A SOLUTION FOR THE THIRD INTERNATIONAL DECADE FOR THE ERADICATION OF COLONIALISM: A 'FOURTH' OPTION TO OBVIATE THE NEED FOR A FOURTH DECADE?

Elisabeth Perham*

I. Introduction

Despite concerted efforts by the international community over almost six decades to bring an end to the era of colonialism, 17 territories remain on the United Nations (UN) list of non-self-governing territories.[1] In 2011 the UN declared 2011-2020 the Third International Decade for the Eradication of Colonialism,[2] but few of the non-self-governing territories appear to be getting much closer to completing the decolonisation process.[3] For some of the territories this is in large part due to territorial disputes.[4] However, for other territories the stalemate may be due to the fact that the UN currently accepts only the three methods of decolonisation prescribed in UN General Assembly (UNGA) Resolution 1541[5] as proof that a territory has become self-governing for the purposes of removing it from the list.

This article argues that for the decolonisation process to be completed there needs to be more flexibility in determining when a territory has become self-governing: the Secretary-General himself has recognised the need for a "creative approach" in the quest for decolonisation.[6] More

* Elisabeth Perham, LLB (Hons), BA (Hons). A version of this article was submitted as part of the requirements for the LLB (Hons) degree at Victoria University of Wellington. Elisabeth is grateful to Professor Tony Angelo for his supervision of that paper.

1 Hereinafter referred to as the list. Anguilla, American Samoa, Bermuda, British Virgin Islands, Cayman Islands, Falkland Islands, French Polynesia, Gibraltar, Guam, Montserrat, New Caledonia, Pitcairn, St Helena, Tokelau, Turks and Caicos Islands, United States Virgin Islands, Western Sahara.

2 *Third International Decade for the Eradication of Colonialism* GA Res 65/119, A/Res/65/119 (2011). The first international decade was proclaimed by *International Decade for the Eradication of Colonialism* GA Res 43/47, A/Res/43/47 (1988); and the second by *Second International Decade for the Eradication of Colonialism* GA Res 55/146, A/Res/55/146 (2000).

3 Perhaps with the exception of New Caledonia: under the 1998 Noumea Accord, a referendum will be held between 2014 and 2019 to decide the future status of the territory. See Nic MacLellan "The Noumea Accord and Decolonisation in New Caledonia" (1999) 34 The Journal of Pacific History 245. However, French Polynesia was added back to the list in May 2013.

4 Falkland Islands, Gibraltar and Western Sahara.

5 *Principles which should guide Members in determining whether or not an obligation exists to transmit the information called for under Article 73e of the Charter* GA Res 1541, XV (1960) [GA Res 1541].

6 *Second International Decade for the Eradication of Colonialism: Report of the Secretary-General* GA Res 65/330, A/65/330 (2010) at 10.

latitude needs to be allowed to non-self-governing territories in selecting their international status, and their peoples' right to self-determination needs to take precedence over pre-determined ideas about what forms decolonisation should take. UNGA Resolution 2625[7] allows for further options to be available to non-self-governing territories, but there has been little discussion of what these further options could be.[8] This article seeks to fill that gap.

This article does five things. First, it presents a case study of a non-self-governing territory, Tokelau, in order to describe the challenges posed by one particular territory. Second, the article briefly describes the international law relating to self-determination and decolonisation. The UN system established to achieve decolonisation is also outlined. Third, suggestions are made as to why the current options available for self-determination have not been adopted by the non-self-governing territories, and the existence of 'fourth' options is justified. Fourth, a broad set of criteria are proposed to determine the validity of an act of self-determination if 'fourth' options are accepted. Finally, four potential options for self-determination are suggested as examples of what new options could meet the aspirations of non-self-governing territories, enabling them to self-determine. The proposals draw on actual existing or historical constitutional arrangements, but discuss how these arrangements might be adapted by non-self-governing territories.

II. A Non-Self-Governing Territory: Tokelau

A. Description

Tokelau is a territory of New Zealand. It is a constituent part of the Realm of New Zealand by virtue of the 1983 Letters Patent[9] and Tokelauans are New Zealand citizens.[10] Tokelau was formerly a part of the Gilbert and Ellice Islands Colony: a former colony of the United Kingdom (UK).

7 *Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations* GA Res 2625, XXV (1970) [GA Res 2625].

8 The existence of a fourth option is discussed in Javier J Rúa-Jovet "Modern Self-Determination Law and the Fourth Option: International and United States Law" (2009-2010) 49 Rev Der PR 163. What the fourth option might be is discussed in: James Crawford *The Creation of States in International Law* (2nd ed, Oxford University Press, Oxford, 2006) at 635-637; Roger S Clark "Self Determination and Free Association – Should the United Nations terminate the Pacific Islands Trust?" (1980) 21 Harv Int'l LJ 1 at 64; Olga Šuković "Principle of Equal Rights and Self-Determination of Peoples" in Milan Šahović (ed) *Principles of International Law Concerning Friendly Relations and Cooperation* (Institute of International Politics and Economics, Belgrade and Oceana Publications Inc, New York, 1972) at 357; Tony Angelo and Andrew Townend "Pitcairn: A Contemporary Comment" (2003) 1(1) NZJPIL 229 at 244-251.

9 Letters Patent Constituting the Office of Governor-General of New Zealand (28 October 1983), SR 1983/225 (as amended SR 1987/8 and SR 2006/224).

10 Citizenship Act 1977 (NZ), s 2(1).

Administration of Tokelau was transferred to New Zealand in 1926, and it formally became a territory of New Zealand by virtue of the Tokelau Act 1948.[11]

Tokelau has a land area of around 12 square km, and a population of 1411.[12] The territory is made up of three atolls, which are divided by the high seas, and are at least 60 km apart. Though a shared language, culture and colonial history link the atolls, they have had "largely separate existences".[13] Each atoll constitutes a village.[14] Until the 1960s, the governing of Tokelau took place largely on a village basis because of the impracticalities of travel from one island to another,[15] and from the islands of Tokelau to anywhere else.[16] There is no airstrip on Tokelau: it can only be reached by boat from Samoa.[17]

Agricultural production is limited because of the small land area and the coral substrate.[18] Tourism is virtually impossible.[19] There is essentially no private enterprise in Tokelau. Tokelau is almost entirely dependent on foreign aid for public funding, most of which comes from New Zealand.[20] Some income is derived from the issuance of fishing licences[21] and remittances.[22]

The New Zealand Parliament has supreme law-making power for Tokelau.[23] The General Fono of Tokelau (the supreme national body) is able to make rules for Tokelau to the extent that they are not inconsistent with any Act of the New Zealand Parliament that is in force in Tokelau, any regulation made by the Governor-General of New Zealand, or international obligations.[24] In practice, the General Fono makes rules on most matters. The General Fono derives its authority from the *taupulega* (village councils) of the three atolls, which have customary authority to govern, as confirmed in the

11 Tony Angelo and Talei Pasikale *Tokelau: A History of Government: The constitutional history and legal development of Tokelau* (Council for the Ongoing Government of Tokelau, Apia, 2008) at 23; Tokelau Act 1948 (NZ), preamble and s 3.

