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

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### 3 | Different Modes of Political Decolonization

International law recognizes three political status options as forms of decolonization if they are the outcome of a process of self-determination. According to General Assembly Resolution 2625 of 1970 it is also possible that self-determination and decolonization leads to 'any other status freely chosen by the population'. I will try and see what these options mean and how they can be recognized, in order to be able to determine (in the next Chapter) whether the constitution of the Kingdom of the Netherlands can be characterized as a form of decolonization.

#### 3.1 INDEPENDENCE

The developments described in the preceding sections have clearly led to the establishment of an unconditional right to independence for all territories that were once considered colonies, and which still maintain constitutional ties with their mother country,<sup>1</sup> except perhaps when these territories have become an integral part of the mother country (*see below*). This right has an uncontested status in international law and in Dutch constitutional law. Since independent statehood has already been the subject of an overwhelming body of legal scholarship, and since the populations of the Netherlands Antilles and Aruba are not interested in independence, at least not in the near future, it does not seem necessary to go into this subject at this point. The right to choose for free association, integration or another form of continued metropolitan sovereignty has received much less attention in the literature, but seems more relevant to this study in view of the preference of the Caribbean populations for continued ties with the Netherlands. I will therefore try to describe these status options in order to be able to determine in the next Chapters whether the present constitution of the Kingdom of the Netherlands could be classified in one of these categories, or whether these forms of decolonization might serve to complete the decolonization of the Dutch Caribbean.

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<sup>1</sup> In a similar sense, *see for instance* Cassese 1996, p. 357, with reference to the Advisory Opinion of the ICJ on Namibia.

3.2 FREE ASSOCIATION<sup>2</sup>

UN General Assembly Resolution 1541 of 1960 provides in Principle VII:

(a) Free association should be the result of a free and voluntary choice by the peoples of the territory concerned expressed through informed and democratic processes. It should be one which respects the individuality and the cultural characteristics of the territory and its peoples, and retains for the peoples of the territory which is associated with an independent State the freedom to modify the status of that territory through the expression of their will by democratic means and through constitutional processes.

(b) The associated territory should have the right to determine its internal constitution without outside interference, in accordance with due constitutional process and the freely expressed wishes of the people. This does not preclude consultations as appropriate or necessary under the terms of the free association agreed upon.

The definition of this status option did not provoke much debate in the Committee of Six which drafted the Resolution. The representative of India cited Puerto Rico as an example of free association, which he described as a situation where a territory voluntarily renounced some aspects of its sovereignty while reserving the right to reconsider that decision.<sup>3</sup> This statement was not contested, and the GA accepted the Committee's proposal without much discussion.

The GA Resolutions on self-government and decolonization of the 1950s which preceded Resolution 1541<sup>4</sup> make clear that a majority of the GA considered that an associated territory should have complete self-government in internal affairs, including the right to make its own laws, elect its representatives, and to appoint the members of the judiciary, but Resolution 1541 does not state this clearly. It is not certain whether the right of the territory 'to determine its internal constitution' could perhaps lead to a voluntary decision to delegate certain aspects of the internal government to the independent state with which it is associated (the 'principal state'). This would lead to something less than complete internal self-government. It seems doubtful that the GA really intended to make this possible, and the Resolution is not usually interpreted in this way. But the text certainly leaves open this possibility, and it does not appear unreasonable to grant the territory the freedom to limit its internal self-government in the same way that it can delegate its foreign affairs and defence to the principal state. It should therefore be possible – I think – for such arrangements to comply with Resolution 1541, if the associated

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2 For this political status in general, *see* Keitner & Reisman 2003, Igarashi 2002, Thomas 1987, Clark 1980, Crawford 2006 and Broderick 1968.

3 'Study of the principles which should guide Members in determining whether or not an obligation exists to transmit the information called for in Article 73 e of the Charter of the United Nations', UN Doc. A/AC.100/SR.5, p. 11.

4 GA Res. 567 (VI) and 648 (VII) of 1952, and 724 (VIII) of 1953.

territory can renounce them, and if they are based on clear popular support in the territory.

In order for such arrangements to be seen as a form of decolonization, it would also be important to take account of Paragraph 5 of Resolution 1514, which demands that 'all powers' should be transferred to the people of the territory. What this means is not entirely certain, but it has often been defended (also by anti-colonial states) that it only demands that the people should be in possession of all powers at some point, and that it does not mean that the people cannot decide to hand back certain powers to the metropolis if such a decision were made freely and in the awareness of the consequences (see Chapter 3).

The legal literature has shown little interest in the concept of free association. Some writers consider it as a valuable addition to the state system, others see it as a curious or anachronistic aberration. *Crawford* considers that associated status 'is a modern and, it might be thought, sanitised version of older arrangements whereby a territory retained internal self-government with responsibilities for international relations and defence assumed by another country'. The associated states are similar to the colonial protectorates as they existed before the Second World War, according to *Crawford*, with two essential differences: the population has voluntarily accepted the relation with the 'principal state' (the former mother country) and it possesses the freedom to choose another status.<sup>5</sup>

*Broderick* is much less optimistic. She doubts whether the concept of associated states will ever provide a successful solution to the problems of overseas government, because international law did not contain clear rules concerning the responsibility for and of 'subordinate entities', and because it did not provide for a real identity for associated states in the areas of treaty-making and international co-operation.<sup>6</sup> *Thomas*' criticism is less diplomatically worded: he concludes that the international community views associated states as colonies and treats them as such, in spite of Resolution 1541.<sup>7</sup>

Both these writers base their criticism mainly on the UK experience, but the associations entered into by New Zealand and the US show that it is possible to grant associated states a real international identity (which the UK chose not to do). *Crawford* maintains that it is untenable to maintain that associated states lack all international personality, and *Oppenheim* agrees that certain territories which are not fully independent, may have some international status.<sup>8</sup> The problem with the UK associations was that the islands

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5 *Crawford* 1989, p. 282.

6 *Broderick* 1968, p. 402-3.

7 *Thomas* 1987, p. 318. *See also* *Connell* 1970, p. 344.

8 *Crawford* 2006, p. 633, and *Oppenheim/Jennings & Watts* 1992, p. 279-80. In a similar sense, *see* *Keitner & Reisman* 2003.

remained to be considered as 'subordinate entities' by the UK and therefore also by the international community.

Most other writers on free association think that the concept could be a good alternative for many of the remaining dependencies.<sup>9</sup> In my opinion, it might be an attractive option for the Netherlands Antilles and Aruba, if the Kingdom partners and the international community are prepared to learn from the experiences of New Zealand and not to repeat the mistakes of the UK. In Chapter 6 I will discuss the question whether the Kingdom might not already be considered as a form of free association.

The state practice is rather limited. Three states have attempted to gain UN approval for what they explicitly considered as 'free association'. But only the status of the Cook Islands and Niue has been recognized by the GA as free association. The associated states of the US in the Pacific have been accepted as a form of decolonization by the Trusteeship Council and the Security Council. The UK example is interesting because it fell just short of the UN standards and led to some further discussion on the concept of free association. I will discuss these cases briefly, and then try to determine a number of common characteristics, and see which criteria need to be met in order to obtain UN approval.

### 3.2.1 Three Cases

#### *The Cook Islands and Niue*

The Cook Islands and Niue are very small and isolated territories located in the south Pacific Ocean, about halfway between New Zealand and Hawaii.<sup>10</sup> The UK transferred its responsibility for the islands to New Zealand in 1900 and 1901. The islanders live off agriculture, fishing, tourism and economic aid from New Zealand. The islands have GDPs per capita that are about average for the region.<sup>11</sup> In 1965, New Zealand's aid amounted to 20% of the total annual income of the territory, and it accounted for 75% of government expenditures in the territory.<sup>12</sup> After the Cook Islands became an associated

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9 See for instance Rappaport 1971, p. 181-8, Reisman 1975, p. 19, Macdonald 1981, p. 281, Gilmore 1982, p. 17-20, and Igarashi 2002, p. 298-301.

10 The Cook Islands covers 240 square kilometres spread out over 15 islands and atolls, and its population currently stands at 21,000. Niue consists of a single island which covers 260 square kilometres, with a steadily decreasing population (currently 2,000). Most Niueans live in New Zealand.

11 The GDP per capita of the Cook Islands is approximately US\$ 5,000, and in Niue it stands at US\$ 3,600 (according to the *CIA World Factbook*).

12 Stone 1966, p. 177. See also Kolff 1965.

state, the aid more than doubled.<sup>13</sup> At present, the aid seems to make up some 10% of the GDP. New Zealand aid constitutes some 35% of the GDP of Niue.<sup>14</sup>

New Zealand voluntarily cooperated with the UN during the early 1960s when it decided it was time to fully decolonize the Cook Islands and Niue. It invited several UN visiting missions, and kept the UN informed of the developments.<sup>15</sup> Other Administering States were not happy with New Zealand's approach, because it disrupted the united front against UN involvement.<sup>16</sup> Most of the other Administering States would nonetheless soon afterwards follow New Zealand's example of cooperation with the UN, because it produced positive results.

When the GA discussed the new status of the Cook Islands in 1965, many states expressed enthusiasm about the way the Cook Islanders had been allowed to exercise their right to self-determination, and recommended the result to other small NSGTs. The Socialist states and a number of Third World states, however, thought that the Cook Islands remained a colonial territory because it had not become independent. As a compromise, the reference to Resolution 1541 was struck from the draft Resolution, and a paragraph was introduced which stated that Resolution 1514 continued to apply, in the sense that the UN remained responsible to assist the Cook Islands 'in the eventual achievement of independence of full independence, if they so wish, at a future date'. The GA unanimously adopted this Resolution, which explicitly released New Zealand from its obligations under Article 73 of the UN Charter 'since the Cook Islands have attained full internal self-government', and because 'the people of the Cook Islands have (...) control of their internal affairs and of their future'.<sup>17</sup> This last phrase was almost deleted, but the Fourth Committee voted 29 to 28, with 43 abstentions, to keep it in.<sup>18</sup>

The free association of Niue was received much more enthusiastically in 1974. The GA clearly appeared more convinced that the people of Niue had freely chosen its new status, and that consequently New Zealand had fulfilled its obligations under the Charter and Resolutions 1514 and 1541. No negative speeches were made during the debate, and the Resolution was unanimously approved without a roll-call.<sup>19</sup> The difference with the Cook Islands was probably caused by the fact that a referendum was held on Niue, but not on

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13 Leibowitz 1976, p. 145.

14 According to the *CIA World Factbook*.

15 The UN supervised the elections in which the free association with New Zealand was approved (GAOR (XX), Annexes, Agenda items 23 and 24), and the plebiscite in Niue (GAOR (XXIX) Supplement No. 23, Chapter XXII, Annex 1).

16 Stone 1966, p. 169.

17 GA Res. 2064 (XX) of 16 December 1965, adopted by 78 votes to nil, with 29 abstentions. See Barbier 1974, p. 601-2, and Igarashi 2002, p.107-10.

18 Igarashi 2002, p. 108.

19 GA Res. 3285 (XXIX) of 1974. For the voting, see GAOR (XIX), Plenary, 2318<sup>th</sup> Meeting. See also Clark 1980, p. 60.

the Cook Islands, but may also be viewed 'to lend further support to the notion of an evolutionary development [of] the law of free association'.<sup>20</sup> Also, the high tide of anti-colonialism had passed. In any case, both territories were removed from the list of NSGTs.

The Cook Islands has full control over its Constitution, which is the supreme law of the Cook Islands. It can be amended by its parliament, except for the Articles that deal with the association with New Zealand, which also need the approval of two thirds of the electorate of the Cook Islands in a referendum. New Zealand has no legislative power in the Cook Islands on *any* subject.<sup>21</sup> The situation is similar in Niue, although that territory can still request the New Zealand parliament to legislate for Niue, which it occasionally does.<sup>22</sup> In both territories some New Zealand laws and English common law still applies, because the territorial legislators have not used their power to provide new laws on all subjects. In some respects, these territories seem to be more closely connected with the metropolis than the Netherlands Antilles and Aruba, perhaps because they are economically more tied in with New Zealand. The Cook Islands and Niue for instance still use the New Zealand dollar.

Executive power in both these territories lies with a cabinet that commands the confidence of parliament.<sup>23</sup> New Zealand can only act on behalf of the Cook Islands or Niue when it concerns foreign affairs or defence. In 1965, a few representatives in the GA criticized the arrangement because the High Commissioner of New Zealand in the Cook Islands also had powers in the internal affairs of the Cook Islands. New Zealand's explanation that the Cook Islands were free to appoint who they wanted as High Commissioner, the GA decided not to condemn this fact, but to note that 'the people of the Cook Islands have (...) control of their internal affairs and of their future'.<sup>24</sup>

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20 Macdonald 1981, p. 247.

21 The New Zealand representative informed the UN in 1965 that New Zealand had 'legislated away' its authority to unilaterally make laws that applied in the Cook Islands, even though the New Zealand parliament had appeared to think differently when it approved the free association. During a conflict regarding civil aviation matters in 1969, it was settled that the New Zealand parliament could not legislate in the Cook Islands, not even when it concerned external affairs or defence. (Frame 1987, p. 144 et seq.) This conclusion was confirmed by the exchange of letters between the prime ministers of New Zealand and the Cook Islands to clarify the free association. New Zealand's prime minister wrote that 'there are no legal fetters of any kind upon the freedom of the Cook Islands, which make their own laws and control their own Constitution' (letter of 4 May 1973, reproduced in Blaustein/Raworth 2001b, p. 99). In the 'Joint Centenary Declaration of the Principles of the Relationship between New Zealand and the Cook Islands' (11 June 2001), it was recalled that 'the Cook Islands has full and exclusive powers to make its own laws and adopt its own policies'.

22 Townend 2003, p. 591. The same option used to exist for the Cook Islands, but it was abolished by that territory in 1981.

23 See Ntunmy 1993 for further details.

24 GA Resolution 2064 (XX), see also UN Yearbook 1965, p. 572.

With regard to the internal affairs, the situation is clear: the Cook Islands and Niue are fully autonomous. But in foreign affairs, there exists some uncertainty. The Cook Islands has gradually achieved an apparently complete control over its foreign affairs, in a development similar to that of the dominions within the Commonwealth between the two World Wars. The original arrangement was laid down in Article 5 of the Cook Islands Constitution Act 1964, which states that 'Nothing in this Act or in the Constitution shall affect the responsibilities of Her Majesty the Queen in right of New Zealand for the external affairs and defence of the Cook Islands, those responsibilities to be discharged after consultation with the Prime Minister of the Cook Islands'.<sup>25</sup> Based on this Article, New Zealand handled foreign affairs, including treaties, although it had no formal powers to ensure the Cook Islands' compliance with international obligations.

This arrangement was changed, or re-interpreted when the Cook Islands government increasingly started to handle its own foreign affairs independently from the 1960s onwards. A convention was created through 'the quiet growth of an acceptable practice' that 'Her Majesty the Queen in right of New Zealand' was advised on the foreign affairs of the Cook Islands by Her ministers of the Cook Islands, and no longer by those of New Zealand – which is a British formula for expressing that the Cook Island had become fully self-governing in that area as well.<sup>26</sup>

This development raised some questions with foreign states, who for instance wondered whether the Cook Islands had the capacity to sign international treaties. New Zealand, when requested by the US to clarify the situation, stated in 1976 that: 'The Cook Islands Government is not restrained from initiating international negotiations or concluding agreements and there is no constitutional requirement for prior authority or approval from the Government of New Zealand'.<sup>27</sup> During the 1980s, New Zealand appears to have stopped ratifying treaties in the name of the Cook Islands.

The Cook Islands now appears to be very similar to an independent state. It has contemplated requesting UN membership, but it has not yet done so – probably because of the high costs involved.<sup>28</sup> This does make it more

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25 Section 5 of the Cook Islands Constitution Act 1964. This New Zealand act contained the original Constitution of the Cook Islands as a schedule. It can now only be amended by the Cook Islands, *see* Article 41 of the Constitution.

26 Frame 1987, p. 148. It seems that the negative reaction by the UN to the fact that the UK had retained some reserved powers under the West Indies Associated States played a role in forming and maintaining the convention that New Zealand cannot use Article 5 to act on behalf of the Cook Islands, except at the request and with the consent of the Cook Islands (Frame 1987, p. 145).

27 Cited in Frame 1987, p. 150. *See also* Ntuny 1993, p. 12. Upon this response, the US decided to enter into an agreement with the Cook Islands.

28 Crocombe & Tuainekore Crocombe 1996, p. 180 write that the Cook Islands was considering UN membership in 1995. The authors think that the Cook Islands could join the UN, 'because several UN members are less independent than the Cook Islands'.

difficult for the Cook Islands to take part in international affairs.<sup>29</sup> *Ntuny* concluded in 1993 that 'the status of the Cook Islands as an independent state capable of entering into international relations is controversial', and that while many states dealt with the territory as an independent legal personality, it was not recognized as a sovereign state by some states, including Japan and the US.<sup>30</sup> *Blaustein* summarized the situation in 2001 by stating that 'strictly speaking' the Cook Islands and Niue are not dependencies of New Zealand, 'but they are normally regarded as such'. It seems doubtful whether this is still an accurate description of the situation.<sup>31</sup> The *United Nations Treaties Series* in 2005 lists 141 treaties that the Cook Islands has concluded with many different organizations and states (including New Zealand, indicating the international nature the relations have assumed).<sup>32</sup> It is a full member of a number of international organizations.<sup>33</sup>

Whether New Zealand is still internationally liable for the actions of the Cook Islands, is not certain. *Frame* thinks that New Zealand is still responsible for the Cook Islands, even though that responsibility does not carry with it any legislative or executive authorities,<sup>34</sup> but *Clark* considers that it is 'a little murky' what the responsibilities of New Zealand exactly entail.<sup>35</sup> In its response to the US, the New Zealand government stated that 'until the Cook Islands assumes sole responsibility for the conduct of its international relations, New Zealand will remain internationally responsible for the acts and obligations of the Cook Islands'.<sup>36</sup> In an exchange of letters with the Asian Development Bank, the Cook Islands and New Zealand convinced the Bank that the Cook Islands could be held internationally accountable for its loans, and not New Zealand (*see below* in the paragraph on international recognition). The recent restatement of the free association, entitled the 'Joint Centenary Declaration of the Principles of the Relationship between New Zealand and the Cook

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29 The Cook Islands' membership of the International Maritime Organization, for instance, is still pending, because that organization requires that two thirds of the members approve the membership of a state that is not a member of the UN. Currently, 57 members have expressed their support (including the Netherlands) but important states such as Japan and the US have not (*see* <http://www.imo.org>).

30 *Ntuny* 1993, p. 12-3. The author expected that the US might change its attitude because it would like the associated states of its former Pacific Trust Territory to be recognized as independent states as well. The US State Department still lists the Cook Islands and Niue under 'Dependencies and Areas of Special Sovereignty' with New Zealand as the sovereign. The US associated states are listed as 'independent states'. *See* <http://www.state.gov/s/inr/states/>. Japan still seems to refuse to recognize the independence of the Cook Islands, but does give economic aid to the islands directly (Crocombe & Tuainekore Crocombe 1996, p. 180).

31 *Blaustein/Raworth* 2001c, p. 1.

32 For Niue, the number stands at 116.

33 It for instance joined the WHO (1984), the FAO (1985), and UNESCO (1989) as full member.

34 *Frame* 1987, p. 150.

35 *Clark* 1980, p. 55.

36 Cited in *Frame* 1987, p. 150.

Islands' (2001), holds that 'responsibility at international law rests with the Cook Islands in terms of its actions and the exercise of its international rights and fulfilment of its international obligations'. This statement seems to conflict with Article 5 of the Constitution of the Cook Islands Act 1964 (cited *above*), which is still in force as the Declaration did not aim to replace this Act. I am not certain as to how these two different texts should be brought in line with each other.

Recently, the Cook Islands has acceded to multilateral treaties that were originally ratified by New Zealand in the name of the Cook Islands. Upon such occurrence, the government to New Zealand has informed the UN Secretary-General that it no longer holds any state responsibility for the adherence to the treaty by the Cook Islands. It should probably be assumed therefore that New Zealand accepts that it still holds responsibility for the treaties and perhaps also the other actions that it has concluded or performed in the name of the Cook Islands, but this is not certain.<sup>37</sup>

Niue takes a somewhat different approach to the association, thereby providing evidence of the flexibility of the arrangement. It deliberately slowed down the process of decolonization between 1963 and 1972, and has not been as eager as the Cook Islands to limit New Zealand's role.<sup>38</sup> The association still takes the form as devised in the 1960s. Niueans seem to find the influence of New Zealand less objectionable. There even appears to be some support for complete integration with New Zealand. But because of the virtual absence of recent literature on Niue, it is very difficult to gain a view of the actual situation. To some extent one can only agree with the writers of the *Lonely Planet* travel guide for the South Pacific, who write on Niue: 'Independence came in 1974, but Niue continues to operate in "free association" with New Zealand. Free association is usually something you do with your psychiatrist, so who knows what goes on in the corridors of power.'<sup>39</sup>

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37 The uncertainty surrounding the continuing responsibilities of New Zealand for the Cook Islands is also visible in the New Zealand reports on the UN human rights instruments. New Zealand's initial report on the Cook Islands to the Human Rights Committee (CCPR/C/10/Add.13) was discussed in 1985, at which point the Cook Islands representative still held that New Zealand carried international obligations for the Cook Islands. But thereafter, New Zealand has only informed the HRC and other committees that it is unable to supply information, that 'the Cook Islands is aware of its obligations', and that New Zealand supplies experts to help in the preparations to the reports. But no further information appears to have been supplied to the committees on the human rights situation in the Cook Islands since the 1980s (according to the treaty body database at <http://www.unhchr.ch/>).

38 Chapman 1982, p. 137 attributes Niue's slow and somewhat reluctant acceptance of self-government to the 'overtly and absolutely egalitarian' and individualistic nature of Niueans, which will not accept that one of them should rule the other, and therefore prefer the rule of neutral outsiders. The Niuean leader of government in 1973 explained to the UN that the people 'preferred what they believed to be the impartial rule of the New Zealand Administration for New Zealand had no stake in Niue' (cited in Chapman 1982, p. 138).

39 Geert Cole et al. (eds.), *South Pacific*, [s.l.]: Lonely Planet 2003.

The scarcity of information available on Niue and the Cook Islands could be taken as evidence that the local situation is not very troublesome, or at least that the relation with New Zealand operates satisfactorily, as some authors assume.<sup>40</sup> Drower cites an interview with a New Zealander at the Commonwealth Parliamentary Association, who claimed that the 'the Cooks' are happy with their status, and that the association 'has actually worked. If it hadn't the Cooks would merely have grabbed at independence'.<sup>41</sup> New Zealand also seems to have retained its faith in the concept of free association, as it recently offered free association to its last remaining NSGT, Tokelau. A treaty of free association was drafted, which was put to a referendum, but not approved by the population.<sup>42</sup>

Occasionally, however, some worrying reports are published on the government of the Cook Islands, which have earned it a somewhat disreputable reputation.<sup>43</sup> New Zealand sometimes seems worried about public spending in the Cook Islands. It has been speculated that this might cause New Zealand to cut back on the Cook Islands' privileges, to refuse to extend its nationality any longer to the Cook Islanders, or to terminate the association altogether.<sup>44</sup> Whether New Zealand could lawfully take all of these steps seems uncertain.

It has been stated that for the Cook Islands and Niue self-government might well be meaningless as long as they remain economically so dependent on New Zealand.<sup>45</sup> If New Zealand were to apply the principle of 'who pays the piper, orders the tune' the self-government of the associated states would indeed be rather meaningless, but this does not seem to be the case.<sup>46</sup> In fact, the association devised for these islands seems to be a legally very flexible

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40 See for instance Gilmore 1982, p. 18.

41 Drower 1992, p. 35.

42 See the 2005 working paper on Tokelau prepared by the UN Secretariat (UN Doc. A/AC.109/2005/3) and the website of the Tokelau government, <http://www.tokelau.org.nz/>. The treaty required the support of 66% of the votes, but it received only 60% in the 2005 referendum.

43 In 1995, it was uncovered that the Cook Islands had enabled 'the largest tax evasion scam' in New Zealand's history, which had been perpetrated through trust companies established on the islands. Even though the scandal involved some of the largest financial institutions of New Zealand, at least part of the blame was placed with the Cook Islands, which had always maintained that its offshore sector was completely clean. Many New Zealanders felt 'ripped off' by a country that receives large amounts of New Zealand tax money, and public opinion for further concessions disappeared. Unpredictable and unreliable government practice seems to have 'deterred investors of integrity and attracted those who lack it'. The government continued to hire more and more personnel, while its efficiency decreased. It was unable to acquire any more private loans to finance its debts. The government abandoned the Cook Islands dollar and reverted to the New Zealand dollar. See Crocombe & Tuainekore Crocombe 1996, p. 176.

44 Crocombe & Tuainekore Crocombe 1996, p. 180, and Clark 1980, p. 56.

45 Kolff 1966.

46 The UN did not criticize the economic dependence of the islands. In fact, it recommended to New Zealand to continue providing aid to Niue, when it approved the cessation of information on that territory in 1974 through GA Res. 3285 (XXIX).

system which can accommodate territories with very different ambitions such as Niue and the Cook Islands. To what extent this system is comparable to that of the Kingdom of the Netherlands, and whether it might serve as an example for the Dutch Caribbean, will be discussed in Chapter 6.

*The UK West Indies Associated States*

Inspired by the example of New Zealand, the UK experimented with the concept of free association in six of its dependent territories, St. Kitts-Nevis-Anguilla, Dominica, St. Lucia, St. Vincent, Grenada, and Antigua and Barbuda. These island territories are located in the eastern Caribbean and are comparable in size (and many other aspects) to the Netherlands Antilles and Aruba.<sup>47</sup> While their larger neighbours chose independence during the 1960s, these islands wished to stay with Britain. In 1967, the UK government considered that 'it would be totally wrong to abandon them before they can stand on their own' and offered free association to the islands, after briefly considering and rejecting the option of integration with Britain. The parliaments of the islands accepted the British proposals, but no referendums were held.<sup>48</sup>

The West Indies Act of 1967 attributed legislative and executive powers almost completely to the elected organs of the associated states. The British parliament lost its power to legislate for the islands without their consent, except with regard to foreign affairs, defence, and nationality.<sup>49</sup> The British government was no longer responsible to parliament for the internal affairs of the islands.<sup>50</sup>

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47 St. Kitts-Nevis is located very close to St. Maarten, St. Eustatius and Saba, and maintains many historical and personal links with those islands. It originally also included the island of Anguilla. It had some 45,000 inhabitants around 1970, and it covers 260 square kilometres (excluding Anguilla). Dominica had 70,000 inhabitants and 750 square kilometres. St. Lucia 100,000 inhabitants and 615 square kilometres, St. Vincent 87,000 inhabitants and 390 square kilometres, Grenada 90,000 inhabitants and 310 square kilometres, Antigua 65,000 and 440 square kilometres (source: Thomas 1987, p. 2).

48 For the genesis of the West Indies Act, see Thomas 1987 and Broderick 1968.

49 Section 3 (1) of the West Indies Act 1967.

50 The UK Secretary of State explained in 1966 that in the colonial system, 'The British Government were held internationally responsible for matters which they had no effective means of controlling. At the same time the British Government were constantly urged to try to interfere in matters which the local Government regarded as their sole responsibility' (statement by the Secretary of State at one of the Constitutional Conferences of 1966, cited in Spackman 1975, p. 388). The bill for the West Indies Act was criticized in the UK parliament 'as a means of a rather hasty sloughing off of colonial responsibilities and an end to ministerial responsibility in the House' (Broderick 1968, p. 392). This abdication of responsibility was one of the reasons why the UK preferred an association over the normal colonial system of government, but it was actually far from certain that the UK had also lost its responsibility for the islands under international law. Broderick doubts whether the UK government could avoid international responsibility for actions of the associated states, since it was responsible for those states' external affairs (Broderick 1968, p. 382-3 and 402).

