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

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2 | The Right to Decolonization and Self-Determination

In this Chapter I will give an overview of the right to decolonization as it has been defined in international law, and look at its relation to the right to self-determination.

2.1 COLONIES AND DECOLONIZATION

In the older literature on international law the concept of 'colonies' is sometimes considered not to be a legal concept, because the classification as a colony did not in itself create any rights or duties in international law.¹ This changed after the right to self-determination of colonial peoples became a generally recognised part of international law during the 1960's, and the need arose to find an accurate legal definition of colonies.

The word 'colony' originally referred to an overseas territory where a group of settlers had occupied an uninhabited area or subdued the indigenous population, which was used as a trading post or to accommodate a population surplus in the home country of the settlers.² During the 19th and 20th century, the term gained a negative connotation, describing a situation where a foreign white elite deprives the non-white masses of self-government and human rights in order to 'extract immense riches for their own profit'.³ But the term was also still used in a less disapproving way to simply refer to 'distant territories that remain, in some way, politically dependent on the metropolitan power', as Aldrich and Connell put it.⁴

A definition based on the current usage in the legal literature should probably take account of the following five main elements.

1 In this sense, *see* for instance Kirchschläger 1961, p. 256-7.

2 Wesel 1999. Under British constitutional law it meant 'any part of Her Majesty's dominions exclusive of the British Islands, and of British India' (Interpretation Act, 1889, section 18 (3)). This definition excluded the protectorates and protected states, and is narrower than the all-encompassing term 'possessions', *see* Roberts-Wray 1966, p. 37-44. British law also distinguished between settled and conquered colonies, *see* Davies 1995.

3 Aldrich & Connell 1998, p. 3.

4 Aldrich & Connell 1998, p. 1.

1. Subordination

According to Ermacora, in the *Encyclopedia of Public International Law*, colonial relationships were characterised by 'subordination and supremacy'. Colonies might obtain some delegated powers of government or be integrated in the state to some degree, but the colonial power remained 'a kind of *Oberstaat*. The colony is subordinated but without creating a confederation'.⁵ Fastenrath, in Simma's commentary on the UN Charter, also sees the 'subjection' of the territory as a characteristic, although a colony could also be integrated into the state, but 'without the status of equal rights, or without its free decision'.⁶ Kirchschläger speaks of an '*Unterwerfungsverhältnis*' (relation of subjection or subjugation).⁷ Crawford also considers that colonial territories are subordinate to a metropolitan state.⁸

2. Separateness

Another characteristic to be found in the legal literature is that the territory of a colony is not part of the metropolitan area of the state and that the population of the colony does not enjoy full citizenship. Both these characteristics are not found in all colonies, but there is always a certain distinctness from the mother country.⁹ The separateness of colonies is connected to the historical goals of colonisation, namely exploitation of the local population and empire-building. The pursuit of these goals usually meant that the population of the colony was not considered part of the 'nation' or 'people' of the mother country.¹⁰

3. Substantive metropolitan powers in the territory

Writers have also often noted that the government of the mother country has the last word in the internal affairs of the colony. If the colony possesses a measure of autonomy, the mother country will always command 'reserved powers', either to intervene in the internal affairs of the territory, or to revoke the autonomy at will. *Oppenheim* considers that the internal autonomy which colonies often possess is a revocable delegation of the state's powers, at least from the metropolitan point of view,¹¹ and in the first edition, *Oppenheim* stated that the determining factor for colonial status was 'that their Governor,

⁵ Ermacora 1992, p. 663.

⁶ Fastenrath 2002, p. 1090. Kirchschläger 1961, p. 257 also considers that there are colonies which are incorporated in the mother country or associated with it.

⁷ Kirchschläger 1961, p. 257.

⁸ Crawford 1997. The Dutch legal literature of the early 20th century also used subordination as a defining characteristic of colonialism, see Chapter 5.

⁹ Oppenheim/Jennings & Watts 1992, p. 281. Crawford 1997 only refers to geographical separateness.

¹⁰ Wesel 1999, p. 241-4.

¹¹ Oppenheim/Jennings & Watts 1992, p. 275-6. In 1905, *Oppenheim* wrote: 'the mother country could withdraw self-government from its Colonial States and legislate directly for them' (p. 103).

who has a veto, is appointed by the mother country.¹² The fact that the metropolitan legislator is authorized to legislate for a colony is seen as the decisive criterion by *Belle Antoine*.¹³

4. Not voluntary

It is also sometimes stated as a characteristic of truly colonial relations that they are not voluntary on the part of the colony, or at least that they have originally come about against the wishes of the overseas populations.¹⁴

5. Dependence

All of the territories dealt with in the comprehensive study *The Last Colonies*¹⁵ depend on the metropolis for financial support, or some other form of assistance, usually in the area of international relations and defence.¹⁶ The assistance lent by the metropolis to the territories is felt by many, both in the territories and in the metropolises, to be indispensable.

Where the dependence results from extreme remoteness and smallness, assistance by an independent state can indeed be called indispensable. St. Helena and Pitcairn exhibit this form of inevitable dependence.¹⁷ The dependence of for instance Puerto Rico is of an entirely different nature. Its size, population, and location do not clearly preclude it from being an independent state or from functioning without any form of assistance by the US. Its dependence can only be explained from historical and political factors.

But most of the other remaining 'colonies' do not clearly fall either in the category of Puerto Rico or in the category of inescapable dependence of Pitcairn. In most of these cases, including the Netherlands Antilles and Aruba, it is difficult to determine whether the dependence should be considered as a fact of nature, or whether it is the result of historical developments, political choices, or from such factors as aid addiction. Sometimes these territories will choose to remain dependent because they (perhaps incorrectly) assume that they will not be able to survive without the assistance of the mother country. In other cases, the choice appears to be governed by the desire to continue to benefit from the advantages of belonging to a Western state.¹⁸

¹² Oppenheim 1905, p. 103.

¹³ Belle Antoine 1999, p. 10, where it is claimed that the UK dependent territories are colonies for this reason. The author adds that 'there is, however, a non-enforceable convention which prescribes that the UK parliament should not legislate for the colonies without their consent.'

¹⁴ See for instance Fastenrath 2002, p. 1090.

¹⁵ Aldrich & Connell 1997, which discusses some 40 small overseas territories of Western states, including the Netherlands Antilles and Aruba.

¹⁶ Aruba, Bonaire and Curaçao are clear examples of this feature, being located only a few kilometres off the South American mainland of Venezuela and Colombia, and almost 8,000 kilometres from The Hague.

¹⁷ See Gorelick 1983 on the right to self-determination of Pitcairn.

¹⁸ C.f. Davies 1995, p. 2, with regard to the British overseas territories: 'certain factors make independence difficult for some and undesirable for others'.

It is far from clear how such choices and developments should affect the 'colonial' status of these territories. When a people is allowed to make a free choice on its political future, but it chooses to remain dependent on the mother country, even though it could be independent, does it then remain a colony?

In cases where the dependence of the territory is the result of a choice by the people, it could be wondered whether such a people still deserves the epithet of 'colonial people'. When a 'people' consciously chooses to remain dependent on another people, it may seem unreasonable to continue to view it as 'under colonial or alien domination', as the UN puts it, and to continue to afford it the luxury of the special status that international law has created for colonial peoples. To some extent, the UN practice has confirmed this view, by not involving itself with some of the territories that might otherwise be considered 'colonies', but which appear to be happy with their 'colonial' status.

International law takes a differentiated approach to these questions, which will be discussed below. But however one might wish to answer these questions, it cannot be denied that colonial rule in the remaining overseas territories has to a large extent changed to a relation of one-sided dependence.

Many authors currently use 'dependent territory' or 'dependency' as a euphemistic¹⁹ synonym of colony, although that is not strictly speaking correct.²⁰ The phrase 'dependent peoples' is quite common at the UN to in-

19 Perhaps because of this euphemistic usage, the term has gained a somewhat negative connotation itself. Roberts-Wray 1966, p. 60 notes that it 'does not find favour in some of the territories'. He also found that 'the term "dependent territories" does not appear to have acquired the same degree of unpopularity'. In 1999, the UK introduced the term 'overseas territories' to replace the 'outdated terms such as "dependent territories" or "colonies"' (Explanatory Notes to British Overseas Territories Act 2002, Chapter 8, para. 4), because 'today's territories are energetic, self-governing, and anything but dependent' (statement by Foreign Secretary Cook in the House of Commons, 17 March 1999). One wonders how long it will take for the term 'overseas territories' to gain a negative meaning in the UK as well, and by which term it will be replaced. Perhaps by 'non-independent territories', which is sometimes used in the present-day literature despite the double negative.

20 See for instance Crawford 1997, Ofuatey-Kodjoe 1970, p. 290, Davies 1995, p. 1-5. Ermacora 1992, p. 663 finds the use of the term 'colonies' no longer justified. It should be replaced by the term 'dependent territories', even though he claims there still exist dependent territories which are colonies (p. 662). See also for instance the analysis by the UN representative of Thailand in 1986 of the situation in New Caledonia, GAOR (41), Plenary Meetings, 91st meeting, p. 93. Under the domestic law of the UK and other metropolitan states, 'dependency' simply indicated a territory that was separate and subordinate to a larger territory, and the term is still sometimes used in that sense. See Roberts-Wray 1966, p. 60-1, which uses 'dependent territories' to refer to all of the places in the Commonwealth that are not independent states when 'precision is not important'. The *Random House Unabridged Dictionary* (1993) describes dependency as 'a subject territory that is not an integral part of the ruling country' (fourth meaning). The *Concise Oxford Dictionary* (1982) gives a similar description. The English to Dutch dictionary *Van Dale Groot woordenboek Engels-Nederlands* (Utrecht 1989) cites 'kolonie' as one of the possible translations of 'dependency'. GA Res. 66 (I) of 1946 lists many NSGTs with dependencies. The Comoros were a dependency of Madagascar. Even tiny territories such as St. Helena and Pitcairn have their 'dependencies', see Roberts-Wray 1966, p. 61. This meaning of 'dependency' corresponds to the Dutch

dedicate NSGTs, Trust Territories, and other territories that are -or were- considered colonial, such as Algeria.²¹ In the context of the right to self-determination, UN usage often refers to the right to self-determination of dependent peoples, most importantly in GA Resolution 1514 (XV), the Declaration on the Granting of Independence to Colonial Countries and Peoples, which despite its title does not once use the phrase 'colonial peoples' but frequently speaks of 'dependent peoples'.

In *Blaustein's* collection of *Constitutions of Dependencies and Territories* dependencies are described as 'those territories that are not part of a particular nation but tributary²² to it.' *Blaustein* distinguishes them from 'national territories' which 'are an integral part of a particular nation'. The editors of the collection consider that the criterion of being an integral part of the state determines whether an overseas territory is a dependency or not.²³ But this does not explain why, for instance, Corsica, Hong Kong, the Faeroe Islands

concept of 'onderhorigheid'. The Netherlands Antilles were called '*Curaçao en onderhorigheden*' before 1948.

- 21 See the report of the Committee of Six which prepared the Principles of GA Res. 1541 (see below) which states that Chapter XI of the UN Charter 'expressed international concern for the welfare and freedom of dependent peoples', while the first Principle declares that Chapter XI was intended to cover all territories 'of the colonial type' (GAOR (XV) Annexes, Agenda item 38, para. 17). See also for instance GA Res. 1573 (XV) of 19 December 1960 on Algeria, which refers to 'the passionate yearning for freedom of all dependent peoples'. See also the *Yearbook of the United Nations* 1960, p. 504. According to a UN brochure entitled 'A Sacred Trust. The Work of the United Nations for Dependent Peoples' (1957) the category of 'dependent territories' consists of Trust Territories and NSGTs (p. 2). A similar brochure, published in 1963 by the Office of Public Information, entitled *From Dependence to Freedom. The United Nations Role in the Advance of Dependent Peoples towards Self-Government or Independence*, explains that dependent peoples live in Trust Territories or NSGTs, which are colonies governed by distant metropolitan countries (p. 3). 'Dependent territories' is also used by the specialised agencies when reporting on their efforts to implement GA Res. 1514 (see for instance UN Doc. E/2000/68 of 15 June 2000). It is also sometimes used at the UN to refer to the Netherlands Antilles and Aruba. It seems the term 'dependent peoples' is used in order to avoid giving offence, whereas the term 'colonial peoples' is used when the aim is to provoke or indict.
- 22 The role of the tributary has been entirely reversed in the course of history. None of the territories literally pay tribute (an ancient form of taxation) to the metropolis anymore. On the contrary, most receive public funding from the mother country.
- 23 See also for instance the introduction to the section on the 'Netherlands Dependencies', which states that: 'Exceptionally in the case of dependencies, these territories are accorded special rights under the Dutch National Constitution. However, they are not an integral part of the Netherlands and thus cannot be considered national territories' (Blaustein/Raworth 2001a, p. 1).

and Greenland are categorised as national territories,²⁴ whereas Guadeloupe, Réunion, Martinique and the Cocos (Keeling) Islands as dependencies.²⁵

Rather, the criterion (perhaps subconsciously) appears to be whether the territory was once considered a colony or is still considered as such, and has not yet become independent or integrated with a Third World state.²⁶ This is also indicated by *Blaustein's* remark with respect to dependencies that 'the degree of independence from colonial control varies.'²⁷

Summing up, a tentative conclusion could be formulated that the present-day definition of 'colonies' is an overseas territory of a Western state, which is subordinated to the metropolis. If the territory possesses a form of autonomy, this will either be revocable by the mother country, or be subject to the 'reserved powers' of the metropolitan government to intervene in the autonomy of the territory. The metropolis is authorized to legislate for the colony, although this authority may be constitutionally restricted. Politically, the government of the mother country is still a dominant factor in the government of the colony, which is dependent on the mother country.

In recent decades it has become uncommon to refer to overseas territories as 'colonies', because the term has become something of a fighting word. Instead of 'colony', the term 'dependent territory' is nowadays used to refer to the same category of territories. But the term 'decolonization' has remained in frequent use, to refer to 'the process that leads toward ending political dominion by colonial powers over overseas territories, and which intends to open possibilities for free political, economic, social and cultural development'.²⁸ The emphasis in the modern discourse on decolonization appears to be on the political dominance of the metropolis, which is no longer based on economic exploitation, violent repression or feelings of racial or cultural superiority. Instead, overseas relations are now treated by political science

24 Some of these territories can be perhaps be considered integral parts of an independent state, but at least Greenland and the Azores have relations with Denmark and Portugal that appear to be closer to association than integration. The constitutional position of Corsica appears to be rather similar to that of the French 'dependencies' in the Caribbean or Pacific.

25 These four territories are examples of colonies that have become integrated parts of the mother country (France and Australia), *see* Chapter 3. The US State Department also include them in their list of dependencies, but explain that 'French Guiana, Guadeloupe, Martinique and Reunion are departments (first-order administrative units) of France, and are therefore not dependencies or areas of special sovereignty. They are included in this list only for the convenience of the user.' *See* the web site of the State Department: <http://www.state.gov/www/regions/dependencies.html> (visited on 3 March 2004).

26 This does not explain why the Channel Islands and the Isle of Man are classed as dependencies, but the reason for this could be that these islands were for a long time called 'dependent territories' under UK law. The fact that Greenland is called a national territory is clearly a mistake. It is not an integral part of Denmark, and it used to be considered a colony, at least at the UN.

27 Blaustein/Raworth 2002, p. 2.

28 Verton 1990, p. 215. Cited with approval by Klinkers 1999, p.

as a particular manifestation of the more common phenomena of dependence and core-periphery relations.