12 *Final Count for the 2011 Tokelau Census of Population and Dwellings* (Statistics New Zealand, Wellington, 16 December 2011) [*Final Count for the 2011 Tokelau Census of Population and Dwellings*].

13 John Connell "'We are Not Ready': Colonialism or Autonomy in Tokelau" in Godfrey Baldacchino and David Milne (eds) *The Case for Non-Sovereignty: Lessons from Sub-National Island Jurisdictions* (Routledge, London, 2009) at 159.

14 Antony Hooper "Tokelau: a sort of 'self-governing' sort of 'colony'" (2008) 43 The Journal of Pacific History 331 at 331.

15 It is 70 km from Fakaofo to Nukunonu, and a further 100 km to Atafu.

16 Tony Angelo "Establishing a Nation – Kikilaga Nenefu" (1999) 30 VUWLR 75 at 77.

17 Approximately 500 km away.

18 Connell, above n 13, at 160.

19 At 160.

20 Hooper, above n 14, at 331.

21 Connell, above n 13, at 160. The Tokelau budget shows that Fishing Licences contributed $2.1m of the $5.1m local revenue for 2011/2012: *General Fono Minutes* (General Fono, Tokelau, 21-24 May 2012) at Item 9 and Appendix 1.

22 Connell, above n 13, at 160.

23 Tokelau Act 1948, s 6. New Zealand legislation applies to Tokelau only insofar as this is expressly provided for in an enactment.

24 Tokelau Act 1948, ss 3A and 3B.

Village Incorporation Rules.[25] In recognition of the customary authority of the villages, some of the powers of the Administrator of Tokelau,[26] which had been delegated to the General Fono, were in 2004 delegated instead to each village. The villages then delegated some of these powers back to the General Fono.[27] The Head of Government in Tokelau is the *Ulu*; a position which rotates between the *faipule* (elected chair of the *taupulega*) of the villages on an annual basis. This internal governance apparatus in Tokelau has been developing since the 1960s in preparation for eventual self-determination. In many senses, the current situation in Tokelau may be described as 'self-government'.[28] However, New Zealand could remove legislative or executive powers from Tokelau at any time.

B. The Referenda on Self-Government in Free Association

In 1994 Tokelau declared its intention to move towards a free association arrangement with New Zealand.[29] A draft Treaty of Free Association was negotiated and prepared, as was a draft Constitution for Tokelau.[30] Two UN-supervised referenda were held on the subject. Only those resident in Tokelau were eligible to vote.[31] The referenda asked voters to accept or reject the proposal that Tokelau become self-governing in free association with New Zealand on the basis of the draft Constitution and Treaty.[32] A two-thirds majority was required for free association to be implemented.[33] The first referendum, in 2006, gained a 60 per cent affirmative vote for free association; the second, in 2007, gained a 64.4 per cent affirmative vote.

Why the vote failed is unclear. Suggestions include that voters voted based on personal or local concerns, rather than on the issue of political status,[34] or that Tokelauans were concerned that the referendum was New Zealand's

25 Angelo, above n 16, at 76; Village Incorporation Rules 1986 (Tokelau), rr 3 and 5.

26 "The person charged with performing the administrative and economic functions of Tokelau" appointed by the New Zealand Minister of Foreign Affairs: Angelo and Pasikale, above n 11, at 77.

27 Alison Quentin-Baxter "The New Zealand Model of Free Association: What does it mean for New Zealand?" (2008-2009) 39 VUWLR 607 at 630.

28 Hooper, above n 14, at 331.

29 Keli Neemia "'New Wind, New Waters, New Sail – The Emerging Nation of Tokelau' Statement of the Ulu o Tokelau to the UN Visiting Mission (1994)" in Andrew Townend and Tony Angelo *Tokelau: A Collection of Documents and References Relating to Constitutional Development* (4th ed, Law Publications, Wellington, 2003) at 93.

30 Andrew Townend "Tokelau's 2006 Referendum on Self-Government" (2007) 5 NZJPIL 121 at 123. The draft Treaty of Free Association is appended to that article.

31 Connell, above n 13, at 164-165.

32 Referendum Rules 2005 (Tokelau), sch 2.

33 Townend, above n 30, at 7.

34 Edward P Wolfers "Decolonisation in the Pacific: Context, Issues, and Possible Options for the Third United Nations Decade for the Eradication of Colonialism" (Discussion Paper presented to the Pacific Regional Seminar on the Implementation of the Third International Decade for the Eradication of Colonialism: Current Realities and Prospects, Quito, 30 May to 1 June 2012) at 7.

way of trying to loosen its ties with Tokelau.[35] Some felt that Tokelau did not have the facilities required of a self-governing state.[36] Others saw no reason to change – the Ulu is quoted as saying: "Life as a New Zealand colony has brought many benefits to the country. There is no poverty, no unemployment, and full literacy."[37] Some blame was placed on Tokelauans living in New Zealand who were arguably disillusioned because they were not entitled to vote, and were suspicious of the aspirations of the Tokelauan politicians who supported free association.[38] The issues involved were complex.[39] When asked why they voted no, many Tokelauans simply responded they did not understand.[40]

Following the failure of the 2007 referendum, the pursuance of free association with New Zealand was put on hold.

C. Factors to Consider in Creating a Decolonisation Model for Tokelau

Relevant factors in devising a self-determination model for Tokelau are its small population, geographical isolation, poor transport infrastructure, and the scarcity of opportunities for economic development. Tokelau's unique culture must be both taken into account, and protected. Of key importance are the aspirations and fears of the Tokelauan people, as they ultimately determine their status.