The Constitutions of the associated states were provided by an Order in Council, which is a form of subordinate legislation created by the Privy Council (the Queen and her cabinet ministers). The Constitutions could be amended by an Order in Council, upon the request and with the consent of the government of the associated state, or by a more difficult procedure to be followed in the associated states, as provided in the constitutions themselves.<sup>51</sup> The UK considered itself not principally obligated to cooperate with the amendment of a constitution, but it remained unclear under which circumstances it would withhold its cooperation.<sup>52</sup> It also remained somewhat unclear whether the UK parliament would be allowed to amend the West Indies Act itself without the consent of the associated states.<sup>53</sup>

The UK government remained responsible for any matter which – in the opinion of the UK government – was a matter relating to external affairs, defence or nationality.<sup>54</sup> The powers in these areas were attributed to the UK government, which could delegate them to the governments of the associated states.<sup>55</sup> The UK government concluded agreements with each of the associated states by which the associated states could be required to either provide legislation themselves, or to allow the UK to make legislation for them, if that was considered necessary in the interest of the UK's responsibilities for defence and foreign affairs. In case of a conflict, the agreement stipulated an obligation for consultation, but failing an agreement, the associated states had to accept the decision of the UK, or terminate the association.<sup>56</sup> The agreements obligated the UK to consult with the associated states before entering into international obligations with respect to those states, and required the associated states to keep the UK informed of developments that might be relevant to foreign affairs and defence.<sup>57</sup>

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51 Section 5 of the West Indies Act 1967.

52 Memorandum in Appendix I to the Constitutional Proposals of 1965, reproduced in Spackman 1975, p. 378. *See also* Forbes 1970, p. 86, who notes that these procedures, and the procedures for terminating the association, indicated that the UK had 'continuing reservations about the standard of political behaviour in the territories'.

53 The West Indies Act contained no provision on its amendment, but the Constitutional Proposals of 1965 stated that 'neither Britain nor the territory will be able to change the relationship (...) without the consent of the other party', except through unilateral termination of the association (reproduced in Spackman 1975, p. 380).

54 Section 2 (1) of the West Indies Act 1967.

55 The Secretary of State for the Colonies would send a dispatch to the associated state governments in which those governments were authorized to conclude treaties on a few subjects, and to apply for membership of international organizations of which the UK was a member. *See for an example of such a dispatch*, Spackman 1975, p. 400 et seq.

56 *See for instance* the Antigua Agreement, reproduced in Spackman 1975, p. 397 et seq.

57 Broderick 1968, p. 381 notes that there existed no obligation for the UK to inform the associated states of the international obligations that the UK had already entered into before 1967. And even if the UK were to do so, the legal divisions of the islands would not be capable of analyzing the some 500 treaties that applied to the islands, and would perhaps

The UK was allowed to make changes to any law of the associated states (by an Order in Council), if these changes appeared necessary to the UK government in the interest of external affairs or defence.<sup>58</sup> According to *Broderick*, the Act thus created 'the competence of the United Kingdom Government, even without Parliamentary debate, to affect, at least in part, the Constitutions of the Associated States where, in the opinion of Whitehall, the matter is within the United Kingdom's reserved area of power'.<sup>59</sup> This caused some 'disquiet' among the governments of the islands, according to *Broderick*, because the limits of these powers were unclear,<sup>60</sup> and because the final word was unequivocally attributed to the UK, as *Clark* puts it.<sup>61</sup>

*Broderick* described the association as 'a precarious balance' between autonomy in internal affairs and UK responsibility for external affairs, and as a 'delicate fabric' which might well be 'ripped asunder' if 'any serious political collisions occur between [the associated states] and the metropolis'.<sup>62</sup> The extent of the reserved powers that the UK could fall back on was ultimately defined unilaterally by the UK government and the associated states appear to have had no way of challenging a UK decision on legal grounds.<sup>63</sup> Similar to the relations within the Kingdom of the Netherlands, the extent of the self-government of the islands would ultimately depend on the decisions of the metropolitan government. The associated states did not have any constitutionally guaranteed means to influence UK decisions which concerned them, and they also did not have a right of veto in any matter.<sup>64</sup>

The relations clearly differed from those between the Cook Islands and New Zealand, in that New Zealand has no reserved powers to intervene in the Cook Islands under any circumstance.<sup>65</sup> The conflicts concerning civil aviation that occurred around the same time in the Cook Islands and Antigua were a clear example of the different position of these territories. Whereas New Zealand decided that the issue could only be resolved through mutual agreement even though it concerned external affairs, the UK government simply

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'proceed to legislate in ignorance', or to 'stumble into contradictions' with the UK's obligations.

58 Section 7 of the West Indies Act 1967.

59 *Broderick* 1968, p. 375. 'Whitehall' refers to the UK government, or its civil service.

60 *Broderick* 1968, p. 374-5.

61 *Clark* 1980, p. 61.

62 *Broderick* 1968, p. 371.

63 *Gilmore* 1982, p. 11.

64 There was, for instance, no obligation for the UK to cooperate with the ratification or termination of economic and financial treaties for the associated states, similar to Article 25 of the Kingdom Charter, and the associated states also did not have any of the constitutional rights of participation in the ratification process (or other legislative processes) that the Caribbean Countries have under the Kingdom Charter.

65 In the UK parliament, this difference was explained by stating that the Cook Islands are relatively close to New Zealand, whereas the Caribbean islands maintain close contacts with the American states. This created more occasions for political contradictions than in the Cook Islands. See *Broderick* 1968, p. 391-2.

enforced its own views *because* civil aviation touched on external affairs.<sup>66</sup> The constitutional position of the Cook Islands after 1965 could well be compared with that of the Dominions under the Statute of Westminster, but the status of the West Indies associated states clearly fell short of this.<sup>67</sup>

*Forbes* wrote in 1970 that the association was not intended to create parity of political status in the relation between the UK and the associated states. Instead: 'Associated statehood means essentially a decision to limit colonial-type controls to the areas of defence and external relations. Bearing in mind the openness of these small island economies and their dependence for survival on external contacts, British control of external affairs does have very serious political implications'.<sup>68</sup> For this reason, the West Indies Act was considered by some writers to be inconsistent with Principle VII of Resolution 1541.<sup>69</sup>

After the West Indies Act 1967 formalized the association, the UK government stopped transmitting information under Article 73 *e* of the Charter. At the UN, the UK explained that it had attached much importance to making sure the association would comply with Resolution 1541, and repeatedly stated that all of the stipulations of Principle VII had been met.<sup>70</sup> The UK and the territories 'had carefully borne Resolution 1541 in mind while devising the new status',<sup>71</sup> and they had also made 'a careful study of the principal recent precedent of the Cook Islands'.<sup>72</sup>

Surprisingly, only a few of the members of the Decolonization Committee commented on this.<sup>73</sup> The Soviet Union claimed that the UK retained 'the right to direct interference in the domestic affairs of the Territories',<sup>74</sup> and that the territories had not even achieved internal self-government.<sup>75</sup> Syria criticized the fact that the UK would be authorized to legislate for the territories, at least in the fields of defence and foreign affairs, without their consent.<sup>76</sup> A few representatives regretted that the territories had no say in the appointment or removal of the Governor.<sup>77</sup> Sierra Leone considered that free association

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66 Broderick 1968, p. 378-9 describes a conflict that took place in 1967.

67 Broderick 1968, p. 372 and Gilmore 1982, p. 11.

68 Forbes 1970, p. 87.

69 Crawford 2006, p. 631 and Gilmore 1982, p. 17. Clark 1980, p. 61-2, however, thinks that the association seemed to comply with Resolution 1541.

70 GAOR (XXII), Annexes, Addendum to agenda item 23 (part III), para. 787. *See also* Gilmore 1982, p. 14-17.

71 *Idem*, para. 830.

72 *Idem*, para. 889.

73 *See* De Smith 1974, p. 73.

74 GAOR (XXII), Annexes, Addendum to agenda item 23 (part III), para. 734.

75 *Idem*, para. 879.

76 *Idem*, para. 789.

77 Sierra Leone (para. 825), and Madagascar (843).

should take place on the basis of complete equality<sup>78</sup> and found the role of the associated states in the defence of their territories incompatible with that principle: 'One would expect an association which was based on absolute equality to require consultation rather than to place one partner in a position of subservience'.<sup>79</sup>

The UK did not really respond to these allegations, perhaps because they did not appear to be shared by the more moderate members of the Committee, who stated that the association would have been acceptable as a form of decolonization, if only the populations of the territories had been consulted on it. The debate focussed almost entirely on the question whether the UK should not have ascertained the wishes of the population, which led to the conclusion that the decolonization of the islands was not complete and that the UK should continue reporting under Article 73 *e*. It remained unclear whether the arrangement complied with Principle VII in other respects.

A majority of the members did not agree with the UK's contention that Article 73 *e* of the Charter no longer applied. They considered that the arrangement might have fulfilled the criteria for free association (although the particulars were hardly discussed), if only the population had been consulted.<sup>80</sup>

After one month of debating the issue, and after a UK minister had visited New York for 'informal discussions', a compromise was reached. The anti-colonial states softened the tone of the draft resolution, which would no longer express 'deep regrets'. In return the UK stated that it was not opposed to further UN discussion of the case, and would cooperate with the Decolonization Committee and enable it to ascertain whether the wishes of the population had been realized. It also announced that it was prepared to consider arrangements for the territories similar to those adopted for the Cook Islands.<sup>81</sup>

In the Fourth Committee and the Plenary GA the UK again (at length) explained the West Indies Act and the way in which it had been drafted. The US and the Netherlands were the only states which supported the UK.<sup>82</sup> None

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78 The representative derived this phrase from the factors for association in Resolution 742 (VIII) of 1953. But these factors really referred to *integration* with an independent state, in the sense of Resolution 1541, and were therefore strictly speaking not applicable to the associated states.

79 GAOR (XXII), Annexes, Addendum to agenda item 23 (part III), para. 827.

80 Many representatives seemed to agree with Yugoslavia's statement that: 'no one could have questioned the new arrangements had the people of the Territories been [given] an opportunity, under United Nations supervision, to express their views (GAOR (XXII), Annexes, Addendum to agenda item 23 (part III), para. 764). A few representatives, however, maintained that the territories would have simply remained colonies (Mali and the Soviet Union).

81 *Idem*, para. 933. The Decolonization Committee adopted a Resolution which reaffirmed that Resolution 1514 continued to apply and requested a sub-committee to study the situation further (Resolution of 23 March 1967 (A/AC.109/235), adopted by 18 votes to 3, with 3 abstentions).

82 The Netherlands considered that the UK had fulfilled its obligations under the Charter and Resolution 1541, and that 'it was undeniable that the people had been sufficiently consulted' (GAOR (XXII), Fourth Committee, 1753<sup>rd</sup> Meeting, para. 4-6).

of the anti-colonial states found it necessary to go into the matter. GA Resolution 2357 (XXII) of 19 December 1967 simply lumped the six territories together with the (other) NSGTs, noted that constitutional changes had taken place, and reiterated the customary recommendations for the Administering States. It was adopted by 86 votes to nil, with the abstention of most of the Western states and a few of the former colonies of the UK.

The Decolonization Committee continued to request that the UK would allow a visiting mission to the islands, while the UK repeated that it had supplied enough information. The GA 'strongly regretted' that the UK no longer reported on the islands.<sup>83</sup> The secession of Anguilla from the associated state of St. Kitts-Nevis-Anguilla and the subsequent military intervention of the UK in 1969 inspired a number of member states to again reject the status of association as a form of colonialism.<sup>84</sup>

A number of reasons have been identified why the associated states quickly became dissatisfied with their new status: firstly, the British resolution of the Anguilla problem bypassed the West Indies Act by removing the island from the associated state of St. Kitts-Nevis-Anguilla without the consent of that state, which created a fear that when push came to shove, the UK still wielded unlimited powers in the associated states; secondly there existed 'a certain inflexibility in British attitudes' when it came to an independent role for the associated states in external affairs;<sup>85</sup> thirdly, the UK provided economic aid to the islands, but it also made it clear that the amount of aid would not change if the states would choose to become independent, while the states were under the impression that they would qualify for more aid from other states and international organizations if they became independent;<sup>86</sup> fourthly, when the UK acceded to the EEC, the associated states had to become Overseas Countries and Territories, and this status was feared to conflict with their participation in CARICOM, the members of which were all ACP states;<sup>87</sup> finally, the right of abode of the inhabitants of the associated states in the UK was restricted during the 1960s, through British policies that 'were widely perceived

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83 See GA Resolution 2422 (XXIII) of 18 December 1968, and GA Res. 2701 (XXV) of 14 December 1970.

84 For the problems with Anguilla, see further Chapter 8. According to *De Smith*, the Decolonization Committee was 'fortified in its conviction that associated statehood was a bogus form of decolonization' (*De Smith* 1974, p. 73).

85 Gilmore 1982, p. 13. The UK, for instance, demanded that the associated states would not cooperate with any CARICOM-policies that concerned the foreign relations of the associated states, without the consent of the UK. For this reason, CARICOM decided to exclude the associated states from participation in a number of important areas.

86 Thomas 1987, p. 159-60. Gilmore 1982, p. 14 acknowledges that this perception existed, but also thinks that the association relation did not make it impossible for the islands to receive aid from other sources than the UK.

87 Thomas 1987, p. 162 et seq. The problem of the lack of independent representation of the OCTs in Brussels is discussed in Chapter 9.

as racist in intent and [which] caused obvious resentment'.<sup>88</sup> These policies would ultimately lead to the 'the truly immoral British Nationality Act 1981' through which most of the inhabitants of the remaining dependencies and associated states lost their UK citizenship.<sup>89</sup> Consequently, the associated states thought they stood to lose little, and perhaps might gain something from independence.

According to *Thomas*, 'independence in 1974 was no more realistic than in 1965',<sup>90</sup> when it was rejected as not viable by both the UK and the territories. The most important reason for choosing independence, in spite of the economic decline of the islands during the 1970s, was that the association did not offer an effective way of taking part in the international community. Also, the UN had dropped its initial reservations about the membership of micro-states. There was also pressure exercised by their independent neighbours, who apparently did not appreciate that the UK remained a factor in their attempts at regional integration, and did not consider the leaders of the dependent islands as equal partners. At the CARICOM conference of 1975, the associated states were called upon to terminate their relation with Britain because the association no longer served the interests of their populations.<sup>91</sup>

*Thomas* also notes that the association did not offer some of the benefits of other associations, such as the right of abode in the metropolis.<sup>92</sup> The examples of the Cook Islands, Niue and the Netherlands Antilles indicate that this may have been a crucial factor, since the right of abode in New Zealand and the Netherlands respectively is considered one of the most important reasons for maintaining constitutional ties with the metropolis in those islands.

For the UK, the problems with Anguilla seem to have led to the conclusion that the West Indies Act gave it a responsibility for problems that were legally and politically beyond its control. It was therefore glad to cooperate with the independence of the associated states, and the experiment with free association was seen as a complete failure by many in the UK and the territories. *Gilmore* put the blame with the extensive authority that the UK retained in external affairs, with the inflexibility of the West Indies Act, and with a lack of mutual

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88 Gilmore 1982, p. 14. The legal instruments by which the restrictions were realized were the Commonwealth Immigrations Act 1962 and the Immigration Act 1971. When the UK acceded to the EC in 1972, it declared that 'nationals' in the sense of the EC Treaty did not include the inhabitants of the associated states and the other non-European territories of the UK (*see* Court of Justice of the EC, judgement of 20 February 2001 (C-192/99, *Kaur v. UK*) in which this declaration was considered valid).

89 Ritchie 1998, p. 6. By the time the Act went into force (1983), only one associated state, St. Kitts-Nevis, had not yet become independent. *See also* Hintjens 1997, p. 39, and Aldrich & Connell 1998, p. 21-2.

90 Thomas 1987, p. 286.

91 Cited in Thomas 1987, p. 280. These conclusions were formulated with the agreement of the premiers of the associated states.

92 Thomas 1987, p. 286, where a comparison is made with the Cook Islands, Puerto Rico and the Netherlands Antilles.

trust. He contrasted the British experiment with the Cook Islands scheme, 'which continues to prosper in the Pacific', and concluded that free association could still offer an attractive option for the UK's relations with its remaining dependencies.<sup>93</sup> But the UK has not been prepared to discuss free association as a method of decolonization, even though some of its dependencies have expressed an interest in it. It appears to be a steady UK policy since the 1970s that no more powers are transferred to the overseas territories, unless they choose for independence.<sup>94</sup> *Drower* thinks that this is a wise policy, because 'associations with overseas territories could be more trouble than they were worth'.<sup>95</sup>

The Charter for the Kingdom of the Netherlands is somewhat similar to the associations created by the West Indies Act 1967. I will discuss these similarities in Chapter 6.

#### *The Associated States of the US in the Pacific*

The US has entered into free association relations with Palau,<sup>96</sup> Micronesia<sup>97</sup> and the Marshall Islands.<sup>98</sup> These are tiny island states spread out over large stretches of the western Pacific. Their indigenous populations for a large part exist on subsistence farming and fishing, although tourism is developing. The islands became part of the US Strategic Trust Territory of the Pacific Islands in 1945, together with the Northern Mariana Islands (which became a Commonwealth of the US in 1976). After it was decided during the 1970s that the Strategic Trust Territory would not become independent as a whole, the US applied the example of the Cook Islands to those parts of the Territory that strove towards independence. But similar to the UK, it attempted to modify the Cook Islands model so that it would retain more formal control over the islands, especially in matters of defence.

The US was not prepared to grant the islands full independence, or at least not if that meant giving up its military control over the western Pacific. It had hardly any interest in the islands themselves, which are very poor and resourceless, but merely wished (and still wishes) to deny aggressive foreign

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93 Gilmore 1982, p. 17-20.

94 *Drower* 1992, p. 144 states that the Anguilla episode had convinced the UK not to grant associated statehood to any other territory.

95 *Drower* 1992, p. 36.

96 Palau (or Belau) consists of more than 200 islands (460 square kilometers in total), and has a population of 19,000 (*CIA World Factbook*, 2001).

97 The Federated States of Micronesia consists of more than 600 islands (700 square kilometres), spread out over a vast area of the Pacific Ocean. Its population is 135,000 (*CIA World Factbook*, 2001).

98 The Marshall Islands consist of 5 islands and 29 atolls, some 180 square kilometres in all. Its population is 70,000 (*CIA World Factbook*, 2001).

states access to the area.<sup>99</sup> The Marshall Islands and Micronesia are among the poorest countries in the Pacific. Their GDP per capita, as calculated by the *CIA World Factbook*, is about ten times smaller than that of the French Polynesia, and only slightly larger than that of the poorest country in the region, Kiribati.<sup>100</sup> Palau seems to do slightly better than the average Pacific micro-state.<sup>101</sup>

The US concluded 15 year Compacts of Free Association with Micronesia and the Marshall Islands that entered into force in 1986 after they had been approved in referendums. They were renewed in 2004 for another 20 years.<sup>102</sup> The Compact with Palau initially ran into trouble because it had adopted a Constitution which provided that any bilateral agreement which allowed for the 'use, testing, storage or disposal of' nuclear and other toxic substances on Palau's territory required the approval of 75% of the votes in a referendum. The Compact contained such provisions (at the wish of the US), but it failed to achieve a sufficient majority in seven subsequent referendums. The US continued to insist that its freedom to bring nuclear weapons into Palau was essential to its defence obligations. Eventually, Palau amended its Constitution so that a simple majority would be enough. The Compact was then adopted in 1993, in the eighth referendum. *Hinck* argues that the US position in this conflict violated the right to self-determination of Palau, and *Clark & Roff* criticize the US exploitation of Palau's dependency.<sup>103</sup>

Under the law of the associated states, their Constitutions are the supreme law of the land,<sup>104</sup> which can only be amended by the legislature of these states themselves. The autonomy and self-government of the islands is thereby constitutionally guaranteed, and in principle unlimited. The Constitutions give the governments of the states the authority to conclude treaties, and the Compacts are considered to be based on that authority.

Through the Compacts, the states have delegated a number of powers to the US government, some of which cannot be retracted. The US government has a right of veto over any action taken by an associated state that the US considers inconsistent with its obligation to defend the islands. The Marshall

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99 Keitner & Reisman 2003, p. 34-5, and Boneparth & Wilkinson 1995, p. 66-7. The Marshall Islands used to be a test site for nuclear weapons (Bikini), and for intercontinental ballistic missiles (Kwajalein). It currently seems to play a role in the development of a missile defence system for the US (Aldrich & Connell 1998, p. 182).

100 The *CIA World Factbook* estimates that in 2001/2002 the GDP per capita of the Marshalls was US\$ 1,600 and US\$ 2,000 for Micronesia. A number independent states in the region seem to fare much better economically, for instance Fiji (US\$ 5,900) and Samoa (US\$ 5,600), and all of the territories which maintain constitutional ties with a Western state are considerably better off than these two associated states.

101 The GDP per capita of Palau is estimated at US\$ 9,000.

102 Compacts of Free Association Amendments Act 2003, Public Law 108-188. This law covers 116 pages with many intertwining and excessively complicated provisions.

103 Clark & Roff 1984, p. 5, and Hinck 1990.

104 See for instance Article I, Section 1 of the Constitution of the Marshall Islands.

Islands, Micronesia and Palau must furthermore ‘consult’ with the US on foreign affairs,<sup>105</sup> and the Compacts provide that the US has full authority and responsibility for security and defence matters in or relating to the three states.<sup>106</sup> They shall refrain from actions that the US considers incompatible with its responsibilities for their defence.<sup>107</sup> This provision seems to give the US the right to interfere in the internal affairs of the associated states, if such interference is considered necessary – by the US – for defence purposes.<sup>108</sup> The US has also reserved the right to establish military bases in these states.

The Compacts of the Marshall Islands and Micronesia contain certain ‘survivability’ provisions, which stipulate that the defence and security provisions of the Compact will continue in full force until 2024, even if the associated state or the US terminates the Compact.<sup>109</sup> Subsidiary agreements on defence, which provide (among other things) a ‘right of denial’<sup>110</sup> for the US, can only be terminated by mutual consent and were intended by the US Congress to continue in perpetuity.<sup>111</sup> In the case of Palau, the provisions on defence and security continue for 50 years, that is to say until 2044, even if the Compact is terminated before that time.<sup>112</sup> The US right of denial also continues after the Compacts are terminated, and can only be ended by mutual consent.<sup>113</sup>

*Keitner & Reisman* admit that the survivability provisions may perhaps be questionable under contract law.<sup>114</sup> *Macdonald* doubts whether the clauses could be enforced after a unilateral termination ‘since it might be argued with some force, that post-termination Micronesians are not bound, as a matter of law, to pre-termination agreements’.<sup>115</sup> Whether this is true seems to depend on whether one agrees that the Compacts are really treaties concluded between independent states. It could be argued that the associated states were not fully independent before they signed the Compacts, and that it should be determined by the law of succession whether certain onerous pre-independence obligations could still be enforced after independence. This argument is of

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105 Section 123 of the three Compacts of Free Association.

106 Section 311 of the Compacts of the Marshall Islands and Micronesia, and Section 312 of the Compact of Palau.

107 Section 313 of the Compacts.

108 Igarashi 2002, p. 208.

109 Sections 451 to 453 of the Compacts. These provisions were introduced in the Compacts after the Reagan administration refused to submit the Compacts (already signed by President Carter) to the US Congress (Leibowitz 1989, p. 650-1).

110 Right of denial means a right to deny other states military access to the territory of the associated states.

111 Prince 1989, p. 55, note 212, and Leibowitz 1989, p. 673 and 683 et seq.

112 Section 453(a) of the Compact of Palau. The arrangement with Palau makes it possible for the US to occupy one third of the land on the largest island, see Clark & Roff 1984.

113 Section 453 of the Palau Compact.

114 Keitner & Reisman 2003, p. 58.

115 Macdonald 1981, p. 252.

course considerably weakened by the fact that Micronesia and the Marshall Islands have renewed their Compacts in 2004. The fact that the US and the associated states are very unequal partners does not automatically invalidate treaties concluded between them.<sup>116</sup>

The survivability clauses do seem to be inconsistent with Principle VII of Resolution 1541, in that they make it impossible for the associated states to choose for full independence unilaterally.<sup>117</sup> It might seem strange to interpret this Principle so as to forbid associated states to enter into non-revocable agreements. But when it concerns agreements with the mother country that limit the sovereignty of the associated states permanently for the benefit of the military interests of the mother country, it is probably justified to presume that the agreement was not fully voluntary on the part of the associate.<sup>118</sup> There is evidence, moreover, that the associated states were not happy with the survivability clauses during the negotiations, and that they were forced to accept them.<sup>119</sup>

The Trusteeship Council and the Security Council accepted the Compacts as compatible with the right to self-determination. The Western members of the Trusteeship Council (the US, the UK and France) approved the termination of the Trusteeship in 1986, even before the Compacts had entered into force. The only other active member of the Council, the Soviet Union, opposed the Compacts all the way. A Resolution was adopted, which declared that the islands had exercised their right to self-determination in plebiscites observed by the UN in which they had chosen for free association (and in the case of the Northern Mariana Islands, for a Commonwealth status similar to Puerto Rico).<sup>120</sup> Because the Soviet Union would probably have vetoed a similar resolution by the Security Council, the US waited until the fall of the Berlin Wall before it dared to submit the case to the Security Council. The termination of the Trusteeship was approved by the Security Council in 1990 and 1994.<sup>121</sup>

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116 Brownlie 2003, p. 591.

117 *Clark*, who had written in 1980 that the draft Compacts probably complied with the UN criteria for self-determination and decolonization, changed his opinion when the survivability provisions were introduced. *Clark* testified before the Trusteeship Council in 1986 that the provisions made the Compacts incompatible with 'a proper exercise of self-determination', and should be viewed as void for that reason (UN TCOR, 53<sup>rd</sup> Session (1986), 1604<sup>th</sup> Meeting, p. 39-43).

118 Prince (1989) thinks it would be 'overly paternalistic, even in the Trusteeship context' to refuse to recognize the ability of the island governments to enter into such agreements. This would be true if the islands had been free to accept or reject the defence arrangements, which seems doubtful.

119 De Smith 1974, p. 77.

120 Trusteeship Council Resolution 2183 (LIII) of 1986 (UN Doc. T/1901).

121 Security Council Resolution 683 of 22 December 1990 (Marshall Islands, Micronesia and the Marianas), and Resolution 956 of 10 November 1994 (Palau).