The term decolonization therefore nowadays usually refers to the termination of political (and social) structures that give the metropolis a dominant position in relation to its overseas territories.²⁹ At the United Nations, a system has been developed to guide this process.

2.2 DECOLONIZATION AT THE UNITED NATIONS

Colonies are often equalled to Non-Self-Governing Territories (NSGTs) at the UN,³⁰ and this usage has been adopted in the legal literature,³¹ although doubts have been expressed whether the two terms really cover exactly the same categories of territories.³² The GA has developed criteria to determine whether a territory is no longer a NSGT. If the concept of colonies should indeed be equalled to NSGTs, then these criteria should also be considered to determine when the process of decolonization is complete, at least in the eyes of the UN.

29 Verton, in his description of the decolonization of the Netherlands Antilles, claims that true decolonization also involves changes to the internal social structures, in order to redress the dominance of colonial elites within the territory (see Verton 1977).

30 See GA Res. 1514 (XV), the Declaration on the Granting of Independence to Colonial Countries and Peoples of 1960 which applies to NSGTs (operative para. 5) and the yearly GA resolutions based on this Declaration. See also GA Res. 1541 (XV) which declares that NSGTs are territories that were known to be 'of the colonial type' in 1945. An exception should perhaps be made with respect to Gibraltar and the Falkland Islands, because the GA has not declared that the populations of these territories are *peoples*, even though it has declared that the Colonial Declaration of GA Res. 1514 (XV) applies to them. This was also true for Hong Kong and Macao. Territorial claims by a neighbouring state could apparently affect the status of 'people' in the view of the GA. The identification of NSGTs with colonies is also found in the information provided by the UN Department of Public Information. See for instance the *Basic Facts about the United Nations* (New York: Department of Public Information 1998) which on p. 275 claims that the peoples of the NSGTs live 'under colonial rule'.

31 See for instance Kirchschräger 1961, p. 259, Cassese 1995, p. 71, Doebling 2002, p. 52, Fastenrath 2002, p. 1089-90, Malanczuk 1997, p. 330, and Ermacora 1992, p. 665.

32 Rigo Sureda considers that on the basis of the criteria of 'salt water and skin pigmentation' (laid down in GA Res. 1541, see below) the UN continues to view the traditional colonies of 1945 as under 'colonial rule' as long as they have not become independent. Colonial status could perhaps also end through free association or integration, but in those cases a democratic form of government and a degree of political advancement of the population, and in case of integration also an amount of experience in self-government, is required. These criteria are not applied in case of independence, which lead Rigo Sureda to conclude that 'colonial rule' is akin to non-independence. See Rigo Sureda 1973, p. 261.

2.2.1 Chapter XI of the UN Charter

Chapter XI of the UN Charter, the 'Declaration Regarding Non-Self-Governing Territories', was a revolutionary statement, in that the colonial powers of 1945 promised that from then on, the interests of the colonial peoples would be of the first most importance in the administration of the NSGTs. Article 73 states that:

Members of the United Nations which have or assume responsibilities for the administration of territories whose peoples have not yet attained a full measure of self-government recognize the principle that the interests of the inhabitants of these territories are paramount, and accept as a sacred trust the obligation to promote to the utmost, within the system of international peace and security established by the present Charter, the well-being of the inhabitants of these territories (...).

The 'Administering Members' furthermore promised to develop the political, economic, social and educational advancement of the territories, and to develop self-government, while taking into account the political aspirations of the people. The Declaration does not refer to 'independence' (in contrast with Chapter XII, 'International trusteeship system') or 'self-determination'.

The colonial powers of 1945 probably intended Chapter XI to be no more than a code of good conduct,³³ but difference of opinion existed from the start among the Members of the UN on the legal character of Chapter XI. The colonial powers had insisted at the San Francisco Conference that the Chapter should be titled a 'declaration', to show that it was intended as a unilateral statement of principles, not as a basis for a system of supervision by the United Nations. After the adoption of the UN Charter, the anti-colonial Members of the UN, supported by a majority of legal scholars,³⁴ argued that since the Declaration had been incorporated into a treaty, it was equally binding as any other Chapter of the Charter.

The Administering Members maintained that even though Chapter XI created far-reaching obligations and responsibilities, it should in no way infringe upon their domestic jurisdiction. Between 1945 and 1970 many states, including the Netherlands, claimed that Article 2, para. 7 prohibited the UN from interfering in the administration of their NSGTs. The 'colonial problem' should remain an internal affair of states. But as *Kelsen* already pointed out in 1950, Article 10 of the Charter gives the GA the authority to discuss any subject within the scope of the Charter and make recommendations thereon. Under Article 6 of the Charter, the GA could, upon the recommendation of

³³ Kuyper & Kapteyn 1980, p. 155.

³⁴ See Engers 1956, p. 200-210 for a comprehensive review of the contemporary scholarship on the legal status of Chapter XI.

the Security Council, expel a member state that persistently violated the principles of the Charter. *Kelsen* states: 'If this is 'supervision', the Charter indeed does provide organs for the supervision of application of Chapter XI'.³⁵ According to *Kelsen*, it is not impossible for states to invoke Article 2, para. 7 in this area, but an interpretation which places the administration of the NSGTs essentially within the domestic jurisdiction of states would make the provisions of Chapter XI illusory.

Which Territories Were Intended to Fall Within the Scope of Chapter XI?

There exists some disagreement among writers as to the categories of territories that the drafters intended to be covered by Chapter XI. *Kelsen* thought that it referred only to those colonies inhabited by 'relatively primitive aborigines with a backward civilization', or 'peoples which were not yet able to stand by themselves'.³⁶ *Engers* and *El-Ayouty* pointed out that only the UK expressed itself in this sense during the drafting of the Charter.³⁷ *Fastenrath* thinks it reasonable to assume that the drafters intended the territories that were traditionally considered colonies in 1945. *Goodrich, Hambro & Simons* consider that the records of the San Francisco Conference do not shed much light on what the drafters had in mind.³⁸

Whatever the real intentions of the drafters, the representatives at the UN assumed that Chapter XI had been intended to cover all of the Western overseas territories, and that it had not been intended for other dependent, backward, or disenfranchised population groups.³⁹ *Kelsen* pointed out that Chapter XI does not make it impossible that territories not traditionally considered colonies, could be NSGTs, as long as they are not part of the 'metropolitan areas' of the Member states, as Article 74 of the Charter puts it,⁴⁰ but the UN has not made use of this possibility.

The early UN practice shows that all of the territories that were traditionally considered 'colonies' were considered to fall within the ambit of Chapter XI. During the first debates in the GA on this issue, Administering States such as Australia and the UK explicitly considered Chapter XI to deal with the 'colonies'. The UK for instance spoke of 'the colonial or non-self-governing

³⁵ *Kelsen* 1950, p. 551, note 1.

³⁶ *Kelsen* 1950, p. 556. See also *Ninčić* 1970, p. 227, where it is claimed the drafters intended the 'areas of classical colonialism'.

³⁷ See *Engers* 1956 and *El-Ayouty* 1971 for analyses of the *travaux préparatoires*.

³⁸ *Goodrich, Hambro & Simons* 1969, p. 458-9. *Fastenrath* 2002, p. 1091.

³⁹ The representatives thought there had existed 'a measure of agreement' at the San Francisco Conference that dependent peoples living within the borders of the metropolitan areas of states were excluded from the scope of Chapter XI. See the summary of the debates on this issue in *Non-Self-Governing Territories: Summaries and Analyses of Information Transmitted to the Secretary-General during 1950*, New York: United Nations 1951 (UN Doc. ST/TRI/SER.A.5/Vol.I), p. 51-52.

⁴⁰ *Kelsen* 1950, p. 556. See also *Crawford* 2006, p. 610-2.

peoples'.⁴¹ The correctness of the equation colony = NSGT has been put into question, most notably by the Belgian representatives at the UN. The so-called *Belgian thesis* provides that Chapter XI of the Charter, dealing with the NSGTs, should also be applied to the backward or otherwise non-self-governing areas of the non-Western states.⁴² This thesis has not been accepted⁴³ and in fact increasingly aroused the anger of the Third World states, for which reason Belgium was requested by the other Administering Members not to defend it any more in the GA.⁴⁴

2.2.2 Transmission of Information under Article 73 *e*

Paragraph *e* of Article 73 is the only paragraph of Chapter XI that provides for a concrete and controllable obligation. It obliges the Administering Members to transmit regularly 'statistical and other information of a technical nature relating to economic, social and educational conditions in the territories for which they are (...) responsible.' Political conditions were intentionally excluded, and the reports would serve 'information purposes' only. The paragraph does not state how and by whom it should be decided when this obligation to transmit information exists.

All of the Members that were considered to possess colonies had upon request by the Secretary-General listed the NSGTs that they administered and had already started reporting on them.⁴⁵ The list included all of the Western 'colonies' (except those of Spain and Portugal, which were not yet members of the UN) and even included some European territories,⁴⁶ and a number of territories of which it might have been doubted whether they fell within the traditional category of colonies because their Administering States were not Western European powers.⁴⁷

41 Cited in Kelsen 1950, p. 555, note 5.

42 See for instance the speech by the Belgian representative in the Fourth Committee of the Fourth Session, GAOR (IV) Fourth Committee, 124th Meeting, par. 39-40. See also Claude 1975, p. 125 et seq.

43 In the early years of the UN, it was also defended by France, see for instance the statement of the representative of France in the Special Committee on Information of 1949, UN Doc. A/AC.28/SR.2, p. 7. China (Taiwan) in 1963 requested the Decolonization Committee to declare that the Declaration on the Granting of Independence also applied to the European and Asian territories that were subjected to 'Soviet colonialism', especially the 'Chinese' territories that Russia had acquired during the 19th century through the conclusion of unequal treaties. See Barbier 1974, p. 165.

44 During the final debates on the Netherlands Antilles and Surinam in 1955, the Netherlands delegation feared Belgium would again enrage the anti-colonial states, and asked the UK to request Belgium not to make a radical speech in the GA.

45 GA Res. 66 (I) of 14 December 1946.

46 Cyprus, Gibraltar and Malta.

47 Australia, New Zealand and the United States.

When Spain and Portugal joined the UN in 1955, they informed the Secretary-General that they did not consider their African and Asian 'overseas provinces' to be NSGTs. But a majority in the GA probably thought otherwise.⁴⁸ The non-Administering states wished to declare these territories NSGTs, but such a move by the GA would have been unprecedented since all of the other NSGTs had been voluntarily listed by the Administering members. The GA had been working on a list of factors that should decide whether a territory was a NSGT or not, but this process had been consistently opposed by the Western states.⁴⁹

The GA in 1959 made another attempt to reach consensus on the definition of NSGTs. It instituted a 'special committee of six on the transmission of information under Article 73 (e)', which should study the 'principles' which should guide member states in determining whether or not an obligation existed to transmit information under Article 73 e.⁵⁰ The Committee was made up of three non-Administering members (India, Mexico and Morocco), and three Administering members (the UK, the US, and the Netherlands⁵¹).

On the basis of the study of factors conducted in the early 1950s, and on the views on this issue that 26 governments had submitted to the Secretary-General,⁵² the Committee unanimously drew up a list of 12 principles to be approved in the 15th session of the GA. This result, the Netherlands representative stated, was 'a shining example to the Fourth Committee of what members can achieve when united by common effort, good faith and perseverance, under the guidance of an inspiring chairman'.⁵³ These Principles would be adopted as GA Resolution 1541 (XV) on 15 December 1960.

The first Principle 'reaffirms' that Chapter XI applies only to territories which were known in 1945 'to be of the colonial type'. The GA thus explicitly connected Chapter XI to colonialism and thereby also rejected the Belgian thesis. The representatives were not entirely in agreement on the question of which territories were 'of the colonial type', as was shown by the attempt of

48 See El-Ayouty 1971, p. 180 and Wohlgemuth 1963.

49 See El-Ayouty 1971 for a description of the extensive debates at the UN on this subject during the 1940s and 1950s.

50 GA Res. 1467 (XIV) of 12 December 1959, adopted by 54 votes to 5, with 15 abstentions. The Netherlands abstained, see GAOR (XIV) Plenary meetings, p. 726.

51 The Netherlands at that time still administered West New Guinea as a NSGT. Because of the mounting political tensions concerning this territory, the Netherlands was keen to show its dedication to the cause of decolonization.

52 Summarised in [UN Doc. A/AC.100/L.1 (mimeographed only)].

53 Statement by Dingemans in the Fourth Committee on 2 November 1960, GAOR (XV) 4th Comm., 1032nd Meeting, para. 1.

the Ukraine to have the Canary Islands included in a list of territories on which Spain should transmit.⁵⁴

The second Principle refuted a position often defended by the Netherlands and other Western states until 1960, and which played an important role in the debate on the status of the Netherlands Antilles and Surinam. The Principle states that the obligation to transmit information continues to exist until a full measure of self-government has been reached, and not until the territory has become self-governing in the three fields mentioned in Article 73 *e*. Principle IV further clarifies the scope of Article 73 *e*: an obligation to transmit information exists *prima facie* when that territory is geographically separate and ethnically and/or culturally distinct from the state administering it. In combination with the first principle, this definition included all of the territories that were at that time considered Non-Self-Governing, and it presumably also included such territories as the French DOMs and TOMs, Puerto Rico, Hawaii, the Netherlands Antilles and Surinam, and the Spanish and Portuguese overseas provinces. Based on principle I and IV there exists a presumption that all of these territories were NSGTs. The burden of proof probably lies with the presumed Administering State to show that Article 73 *e* does not apply.⁵⁵

Principle V offers further criteria that might strengthen or deny this presumption. These criteria were 'additional elements *inter alia* of an administrative, political, juridical, economic or historical nature', of which it was said that:

If they affect the relationship between the metropolitan State and the territory concerned in a manner which arbitrarily places the latter in a position or status

54 See UN Doc. A/C.4/L.651, introduced during the 1046th Meeting of the 15th Session of the GA (Fourth Committee), para. 20. The Soviet representatives claimed that this proposal was based on facts 'known to any schoolboy' (Soviet Union, 1034th Meeting, para. 30) and the Canary Islands 'had the same status as the other Non-Self-Governing Territories under Spanish administration' (Ukraine, 1046th Meeting, para. 20). Colombia responded that 'as every schoolboy knew, the Canary Islands, far from having ever been a colony, had been Columbus's last Spanish port of call on his way to America' (1047th Meeting, para. 39). Ireland (1049th Meeting, para. 9), Argentina (para. 31) and Haiti (para. 33) supported Spain, which considered the Ukrainian proposal 'a personal offence against all Spaniards' (1048th Meeting, para. 68). It seems that Spain had reached an agreement with representatives of a number of anti-colonial states, which provided that Spain would voluntarily consider a number of its territories as NSGTs. Spain in exchange obtained the guarantee that the Canary Islands would not be considered a NSGT (see BuZa 1961, p. 161). One reason why the African states were probably willing to negotiate with Spain, was that Morocco objected against the listing of the Western Sahara, Ifni, Ceuta and Melilla as NSGTs which it considered integral parts of its territory (1046th Meeting, para. 39). The proposal of the Ukraine was rejected by 42 votes to 15, with 16 abstentions (1048th Meeting, para. 71-77). Other states suggested that the Azores and Madeira should be included in the list of Portuguese territories, but this suggestion was not acted upon.