Tokelau's circumstances are unique but some of these same considerations may be relevant in developing models for other non-self-governing territories. They are generally small: only three non-self-governing territories have populations of over 100,000.[41] Both Pitcairn and St Helena are isolated and only accessible by sea. Some of the circumstances differ greatly: for example, the Pitcairn Islands, Gibraltar and the Falkland Islands, while possessing unique cultural identities, have more in common culturally with their administering power than does Tokelau with New Zealand. The Falkland Islands, Gibraltar and Western Sahara are the subjects of sovereignty disputes. While there may be principles of general application that guide the development of self-determination models, the uniqueness of each territory means that any proper consideration of future political status must occur on a case-by-case basis.

35 Connell, above n 13, at 164.
36 At 165.
37 *Sydney Morning Herald* (21 May 2004) quoted in Connell, above n 13, at 164.
38 Hooper, above n 14, at 335-336.
39 Kelihiano Kalolo "Tokelau" (2007) 19 Contemporary Pacific 256 at 258-259.
40 At 259.
41 "Non-Self-Governing Territories" United Nations and Decolonization <www.un.org>.

III. Decolonisation and Self-Determination

A. The Principle of Self-Determination

The principle of self-determination in relation to national groups was developed in the 18th and 19th centuries.[42] In the aftermath of World War I, Woodrow Wilson became a strong advocate for the principle, but it was never included in the League of Nations Covenant.[43] Prior to World War II self-determination was regarded as a political principle rather than a legal principle.[44] This was also true in 1945 when the Charter of the UN (the Charter) was drafted.[45] However the political principle of self-determination was accepted by the international community and included in the Charter. Article 1(2) of the Charter states that one of the purposes of the UN is "to develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace"; a purpose further developed in arts 55 and 56 of the Charter.

Chapter XI of the Charter – the Declaration Regarding Non-Self-Governing Territories – constitutes a "significant extension of the principle" of self-determination to non-self-governing territories,[46] though it does not expressly mention self-determination. The Chapter is devoted to the issue of the progress of colonial people to self-government.[47] Article 73 of the Charter states that member states which administer

> … territories whose peoples have not yet attained a full measure of self-government recognise the principle that the interests of the inhabitants of these territories are paramount, and accept as a sacred trust the obligation to promote to the utmost … the well-being of the inhabitants of these territories.

Such member states also agree to five undertakings, including to develop self-government in the non-self-governing territories and assist them in the development of their political institutions,[48] and to regularly transmit information about the territories to the Secretary-General.[49] Until the territories have gained "a full measure of self-government", the administering state must continue to report on them.

42 Hurst Hannum "Rethinking Self-Determination" (1993-1994) 34 Va J Int'l L 1 at 3.

43 Malcolm N Shaw *International Law* (6th ed, Cambridge University Press, Cambridge, 2008) at 251.

44 The case of the Aland Islands demonstrates this: although it was clear that the people of the Aland Islands would have chosen to integrate with Sweden, they were integrated with Finland because this fitted with the geopolitical and strategic interests of the Great Powers. Hurst Hannum *Autonomy, Sovereignty, and Self-Determination: The Accommodation of Conflicting Rights* (University of Pennsylvania Press, Philadelphia, 1990) at 28-30; Shaw, above n 43, at 251.

45 Hannum, above n 44, at 33.

46 Crawford, above n 8, at 116.

47 Chapters XII and XIII deal with trust territories. These were also a decolonisation issue until 1994 when the last trust territory, The Trust Territory of the Pacific Islands, was fully decolonised.

48 United Nations Charter, art 73(b) [UN Charter].

49 UN Charter, art 73(e).

B. The Right of the Peoples of Non-Self-Governing Territories to Self-Determination[50]

Self-determination was included in the Charter as a principle, rather than a right.[51] Likewise, no right to self-determination was included in the 1948 Universal Declaration of Human Rights. By 1966, the right of peoples to self-determination had been included in the joint art 1(1) of ICCPR[52] and ICESCR,[53] which states: "All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development."

The language in these instruments derives from the language of UNGA Res 1514, known as the 'Colonial Declaration'.[54] This Resolution is thought by some to constitute a binding interpretation of the Charter.[55] It was passed on 14 December 1960 by a vote of 89 to 0, with 9 abstentions.[56] This Resolution provides, inter alia:

> … [a]ll peoples have the right to self-determination; by virtue of that right they freely determine their political status …
>
> 1. The subjection of peoples to alien subjugation, domination and exploitation constitutes a denial of fundamental human rights, is contrary to the Charter of the United Nations and is an impediment to the promotion of world peace and co-operation.

The Resolution further allows no excuse for inaction,[57] and requires immediate action on the issue.[58] It characterises self-determination as a right expressly applicable to peoples of non-self-governing territories. Resolution 1514 signals the beginning of the decolonisation effort of the UN in earnest.[59]

It is now generally accepted that self-determination is a customary law right,[60] and that the international community regards the right to self-determination as a jus cogens right.[61] Self-determination in relation to non-self-governing territories refers to the right of peoples to determine their own international political status (external self-determination).[62] The content

50 See generally: Antonio Cassese *Self-Determination of Peoples: A Legal Reappraisal* (Cambridge University Press, Cambridge, 1995).
51 Shaw, above n 43, at 252.
52 International Covenant on Civil and Political Rights 999 UNTS 171 (opened for signature 19 December 1961, entered into force 23 March 1976).
53 International Covenant on Economic, Social and Cultural Rights 993 UNTS 3 (opened for signature 19 December 1966, entered into force 3 January 1976).
54 *Declaration on the Granting of Independence to Colonial Countries and Peoples* GA Res 1514, XV (1960) [*Colonial Declaration*].
55 I Asamoah *The Legal Significance of the Declarations of the General Assembly of the United Nations* (Martinus Nijhoff, The Hague, 1966) at 177-185 cited in Shaw, above n 43, at 253.
56 Cassesse, above n 50, at 71.
57 *Colonial Declaration*, above n 54, Principle 3.
58 Principle 5.
59 Connell, above n 13, at 157.
60 Hannum, above n 44, at 45.
61 Cassese, above n 50, at 140 and 169-173.
62 At 72.

of the right in relation to people other than those of non-self-governing territories is much less clear because the right of people to self-determination must be balanced against the right of states to territorial integrity; the latter right having largely taken precedence.[63]