The US associated states are full members of a few international organizations.<sup>122</sup> *Macdonald* argued in 1981 that the associated states would not fulfil all of the criteria for UN membership because the defence arrangements with the US would not allow them to support the UN in each case as required by the Charter.<sup>123</sup> When the Marshall Islands and Micronesia subsequently applied for UN membership, their status became a subject of a behind-the-scenes debate. *Boneparth & Wilkinson*, two members of the US delegation to the UN during this time, write that 'some (mostly Western) diplomats and legal advisers questioned whether FSM and RMI delegations to the United Nations could vote freely or pursue their own national interests faithfully, given constraints built into the Compacts of Free Association'.<sup>124</sup> It was also doubted whether micro-states could contribute anything to the UN, and whether it was justified to grant such states full voting power in the GA, for which reason the Western states, including the US, had always opposed the membership of very small states.<sup>125</sup> This reluctance was abandoned, for some reason, when Liechtenstein (again) tried to become a member of the UN in 1988. Surprisingly, the principality with 30,000 inhabitants was warmly welcomed as a valuable addition to the UN, and its application did not meet with any outspoken criticism at the UN.<sup>126</sup>

The issue was resolved purely on the basis of politics, with the US claiming membership for the associated states because it would lead to two extra votes for the US in the GA, while most other states were afraid to confront the US by raising 'the spectre of colonialism'.<sup>127</sup> The associated states were admitted to the UN as members.<sup>128</sup> Some authors think that the independence of the associated states was thereby established, but others continue to doubt whether the states really fulfil the criteria for independence.<sup>129</sup> *Duursma* considers that bilateral agreements such as the Compacts cannot prevail over the Charter obligations of member states, and that therefore the restrictions on the external powers of the associated states have no legal effect within the UN. The voting behaviour of the associated states is conspicuously in harmony with that of the US, which perhaps indicates that they do not (yet) really participate within

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122 Keitner & Reisman 2003, p. 59 et seq. provides an overview of the international organizations of which these states are members.

123 Macdonald 1981, p. 273.

124 Boneparth & Wilkinson 1995, p. 65. 'FSM' stands for the Federated States of Micronesia, and 'RMI' refers to the Republic of the Marshall Islands. Drower 1992, p. 36 reveals that one of the states which opposed UN membership for Micronesia was the UK.

125 Duursma 1996, p. 134 et seq.

126 Security Council Resolution 663 of 14 August 1990, and GA Res. 45/1 of 18 September 1990. See also Duursma 1996, p. 195 et seq. Liechtenstein's application to the League of Nations had been rejected in 1920, and it also failed to join the UN during the 1960s.

127 Boneparth & Wilkinson 1995, p. 66.

128 Security Council Resolutions 703 and 704, adopted without a vote on 9 August 1991, and GA Res. 46/2 and 46/3 of 17 September 1991, also adopted without a vote.

129 Duursma 1996, p. 425. See also Boneparth & Wilkinson 1995, p. 75, note 15.

the UN as fully sovereign states.<sup>130</sup> The associated states have concluded some international treaties,<sup>131</sup> and they have established diplomatic relations with a few foreign states.

The economic aid provided under the Compacts is probably the most important aspect of their relation with the US. In the case of Micronesia, the US spent US\$ 1.5 billion during the first 15 years of the Compact, nearly US\$ 1 billion in the Marshall Islands, and around US\$ 400 million in Palau. The Compact funding is currently estimated to contribute around 35% of the GDP of Palau,<sup>132</sup> 40% in the case of Micronesia,<sup>133</sup> and probably even more in the Marshall Islands.<sup>134</sup> The government budgets of these states almost completely consist of US money.<sup>135</sup> Especially the Marshall Islands and Micronesia seem to be unable to generate economic development of any substance. The aid is generally considered to have contributed little to the growth of the local economies,<sup>136</sup> but cutbacks in US support have in the past created serious social and economic problems, and were therefore undone. The renegotiated Compacts provide for US\$ 3.5 billion in aid to the Marshall Islands and Micronesia over the next 20 years.<sup>137</sup> A number of federal programs and services assistance also apply to the associated states, such as rural development, supporting the postal system and assuring safe air transportation.

Joint committees, in which the US has a majority vote, will decide on the use of the Compact funds. This has led to accusations of 'neo-colonialism',

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130 The voting coincidence of the associated states with the US used to be 100% or very close to that percentage, but it is declining. In 2002, the US State Department still noted with satisfaction that Palau's voting coincidence with the US was 98.5%, which is the highest percentage of any UN member state. But Micronesia and Marshall Islands showed substantially lower percentages, although they still came third and fourth in the top 10 of friendly nations, see the Report to Congress Submitted Pursuant to Public Law, 101-246, June 17, 2002. The sympathetic voting behaviour of the associated states recently gained some international attention when they were virtually the only UN member states which continued to support the US and Israel in opposing the GA's condemnation of Israel's building of the safety barrier.

131 The *United Nations Treaties Series* contains 23 treaties signed by Micronesia, 94 by the Marshall Islands, and 33 by Palau.

132 According to the information in Palau's Core Document for the UN human rights instruments, see HRI/CORE/1/Add.107, 10 January 2000.

133 Dobbin & Hezel 1998.

134 According to the magazine *Marianas Variety* of 18 August 2003, the US provided 61% of the government budget of the Marshall Islands in 2004.

135 Prince 1989, p. 79 states that US aid constituted 90% of the budget of Micronesia.

136 This was already noted by the UN visiting mission of 1976 to Palau, and in a staff report of the US House of Representatives of 1978, see Clark & Roff 1984, p. 9.

137 *Pacific Islands Report* of 25 July 2003. Complaints about the misspending of the Compact funding and rumours about wide-spread corruption in the associated states prompted the US Congress in 2000 to request the US General Accounting Office to audit the spending of the Compact funding during the first 15 years in the associated states before it would be prepared to approve the granting of any new subsidies (*Pacific Islands Report* of 29 February 2000).

which may seem exaggerated and unjustified,<sup>138</sup> but the reliance of the associated states on US funding has become so strong that the strict application of the principle of ‘he who pays the piper calls the tune’ would mean a severe restriction on the independence of the associated states. *Boneparth & Wilkinson* conclude that the independence of the associated states ‘may mean little unless economic dependence can be decreased’.<sup>139</sup>

Free association ‘compact style’ is similar to the Cook Islands model in that it leaves the associated state free to determine its own policies, draft its own laws, and conduct its own foreign affairs, while receiving substantial financial aid from the principal state. It is different because of the military servitudes. The US associated states also appear to operate less independently in foreign affairs than the Cook Islands.

### 3.2.2 Characteristics of Freely Associated Territories

The examples discussed *above* exhibit a few common characteristics, which are supported to some extent by the criteria developed at the UN, as formulated in the Principles of Resolution 1541 of 1960.

#### *Popular Consent*

Principle VII of Resolution 1541 states that: ‘Free association should be the result of a free and voluntary choice by the peoples of the territory concerned expressed through informed and democratic processes’. This has been the key criterion for the UN to determine whether a form of association can be considered as ‘a full measure of self-government’. It places the burden of evidence on the principal state to show that the association was the result of a truly free choice by the overseas population. This proof can probably only be delivered through ‘an affirmative showing supervised by the United Nations that the people of the territory do, in fact, desire the free association status’.<sup>140</sup>

UN supervision is probably indeed compulsory, but the UN has not excluded the possibility that peoples exercise their right to self-determination through elections, instead of a plebiscite. In the case of the Cook Islands, the UN approved the free association with New Zealand after a general election resulted in a parliamentary majority for political parties that supported free

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138 See the response to these accusations by the head of the office that will implement the new financial assistance program in the *Pacific Magazine* of June 2003.

139 Boneparth & Wilkinson 1995, p. 71.

140 Macdonald 1981, p. 280.

association.<sup>141</sup> This procedure has been criticized as obscuring the view on the true wishes of the population.<sup>142</sup> All of the political parties which participated in the elections seem to have been in favour of free association.<sup>143</sup> Requests for a referendum were denied, and the population was therefore not given a direct – nor in fact an indirect – opportunity to express its preference. The GA was clearly more satisfied by the free association of Niue, which had been approved in a referendum. The GA considered the process in Niue as an expression of the right to self-determination that was ‘in accordance with the principles of the Charter of the United Nations and the Declaration on the Granting of Independence to Colonial Countries and Peoples’. The Resolution on the Cook Islands did not declare this.<sup>144</sup>

The UN consideration of the West Indies Associated States in 1966 and 1967 led to a fundamental discussion on the meaning of ‘popular consent’. A majority in the GA rejected the UK’s position that the populations of the islands had consented to their new status. There had not been plebiscites, and in two of the territories there had not even been elections in which the new constitutional structure had been an issue. In 1966, the Decolonization Committee recommended that plebiscites should be held, and also requested (in vain) to be allowed to monitor the process.<sup>145</sup> A representative of the opposition in Grenada stated before the Decolonization Committee in 1967 that the people of Grenada had been demonstrating in large numbers ‘also because [the government] had begun discussions with the United Kingdom Government on a new constitution without first consulting the people’.<sup>146</sup> According to this representative the people of Grenada were not opposed to an association *per se*, but objected to the way in which it was being realized.

In his dissertation, *Thomas* represents the West Indian perspective on the coming about of the association:

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141 GA Resolution 2064 (XX) of 16 December 1965. The UN representative who observed the elections reported that ‘there was, in a fairly large selection of the population, a fair degree of awareness of the significance of the elections’ (UN Doc. A/5962, cited in UN Yearbook of 1965, p. 571). The fact that *all* of the political parties more or less supported the proposals for free association was not criticized.

142 Mali, Yugoslavia and the Soviet Union in the GA criticized the fact that no referendum had been held (UN Yearbook 1965, p. 572). Northey 1965, p. 112 condemned the procedure as an attempt to launch the Cook Islands on the road to independence against its will. *See* Stone 1965 and Stone 1966 for a response to this allegation.

143 Only an opposition party in New Zealand opposed free association. It unsuccessfully campaigned for a referendum on the Cook Islands (*see* Northey 1965).

144 Before New Zealand entered into a relation of free association with Niue in 1974, the Niue Island Assembly decided to hold a referendum on the new Constitution (UN Doc. A/9623/Add. 5 (Part V), Chapter XXII, para. 86 et seq.). The UN was requested to supervise the referendum, and the GA afterwards considered that this process had allowed the people of Niue to use its right to self-determination, *see* GA Res. 3285 (XXIX).

145 Thomas 1987, p. 148-9.

146 GAOR (XXII), Annexes, Addendum to agenda item 23 (part III), para. 655.

The statehood idea was conceived in the UK without participation of the political leaders of the islands. It was only after the UK government had firmly decided on the new constitutional arrangement, including the specific conditions, [that] statehood [was] offered. It was packaged, gift-wrapped and presented with the compliments of the Colonial Office – and you do not look gift horses in the mouth!<sup>147</sup>

The UK responded to these objections that during the constitutional conferences which had been held in England in 1966, and which had been attended by every political party that was represented in the parliaments of the six territories, ‘full and unqualified agreement’ had been reached on the basic objectives of associated statehood. The proposals were subsequently approved by the parliaments of the six territories without a single dissenting vote. The United Kingdom furthermore stated that referendums or special elections had not been deemed necessary, considering that the West Indies Act 1967 offered the Associated States the possibility to become independent without interference of the United Kingdom.

The position of the UK on the ascertainment of the wishes of the people was rejected by all members of the Committee, except the US. The representatives of the other Western states agreed that it would have been preferable to hold referendums.<sup>148</sup> The representative of Italy stated that: ‘The crucial element in decolonization, at least as far as small Territories were concerned, was self-determination, or the consultation of the populations of the Territories as to their future’.<sup>149</sup> All of the members (including the UK) agreed on this, but the UK stated that a referendum was not suitable for complex questions such as the adoption of a new constitution.<sup>150</sup>

Only a few members considered that the holding of a referendum was obligatory in each case of free association,<sup>151</sup> but a majority was convinced that the UK procedure had been insufficient. The fact that the UK had not allowed a UN visiting mission to observe the process appeared to be a crucial factor. Other cases have shown that the Decolonization Committee does not wish to rely on the information of the Administering State only,<sup>152</sup> and that it considers it an obligation of the UN to make sure that the populations are granted an opportunity to make a free choice.<sup>153</sup>

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147 Thomas 1987, p. 149.

148 Italy (GAOR (XXII), Annexes, Addendum to agenda item 23 (part III), para. 746), and Finland (para. 822).

149 GAOR (XXII), Annexes, Addendum to agenda item 23 (part III), para. 809.

150 *Idem*, para. 894.

151 Poland (para. 772), and Venezuela (para. 888).

152 The UK had not followed the examples of the Netherlands and New Zealand of including members of the territories in the UN delegation.

153 The representative of Tanzania stated: ‘particularly in the case of small Territories, the United Nations should take appropriate steps to ensure that the people of the Territories were enabled to express themselves freely on their future status and in full knowledge of the options available to them’ (para. 716).

A majority of the Committee also did not accept the opinion of the UK that it was enough to conclude that the populations of the West Indian islands were not opposed to association with the UK, because there had been little or no outspoken opposition to the West Indies Act. The representative of Uruguay, who took a moderate position and supported the UK on many other points, stated: 'It was not enough to say that no opposition had been expressed to the proposed arrangements; General Assembly resolution 1514 (XV) required not merely the absence of opposition but the existence of a positive desire for a particular arrangement'.<sup>154</sup>

Another point of criticism was that the population had not been given a real choice between the three options of Resolution 1541. Chile, for instance, regretted that the association 'had not been based on a referendum in which the peoples of the islands had specifically chosen association with the former administering Power in preference to independence or integration. If that procedure had been followed, the people would have exercised their right to self-determination'.<sup>155</sup> Australia stated that: 'it might be argued that a clearer choice should have been given between independence, integration and association'.<sup>156</sup> The UK responded to this that it had been impossible to realize a federation between the islands, and that independence had been rejected by the representatives of the islands. The only choice that could therefore have been offered, according to the UK, would have been between association and colonial status.<sup>157</sup> Apparently, integration with the UK was out of the question. The UK, the US and a number of other states added that the new status of the islands allowed them the freedom to unilaterally choose for independence or integration with an independent member of the Commonwealth. According to the UK, 'self-determination would not cease when the new arrangements came into effect, since they provided a permanent machinery for its continuing exercise',<sup>158</sup> echoing New Zealand's phrase 'continuous self-determination' that was used with some success in the Cook Islands case.<sup>159</sup>

The UN attitude in these cases was perhaps not very consistent, and probably guided – at least partly – by the UK's unpopularity at the time. But the 1967 debate does seem to have set the standard for the future. This standard – free choice between different options in a UN supervised plebiscite – is in line with Resolutions 1514 and 1541. It might very well be wondered whether it is at all possible to ascertain the opinion of the population of a small island on a change in status through elections for the representative organs. The UK

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154 *Idem*, para. 723. Similarly Poland (para. 773).

155 *Idem*, para. 743.

156 *Idem*, para. 775.

157 *Idem*, para. 756 The other members of the Committee did not refer to this option either, and interpreted 'integration' as the option of a federation with an independent state in the Caribbean, for instance Trinidad and Tobago (*see below* in the paragraph on integration).

158 *Idem*, para. 785.

159 The phrase was first used by New Zealand in 1964, *see* Stone 1966, p. 169.

practice (as well as the Dutch) has long been to assume that the government speaks for the people, and that referendums 'are not the British way'. Drower has criticized this approach based on a review of the way six small UK territories achieved independence, and states: 'in territories such as Grenada, Dominica, St Lucia and the Seychelles, election outcomes were as much influenced by the personal popularity of the leading contestants as they were by the inhabitants' views on decolonization'.<sup>160</sup> Moreover, elections sometimes offer no choice on the constitutional future of the territory. In the cases of the Cook Islands in 1965,<sup>161</sup> the West Indies Associated States in 1967,<sup>162</sup> the Netherlands Antilles during the 1950s and Aruba in the 1970s and 1980s, all of the parties that participated in the elections supported the proposal under discussion, or at least its main features. Under such circumstances, the electorate is obviously not given an opportunity to make a choice, and the right to self-determination – defined as the freedom of choice of the population – is effectively reduced to zero. Complete reliance on the assumption that the wishes of the population will be accurately represented through the party system was shown to be unjustified on at least one occasion in the Netherlands Antilles.<sup>163</sup> It was also criticized in the case of Puerto Rico.<sup>164</sup> This is not to say that plebiscites will always lead to a more accurate gauging of popular opinion, witness the approval of the Compacts of Free Association arrangements between the US and Micronesia, the Marshall Islands, and Palau.<sup>165</sup>

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160 Drower 1992, p. 133. *See also* Northey 1965, p. 113, who calls it 'an absurd assumption' that the future status of the Cook Islands was the main issue in the 1965 election: 'Personalities and policies will dominate this issue at the election'.

161 Stone 1966 171.

162 The UK explained to the Decolonization Committee in 1967 that 'no political party had sought independence and all had agreed in supporting the new association agreements' (para. 709).

163 The outcome of the referendum of 1993 on Curaçao had not been supported by any political party represented in the Island Council previously to the referendum (Van Rijn 1999, p. 42, and Pietersz 1993). Drower 1992, p. 133 contains a considerable list of UK territories in which the elected representatives of the people chose for independence while the people itself did not appear to desire it.

164 *See below* in the paragraph on Puerto Rico.

165 When the UK representative in the Trusteeship Council stated that: 'the people of Micronesia could have chosen whatever status they wished – be it independence, integration with the United States, or a relationship with some other state', he was probably being deliberately naïve (UN TCOR (XVI) 1669th Meeting (1989), p. 7-8). The history of the negotiations shows that none of these options was really open to the territories, as far as the US government was concerned, except perhaps some sort of status similar to the Commonwealth status of the Marianas, which can be called neither integration nor association. The Compacts were the subject of UN supervised referendums on the islands, after the Trusteeship Council had urged the US to make sure that free association was really the status desired by the islanders. This was achieved by offering the population a choice of yes or no on the infinitely complex Compacts, and by including an 'advisory section' in which the voters were asked what kind of status they would prefer if the Compacts were rejected. The advisory section offered a choice between independence or another relation with the US

It can be inferred from these cases that UN approval of a free association as a form of decolonization can only be obtained if UN observers are present to witness or supervise the exercise of the right to self-determination. There might be various ways of consulting the people that are acceptable, as long as it becomes sufficiently clear that the new status enjoys the support of the population.

In the cases of free association approved by the UN so far, there was no evidence that the population was given the opportunity to choose between different status options. In each case, the terms of the association were determined through negotiations between the principal states and representatives of the islands, after which the result was sometimes put to the people in a referendum in a single 'yes or no' vote, or made an issue in a general election. This obviously leaves much room for improvement. A simple 'yes or no' vote is rather a crude way of determining whether the new status enjoys the support of the population. In territories that have little experience with self-government, or where the population has not developed much political awareness, a referendum on a fully worked out association scheme can even be seen as confronting the people with a *fait accompli*.

International law offers little consolation here, and it is probably up to the population itself to make sure that it is not faced with a 'yes or no' vote on a form of full self-government that is not in line with its aspirations, and with no view to an alternative. It is therefore important to realize that in spite of the fact that the freedom of choice of these populations is recognized in international law, their full use of this freedom can still be annulled quite easily, with the approval of the UN. Attention should be focussed on the moment when it is decided to start negotiations with the metropolis on a form of association, seeing that most of the associations ('free' or not) discussed in this study have developed into a form of independence, without the population ever explicitly choosing for it. The principal decision to pursue the goal of association instead of other options should therefore ideally be made by the

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which the voters could describe themselves. The UN visiting missions noted a high level of apathy among the inhabitants, and were surprised that such a major political event inspired so little enthusiasm. This could indicate that the population felt it was confronted with a *fait accompli* which it did not understand. Despite the fact that interest groups distributed stickers which had certain status options printed on them (including 'communism' which was used by one voter in the Marshall Islands), 20% of the voters in Micronesia and over 70% in the Marshall Islands did not fill in the advisory section. Both UN visiting missions considered the advisory part of the plebiscite as a failure. The information campaign had concentrated on the Compacts, and the other options were probably not properly understood by the voters, or 'did not excite much interest'. See the 'Report of the United Nations Visiting Mission to Observe the Plebiscite in the Federated States of Micronesia, Trust Territory of the Pacific Islands, June 1983' (UN TCOR, 51<sup>st</sup> Session, Supplement 1, UN Doc. T/1860), and the report on the Marshall Islands (*idem*, supplement 2).

population, with full awareness that the end result is likely to be very close to independent statehood in the long run.

### *Continuing Self-Determination*

According to Resolution 1541, the people of the associated state should have the right to choose another status 'through the expression of their will by democratic means and through constitutional processes'.<sup>166</sup> The legal doctrine considers this an essential attribute of associated statehood.<sup>167</sup> A choice for free association is in effect one of 'continuing self-determination', as the representative of New Zealand described it at the UN. This view was shared by the Netherlands during the drafting of Resolution 2625.<sup>168</sup> According to *Crawford*, 'it is clear that those territories which have so far achieved associated status have remained self-determination units, able both in international and municipal law to choose other more permanent forms of self-government'.<sup>169</sup>

The debates on the Cook Islands showed that New Zealand's promise that the territory had the freedom to proceed towards independence if it so desired was very important to many member states, as it had been in the cases of Puerto Rico and the Dutch Caribbean Countries. This freedom is considered by certain writers to be a right to choose for another relation with New Zealand, including integration.<sup>170</sup>

The GA Resolution on the Cook Islands insisted that the UN would have an obligation to assist the Cook Islands if it wanted to proceed to independence.<sup>171</sup> The Resolution of 1974 on Niue did not contain such a promise, which perhaps shows that the GA had become less suspicious of free association, or convinced that New Zealand would really not oppose a drive towards independence.<sup>172</sup>

The association arrangements discussed above contain a procedure which the associated state could follow towards terminating the association. A re-

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166 Principle VII of Resolution 1541.

167 See for instance *Crawford* 2006, p. 633, and Hannum 1996, p. 17. *Cassese* is the only writer (as far as I am aware) who thinks that a choice for free association terminates the right to self-determination. He bases this conclusion on a questionable interpretation of Resolution 2625, which declares that 'the separate and distinct status' of colonial territories continues until the right to self-determination has been exercised (*Cassese* 1995, p. 73).

168 The Netherlands considered that the right to external self-determination also applied to freely associated territories that had already exercised their right to self-determination but not necessarily for the last time (statement by the Netherlands in the Drafting Committee (UN Doc. A/AC.125/SR.107, p. 84), see also the Report of the Netherlands delegation, cited in *Kuyper & Kapteyn* 1980, p. 204). See also *Wainhouse* 1964, p. 72.

169 *Crawford* 1979, p. 376. This passage was deleted from the second edition, see *Crawford* 2006, p. 633.

170 The draft Treaty of Free Association for Tokelau granted the population the right to choose for independence or integration with New Zealand.

171 GA Res. 2064 (XX) of 1965.

172 GA Res. 3285 (XXIX) of 1974.

ferendum is prescribed, as well as a qualified majority of the votes of the members of the representative body. The US Compacts of Free Association give the US the right to break off the association unilaterally, and the UK West Indies Act also made this possible for the UK.<sup>173</sup> The relationship between New Zealand and its associated states is usually regarded as 'a partnership from which each partner can withdraw at any time', although it is not certain whether New Zealand would really have the right to break off the relations unilaterally.<sup>174</sup>

This element of the free association arrangements has not been criticized, perhaps because so far none of the principal states has broken off the association without the consent of the associated states. It could be argued that such an action would be illegal under international law, and the respective clauses in the association agreements might be invalid, because unilateral termination without the consent of the associated people would violate their right to self-determination.<sup>175</sup> But it could also be argued that, if it is established that the associated state voluntarily agreed to the termination clause, with the consent of its people, it might not be unreasonable for the metropolitan state to hold the associated state to it, if it were clear that the metropolitan state would be severely affected by a continuation of the association.

*Nelissen & Tillema* write on this subject:

If one now argues that once a territory is associated, in conformity with its rights and the administering power's duties under Article 73 [of the UN Charter] and subsequent developments, the obligations under Article 73 cease to exist, it would mean that one could do exactly that what had been forbidden before: to force upon the people a political status they did not desire and to take not their interests, but one's own interests as paramount.<sup>176</sup>

In any case, it could well be maintained that the procedure by which the UK associated states achieved independence is hard to reconcile with the right to self-determination. The governments of the states requested independence,

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173 The UK had made clear in the Constitutional Proposals of 1965, that the termination of the association by the UK 'will not require the request and consent of the territory' (Spackman 1975, p. 379-80). The Compacts of Free Association unequivocally create right for the US to terminate them, although certain provisions will persist, mainly regarding the defence obligations of the US, and the obligation to donate to a Trust Fund for the islands.

174 Fears that New Zealand might force the islands to become independent does exist in Niue and the Cook Islands, see Aldrich & Connell 1998, p. 141, and Clark 1980, p. 64.

175 Brownlie 2003, p. 489. See also Crawford 1979, p. 376: 'given that association relations are accepted in practice as satisfying the principle of self-determination, and are accepted on the basis of undertakings and arrangements to which the Metropolitan state is committed, it cannot be argued that association relations are, as a matter of international law, revocable at the will of the metropolitan State.' This passage was rewritten for the second edition of *Crawford's* study, and now merely asserts that association agreements are binding under international law (Crawford 2006, p. 633).

176 Nelissen & Tillema 1989, p. 190.

but they did not want to follow the prescribed procedure including a referendum, probably for fear that the population would vote against independence. The West Indies Act made it possible for the UK government to end the association by a simple Order in Council.<sup>177</sup> All of the West Indies Associated States became independent between 1974 and 1983, but no referendum was held in any of them. Instead, the UK chose to avoid confrontations with the governments of the associated states, and ended the association by Orders in Council in the face of strong opposition to independence in most of the territories. This procedure denied the associated populations their right of 'continuing self-determination', while there appeared to be no pressing need for the UK to break off the relations.

Should an associated territory also be able to choose for integration with the principal state? This question, which might be of some relevance to the Netherlands Antilles or Aruba in the future, has never been answered clearly (or even asked) at the UN, although some statements indicated that the freedom of choice of Principle VII should perhaps not be limited to independence (*see below* in the paragraph on integration).

#### *International Personality*

It is far from clear what the international legal consequences should be when a territory enters into a free association with an independent state, apart from the fact that the reporting obligation under Article 73 *e* of the Charter probably ceases. For an associated state to be able to exercise rights, or to take on obligations, under international law, it is often entirely dependent on the recognition of the international community that it is capable to do so. This recognition can only be obtained on a case-by-case basis as long as general international law does not clearly define the position of associated states in the international system, and international organizations do not make allowance for the existence of associated states as a separate category of international persons that are neither independent states nor dependencies.<sup>178</sup>

Some attempts at clarification of the status of associated territories have been made. The International Law Commission debated whether the Vienna

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<sup>177</sup> This procedure had obviously not been intended to be used in this way. In 1967, the UK had expected the association to be permanent because the territories were too small for independence, and they should not be allowed to make the mistake of choosing for independence too easily. According to Drower 1992, p. 135, the Order in Council procedure was intended to protect the UK from 'unwelcome behaviour' by the associated states. Forbes 1970, p. 87 writes on the difficult procedure for independence to be followed by the associated states: 'The inference, quite clearly, is that a high probability of impulsive authoritarian behaviour does exist and must be taken into account. In contrast, the United Kingdom Government can be entrusted, without any legal procedural restraints, to proceed with maturity of judgment in terminating the association by the purely ministerial device of an Order in Council.'

<sup>178</sup> In a similar sense, *see* Macdonald 1981, p. 281-2, and Broderick 1968, p. 402.

Convention on the Succession of States in Respect of Treaties should include a reference to the special situation of associated states, but the debate merely revealed that the members were confused about the exact meaning of associated status, and whether the existing examples could be treated as single category. The confusion was caused (among other things) because the Special Rapporteur also discussed the Netherlands Antilles and Surinam in this category, as well as other overseas territories that do not conform to the UN criteria at all.<sup>179</sup> The ILC decided to recommend not including a reference to associated states, which is unfortunate, because the current situation with regard to territories such as the Cook Islands is rather in need of some clarification.

It has been up to the associated states themselves, with the help of their principal, to force an entrance onto the international scene. States and organizations often continue to demand from associated states that they exhibit all of the characteristics of independent states before they can participate in international relations independently of their principal. The territories sometimes attempt to pose as independent states. Some fare better at this than others, for reasons which are not always clear, but the principal states appear to play an important role in this process.