55 Principles IV and V were interpreted in the 4th Comm. to place the burden of proof with the state, see for instance the statement by Pakistan (GAOR (XV) 4th Comm., para. 4).

of subordination, they support the presumption that there is an obligation to transmit information under Article 73 e of the Charter.

It must be assumed that these additional elements could also lead to the conclusion that an obligation to transmit information does *not* exist, even though that obligation existed *prima facie* on the basis of the Principles I and IV. In that case, the additional evidence should prove that the territory is *not* arbitrarily subordinated to the metropolitan state. The Principle does not indicate how it should be determined whether a territory is 'arbitrarily' placed in a position of subordination, but the next Principle states that:

A Non-Self-Governing Territory can be said to have reached a full measure of self-government by:

- (a) Emergence as a sovereign independent State;
- (b) Free association with an independent State; or
- (c) Integration with an independent State.

Strictly speaking, the Resolution does not state that a full measure of self-government can only be achieved in these three ways, nor that a territory which has not achieved any of these three statuses is arbitrarily placed in a position of subordination. The Principles do not explicitly exclude the possibility that the constitutional relations between a territory and a metropolitan state do not comply with the criteria for integration or association, as defined by Principles VII until IX, but still do not constitute an arbitrary subordination of the territory.

The Principles might also be used (more or less *a contrario*) to define the status of colony. Colonies, according to Principles IV and V, would be overseas territories, ethnically and culturally distinct from the people of the metropolis, and arbitrarily subjugated to the metropolis. The population of a colony has not voluntarily agreed to its political status, because it is a key element in free association and integration that the people should have freely adopted it (Principles VII and IX). Any political status that has not been clearly approved by the population, therefore runs the risk of being branded 'colonial' on the basis of GA Res. 1541.

1541 constituted a large step towards consensus on the issue of decolonization among the administering and non-Administering States. The main point of contention remained the competence issue, but besides that, most of the UN members agreed that the Principles represented an accurate picture of 'a full measure of self-government'.

For the most part, the Principles were generally supported in the GA, as 'logical and clear',⁵⁶ 'clear-cut basic principles',⁵⁷ which were 'extremely'

⁵⁶ The Netherlands (1032nd Meeting, para. 1).

⁵⁷ Ghana (1032nd Meeting, para. 16).

satisfactory.⁵⁸ Some Third World representatives stated that the Principles were nothing new, because the GA had already agreed on everything they contained. Other Third World states thought it very important that the Principles were the result of a compromise between the administering and non-Administering States. That would add to their status, especially if the GA were to adopt them unanimously. It was hoped that the Principles would compel the Administering States to change their interpretation of Chapter XI so that their behaviour would not be in violation of international law. The Netherlands stated there could be 'no doubt that the twelve principles set forth in the report will be a useful guide to all member nations represented here in determining whether or not an obligation exists to transmit information'.⁵⁹

UN Supervision

The Fourth Committee made only one change to the proposals, albeit an important one. The administering members of the Committee of Six had agreed to include in principle IX, which dealt with the processes by which a NSGT could integrate with a state, the following sentence:

It is recognised that in certain circumstances United Nations supervision of such processes may be desirable.⁶⁰

This sentence already represented a major change in the position of the administering members, in that it allowed the possibility that the UN might play a supervisory role in the integration of territories with states, but it did not go far enough for a majority of the UN members.

The UN's supervisory role in these processes was one of the most contentious issues before the 15th Session of the GA. In the Fourth Committee, the representatives of Tunisia and Togo submitted an amendment⁶¹ which changed the final sentence of Principle IX to read:

The United Nations could, when it deems it necessary, supervise these processes.⁶²

⁵⁸ Cambodia (1044th Meeting, para. 2).

⁵⁹ Statement by Dr. Dingemans in the Fourth Committee, reproduced in BuZa 1961, p. 378. The Official Records of the GA report that Dingemans said: 'the Principles would be a useful guide to the Fourth Committee in determining whether an obligation existed to transmit the information called for in Article 73 e of the Charter'. That would mean the Netherlands already considered the GA competent to decide when Article 73 e applied (GAOR (XV) 4th Committee, 1032nd Meeting, para. 1).

⁶⁰ Report of the Special Committee of Six (etc.) of 3 October 1960, UN Doc. A/4526, p. 3.

⁶¹ According to the Netherlands ministry for Foreign Affairs, the amendment was inspired by the situation in Algeria (*see* BuZa 1961, p. 160). Algeria was one of the most contentious issues of the 15th GA, *see below*.

⁶² Principle IX, (b).

Tunisia and Togo were urged by many representatives to withdraw their proposal in order not to disrupt the wide but delicate consensus established through the carefully crafted compromise in the Committee of Six. It was feared that the amendment, if adopted, would lead to the Administering States abstaining from the vote on the Principles, which would lessen their value.⁶³ The amendment was nonetheless put to the vote and adopted by 38 votes to 24 (including the Netherlands and all the other Western states) with 26 abstentions,⁶⁴ showing how divided states still were on the subject of UN supervision.⁶⁵

Unity of Article 73

Most states considered that the obligation of Article 73 *e* could not be isolated from the rest of the Article.⁶⁶ Chapter XI should be read as a whole and the obligation to transmit information could only end when the territory achieved a full measure of self-government. Only by studying the information transmitted by the Administering state, could the UN judge whether the state fulfilled its obligations under Article 73 *a* through 73 *d*. This subject is of particular relevance to the status of the Netherlands Antilles and Aruba under Chapter XI (*see* Chapter 6).

The text of Article 73 *e* provides that the information is transmitted 'subject to such limitation as security and constitutional considerations may require'. Principle XI interprets this provision as follows:

The only constitutional considerations to which Article 73 *e* of the Charter refers are those arising from constitutional relations of the territory with the Administering Member. They refer to a situation in which the constitution of the territory gives it self-government in economic, social and educational matters through freely elected institutions. Nevertheless, the responsibility for transmitting information under Article 73 *e* continues, unless these constitutional relations preclude the Government or parliament of the Administering Member from receiving statistical

⁶³ GAOR (XV), 4th Comm., 1042nd – 1046th Meetings. *See also* BuZa 1961, p. 160.

⁶⁴ 1045th Meeting, para. 28.

⁶⁵ It was shown during the same session of the GA that a majority of states were prepared to put Principle IX in practice with regard to Algeria (even though that territory was not considered a NSGT). Tunisia (together with 23 other states) submitted a proposal to have the GA 'decide' that a referendum should be conducted in Algeria, 'organized, controlled and supervised by the United Nations'. This proposal was adopted by the Fourth Committee by 38 to 33 votes, but the Committee also decided that this resolution required a two-thirds majority in the Plenary. Cyprus submitted a compromise proposal that recommended that a referendum should be held under the auspices of the UN. This proposal received 53 votes in favour and 27 against, and was therefore not adopted. *See the Yearbook of the United Nations* 1960, p. 132-6.

⁶⁶ Burma (1033rd Meeting, para. 7)

and other information of a technical nature relating to economic, social and educational conditions in the territory.

This suggests that it might be possible that there exist territories which do not possess a full measure of self-government, but on which the Administering State does not have to report to the Secretary-General. Difference of opinion existed among members of the Special Committee and the Fourth Committee on what the Principles actually meant to provide for such situations.

The idea that there could be NSGTs on which no information was transmitted, was unpalatable for many non-Administering States. They stated that the GA had never accepted that 'fallacious argument',⁶⁷ which could be used as a pretext by colonial powers to provide no information on their colonies.⁶⁸ Some members thought the situation purely hypothetical. Why should the constitution of a NSGT provide that it would not transmit information to the Administering State? Moreover, in a situation where only limited powers had been delegated to the NSGT, the final responsibility for the territory still lay with the Administering State.⁶⁹

The debate also involved Principle X, which states that:

The transmission of information on Non-Self-Governing Territories under Article 73 *e* of the Charter is subject to such limitation as constitutional and security considerations may require. This means that the extent of the information may be limited in certain circumstances, but the limitation in Article 73 cannot relieve a Member State of the obligations of Chapter XI. The "limitation" can relate only to the quantum of information of economic, social and educational nature to be transmitted.

The UK representative in the Special Committee of Six only accepted Principle X 'on the understanding that there might be circumstances in which constitutional considerations of the kind referred to reduced to nil the amount of information which could be transmitted'.⁷⁰ A number of representatives in the Fourth Committee regretted that the UK had made this 'reservation', because it limited the value of the Principles, or could even make them void.⁷¹ Venezuela stated that under no circumstances could the amount of information be reduced to nil, because Principle X stated that the constitutional considerations could not relieve a state of its obligations of Chapter XI, and the UK should have been satisfied with the last sentence of Principle XI. The UK answered that the statement had not been intended as a reservation but as

67 Burma (1033rd Meeting, para. 8).

68 Venezuela (1035th Meeting, para. 22) and Nigeria (1035th Meeting, para. 29).

69 Nigeria (1035th Meeting, para. 29).

70 Report of the Special Committee of Six (etc.), GAOR (XV), Annexes, Agenda item 38, para.15 (UN Doc. A/4526).

71 Venezuela (1035th Meeting, para. 21).

a clarification, and agreed with Venezuela that Principle XI met the UK's position.⁷² Principles X and XI were adopted unchanged by the GA.

Voting

The Principles were adopted in the Plenary of the GA by 69 votes to two (South Africa and Portugal) with 21 abstentions.⁷³ The Netherlands and most of the other Administering States abstained from the vote, but not because they did not agree to the principles which they had helped to draft. They stated that their reason for abstaining lay in the adoption of the amendment submitted by Tunisia and Togo, while the Principles were otherwise completely acceptable.⁷⁴ The Socialist states of Eastern Europe also abstained, because they still considered decolonization could only lead to independence.

During this same session of the GA, the representative of Spain announced that his government would start transmitting information on a number of Spanish NSGTs.⁷⁵ The government of Portugal refused to make a similar promise and the GA therefore decided to take the revolutionary step of declaring that it considered nine Portuguese territories to be non-self-governing, and that an obligation existed for Portugal to transmit information on these territories under Article 73 e.⁷⁶ The GA also issued a strong declaration regarding Algeria, a territory which France claimed was integrated with the metropolis.⁷⁷ By these two declarations, the GA showed that it considered itself competent to decide which territories fall within the scope of Chapter XI.

⁷² UK (1035th Meeting, para. 24.

⁷³ GOAR (XV) Plenary, 948th Meeting, para. 88. In the Fourth Committee, there had been three negative votes. Spain had apparently changed its opinion and abstained in the Plenary. It explained its vote by stating that the Principles 'contain valuable ideas' but the draft resolution was 'confused, imprecise and open to erroneous interpretations' (GAOR (XV) Plenary, 948th meeting, para. 95).

⁷⁴ For the Netherlands *see* the statement by Dr. Dingemans in the Fourth Committee (1046th Meeting), reproduced in BuZa 1961, p. 382. Belgium abstained because it did not think the GA was authorised to say anything on a matter that lay 'within the exclusive jurisdiction of sovereign States' (1046th Meeting). Spain and Portugal (which voted against) stated that the Principles would be used against them, which showed that they were not properly formulated. South Africa did not explain its negative vote.

⁷⁵ GAOR (XV) Fourth Committee, 1048th Meeting. This announcement appears to have been the result of negotiations between Spain and the anti-colonial Third World countries, *see* below in the Paragraph on the Decolonization Committee.

⁷⁶ GA Res. 1542 (XV) of 15 December 1960, adopted by 68 votes to 6, with 17 abstentions. The Netherlands abstained.

⁷⁷ GA Res. 1573 (XV) of 19 December 1960.

2.2.3 Subsequent attitudes towards Resolution 1541

A considerable number of GA Resolutions has referred to Resolution 1541 as one of the signposts for the decolonization process in almost all of the remaining NSGTs and similar territories. Administering states have treated 1541 as an authoritative document for the purpose of determining the acceptability of decolonization schemes falling short of independence. A clear example was the decolonization process of the Cook Islands and Niue, where New Zealand explicitly used the criteria of 1541 to guide its actions. The UK aimed at 'complete compliance' with 1541 in the creation of the Federation of Malaysia,⁷⁸ and with regard to its associated states in the Caribbean. Australia used 1541 in the decolonization of the Cocos (Keeling) Islands. *See further* in Chapter 3.

The Netherlands considered 1541 as one of the most important resolutions with respect to self-determination and decolonization,⁷⁹ although after 1970, the Netherlands has attached more importance to the Friendly Relations Declaration (2625 (XXV)) in various official statements on self-determination. The Netherlands also claimed that its relations with Surinam and the Netherlands Antilles fulfilled the Principles of 1541, in the sense that those territories had become freely associated with the Netherlands (*see* Chapter 6).

Resolution 1541 was emphatically used in the debate on New Caledonia in 1986.⁸⁰ It has also been invoked in many other (unsuccessful) attempts to have territories (re-) inscribed on the list of NSGTs.⁸¹

Some authors have nonetheless belittled the importance of 1541,⁸² but usually from a viewpoint of the right of colonies to independence, in which context GA Res. 1514 (XV) was of course much more important. When discussing integration and especially free association regimes, many authors are

⁷⁸ *See* Rapaport et al. 1971, p. 101.

⁷⁹ *See* Kuyper & Kapteyn 1980, p. 201-4.

⁸⁰ When the GA decided in 1986 that the situation in the French *territoire d'outre-mer* New Caledonia was one of international concern, it applied the Principles to reach the conclusion that 'New Caledonia is a Non-Self-Governing Territory within the meaning of the Charter' and that 'an obligation exists on the part of the Government of France to transmit information on New Caledonia under Chapter XI of the Charter'. On this occasion, an Administering State (New Zealand) and a former Administering State (Australia) used the Principles of 1541 as the legal basis for their argument that New Caledonia was a NSGT. The other South Pacific states also referred to Resolution 1541, 'which must guide the membership' in making a determination of the status of a territory. The representative of Fiji underlined that the Principles of 1541 were 'drawn up carefully, deliberately and systematically', that they were 'overwhelmingly endorsed by the Assembly', and that 'their status in international law has been attested to by the International Court of Justice' (GAOR (41), Plenary, 92nd Meeting, p. 7). Similar comments were made by the representatives of Thailand (91st Meeting, p. 93), and Ghana (92nd Meeting, p. 47).

⁸¹ *See* Lopez-Reyes 1996, Castanha 1996, Churchill 2002, and Pakaukau 2004 in their appeals to have Hawaii re-inscribed as a NSGT. Barsh 1984 uses 1541 to show that Alaska should perhaps not have been removed from the list of NSGTs.

⁸² *See* for instance De Smith 1974, p. 71.

of the opinion that the criteria of 1541 are the most likely candidate for the GA to apply.⁸³

Despite the fact that the Netherlands abstained from the vote on 1541, it afterwards referred to this resolution at several instances as an important legal source for defining the right to self-government. The Netherlands government claimed that 1541 offered freedom of choice to the inhabitants of colonial territories. It vented this opinion for instance in the Security Council with regard to the Portuguese overseas territories,⁸⁴ and in the Fourth Committee of the GA with regard to Fiji,⁸⁵ and with regard to Gibraltar.⁸⁶ This attitude by the Netherlands was obviously influenced by the desire to obtain or maintain the support of states and UN organs for its ties with West New Guinea, Surinam and the Netherlands Antilles.⁸⁷ But it also shows that the Netherlands had accepted that the UN could lay down criteria for the administration of the overseas territories of the Netherlands, and that it considered that its relations with the Netherlands Antilles (and Aruba) should comply with the standards of 1541.