C. Getting On the List

In practice the determination as to which territories belong on the list has been made by the UN acting in conjunction with the administering state. However, the UNGA has reserved the possibility of unilaterally declaring that a territory belongs on the list.[64] One example of when the UNGA has exercised this possibility was when Portugal refused to transmit information on its colonial territories.[65]

Resolution 1541 provides some useful criteria for determining which territories belong on the list: prima facie those territories that are geographically separate and ethnically/culturally distinct from their administering power, and "arbitrarily in a position of … subordination".[66] There are territories that were never placed on the list, but which perhaps should have been.[67]

D. Getting Off the List

Under Chapter XI of the Charter, once a non-self-governing territory has attained a full measure of self-government it can be removed from the list of non-self-governing territories, and the obligations of its administering power towards it cease. However, the description "full measure of self-government" throws scant light on what level of self-government will suffice. UNGA Resolutions assist by outlining what outcomes the UNGA will accept as evidence that a non-self-governing territory has attained a full measure of self-government.[68]

63 See GA Res 2625, above n 7. The exception is 'remedial secession' where a state does not allow for the equal rights and self-determination of peoples within its borders. Examples include Bangladesh and Kosovo. See Crawford, above n 8, at 119-120 and 126 and *Reference re Secession of Quebec* [1998] 2 SCR 217.

64 Crawford, above n 8, at 608. Eg, when Portugal refused to transmit information on its colonial territories: *Transmission of Information under Article 73 e of the Charter* GA Res 1542 XV (1960).

65 Portugal refused to place its colonial territories on the list of non-self-governing territories, so the UNGA placed them on the list in *Transmission of Information under Article 73 e of the Charter* GA Res 1542 XV (1960). In another example, New Caledonia was placed back on the list of non-self-governing territories by the UNGA in 1986, after having been removed from the list by France in 1947: *Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples* GA Res 41/41A, A/Res/41/41A (1986).

66 GA Res 1541, above n 5, Principles IV and V.

67 See for example: Rodrigo A Gōmez S "Rapanui and Chile, a debate on self-determination: A notional and legal basis for the political decolonisation of Easter Island" (LLM Research Paper, Victoria University of Wellington, 2004) at 92-96; "The Political and Legal Status of the Faroes" The Foreign Service <www.mfa.fo>; Cassese, above n 50, at 79-86.

68 An earlier UNGA Resolution not discussed in this article had also attempted to clarify the meaning of "full measure of self-government": *Factors which should be taken into account in deciding whether a Territory is or is not a Territory whose people have not yet attained a full measure of self-government* GA Res 742 VII (1953) [GA Res 742]. This was superseded by GA Res 1541, above n 5.

Resolution 1541 was passed by the UNGA the day after the passing of Res 1514, by a vote of 69 to 2 with 21 abstentions.[69] In Res 1541 the UNGA lays out the three options it considers to be acceptable outcomes of self-determination for the purposes of decolonisation: independence, free association and integration. These options are discussed at the end of this Part.

A decade later, the UNGA passed a further important resolution relevant to non-self-governing territories: Res 2625.[70] This Resolution reiterates the three options set out in Res 1541 which constitute an acceptable exercise of self-determination by colonial peoples, but adds to the list: "or the emergence into any other political status freely determined by a people." Resolution 2625 thus suggests that the three options in Res 1541 are not the exclusive decolonisation options. This idea is explored in detail later in the article.

These Resolutions do not indicate who has the competence to determine when a territory has attained self-government. Practice has shown that the UNGA generally expects that states will continue to transmit information on non-self-governing territories until the UNGA determines otherwise. In 1947 when France integrated six territories and removed them from the list there was no offical UN approval of this action,[71] but also no resistance. In 1953 the UNGA purported, by majority vote, to assert its competence to decide when a territory has ceased to be non-self-governing.[72] Therefore, when the UK decided to stop transmitting information about its Caribbean territories in 1967, the UNGA resolved that the UK should keep transmitting information until such time as the UNGA decided.[73]

Chapters VII and VIII of the Charter (relating to trust territories) provide that termination functions will be exercised by UN organs in order for the trust over trust territories to cease to operate, but Chapter VI (relating to non-self-governing territories) provides for no such functions. Crawford states therefore that this cannot just be a matter for the UNGA, otherwise it would be provided for in the Charter.[74] Nor can it be solely within the domestic jurisdiction of the administering state.[75] He suggests that the current international law position is that removal from the list should be decided by the UNGA and the administering state together.[76]

69 Cassesse, above n 50, at 71.

70 GA Res 2625, above n 7.

71 Crawford, above n 8, at 623. These territories were New Caledonia, French Polynesia, Martinique, Guadeloupe, French Guiana, and Reunion. New Caledonia has since been re-instated to the list of non-self-governing territories.

72 Leland M Goodrich, Edvard Hambro and Anne Patricia Simons *Charter of the United Nations: Commentary and Documents* (Columbia University Press, New York, 1969) at 460-461; *Cessation of the transmission of information under Article 73 e of the Charter in respect of Puerto Rico* GA Res 748, VIII (1953) [GA Res 748].

73 *Information from Non-Self-Governing Territories transmitted under Article 73(e) of the Charter of the United Nations* GA Res 2701, XXV (1970).

74 Crawford, above n 8, at 622.

75 At 621-622. See also Robert Aldrich and John Connell *The Last Colonies* (Cambridge University Press, Cambridge, 1998) at 157 on US claims to be able to remove Puerto Rico unilaterally from the list.