New Zealand has taken considerable effort to enable the associated states 'to gyrate on the international scene'.<sup>180</sup> New Zealand and the Cook Islands have had to explain the special status of the associated states on numerous occasions, in order to convince states and organizations that the Cook Islands was no longer a colony or a dependency, and capable of entering into international relations in its own name. These attempts have become increasingly successful as the status of the Cook Islands developed. In 1981, the Lomé Council refused a request by the Cook Island to be allowed to the second Lomé Convention,<sup>181</sup> but in 2000, it (and Niue) was allowed to sign the Cotonou agreement and became part of the group of ACP states. During the 1970s and 1980s, New Zealand and the Cook Islands also tried to realize a provision in the UN Convention on the Law of the Sea which would make it possible for associated states to become a party to the Convention. This campaign was finally successful in 1982 when the Prime Minister of the Cook Islands signed the Convention and received 'a loud ovation and applause from delegates, particularly from the small island states'.<sup>182</sup>

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179 Igarashi 2002, p. 150-2.

180 Gilmore 1982, p. 18.

181 According to Crocombe & Tuainekore Crocombe 1996, p. 179 only the African bloc objected.

182 Igarashi 2002, p. 282. New Zealand at first also defended the interests of the Dutch territories. The final text of the Convention however only allows the signature of self-governing territories 'recognized as such by the United Nations', and 'which have competence over the matters governed by this Convention, including the competence to enter into treaties in respect of those matters' (Article 305 (e)). The Netherlands Antilles and Aruba might claim to fulfil the first criterion, but the Kingdom Charter clearly precludes them from

The Asian Development Bank also changed its opinion during this period. When the Cook Islands became a member of the Bank in 1976, it was agreed between New Zealand, the Cook Islands and the Bank that New Zealand would be responsible for the debts incurred by the Cook Islands, under Article 3, paragraph 3 of the Charter of the Bank, which refers to dependencies.<sup>183</sup> In 1992, the Cook Islands and New Zealand informed the Bank that, in view of the fact that the Cook Islands had assumed responsibility for its foreign affairs, it would also take on responsibilities for its loans. The Bank accepted this.<sup>184</sup> In spite of this, the New Zealand government still appears to fear that it may be held responsible if the Cook Islands would fail to satisfy its creditors.<sup>185</sup> The international community now seems to have accepted the Cook Islands and Niue as entities capable of exercising international functions independently, even though some doubts continue to exist. New Zealand, for instance, has had to explain repeatedly to the UN human rights monitoring bodies why it does no longer report on the Cook Islands and Niue, which are described by various committee members as 'dependencies', and are compared to for instance the British Virgin Islands (a NSGT). The explanation by New Zealand that the associated states are fully responsible for the implementation of the human rights treaties and the reporting thereon, now do seem to be accepted by the monitoring bodies.<sup>186</sup>

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concluding treaties in their own name. The Caribbean Countries are therefore not allowed to become parties to the Convention.

183 Article 3, para. 3 of the Charter of the ADB provides: 'In the case of associate members of the United Nations Economic Commission for Asia and the Far East which are not responsible for the conduct of their international relations, application for membership in the Bank shall be presented by the member of the Bank responsible for the international relations of the applicant and accompanied by an undertaking by such member that, until the applicant itself assumes such responsibility, the member shall be responsible for all obligations that may be incurred by the applicant by reason of admission to membership in the Bank and enjoyment of the benefits of such membership.'

184 *The Cook Islands. A Voyage to Statehood* (Occasional Paper prepared by the Ministry of Foreign Affairs and Immigration of the Cook Islands (July 1998).

185 Crocombe & Tuainekore Crocombe 1996, p. 174-5 recount how four foreign swindlers almost bankrupted the Cook Islands by a failed scheme that involved a sum 21 times the annual income of the government. New Zealand pressed for an investigation. The report described the Cook Islands government as 'a gullible victim'.

186 The EU also exhibits a somewhat ambiguous attitude towards the situation. After the Cook Islands and Niue were allowed by the EU to sign the Cotonou development agreement of 2000 on their own name, the website of the Directorate General for Development Commission of the EU explained that: 'In practical terms, the Cook Islands acts as an independent country and the government has full executive and legislative powers.' (See the Country Overview on the Cook Islands at <http://europa.eu.int/comm/development/body/country/>.) Even though the two states have thus been allowed into the group of ACP states, which otherwise consists entirely of independent states (see Chapter 9), the EU still appears reluctant to accept the independence of the Cook Islands and Niue, other than 'in practical terms'.

The US has taken a different approach by presenting its associated states as independent states with a special relation with the US. This approach has been successful, in the sense that the Marshall Islands, Micronesia and Palau have been accepted as UN members. For this reason they are now sometimes viewed as more independent than the Cook Islands and Niue, even though they clearly appear to be less active on the international scene and are still very dependent on the US.<sup>187</sup> The UN membership of the US associated states may help to make the concept of associated statehood more acceptable to states and international organizations. But if it means that associated statehood will be equated with independence, it may lead to elimination of the concept as a real option separate from independence.

#### *Nationality and Access to the Principal State*

Resolution 1541 does not provide anything on the subject of nationality and citizenship, but in practice this has been an important aspect of association relations. It should probably be assumed that the principal and the associated states are free to choose whether to establish a separate nationality for the inhabitants of the associated territory or not.<sup>188</sup> The practice of the UK, the US and New Zealand varies considerably.

The inhabitants of the Cook Islands and Niue are New Zealand nationals with unrestricted right of access to New Zealand (and Australia). Only 28% of the Cook Islanders actually live in the Cook Islands. Most of the others live in New Zealand and Australia. New Zealanders do not have the right of abode in the Cook Islands and Niue, which hardly ever grant permanent residence to any outsider.<sup>189</sup>

Japan and other countries have refused to recognize the Cook Islands and Niue as independent states because their inhabitants have New Zealand nationality.<sup>190</sup> It has been pointed out by several authors, however, that this

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187 Witness for example the number of international treaties they have participated in according to the *United Nations Treaties Series* (Cook Islands 144 versus Micronesia 23, *see above*).

188 According to Igarashi 2002, p. 249 it is not in contention that territories which are not independent states may have their own separate nationality.

189 *See Crocombe & Tuainekore Crocombe* 1996, p. 180, who wonder how long New Zealand will allow the Cook Islands 'to eat their cake and have it too'. Broderick 1968, p. 389 cites a New Zealand minister as saying in 1967 that it was impossible to deport Cook Islanders who had committed crimes in New Zealand, because no distinction could be made between New Zealand citizens, wherever they were from.

190 Ntuny 1993, p. 13. It seems that one of the reasons why the Cook Islands were refused accession to the Lomé II Convention in the early 1980s was because it did not have its own nationality (Igarashi 2002, p. 265). As a result of this, the Cook Islands Constitution was amended (among other things) to create the status of 'permanent resident of the Cook Islands' (Igarashi 2002, p. 239), which might be considered as a form of citizenship that co-exists with New Zealand nationality. It seems doubtful that this operation was the reason why the Cook Islands was allowed to sign the Cotonou agreement of 2000, seeing that Niue, which did not change its Constitution, was also allowed to sign it.

is not really a valid reason for withholding recognition.<sup>191</sup> Citizenship used to mean an allegiance to the head of state, which would conflict with the idea of establishing a separate state, but this appears to be an outdated view.<sup>192</sup> Anyway, it did not prevent the UN from welcoming several former French and British colonies as members during the 1950s and 1960s while they did not have a separate nationality.<sup>193</sup> The Cook Islands has established a separate citizenship for its inhabitants, and seems to contemplate issuing its own passports.<sup>194</sup>

The inhabitants of the UK associated states also did not have a separate nationality. They were considered 'citizens of the United Kingdom and Colonies' until 1983, but this did not entitle them to unrestricted access to the UK. The UK's immigration policies became more strict during the 1960s, in order to restrict 'the immigration into the country of coloured people from the British colonial territories'.<sup>195</sup> Most UK citizens who lived in the Caribbean lost their right of abode in the UK in 1962, and the British Nationality Act 1981 would strip them of their UK citizenship to replace it with a 'Dependent Territory Citizenship'.<sup>196</sup>

The US associated states do have their own nationality. With the entry into force of the Compacts, they gained an essentially unrestricted access to the US,<sup>197</sup> which was followed by a considerable increase of migration, especially to Hawaii and other US territories in the Pacific, because there were more job opportunities on those islands, and the US provided better health care and social services in those territories.<sup>198</sup> According to the US State Department, there was concern over 'migrants who have communicable diseases, criminal records, or are likely to become a public charge as a result of chronic health or other problems'. Hawaii and the other US territories claimed compensation from the US federal government for the costs incurred.<sup>199</sup> The amendments

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191 See Keitner & Reisman 2003, p. 9.

192 According to Townend 2003, p. 595-6, New Zealand citizenship is not dependent on allegiance to the head of state of New Zealand, and could be extended by statute to inhabitants of foreign territories.

193 The inhabitants of the French West African states that remained part of the *Communauté* retained French nationality after independence, see Reisman 1975, p. 57-8. Thirteen of these African states were nonetheless admitted as members of the UN. See also Igarashi 2002, p. 292.

194 Crocombe & Tuainekore Crocombe 1996, p. 180. This could bring in money for the government, as the sale of passports to wealthy stateless persons seems to be a profitable business in Tonga and the Marshall Islands.

195 J.M. Evans, *Immigration Law*, Sweet & Maxwell: London 1983, p. 94, cited in Igarashi 2002, p. 250.

196 See above, in the paragraph on the West Indies Associated States.

197 Ntuny 1993, p. 107.

198 Grieco 2003.

199 Paper presented by John Fairlamb of the US State Department at a conference in Hawaii, June 2001 (published on the website of the government of Micronesia, <http://www.fsmgov.org>).

to the Compacts in 2004 terminated the unrestricted access to the US, and made clear that US immigration laws would apply to Micronesians and Marshallese as they do to other foreigners, with certain exceptions.<sup>200</sup>

It may be concluded that nationality is an important aspect of association arrangements, but that the legality of the association is not affected by a choice for separate nationality or not.

*Capacity to Comply with International Human Rights Standards?*

*Keitner & Reisman* consider that the legality of any association agreement essentially depends on the consent of the population, and the 'extent to which the association conduces to a better fulfilment of the human (including economic and social) rights deemed under contemporary prescriptions to be minimum international standards'.<sup>201</sup> There is abundant evidence that the first factor is indeed essential, but it seems doubtful whether the second factor is indeed relevant to the legality of association schemes.

If the situation with regard to the UN human rights treaties is any indication, serious questions could be raised as to the legality of the associations described above, assuming that *Keitner & Reisman's* opinion is correct. Only one of the associated states of the US and New Zealand has acceded to more than one of the UN human rights treaties in its own name,<sup>202</sup> and only three of them have ever reported on the implementation of these treaties independently,<sup>203</sup> whereas their principal states are parties to three and eight of these treaties respectively and report regularly on them (or in the case of the US: occasionally).

Might not the human rights of the inhabitants of these territories be better served if the principal states were directly responsible for them? Clearly, the governments of the associated states are not able to realize the material standards of living in the principal states. In the Marshall Islands and

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200 Section 141(a) of the Compacts of Micronesia and the Marshall Islands, as amended in 2004. The Compact with Palau is not up for renegotiation until 2009, but the US government has announced that it wants to restrict immigration from that state as soon as possible along the same lines.

201 *Keitner & Reisman* 2003.

202 The associated states have only acceded to the Convention on the Rights of the Child, except Micronesia, which is also party to the CEDAW. New Zealand used to extend the application of human rights treaties to the Cook Islands and Niue, but these territories have not used the possibility to accede (or succeed) to them in their own name, nor do they report on these treaties. The reports of New Zealand used to contain paragraphs on the Cook Islands and Niue, but no longer do. The Committee on Economic Social and Cultural Rights has asked New Zealand in 2002 how these territories could best be represented before the human rights bodies. New Zealand responded that it consulted with the UN secretariat to find a solution, but the fact that the Cook Islands and Niue seemed to pose a problem. (E/C.12/Q/NZE/1 (List of Issues) and E/C.12/2003/SR.11.)

203 Micronesia, the Marshall Islands and Palau have reported on the implementation of the Convention on the Rights of the Child in their territories.

Micronesia, standards appear to be very much lower than in the US.<sup>204</sup> While this is obviously an area of legitimate concern, the fact that these territories are nonetheless universally accepted as independent states, makes it likely that the legality of these association arrangements does not depend – at least not essentially – on their capacity to ensure respect for human rights.

### 3.2.3 Conclusion

Free association is a form of full self-government and decolonization that has been accepted by the UN as a legitimate outcome of the process of self-determination and decolonization, at least for small territories. In the view of the UN, an associated territory remains sovereign in the sense that it voluntarily delegates certain tasks to the metropolitan state, but retains the right to make another choice in the future.

The UN criteria for free association could be summarized as follows: the associated state should have full self-government, although it may voluntarily delegate certain tasks to the metropolitan state, especially in the fields of foreign affairs and defence; the association should be embraced by the population in an act of free choice observed by the UN; and the territory should retain the guaranteed right to choose another status in the future.

The practice of New Zealand and the UK indicates that free association may be a satisfactory form of decolonization if the metropolitan state is prepared to relinquish its legislative and administrative control over the territory and to promote its capacity to enter into international relations independently. The attempts by the UK to retain control and to maintain a unified foreign policy were an important reason why the relations with the West Indies Associated States quickly turned sour. The US has granted its associated states more freedom in foreign affairs than the UK, but remains a strong factor in the territories through its responsibilities for defence, and through substantial financial aid.<sup>205</sup>

The international responsibility of and for associated states remains a little murky. It seems logical to assume that when an associated territory is not limited by its relations with the principal state to enter into international relations independently, it ought to be treated as such by states and organizations. In practice, however, freely associated territories still tend to be treated as dependencies of their principal states. Some progress has been realized through to the initiatives of New Zealand and the Cook Islands. But the Cook Islands seems to have been forced to modify its relations with New Zealand to such an extent that the differences with full independence are now almost indiscernible.

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204 These countries recently even suffered from outbreaks of cholera and leprosy.

205 See Macdonald 1981, p. 252.

If the concept of free association is to have a future, states and international organizations should relinquish their hesitance to accept associated states as participants in the international arena. The development of the concept of free association places an obligation on states to recognize entities which the UN has determined to have achieved 'a full measure of self-government'. One of the factors for full self-government adopted in 1953 by the GA provides that the associated territory should be able to enter into relations with foreign states and international organizations. If the metropolitan state grants this freedom to the territory with the approval of the UN, the international community should not try to annul this development by ignoring the existence of associated states as international persons.

Associated states are allowed to go their own way, and make their own mistakes, which may also mean that they descend into poverty. The US, the UK and New Zealand have shown considerable financial solidarity with their associated territories, but full internal self-government inevitably entails certain risks for small territories, which have become very visible in territories such as the Marshall Islands. Associated territories also tend to disappear beneath the radar of international human rights supervision once it becomes clear that the metropolitan state cannot be held responsible anymore.

### 3.3 INTEGRATION

Integration of an overseas territory into a metropolitan state is generally interpreted to mean that the territory becomes part of that state and loses most or all of its separate status and personality under international law. The territory is incorporated in the normal constitutional structure of the state on an equal footing with the metropolitan administrative subdivisions of that state.

There are three elements of integration that distinguish it from association. First, the metropolitan state is fully responsible for every aspect of the government of its integrated territories, whereas associations may exonerate the metropolitan government from such responsibilities. Secondly, integration means that the overseas population should have the same status as the metropolitan population, with equal rights and obligations. In practice this does not mean that, for instance, social security benefits will always be exactly the same as in the mainland, not even in a unitary state such as France, but as a rule there should be equality, while exceptions will have to be clearly motivated by the demands of the local circumstances of the overseas territory itself. Thirdly, integration is usually assumed to be a definitive choice which extinguishes the separate position of the territory under international law.

GA Resolution 1541 recognizes integration as a valid form of full self-government.<sup>206</sup> Principles VIII and IX lay down the basic principles for integration, which were accepted almost without opposition in the GA. They read:

*Principle VIII*

Integration with an independent State should be on the basis of complete equality between the peoples of the erstwhile Non-Self-Governing Territory and those of the independent country with which it is integrated. The peoples of both territories should have equal status and rights of citizenship and equal guarantees of fundamental rights and freedoms without any distinction or discrimination; both should have equal rights and opportunities for representation and effective participation at all levels in the executive, legislative and judicial organs of government.

*Principle IX*

Integration should have come about in the following circumstances:

- (a) The integrating territory should have attained an advanced stage of self-government with free political institutions, so that its peoples would have the capacity to make a responsible choice through informed and democratic processes;
- (b) The integration should be the result of the freely expressed wishes of the territory's peoples acting with full knowledge of the change in their status, their wishes having been expressed through informed and democratic processes, impartially conducted and based on universal adult suffrage. The United Nations could, when it deems it necessary, supervise these processes.

The Resolution clearly creates higher standards for integration than for association, both with regard to the content of the status and the procedure by which it is achieved. This reflects a critical attitude towards integration among states, which originated in the 1940s and 1950s because of the assimilation policies of France and Portugal. Many states feared the colonial powers would use integration as a legal façade behind which colonial rule would simply continue.

Mere references to constitutional provisions that guarantee the equality of the overseas departments or provinces were quickly dismissed during the debates on the Portuguese overseas provinces and several French territories. Many representatives insisted that in these cases, practice was as important as law.<sup>207</sup> With regard to the Portuguese territories the representatives discussed such questions as racial discrimination, labour conditions, undernourishment, infant mortality rate, and the fact that there was only one indi-

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<sup>206</sup> 'Self-government' is in this case perhaps a misnomer, since integration does not mean that the territory gains the right to govern itself but only a right to participate in the government of the entire state.

<sup>207</sup> See for instance the statement by the representative of Jordan during the debate on Resolution 1541 in 1960, GAOR (XV), 4<sup>th</sup> Comm., 1033<sup>rd</sup> Meeting, para. 17.

genous inhabitant of Mozambique with a university degree.<sup>208</sup> In the debate of 1986 on New Caledonia, representatives attached much importance to the French policy of stimulating migration of Francophone people to New Caledonia in order to secure that the indigenous Kanaks would not represent a majority of the population in the territory.<sup>209</sup> It could be deduced from these debates that the equality of the overseas population should be real, and not merely symbolic, and that integration should not lead to forced assimilation or repression of the indigenous population.<sup>210</sup>

During the 1960s and 1970s, integration was not considered as a valid way of exercising the right to self-determination by many states. An important reason for the unpopularity of integration was that it eliminated the possibility of independence for the future, and that it was expected to bring the territory fully under the domestic jurisdiction of the metropolitan state. The UN would therefore not be allowed to involve itself with the territory anymore. A majority of states thought that the UN should always send visiting missions to supervise elections or referendums which might lead to integration of the territory. The representative of Tunisia expressed this sentiment in the Fourth Committee in 1960:

The Committee must therefore be mindful of the immense harm it could cause the Non-Self-Governing Territories if it decided that the United Nations did not have the right to scrutinize rigged elections which would sanction for all time an 'integration' which the population of the Non-Self-Governing Territory concerned had not really wanted.<sup>211</sup>

It was never explicitly agreed that integration would put an end to the international status of an integrated territory, but Resolutions 1541 and 2625 suggest that this is the case. Some writers such as *Crawford*<sup>212</sup> and *Cassese*<sup>213</sup> think

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208 See for instance the statements by Iraq (GAOR (XV) 4<sup>th</sup> Comm., 1036<sup>th</sup> Meeting), Byelorussia (1037<sup>th</sup> Meeting), Guinea (1038<sup>th</sup> Meeting), India (1040<sup>th</sup> Meeting), Ukraine (1042<sup>nd</sup> Meeting).

209 See Chapter 3.

210 *Oppenheim* concludes that 'in particular, the adoption of a constitutional structure by which overseas territories, however distant, are constituted as provinces or departments of the parent state, on an equal footing with provinces or departments in the metropolitan territory of the state, may not be sufficient in itself to render them any the less in substance colonial territories' (*Oppenheim/Jennings & Watts* 1992, p. 277).

211 GAOR (XV) 4<sup>th</sup> Comm. 1044<sup>th</sup> Meeting, para. 7. Morocco agreed that integration was indeed 'an indissoluble marriage and an irrevocable procedure' (*idem*, para. 27). The UN visiting mission to the Cocos (Keeling) Islands answered several questions by the islanders whether a choice for integration was final that 'the act of self-determination could not be held again in the future' (Report of the visiting mission (17 September 1984), UN Doc. A/39/494, para. 189).

212 *Crawford* 2001, p. 17.

213 *Cassese* 1995, p. 73. *Cassese* bases this conclusion on paragraph VI of GA Resolution 2625 (XXV) of 1970, which declares that the separate status of overseas territories continues until they have exercised their right to self-determination.

that a choice for integration is final, at least where international law is concerned. *Pomerance*, on the other hand, writes that any alternative to independence is deemed to be inherently reversible.<sup>214</sup> This latter position is supported by Resolution 1514, which applies to any territory which has not yet become independent. It is also supported by GA Resolution 742 (VIII) of 1953, which states that the population of territories that achieved self-government as an integral part of a state should still be able to choose freely 'to modify this status through the expression of their will by democratic means'.<sup>215</sup> But perhaps this criterion was included in this list because the distinction between associated and integrated territories had not yet fully crystallised in 1953.

The UN Charter and Resolution 1541 suggest that an acceptable form of integration means that the relations between the metropolis and the overseas territories are from then on 'essentially within the domestic jurisdiction' of the state in the sense of Article 2, paragraph 7 of the Charter. The population would thereby lose its legal right to choose for another status unilaterally. Of course, it would probably be politically very difficult for a democratic state to hold on to an overseas territory which in majority wishes to secede from the state, no matter what international or domestic law dictates.

It might be that the question of legal finality can only really be answered in the abstract by giving preference to either the anti-colonial doctrine laid down in Resolution 1514, or the law based on Chapter XI and Resolution 1541. It might also be that these two doctrines can be brought into conformity with each other by concluding that integration ends the applicability of Chapter XI and 1541, but that 1514 continues to apply, meaning that the UN could still involve itself with the case, and the population retains its right to self-determination. This is consistent with the fact that during the drafting of the ICCPR and ICESCR there appeared to be a consensus that self-determination was a permanent right.<sup>216</sup> This conclusion is not supported (nor contradicted) by the practice of the GA in cases of integration. There is simply too little practice, and states and UN organs have never really spoken out on this issue. The question of finality will probably remain unresolved until the GA is faced with a case of a fully integrated overseas territory that wishes to change its relation with the metropolis.<sup>217</sup>

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214 Pomerance 1982, p. 25.

215 Factor A.2 of the Third Part of the Annex to Draft resolution I (GAOR (VIII) Annexes, Agenda item 32, p. 13) and to GA Res. 742 (VIII) of 27 November 1953.

216 See for instance the statement by the chairman of the Working Party that drafted the text of Article 1 of both Covenants, GAOR (X), 3rd Comm., 668th meeting, par. 3.

217 The UN involvement with Algeria in the early 1960s is not really an example of such a case, because the GA had never explicitly accepted it as a case of decolonization through integration with France. The case of New Caledonia (and the other *territoires d'outre-mer*) is not a good example either, because the GA did not consider their relation with France as a form of integration in the sense of Resolution 1541.

### 3.3.1 State Practice

Most of the colonial powers have at one time or another contemplated integrating their remaining overseas territories into the state on a basis of equality, but only a few have actually realized this. Since 1946, the French overseas departments and Hawaii have been the main example of integration as a serious alternative to independence or association.

#### *The Overseas Departments of France*

The local leaders of Martinique and Guadeloupe – the ‘old colonies’ in the Caribbean – had been petitioning for integration with the mother country since the 19<sup>th</sup> century.<sup>218</sup> In 1946, this request was granted when the islands became *départements d’outre-mer* (DOM). France immediately stopped transmitting information on the DOMs (and a number of other territories) under Article 73 *e* of the UN Charter, which led the GA to request a reason for this decision.<sup>219</sup> France replied that the peoples of the DOMs had requested ‘complete assimilation’. The peoples would ‘receive all the civic freedoms, duties and faculties which belong to the inhabitants of metropolitan France: all political differentiation in their regard disappears within a single legal and moral community’. Although the status of the DOMs would only be ‘largely identical’ to that of the metropolitan departments, the inhabitants of the DOMs would enjoy exactly the same status as the metropolitan French, or so France claimed.<sup>220</sup>

Although the French territories were removed from the list of NSGTs, a majority of the UN member states does not consider the events of 1947 as conclusive *per se*, witness the re-listing of New Caledonia in 1986. Some of the other French territories were also re-listed in the 1960s and 1970s (*see below*), but these all concerned territories that were far less integrated with France than the DOMs. Whether the GA could also decide to re-list the DOMs has never been discussed, as far as I am aware, and it would probably depend on the estimation of the GA whether DOM status represents a full measure of self-government and a completed form of decolonization in the sense of Resolutions 1541 and 1514.<sup>221</sup>

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218 Oostindie & Klinkers 2003, p. 34.

219 GA Resolution 222 (III) of 3 November 1948. *See also* GAOR (IV), Annual Report of the Secretary-General on the Work of the Organization, Supplement No. 1, p. 127.

220 Translation by the Secretary-General of a letter by the French government of 29 April 1949 (UN Doc. A/915). France also included a large collection of applicable laws and decrees to the Secretary General.

221 The independence movement on Guadeloupe has attempted to have the territory re-listed as a NSGT during the 1980s, but without success. *See* Aldrich & Connell 1992, p. 239.

The DOM status means that all French legislation applies, unless the legislator explicitly decides it does not, as Article 73 of the French Constitution provides:

Dans les départements et les régions d'outre-mer, les lois et règlements sont applicables de plein droit. Ils peuvent faire l'objet d'adaptations tenant aux caractéristiques et contraintes particulières de ces collectivités.

Such adaptations are made by the legislator, or by the local authorities if they have been legally authorized to do so. In theory, this system could lead to 'arbitrary subordination' because it is entirely up to the French legislator to decide which rules and benefits are extended to the DOMs. But the *Conseil Constitutionnel* has interpreted the legislator's freedom restrictively, and only accepts exceptions for the DOMs, if they are necessary and motivated by the particular circumstances of the territory itself. Also, the adaptations should not distort the nature of the DOM, for instance by turning them into something more like a TOM.<sup>222</sup>

Since World War II, the financial contributions of France to the DOMs have been huge, and they have transformed the backward rural communities of 1945 in almost every respect. Infrastructure, health care, education, housing, etc. are all supposed to be at French levels, but in 1981 it was still estimated that '*la protection sociale*' was 43% to 49% lower than in the metropolis. The professed reason for this was that the unemployed population of the DOMs should be stimulated to migrate to metropolitan France.<sup>223</sup> This policy seems to have been abandoned during the 1990s. Increased efforts have been made to integrate the DOMs with the European Union. As 'ultra-peripheral territories', they have received large amounts of European funding to develop their economic ties with Europe, and to tackle their specific problems (*see* Chapter 9).

Political parties in Martinique and Guadeloupe have campaigned for more local autonomy and exceptions from the metropolitan legal regime.<sup>224</sup> An independence movement has also developed, which could never count on much popular support, but which instead resorted to violence, also in metropolitan France.<sup>225</sup> In 1982, France increased the competences of the local organs, and the DOMs were allowed to develop more of a separate identity. Since then, the independence movement was gradually pacified, although it remains active.