2.2.4 Legally Binding Force of Resolution 1541

During the debate on the Principles in the Fourth Committee, many representatives said that the formulation of the Principles was a legal matter.⁸⁸

It could well be defended that the project of formulating the Principles intended to register the agreement among states on the interpretation of

83 See for instance Clark 1980, p. 71. *Keitner & Reisman* consider that 1541 contains 'critical factors in determining the international lawfulness of an association'.⁸³

84 See statement by the Netherlands representative of 9 November 1965 in the Security Council, BuZa, No. 82, p. 195.

85 See statement by the Netherlands representative of 6 December 1966 in the Fourth Committee, BuZa, No. 83, p. 343.

86 See statement by the Netherlands representative of 16 December 1968 in the Fourth Committee, BuZa, No. 93, p. 298.

87 Kuyper & Kapteyn 1980, p. 202.

88 See for instance the statement by Brazil (1037th Meeting, para. 17), Guinea (1038th Meeting, para. 5), and Mexico (1043rd Meeting, para. 37). A number of (Third World and Socialist) representatives thought that a legal debate was not necessary or desirable because the colonial problem should or would be resolved by political means, *see for instance* the statement by the representatives of Liberia (1034th Meeting, para. 3). These states attached much importance to the fact that the Report of the Committee of Six stated in its introduction to the Principles that the Charter was 'a living document' and that 'the obligations under Chapter XI should be viewed in the light of the changing spirit of the times', but a proposal to have GA Res. 1541 refer to this paragraph in the report of the Committee was not adopted. The Canadian representative remarked afterwards that the debate 'might well give the impression that the Fourth Committee was the legislative body of a world Government and that it was engaged in drafting the fundamental law or even the criminal code of that Government', although he immediately added that the Committee should realise it was *not* the world legislature (GAOR (XV), 4th Committee, 1046th Meeting, para. 2).

Chapter XI. After long and difficult negotiations on this subject during the first fifteen years of the UN, the members finally succeeded to reach an agreement regarding a few essential principles to be taken into account when applying Chapter XI. The choice of words of the representatives sometimes revealed that the formulation of the Principles was thought to be akin to the drafting of a treaty.⁸⁹ If the main intent of the Resolution was to express an agreement among the member states, it could be regarded as having the same legally binding force as a treaty.⁹⁰ The main problem with this argument is that none of the Administering States voted in favour of the resolution, which would make it worthless as a treaty concerning the obligations of the Administering States.

It is perhaps better to see Resolution 1541 as a generally acceptable interpretation of a Charter provision.⁹¹ Whether such an interpretation is binding upon the members, depends upon the circumstances. The GA is not explicitly authorized to give authentic interpretations of the Charter. But the idea that the GA can – under certain circumstances – give binding interpretations of Charter provisions is generally accepted.⁹² At the San Francisco Conference it was concluded that ‘each organ will interpret such parts of the Charter as are applicable to its particular functions’. Combined with Article 10 of the Charter, the competence of the GA to interpret the Charter is considered to be very wide. In San Francisco it was also stated, however, that these interpretations of the Charter by an organ would not have binding force if they were ‘not generally acceptable’.⁹³

This statement has been interpreted to mean *a contrario* that GA Resolutions which interpret the Charter, and which are ‘generally acceptable’, are legally binding.⁹⁴ It has been suggested that all members of the UN should agree to such an interpretation,⁹⁵ or that ‘an overwhelming majority’ is needed,⁹⁶

89 See for instance the discussion about the British ‘reservation’ to Principle X, GAOR (XV) 4th Committee, 1035th Meeting.

90 See Castañeda 1969, p. 150 et seq. and Sloan 1991, p. 65-6 for GA Resolutions as agreements. See also Article 31 of the Vienna Convention on the Law of Treaties. The Vienna Convention does not apply to the UN Charter because the Charter predates the Convention (see Article 4 of the Convention) but its rules regarding interpretation of treaties were already part of international law in 1945.

91 Some representatives stated that they considered the Principles a legal interpretation of the Charter, for instance Tunisia (1036th Meeting, para. 29), Brazil (1037th Meeting, para. 17), Guinea (1038th meeting, para. 5), and Sudan (1039th Meeting, para. 12).

92 See Sloan 1991, p. 59.

93 Report of the Rapporteur of Committee IV/2, UNCIO Doc. 933, IV/2/42(2), p. 7, 12 June 1945 (UNCIO Documents, vol. 13, p. 703). Reproduced in Sloan 1991, p. 480.

94 See Sloan 1991, p. 59-60 for references to the works of Schachter, Sohn, Šahović, Tunkin and many others.

95 Šahović 1972, p. 49.

96 Asamoah 1966, p. 35.

or that the normal majority as provided by the Charter suffices,⁹⁷ or that the amendment procedure of the Charter should be applied analogously (two-thirds majority including the permanent members of the Security Council, *see* Article 108 of the Charter).⁹⁸

Despite these differing opinions, it may be concluded that a GA Resolution which clearly intends to interpret Charter obligations, and which is unanimously accepted, will have binding force on the member states.⁹⁹ If it is not unanimously accepted, then it may still have binding force if only a few states vote against it, especially if these do not include any of the permanent members of the Security Council. Special importance should also be attributed to the opinion of the states that should execute the obligations, especially in a case such as this where only a few states are considered to have obligations.

Only two states voted against 1541, but one of these was an Administering State (Portugal). All of the other Administering States abstained, as did all of the permanent members of the Security Council (three of which are still Administering States). But it should be recalled that the abstentions of most of the Administering States were caused by the amendment which gave the GA the authority to consider when UN supervision was necessary in a territory contemplating integration with the mother country. Most Administering States wholeheartedly supported the rest of the Principles, which were not really contested by the other UN members either. The Resolution was used by Administering States in the decolonization of several small territories (*see above*). Only France has not yet explicitly recognized 1541 as a valid interpretation of the Charter, but during the debate on New Caledonia in the GA in 1986, it did not contest the legitimacy of 1541.¹⁰⁰

97 Castañeda 1969, p. 123. This seems illogical, as the decisions of organs are always supported by a majority. That the phrase 'generally acceptable' was added at the San Francisco Conference therefore would have to mean something more than a simple majority, otherwise it would be pleonastic. *Castañeda* himself adds that 'politically', the consent of the principal members involved in the case, will determine whether the interpretation 'is, or remains, binding' (*Castañeda* 1969, p. 218, note 10).

98 Sloan 1991, p. 60 refers to *Akehurst*, with regard to a modification of the Charter by subsequent practice.

99 Sloan 1991, p. 60.

100 Curiously, the UK has recently denied the applicability of the Resolution to its NSGTs. On 12 November 2003, the Parliamentary Under Secretary of State for the OTs wrote to the Government Leaders of the OTs, stating: 'the UK did not vote for Resolution 1541 and is not bound by it.' He also asserted that the option of 'Free Association is unacceptable to the UK.' This statement should probably be considered as a mistake, or as irrelevant, seeing that the UK cooperated in the drafting 1541, and during the 1960s explicitly considered that it contained the international standards for the decolonization of NSGTs. The chairman of the Decolonization Committee in a reaction to the UK wrote that: 'If all UN members were to claim not to be bound by resolutions for which they did not vote, then the UN could not function. In fact, the UK was one of the authors of the resolution and in particular the concept of the three options. Its abstention during voting was only linked to disagreement with the issue of transmission of information. (...) It is unfortunate that

For the Netherlands, it is important to remember that it was a member of the Committee of Six that unanimously submitted the draft for the Principles to the GA, which was adopted without hardly any changes. The Netherlands abstained from the final vote because of the passage referring to the visiting missions, but it has confirmed on various occasions since 1960 that Resolution 1541 should guide the UN and member states in the area of decolonization.¹⁰¹

The main elements of 1541 were confirmed in 1970 by the unanimously adopted GA Resolution 2625 (XXV) which was intended to formulate a number of principles as the foundation of modern international law (*see below*). The legally binding character of 1541 was also confirmed by the Advisory Opinion of the ICJ on the Western Sahara of 1975.¹⁰² The Court has in general been prepared to consider the resolutions of international organizations as valid interpretations of their constituting treaties, and has paid little attention to the question whether these resolutions were unanimously adopted or not.¹⁰³

Resolution 1541 could therefore be considered as a generally accepted, and therefore legally binding interpretation of the Charter. Resolution 2625 would confirm the validity of the status options of 1541, and connect them explicitly with the exercise of the right to self-determination.

2.2.5 Reaffirmation of the Status Options: GA Resolution 2625 (XXV)

The 'Declaration on Principles of International Law Concerning Friendly Relations and Cooperation among States in Accordance with the Charter of the United Nations'¹⁰⁴ was the result of a drafting process that had started in 1961 when the GA asked its Legal Committee to study seven general principles of international law recognized in the UN Charter, among which the principle of equal rights and self-determination, and create new formulations of these principles in a draft declaration.¹⁰⁵

the UK still wants to limit the options facing the territories to gaining independence or maintaining the status quo. We have pointed out and wish to emphasize that the "free association" option offers the flexibility to allow both parties – the territories and the UK – to achieve their objectives (UN Doc. SC24/46/03). *See also* the paper presented by Pineau and Ebanks at the Cayman Islands Country Conference of 27-8 May 2004 at the University of the West Indies, entitled 'Self-Determination – The United Kingdom and the Overseas Territories'.

101 *See* Kuyper & Kapteyn 1980, p. 201-4.

102 Advisory Opinion of 16 October 1975, *ICJ Reports* 1975, p. 32-3. *See also* Cassese 1996, p. 356 et seq. and Crawford 2001.

103 Sloan 1991, p. 60-1.

104 GA Res. 2625 (XXV) of

105 For the genesis of 2625 (XXV) *see* Šahović 1972, Arangio-Ruiz 1979 and Mani 1993.

The aim was to reaffirm these principles as the foundations of modern international law.¹⁰⁶ The Declaration represented a compromise between the Western states (and their supporters) and the rest of the world. The principles became the subject of 'a bitter struggle' between the jurists representing their governments,¹⁰⁷ but the end result was adopted unanimously by the GA as part of the festivities surrounding the 25th anniversary of the UN.

It was also proposed by Third World and Socialist states to have the GA declare colonialism contrary to international law, for which reason it should be eliminated in all its forms.¹⁰⁸ As this might be interpreted as declaring the entire system of Chapter XI of the Charter illegal, it was decided to declare instead that 'subjection of peoples to alien subjugation, domination and exploitation constitutes a violation of the principle [of equal rights and self-determination of peoples]'. The proposal to include the phrase 'and other forms of colonialism' after the word 'exploitation' was not adopted, but it was decided to declare that: 'Every State has the duty to promote (...) realization of the principle of equal rights and self-determination of peoples (...) in order: (a) (...) (b) To bring a speedy end to colonialism'. Until this goal is achieved, the Declaration provides that:

The territory of a colony or other non-self-governing territory has, under the Charter, a status separate and distinct from the territory of the State administering it; and such separate and distinct status under the Charter shall exist until the people of the colony or non-self-governing territory have exercised their right of self-determination in accordance with the Charter, and particularly its purposes and principles.

It is not entirely clear what was meant by 'colonies or (other) non-self-governing territories'. A number of Third World and Socialist states gave their opinion on how a colonial situation could be recognised. These states thought that the concept of colonies was much wider than the conception of NSGTs current at that time. Many states referred in general to situations of 'subjugation and exploitation' and 'alien domination'. These situations might include the importation of foreign settlers, trade agreements concluded with individuals who did not represent the people, and racism. Examples given of colonial situations were South Africa, Namibia, Southern Rhodesia, Vietnam, Israel, the Maldives, Cyprus, Angola and Mozambique. The Soviet Union listed as an example 'the so-called administrative arrangements between former colonial powers and their erstwhile colonies', which may have included the Kingdom Charter.¹⁰⁹

106 The drafting of the formulations was delegated to a Special Committee, which was asked to strive for consensus so that the formulations might gain the status of international law (see Šahović 1972, p. 11, note 7).

107 Šahović 1972, p. 12.

108 See the several proposals cited in Mani 1993, p. 237.

109 Statement by the Soviet Union (UN Doc. A/AC.125/SR.43, p. 13).

The representative of Ghana stated that colonial relationships demonstrated an 'arbitrary subjugation of the interests of a recognizable group to the interests of another recognizable group in which the power of government rested' and also that the colonial people lived in an area distinct from the 'ruling area'. In case of doubt, the representative of Ghana suggested that the ICJ should be empowered to decide whether the situation exhibited the basic features of colonialism. The Court should consider 'all relevant factors such as geography, ethnic diversity, cultural differences, degree of self-government, history and tradition'.¹¹⁰

The Western states were not inclined to provide a material definition of 'colonies', but the proposals for the text on self-determination submitted by the UK and the US showed that these states considered colonies as a sub-category of the NSGTs.

The wording of the paragraph suggests that the category of NSGTs includes all colonies and perhaps also a number of territories that are no longer colonies. This would mean that any territory which is not a NSGT, is not a colony either. It is not certain whether the GA was aware of this implication. Later resolutions contain the phrase 'Non-Self-Governing Territories and other colonies', which seems to imply that 'colonies' is the broader category, encompassing all NSGTs and some other territories.¹¹¹ This choice of words may relate to a real difference of opinion on the definition of colonies and NSGTs, which is also visible at other instances. The first definition was proposed by the US and the UK, and fits the notion that colonialism is something of the past, or to be found only in a very humane form in a few NSGTs that are too small for full self-government. The second definition is typical of resolutions proposed by the Non-Aligned countries, and relates to the wish to provoke outrage against the *apartheid* regime of South-Africa and against Israel, and also to keep open the possibility of adding new territories to the list of NSGTs.

Arangio-Ruiz, who represented Italy in the Committee, states that the paragraph was 'intended to discourage or neutralise (...) the tendency of States to "dissimulate" the dependent condition of a people by promoting it to the status of province or overseas *département* or other municipal law subdivision, or to any other more or less autonomous status'. This intention certainly existed with some states that considered free association and integration unacceptable and thought the Declaration should refer to the obligation to grant independence without delay.¹¹²

110 Statement by Ghana (UN Doc. A/AC.125/SR.68, p. 18-9).

111 See for instance GA Res. 35/118 of 11 December 1980, which contains the 'Plan of Action for the Full Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples'.

112 See for instance the statement by Syria that 'concepts such as free association of a colonial territory with an independent State cannot be accepted because of their own inherent weaknesses' (cited in Mani 1993, p. 243) and the final Report of the Special Committee (GAOR (XXV) Supplement No. 18), which at p. 61 refers to statements by delegations to

However, ‘informal negotiations’ between the delegations during the final session of the Special Committee led to the inclusion of the other modes of exercising the right to self-determination.¹¹³ The Declaration proclaims that:

The establishment of a sovereign and independent State, the free association or integration with an independent State or the emergence into any other political status freely determined by a people constitute modes of implementing the right to self-determination by that people.

It is therefore not justified to claim that the Declaration denounces or discourages autonomy regimes or forms of integration with the mother country, as long as those are ‘freely determined by a people’.