76 Crawford, above n 8, at 622-623.

E. Monitoring Bodies

As a result of Res 1514 and the priority placed by the international community on decolonisation, the UN set up a special committee to study the application of that Declaration, and to report on progress.[77] This Committee is known today as the 'Special Committee on the Situation with regard to the Implementation of the Declaration on the Granting of Independence of Colonial Countries and Peoples'. It is also known as the 'Special Committee on Decolonisation' or 'C24'.[78]

C24 continues to operate, despite numerous criticisms levelled at it over the years, including that it is an 'anachronism' because of its inflexibility,[79] that it does not accurately reflect territory developments in its Resolutions,[80] that it is no longer useful,[81] and that its operation is too expensive.[82] The Committee reviews the situation of the non-self-governing territories annually and makes recommendations as to the implementation of Res 1514. It organises Regional Seminars annually, and organises visiting missions to non-self-governing territories where there has been an invitation.[83] It also has an educative function. C24 currently has 29 members, including many former colonies.[84] None of the administering powers are members.[85]

The Fourth Committee of the UNGA, known as the 'Special Political and Decolonisation Committee', also has responsibility for decolonisation issues. Most of the C24's resolutions are filtered to the UNGA through the Fourth Committee. Each member state of the UN is entitled to have one representative on this committee.[86]

F. Self-Determination versus Decolonisation

It is appropriate at this point to establish the difference between 'self-determination' and 'decolonisation'. The two terms are often used interchangably, but in fact have distinct meanings.[87] Self-determination,

77 *The Situation with Regard to the implementation of the Declaration on the granting of independence to colonial countries and peoples* GA Res 1654, XVI (1961).
78 Aldrich and Connell, above n 75, at 158.
79 Connell, above n 13, at 168.
80 "Overseas Territories" (Memorandum by the UK Foreign and Commonwealth Office submitted in response to a letter from the Chairman of the Foreign Affairs Committee, Session 2010-2012).
81 Jorri C Duursma *Fragmentation and the International Relations of Micro-States: Self-Determination and Statehood* (Cambridge University Press, Cambridge, 1996) at 49.
82 James H Mittelman "Collective Decolonisation and the UN Committee of 24" (1976) 14 The Journal of Modern African Studies 41 at 55. This article is a defence of C24, though it addresses criticisms of it.
83 "Committee of 24 (Special Committee on Decolonization)" United Nations and Decolonization <www.un.org>.
84 "Members" United Nations and Decolonization <www.un.org>.
85 The UK, France and New Zealand formally participate. The US does not participate.
86 UN General Assembly Rules of Procedure, r 100.
87 Edward Wolfers "Self-determination, Decolonisation and the United Nations: Links, Lessons and Future Options with Particular Reference to the Pacific" (Discussion Paper presented to the Pacific Regional Seminar of the United Nations Special Committee on Decolonisation, Noumea, New Caledonia, 18-20 May 2010) at 1.

as just defined, relates in this context to the principle that colonial peoples have a right to freely decide for themselves their international political status. Conversely, decolonisation in this context refers to the process whereby a colonial power withdraws from its former colonies in a manner prescribed by the UNGA in Res 1541. Decolonisation in the past has been undertaken without regard to the self-determination of the people of the territory,[88] and self-determination can fail to lead to 'decolonisation' in the sense that it can fail to lead to withdrawal of colonial power in a manner envisaged in Res 1541.

Self-determination is a right of colonial peoples at international law. 'Decolonisation' is a goal of the UN expressed in UNGA resolutions and often equated with self-determination. While often the difference in the meaning and status of the two terms may not be of practical significance, at times it will be, and it is argued in this article that self-determination must take precedence. The meaning of decolonisation must adapt to allow for this. Any outcome that is freely determined by colonised people logically leads to their decolonisation, even if it is not decolonisation as currently accepted by the UN. This is because colonial arrangements cease to be 'colonial' when they exist not because they were imposed by colonisers, but because they have been freely chosen. Decolonisation should therefore be seen to flow from self-determination, and should not only result from one of the three Res 1541 statuses. Those three statuses may fail to meet the aspirations of the people of non-self-governing territories.

G. The Current Options

This section discusses the three outcomes which are currently accepted by the international community in the exercise of self-determination by colonial peoples. It also attempts to ascertain why the non-self-governing territories listed with the UN might not already have chosen one of these options.[89]

1. Independence

"[E]mergence [of a non-self-governing territory] as a sovereign independent State"[90] will cause the art 73(e) Charter obligations to cease. Independence is considered the normal result of an exercise of self-determination[91] and has

88 For example Greenlanders were not consulted before their territory was removed from the list: see Gudmunder S Alfredsson "Greenland and the Right to Self-Determination" (1982) 51 Nordisk Tidskrift Int'l Ret 39 at 40-41. Another example is Hong Kong, which was removed from the list at the request of China without consultation with the people of Hong Kong: Roda Mushkat "Hong Kong as an International Legal Person" (1992) 6 Emory Int'l L Rev 105 at 112-117.

89 It is acknowledged that some territories are the subjects of sovereignty disputes: the Falkland Islands, Gibraltar and Western Sahara.

90 GA Res 1541, above n 5, Principle VI(a).

91 Hannum, above n 44, at 39-40.

historically been the most usual form of self-government for territories listed under Chapter XI.[92] However, there are reasons non-self-governing territories may not choose independence.

Most of the territories on the list are small, with populations of less than 100,000.[93] There exists an extensive literature[94] discussing why small territories may not choose independence when self-determining. For many, the safety net of the metropolitan power will prove a strong incentive not to choose independence.[95] Often they can enjoy many of the benefits of self-government while simultaneously enjoying the security and material benefits of association with a larger state.[96] There are economic benefits associated with non-sovereign status, including the ability to use the regulatory and legislative frameworks of the metropolitan state which can encourage investment and decrease transactional costs.[97] Non-sovereign small territories consistently enjoy higher living standards than small sovereign territories.[98] Bertram has shown that, in the Pacific, independence has not paid as well as continued political dependence.[99]

Climate change is a further driver which may have discouraged, and may discourage, some non-self-governing territories still on the list from pursuing an independence status, particularly those non-self-governing territories which are made up of small islands. Tokelau, for example, is vulnerable to sea level rise from climate change due to its small land mass, and its location makes it vulnerable to extreme weather events.[100] Sea level rise can result in loss of territory, and may make some islands uninhabitable, while extreme weather events can result in a need for outside assistance. The safety net of the metropolitan power may therefore prove attractive to territories facing such threats.

92 Approximately 70 per cent of once non-self-governing territories have attained self-government through becoming independent: Crawford, above n 8, at 623.

93 "Non-Self-Governing Territories" United Nations and Decolonization <www.un.org>. The US Virgin Islands, New Caledonia and Guam are larger than this.

94 See: Godfrey Baldacchino and David Milne (eds) *The Case for Non-Sovereignty: Lessons from Sub-National Island Jurisdictions* (Routledge, London, 2009); Helen M Hintjens *Alternatives to Independence: Explorations in Post-Colonial Relations* (Dartmouth Publishing Company, Aldershot, 1995); Fred Constant "Alternative Forms of Decolonisation in the East Caribbean: The Comparative Politics of the Non-sovereign Islands" in Helen M Hintjens and Malyn D D Newitt (eds) *The Political Economy of Small Tropical Islands: The Importance of Being Small* (University of Exeter Press, Exeter, 1992).