France only seems prepared to fully integrate territories into the Republic that are already very French. After the failed experiment with St. Pierre et

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222 Miclo 1989, p. 104 et seq.

223 Blérald 1989, p. 266.

224 Constant 1992, p. 55.

225 Aldrich & Connell 1992, p. 237.

Miquelon during the 1970s (see Chapter 9), the French have become reluctant to create any new DOMs. The integration of Mayotte has been held off by Paris, in spite of an overwhelming vote in favour of *départementalisation* in a referendum on the island in 1976. The French government instead announced that the issue would be put to a second referendum, which was frequently postponed during the next 25 years. This French refusal may have been influenced by international pressure to reunite Mayotte with the Comoros, but also by the fact that Mayotte is much less French than the existing DOMs. French is not widely spoken and the population is mainly Muslim. Another important factor is that the island is very poor.<sup>226</sup>

In 1986 France has placed Mayotte on a par with the DOMs for development purposes, and it has invested considerable sums since the late 1980s, increasing the social standards and improving the infrastructure. In 2000, an agreement was reached between the French government and the political parties of Mayotte on a new status, called *collectivité départementale*, which entailed an increase in autonomy for the island government, more French financial contributions, and which offers full departmental status as a possibility in some distant future. The inhabitants approved the new status in a referendum.

#### *The United States*

The US is the only metropolitan state that developed some explicit conditions under which a request for integration would not be denied. These conditions were based on the Northwest Ordinance, by which the US Congress in 1787 spelled out the criteria that should be met by the western territories before they could enter the Union as a state equal to the old states. It also provided that the settlers of the new territories would become equal citizens of the US.

Three main criteria are currently identified in the literature: 1) the inhabitants of the territory should embrace the principles of democracy 'as exemplified in the American form of government'; 2) they should desire statehood; and 3) the territory should have sufficient population and resources to support state government, and to take a share in the cost of the federal government.<sup>227</sup> Geographic separation and cultural differences have been considered problematic in the case of Puerto Rico, and in the case of Hawaii statehood was held off for a long time because of racist sentiments in Congress,<sup>228</sup> but according to *Leibowitz* it is now possible for a non-English speaking territory to become a state.<sup>229</sup>

The practice shows that Congress requires a long period of sustained petitioning, mainly because the existing states are not keen on sharing power

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226 Aldrich & Connell 1998, p. 228 et seq.

227 Leibowitz 1989, p. 70.

228 Daws 1974, p. 388.

229 Leibowitz 1989, p. 76.

with new states, but also perhaps to make sure that the territory really wants to become American. Alaska and Hawaii campaigned for statehood during 50 years, with three plebiscites being held in Alaska and two in Hawaii, all showing a clear majority for statehood. The third criterion has often been used to oppose new states, but if the political will exists to admit a territory as a state, the issue of small size can be resolved. *Leibowitz* considers that requests by small US territories such as Guam or the US Virgin Islands could not be refused on this ground, 'once it is accepted that the Nation should be responsive to the citizens of the United States in their status preference'.<sup>230</sup>

These criteria were applied in the cases of Hawaii and Alaska, both NSGTs which became states in 1959. The US government informed the UN that it would no longer report on the territories. The Fourth Committee briefly debated the issue.<sup>231</sup> It was stated that NSGTs could achieve self-government primarily through independence, but integration could also be acceptable, if it was realized on the basis of absolute equality with the metropolis, and in concurrence with the freely expressed wishes of the population. There was unanimous agreement that Alaska and Hawaii had achieved a full measure of self-government on the basis of equality with the other states of the US, and that they had exercised their right to choose their own form of government.<sup>232</sup> The GA expressed the opinion that 'the people of Alaska and Hawaii have effectively exercised their right to self-determination and have freely chosen their present status', and it congratulated them and the US upon the achievement of a full measure of self-government.<sup>233</sup>

In recent years there have been quite a few publications in which it is claimed that Hawaiians did not really enjoy a free choice in 1959, mainly because the only option on the ballot was integration with the US, and because the franchise was based on US citizenship.<sup>234</sup> In 1999, a UN Special Rapporteur on the human rights of indigenous peoples suggested that Hawaii should be re-inscribed on the list of NSGTs because its annexation by the US in 1897 had been a violation of international law at the time.<sup>235</sup> Authors such as *Lopez*

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230 *Leibowitz* 1989, p. 82.

231 GAOR (XIV), Fourth Comm., 981<sup>st</sup> – 983<sup>rd</sup> Meetings.

232 Repertory of Practice of UN organs, Supplement No. 2 (1955-59), Volume 3, para. 101.

233 GA Res. 1469 (XIV) of 1959, adopted without a roll-call.

234 The indigenous Hawaiians were already a numerical minority in 1959, and a number of them had not chosen to become US citizens (although they did have that option) and were therefore not allowed to vote.

235 See 'Human Rights of Indigenous Peoples. Study on treaties, agreements and other constructive arrangements between States and indigenous populations. Final report by Miguel Alfonso Martínez, Special Rapporteur' of 22 June 1999, UN Doc. E/CN.4/Sub.2/1999/20. Para. 163-4 read: 'the 1897 treaty of annexation between the United States and Hawaii appears as an unequal treaty that could be declared invalid on those grounds, according to the international law of the time. It follows that the case of Hawaii could be re-entered on the list of non-self-governing territories of the United Nations and resubmitted to the bodies of the Organization competent in the field of decolonization.'

*Reyes, Castanha, Churchill, and Pakaukau* conclude that the Hawaiian ‘people’ was not given a chance to exercise its right to self-determination, even though the GA in 1959 explicitly stated otherwise.<sup>236</sup>

The case really concerns the rights of indigenous minorities, or lack of respect for those rights,<sup>237</sup> but the arguments for re-inscription do not appear to be very strong. The process of 1959 did have some flaws, because the plebiscite was not observed by the UN and did not offer a choice for other options than integration or continued non-self-governing status. But the authors cited above do not provide proof that the overall population of Hawaii desires some other status is unhappy with its current status. The argument which some of these authors explicitly use is that only those Hawaiians are entitled to participate in the process self-determination whose ancestors lived on the islands before the first Europeans arrived.<sup>238</sup>

At least some members of the UN appeared to be sensitive to this argument in the case of New Caledonia, which is somewhat similar in this respect to Hawaii. To some extent it was also accepted by the HRC and the ECHR in the case of *Py v. France*, where the Committee and the Court admitted that a process of self-determination could justify the exclusion of newcomers from the exercise of voting rights in referendums on the future of the island (*see below* in the paragraph on New Caledonia).

#### *Other Cases*

The option of integration was discussed in the UK during the 1950s and 1960s, most seriously with regard to Malta. In 1956, the government of that island, which had an autonomous status in association with the UK, requested the British government to consider the integration of Malta into the UK. At first, the UK was not opposed to integration, apparently because of Malta’s value as a military strongpoint. At a parliamentary conference in London, a plan for integration was drawn up. It was put to a plebiscite on the island in 1956, where it was supported by a substantial majority, although the largest opposition party boycotted it. It seems the UK government was subsequently taken

236 See Lopez-Reyes 1996, Castanha 1996, Churchill 2002, and Pakaukau 2004.

237 Merry 2000, p. 23 writes that ‘for the Native Hawaiian descendants of the once-sovereign Hawaiian nation (...) statehood exacerbated a long-term slide into political powerlessness, economic fragility, and cultural dispossession.

238 This argument leads to a far-reaching form of distinction based on descent which is unacceptable. Similar views appear to be held by some people in the Netherlands Antilles, especially on St. Maarten, where the population has grown exponentially during the past few decades through an influx of migrants, demoting the indigenous (or ‘real’ as they tend to call themselves) St. Maarteners to a minority, albeit a powerful one. The debate on ‘St. Martin culture’ sometimes seems to be aimed at excluding a large part of the inhabitants of the island from participating in decisions concerning the future of the island. *See for instance* the claim by the St. Martin Nation Building Foundation that only the ‘real’ St. Maarteners have the right to self-determination (*Amigoe* of 7 November 2005).

aback by the estimated costs of creating 'economic parity' for Malta. Because the plan also caused some controversy in the British media, Britain decided not to guarantee the financial solidarity that Malta requested. The plan was abandoned and the island became independent in 1964.<sup>239</sup>

The British willingness to discuss integration quickly disappeared thereafter. A former British Parliamentary Under-Secretary explained in an interview why a similar request from the Seychelles had been rejected: 'It is simply – to our way of thinking – impossible to imagine a tiny island, thousands of miles away, being just like a county of England'.<sup>240</sup>

*Wainhouse* writes that the UK did sound out a few territories 'for which integration seemed appropriate' around the time when the integration of Malta was contemplated, but the territorial governments. But the French model seemed a regressive step to the British dependencies, according to *Wainhouse*.<sup>241</sup> *Leibowitz* on the other hand, states that the British islands in the eastern Caribbean feared that their interests would not be served by a House of Commons in which they would have only one seat. But the most important factor in all this seems to have been 'the extra burden that would have fallen on Great Britain to introduce the benefits of the welfare state and the higher educational standards'.<sup>242</sup>

The UK has also refused to integrate such tiny territories as St. Helena, which appear to be very British already,<sup>243</sup> and which are clearly too small to ever become independent. The money argument could not have played much of a role in these decisions, but perhaps the UK was led by the fear that the integration of these tiny outposts might have tempted larger territories to hold out for this option instead of independence.<sup>244</sup> When the West Indies Associated States were discussed in the Decolonization Committee, the UK therefore explained that the only *imaginable* status options for the islands were independence, integration into any other state than the UK, association with the UK, or colonial status.

Australia offered integration to the Cocos (Keeling) Islands<sup>245</sup> in a plebiscite in 1984.<sup>246</sup> The option of integration was defined by Australia in

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239 Drower 1992, p. 22, and Aldrich & Connell 1998, p. 31.

240 Cited in Drower 1992, p. 144. The request was made in 1971.

241 *Wainhouse* 1964, p. 72-3.

242 *Leibowitz* 1976, p. 182.

243 See *Ritchie* 1998 for a description of life on St. Helena and other small British outposts.

244 This theory was defended in an editorial entitled 'Small States and Left-Overs of Empire' in *The Round Table* (1984), nr. 292, p. 128.

245 This minute and extremely isolated island territory is located in the Indian Ocean, approximately half-way between Australia and Sri Lanka. The nearest country is Indonesia, at 960 kilometres. Its total surface is 14 square kilometres and its population in 1983 stood at 559. The main economic activity in the islands is the production of coconuts (Report of the UN visiting mission of 1984, UN Doc. A/39/494, para. 15 et seq.).

246 The plebiscite offered a choice between independence, free association with Australia, or integration with Australia.

a paper distributed among the islanders. It would entail 'the full rights, privileges and obligations of other Australian citizens', including social security, health care, and the application of other 'appropriate' Australian legislation. Integration also meant that taxation would be introduced, but it was estimated that the indigenous population's income was currently below the threshold for income tax. The Australian government would take measures to bring the level of services and the standard of living to Australian levels within 10 years, but it would consult closely with the locally elected representatives about any proposed measures, with the aim of preventing 'overly-rapid change'.<sup>247</sup>

Upon a request by the Cocos (Keeling) Islands, Australia invited a visiting mission to observe the plebiscite.<sup>248</sup> The mission reported that the preparations by Australia for the plebiscite were beyond reproach, although the full implications of the three options were not completely understood by the people. On voting day, only 9 islanders chose for independence, 21 voted for free association, and 229 chose to become integrated with Australia. The turnout was a remarkable 100%.<sup>249</sup> The visiting mission concluded that the choice for integration was made in complete freedom, and that the people of the islands had exercised their right to self-determination, which conclusion was adopted by the GA without comment.<sup>250</sup>

There is one other case of integration that was approved by the GA, Greenland. This was a special case that did not inspire much debate at the UN, perhaps because Greenland was not considered part of the Third World. The fact that Denmark was not unpopular at the UN like the Netherlands and the other real 'colonial powers' must also have played a role, as well as the fact

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247 See the options paper distributed on the islands, reproduced in the Report of the visiting mission, p. 46-8. See also the minister for Territories and Local Government's explanation to the Australian parliament in 1984, cited in Brown 1991, p. 180. It seemed that the voters were somewhat encouraged by Australia to choose for integration, but Australia never made its preference clear. One of the inhabitants of the islands complained to the UN that Australia wished to annex the islands in order to turn it into a military base. This was denied by the Australian government, and so far Australia has lived up to its promise. The complainant (a descendant of Captain John Clunies-Ross, who acquired the islands in the 19<sup>th</sup> century) was perhaps inspired by the fact that Australia was trying to expropriate him in order to terminate his control over the islands, see the Report of the visiting mission, para. 25, 41-2 and 66.

248 Brown 1991, p. 180. The members of the visiting mission were appointed by the Chairman of the Decolonization Committee.

249 Report of the UN visiting mission, para. 184 and 192. The Referendum Ordinance provided for compulsory voting.

250 The Decolonization Committee only briefly considered the report (UN Doc. A/AC.109/PV.1269, para. 37). The GA approved it without discussion, and adopted a Resolution that confirmed that the islanders had exercised their right to self-determination, and that Article 73 of the Charter no longer applied, see GA Res. 39/30 of 5 December 1984, adopted by consensus (GAOR, 39th Session, Plenary, 87th Meeting). The Cocos (Keeling) Islands were removed from the list of NSGTs.

that Greenland was considered of strategic importance to the US.<sup>251</sup> The GA did not discuss any of the particulars of the situation, and in 1954 expressed a conviction that Greenland had freely decided on its integration with Denmark 'on an equal constitutional and administrative basis'. The territory had thereby achieved self-government and Chapter XI of the Charter ceased to apply. The Resolution made no explicit or implicit criticism of Denmark and included all the elements which the GA would refuse to include in the Resolution on the Netherlands Antilles the next year: self-determination, full self-government, compliance with Resolution 742, and the termination of the applicability of Chapter XI.<sup>252</sup>

Portugal integrated all of its overseas territories as 'provinces' into the metropolis, but this was rejected by the GA as a fake form of decolonization because the overseas populations were clearly not treated equally to the Portuguese in Europe.<sup>253</sup> The integration of the Azores and Madeira into Portugal, and the Canary Islands into Spain, could be considered as successful forms of integration, but they were not discussed at the UN because these territories were consciously excluded from the application of GA Resolution 1541 (*see* Chapter 3). New Zealand seriously considered the concept of integration around 1950, and has offered it to several of its overseas territories.<sup>254</sup> This means that the Netherlands is one of very few metropolitan states – or perhaps even the only one<sup>255</sup> – which never seems to have contemplated integrating any of its overseas territories. The islands of Bonaire, St. Eustatius and Saba in April of 2006 announced that they wished to use 'an integration model' as the starting point for their discussions with the Netherlands on a new political status. At the time of writing, it was not yet clear how the Netherlands would react to this request.

Cases such as Hong Kong, Goa, West New Guinea, East Timor and the Western Sahara could also be considered under the heading of integration, but since it is uncertain whether the principles of 1541 should be applied in these cases, where the territory did not integrate with the mother country, but with a neighbouring state, I will not discuss them here.

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251 *See* GAOR (IX), Suppl. 18, part 1 of section IX.

252 GA Res. 849 (IX) of 22 November 1954.

253 GA Res. 1542 (XV) of 1960.

254 New Zealand considered integration as a likely long-term result of the decolonization of its overseas territories after World War II, but it abandoned this idea in favour of free association around 1955 because it expected 'disastrous social effects' for the islands (*see* Stone 1965, p. 366). It has nonetheless offered this option to the Cook Islands and Niue, and included integration as a possible choice for the future in the draft treaty with Tokelau.

255 I do not know whether this option was ever on the table with regard to the Belgian territories.

### 3.3.2 Conclusion

In practice, metropolitan states have interpreted integration to mean that a territory fully becomes part of the state, with equal status for its inhabitants, and a duty for the state to ensure that public services, human rights, and other conditions are up to the standards applied in the metropolitan territory. It is a rare form of decolonization of overseas territories. The most important reason why it has not been used more often seems to have been that the metropolitan governments are not prepared to pay for it. Another inhibiting factor has been the resistance in the territories to what is perceived as 're-colonization'. But in those cases where the metropolis offered integration as a real option to the population of small overseas territories, it was rarely refused. The benefits to the population are obvious, and support for it has remained very firm in all of the integrated territories discussed above (except Greenland), despite all sorts of economic, social and cultural problems that have accompanied this status option.

GA Resolution 1541 demands that the government of the state should treat the inhabitants of an integrated overseas territory the same as the metropolitan population. In practice, many exceptions are made, mainly with an eye to protecting the interests of the overseas territory and its economic, social and cultural distinctness, but sometimes also for the benefit of the metropolis. How far these exceptions may go, and which grounds for unequal treatment are acceptable, is hard to say on the basis of the law of decolonization and self-determination. In general, it may be assumed that exceptions are not in line with the principles of Resolution 1541 and the UN Charter if it seems to place the interests of the metropolis before those of the overseas population without good cause. If such a situation leads to a form of 'arbitrary subordination' it could perhaps even invalidate the integration as a form of decolonization and revive the non-self-governing status of the territory.

Under the international law of decolonization and self-determination integration should be considered as a valid way of ending non-self-governing status, if it is the result of a free and informed choice by the population. It is uncertain whether integration definitively ends the international status of the territory and extinguishes the separate right to self-determination of the population. Full assimilation of the territory in every respect is not necessary, and perhaps not allowed if the overseas population does not want it, in view of the rights of minorities and indigenous peoples.<sup>256</sup> It does seem reasonable, or perhaps even inevitable, that the overseas population is prepared to adopt the national identity of the metropolitan state, at least to some extent. France and the US have even used this criterion as an essential pre-condition for

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<sup>256</sup> Van Rijn 2005b, p. 161 considers that the right to self-determination means that a choice for integration does not mean that the islands should automatically give up all of their individuality.

integration, and the UK also seems only to have contemplated the integration of territories which exhibit a sufficient amount of 'British-ness'. But this is not a legal criterion.

Metropolitan states have considered themselves authorized to set criteria before offering integration as an option to an overseas territory. In many cases they have simply rejected integration beforehand as impractical or too expensive. Metropolitan policies sometimes also seem to be guided by strategic military considerations. It might well be wondered whether such policies are consistent with the principle that due account should be taken of the wishes of the population. These metropolitan governments should perhaps have taken their obligations under the Charter more seriously, especially their duty to try and realize the political aspirations of the population as well as possible. The alternatives to independence were considered of special relevance to small territories in the debates between the Administering States and the anti-colonial states during the drafting of Resolution 1541, and in the Decolonization Committee since the 1960s. In spite of this, no examples of integration were realized after 1960, except by Australia in the tiny Cocos (Keeling) Islands.

When a territory consistently demands integration over a longer period of time, with clear support from the population, such a demand has not been refused, although there are only a few examples of this. States probably did not act out of awareness of an international obligation to realize the wishes of the population. On the contrary, it seems that most metropolitan governments think they can exclude integration as a possible form of decolonization, which practice is hardly consistent with the right to self-determination. But all of the states studied here are democracies, where it is uncommon that the wishes of the population would go unheard over a prolonged period of time.

In the few territories that have been integrated into the mother country during the 1940s and 1950s, the population is very attached to that status, although there are small but very active groups which still strive for independence and claim that decolonization has not been completed. In some territories there are also problems with disfranchised indigenous peoples. Full integration can also lead to severe economic and social problems, and if the living standards are raised to a level substantially higher than common in the region, an increase in economic migration can obviously be expected.

### 3.4 OTHER OPTIONS

Resolution 2652 (XXV) of 1970 recognizes that dependent territories may not only exercise their right to self-determination by choosing for free association or integration, but also for 'any other political status freely determined by a people'. I will discuss the cases of Puerto Rico and New Caledonia to see how the UN looks at such cases, and whether they could nevertheless be regarded

as 'a full measure of self-government' in the sense of Article 73 of the UN Charter.

### 3.4.1 Puerto Rico

Puerto Rico was a Spanish colony until 1898, when it was conquered by the US during the Spanish-American war. By the Treaty of Paris of that same year, Spain ceded Puerto Rico to the United States. The Treaty differed from other treaties of cession that the US had concluded during the 19<sup>th</sup> century,<sup>257</sup> as it made no mention of a possible future incorporation of Puerto Rico into the US. Article IX of the Treaty read: 'The civil rights and political status of the territories hereby ceded to the United States shall be determined by the Congress.' Some US Senators wondered whether the US Constitution allowed Congress to hold territories without the intention of granting them statehood, but the Treaty was ratified, and became the legal basis for US sovereignty over Puerto Rico.

When in 1900 Puerto Rico became the first 'unincorporated territory' of the US, the autonomy enjoyed under Spanish rule was significantly reduced. Unincorporated territories (also called 'possessions') are annexed overseas territories of the US that are subject to exclusive Federal control under the so-called Territorial Clause of the US Constitution.<sup>258</sup> This Clause reads:

The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.<sup>259</sup>

Based on this clause, the unincorporated territories come under direct control of Congress and the Federal executive, and do not enjoy the autonomy of the states of the US. By the 'Insular Cases', a series of cases decided in 1901, the US Supreme Court decided that to an unincorporated territory the US Constitution only applied with respect to those fundamental rights which were essential to the citizens of the US. The Constitution did not apply fully in these territories because, contrary to incorporated territories, they were not intended to become states.

In Puerto Rico, there already existed a strong movement for full autonomy at the start of US rule over the island. This movement did not strive for independence, but for Puerto Rican self-government in association with the US.

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257 See for instance the treaties with France (regarding Louisiana, 1803), Spain (Florida, 1819), and Russia (Alaska, 1867).

258 See Leibowitz 1989, p. 17 et seq. for a discussion of the development of the concept of unincorporated territories.

259 Article IV, section 3, clause 2.

It opposed any measures that would integrate Puerto Rico in the US. In 1917, when the Jones Act granted US citizenship to Puerto Ricans, the autonomist movement protested, as US citizenship might 'undermine the foundation of the Puerto Rican nation'.<sup>260</sup>

### *The Commonwealth*

In 1950 the US Congress adopted Public Law 600,<sup>261</sup> which offered Puerto Rico the opportunity to adopt its own constitution. The Law stated in its preamble that it was adopted 'in the form of a compact', and it would only enter into force after it had been approved in a referendum in Puerto Rico. The Puerto Ricans approved Public Law 600, and a Constitutional Convention in Puerto Rico drew up a Constitution that would establish the *Estado Libre Asociado* of Puerto Rico. The choice for this name, which literally translates into 'Associated Free State', shows that it was the intention of the framers of the Constitution to transform Puerto Rico into an autonomous unit associated with the US. Realising that this objective could not be achieved at that time, the Spanish term was translated instead into 'Commonwealth', a term that has been used to describe a wide variety of political entities, and offered the opportunity (it was hoped) that the relation between the US and Puerto Rico could evolve into the desired form of association.<sup>262</sup>

The Constitution was modified on a number of points by the US Congress. Most importantly, the freedom of Puerto Rico to amend the Constitution was limited, as any amendment should be in accordance with the Congressional resolution that approved the Constitution, the Puerto Rican Federal Relations Act (PRFR, an act of the US Congress<sup>263</sup>), the applicable provisions of the US Constitution, and Public Law 600.<sup>264</sup> The modified Constitution was approved in another Puerto Rican referendum.

A number of elements of the US-Puerto Rico relations did not change with the creation of the Commonwealth in 1952. Puerto Ricans did not obtain the right to vote in US Presidential elections, nor did the Puerto Rican Resident Commissioner obtain the right to vote in the US Congress. Puerto Rico remained exempt from Federal taxation,<sup>265</sup> but the official currency on the

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260 Reisman 1975, p. 28.

261 Act of 3 July 1950, ch. 446, 64 Stat. 319. For the legislative history of PL 600, see Leibowitz 1989, p. 162 et seq.

262 See Leibowitz 1989, p. 162, note 127.

263 The PRFR is a collection of legal provisions that were created for Puerto Rico during the first half of the 20<sup>th</sup> century. Part of these provisions were withdrawn to make room for the Constitution of Puerto Rico. The remainder of the Act contains provisions with respect to the fiscal and economical relationship between the US and Puerto Rico, on the US citizenship of Puerto Ricans, and on a few other subjects.

264 Section 3 of Article VII of the Puerto Rican Constitution.

265 Duany & Pantojas-García 2005, p. 23.

islands remained the US dollar. Puerto Ricans can – and have been – drafted for the US armed forces, and the US Federal government has retained full control over foreign affairs and defence. Puerto Rico only has very limited freedom to operate on the international scene.<sup>266</sup>

Puerto Rico's autonomy is not defined negatively, by enumerating the subjects that fall within the jurisdiction of the Federal authorities (as in the Kingdom Charter), but positively, by enumerating all the subjects which fall within the autonomous jurisdiction of Puerto Rico. All other subjects must be considered to fall within the jurisdiction of the Federal authorities of the US. The Puerto Rican Constitution of 1952 gives Puerto Rico the right to choose or appoint all members of its executive, judiciary and legislative branches. In matters of education, criminal law, and civil law the Puerto Rico legislature enjoys full autonomy, and it also determines its own budget. The Supreme Court of the US has decided that the Supreme Court of Puerto Rico is the final authority on the interpretation of Puerto Rican law, unless its interpretation is 'inescapably wrong' and the decision 'patently erroneous'.<sup>267</sup>

#### *Federal Powers in Puerto Rico*

Difference of opinion exists on the limits to the exercise of Federal power in Puerto Rico. One interpretation holds that the relation has the character of a compact, which can only be amended or terminated by mutual consent. This would mean that Federal power has been limited by Public Law 600, the PRFR, and the Constitution of Puerto Rico. Adherents of this interpretation point to the procedure which led to the Commonwealth status of Puerto Rico, which was similar to the procedures followed when territories became states of the Union or independent states, i.e. when territories achieved a status that could not be annulled or changed unilaterally by the US Congress.

The Constitutional Convention, which drew up the Constitution of Puerto Rico in 1952, considered that 'when this Constitution takes effect, the people of Puerto Rico shall thereupon be organized into a commonwealth established within the terms of the compact entered into by mutual consent'.<sup>268</sup> After the Constitution had come into force, the Governor of Puerto Rico concluded in a letter to President Eisenhower, dated 17 January 1953, that 'Our [Puerto Rico's] status and the terms of our association with the United States cannot be changed without our full consent'.<sup>269</sup> This interpretation was adopted by the US representatives at the UN during the debate on the cessation of transmission of information with respect to Puerto Rico, when he described the

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266 Reisman 1975.

267 See Reisman 1975, p. 35.

268 See the final declaration of the Constitutional Convention of Puerto Rico (Resolution 23), cited in Reisman 1975, p. 42.

269 Cited in Reisman 1975, p. 43.

new relationship as 'a compact of a bilateral nature whose terms may be changed only by common assent'.<sup>270</sup>

Although the US may be bound under international law by this statement at the UN,<sup>271</sup> the legal validity of the compact argument has nonetheless been questioned.<sup>272</sup> Congress did not support the statements made on behalf of the US government at the UN.<sup>273</sup> With the adoption of Public Law 600, Congress appears to have acted in the conviction that the Law would not 'preclude a future determination by Congress of Puerto Rico's ultimate political status'.<sup>274</sup> In Congress, it has often been defended since 1952 that Public Law 600 has not changed the nature of US-Puerto Rico relations, and that Congress still possesses its unlimited authority to legislate with respect to Puerto Rico under the Territorial Clause of the US Constitution. Some lower Federal courts have assumed that there exists a compact, but the Supreme Court has not gone farther than to state that Puerto Rico is a Commonwealth, and that it has a unique status, without defining that status.<sup>275</sup> The US courts consider Congress authorised to decide whether a US law is applicable in Puerto Rico, but they have occasionally refused to apply Federal legislation which 'conflicts with, or attempts to modify the Puerto Rican Constitution'.<sup>276</sup>

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270 Statement by the US representative in the Fourth Committee of the Eighth session (1953) of the GA, cited in Reisman 1975, p. 44.