It is not clear what the fourth option ‘any other political status’ means. It may have been intended to merely stress that self-government should be freely chosen by the population, whatever form it takes, as the ICJ appeared to think in the Western Sahara case. Seeing the absence of debate on this option during the drafting stage, it could also be considered as ‘a mere slip of the pen’.¹¹⁴

The Friendly Relations Declaration is considered to be one of the most important resolutions of the GA. Its historical value was ‘strongly emphasized by all the members of the United Nations who had taken part in the debate in the Legal Committee and in the plenary meeting of the 25th session of the General Assembly’.¹¹⁵ It provides evidence for the existence of *opinio juris* among most states that self-determination is a legal right of peoples, the exercise of which can lead to independence, free association, integration, or any other status freely chosen by a people. In view of its aim to interpret and develop a number of basic principles of the UN Charter, its unanimous approval in the GA and the extensive legal debates and political negotiations among states which preceded it, the Declaration should be considered as an interpretation by the member states of their obligations under the Charter.¹¹⁶ The section of the Resolution which deals with the freedom of choice is formulated to proclaim an existing right and a binding rule of law.

2.2.6 Who Determines Whether Chapter XI Applies?

Chapter XI does not state how and by whom it should be decided whether a territory is self-governing or not. During the debates on GA Resolution 1541

this effect.

¹¹³ Report of the Special Committee (GAOR (XXV) Supplement No. 18), p. 48.

¹¹⁴ Clark 1980, p. 77.

¹¹⁵ Šahović 1972, p. 48.

¹¹⁶ In this sense, see Šahović 1972, p. 49, Macdonald 1981, p. 243-4, and Ofuatey-Kodjoe 1995, p. 360. See also above the para. on the legally binding force of GA Res. 1541.

the question naturally arose *who is competent* to apply these factors and principles. With respect to many of the remaining overseas territories of Western states, the answer to this question really decides whether these territories are NSGTs or not, as the majority of the UN members states probably differ in opinion with the Administering States on the status of these territories.¹¹⁷

The GA has claimed a large role in determining the meaning of the concept of 'a full measure of self-government', and has claimed to be competent to decide whether a territory is self-governing. GA Res. 648 (VII) 'recognised' that the GA shared the authority to declare a territory self-governing with the Administering State. 742 (VIII) recommended that the GA and the Administering States would use the factors annexed to that resolution in determining whether a territory falls within the scope of Chapter XI of the Charter. 748 (VIII) on Puerto Rico referred to the 'competence of the General Assembly to decide whether a Non-Self-Governing Territory has or has not attained a full measure of self-government',¹¹⁸ as did Res. 945 (X) on Surinam and the Netherlands Antilles.¹¹⁹ The Administering States quite consistently opposed this opinion of the majority of states. Later resolutions avoided the subject in order to be able to reach unanimity.

This problem was one of the most divisive under consideration at the UN during the 1950's, as it determined whether the administration of the overseas territories of the Western states fell within their domestic jurisdiction or not.¹²⁰ Writers on the subject at the time varied in opinion on this question, which was part of the uncertainty that existed from the start of the UN on the role of the GA in the 'supervision' of the application of Chapter XI.¹²¹

117 These would at least appear to include Puerto Rico, the French overseas territories, and the Netherlands Antilles and Aruba (*see below*).

118 This paragraph of the Resolution was voted on separately and by roll-call. All Western states voted against it. The US nonetheless voted in favour of the resolution as a whole. Belgium and Australia voted against it. The other Administering States abstained (*see GAOR* (VIII), Plenary, 459th Meeting, para. 159-60).

119 In this case, the competence paragraph was also unanimously rejected by the Administering States, but this time, Denmark, France, the US and the Netherlands voted in favour of the resolution as a whole. Only Belgium voted against it. The other Administering States abstained.

120 *See Ninčić* p. 219 et seq.

121 *Engers* claimed that by the resolutions of 1953 and 1955, part of the Administering States' sovereignty has been taken away by a majority decision in the GA (*Engers* 1956, p. 159). *Spits* considered at the time that these decisions meant that the GA could now classify territories as non-self-governing that were not yet on the list of NSGTs, although he considered it doubtful whether the GA realised this, and whether it would ever take such a decision (*Spits* 1953, p. 110-11). *See also Spits* 1954, p. 444, where the author states with regard to a similar paragraph in the factors resolution of 1953 (GA Res. 742 (VIII), *see below*), that it is the GA which shall decide whether information should be transmitted under Article 73 e.

The GA has acted upon its claim of authority by declaring the Portuguese overseas provinces to be NSGTs in 1960,¹²² and New Caledonia in 1986.¹²³ The GA has also adopted a number of resolutions in which it extended the application of Resolution 1514 to territories which were (previously) not considered to be NSGTs. In 1961, it adopted such a resolution on Algeria,¹²⁴ in 1962 on Southern Rhodesia,¹²⁵ in 1965 on Oman,¹²⁶ in 1966 on French Somaliland,¹²⁷ in 1973 on the Comoro Archipelago,¹²⁸ and in 1975 on Brunei.¹²⁹ All of these resolutions prompted the Decolonization Committee to involve itself with these territories, which is not entirely the same as declaring them to be NSGTs, but the GA is rarely concerned with such legal niceties when decolonization is concerned.

Oppenheim considers that it was legitimate for the GA to establish suitable procedures for the implementation of Chapter XI, but does not state whether the GA is authorised to determine whether a territory is non-self-governing.¹³⁰ *Dahm* thinks that the interpretation of Article 73 must be left to the organs of the UN that are competent to receive the information under Article 73 e, and these organs should also be allowed to insist on compliance with it.¹³¹ According to *Thürer*, the organs of the UN are competent to demand that the obligations of Chapter XI are fulfilled, and states have a duty of loyalty to the

122 GA Res. 1542 (XV) of 15 December 1960.

123 GA Res. 41/41 A of 2 December 1986.

124 GA Res. 1724 (XVI) of 1961. Earlier resolutions on Algeria were probably not yet examples of the GA using or extending its authority under Chapter XI or GA Res. 1514, *see* GA Res. 1012 (XI) of 1957, 1184 (XII) of 1957, and 1573 (XV) of 1960. All of these resolutions were prepared by the First Committee instead of the Fourth Committee, which usually deals with decolonization issues. None used such words as 'colonial' 'Territory' or 'administering Power'. Algeria was referred by a number of states during the debate on Res. 1541 in 1960 as an example of fake integration with a mother country. The resolution of 1960 (1573) quoted a passage from 1514 ('the passionate yearning for freedom of all dependent peoples') and recognised the right to self-determination of the Algerian people. GA Res. 1724 explicitly referred to GA Res. 1514, thereby probably classifying Algeria as a colony, although not necessarily as a NSGT. The independence of Algeria (1962) came too soon for the Decolonization Committee to get involved with the issue.

125 GA Res. 1747 (XVII) of 28 June 1962.

126 GA Res. 2073 (XX) of 17 December 1965.

127 GA Res. 2228 (XXI) of 20 December 1966.

128 GA Res. 3161 (XXVIII) of 14 December 1973.

129 GA Res. 3424 (XXX) of 8 December 1975. The Decolonization Committee has also placed Puerto Rico on the list, but this decision was not endorsed by the GA (*see below*)

130 *Oppenheim/Jennings & Watts* 1992, p. 291. *Oppenheim* provides a list of instances in which the GA has stretched its legal powers beyond the limits of the Charter in the area of decolonization, but the unilateral claim of authority in determining NSGT is not on this list (*Oppenheim/Jennings & Watts* 1992, p. 294).

131 *Dahm* 1958, p. 579. The text of Article 73 e provides that the Secretary-General should receive the information.

organisation.¹³² A number of authors consider that the GA has simply claimed this authority in practice and has thereby acquired it.¹³³

Castañeda has argued that unanimous approval is not necessary when the GA decides whether a particular territory is Non-Self-Governing. Even if the state concerns does not agree, the decision is nonetheless binding, because the organs of the UN interpret the scope of the obligations imposed on states by the Charter in the process of applying the Charter provisions in concrete cases.¹³⁴ Another way of considering the legal character of the GA Resolutions on Chapter XI is by treating them as 'true determinations of facts or concrete legal situations', as *Castañeda* calls them. This type of resolutions provides 'the hypothesis or condition of the rules of law applied, or at times issued, by international organs in the performance of their activities'.¹³⁵ *Castañeda* differentiates between the condition (or hypothesis) and the consequence that is the result of the fulfilment of that condition. The consequence is determined by the law, but the existence of the condition must be determined by a person or an organ in the real world. As an example *Castañeda* refers to the rule of Article 73 e, which provides that if a state administers a NSGT (condition), then it is obligated to transmit information (consequence). For the GA to observe the compliance with this rule (which, *Castañeda* assumes, is within the competence of that organ) it must determine when this condition is fulfilled. This determination does not in itself create a legal obligation; it only makes possible the application of a rule established by the Charter.

Judge Jessup, in the South-West Africa cases before the ICJ in 1962, considered that the discussions at the UN on the authority of the GA under Chapter XI should be seen as negotiations between the member states of the UN. The objections of the Administering States to the 'interference' of the UN in this area have diminished considerably during the second half of the 20th century. In 1960, most of the Administering States stated that the GA did not have the

132 Thürer 1976, p. 97-8. Islam 1987, p. 10-12 considers the UN has a very broad and varied jurisdiction to intervene in the event of a transgression of its purposes. *Islam* considers the decolonization of the NSGTs as one of the purposes of the UN.

133 *El Ayouty* considers the competence question was not answered by the Charter, but by the GA, which resorted to a broad political interpretation of Chapter XI (*El Ayouty* 1971, p. 230-2). According to *Sloan*, the GA thus acquired through its own practice the authority to apply Chapter XI (*Sloan* 1991, p. 22). *Igarashi* maintains that self-government cannot legally be achieved without the explicit approval of the UN. When a state stops transmitting information under Article 73 e without the approval of the GA 'it is in obvious violation of its duty under the United Nations Charter' (*Igarashi* 2002, p. 234). Another view has been to see the role of the UN in this area as a guarantor, while the Administering State acts as the obligee (*Ofautey Kodjoe* 1970, p. 177-9). This view is also defended by *Lopez-Reyes* 1996, p. 84-5.

134 *Castañeda* 1969, p. 122-3. This does not mean that the GA is authorized to give general authentic interpretations of the Charter. *Castañeda* therefore considers that GA Res. 742 (VIII) and 1541 (XV) are not binding.

135 *Castañeda* 1969, p. 118 et seq.

authority to list the NSGTs of Portugal and voted against the resolution in which the GA nonetheless did so.¹³⁶ But during the 1960's the Administering States changed opinion, or perhaps considered opposing the GA's policy less important. From 1971, a general paragraph was included in the yearly resolution on Article 73 e, which affirmed that:

(...) in the absence of a decision by the General Assembly itself that a Non-Self-Governing Territory has attained a full measure of self-government in terms of Chapter XI of the Charter, the administering Power concerned should continue to transmit information under Article 73 e of the Charter with respect to that Territory.¹³⁷

At first, the Western states opposed this phrase, but the GA has continued to include it in its annual decolonization resolution. From 1986, these resolutions have been adopted unanimously, with only a small number of states abstaining from the vote.¹³⁸

There are now a considerable number of arguments for concluding that the GA does indeed have the authority to declare a territory non-self-governing. The GA has supported this assumption in unanimously adopted resolutions for more than 20 years now, it has used its alleged authority with respect to a large number of territories since the 1950's, the administering powers (except France) have usually solicited a positive GA decision before or shortly after ceasing to transmit information on a territory that did not become independent, and most legal writers have concluded that the GA has the authority to decide when a full measure of self-government has been achieved.

It can therefore be concluded that the GA is competent to decide when a NSGT attains a full measure of self-government other than through independence. This does not necessarily mean that the GA is also authorized to decide when the transmission of information should *start*. But it seems logical that when an organ has the authority to decide whether a territory is still a NSGT because it does not possess a full measure of self-government, it also has the authority to decide that a territory has *become* a NSGT because it no longer possesses a full measure of self-government. The GA does, however, appear to feel itself bound by the 'colonial confession' of 1946, whereby the colonial powers voluntarily listed their NSGTs. GA Res. 66 (I), which had taken note of this list, perhaps represents the maximum scope of application of

136 See GAOR (XV) 4th Comm., 1049th Meeting for the explanations of the negative votes which most Administering States cast on 1542 (XV). The Netherlands abstained from the vote, but did not explain why.

137 GA Res. 2870 (XXVI) of 20 December 1971.

138 See for instance GA Res. 41/13 of 31 October 1986. In 2003, the general decolonization resolution (including the usual statement of the GA's competence) was adopted by 163 votes to nil, with 6 abstentions (the US, the UK, France, the Federated States of Micronesia and Angola). See GA Res. 58/102 of 17 December 2003

Chapter XI of the Charter. GA Res. 1541 in a sense acknowledged this by limiting the obligation to transmit information to territories 'of the colonial type'.

2.2.7 The Colonial Countries and Peoples of Resolution 1514

With regard to the implementation of GA Resolution 1514, the Declaration on the Granting of Independence to Colonial Countries and Peoples of 1960, the GA has granted itself the unlimited authority to declare that territories fall under its application. This freedom of application was perhaps even one of the reasons for adopting the Declaration, and certainly for developing a system for its implementation.

The adoption of Resolution 1514 is considered to have been very important for the UN drive to obtain independence for all colonial territories. Looking at the GA Resolutions dealing with decolonization issues since 1960, the Declaration is referred to in each and every one. Indeed, in the eyes of the GA (and many observers¹³⁹), the Declaration was the key legal instrument in the area of decolonization, at least during the 1960's and 1970's.¹⁴⁰ In that period, the UN involvement with the NSGTs was claimed to be based in the first place on the Declaration, which gave the GA the freedom to designate any territory as 'a territory to which the Declaration applies'. This freedom appeared to open the door to purely politically motivated decisions to declare certain areas 'colonial', but in practice it was almost only used with respect to territories that also fell within the ambit of Chapter XI of the Charter as interpreted by Resolution 1541.¹⁴¹ When considering that Resolution 1541 also recognizes a right of independence for NSGTs, it could be wondered what addition Resolution 1514 has really made, in a legal sense, to Chapter XI and Resolution 1541 (*see below*). But one thing that the Declaration has definitely accomplished, is the establishment of the Decolonization Committee.

139 See for instance De Smith 1974, p. 71, and Asamoah 1966.

140 For the process of the adoption of Resolution 1514, *see* Higgins 1963, p. 100-1. For the legal significance of the Resolution during the early 1960s, *see* Asamoah 1966.

141 Islam 1987, p. 10 considers that the actions of the GA in the area of decolonization suggest that NSGTs may also include other territories than the conventional colonies. But the GA has only four times applied GA Res. 1514 to territories that had not been on the first list of NSGTs (GA Res. 66 (I)), namely Oman, Algeria, the Portuguese overseas provinces, and a number of Spanish overseas territories. The GA has considered the situation in South Africa and Palestine in resolutions that also dealt with the application of GA Res. 1514 (*see for instance* GA Res. 35/28 of 11 November 1980 and 35/35 of 14 December 1980), but these situations were never discussed in the Decolonization Committee, nor placed on the list of territories to which 1514 applied. The wording of the resolutions on South Africa and Palestine suggest that the GA considers apartheid, racism, and the treatment of the Palestinians by Israel to belong to the same category of international crimes as colonialism.

The Relation between Resolutions 1541 and 1514

The Declaration on the Granting of Independence (Resolution 1514) portrays 'complete independence and freedom' as the Valhalla of all dependent peoples. The most important paragraph of 1514 in this respect is operative paragraph five, which reads:

Immediate steps shall be taken, in Trust and Non-Self-Governing Territories or all other territories which have not yet attained independence, to transfer all powers to the peoples of those territories, without any conditions or reservations, in accordance with their freely expressed will and desire, in order to enable them to enjoy complete independence and freedom.