95 Godfrey Baldacchino and David Milne "Exploring Sub-National Island Jurisdictions" in Baldacchino and Milne, above n 94, at 4.

96 Jerome L McElroy and Kara B Pearce "The Advantages of Political Affiliation: Dependent & Independent Small Island Profiles" in Baldacchino and Milne, above n 94, at 41.

97 Godfrey Baldacchino "'Upside Down Decolonization' in Subnational Island Jurisdictions: Questioning the "Post" in Postcolonialism" (2010) 13 Space and Culture 188 at 191.

98 At 193.

99 G Bertram "On the Convergence of Small Island Economies with their metropolitan powers" (2004) 32 World Development 343.

100 See Government of Tokelau "Department of Economic Development, Natural Resources and Environment (EDNRE)" <tokelau.org.nz>.

The experiences of some now independent small territories provide cautionary tales for non-self-governing territories considering independence. When the Comoros Islands voted on independence in 1974, the island of Mayotte voted for retaining its association with France. It has since become an overseas department of France.[101] Anjouan, one of the Comoros Islands which did agree to independence, held a referendum in 1997 which communicated the overwhelming desire of its people to revert to French colonial status. This request was rejected by the Government of the Comoros Island, and by the French Republic.[102]

2. Free Association with Another State

Free association falls somewhere between independence and integration. The Res 1541 requirements for free association are:[103]

> (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 processes 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.

As the people remain free to modify their status, free association can be a staging post for territories looking to eventually move to integration or independence. Free association has been employed in the Cook Islands, Niue, the Federated States of Micronesia, the Republic of the Marshall Islands, Palau, Puerto Rico and the Netherlands Antilles.[104]

Quentin-Baxter argues that in many cases free association has come very close to independence.[105] The Federated State of Micronesia, the Marshall Islands and Palau are even member states of the UN, and the Cook Islands

101 An overseas department has the same status as a metropolitan department. Mayotte's secession is considered illegal by the UNGA, which has classed it a violation of the territorial integration of the Comoros: *Question of the Comorian Island of Mayotte* GA Res 31/4, A/Res/31/4 (1976).

102 Kamal Eddine Saindou "Rebellious Island Votes to Secede; Comoros Government Rejects Results" (27 October 1997) Associated Press <www.apnewsarchive.com>.

103 GA Res 1541, above n 5, Principle VII. Emphasis added.

104 The arrangements of the Federated States of Micronesia, the Republic of the Marshall Islands and Palau did not have to meet Res 1541 criteria, because their previous trusteeship arrangements were terminated by the Security Council. In relation to Puerto Rico and the Netherlands Antilles there are disputes as to whether or not their status was really one of free association. The Netherlands Antilles dissolved in 2010.

105 Notably in the Cook Islands, Niue, the Federated States of Micronesia, the Republic of the Marshall Islands and Palau: Alison Quentin-Baxter "Sustained Autonomy – An Alternative Political Status for Small Islands?" (1994) 24 VUWLR 1 at 1.

could pursue the same status.[106] Therefore freely associated states find that they need to develop their own government institutions and foreign relations as if they were small independent states, with similar strains being placed on their resources. Their limited resources restrict their ability to represent themselves in international organisations.[107] Furthermore, although they are reliant on their metropolitan state for funding, they are often treated similarly to aid recipients. The focus of funding to them therefore shifts from providing essential services and governance structures, to a focus on developing self-reliance and decreased dependence.[108]

The free association relationship can also be misunderstood, so that moves towards free association may be perceived by colonial peoples as attempts by their administering state to cut ties with them; an outcome that may be highly undesirable, particularly for very small and very economically dependent territories.

3. Integration

Of integration, Res 1541 states:[109]

> *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

Integration carries with it obvious disadvantages. The non-self-governing territory ceases to exist as a separate entity in its own right. It may therefore be difficult for it to maintain its own separate cultural identity. The territory may be unable to represent itself in regional and international organisations, or at

106 See SE Smith "Uncharted Waters: Has the Cook Islands become Eligible for Membership in the United Nations?" (2010) 8 NZJPIL 169.

107 Quentin-Baxter, above n 105, at 3-4.

108 At 4. See also Foreign Affairs, Defence and Trade Select Committee *An Inquiry into New Zealand's relationships with South Pacific countries* (December 2010) at 27-31 in relation to the Cook Islands and Niue.

109 GA Res 1541, above n 5, Principles VIII and IX. Emphasis added.

least may suffer significant constraints in its ability to do so. Integration will ordinarily be irreversible: under Res 2625, once a people chooses to integrate with a sovereign country, "[i]t can subsequently only exercise the right to internal self-determination".[110]

Small territories are likely to have particular problems with integration because of the requirement in Res 1541 that the integrated peoples should have equal rights and opportunities for representation and effective participation at all levels of government. Quentin-Baxter points out that this assumes the territory is sufficiently large that its representation will be meaningful, and sufficiently similar that it will be acceptable.[111] Cocos (Keeling) Island, a small island territory in the Indian Ocean, voted for integration with Australia in 1984. It has a population of around 600.[112] The islanders have their own local government, but at a federal level they form part of a Northern Territory Electoral District.[113] Their opportunity for meaningful representation at a federal level is therefore almost non-existent.

IV. The Proposal: A 'Fourth' Option for Self-Determination

The previous Part examined the current options available to non-self-governing territories when exercising their right to self-determination, and explored why these may be unattractive to those remaining non-self-governing territories. The stalling of decolonisation leaves open the inference that these options are inadequate. Since the declaration of the First Decade for the Eradication of Colonialism, only one non-self-governing territory has self-determined.[114] This article argues that the UN should pay greater regard to colonial peoples' right to self-determination and that colonial peoples should not be constrained to choosing one of the three options available in Res 1541. This Part argues for the existence of a 'fourth' option.

Resolution 2625 appears to expand the range of internationally acceptable outcomes of decolonisation. It states that:[115]

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

110 Cassese, above n 50, at 73-74.

111 Quentin-Baxter, above n 105, at 6.

112 "Cocos (Keeling) Island" (9 April 2014) CIA World Factbook <www.cia.gov>. Eighty per cent of the predominantly ethnic Malay population is Muslim.