271 Clark 1980, p. 45.

272 Leibowitz 1989, p. 163, note 131 presents an extensive list of articles on this issue. *See also* Cabán 1993, p. 21. Stein 1961 and Helfeld 1952 concluded that PL 600 did not change Congressional power over Puerto Rico.

273 *See* Leibowitz 1976, p. 48 et seq.

274 Statement by Interior Secretary Oscar Chapman during the debate in the House of Representatives, cited in Trías Monge 1997, p. 112. This statement was followed in both the House or Representatives and the Senate Committee Reports on the bill, *see* Leibowitz 1989, p. 166. At the time of the enactment of Public Law 600 and the resolution approving the Constitution of Puerto Rico by the US Congress, there existed difference of opinion about the legal consequence of these acts. Congress seemed convinced that it did not relinquish its authority to legislate for Puerto Rico or to annul Puerto Rican legislation. To reaffirm the powers of Congress under the Territorial Clause, an amendment to the resolution approving the Constitution of Puerto Rico was submitted to Congress, which stated: 'That nothing herein contained shall be construed as an irrevocable delegation, transfer or release of the power of the Congress granted by Article IV, section 3, of the Constitution of the United States' (98 *Congressional Record* 6203, cited in Leibowitz 1989, p. 168). This amendment was rejected, but it was not clear why. It may have been rejected merely for technical reasons, or because it was considered unnecessary. In the end, the difference of opinion in Congress was not resolved, and the Constitution of Puerto Rico was approved while its legal status remained unclear.

275 'The Supreme Court has stated [that] the Commonwealth has a status in American Jurisprudence "unique in American history" but has yet to accord this unique status great significance. (...) no court has held Commonwealth requires mutual consent before a particular statute comes into effect.' (Leibowitz 1989, p. 66.)

276 Reisman 1975, p. 36, note 75. For a discussion of the cases in which Federal courts were faced with the question of whether a Federal statute applied to Puerto Rico, *see* Leibowitz 1989, p. 190-92.

During the 1990s, some attempts have been made by Congress to clarify the status of Puerto Rico. In 1996, the Chairmen of the several committees of the US House of Representatives which deal with Puerto Rico, sent a letter to the Puerto Rican parliament, which states:

Although there is a history of confusion and ambiguity on the part of some in the U.S. and Puerto Rico regarding the legal and political nature of the current "commonwealth" local government structure and territorial status, it is incontrovertible that Puerto Rico's present status is that of an unincorporated territory subject in all respects to the authority of the United States Congress under the Territorial Clause of the U.S. Constitution. As such, the current status does not provide guaranteed permanent union or guaranteed citizenship to the inhabitants of the territory of Puerto Rico, nor does the current status provide the basis for recognition of a separate Puerto Rican sovereignty or a binding government-to-government status pact. (...) In addition it is important to recognize that the existing Commonwealth of Puerto Rico structure for local self-government, and any other measures which Congress may approve while Puerto Rico remains an unincorporated territory, are not unalterable in a sense that is constitutionally binding upon a future Congress.<sup>277</sup>

This denial of the compact argument was upheld two years later by the House of Representatives when it approved H.R. 856, the 'United States-Puerto Rico Political Status Act'.<sup>278</sup> It can safely be assumed that in the view of the US Congress, Puerto Rico is still an unincorporated territory, which means that Congress' authority to legislate for Puerto Rico is unlimited, and that it can repeal the Commonwealth status of Puerto Rico, including the US citizenship of the Puerto Ricans. Perhaps Congress could indeed retract at least some of the legislation in which it has defined the relation with Puerto Rico, but whether the Congress would really be authorized to set aside the Constitution of Puerto Rico seems uncertain in view of the way it was adopted. As it is, the US has considerable legislative powers in Puerto Rico, while it is uncertain whether Congress will respect the right to self-determination of the people of Puerto Rico.

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277 Letter to The Honorable Roberto Rexach-Benitez, President of the Senate, and the Honorable Zaida Hernandez-Torres, Speaker of the House of the Commonwealth of Puerto Rico, dated February 29, 1996, reproduced on <http://www.puertorico51.org>.

278 H.R. 856, 105<sup>th</sup> Cong. (1998). This bill was not adopted by the Senate, *see below*. According to this bill, Puerto Ricans only have US citizenship 'by statute', as opposed to citizenship on the basis of the US Constitution, which other American citizens possess. US citizenship of Americans born in one of the states is protected by Amendment XIV, section 1 of the US Constitution, *see Roman 1998*, p. 3. This would mean that the citizenship of Puerto Ricans is not based on the US Constitution, and that Congress could repeal the Jones Act of 1917 which conferred US citizenship on Puerto Ricans.

### *A Full Measure of Self-Government?*

There seems to exist little doubt in the legal literature and otherwise that Puerto Rico's status does not represent a full measure of self-government or a form of complete decolonization. Even *Reisman*, in his optimistic account of Puerto Rico's potential role in international relations, has to admit that in the light of Resolution 1541 'there are obvious imperfections in the association status of Puerto Rico', namely the reserved Congressional powers, the application of US Federal law in Puerto Rico, and the relative absence of Puerto Rico as an actor in international politics.<sup>279</sup> *Crawford* considers that there are substantive defects in the terms of the association of Puerto Rico, and he sees it as an unsatisfactory model of association because the territory has few means of participating in international and metropolitan affairs, and because its internal autonomy is restricted.<sup>280</sup> Several sources do not hesitate to call the status of Puerto Rico colonial.<sup>281</sup>

The US has often presented Puerto Rico as a form of free association,<sup>282</sup> but recently, Congress recognized that the status of Puerto Rico is not a full measure of self-government. Resolution H.R. 856, which was adopted by the House of Representatives in 1998, not only claims that Puerto Rico does not have the status of free association with the US 'as that status is defined under United States law or international practice', but also that Puerto Rico has not become fully self-governing. Puerto Rican politicians also do not think a full measure of self-government has been achieved. When the Governor of Puerto Rico testified before the Decolonization Committee in 1989 and 1991 he stated that the status of Puerto Rico 'must be declared colonial by this Committee because it does not meet the minimum parameters for (...) free association'.<sup>283</sup> But in 1953, the GA had already decided otherwise.

### *The UN Debate on the Cessation of Transmission of Information on Puerto Rico*

In 1953, Puerto Rico and the US agreed that the US should cease transmitting information on Puerto Rico under Article 73 *e* of the UN Charter. Puerto Rico hoped that when the US was called upon by the UN to defend its position that Puerto Rico had achieved 'a full measure of self-government', the US would be forced to recognise that its grant of self-government to Puerto Rico could

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279 *Reisman* 1975, p. 49.

280 *Crawford* 2006, p. 627.

281 See *Cabranes* 1978, *Duany & Pantojas-García* 2005, and also the statements of Governors of Puerto Rico at the UN in 1978 and afterwards (see below).

282 The US State Department has also defended it as a form of integration, see the *Digest of United States Practice in International Law* (1975, p. 104). See also *Dempsey* 1976, p. 297, who contradicts this claim.

283 See the verbatim reports of the Special Committee's meetings of 1989 and 1991, UN Doc. A/AC.109/PV. 1357 (1989) and A/AC.109/PV. 1390 (1991).

not be repealed unilaterally by Congress, and that Congress had limited its authority to legislate for Puerto Rico. The US wished to obtain the international recognition that Puerto Rico was no longer a colony of the US.<sup>284</sup>

The debate in the UN revealed a considerable degree of scepticism among a number of non-Western states about the measure of self-government Puerto Rico had obtained. Opposition by the Communist states and a number of Asian states had been expected by the US, but the opposition was enlarged by a number of Latin American and Middle-Eastern states, which found that the Commonwealth did not meet the standards for full self-government. Puerto Rico did not appear to be associated with the US, and it had clearly not been integrated into the US.

Many states objected to the fact that Puerto Rico was partly governed by legislation enacted by organs in which it was not properly represented. The criticism was also directed at the US control over defence and foreign affairs, the seemingly arbitrary way in which Congress decided whether Federal legislation would apply to Puerto Rico or not, the jurisdiction of the US Supreme Court over Puerto Rico, the lack of economic independence, and the absence of a right of secession.<sup>285</sup>

During the lengthy debates in the Fourth Committee of the GA of 1953, the US representatives used the compact argument to convince states of the voluntary character of the relations and of the inviolability of the Puerto Rican autonomy, even though this interpretation of the Commonwealth was probably not supported by the US Congress. Most of the opponents of the US voiced doubts about the validity of the compact argument. Several Members were convinced that the relation between Puerto Rico and the US could be altered by the latter without the consent of the former, as the compact did not prevail over the laws of Congress, and had never intended to do so, since it was subject to the limitations established by those laws.<sup>286</sup>

Shortly before the final vote in the Plenary, the representative of the US announced on behalf of President Eisenhower that if at any time the legislative assembly of Puerto Rico would chose 'more complete or even absolute independence', the President would immediately thereafter recommend to Congress

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284 The Representative of the US at the UN informed the Secretary-General that 'in the light of the change in the constitutional position and status of Puerto Rico' the US considered it 'no longer necessary or appropriate for the United States to continue to transmit information on Puerto Rico under Article 73 e'. Letter from the United States Mission to the UN, dated 19 January 1953, reproduced in *Non-Self-Governing Territories: Summaries and analyses of information transmitted to the Secretary-General during 1953*, p. 33 (UN Doc. ST/TRI/SER.A/ 8).

285 BuZa 1954b, p. 142.

286 See for instance the statement by the Iraqi representative, GAOR (VIII) Fourth Committee, 356th meeting, p. 257.

that such independence be granted.<sup>287</sup> The decision on the independence of Puerto Rico (let alone a choice for any other status) thus continued to lie with Congress.

The resolution approving the cessation of transmission of information could only be adopted in the Plenary of the GA after it had been decided by a very slim majority that the resolution did not require a two-thirds majority.<sup>288</sup> The resolution was adopted by 26 votes to 16, with 18 abstentions,<sup>289</sup> with the crucial support of eight Latin American states<sup>290</sup> that had disapproved of the cessation of transmission of information with respect to the Netherlands Antilles and Surinam only a few minutes earlier. The representatives of these states explained their vote by saying that Puerto Rico had achieved a larger measure of self-government than the Dutch territories. It was stated that Puerto Rico had drafted its own Constitution, the people of Puerto Rico had approved its new status in a plebiscite, and its governor was elected through elections in Puerto Rico.

Resolution 748 declared that 'Chapter XI of the Charter can no longer be applied to the Commonwealth of Puerto Rico', which meant that Puerto Rico had achieved a full measure of self-government and was no longer a Non-Self-Governing Territory. The resolution also declared that 'the people of Puerto Rico have effectively exercised their right to self-determination'.<sup>291</sup>

Interestingly, this conclusion was contested by the Dutch ministry of Foreign Affairs in its report of the Eighth Session of the GA. The plebiscites of 1952 could not be considered a real exercise of the right to self-determination, as the population of the territory did not have the possibility to choose for independence or integration in those plebiscites. In the view of the ministry, the Puerto Rican general elections of 1948, at which status was an issue, and during which the political party that promoted Commonwealth received 61% of the votes, could not be put on a par with a plebiscite, as the outcome of these elections were undoubtedly influenced by other issues as well.<sup>292</sup>

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287 See statement by US Representative during the 459<sup>th</sup> Plenary Meeting of the Eighth Session of the GA on 27 November 1953 (A/PV.459, Par. 66). According to Clark 1980, the US government is probably bound by this promise as a matter of international law.

288 A Mexican proposal, which was adopted by 30 votes to 26 (Par. 36 of the 459<sup>th</sup> Plenary Meeting of the Eighth GA), provided that under Article 18, para. 3 of the UN Charter a simple majority would suffice to adopt the resolution (or *all* resolutions dealing with Chapter XI of the UN Charter – there existed difference of opinion among the delegations about what had been voted upon exactly, see Par. 74-148 of the 459<sup>th</sup> Plenary Meeting of the Eighth GA).

289 GAOR (VIII), Plenary, 459<sup>th</sup> Meeting, para. 160.

290 Bolivia, Brazil, Chile, Colombia, Cuba, Haiti, Nicaragua and Uruguay.

291 GA Res. 748 (VIII) of 27 November 1953.

292 BuZa 1954b, p. 140.

*UN Involvement After 1953*

The adversaries of the US came to consider Puerto Rico as its Achilles heel. Puerto Rico's status could be used to 'expose' the US as a colonial power and 'the enemy of Latin American freedom'.<sup>293</sup> From 1965, Cuba tried to have the 'colonial question of Puerto Rico' entered in the agenda of the Decolonization Committee. Cuba, and a majority of the Non-Aligned Movement<sup>294</sup> (supported by the Communist bloc) viewed the mandate of the Decolonization Committee to include all territories which had traditionally been considered colonies of the Western states, and which had not yet achieved full independence. This certainly included Puerto Rico.<sup>295</sup> Resolution 748 of 1953 was only concerned with Chapter XI and could not decide on the application of the Declaration on the Granting of Independence (1514) of 1960.

In 1966, Puerto Rico was included in the agenda of the Decolonization Committee for the next year. The US announced that 'it would view very seriously any attempt to discuss the matter since that would question Puerto Rico's self-governing status'.<sup>296</sup> The GA nonetheless approved the report of the Decolonization Committee, including its decision to discuss the question of Puerto Rico at its next session.<sup>297</sup> The Committee, however, decided to postpone discussion of the matter *sine die*.

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293 See Carr 1984, p. 348.

294 In 1964, the final communiqué of the Cairo Conference of the Heads of State or Government of Non-Aligned Countries requested the Decolonization Committee to consider the case of Puerto Rico.

295 The first petition the Committee received from a territory therefore came from the Puerto Rican Pro-Independence Movement (reproduced in GAOR 26<sup>th</sup> Session, Annexes, Agenda item 8, p. 10-12 (UN Doc. A/8441/Add.1)). Puerto Rican independence organisations had requested hearings at the UN since 1953, but these had always been denied. Ironically, in 1953, the pro-independence parties represented the second largest political movement of Puerto Rico, while in 1973 when they were finally recognised by the Decolonization Committee as representatives of the Puerto Rican opposition, they had been reduced to splinter parties, which together received no more than 5 percent of the votes, see Cabranes 1978, p. 80 for Puerto Rican election results.

296 GAOR 21<sup>st</sup> Session, Annexes, Addendum to Agenda Item 23, (UN Doc. A/6300/Rev.1), Report of the Decolonization Committee on the Situation with regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples, paragraphs 265-69.

297 GA Res. 2189 (XXI) of 13 December 1966, operative paragraph 4. The Western states were of the opinion that by considering Puerto Rico to fall within its jurisdiction, the Committee would act counter to the GA's findings in 1953, and as a subsidiary body of the GA, it was not allowed to do so. The Committee should therefore limit itself to stating its lack of competence in the matter (GAOR 22<sup>nd</sup> Session, Annexes, Addendum to Agenda Item 23, (UN Doc. A/6700/Rev.1), Report of the Decolonization Committee on the Situation with regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples, paragraphs 171-256).

The US successfully foiled an attempt by Cuba to insert 'the colonial case of Puerto Rico' in the agenda of the GA in 1971.<sup>298</sup> But after the US and the UK had resigned from the Decolonization Committee, that body felt itself more free to pursue anti-Western objectives, and Cuba succeeded in re-introducing the issue on the agenda of the Committee.<sup>299</sup> A Resolution was adopted by 12 votes to none with 10 abstentions, which recognized the 'inalienable right of the people of Puerto Rico to self-determination and independence in accordance with General Assembly resolution 1514 (XV) of 14 December 1960'.<sup>300</sup> The Committee did not, however, recommend to the General Assembly that Puerto Rico should be included in the list of territories to which the Declaration is applicable.<sup>301</sup> Instead, it decided to continue discussing the issue at its next sessions.<sup>302</sup>

In 1978, the Governor of Puerto Rico and the leader of the largest opposition party announced they wanted to testify before the Decolonization Committee. In Puerto Rico many people had become disillusioned by Congress' failure to implement any of the proposals for a stronger Commonwealth after the plebiscite of 1967, and feared that the growing power of the Federal

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298 Letter dated 17 August 1971 from the permanent representative of Cuba to the Secretary-General, GAOR 26th Session, Annexes, Agenda item 8, p. 10, UN Doc. A/8441, Par. 41). The proposal was defeated by 10 votes to 5, with 8 abstentions (GAOR 26th Session, General Committee, 192nd Meeting, Item 104, UN Doc. A/BUR/SR.192).

299 Letter dated 25 March 1972 from the Permanent Representative of Cuba to the United Nations addressed to the Chairman of the Decolonization Committee, GAOR 27th Session, Supplement 23 (Report of the Decolonization Committee), Annex III B, p. 93 (UN Doc. A/8723/Rev.1). Cuba also circulated a letter by the Political Committee of the Central Committee of the Puerto Rican Socialist Party (Pro-Independence Movement), which complained about the repression of the independence movement in Puerto Rico by US federal agencies, GAOR 27th Session, Supplement 23 (Report of the Decolonization Committee), Annex III C, p. 97-100 (UN Doc. A/8723/Rev.1). In 2000, these accusations were shown to have had a basis in fact, when FBI director Louis Freeh 'stunned' a congressional budget hearing by conceding that his agency had for over 40 years pursued a secret campaign of surveillance, disruption and repression against Puerto Rico's independence movement, *see New York Daily News*, 5 May 2000.

300 Resolution (A/AC.109/419), as adopted by the Decolonization Committee at its 890th meeting on 28 August 1972, *see* GAOR (XXVII), Supplement 23 (A/8723/Rev.1), *Report of the Decolonization Committee on the Situation with regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples*, Volume I, p. 31.

301 It did make such a recommendation with respect to the Comoro Archipelago earlier that same session, by 17 votes to none with 2 abstentions *See* GAOR (XXVII), Supplement 23 (A/8723/Rev.1), *Report of the Decolonization Committee*, Volume I, p. 28-29.

302 From 1973, the Decolonization Committee has each year received representatives of the Puerto Rican Socialist Party and the Puerto Rican Independence Party, two splinter parties. Puerto Rican independence organisations had requested hearings at the UN since 1953, but these had always been denied. Ironically, in 1953, the pro-independence parties represented the second largest political movement of Puerto Rico, while in 1973 when they were finally recognised by the Decolonization Committee as representatives of the Puerto Rican opposition, they had been reduced to splinter parties, which together received no more than 5 percent of the votes, *see* Cabranes 1978, p. 80 for Puerto Rican election results.

government would cause 'a relapse into colonialism'.<sup>303</sup> The pro-statehood party intended to use the UN to convince Congress to make Puerto Rico the 51<sup>st</sup> state.

The US Government made several attempts to prevent the Governor from testifying. In July of 1978, President Carter issued a proclamation to the Puerto Rican people in which he affirmed the US commitment to the principle of self-determination, and pledged to urge Congress to support whatever status the Puerto Ricans might choose in the referendum that was scheduled for 1981.<sup>304</sup> According to *Cabranes*, this proclamation was hailed in Puerto Rico as 'a milestone of considerable significance', but many Puerto Ricans still saw the Decolonization Committee as 'the only authoritative and disinterested body capable of guaranteeing the integrity and fairness of any process for political change'.<sup>305</sup> The US Government, however, was not prepared to accept the Decolonization Committee as a forum for discussing the status issues of Puerto Rico, and perhaps more importantly, it wished to avoid appearing 'soft on Cuba'. Disappointed with the US attitude, the leader of the pro-Commonwealth party testified before the Committee that:

If one takes into account that the United States has not recognised the will of the people of Puerto Rico, as expressed in the 1967 plebiscite, and that the President's assurances<sup>306</sup> depend upon his re-election in 1980 and that in the federal Government the power to decide upon the status of Puerto Rico resides in Congress, one still wonders if the exercise of the right to self-determination of the Puerto Rican people is properly guaranteed.<sup>307</sup>

The pro-statehood Governor of Puerto Rico testified that the relation of the US with Puerto Rico 'retains vestiges of colonialism', but also considered that the people of Puerto Rico should be free to continue such a semi-colonial relation. It can safely be assumed that a majority of the Committee did not agree, and this use of the 'forbidden word' (colonialism)<sup>308</sup> by the Governor of Puerto Rico added to the already large 'mass of negative testimony', which in the view of the US State Department 'materially undercut our position in the committee to defer the issue'.<sup>309</sup>

The Committee adopted a resolution which declared that the Committee deemed that 'Any form of free association between Puerto Rico and the United

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303 Carr 1984, p. 354-55.

304 Proclamation by President Carter, 25 July 1978, distributed at the UN in a statement by Ambassador Young on 28 August 1978, see Leibowitz 1989, p. 231, note 398.

305 Cabranes 1978, p. 85.

306 To respect the outcome of the plebiscite of 1981 (*see above*).

307 Verbatim record of the 1125th Meeting of the Decolonization Committee on the Situation (etc.) on 28 August 1978, UN Doc. A/AC.109/PV.1125, p. 26.

308 See Cabranes 1978, p. 68 et seq.

309 See Eric Swenden's article in *Open Forum*, No. 20 (Spring/Summer 1979), p. 21-27, cited in Carr 1984, p. 359-60.

States must be in terms of political equality in order to comply fully with the provisions of the relevant resolutions and decisions of the General Assembly and of applicable international law, and must recognize the sovereignty of the people of Puerto Rico.<sup>310</sup> The resolution made no mention of the option of integration with the US as a valid exercise of the right to self-determination. Similar resolutions were adopted in 1979<sup>311</sup> and 1980,<sup>312</sup> in which the US was also asked to present a plan for the decolonization of Puerto Rico.

In 1981, the US State Department became seriously worried about the developments at the UN, because the Decolonization Committee had recommended to the GA to examine the issue of Puerto Rico as a separate item.<sup>313</sup> As long as the anti-colonialists had limited their activities to the Decolonization Committee, they had been tolerated as a 'nasty nuisance' to the US,<sup>314</sup> but if the GA would act upon the recommendation of the Committee, the issue would be considered a real political threat. The US feared it would be depicted by Third World countries as 'a South Africa of the Western Hemisphere'.<sup>315</sup> According to Carr, the issue of Puerto Rico also threatened to strain the relations with the Latin American states. In his view, states such as Venezuela, while loath to support Cuban initiatives, used the exhibition of 'support for the independence of Puerto Rico [as] a cheap way to display Venezuela's freedom, as a Third World power, from United States' pressure and its fidelity to the legacy of Bolívar the Liberator'.<sup>316</sup>

During the meetings of the GA, the US took considerable pains 'to rally America's friends and threaten its enemies', and made it clear to the Non-Aligned countries that a vote against the US on this matter would 'carry penalties'.<sup>317</sup> In the General Committee, the US obtained a victory of 11 votes

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310 Operative paragraph 6 of the Resolution adopted by the Decolonization Committee at its 1133rd meeting, on 12 September 1978, UN Doc. A/AC.109/574.

311 Resolution adopted by the Decolonization Committee at its 1160th meeting, on 15 August 1979, UN Doc. A/AC.109/589.

312 Operative paragraph 2 of the Resolution adopted by the Decolonization Committee at its 1179th meeting, on 20 August 1980, UN Doc. A/AC.109/628.

313 Operative paragraph 3 of the Resolution adopted by the Decolonization Committee at its 1201st meeting, on 20 August 1981, UN Doc. A/AC.109/677.

314 Statement by a member of the US Mission to the UN in the *Washington Post* of 21 August 1981, cited in Carr 1984, p. 361.

315 Carr 1984, p. 361.

316 Carr 1984, p. 362.

317 One US diplomat described the diplomatic effort by saying that 'behind the scenes we raised holy hell with the NAMs' (cited in Franck 1985, p. 199, 'NAM's' refers to the members of the Non-Aligned Movement). The Netherlands and other Western states actively supported the US, see GAOR (XXXVI), 72<sup>nd</sup> and 73<sup>rd</sup> Plenary Meeting. US ambassadors vociferously pressed for a sympathetic vote in many Third World capitals, threatening explicitly to retaliate through economic measures or cutting back military aid. Allegedly, the ambassadors also threatened that the US would oppose World Bank loans to uncooperative countries. See Franck 1985, p. 202-3.

to 7, with 8 abstentions.<sup>318</sup> Cuba complained that the US had used political pressure and even threats to convince several UN Members to vote against the Cuban proposal.

In the Plenary of that year, Cuba made a final attempt to convince the GA to take up the agenda item of Puerto Rico.<sup>319</sup> The US had invited the Mayor of San Juan (the capital of Puerto Rico), to address the GA on this issue. The Mayor reiterated in Spanish the traditional US position that Puerto Rico was governed democratically and that the Puerto Ricans had the right to change their relation with the US at any time. Also, 'Puerto Rico is not an international problem and does not wish to be one'.<sup>320</sup> The Cuban proposal was rejected by 70 votes to 30, with 43 abstentions, but not before a large number of representatives explained their vote at length.<sup>321</sup> The President of the GA reminded the representatives on two occasions that they should limit their comments to the procedural aspects, but many representatives nonetheless discussed the autonomy of Puerto Rico and the question whether the Puerto Rican people's right to self-determination was respected by the US, thereby in fact granting the Cuban request for a plenary discussion of the 'Question of Puerto Rico'.<sup>322</sup>

The US representative considered this result the greatest US victory at the UN that year, together with defeating the attempts to expel Israel from the UN.<sup>323</sup> *Trías Monge* describes it as 'a remarkable diplomatic feat, given the general opinion as to Puerto Rico's subordinate condition'.<sup>324</sup> The GA's repeated refusal to discuss Puerto Rico must be ascribed for a large part to the political and economical power of the US. For a majority of states it is obviously

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318 The president of the GA, after 'consultations with numerous delegations concerned', decided that a vote in favour of the Decolonization Committee's Report would not mean the automatic inclusion of Puerto Rico in the agenda of the next session (GAOR (XXXVI), 79<sup>th</sup> Plenary Meeting). Cuba was thereby forced to ask the General Committee to include an item entitled 'Question of Puerto Rico' in the agenda of the next session. This proposal was rejected by 11 votes to 7, with 8 abstentions (GAOR (XXXVII), General Committee, 2<sup>nd</sup> Meeting, Par. 50-72 and 123-125, UN Doc. A/BUR/37/SR.2).

319 GAOR (XXXVII), 4<sup>th</sup> Plenary Meeting, 24 September 1982, Par. 21-32.

320 GAOR (XXXVII), 4<sup>th</sup> Plenary Meeting, 24 September 1982, Par. 33-55.

321 Curiously, many of the Members voting against the Cuban proposal were present at the summit of non-aligned countries in 1978, which issued a final communiqué in which it was reiterated that the UN should consider the case of Puerto Rico, and which condemned the fact that the US continued to exercise sovereignty over Puerto Rico. These states defended their apparent change of opinion by stating that the people of Puerto Rico had freely chosen their present status, and that GA Res. 1541 (XV) accepted free association and integration as modes of implementing the right to self-determination (*see for instance the statements by the representative of Uruguay and Zaire, GAOR (XXXVII), 4<sup>th</sup> Plenary Meeting, 24 September 1982, Par. 65-77 and Par. 131-135*).