All territories which have not yet attained independence should therefore be given the possibility to 'enjoy complete independence' as soon as possible. This does not mean, however, that the founding of an independent state should always be the end result.¹⁴² Dependent peoples should be enabled to choose for independence in a situation where they possess 'all powers', but they are not obliged to use this freedom to become an independent state.

The Declaration demands from the metropolitan states that they relinquish political control over their non-metropolitan territories, at least for a period long enough for those territories to reach a sovereign decision on their future.¹⁴³ The Declaration does not forbid the people of the territory to choose, as a sovereign people, to reaffirm its ties with the mother country, or to delegate certain of its sovereign powers to that mother country. This interpretation of the Declaration is in line with the demands the Decolonization Committee made from several Administering States during the 1960's and 1970's. It was also defended by the representative of the UK during the debate in the Decolonization Committee on the West Indies Associated States in 1967, when he stated that:

That paragraph could have only one meaning: all powers must be offered to the people and those which they wished to assume and exercise for themselves directly must be transferred to them. In cases where they freely decided to request some other authority to exercise certain limited powers on their behalf, that fundamental recommendation in resolution 1514 (xv) was nevertheless satisfied, especially if, as in the present case, they had the opportunity to assume full powers themselves.¹⁴⁴

¹⁴² See in this sense Ofuatey-Kodjoe 1995, p. 359.

¹⁴³ For a similar view of what decolonization should entail, but from a sociological point of view, see *above* in the Paragraph on Colonies and Decolonization, with reference to the study by Verton. See also Korthals Altes 1999, p. 189 et seq.

¹⁴⁴ GAOR (XXII), Annexes, Addendum to agenda item 23 (part III), para. 787.

It might be wondered whether it is enough to merely ‘offer’ all powers to comply with Resolution 1514. Some authors interpret paragraph 5 to mean that the territory should be really *in possession* of all powers, and be a fully independent state, even if only for a second. Only at that moment can the population make a free choice to hand back certain powers to the former mother country.¹⁴⁵

Most of the members of the Decolonization Committee considered, however, that even when the people of a territory had freely chosen to become associated with an independent state, Resolution 1514 could continue to apply, as in the case of the West Indies Associated States and the Cook Islands. Perhaps Puerto Rico is another example. In these cases, the Administering State might no longer have an obligation to report on the territory on the basis of Article 73 *e* because the criteria of Resolutions 742 and 1541 had been met, and the territory could therefore perhaps no longer be considered a NSGT. But the GA could nonetheless decide to involve itself with the territory if the need arose, based on Resolution 1514, which continued to apply until the territory had achieved independence, many states thought.¹⁴⁶ The Resolution on the Cook Islands of 1965 specified this, and the debates on the West Indies Associated States and Puerto Rico also confirmed that this was the opinion of a majority of states.¹⁴⁷

The question remains, then, whether a choice not to become independent, in compliance with Resolution 1541, should be considered final, or whether such a territory retains a right to decolonization. Resolution 1514 might be read to mean that decolonization can only really be considered complete after full independence has been achieved. Resolution 1541 suggests otherwise, as does Resolution 2625 for that matter.

Some authors consider 1541 should take precedence over 1514. *Ofuatey-Kodjoe* calls 1541 ‘an even more authoritative definition of the meaning of the right of peoples to self-determination’ than 1514, because the Principles have ‘furnished the basis of subsequent UN practices of self-determination’. In his

¹⁴⁵ See for instance the recitation by Harrop Freeman of 1979 cited in Macdonald 1981, p. 249-50.

¹⁴⁶ See for instance the statement by Tanzania in the Decolonization Committee in 1967 (GAOR (XXII), Annexes, Addendum to agenda item 23 (Part III), para. 808. Similarly India in para. 927). During this debate on the West Indies Associated States, the UK repeatedly asked the anti-colonial states whether they rejected Resolution 1541. India, in response, probably voiced the opinion of the majority of the Committee, when it agreed with the UK that ‘Resolutions 1514 (XV) and 1541 (XV), both highly respected by his delegation, were not contradictory. By that his delegation meant that in a case where Resolution 1541 (XV) had been satisfied, Resolution 1514 (XV) might still apply, though not necessarily in every case’ (para. 919). The representative of Uruguay objected to this, and stated: ‘If that interpretation was accepted, the integration of Greenland with Denmark, for example, and of Surinam with the Netherlands (...) would have to be considered invalid’ (para. 860), but he was not supported by other representatives on this point.

¹⁴⁷ See Chapter 3 on the Cook Islands, the West Indies Associated States and Puerto Rico. The Netherlands Antilles and Aruba perhaps also fall in this category (see Chapter 6).

view, 1541 'is more consistent with the practice of the United Nations throughout the era of decolonization'.¹⁴⁸ *Prince* thinks that 'Resolution 1541 should carry more weight because it reflects more of an attempt to interpret United Nations Charter provisions'.¹⁴⁹ *Macdonald* tries to reconcile 1514 and 1541, 'these two embodiments of opposing political and philosophical positions', by interpreting them to create on the one hand 'an irrebuttable presumption' that with independence the right to self-determination would be satisfied, while on the other hand creating 'a rebuttable presumption *against* free association and integration' as forms of self-determination, because these status options 'possess more possibility for exploitation and denial of self-determination by the metropolitan country than independence'.¹⁵⁰ In the Chapter on free association and integration (Chapter 3), the finality of these options will be discussed further.

The interpretation of Resolution 1514, and the scope of its application, has been determined to a great extent by the Decolonization Committee.

The Decolonization Committee

The GA in 1961 instituted a Special Committee on the Situation with Regard to the Implementation of the Declaration (here referred to as the Decolonization Committee, but also called the Special Committee, or the Committee of 24).¹⁵¹ Because the membership of this Committee was not based on parity between administering and non-administering States, as the previous committees which only dealt with Chapter XI had been. It quickly became a platform for the most radical anti-colonial states to attack the policies of the remaining Administering Powers.¹⁵² The US, the UK, Italy and Australia all resigned from the Committee between 1969 and 1971,¹⁵³ and as France and Portugal had never co-operated, the only Administering Powers that remained willing to discuss their

148 *Ofuately-Kodjoe* considers that despite its dramatic impact, 'the Declaration's effect on the General Assembly's definition of the right to self-determination was more peripheral than at first believed' (*Ofuately-Kodjoe* 1995, p. 359).

149 *Prince* 1989, p. 44.

150 *Macdonald* 1981, p. 244. In a similar sense, see *Asamoah* 1966, p. 166, and *Prince* 1989, p. 83.

151 GA Res. 1654 (XVI) of 27 November 1961, adopted by 97 to nil, with 4 abstentions (France, South Africa, Spain and the UK). GA Res. 1810 (XVII) of 17 December 1962 provided further instructions for the Committee.

152 *Franck* 1985 describes how the 'radicals' within the anti-colonial movement succeeded in 'hijacking' the Committee.

153 The UK withdrew when the GA adopted Resolution 2908 (XXV), the programme of action for the implementation of GA Res. 1514, which contained special recommendations for Southern Rhodesia and other territories, and which convinced the UK that the Committee could no longer offer solutions to the problems of decolonization. The other Western states resigned because they considered the Committee did no longer act within the limits of its legal powers (*Oppenheim/Jennings & Watts* 1992, p. 292-3. *See also* *El Ayouty* 1971, p. 236, *Barbier* 1974, p. 112 and *Franck* 1985, p. 193-4, and the letters by the UK and the US to the Secretary General, dated 11 January 1971 (A/8276 and A/8277).

policies with the Committee were Spain and New Zealand.¹⁵⁴ After 1971, the anti-colonialists could freely express their opinions on decolonization through the resolutions of the Committee, since it was no longer necessary to keep the US, France and the UK 'on board'. But without the cooperation of the most important Administering States, the recommendations of the Decolonization Committee became slightly pointless.

From 1970, UN officials no longer hid their skepticism about the work of the Committee.¹⁵⁵ It found itself in a complete deadlock, faced on the one hand by Administering States which were unwilling to furnish the Committee with the most basic information, and on the other hand by territories that clearly did not wish to become independent. To make matters worse, the anti-colonial movement started using the small territories in the Caribbean, Pacific and Indian Ocean, which possessed some strategic importance for France, the UK and the US, to blackmail these states into cooperating with isolating South Africa and Portugal. The Administering States were told that the UN would continue to insist on independence for even the smallest overseas territories until the Western states would help to realize the decolonization of the Portuguese territories and Namibia, and a regime change in South Africa. The NSGTs obviously did not appreciate being used as 'spare change' in this way, and consequently became highly suspicious of any involvement of the Decolonization Committee.¹⁵⁶

After the fall of the Berlin Wall, attempts were made to eliminate the Committee. A number of states, which notably included a few Eastern European states which used to be among the most fervent supporters of the Committee, now argued in the Plenary of the GA that the Committee no longer served a useful purpose because it did not take into account 'the realistic interests of the remaining colonial peoples'.¹⁵⁷ The Committee dealt out 'excessively harsh criticism' and used 'outdated formulas', the representative of Czechoslovakia claimed.¹⁵⁸ The Third World supporters of the Committee did not swerve, however. The GA instead declared the 1990s to be the 'Decade for the Eradication of Colonialism'. The campaign for the abolition of the Committee continued during the 1990s,¹⁵⁹ but the decade between 2000 and

¹⁵⁴ See Aldrich & Connell 1998, p. 156 et seq.

¹⁵⁵ Barbier 1974, p. 630-1. According to *Barbier*, the Committee reached a peak in radicalism and dogmatism around 1970, and at the same time became very ineffective.

¹⁵⁶ Barbier 1974, p. 632 and Aldrich & Connell 1998, p. 142 and 156 et seq. When the Administering States started inviting UN visiting missions to the NSGTs, these often did not receive a very warm welcome, especially in the small island NSGTs. See Drower 1992, p. 44-5 for a description of how a visiting mission to Montserrat in 1975 was 'sent packing', and Aldrich & Connell 1998, p. 142 for similar unwelcoming reactions in the Cayman Islands in 1993. For a long time, the Decolonization Committee appeared to visit the islands 'just to check they haven't changed their minds!' (Drower 1992, p. 45).

¹⁵⁷ Statement by the UK, UN Doc. A/45/PV.44, p. 71.

¹⁵⁸ UN Doc. A/45/PV.44, p. 7-8, cited in Duursma 1996, p. 49.

¹⁵⁹ Corbin 2000, p. 9.

2010 was nonetheless declared the 'Second Decade for the Eradication of Colonialism', probably ensuring the continued existence of the Committee, at least until 2010.

Since the fall of the Salazar regime in Portugal, which led to the independence of the Portuguese overseas provinces (except East Timor) in 1975, and after the Western states agreed to isolate South Africa, the remaining NSGTs have received a more fair treatment by the Decolonization Committee. The Committee has discontinued its most controversial practice of unilaterally setting a date for independence, or urging the Administering State to set a timetable for realising 'the right to self-determination and independence', even with respect to such tiny territories as Pitcairn and St. Helena.¹⁶⁰ The last case in which the Committee urged an Administering State to grant independence before a certain date was Belize in 1979.¹⁶¹

The Administering States have also changed their attitude towards the Committee. During the 1970s, Australia and the UK again started providing information, answering questions and inviting visiting missions to their territories.¹⁶² Australia rejoined the Committee in 1973.¹⁶³ The Labour government that took office in the UK in 1974 decided that the irritating demands of the Committee might be lessened by co-operating with it. The Foreign and Commonwealth Office therefore started to invite visiting missions to the remaining British NSGTs.¹⁶⁴ New Zealand, the US and Spain already co-operated (to a differing extent), leaving only France as a persistent objector to the work of the Committee. The Committee's Regional Seminars, which are held each year since 1990, either on a Caribbean or a Pacific island, during the 'Week of Solidarity with Peoples of All Colonial Territories Fighting for Freedom, Independence and Human Rights', are attended by an observer of France when the seminar is held in the Pacific, and by a delegation of the UK when the seminar is held in the Caribbean. In 2003, the seminar was held in Anguilla, which was the first time it was held in a NSGT. The UK participated

160 UN Repertory of Practice, Suppl. No. 4, Vol. 2, para. 180 et seq. and Suppl. No. 5, Vol. 4, para. 221 et seq. This practice was started by the GA itself after the adoption of GA Res. 1514. By resolutions 2189 (XXI) and 2326 (XXII) of 1966 and 1967 the GA asked the Committee to set a date for independence whenever it considered it proper and appropriate. *See also* Corbin 2000, p. 6.

161 UN Repertory of Practice, Suppl. No. 6, Vol. 5, para. 75 and 107.

162 The UN Department of Political Affairs noted a remarkable increase in the co-operation of the Administering States after 1972, *see Decolonization* Vol. II, No. 6 (December 1975), p. 17. *See also* Franck 1985, p. 188.

163 De Smith 1974, p. 69.

164 Drower 1992, p. 44. In 1986, the British government (at that time Conservative) announced it would stop cooperating with the Committee, because it did not appreciate the anti-colonial wording of the annual resolution of the GA regarding the remaining NSGTs (most of which are British). The UK considered its NSGTs were no longer colonies, and that it would therefore serve no useful purpose to take part in the activities of the Committee. It advised the UN to devote its time and resource to other more pressing matters (GAOR (41), Plenary Meetings, 92nd Meeting, p. 71-3). The UK did not persist in this attitude.

in the debates at this seminars, as did some 40 other UN members states, representatives of the territories, and a number of NGO's.¹⁶⁵

Even though the Administering States may not appreciate the work of the Committee, and have never hesitated to ignore its more radical recommendations, they have good reason to cooperate with the Committee, and to provide it with information. It has been pointed out by *Franck*, who is not exactly an enthusiastic supporter of the Committee's work, that the well-funded Committee creates a paper record through its reports and resolutions which is consulted by diplomats who often have no prior knowledge of the situation. Moreover:

(...) its distortions and half-truths have a way of becoming conventional wisdom. They reappear, buttressed with authoritative U.N. citations, in publications all over the world. No matter how often they are later refuted, these "facts" take on a life of their own and frequently are cited to justify subsequent U.N. activities.¹⁶⁶

But *Franck* also points out that states cooperating with the Committee will usually find that it makes constructive contributions to solving the problems in the territories. It conducts thorough research, and is usually more interested in maintaining a dialogue than in seeking a confrontation. The reports of the visiting missions the Committee sends to the territories usually note improvements and accomplishments in the territories, and commend the positive attitude of the Administering Power.¹⁶⁷ Once the Committee has drawn up its report, little can be done to prevent the GA from approving it. Adoption of the report of the Decolonization Committee is 'a sacred annual ritual', in the words of one US delegate, who also stated that it is 'virtually impossible for any country – particularly a Western country – to amend it from the floor'.¹⁶⁸ Also, 'very few of the NAMS will vote against a decolonization resolution, no matter how absurd, or how much they disapprove of its con-

165 See the Report of the Decolonization Committee of 2003. See Tanoh-Boutchoue 2001 on the seminars in general. The Regional Seminars could be a useful addition to this process, but not in their present form. Their impact appears to be minimal. They may only be attended on a special invitation. Media attention is absent. By organizing these seminar in their present form, the Committee confirms its reputation as a 'traveling circus' that is not open to the public.

166 *Franck* 1985, p. 197.

167 See for instance the visiting missions to the US territories of the Virgin Islands and American Samoa in 1978 and 1980, reported in *Franck* 1985, p. 188-9.