113 Commonwealth Division of Lingiari (for the 2013 Federal Election, 65,937 were enrolled to vote in this division). See "Cocos (Keeling) Islands Governance and Administration" (29 January 2014) Department of Regional Australia, Local Government, Arts and Sport <www.regional.gov.au>.

114 East Timor. The Former Trust Territory of the Pacific Islands self-determined, but as it was a Trust territory this was not supervised by the C24. French Polynesia was re-added to the list.

115 GA Res 2625, above n 7. Emphasis added.

There is thus arguably a fourth option available for decolonisation, or even numerous other options. An exploration of further options may be the best chance the UN has to reach its goal of ending colonialism.

Nothing precludes the possibility of a status beyond the three listed in Res 1541. The Charter does not dictate the status a territory must achieve to be removed from the list, except that it should have obtained a "full measure of self-government".[116] Furthermore, it has been stated that Res 2625 is the "most authoritative statement of the principles of international law relevant to the questions of self-determination"[117] and it is this Resolution which appears to extend the meaning of self-government to include any freely self-determined status.[118]

Academics have indicated the need to explore alternative outcomes of decolonisation. Wolfers has highlighted the "need to clarify, refine and possibly (re)define the options available as outcomes of decolonisation" and suggested that C24 should consider the issue afresh, especially in light of the Secretary-General's call for "innovative approaches, and … new dynamics" in the fight to end colonialism.[119] Rúa-Jovet has noted his belief that the ability of territories to tailor their own solutions to fulfil their aspirations is limited only by the constraints of reasonableness and political reality.[120]

Both administering states and non-self-governing territories have indicated support for a fourth option. The United States and the UK have both said the C24 is wrong to insist on "a single and narrow standard for decolonisation."[121] Gibraltar has advocated for the fourth option. In 2007, the representative of Gibraltar said at the C24 Regional Seminar that "the classic models of decolonisation … may not be appropriate by virtue of the individual circumstances and characteristics of these territories … the General Assembly has recognised this … [in] Resolution 2625."[122]

V. Removal from the List: Towards a Definitive Set of Criteria

Resolution 1541 currently sets out criteria to determine when a territory has achieved one of the three currently accepted statuses for decolonisation.[123] However, if a different status is to be selected, guidance will be necessary in determining whether the choice of any given fourth option can appropriately

116 UN Charter, art 73.

117 Rúa-Jovet, above n 8, at 166-167, citing the Secretariat of the International Commission of Jurists "The Events in East Pakistan" (1972) 8 International Commission of Jurists 44.

118 Šuković, above n 8, at 357.

119 Wolfers, above n 34, at 15.

120 Rúa-Jovet, above n 8, at 169.

121 Cited in Crawford, above n 8, at 636.

122 Joseph Holliday "Statement by the Hon Joseph Holliday to the Caribbean Regional Seminar on the Implementation of the Second International Decade for the Eradication of Colonialism: Next Steps in Decolonization" (St George's, 22-24 May 2007) at 1.

123 GA Res 1541, above n 5, Principle VII.

be considered an exercise of self-determination. This Part proposes broad criteria to be taken into account when determining whether a territory has self-determined.

As this article takes the position that the right to self-determination needs to take precedence in considering whether or not a territory has decolonised, the proposed criteria focus on how the decision was made as opposed to the outcome of the decision, leaving the people of non-self-governing territories free to craft their own solutions. The key question to be asked in determining whether or not a territory has decolonised is: have the people of that territory communicated to the international community that they have determined the status that reflects their needs and aspirations, and therefore no longer consider themselves to be a colony? Resolution 1541 describes non-self-governing territories as prima facie those which have been "arbitrarily place[d] … in a position or status of subordination."[124] If a territory chooses its status through a fair and robust process, it cannot be said to fit this description.

A. That the UNGA Considers the Act of Self-determination to be Valid

There is no guidance in the Charter as to who is competent to decide when a territory can be removed from the list. In practice this decision is made by the UNGA in conjunction with the administering state.[125] This competence should be confirmed by multilateral agreement, or at least by UNGA Resolution adopted on the basis of consensus,[126] to confirm which entity non-self-governing territories should approach when they are ready to self-determine. The competent entity should be the UNGA, because a majority vote of the UNGA indicates the general approval of the international community. It would be inappropriate for administering states to have the authority to make this determination. The competence granted to the UNGA to approve self-determination would not be unconstrained: it would be made on the basis of the criteria that follow.

B. That the Appropriate 'Peoples' have Exercised the Right to Self-determination

Resolution 1514 states: "All peoples have the right to self-determination". Although the idea that the people may decide seems a sensible one in theory, in practice it is "ridiculous, because the people cannot decide until someone decides who are the people."[127] Here arises the first challenge: who are the correct 'people' to self-determine?

124 At Principle V.

125 Crawford, above n 8, at 622-623.

126 GA Res 748, above n 72, attempts to assert the UNGA's competence, but was only passed by a majority.

127 Ivor Jennings *The Approach to Self-Government* (1956) at 55-56 quoted in John T Paxman "Minority Indigenous Populations and their Claims to Self-Determination" (1989) 21 Case W Res J Int'l L 185 at 194.

GA Res 742[128] and the International Court of Justice (ICJ) in *Western Sahara*[129] have used the word "inhabitants" in place of the word "people/s". This seems to suggest the solution is as simple as allowing all adult inhabitants to vote. That solution is overly simplistic and may fail to take into account the individual circumstances of each territory.

Two issues in particular arise: How should the diaspora be dealt with, and what should be done where the voice of the 'immigrant' population might overwhelm that of the indigenous population?

1. Diaspora

Many non-self-governing territories have a large diaspora. For example, Tokelau has a resident population of 1411[130] while approximately 7000 Tokelauans live in New Zealand.[131] The diaspora contributes significant funds to the Tokelauan economy, and some members of the diaspora possess land rights in Tokelau.[132] This was an issue when Tokelau held its referenda on free association because many in the diaspora felt they should be entitled to vote.[133] The issue is fraught: to have allowed the diaspora to vote in the Tokelau referenda would have allowed those who do not live on the islands to determine the future of those who do.