322 GAOR (XXXVII), 4<sup>th</sup> Plenary Meeting, 24 September 1982, Par. 57-145.

323 Reported by *The New York Times* of 22 December 1982.

324 *Trías Monge 1997*, p. 139. *Franck 1985*, p. 195 describes it as 'a textbook success in US diplomacy'.

very unattractive to take sides with Cuba against the US on an issue which is of special importance to the US and of little importance to most other states. For many Third World countries this means repudiating a position which they have taken (and still take<sup>325</sup>) on the summits of the NAM and in the Decolonization Committee.<sup>326</sup>

The Decolonization Committee remains a forum for Puerto Ricans to express their dissatisfaction with their present status, and perhaps also to provoke the US government into action and granting Puerto Rico a real choice between the status options of Resolution 1541. Each year approximately 20 Puerto Rican organisations send representatives to New York to be heard by the Committee. The Committee still accedes to these requests, but other than that, it has done little more since 1991 than postpone discussion of the issue until next year.

#### *Proposals for Reform*

Since 1953, many attempts have been made to clarify or modify the relation between Puerto Rico and the United States, partly, it seems, to prevent further UN involvement. To this end, several bills have been introduced in Congress, but none were approved.

In 1967, a plebiscite was held upon the recommendation of a Congressional Commission, in which the people of Puerto Rico was offered a choice between independence, integration with the United States, and improved Commonwealth status, which, according to the Commission, would 'remain to be based on the principles of mutual consent and self-determination'.<sup>327</sup> The Commonwealth option received almost 60 percent of the votes, but Congress refused to take any further action.

Discussions between the US and Puerto Rico on the implementation of the results of the plebiscite continued until 1976, when president Ford announced that he believed Puerto Rico should become a state of the US. This statement

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325 The final document of the thirteenth summit of the Non-Aligned Movement in 2003 declares: 'The Heads of State or Government once again reaffirmed the right of the people of Puerto Rico to self-determination and independence on the basis of Resolution 1514 (XV) of December 1960 by the United Nations General Assembly. The Movement took note of the resolution on Puerto Rico adopted by the Special Committee on Decolonisation by consensus in 2000, 2001 and 2002, which, inter alia, urged the United States Government to order the immediate halt of its armed forces military drills and manoeuvres on Vieques Island and to return the occupied land to the people of Puerto Rico.' (Final Document of the XIIIth Summit, Kuala Lumpur, 20-25 February 2003, para. 61.

326 According to Franck, the NAM sometimes takes a radical anti-colonial stance as 'some left-NAMs enjoy a degree of influence out of all proportion to their numbers because they work harder and more relentlessly than the rest (...) This means, generally, that as midnight comes and goes in the councils of the NAM and more delegates drift away, the few dedicated moderates often find themselves hopelessly manipulated.' (Franck 1985, p. 191.)

327 Trías Monge 1997, p. 130.

sparked outbursts of violence in Puerto Rico and in the US. It took until 1988 before Congress again started to discuss the status of Puerto Rico. Several bills were introduced that proposed to organize another plebiscite on the issue. By now, it was expected Puerto Rico might choose for statehood. Popular support for Commonwealth status had waned, as it was felt this status only benefited a small group of industrialists that profited from Puerto Rico's exemption from federal taxes. More than 50 percent of Puerto Ricans continued to live below the poverty line, and they would profit from the social benefits associated with statehood.

However, Congress was unwilling to organize a plebiscite which might lead to statehood, as the integration of Puerto Rico into the Union was expected to be a multi-billion dollar operation. In 1993 the PNP, which at that time governed Puerto Rico, and which favours statehood, decided to organize a plebiscite under Puerto Rican law, which offered a choice between independence, Commonwealth status and statehood. 48.6 percent of the voters chose for the continuation of the Commonwealth, 46.3 percent statehood, and 4.4 percent independence.<sup>328</sup> It was generally assumed that statehood failed to win a majority vote because Congress had not expressed the willingness to implement that choice.

The Clinton administration, supported by the statehood party of Puerto Rico, urged Congress to authorize a binding referendum on the status of Puerto Rico with the promise that the results would be respected, even if it meant accepting Puerto Rico into the Union. The Democratic minority in the House of Representatives, which was in favour of such a referendum, was supported by a small number of Republicans to produce a one vote majority.<sup>329</sup> In the Senate there was less support for the proposals. Most Republican Senators were not ready to accept into the Union a poor, Spanish speaking state that would most likely send Democratic representatives to Congress. The bill was not put to a vote, and instead the Senate adopted a resolution which confirmed that Puerto Rico had the right to express itself on its future status, and to communicate its views to the President and Congress.

The government of Puerto Rico decided to hold a plebiscite in 1998. The ballot presented five options. Commonwealth, statehood, independence and free association were presented in the definitions that the House of Representatives had approved. A fifth option was added, which was entitled 'None of the Above', to satisfy the opposition of the pro-Commonwealth party PPD.

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328 The deadlock between these options could have been resolved by a provision that if none of the options gained an absolute majority, a second round should decide which of the two most popular options should be declared the winner. Such a provision has been included in referendum ordinances in the Netherlands Antilles.

329 The bill was passed by 209 to 208 votes, see *The New York Times* of 5 March 1998. President Clinton hailed the vote as 'victory for democracy and against exclusion'. See David Briscoe's article for the Associated Press, 'House Votes to Allow Puerto Rico Referendum', of 5 March 1998.

During the referendum campaign, the PPD advised the Puerto Ricans to vote for the 'None of the Above' option, and it gave its own interpretation of what such a vote would mean: increased and guaranteed autonomy in internal affairs, the right to seek membership of international organizations, continued citizenship of the US and full Federal social benefits for Puerto Ricans.

50% of the votes went to 'None of the Above', and 46% to Statehood.<sup>330</sup> This result of course did not resolve the stale-mate on the status issue, but it did reveal that the population is not happy with the current status of the island. Only 0.1% voted for the status quo option, and the turn-out of 75% showed that the issue is considered important by Puerto Ricans. In spite of this, the US merely took note of the outcome.

### Conclusion

Puerto Rico has a considerable amount of internal autonomy and self-government, although it is certainly smaller than that of the recognized examples of free association discussed *above*. It is unclear to what extent Puerto Rico's autonomy is protected against the US Congress. It is also unclear whether the US could unilaterally change the status of Puerto Rico, although it seems unlikely that Congress would attempt to do so.

The current status of Puerto Rico does not comply with the norms for free association or integration as defined by the UN. The GA Resolution of 1953 which declared that the US no longer needed to report under Article 73 *e* was circumvented by the Decolonization Committee, on the basis of the reasoning that the Declaration on the Granting of Independence (Resolution 1514) still applied. Cuba's campaign to have Puerto Rico re-introduced in the list of territories to which the Declaration was not fully successful because of a powerful diplomatic effort by the US. Many political parties on Puerto Rico have supported Cuba's campaign, and even Puerto Rico's Governor has testified before the Decolonization Committee that the territory's relation with the US retains elements of colonial rule.

The involvement of the UN has stimulated various initiatives from the US President and Congress to develop Puerto Rico's status into something that could be called a full measure of self-government. Two main directions are supported, both in the US and in Puerto Rico: integration with the US as the 51<sup>st</sup> state, or transforming the Commonwealth status into a free association that complies with Resolution 1541. Internal dissensions, both in the US and

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<sup>330</sup> 75 percent of the Puerto Rican residents eligible to vote turned out. 50.2 percent of the voters chose the option 'None of the Above', 46.5 percent chose for statehood, 2.5 for independence, 0.3 for free association, and 0.1 for Commonwealth as defined on the ballot. Governor Roselló interpreted the results as a victory for statehood, as none of the other defined options had attracted nearly as much votes. He saw the vote for 'None of the Above' as an expression of discontent with his internal policies, and not as a vote against statehood.

in Puerto Rico, have frustrated these initiatives. No clear path for the future is visible, since neither the Puerto Rican population, nor the US Congress seem to be able to make a clear choice for integration or free association. A stalemate has continued for many years now, in spite of the fact that the 1998 plebiscite resulted in only 0.1% of the votes for the option of *status quo*.

The UN has not played a very helpful role in resolving the status issue of Puerto Rico. Its acknowledgment in 1953 of the Commonwealth as a full measure of self-government, and the process instigated by Public Law 600 as an exercise of the right to self-determination satisfied the US that no further steps were necessary to develop the Commonwealth into a truly self-governing unit. The unwillingness of the GA to apply its own standards for decolonization to Puerto Rico or to even discuss the issue of Puerto Rico during any of its subsequent sessions has also not fostered respect for those standards. This passive attitude of the GA must be explained from the considerable political support the US can still muster in the GA in times of need. The attitude of the GA towards Puerto Rico 'depends less on what the United States does in Puerto Rico than on its policies elsewhere, particularly in Latin America'.<sup>331</sup> The Decolonization Committee's actions with respect to Puerto Rico did convince the US government during the 1970's that Puerto Rico's status was a problem that needed attention, but the radical anti-colonialism of the Committee discredited it in the eyes of the US as a platform for discussing the status issue of Puerto Rico.

### 3.4.2 New Caledonia

The French policies of decolonization were quite different from those of the Netherlands and the English-speaking colonial powers. Instead of gradually devolving powers to the colonies in preparation of independence, France attempted to assimilate its overseas territories. After WW II, France retained its full legislative and administrative powers in most of its overseas territories, and granted the populations of these territories French nationality and the right to vote in French elections.<sup>332</sup>

France's attitude was also different in that it adamantly refused any sort of UN involvement in the process of decolonization. This did not mean, however, that France has not been prepared to recognise a right to self-determination of its overseas territories. But this right is considered to be guaranteed by municipal law, more specifically the French Constitution.

The French legal debate on the self-determination of the overseas peoples has focussed on French municipal law, and largely ignores the existence of the international law of self-determination, or denies its application to the

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331 Carr 1984, p. 364.

332 Aldrich 1993, p. 159 et seq.

French overseas territories.<sup>333</sup> One of the reasons for this might be the argument that the French overseas territories have all become integrated with France, and therefore no longer possess a separate right to self-determination. The overseas departments (DOM) are fully integrated with France, and the other territories were given a one-time option to choose another status in 1958, after which the Republic became indivisible.<sup>334</sup>

In the cases of French Somaliland, the Comoros and New Caledonia this argument was summarily rejected by the GA, with no state except France speaking in defence of this interpretation. If one assumes that the GA is the final authority in determining whether a territory has achieved a full measure of self-government (*see* Chapter 3), then its decisions on the French overseas territories mean that their status does not qualify as a form of self-government under Chapter XI of the Charter, and that these territories have remained NSGTs. If this is correct, then the peoples of these territories do have an internationally guaranteed right to self-determination and decolonization.

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333 *See for instance* Pimont 1992, who in his paragraph on the self-determination of New Caledonia pays no attention to international law. Similarly, Maestre 1976 on the question of the self-determination of the TOMs entirely ignores international law. Autin 1997 mentions the UN Charter (on p. 265), and Dormoy 1997 briefly outlines the international right to self-determination and its application to New Caledonia (similarly Breillat 1993, p. 15). Gohin 1997, p. 72 considers that the international law of decolonization did not apply to the Comoros (nor presumably to the other TOMs), because the islands were decolonized in 1946, and the population became part of the people of France in 1959. *See also* Agniel 1997. Goesel-Le Bihan 1998 is an exception in that she discusses the Nouméa Accord with extensive reference to foreign examples and UN developments. Dormoy 1997 is the only French author (as far as I know) who refers to the decisions of the GA and the Decolonization Committee to reach the conclusion that the TOMs have a right to self-determination, including the right to choose for independence, free association or integration.

334 France put the Constitution of 1958 to a referendum in all of the overseas territories. All of the territories voted 'yes', except the West African territory of Guinea. France transferred sovereignty to Guinea only two days after the referendum, on 30 September, *see* Maestre 1976, p. 434. The Territorial Assemblies of the remaining *territoires d'outre-mer* (TOM) now had the option under Article 76 of the Constitution to choose, within four months after the promulgation of the Constitution, to become DOM, remain TOM, or become a member state of the new *Communauté*, which was a construction similar to the Dutch Kingdom order. Autin 1997, p. 269-70 and Breillat 1993, p. 6-9 describe this unsuccessful adventure of France into the realm of federalism. All of the larger African TOMs chose to become members of this new construction and quickly thereafter chose full independence. The smaller TOMs remained TOM, after which the French Republic became indivisible again. The French prime minister confirmed in 1959 that the transformation of DOMs or TOMs into member states of the *Communauté* or independent states was not constitutionally possible, *see* Maestre 1976, p. 435-6. Secession from the Republic would require amending the Constitution, *see* Maestre 1976, p. 455 et seq. Some authors therefore considered the referendums on self-determination that were held in several TOMs and in Algeria after 1960 as unconstitutional, because they threatened the indivisibility of the Republic. *Maestre* even considers De Gaulle's offer of self-determination to Algeria in 1959 clearly contrary to the Constitution because the President is charged with guaranteeing the integrity of the territory of France (p. 455).

The French government has consistently opposed this view, and it is hardly supported in the French legal literature. The French *Conseil Constitutionnel* considers that the TOMs have a right to self-determination, and that their populations constitute separate peoples from the people of France, but this conclusion was derived from the preamble and Article 53 of the Constitution, and not from international law. The *Conseil Constitutionnel* confirmed in a decision on Mayotte in 2000 that France is not bound by a choice of the population of a territory for a form of 'statutory evolution' short of independence, even though the *Conseil* does consider such a choice as an exercise of the right to self-determination.<sup>335</sup> It could be argued that French constitutional law is thus in conflict with international law, at least potentially, as it gives the French government the right to ignore the wishes of the overseas populations on their political status.

Article 72-4 of the Constitution, which was recently introduced, recognizes that it is possible for an overseas territory to change its status. The new status needs to be approved by a referendum in the territory, and by the French legislator. The initiative for such a status changes lies with Paris, according to Article 72-4. The Article has already been applied in Saint-Martin and Saint-Barthélemy, two islands that are part of the *département d'outre-mer* Guadeloupe. The islanders were offered a choice between remaining part of Guadeloupe or becoming separate *collectivités d'outre-mer*. A large majority of the voters in 2004 chose to be separated from the main island, a choice that France announced it would respect.<sup>336</sup>

French government practice has recognised to an increasing extent the freedom of the overseas populations to choose between different status options. France has been prepared to discuss all sorts of status changes when the

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335 Décision 2000-428 DC of 4 May 2000. Since 1966, the French government and a majority of the French legal writers consider that the secession of an overseas territory (not being a DOM) is possible under Article 53 of the French Constitution, which provides (*inter alia*) that 'Nulle cession, nul échange, nulle adjonction de territoire n'est valable sans le consentement des populations intéressées'. According to such authors as *Capitant*, *Luchaire* and *Prélot*, this provision also applies when an overseas territory expresses the wish to secede from the Republic (cited in *Maestre* 1976). Such a secession is constitutionally possible if the population of the territory agrees to it (preferably in a referendum) and the French legislator also approves of it, because para. 1 of Article 53 provides that the transfer of territory should be approved by law (cited in *Maestre* 1976, p. 444-5). See also *Pimont* 1992, p. 1689-96. *Maestre* considered that this so-called 'doctrine *Capitant*' involved an acrobatic interpretation of Article 53, but it was applied by the French Government in the cases of French Somaliland, the Comoros, and to some extent in New Caledonia. It is considered not to apply to the DOMs, although it has been argued in the French parliament that any territory, including the departments of metropolitan France, could use it to become independent (*Maestre* 1976, p. 447).

336 But the French government would oppose the creation 'de "paradis fiscaux" comme il en existe dans la partie hollandaise de Saint-Martin' (*Libération*, 8 December 2003). For the genesis of the new status, see *Saint-Martin: Objectif Statut. Repères pour l'Espoir. Recueil d'Études sur l'Évolution Statutaire de Saint-Martin*, St. Maarten: House of Nehesi 2002.

representatives of the departments or territories requested it, or when international pressure mounted. This attitude led to the independence of some TOMs, with Mayotte remaining a French *collectivité d'outre-mer*, to Wallis et Futuna becoming a TOM, and to the widening of French Polynesia's and New Caledonia's autonomy during the 1990's. France has also campaigned for an addition to the EU draft Constitution which makes it easier for an overseas territory to change its relation with the EU.<sup>337</sup>

A striking element of French practice is the readiness to organize a plebiscite almost as soon as dissatisfaction appears to exist in a territory. In this respect, the French approach is entirely different from that of the UK and the Netherlands. On the other hand, the French plebiscites usually offer very few options. Often, the question put to the electorate has been: 'independence, yes or no?', with a vote for 'no' being interpreted as a vote for unlimited French control. France has also been accused of manipulating the outcome of referendums by an unwarranted limitation or widening of the franchise, or by tampering with the electoral districts. The process of decolonization in the French TOMs has revolved to an exceptionally large extent around the issue of the right to vote in referendums. French policies in this respect have not been consistent, except in the sense that only the '*populations intéressées*' should have the right to vote.<sup>338</sup> It is also remarkable that almost none of these numerous plebiscites were ever observed, assisted or supervised by the UN or other international organisations.<sup>339</sup>

It may be concluded, therefore, that even though French legal thought does not generally recognize the application of the international law of self-determination and decolonization to the French overseas territories, French municipal law and practice does at present recognize the principle of the freedom of choice of the overseas populations, but the exercise of that freedom is still subject to approval by the French legislator.

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337 See Chapter 9.

338 Pimont 1992 (p. 1693) deplores the fact that France has not developed a consistent policy with regard to plebiscites. He cites a number of different criteria used through the years, and concludes that France has been led by local political conditions, instead of principles. Chenal 1976 thinks French policy *has* been consistent, in the sense that it always served short-term French political interests.

339 The 1977 referendum in French Somaliland is probably the only French referendum to be observed by a UN visiting mission. At that time, France was eager to grant independence to the territory, which probably explained its co-operative attitude.

*Background of the Conflict*<sup>340</sup>

The recent history of New Caledonia is characterised by bloody conflicts between the 'Kanak', descendants of the indigenous melanesian population, and the European French 'Caldoches' who started to arrive in the territory after France annexed the territory in 1853. The French colonial government concentrated the Kanak clans on arid and uncultivable areas, while the Caldoche settlers obtained ownership of most of the land.<sup>341</sup> Manual labour was imported from other Pacific and Asian countries, and through the establishment of a penal settlement.

New Caledonia's nickel deposits are estimated at 25 percent of the world reserves. Because of the growing importance of nickel, and the wish to maintain a strong French presence east of Suez, France remained very attached to New Caledonia after the Second World War. French workers were encouraged to move to New Caledonia. Migration by English-speaking people was discouraged.<sup>342</sup> The mainly francophone immigrants have consistently supported the continuation of French sovereignty over the islands.<sup>343</sup>

French policies have led to the disfranchisement of the Kanak population, which, apart from becoming a minority, also did not participate substantially in the major economic activities in the territory, which were controlled by European French companies and Caldoche land owners.<sup>344</sup>

As a *territoire d'outre-mer* (TOM), New Caledonia remained under the legislative and administrative control of France (and its Governors, which were later called High Commissioners), until the 1980s.<sup>345</sup> The French socialist government, elected in 1981, denounced 'the colonial character of New Cale-

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340 New Caledonia is located in the South Pacific, 1700 kilometres north of New Zealand and 1500 kilometres east of Australia. Its other neighbours are Vanuatu (formerly the condominium of the New Hebrides) and Fiji. Its area is 19,000 square kilometres (consisting of the island of Grande Terre and the small Loyalty Islands), which is almost 25 times the area of the Netherlands Antilles, but its population is the same in size, approximately 215,000 (2002, estimate<sup>340</sup>). The population consists of 43 percent Kanaks, which descend from the indigenous Melanesian inhabitants, 37 percent French settlers (called Caldoches), and 20 percent immigrants from several Pacific and Asian countries. According to the CIA World Factbook of 2003, New Caledonia has a higher GDP per capita than all of the independent Pacific states that campaigned for its re-inscription as a NSGT, except New Zealand and Australia. Its estimated GDP per capita in 2002 (US\$ 14,000) is comparable to that of the Netherlands Antilles (US\$ 11,400), but three times as high as that of Fiji (US\$ 4,800) and eight times as high as that of the Solomon Islands (US\$ 1,700).

341 Berman 1998, p. 294-9.

342 Requests by the governments of Tonga, the Gilbert and Ellice Islands, and Fiji for their citizens to be allowed to work in the nickel mining, were denied. See Connell 1987, p. 217.

343 See the chapter entitled 'The politics of population' in Connell 1987, p. 210 et seq. for figures and French policy statements. See also the statement of Papua New Guinea, GAOR (41), Plenary Meetings, 91<sup>st</sup> Meeting, p. 9-11.

344 Connell 1987, p. 122 et seq.

345 Agniel 1997, p.55.

donia',<sup>346</sup> but its attempts to increase local autonomy were overshadowed by the ethnic violence that erupted at this time. The Kanaks started to boycott elections and referendums, and sought support for their cause with the independent Pacific states, with international organisations such as the South Pacific Forum and the Non-Aligned Movement, and in fact with anyone that would offer support. Ultimately, this would lead to the re-listing of New-Caledonia as a NSGT.

#### *UN Involvement*

In 1946, France decided to stop transmitting information under Article 73 *e* on a number of territories, among which New Caledonia.<sup>347</sup> France never cooperated with the Decolonization Committee or its predecessors. It consistently defended a very restrictive interpretation of the UN's mandate on issues of decolonization, which repeatedly put it in an isolated position when its territories were discussed. Combined with its unwillingness to grant the TOMs an irrevocable form of self-government, this led to some of the TOMs being re-listed as NSGTs by the GA during the 1960s and 1970s.<sup>348</sup>

The Kanak independence movement started petitioning the Decolonization Committee in 1975, but initially without any success.<sup>349</sup> The Melanesian members of the South Pacific Forum<sup>350</sup> had been susceptible to the Kanak complaints since the 1970's. From 1980, when its group was reinforced by the independence of Vanuatu, these states started to lobby at the UN to have New Caledonia re-inscribed on the list of territories to which GA Res. 1514 (XV)

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346 Aldrich 1993, p. 241 reports the words of the French Secretary of State for the DOM-TOMs in 1981.

347 For this decision, and the UN response, *see above* in the paragraph on the integration of the French DOMs.

348 For the case of French Somaliland (currently Djibouti), which was re-listed through GA Res. 2228 (XXI) of 1966, *see* Chenal 1976 and Franck & Hoffman 1976. The Comoros were re-listed as an NSGT by GA Res. 3161 (XXVIII) of 1973). The organisation Pacific Action and an independence party in Te Ao Maohi (French Polynesia) have been pleading with the South Pacific Forum and other organisations in recent years to gain support for the re-inscription of 'French-occupied Polynesia' (as well as Ka Pae'Aina (Hawaii) and West Papua) on the list of NSGTs, *see* the website of Pacific Action at [http://www.planet.org.nz/pacific\\_action/action/tahitipet.html](http://www.planet.org.nz/pacific_action/action/tahitipet.html) (visited on 4 February 2004).

349 Kircher 1986, p. 8.

350 The South Pacific Forum was founded in 1971 and renamed the Pacific Islands Forum in 1999. It is the most important regional organisation of the Pacific, which meets annually for the purpose of discussing joint political action and economic co-operation. In 1986, it counted 13 members. Seven were members of the UN (Australia, New Zealand, Fiji, Papua New Guinea, Samoa, Solomon Islands and Vanuatu), the other six were the Cook Islands, Niue, Nauru, Tonga, Tuvalu, and Kiribati.

applies, and to have the GA declare that New Caledonia was still a NSGT.<sup>351</sup> The other members of the South Pacific Forum found it more important to maintain good relations with France, and were hopeful that the French government would implement changes in the government of the territory.<sup>352</sup> Fiji, New Zealand and Australia were not inclined to jeopardise their trade relations with the European Community and many Pacific countries saw France as an ally against possible Soviet influence in the region.<sup>353</sup> It was also feared that France would be able to block an attempt to classify New Caledonia as a NSGT, which would damage the Kanak cause.<sup>354</sup>

After the French elections of 1986, in which the troubles in New Caledonia were an issue, the right-wing alliance led by Jacques Chirac won a majority in the National Assembly. A new policy towards New Caledonia was instituted, which was clearly pro-Caldoche.<sup>355</sup> It was announced a referendum would be held in 1987 on the question of whether New Caledonia should become independent.<sup>356</sup> The franchise for the referendum would be based on the same rules that applied in elections, which meant that all French citizens with domicile in New Caledonia, or who had resided for six months in the territory, were allowed to vote. Based on this franchise, a victory for the independence movement would be highly unlikely.

All of the members of the South Pacific Forum had now become convinced that international pressure on France should be increased, also because of the sinking of the *Rainbow Warrior* and nuclear testing in French Polynesia.<sup>357</sup> In August 1986, they unanimously<sup>358</sup> decided to request the Decolonization

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351 These Melanesian states were Papua New Guinea, Vanuatu and the Solomon Islands. Fiji, which has a partly Melanesian population, did not actively support the Kanak movement for independence. Australia and Fiji were members of the Decolonization Committee when Papua New Guinea made its first requests, but did not take action (*see* Connell 1987, p. 398).

352 *See* for instance the statements by Fiji and New Zealand in the GA of 1986, in which they explained why they had not brought the issue before the UN earlier (GAOR 41, Plenary Meetings, 90<sup>th</sup> and 91<sup>st</sup> Meetings).

353 Connell 1987, p. 385 et seq. and p. 398 claims that these possible motives to support France were not strong, but did lead to a cautious attitude, even with Vanuatu, the strongest supporter of Kanak independence.

354 Australian Foreign Minister Hayden stated at a press conference in 1985 that 'France is in a position to call up quite a lot of IOUs at the United Nations, including from Third World countries, most particularly in Black Africa' (cited in Connell 1987, p. 398).

355 The authorities of the French High Commissioner were increased, and the funds of the regional councils, some of which were controlled by Kanak majorities, were frozen, while the authorities of the territorial congress, controlled by the Caldoches, were increased. More French troops were brought in, which started to patrol the Kanak regions (Aldrich 1993, p. 249 et seq. and Aldrich & Connell 1992, p. 222 et seq).

356 The Socialist government had developed a plan in 1984 to hold a referendum in which a choice would be offered between independence, increased autonomy, or maintaining the status quo. In 1985, this was changed into a referendum with two options: a simple yes or no against a form of free association with France.

357 Connell 1987, p. 398-9.

358 The Cook Islands abstained from the vote.

Committee to recommend to the GA the re-inscription of New Caledonia, 'to ensure regular review by the United Nations of the Territory's progress towards self-government and independence'.<sup>359</sup>

*Debate at the UN*

The Decolonization Committee decided to postpone discussion of the issue to the next session,<sup>360</sup> but to the surprise and dismay of some of the members of the Committee, the South Pacific states were not prepared to have the issue simmer on the backburners of the working groups and the sub-committees for a number of years, as was the practice of the Committee. The South Pacific states simply brought up the question of New Caledonia in the plenary debate on the implementation of the Declaration on the Granting of Independence, bypassing the Fourth Committee on the way.<sup>361</sup>

The South Pacific states claimed that New Caledonia had always remained a NSGT, even though France had ceased to report on it in 1947. The GA had never explicitly approved this French decision, which meant that the obligations of Article 73 were still in force with respect to New Caledonia, it was stated. As an overseas territory that was culturally, historically and ethnically different from the metropolis, *prima facie* there existed an obligation to transmit information. This assumption was confirmed by the constitutional history of New Caledonia, which showed a consistent status of subordination to Paris. The South Pacific states concluded that under Principles IV and V of Resolution 1541, New Caledonia was still a NSGT and 'continues a colonial relation with France'.<sup>362</sup>

With some feeling for drama, Fiji posed a question to the representatives:

Do they [the representatives] believe that a European Power, a colonial Power, has the right in today's world to decide the future of people 20,000 kilometres away, under conditions worked out by that colonial Power alone? Or do they believe

359 GAOR 41<sup>st</sup> Session, Supplement No. 23 (A/41/23), Annex I, p. 53 et seq.

360 GAOR 41<sup>st</sup> Session, Supplement No. 23 (A/41/23), para. 41-42. Earlier requests by Papua New Guinea to put the issue on the agenda of the Committee had been treated similarly.