168 Cited in *Franck* 1985, p. 199.

tent.¹⁶⁹ Only France still thinks it is worthwhile to resist UN involvement with its overseas departments and territories.¹⁷⁰

The Committee has studied the question of the list of territories to which Resolution 1514 applies from its first session in 1961. In 1963, the Committee drew up a preliminary list of territories, which included Trust Territories, other NSGTs on which the administering powers transmitted information, the territories declared non-self-governing by the GA, and South West Africa (Namibia).¹⁷¹ The Committee asked a Working Group to continue looking for other territories which should be on the list. This instruction is repeated every year, but in reality, the Working Group only acts when it is asked to study the situation in a particular territory, as in the cases of French Somaliland, Puerto Rico, and New Caledonia. This practice allows the Committee to discuss the situation in any territory that it finds 'colonial' for whatever reason.

The Committee and its Working Group sometimes seem reluctant to decide that a territory should be included in the list. Such a decision is often postponed for several years, and it is clearly not enough if the Committee is merely petitioned by inhabitants of an overseas territory with a request to include their territory on the list.¹⁷² Considerable political pressure is needed to keep the wheels of the Committee in motion towards a decision to declare that the Declaration (Resolution 1514) applies to a territory. As the case of New Caledonia showed, the attempts by one small state did not convince the Committee to spring into action, and the collective action by all of the South Pacific states in 1986 only caused the Working Group to place the matter on the agenda of the next session. The case of New Caledonia also showed, however, that it is possible to bypass the Committee. The South Pacific states simply submitted a draft resolution in the GA, by which the territory was declared a NSGT.¹⁷³

169 Cited in Franck 1985, p. 202. The 'NAMs' are the member states of the Non-Aligned Movement.

170 During a debate on New Caledonia in 1986, the representative of Vanuatu stated about this French policy: 'So much effort seems to have been put into providing disinformation on New Caledonia, one cannot help but wonder in amazement at how much easier it would have been for the administering Power simply to co-operate with the United Nations and regularly transmit information on the Territory as it is required to do'. GAOR (41), Plenary Meetings, 92nd Meeting, p. 40.

171 Reproduced in Barbier 1974, p. 164.

172 In 1970, for instance, an organization devoted to realizing the self-determination and independence of the Spanish territory of the Canary Islands petitioned the Committee to place the Canary Islands on the list. The Committee took no action. *See* Barbier 1974, p. 165. In the 1960 debate on GA Res. 1541, the Soviet Union, Bulgaria and Somalia had already claimed that Chapter XI applied to the Canary Islands and the Ukraine submitted an amendment to GA Res. 1542 to that effect which was not adopted (GAOR (XV) 4th Comm., 1046th Meeting, para. 20).

173 This procedure was also employed by the Arab states in the case of Oman, *see* Barbier 1974, p. 166.

Despite its occasional reluctance to act, the Committee has added many territories to the list. At first, such a decision was preceded by a GA Resolution declaring the territory a NSGT.¹⁷⁴ Later, the GA only adopted a resolution requesting the Committee to study the application of the Declaration to that territory,¹⁷⁵ after which the GA approved the recommendations of the Committee. From 1965, it was the Committee itself which took the initiative to add new territories.¹⁷⁶ The main difference between the Committee's approach and that of its predecessors and the GA under the system of Chapter XI, is that the Committee considers itself authorized to study and discuss any territory that it considers colonial. It does not consider it necessary that a territory was on the original list of territories of GA Res. 66 (I), nor can it be prevented from discussing a territory by a GA Resolution that declared the territory self-governing. The main criteria for the Committee are those of geographic and ethnic separateness, as laid down in GA Res. 1541 (XV), the absence of independence, and a strong political lobby at the UN to denounce the metropolitan state. How this works, will be discussed below, in the paragraphs on Puerto Rico, and New Caledonia.

The Committee has relinquished its radical and unrealistic insistence on independence for all territories, no matter how small or remote. It has been widely acknowledged at the UN that independence may not be a viable option for many small island territories. Secretary-General U Thant already expressed considerable scepticism about the independence of the smallest NSGTs during the 1960's.¹⁷⁷ A UNITAR study of 1971 pointed out many of the specific problems that face small states and territories, and which make full independence a very unattractive option for them, but also for the world community.¹⁷⁸ The UN became increasingly worried about the proliferation of membership of the UN resulting from the process of decolonization during the 1960's and 1970's. It was feared that the new members would not be able to carry out their obligations as UN members and would thereby weaken the

174 See the case of the Portuguese Territories, GA Res. 1542 (XV).

175 In the case of Southern Rhodesia, the GA asked the Decolonization Committee to determine whether the UK should or could still transmit information under Article 73 e of the Charter, and to pay attention to the question whether the self-government of the territory had been established through freely elected institutions, as required by Principle XI of 1541 (see GA Res. 1745 (XVI) of 23 February 1962). The Netherlands and the other Administering states voted against this resolution. After a Sub-Committee had discussed this question with the UK government, the Decolonization Committee considered Chapter XI still applied to Southern Rhodesia. The UK refused to report on Southern Rhodesia because it considered the territory had acquired full self-government and because it was constitutionally prohibited from requiring the information of Article 73 e from the government of Southern Rhodesia. The GA declared Southern Rhodesia a NSGT (see GA Res. 1747 (XVI) of 28 June 1962). But the UK continued to disagree with the UN, until the unilateral declaration of independence by the Smith regime in 1965. See El-Ayouty 1971, p. 202-206.

176 For example with regard to French Somaliland and the Comoros.

177 Reported in Drower 1992, p. 45.

178 Rapoport e.a. 1971.

system as a whole.¹⁷⁹ Also, they would not be able to contribute to the UN, financially or otherwise, but they would receive an equal vote in the GA and other organs. Small states might also not be interested in participating in most of the affairs of the UN and the world community because their international interests would be limited to their direct surroundings. The Decolonization Committee appeared to remain blind to these fears, that were widely expressed in other UN bodies. But since the 1970's, it has started to pay some attention to the specific problems of these territories and suggested solutions other than independence. It approved the integration of the Cocos (Keeling) Islands with Australia in 1984, and has admitted that independence is not a viable option for tiny island territories. At present, the specific problems of small territories appear to be one of the main concerns of the Decolonization Committee.

The work of the Committee nowadays receives little attention in the media, and even less in the legal scholarship. According to *Aldrich and Connell* it has 'only the most trivial significance in metropolitan states, though considerable value is attached to the committee's deliberations in some territories as the sole international authority on decolonisation'.¹⁸⁰ Many attempts have been made by islanders and organizations to have their territories re-inscribed on the list of NSGTs,¹⁸¹ also by Dutch Caribbean politicians (*see* Chapter 5 in the Paragraph on anti-colonial discourse). The aims of many of these petitioners can probably be summarized in these words of Hawaiian activist Trask:

We're not saying give Hawaii independence, we're just saying re-list Hawaii. Have the U.N. take a look at it, and give our people the opportunity to make a choice, which we never had in 1959.¹⁸²

For most of the remaining overseas territories it is very difficult to gain attention from the metropolis for their problems, or to obtain the opportunity to choose for a different political status. The Committee serves as one of the few means of gaining some attention. The Western attempts to put an end to the Decolonization Committee therefore led to considerable concern in several territories,¹⁸³ including a number of territories that were not even on the list, such as Hawaii.¹⁸⁴

179 Drower 1992, p. 45.

180 Aldrich & Connell 1998, p. 161. Similarly, Leibowitz 1989, p. 56-8.

181 These territories include the Canary Islands (Spain), French Polynesia, Easter Island (Chile), West Papua (Indonesia), Bougainville (Papua New Guinea), and Hawaii (US).

182 Cited in the *Honolulu Star-Bulletin*.

183 *See* Corbin 2000, p. 9, *In Motion Magazine* of 20 November 1997, the *Honolulu Star-Bulletin* of 12 August 1998, and the editorial in *Indigenous Affairs*, No. 1 (2000).

184 In 1998, organizations in Hawaii circulated a petition to the UN to continue the mandate of the Decolonization Committee.

2.3 THE RIGHT TO SELF-DETERMINATION IN THE CONTEXT OF DECOLONIZATION

Chapter XI revolves around the concept of 'self-government', but at the UN a link was quickly laid between this concept (and the process of decolonization) and the right to self-determination and other fundamental human rights, when the Third Committee of the GA started drafting the two human rights Covenants that would be signed in 1966. Much has been written on the development of the right to self-determination, and I refer the reader to the various excellent publications that are available on this subject.¹⁸⁵ Suffice to say that the self-determination of peoples has since the 1960s been considered an essential element of any decolonization process, as was confirmed by the Advisory Opinions of the ICJ on Namibia and the Western Sahara, the two UN Human Rights Covenants of 1966, GA Resolutions 1514 and 2625, and by the legal scholarship. It has often been considered to have the status of *jus cogens*, and to create *erga omnes* obligations.

For the purpose of this study it is important to note that the right to self-determination has been defined in international law as 'the need to pay regard to the freely expressed will of peoples'.¹⁸⁶

2.3.1 Freedom of Choice

It could well be argued that decolonization is not complete until the population has had the opportunity to make a free choice, and until that choice has been realized as well as possible. When reviewing the notions and developments sketched above regarding decolonization and self-determination, it could be concluded that the concept of freedom of choice has been central to most discussions. All states, except a number of the Communist states of Eastern Europe, agreed that decolonization cannot take place without respect for the freely made choices of the populations involved. According to the International Court of Justice, decolonization and self-determination go hand in hand, and should be defined as 'the need to pay regard to the freely expressed will of the people'.¹⁸⁷ In the literature, the freedom of choice has also been considered the essence of self-determination.¹⁸⁸ It could be argued, however, that state practice has not always respected this, or that 'freedom of choice' has only been granted when and if it served metropolitan needs. As *Wesley-Smith* notes: 'Political freedom was returned to the colonial peoples in the 1960s

¹⁸⁵ See for instance Crawford 2001, Musgrave 1997, and McCorquodale 2000.

¹⁸⁶ Advisory Opinion of the ICJ on the Western Sahara (16 October 1975), *ICJ Reports* 1975, p. 33. See also Cassese 1996, p. 358, and Crawford 2001, p. 32-33.

¹⁸⁷ Western Sahara, Advisory Opinion, *ICJ Report* 1975, p. 33.

¹⁸⁸ See for instance Pomerance 1982, p. 24-5, and Prince 1989, p. 45.

and 1970s essentially for the same reason it was removed in an earlier era – to meet the needs of the colonial power'.¹⁸⁹

If it were accepted that the right to self-determination indeed entails a right to choose in complete freedom any constitutional status within or outside of a state, total chaos might ensue. International law has therefore been very reluctant in granting populations the status 'peoples' entitled to self-determination, and has only developed the right to free choice for the benefit of decolonization. In order to 'eradicate all forms of colonialism', the populations of the overseas possessions of the Western states have been given an almost unconditionally formulated right under international law to choose their own political status (*see* Chapter 3).

But does this mean that the Administering state has to accept any outcome of the exercise of the right to self-determination by its overseas populations? This is somewhat of a theoretical question, since no state would probably accept such an absolute or unconditional right for its overseas populations, and the international community would not be prepared to enforce it in such an absolute form with regard to the remaining overseas territories which are all small and mostly of no international political importance. But for the purpose of this study, it is nonetheless relevant to consider whether international law does indeed obligate states to respect the freedom of choice unconditionally, since this claim is sometimes defended in the Netherlands Antilles (*see* Chapter 8).

The doctrine is silent on this subject¹⁹⁰ and the UN instruments do not directly provide an answer either. The law is not developed on this point, for historical and political reasons, but I think some conclusions can be derived from the law of decolonization. The anti-colonial states were only interested in dissolving the colonial empires, and therefore wished to grant a right to freedom of choice because it was assumed that any people would choose independence when given the opportunity. The colonial powers after World War II initially wished to defend their overseas possessions, and proposed that decolonization could also take the form of a grant of full and equal democratic rights to the overseas populations, who could then freely decide to maintain their constitutional ties with the mother country.

These two opposing political drives could only find common ground in the tenet that the wish of the overseas population should be decisive, a consensus that was laid down in many UN Resolutions and other documents, and has become a part of international law, as was confirmed by the International

189 Terrence Wesley-Smith, 'Australia', in: K. Howe et al. (eds.), *Tides of History. The Pacific Islands in the Twentieth Century*, Sydney: Allen & Unwin 1994, p. 221, cited in De Decker 1996, p. 360.

190 The authors discussed in the previous Chapter who hold that metropolitan states do not have the right to sever the constitutional links with overseas territories do not go into this question, but merely conclude that an overseas population has the right *not* to choose for independence.

Court of Justice.¹⁹¹ Based on this consensus, the UN proceeded to define a number of forms of full self-government that could be seen acceptable outcomes of the exercise of the right to self-determination. During the 1960s, when the UN discussed the possible negative consequences for the state community if even the smallest of the remaining 30 something overseas territories were to become independent states (and members of the UN), it was emphasized by various committees, some of which were established specifically for this purpose, that the options of Resolution 1541 were especially relevant to small territories, and there existed an obligation for states to make sure that the peoples of these territories were offered a real choice between the alternatives, and not forced into an independent status they could not support.¹⁹²

Paradoxically, this could be seen as limiting the freedom of choice, but since Resolution 1541 only lays down criteria that safeguard rights for the overseas populations and create obligations for the state, the Resolution must be considered as a form of protection for the overseas population against metropolitan domination. The early practice of decolonization had already convincingly shown that overseas territories were often the weaker party in negotiations concerning self-government. It is clear that in a situation where the Administering State still holds a dominant position in an overseas territory, it is often possible to obtain a certain 'consent' of the population for even a very onerous political status, or to frustrate the freedom of choice by stating that certain status options are 'out of the question' before the negotiations have even started.

The freedom of choice has been recognized as a legal right, but this fact might not prevent Administering States from keeping overseas populations of small islands in a position of arbitrary subordination while on the surface appearing to respecting their freedom, for instance by offering them a choice between independence and status quo. It was therefore necessary to create a 'black list' of forbidden, onerous or suspect clauses, to strengthen the position of the weaker party in these relations. Resolution 1541 should be seen as an attempt to create at least a minimum amount of internationally guaranteed freedom for the overseas populations, by restricting the state from creating forms of government that do not conform to these minimum standards.

Resolution 1541 does not really offer three options to the non-self-governing populations, but only prohibits states from creating forms of government that constitute 'arbitrary subordination'. The freedom of choice of the populations is not limited by 1541. Nor should the metropolitan government try to limit

191 Advisory Opinion, *Namibia*, ICJ Reports, p. 31 et seq., and see also the *Western Sahara* case, cited above.

192 See for instance GAOR (XIX) Annexes Part I, Annex No. 8, p. 493 (on the British Leeward & Windward Islands). The emphasis on the freedom of choice was frequently reiterated during the 1960s and 1970s, for instance during the debate on the West Indies Associated States, where many states made clear that *any* status that the population of a small territory would freely choose, should be acceptable to the UN. See also Thomas 1987, p. 145.

the options to those listed in 1541. In practice, this rule is not always observed by states. It would take a separate study to study all of the cases in which the mother country limited the possible choices to only one option (independence), or where integration or free association were excluded beforehand.¹⁹³

Independence as the Destiny of All Overseas Territories?

