus declared that a decision on the status of Aruba fell within the domestic jurisdiction of the Kingdom. Apparently, the Netherlands parliament thought it could recognize the right to self-determination, ratify the Covenants, and at the same time bar the door to the influence of the Covenants to the relations with Aruba. This is obviously not possible. Once the Kingdom ratified the Covenants, the 'sovereign decision' that the Kingdom partners would take on Aruba had to conform with Article 1.

It was not considered necessary to ensure popular support in the five remaining islands. The right to self-determination and the principle of non-disruption nonetheless demand that the secession of an island should have the support of the population of the entire territory, although it is not clear from the international practice what form such popular support should take. In the absence of much visible or persistent protests in the other islands to the secession of Aruba, and seeing that the international practice contains other examples where secessions were realized in a similar way without provoking international censure, it should probably be assumed that international law was not violated.

But if precedence is given to the freedom of choice of each separate island, a problem occurs when the populations of the islands express different preferences which cannot be reconciled with each other, as happened in 2005, when the population of one island (St. Eustatius) chose to keep the Antilles together, while the referenda on the other islands had revealed a clear preference for breaking up the Antilles. It was obviously impossible to realize both these wishes, therefore the freedom of choice of either St. Eustatius or the other islands had to be denied. If it is assumed that each island has the right to self-determination and decolonization, it would be unacceptable to deny the 'people' of one of the islands the right to determine its own constitutional future. In this case, precedence was given to the choice of the four islands who chose to break up the Antilles,<sup>84</sup> but this choice was not publicly motivated or defended, nor was it really challenged. Since the approximately 2,600 inhabitants of St. Eustatius form only a small minority within the Netherlands Antilles (186,000 inhabitants), this choice was politically obvious, but still hard to reconcile with the idea that St. Eustatius has the right to self-determination. This decision to some extent denied the right to self-determination of St. Eustatius, but any other solution would have denied that right to the other four islands. It could therefore be defended as an equitable and reasonable solution, especially when the population of St. Eustatius will be given the opportunity, at some point, to give its opinion on the new status that will be devised for that island.

In one respect, the outcome of this conflict is rather unusual in view of the practice within the Kingdom and abroad. Generally speaking, secession claims seem to be less readily acknowledged than the desire to maintain the status quo. This factor should have worked in favour of St. Eustatius' wishes. Another factor which has strongly influenced some of these cases is the threat of violence,<sup>85</sup> but in 2005, there were no indications on any of the islands

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84 See the 'Slotverklaring van de start-Ronde Tafel Conferentie van het Koninkrijk der Nederlanden, gehouden op 26 november 2005 in Willemstad, te Curaçao'.

85 Brison 2005, p. 40 et seq. even concludes that constitutional changes in a 'colonial' context are never realized unless there exists a threat of violence. In his view, St. Maarten should 'engage in creative violence' to realize its *status aparte*.

of the Netherlands Antilles that this threat existed. It seems that a third factor – the wishes of larger islands are often given precedence over smaller ones – was decisive in this case.

### 8.3 CONCLUSION

The recognition of the right to self-determination of the individual islands of the Netherlands Antilles in 1981 has thrown into doubt the application of the non-disruption to the Netherlands Antilles. It is not certain whether the population of the Netherlands Antilles as a whole should still be considered as a ‘people’ entitled to self-determination, nor is it clear whether the Country of the Netherlands Antilles is still an entity entitled to international legal protection of its unity on the basis of the principle of non-disruption (*uti possidetis*).

The international practice in comparable cases has not – at least not consistently – upheld the rule proclaimed by Resolution 1514 that states are not allowed to cooperate with the break-up of overseas territories. If there is popular support for a break-up of an overseas island territory, there has often been no clear international opposition to the secession of one or more islands from such a territory, even if it occurs shortly before independence is achieved. The practice does not reveal, however, what form this popular support should take. A referendum seems to be considered indispensable, but should such a referendum be held on all of the islands, or only on the seceding island(s)? This is uncertain, but it is certain that some form of consent of the territory as a whole is necessary. Absence of strong popular opposition has often been considered enough, as in the case of the secession of Aruba.

The current situation within the Netherlands Antilles is exceptional because separate referenda have been held on all of the five islands based on the right to self-determination. The outcome on St. Eustatius – the Netherlands Antilles should remain a single Country – is not compatible with the outcome on the other four islands, which voted in favour of breaking up the Country. The Round Table Conference of 2005 decided to go ahead with the break-up of the Netherlands Antilles, which seems a reasonable decision if the population of St. Eustatius is given the opportunity to give its opinion on the new status that will be devised for that island.