361 A number of states uttered their misgivings about this unprecedented promptness of action, which had also been inspired by the support of the NAM, which in September of that year, announced that it 'welcomed and supported the decision by the members of the South Pacific Forum (...) to seek the re-inscription of New Caledonia (...) and strongly urged the forty-first session of the United Nations General Assembly to re-inscribe New Caledonia on the list of Non-Self-Governing Territories'. See the Conclusions of the Eighth Conference of Heads of State or Government of Non-Aligned Countries in Harare, in September of 1986 (UN Doc. A/41/697, p. 75, para. 150, and p. 76, para. 151). At a summit of the Commonwealth nations, the heads of government 'stressed the need to secure the early independence of New Caledonia' (UN Doc. A/40/817, p. 15, para. 31).

362 A background paper was circulated among the UN members, which is annexed to a letter dated 2 October 1986 from the permanent representative of Fiji to the Secretary-General (UN Doc. A/41/668).

that the people of New Caledonia have the right to a proper act of self-determination, in accordance with the normal processes of the United Nations?<sup>363</sup>

A number of states tried to apply Resolution 1541, but none found it necessary to discuss whether Principles VIII and IX (on integration) applied, either because they thought the territory was clearly not integrated with France,<sup>364</sup> or because they thought integration was not a valid method of decolonization in the first place.<sup>365</sup>

New Zealand discussed at some length why it thought the situation represented a form of 'arbitrary subordination' in the sense of Principle V of Resolution 1541. New Zealand referred to the pre-eminent position that France had maintained throughout all of the changes in the administration of the territory, and especially in the fact that France had retained the right 'to promulgate arbitrary change', which it had used it in 1986 to abolish the devolutionary reforms implemented by the previous French government. 'No consultation; no agreement; a simple display of power', according to the representative of New Zealand.<sup>366</sup>

France also used Resolution 1541, but it argued that New Caledonia was not a NSGT, because it was fully integrated with metropolitan France. Its inhabitants were French citizens and enjoyed 'fully the rights and freedoms attached to that status'. They participated in the elections for the president of France and had 'the same representation in Parliament as all other citizens'.

Fiji responded that French citizenship and the right to vote in French elections did not necessarily mean that the territory was integrated with France. Fiji referred to the situation in the French West-African territories before 1958, when those territories had representatives in the French parliament, but France nonetheless considered them NSGTs. New Zealand added another argument

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363 GAOR (41), Plenary, 92<sup>nd</sup> Meeting, p. 56.

364 Thailand considered Principle V applied because 'New Caledonia has not relinquished its status of dependency to France' (91<sup>st</sup> Meeting, p. 93). Ghana also called New Caledonia a dependency of France (92<sup>nd</sup> Meeting, p. 51). The Solomon Islands also limited its analysis to Principle IV and V, and simply stated that New Caledonia had been 'under colonial control and domination for 133 years' (92<sup>nd</sup> Meeting, p. 7.) New Zealand also considered that Principle V 'was the crux of the matter'.

365 Australia stated: 'France (...) used to maintain that about Algeria too. We all know that in 1986 this attitude seeks to perpetuate a myth and to sustain a legal fiction – a myth and a fiction which future historians may find as bemusing as King Canute's attempt to stem the oncoming tide. France cannot indefinitely resist, in New Caledonia, the wave of decolonization which has already washed over most of this earth' (90<sup>th</sup> Meeting, p. 43). Curiously, Australia had only two years earlier decolonized its last NSGT – the Cocos (Keeling) Islands – through integration, with the unanimous approval of the UN (*see above*). A statement by Ghana also showed some evidence of a selective memory: 'The present claim that the Territory is part of metropolitan France is one of those peculiar postures which France takes when it comes to its own colonial Territories but which has no basis in international law or United Nations practice' (92<sup>nd</sup> Meeting, p. 48).

366 92<sup>nd</sup> Meeting, p. 27.

against the French position. The status of New Caledonia had remained one of 'arbitrary subordination' because the regional organs of New Caledonia held their authority 'only at the pleasure of Paris'.<sup>367</sup> The French Constitution in 1986 did indeed not contain any real checks on the power of the French legislator to change the status of New Caledonia as it saw fit, but it would seem to me that this is an inherent characteristic of the status of integrated territories. The GA, however, chose to view New Caledonia as not integrated into France at all.<sup>368</sup>

Should the status of New Caledonia be seen as compatible with the criteria for integration? The status of the population was not entirely the same as that of the metropolitan French, because many French laws did not apply in the TOMs, and these territories certainly were not as integrated with France as the DOMs. Since France is not a federal state, it could easily be argued that the integration of New Caledonia was incomplete, but whether it did not comply with Resolution 1541 is hard to say. The criteria for integration are rather vague and the GA did not attempt to make them more precise in the case of New Caledonia. Perhaps a conclusion could be drawn that a constitutional arrangement which places an overseas population in a substantially different position from the metropolitan population authorizes the UN to discuss the situation and declare that Resolutions 1514 and 1541 still apply. But a number of other factors obviously influenced the decision of the GA as well: firstly, the apparent repression of an indigenous non-white population, which had a long history of disfranchisement, and secondly, France was very unpopular in the region for its nuclear tests in Polynesia.

In view of the attitude of the vast majority of the GA, any arguments France could put forth in its defence, were really immaterial. But the French representative nonetheless gave it a try. He stated that the Caledonians had the right to secede from France, if they so desired, but the representative organs of the territory had never expressed such a wish. France considered that the Pacific states distorted the principle of self-determination, because they wanted New Caledonia to become independent, even though the population did not want this. The Pacific states attempted to force France to organise 'a slanted referendum whose outcome would be determined in advance'.<sup>369</sup> By insisting

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367 92<sup>nd</sup> Meeting, p. 27.

368 Article 74 of the Constitution provided that the TOMs had their own particular organisation 'tenant compte de leurs intérêts propres dans l'ensemble des intérêts de la République'. The organisation of the government in the TOMs was determined by an organic law, which was not adopted until after the local parliaments had been consulted.

369 This reproach was perhaps justified with respect to Papua New Guinea, Vanuatu and the Solomon Islands. In the communiqué that these states had issued earlier, they had declared that 'the referendum scheduled for mid-1987 (...) should lead to independence' and that only the Kanaks should have the right to vote. The representative of the Solomon Islands stated in the GA that France should make it possible 'to hold a fair and just referendum to decide on New Caledonia's future independent status' (92<sup>nd</sup> Meeting, p. 8). One might wonder how such a referendum could be relevant if New Caledonia should become

that only the Kanaks had the right to determine the future of New Caledonia, the Melanesian states had introduced 'a novel principle: "two men, one vote"', which if applied to Australia or the US would mean that there were very few Australians or Americans'.<sup>370</sup> According to Australia, the franchise should be concentrated in the hands of those who have a long-term residence in, and a commitment to, New Caledonia.<sup>371</sup> France probably took this criticism to heart, because in 1988 it agreed with the Kanaks and Caldoches that the franchise for future referendums would be strictly limited to those persons with long-time residence in the territory, or strong historical ties to it (*see below*).

The GA adopted a resolution that declared New Caledonia was still a NSGT and that France should report on it.<sup>372</sup> The Netherlands explained its negative vote by stating that it considered UN action premature. It favoured waiting for the recommendations of the Decolonization Committee and 'had no reason to doubt that France will ensure that [the] referendum is held in a free and democratic manner'.<sup>373</sup> This statement seemed to imply that the Decolonization Committee was allowed to discuss the issue. Canada explained its abstention by stating that it would only seek to compel a state to transmit information if there was 'sufficient evidence that the administering Power was seeking actively to frustrate or deny self-determination'. It trusted that France would actively seek to ensure that the act of self-determination scheduled for

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independent anyway. *Islam* writes that the non-Kanak population of New Caledonia does not come 'within the perview [*sic*] of "dependent peoples" of "territories which have not yet attained independence"' in the sense of GA Res. 1514. The colonial peoples do not include 'citizens of the colonisers and other independent States'. This does not mean that these persons would not have the right to become citizens of an independent New Caledonia, but 'the right of the Kanaks to colonial self-determination and the right of the settlers and their descendants to be citizens of independent New Caledonia are not the same but somewhat different and there need not be any conflict between these two rights' (*see Islam* 1987, p. 20). This attitude towards settlers of Western descent can also be found in other Pacific territories such as Hawaii (*see above*). It denies the legitimate rights of people who have lived in the islands for a long time, and in some cases even descend from settlers that arrived in the islands during the 19<sup>th</sup> century.

370 91<sup>st</sup> Meeting, p. 60-9. Papua New Guinea and Vanuatu had issued a communiqué earlier that year in which they had declared that only the Kanaks should have the right to vote in the referendum. When confronted by France with this statement, they did not wish to repeat it, but Vanuatu stated that 'the colonized people of New Caledonia, the Kanaks, are not French' (91<sup>st</sup> Meeting, p. 138).

371 90<sup>th</sup> Meeting, p. 47. Zimbabwe considered that only the 'colonized' should have the right to vote. People 'without roots or permanence in the territory cannot be included among the colonized' (91<sup>st</sup> Meeting, p. 108).

372 The resolution was adopted by 89 votes to 24, with 34 abstentions as GA Res. 41/41 A. The negative votes came from most of France's neighbours in Europe (including the Netherlands), nine of its former colonies, and seven other small Third World states. Most of the Western states (including the US and the UK) abstained, as did a number of Arab, African and Caribbean states (92<sup>nd</sup> Meeting, p. 76).

373 93<sup>rd</sup> Meeting, p. 7.

1987 would provide 'a meaningful and representative basis for determining the course of New Caledonia's future political process'.<sup>374</sup>

France did not take the GA decision lightly.<sup>375</sup> It expelled the Australian Consul-General from New Caledonia, and briefly broke off ministerial contacts with Australia.<sup>376</sup> Development aid was reduced for the countries that supported Kanak independence (and opposed French nuclear testing), whereas aid to the Cook Islands was increased, because it generally supported the French presence in the Pacific.<sup>377</sup>

#### *Subsequent UN Involvement*

In the GA debate, New Zealand and Australia had pointed out to France that the UN involvement with their own NSGTs in the Pacific had been beneficial. New Zealand stated that it had found the contributions of the UN had always been positive, helpful, and often conciliatory, providing 'sensible and often imaginative advice to all concerned.' It commended the thought to France that 'there is a place in the resolution of most conflicts for an impartial third party.' 'We thus ask no more of France than we have been prepared to do ourselves'.<sup>378</sup> New Zealand and Australia criticised France's consistent refusal to participate in any of the work of the Decolonization Committee or to allow UN visiting missions to its territories, and its refusal to supply information or attend hearings on French Somaliland after that territory had been declared a NSGT.<sup>379</sup> Ghana reminded the GA that by not providing any information on New Caledonia to the UN and by not allowing visiting missions, France

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374 93<sup>rd</sup> Meeting, p. 2-3.

375 Many of the Pacific states also noted 'with dismay the reports that many Governments have been subjected to economic and political pressure to keep them from doing what is right' (statement by Papua New Guinea, 91<sup>st</sup> Meeting, p. 12). *See also* the statement by the Solomon Islands, 92<sup>nd</sup> Meeting, p. 16. The representative of Vanuatu stated that: 'Many of us have been pressured in ways never previously experienced, none more so than Vanuatu. In some instances, those pressures have been so great as to constitute nothing less than threats. Some of us have been reminded of our economic vulnerabilities. Some of us have been the recipients of rather unusual proposals and propositions' (92<sup>nd</sup> Meeting, p. 39). *See also* the statements by Samoa (91<sup>st</sup> Meeting, p. 31), and the Solomon Islands (92<sup>nd</sup> Meeting, p. 39). Aldrich & Connell 1992, p. 224, state that the French campaign was aimed particularly at Australia, which was possibly threatened that its policies towards the Aborigines would be attacked by France in retaliation for Australia's support of the Kanaks. In the GA debate it was stated that France had also threatened to take economic measures against certain states. It seems France had already uttered such threats in 1981, when it urged Fiji to use its influence in the South Pacific Forum to the benefit of the French presence in the Pacific, because Fiji sold sugar to the European Community based on the Lomé agreement (*see* Connell 1987, p. 396).

376 Berman 1998, p. 322, note 202.

377 Aldrich & Connell 1992, p. 224.

378 92<sup>nd</sup> Meeting, p. 18-20.

379 91<sup>st</sup> Meeting, p. 128 (New Zealand) and p. 133 (Australia).

made it impossible for the UN to determine whether the territory had attained a full measure of self-government.<sup>380</sup>

France has remained opposed to UN involvement with New Caledonia.<sup>381</sup> It has also refused to transmit information under Article 73 *e*. It does, however, annually provide the Secretary-General with information on New Caledonia, and it explains its policies with regard to New Caledonia in the Fourth Committee and it maintains informal contacts with the Decolonization Committee.<sup>382</sup> The *Nouméa Accord* of 1998 (*see below*) provides that the UN 'will be advised that New Caledonia's emancipation is under way'.<sup>383</sup> France formally still does not co-operate with the Decolonization Committee, but it has sent an observer to the Pacific Regional Seminar of the Committee in 2002 and 2004.<sup>384</sup>

The Decolonization Committee has since 1986 yearly reviewed the situation in New Caledonia, heard petitioners from the territory, and drafted resolutions (always adopted by the GA) which have become increasingly detailed, outlining which developments in the territory are positive and which 'merit concern'.<sup>385</sup> But the international criticism has become less severe since France, the Caldoches and the Kanaks signed agreements on the process of self-determination in 1988 and 1998.<sup>386</sup> A representative of the Kanak FLNKS stated at the Pacific Regional Seminar of 2002 that the close attention of the UN to the decolonization process has been 'a determining factor in the struggle of the indigenous people for freedom and independence'.<sup>387</sup>

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380 92<sup>nd</sup> Meeting, p. 52.

381 Berman 1998, p. 331.

382 Goesel-Le Bihan 1998, p. 28-9.

383 Paragraph 3.2.1 of the *Nouméa Accord*. Goesel-Bihan 1998 p. 55-6 sees this as an example where France through constitutional processes has taken on an obligation that it has consistently opposed internationally. Another example is found in para. 5 of the *Accord*, where it is laid down that New Caledonia can only achieve independence as a whole, even though France has never accepted that it is obliged to respect the principle of *uti possidetis* when granting independence to a colony.

384 UN Doc. A/AC.109/2003/7, para. 47.

385 *See for instance* GA Res. 58/106 of December 2003, which has a preamble of 6 paragraphs, followed by 16 operative paragraphs, which note for instance the positive developments in mapping the marine resources within the economic zone of New Caledonia.

386 Berman 1998, p. 331.

387 Statement by the representative of the FLNKS during the Pacific Regional Seminar organised by the Decolonization Committee in 2002, *see* the Working Paper prepared by the Secretariat on New Caledonia (26 March 2003), UN Doc. A/AC.109/2003/7, para. 49. The case of New Caledonia appears to have inspired people and organisations from other Pacific territories to attempt to have their territories inscribed as NSGTs as well. Searching the internet for 'list non-self-governing territories' in combination with names of Pacific dependent territories such as Wallis and Futuna, Hawaii, French Polynesia, Bougainville, Easter Island or Alaska reveals many examples of such attempts, which generally appear to be inspired by alleged violations of indigenous rights. The UN records do not as yet show that the Decolonization Committee is willing to take up any of these cases, nor has the South Pacific Forum been prepared to support their cause in the way it supported the Kanaks.

*The Nouméa Accord: A Procedure for Future Self-Determination*

In 1998 a broad agreement on the future of New Caledonia was signed by France and representatives of the Kanaks and Caldoches, the *Nouméa Accord*.<sup>388</sup> It provides for a gradual development towards independence or free association with France, a decision on which is postponed. Between 2013 and 2018 a referendum is to be held in which the New Caledonians should choose between free association, independence or *status quo*. If the electorate would vote for *status quo*, two further referendums could be held on the same question.<sup>389</sup>

The *Nouméa Accord* was approved in a plebiscite in New Caledonia, and the French Constitution was changed to include a chapter devoted specifically to the territory (which was renamed a *pays d'outre-mer*).<sup>390</sup> It provides that France will delegate '*de façon définitive*' a number of powers to New Caledonia. It does not state which powers they are, nor in what way the delegation should become 'definitive'. But the preamble to the *Nouméa Accord* states that the delegated powers may not revert to France, 'reflecting the principle of irreversibility governing these arrangements'.<sup>391</sup> It must be assumed that France is bound by this agreement, and that the autonomy of New Caledonia can no longer be retracted unilaterally by France. The *Nouméa Accord* also provides that if the New Caledonians do not vote in favour of devolution (free association) or independence in the referendum(s) of 2013-2018, the political organisation set up by the *Nouméa Accord* will remain in force without there being any possibility of reversal, and this irreversibility will then be guaranteed by the Constitution.<sup>392</sup>

The new relations with New Caledonia are regulated by a French organic law,<sup>393</sup> which grants the *pays* the authority to promulgate 'laws of the country' ('*lois du pays*') which have the full force of law and can only be annulled by the French *Conseil Constitutionnel*.<sup>394</sup> The powers which are still exercised by France are external affairs, secondary and higher education, entry and stay

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388 The text of this agreement is reproduced in UN Doc. A/AC.109/2114, annex.

389 Para. 5 of the *Nouméa Accord*. This paragraph also stipulates that New Caledonia can only achieve independence as a whole, and that the results of the referendum(s) will be considered as a whole, and not per province. This provision appears to be inspired by the situation in the Comoros

390 The amendment to the Constitution was approved by the *Congrès de la République* by 827 votes to 31, with 27 abstentions (see Goesel-Le Bihan 1998, p. 30).

391 Para. 5 of the preamble of the *Nouméa Accord*. The translation used here is an 'informal translation' by the Pacific Community translation services, made available through the web site of the French embassy in Australia ([www.ambafrance-au.org](http://www.ambafrance-au.org)).

392 Para. 5 of the *Nouméa Accord*.

393 Organic Law No. 99-209 of 19 March 1999.

394 This is considered to be a fundamental innovation of French constitutional law. See Goesel-Le Bihan 1998, p. 47 et seq. on the question whether the *Nouméa Accord* may have created a federal or confederal form of government, or whether it is simply a form of regionalisation.

of foreign nationals, law enforcement, penal and private law, public order, financial affairs, and a number of other smaller subjects.<sup>395</sup> The territory is competent in the areas of labour and social conditions, it can levy a number of local taxes, it controls some elements of foreign trade, and it can request (associated) membership of some international organisations (with the approval of France). The French government can authorise the president of the territorial government to negotiate and sign treaties with Pacific states.<sup>396</sup> A few of the remaining powers of the state will be transferred to New Caledonia during the period 2004-2014.<sup>397</sup> A new element is the incorporation of some elements of Kanak traditional law and institutions into the constitution of New Caledonia.<sup>398</sup>

The highly contentious issue of the franchise for the referendum(s) of 2013-2018 was settled by providing that only those persons will be allowed to vote who have French nationality, reside in New Caledonia, and were eligible to vote in the referendum of 1987, or had not yet reached the required age. Other French nationals who will have lived in New Caledonia continuously for 20 years in 2013, or who can prove specific links with the territory, either by birth, family ties, or other connections, will also be allowed to vote.<sup>399</sup> People fulfilling these criteria can also apply for New Caledonian citizenship, to which the country may attach certain rights and obligations, and which may be transformed into New Caledonian nationality after 2013.

The plebiscite to approve the Nouméa Accord was already based on these rule (*mutatis mutandis*), which led to the exclusion of 8% of the French inhabitants of New Caledonia that were on the electoral roll for elections. A number of these French citizens lodged a complaint with the Human Rights Committee, claiming that Article 25 (right to vote) and 26 (prohibition of discrimination) of the ICCPR had been violated by the criteria for the referendums of 1998 and of 2013 or beyond.<sup>400</sup> The claimants considered the periods set for length of residence were excessive, and the criteria used to determine the electorate discriminated between French citizens on the basis of ethnic origin, place of birth, family ties, etc. France responded that as these referendums were 'part of a process of self-determination', and as this process might lead to independence it required the 'consent of the population con-

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395 Organic Law No. 99-209, Article 21-2. *See also* the Working Paper prepared by the Secretariat on New Caledonia (26 March 2003), UN Doc. A/AC.109/2003/7, para. 23-25.

396 Articles 28-29 of the Organic Law. *See* Touboul 1997 for the external relations of the TOMs and New Caledonia.

397 Article 26 of the Organic Law.

398 *See* para. 1.2 till 1.4 of the Nouméa Accord, providing for the establishment of a Customary Senate, which must be consulted on 'subjects relating to Kanak identity', legal protection for sites that are sacred in Kanak tradition, and increased use of Kanak languages in school curricula.

399 Para. 2.2 of the Nouméa Accord.

400 Communication No. 932/2000 (CCPR/C/75/D/932/2000), submitted by Ms. Marie-Hélène Gillot et al., 25 June 1999.

cerned', as Article 53 of the French Constitution stipulates.<sup>401</sup> According to France, the persons 'concerned' were those who prove that they have particular ties to the territory whose fate is in question'.<sup>402</sup>

The HRC agreed with France that self-determination inevitably involved some form of exclusion, and it did not find the rules applied to be excessively exclusive.<sup>403</sup> The applicants also took their case to the European Court of Human Rights, which agreed with the HRC in its judgement of 2005 that restrictions to the right to vote were allowed in a process of self-determination.<sup>404</sup> The reasoning of the Committee and the Court, while understandable in the violent and extremely problematic case of New Caledonia, has perhaps created a precedent for other self-determination processes, legitimizing the exclusion of migrants from democratic rights, and may come to play an important role in the latent conflicts between indigenous populations and newcomers, which also exist in the Netherlands Antilles and Aruba.

In the meanwhile, the increased autonomy of New Caledonia has been a mixed success. The Caldoches and Kanaks have been forced to co-operate in administering the territory. There have been occasional violent incidents, but on the whole, the territory has become more stable, and attracts more foreign investors and tourism. The social problems remain largely unsolved, and the wealth of the country still appears to be divided very much along ethnic lines, thereby continuing to pose a threat to future stability.

### Conclusion

France and the UN disagree on whether the international law of self-determination and decolonization still applies to the French overseas territories. French law and practice does at present recognize the principle of the freedom of choice of the overseas populations, but the exercise of that freedom is subject to approval by the French legislator. The power of Paris to unilaterally change the status of the overseas territories without the consent of the population was much criticized by UN members because of the way it was used in the 1980s

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401 See above on the interpretation of Article 53. See Maestre 1976, p. 453 and Gohin 1997, p. 74 et seq. for the possible interpretations of the phrase 'populations intéressées'.

402 Communication No. 932/2000 (CCPR/C/75/D/932/2000), State party's observations on the merits, para. 8.14.

403 In spite of the HRC's opinion that the Optional Protocol does not authorise it to receive complaints concerning violations of the right to self-determination, the HRC in this case considered that it should take Article 1 into account in interpreting Article 25 of the ICCPR. It noted, 'without expressing a view on the definition of "peoples" as referred to in Article 1, that it was not unreasonable to limit the self-determination decision in this case to the population 'concerned', as the French Constitution provides' (examination of the merits, para. 14.7). It agreed with the conclusion of the Senior Advocate General in the case before the French Court of Cassation: 'limitations to the electorate were legitimised by the need to ensure a sufficient definition of identity'.

404 Judgement of 11 January 2005 (application nr. 66289/01, *Py v. France*).

in New Caledonia. Since then, the French Constitution has been amended to reflect the practice, which has grown since then, that status changes are no longer realized without the consent of the overseas populations.

France considered that New Caledonia was integrated with France in the sense of Principles VIII and IX of Resolution 1541, but no other state appeared to share this view. The GA decided that the territory is a NSGT, and that the Decolonization Committee should concern itself with the case. France at present informally cooperates with the UN involvement with New Caledonia, and the international pressure may have stimulated the French government to find a peaceful resolution of the ethnic conflict in New Caledonia. In contrast with Puerto Rico, the Decolonization Committee is not merely used as a platform to attack France, and it seems to play a positive role in this case.

### 3.5 CONCLUSION

It can be concluded from the interminable debates on self-determination and decolonization at the UN that alternative forms of self-government can only be accepted as a 'full measure of self-government' and a completion of the legal process of decolonization if the wishes of the population with regard to the political status of their territory are respected. The freedom of choice of the population has often been the focal point of the debates, but in spite of this, the UN has only formulated two alternatives to independence: free association and integration. The possibility of other options that could qualify as full self-government has never been excluded, and was recognized in Resolution 2625 of 1970, but in practice such options are viewed at the UN with even more suspicion than free association and integration, and are only accepted as temporary solutions at best.

Only a very forceful diplomatic campaign by the US prevented the GA from re-inscribing Puerto Rico on the list of NSGTs in 1981, even though the GA had declared in 1953 that Puerto Rico had achieved full self-government and had exercised its right to self-determination. The GA generally considers the Declaration on the Granting of Independence to Colonial Countries and Peoples (GA Res. 1514 (XV)) sufficient legal basis for re-evaluating its involvement with any territory 'of the colonial type' that has not become independent yet. It therefore each year approves of the Decolonization Committee's report which always includes a discussion of the situation in Puerto Rico. The case of New Caledonia showed that France could not prevent the GA from reviving its involvement with a territory that had not been on the list of NSGTs for almost thirty years.

The cases of Puerto Rico and New Caledonia, while hugely different in most respects to each other share at least one common characteristic: there exists considerable and long-standing dissatisfaction regarding their current political status, which is somewhere in between association and integration.

One of the causes of this dissatisfaction appears to be the 'in-betweenity' of their status, because it suggests a partial responsibility of the metropolis for the internal problems of the territory, which is resented by some, and considered insufficient by others. There exists internal disagreement both in the territories and in the metropolis on the political future of the territory, which creates a deadlock or stalemate situation that hampers the political development of the territory. In New Caledonia a way out of this predicament may have been found by explicitly deciding that the decision on the future of the territory ultimately rests with the population, while limiting the franchise for future plebiscites to those people that may be assumed to have a real and lasting connection with the territory.

Free association can be a satisfactory form of decolonization for small territories, if the metropolitan state is prepared to relinquish all of its legislative and administrative controls over the territory, and to actively promote the territory's capacity to enter into international relations independently. The population of a territory should be aware that the option of free association often ends up being very close to independent statehood. While the US and New Zealand have been prepared to support their associated states with substantial financial aid, they are not obligated to do so under international law, nor does international law compel the principal states to extend their nationality to the inhabitants of associated states.

International law also recognizes the possibility of integrating overseas territories into the mother country as a form of complete decolonization. Most metropolitan governments have not been very willing to discuss this option since the 1960s because of the fear that it would entail huge costs and cut off the road to independence for the territories. But the few territories that have been allowed to integrate completely into the metropolis do seem to be relatively happy with it.

The UN is generally rather suspicious of integration as a form of decolonization. It has re-listed a number of cases of incomplete integration as NSGTs. It should probably be assumed that a status which does not represent complete integration, but does continue to grant some jurisdiction to the metropolitan state in the internal affairs of the overseas territory may authorize the UN from considering that Chapter XI of the UN Charter and GA Resolutions 1514 and 1541 continue to apply.