During the 1960s, some states appeared to think that there existed a duty for all colonies to become independent, or at least a duty for all colonial powers to grant them independence. But a sense of realism – and a growing fear that the fragmentation of the state community might cripple the UN and other forms of international cooperation – led to a consensus among most states that independence was not a desirable outcome of the process of self-determination for the smallest and most remote territories. Difference of opinion existed which territories were really too small to become independent, and some Communist and Third World states continued to press for the independence of *all* dependent territories. From 1970, most states seem to agree that the wishes of the local population should be paramount, also in small territories which do not wish to become independent.

Even the Decolonization Committee, which had pushed for the independence of all territories during the 1960s, acknowledged that small territories might freely choose to maintain ties with the mother country. The Chairman of the Committee stated in 1973 that: ‘independence or self-determination is a right and not a favour, and there can never be any question of imposing independence on a people against its wishes.’¹⁹⁴

In spite of this quite generally held opinion, the consultation of popular opinion on independence has been a rather rare phenomenon in the mainstream of decolonization.

Popular opinion was simply assumed to be in favour of independence, or it was considered not relevant once a policy decision had been made in the metropolis that it was no longer desirable to exercise sovereignty over overseas territories. As *Wesley-Smith* observes: ‘Political freedom was returned

193 Drower 1992 contains many examples of the UK’s refusal to even discuss other options than the one actually desired by the UK, even when there were indications that the population favoured a different option than the UK government. De Smith 1968, p. 608 describes how one of the main political parties of Mauritius in 1965 opposed independence and favoured free association with the UK. The UK’s secretary of state for the colonies refused to hold a referendum that would offer a choice between independence and free association because that would prolong uncertainty and would ‘harden and deepen communal divisions and rivalries’. France has never organized a referendum in which more than one or two options were on the ballot, as far as I am aware. The Dutch government chose to ignore the strong indications that the population of Surinam did not wish to become independent in 1975, and did not heed the calls for a referendum.

194 UN Doc. A/AC.109/SC.22/SR.119.

to the colonial peoples in the 1960s and 1970s for the same reason it was removed in an earlier era – to meet the needs of the colonial power'.¹⁹⁵ The history of decolonization is full of examples of small territories being more or less pushed into independence without any evidence that the population desired independence, or where there was even strong evidence that the population did *not* want independence.¹⁹⁶

In view of this practice, it could be wondered whether the right to self-determination of dependent peoples – in the sense of the freedom of choice – is even part of international law. But to deny this would mean dismissing as meaningless the countless unanimously adopted UN Resolutions, several advisory opinions of the ICJ, and the international legal doctrine, which all hold that the populations of overseas territories that have not yet achieved full self-government have the right to choose their own future status. Also, the state practice does not contain many examples of outright denial of a choice made by an overseas people. Metropolitan states have always been eager to see their own choices realized, but in recent years they have certainly not been blind to the wishes of the overseas populations. Especially with regard to the smallest territories, there have been some regrets in the metropolitan capitals regarding the somewhat hasty or even forced independence of some of these territories, which did not increase the stability of the world community.¹⁹⁷

If the concept of 'freedom of choice' were qualified to mean that overseas populations have a right to express their opinion and a right to be taken seriously, then it would certainly be supported by state practice. The metropolitan states have since the 1950s generally acted in the outspoken awareness

195 Terrence Wesley-Smith, 'Australia', in K. Howe et al. (eds.), *Tides of History. The Pacific Islands in the Twentieth Century*, Sydney: Allen & Unwin 1994, p. 221, cited in De Decker 1996, p. 360.

196 See Macqueen 1997, p. 88 for the sudden achievement of independence of all the Portuguese territories in Africa. Houbert 1980, p. 154 et seq and De Smith 1968 describe the eagerness of the UK to get rid of Mauritius and the Seychelles as part of the termination of its strategic military role in the Indian Ocean, while ignoring calls for referendums and continued ties with the mother country. Drower 1992 contains many other examples of the UK ignoring local opinion in favour of its own desire to get rid of overseas territories. Laing 1979, p. 300 et seq, and Thomas 1987, p. 280-2 describe the achievement of independence of the UK West Indies Associated States, including the ignored calls for referendums which were required by the Constitutions of these territories. This practice was obviously not consistent with the UK's statements at the UN in 1967 that the wishes of the populations should be paramount, and that referendums should be held before independence was achieved, to 'safeguard against hasty, arbitrary or ill-considered constitutional change' (GAOR (XXII), Annexes, Addendum to agenda item 23 (Part III), para. 783). The independence of Surinam was also realized in the face of strong opposition in the territory and vain calls for a referendum. It has often been noted that the population of Surinam was not involved in the decision to become independent, see for instance Ramssoedh 1993.

197 Shortly after the UK had granted independence to the last of its West Indies Associated States in the 1980s, the UK government noted that: 'The last 20 years have witnessed the emergence of a large number of small independent states which are incapable of providing for their own economic or political security' (Drower 1992, p. xii).

that they are obligated to obtain some sort of evidence of popular support for the sovereignty that they continue to exercise over their territories, and to some extent also for the form of government of the territory.

While the metropolitan governments have hardly ever spontaneously offered a choice between more than two options, they have also often co-operated (albeit grudgingly) with overseas proposals for status changes, especially when these appeared to enjoy the support of the population. In fact the only cases where the metropolitan government has consistently refused to realize such proposals over a longer period of time, are those where the population appears to be deeply divided on the future of the territory, such as in Puerto Rico, or where the proposals for status change are defended with little enthusiasm or lack of much outspoken support from the population. Outright denial of the outspoken wish of an overseas population has become a rare phenomenon during the past few decades.¹⁹⁸ Recent years have witnessed a remarkable increase in active metropolitan support for the freedom of choice.¹⁹⁹

The metropolitan states may therefore not be very eager to cooperate with realising the contents of the UN instruments in the sense that they would be obligated to stimulate the realization of an informed choice that would be binding on the government of the state, but otherwise the principles enshrined in the UN instruments are usually respected by and large, at least to the extent that once an overseas population does make a choice, metropolitan governments generally do tend to take these choices seriously.

198 Some of the initial Dutch reactions to the referendum on St. Maarten tended towards such outright denial.

199 See for instance the new Articles 72-1 and 72-4 of the French Constitution, which creates a possibility to submit proposals for status change. Two islands of Guadeloupe (a DOM), Saint-Martin and Saint-Barthélemy have already used this opportunity. The new status of POM created for New Caledonia, the extended autonomy of French Polynesia, and the offer to the DOMs to improve their status, are also examples of the active support from Paris for the freedom of choice, as was the introduction of paragraph 7 in Article IV-4 of the Constitution for the EU, offering an easier procedure for status change in relation to the EU, which was introduced at the instigation of France and the Netherlands (see Chapter 9). The referendum of 1984 in the Cocos (Keeling) Islands showed Australia's preparedness to offer all three of the options of Resolution 1541 to the population. The granting of *status aparte* to Aruba could also be added to this list, as could the policy change of the Netherlands government in 2004 with regard to the breaking up of the Antilles and negotiating new status options for the individual islands. A remarkable example is the draft Treaty devised for the relation between New Zealand and its last NSGT, Tokelau. Article 11 of the Treaty provides that: 'New Zealand acknowledges that the people of Tokelau may at some time in the future wish to consider a status different from that of self-government in free association with New Zealand, including independence or integration with New Zealand. (...) New Zealand and Tokelau shall negotiate in good faith the terms of any change of status.' The Treaty was put to a referendum in Tokelau in 2005. It received 60% of the votes, whereas a minimum of 66% was required for its approval. See www.tokelau.org.nz.

In a few cases the metropolitan government has taken the initiative to obtain an informed opinion of the overseas population. Governments have always been more interested in realizing their own metropolitan agendas. But those territories which succeed in formulating a clear wish for status change, usually find a receptive ear in the metropolis and tend to be able realize many of their wishes. In small territories, these wishes usually did not amount to independence, but to some form of continued ties with the former mother country, some of which are described in Chapter 3.

It could well be argued that there exists a steady state practice in this area, to the effect that clearly expressed wishes of an overseas territory with a colonial past are taken seriously in the metropolis and are often realized. In combination with the *opinio juris* expressed through such UN Resolutions as 1514, 1541 and 2625, it could be concluded that there exists a rule of international law which provides that the freedom of choice of the population with regard to the political status of NSGTs and similar territories should be respected by the metropolitan government.

Some territories are too small too effectively petition the metropolis for status change, or even to formulate an informed opinion on their ideal political status. In these cases, the metropolitan obligations of Chapter XI are especially relevant, namely to provide information and to create awareness among the population of the various ways that might lead to the achievement of a full measure of self-government.

States have rarely done this, as far as I am aware, and it could therefore perhaps be argued that this obligation cannot be derived from customary law. But this does not really matter, since this obligation is specified in the UN Charter, at least with regard to NSGTs.

Whether a particular form of administrative subordination to the metropolis is too restrictive or 'arbitrary' can probably only be determined on a case-by-case basis, as the situation in the remaining dependent territories is immensely diverse and calls for creative solutions geared to tackle the specific problems of each territory. Principle V of Resolution 1541 suggests that the burden of proof is on the metropolis to show that it is not possible to realize the wishes of the overseas populations, or that these wishes are unreasonable in relation to the interests of the metropolitan part of the state.

In summary, a metropolitan state should respect the freedom of choice of its overseas territories, especially those which have not yet achieved a full measure of self-government. States have a wide margin of appreciation to decide how to implement this duty, because international law provides few rules on this subject. Political and other realities dictate that the metropolitan government in practice usually has a strong voice in the determination of the constitutional status of an overseas territory, and it is hard to prevent metropolitan governments from using their dominant position in order to realize a form of government that is geared more towards realizing their own wishes than those of the overseas population. As *Prince* has noted:

A central purpose of the United Nations Charter provisions relating to non-self-governing territories is the prevention of exploitation by powerful nations. The line between the proper use of bargaining power and exploitation, however, is often difficult to define.²⁰⁰

For this reason a few minimum standards have been formulated in international law, which aim to protect the interests of the overseas populations and strengthen their position in the negotiations with the metropolis. In cases where these standards are not met, the UN may decide to supervise the process in order to ensure that 'a free and genuine expression of the will of the people' is realized²⁰¹ and that the choice of the population is respected.

This does not mean that the metropolitan government is not allowed to take the interests of the metropolitan populations into account when dealing with a wish for status change. Rather, it has probably been assumed that governments will do this anyway, and practice has confirmed this assumption. But obviously, metropolitan states should fulfil their obligations towards their overseas territories in good faith and take into account the principle of equity.

Whether states are obligated to take the initiative to ascertain the wishes of the population in all of their territories which have not yet achieved a full measure of self-government – which is one of the mantra's of the Decolonization Committee and the GA – is not certain, because states have rarely done this, and it is not certain whether the GA is allowed to create such obligations for states on the basis of the UN Charter. Perhaps such an authority could be derived from the GA's role in the application of Chapter XI of the UN Charter, because Article 73 obliges them 'to take due account of the political aspirations of the peoples'. It seems logical to assume that these aspirations have to be ascertained before due account can be taken of them.

Freedom to Choose for Colonial Subordination?

Could the aspirations of a people also amount to remaining in (or returning to) colonial subordination? Some islands seem to harbour this wish, but it is not certain whether international law would allow an Administering State to accept such a situation. The cases of Tokelau and American Samoa, territories which have rejected offers of full self-government, but instead have chosen to retain their subordinated status, show that this is not merely a theoretical question. The government of the island of Saba has also sometimes claimed it wishes to become a colony of the Netherlands. The Decolonization Committee is very reluctant to accept that a people does not want self-govern-

²⁰⁰ Prince 1989, p. 83, footnote omitted.

²⁰¹ Advisory Opinion of the International Court of Justice on the Western Sahara, *ICJ Reports*, p. 37.

ment, but does recognize that full self-government may not be attractive to very small territories.²⁰²

The situation of territories that appear to have freely chosen a status that does not meet the standards that the GA has set for 'a full measure of self-government' remains somewhat of a legal puzzle. One solution could be that these territories (which may include the Netherlands Antilles and Aruba, *see* Chapter 6) did exercise their right to self-determination, but did not achieve self-government. This may seem contradictory, but the UN doctrine of self-determination and self-government is itself potentially internally contradictory: what if a people makes a free and informed choice for a status that does not represent a full measure of self-government? Should such a choice be denied? Many of the state representatives struggled with this question in the discussion of the Netherlands Antilles and Surinam in 1955.

If all colonial peoples should be granted independence or some other form of full self-government, while at the same time the will of the people should be paramount, situations can arise which are impossible to solve in accordance with the UN doctrine, unless it is accepted that it is possible to exercise the right to self-determination *without achieving full self-government*.

In my view, self-determination should take precedence over self-government and the demands of decolonization. The freedom of choice of peoples should therefore also include the freedom to choose *not* to obtain 'a full measure of self-government'. At the same time, such a choice means that the obligations of the Administering State under Chapter XI of the Charter continue to apply.²⁰³

2.4 CONCLUSION

A legal definition of the term 'colonies' – a term that is nowadays rarely used in the legal scholarship – should include the following characteristics: an overseas territory of a Western state, which is subordinated to the metropolis and has a separate legal status from the metropolitan territory. If the territory possesses a form of autonomy, this will either be revocable by the mother country, or be subject to the authority of the metropolitan government to intervene in the internal affairs of the territory. The metropolis is authorized

202 After visiting Tokelau in 1976 and 1981, the Committee accepted that the island had freely chosen its current status, *see* De Deckker 1997, p. 84. But it continued to press New Zealand to develop the territory towards self-government. The Committee's Regional Seminar of 2004 was 'willing to support the choice of the people of American Samoa', even though that choice clearly did not represent a 'full measure of self-government'.

203 According to Crawford 2006, p. 636-7, populations of NSGTs should be able to express a wish to retain their status, in which case 'the territory remains subject to Chapter XI'. Crawford considers that such a choice could be seen as 'a phase in the process of self-determination'.

to legislate for the colony, although this authority may be constitutionally restricted. The status of the territory is not based on a free choice by the population. Politically, the metropolitan government is still a dominant factor in the government of the territory, which is in some sense dependent on the metropolis.

The term decolonization in a political context usually refers to the termination of constitutional structures that give the metropolis a dominant position in relation to its overseas territories. This term is still used quite frequently, also with regard to territories that are not commonly considered to be 'colonies'. The UN has developed a mechanism to guide and speed up the process of decolonization, based on Chapter XI of the Charter and the Declaration on the Granting of Independence to Colonial Countries and Peoples (GA Resolution 1514 of 1960). According to Chapter XI, decolonization is completed when 'a full measure of self-government' is achieved. The GA has interpreted this Charter provision to mean that full self-government may take the form of independence, free association or integration with an independent state. The GA has created a number of criteria that must be met before free association or integration may be considered 'a full measure of self-government', the most important of which is that the population should freely choose such a form of government, in full awareness of the consequences.

The Declaration on the Granting of Independence demands that all powers be transferred to the population of the territory, in order for the population to make a sovereign choice on its political status. The GA has not excluded the possibility that a population chooses not to become independent. A problematic situation arises when a population also does not wish to achieve another form of full self-government besides independence. Based on the right to self-determination peoples should have freedom of choice. A choice for a form of subordination to the metropolis, if made freely and in the awareness of the consequences, cannot be dismissed as illegal and should be respected as much as possible. But it might not release the metropolitan government from its obligation to promote self-government, and to try and achieve a form of political decolonization.

In the next Chapter, three forms of self-government will be discussed that have been worked out in international law as acceptable forms of decolonization, as well as a few examples of self-government that may not comply with the international standards, but which are comparable to the status of the Netherlands Antilles and Aruba.