How the diaspora is dealt with will vary from territory to territory. Allowance may also be made, as it was in Tokelau, for notice to be given so people may take up residence again in the territory for the purposes of voting.[134] In some circumstances it may be appropriate to allow the diaspora to vote.[135]

2. Indigenous Population

Some non-self-governing territories have an indigenous population; the population of others is made up of the descendants of settlers and slaves; and in some, the population is a mix of both. The mix can prove problematic where the non-indigenous population could outvote the indigenous population, as

128 GA Res 742, above n 68.

129 *Western Sahara (Advisory opinion)* [1975] ICJ Rep 32 at [59] [*Western Sahara*].

130 *Final Count for the 2011 Tokelau Census of Population and Dwellings*, above n 12.

131 "Quick Stats about Culture and Identity" Statistics New Zealand <www.stats.govt.nz>.

132 Tony Angelo "After the Referendum – Tokelau 2008" (Discussion Paper presented to the Pacific Regional Seminar on the Implementation of the Second International Decade for the Eradication of Colonialism: Priorities for the Remainder of the Decade, Bandung, 14-16 May 2008) at 10.

133 At 10.

134 At 10.

135 For example, where they have been forced to leave the territory for economic or political reasons: there are about 165,000 Sahrawi (the indigenous people of Western Sahara) in refugee camps in Algeria, who may have a good claim to participate in any referendum determining their territory's future: Akbar Ahmed and Harrison Akins "Waiting for the Arab Spring in Western Sahara" (14 March 2012) <www.brookings.edu>.

in Guam[136] and New Caledonia.[137] In New Caledonia the indigenous people boycotted a plebiscite held on the basis of one vote per person because they believed only the indigenous population should be eligible to vote.[138] The outcome of the plebiscite was overwhelming support for New Caledonia retaining its status as a French territory.

The response to this issue has been inconsistent.[139] Most often, the 'people' has been considered to comprise all those who live in a territory, with the attendant problems such an interpretation might bring.[140] However this problem is resolved, the UNGA must be satisfied that the appropriate people have been allowed to participate in any act of self-determination it approves.

C. That the Right to Self-determination has been Exercised Freely

Currently, a valid act of self-determination must be exercised free from external pressure: Res 1514 speaks of the "freely expressed will and desire"[141] of colonial people; Res 1541 speaks of their "free and voluntary choice"[142] and "freely expressed wishes";[143] and Res 2625 requires that the determination be made "freely … without external interference."[144] The ICJ in *Western Sahara* noted that generally "the application of self-determination requires a free and genuine expression of the will of the peoples concerned."[145] This requirement should remain.

The UN has an important role to play in ensuring the right to self-determination is exercised freely, for example in the education of peoples on self-determination options which may meet their aspirations. Careful attention should be paid to how options are communicated and explained to ensure it is done fairly and objectively.

There has been suggestion that where only one option is presented to a people to approve, rather than a choice of available options, the act of self-determination cannot be valid because that people cannot be said to have freely and genuinely expressed their will.[146] However, in many self-determination referenda, for example in Tokelau, only one option has been

136 The indigenous Chamorro people in Guam comprise 45 per cent of the population. See Jon M Van Dyke, Carmen D Amore-Siah and Gerald W Berkley-Coats "Self-Determination for Nonself-governing Peoples and for Indigenous Peoples: The Case of Guam and Hawai'i" (1996) 18 U Haw LR 623 at 624.

137 Indigenous Melanesians comprise 44.1 per cent of New Caledonia's population: "New Caledonia" (7 January 2013) CIA World Factbook <www.cia.gov>.

138 Paxman, above n 127, at 187.

139 Hannum, above n 44, at 38.

140 Thomas D Musgrave *Self-Determination and National Minorities* (Oxford University Press, Oxford, 1997) at 150. See Chapter 7 generally for a discussion of the definitions of the term 'people'.

141 *Colonial Declaration*, above n 54, at [5].

142 GA Res 1541, above n 5, Principle VII.

143 GA Res 1541, above n 5, Principle IX.

144 GA Res 2625, above n 7.

145 *Western Sahara*, above n 129, at [55].

146 Alfredsson, above n 88, at 40.

presented.[147] There is a tension between allowing full choice to the people at the referendum, and ensuring that they fully understand what they are voting for. Presenting too many options may have the opposite effect of that desired, in that it may prevent people from being able to make a fully informed and genuine choice. This problem will intensify if more than the Res 1541 options are allowable.

If only one option is presented in a referendum, the outcome of that referendum should be seen by the UNGA as a legitimate one as long as that option has been selected and negotiated by legitimate representatives of the people concerned. The people always have the opportunity to reject the option if they do not want it.

D. That the Exercise of the Right to Self-determination is Through an International Plebiscite

In the past, the will of peoples has been measured in various ways, and an internationally observed plebiscite has not always been deemed necessary. In the Cook Islands, for example, the will of the people was considered to have been expressed at their General Election when they elected a political party which ran on a platform of pursuing free association with New Zealand.[148] In the *Western Sahara* case the ICJ expressed the view that consultation with the inhabitants of a given territory might not always be necessary, and that special circumstances might make a plebiscite or referendum unnecessary,[149] noting that the UNGA had sometimes dispensed with consultation.[150]

The situation regarding consultation with peoples on self-determination is thus fluid. This flexibility, while pragmatic, could allow for the will of the people to be ignored in favour of other considerations. There should be streamlined requirements to be met, similar to current best practice, before the UNGA will accept that a people's will has been expressed: the people's will should be expressed in a UN-monitored international plebiscite on the basis of universal adult suffrage and by secret ballot.[151] Other methods of determining the will of the people give rise to the risk that political considerations,[152] or the views of the elite, will obscure the people's true wishes.

147 Referendum Rules 2005 (Tokelau), sch 2.

148 *Question of the Cook Islands* GA Res 2064, XX (1965). This election was observed by a UN representative.

149 *Western Sahara*, above n 129, at [59].

150 At [59].

151 Yves Beigbeber *International Monitoring of Plebiscites, Referenda and National Elections: Self-Determination and Transition to Democracy* (Martinus Nijhoff Publishers, Dordrecht, 1994) at 144. GA Res 742, above n 68, provides some useful guidance in this respect.

152 Beigbeber, above n 151, at 44 notes that in some cases in the past, overwhelming anti-colonial sentiment has caused member states to reject self-determination in favour of decolonisation.

E. That Where the Status Chosen Falls Between Independence and Integration, a Future Change in Status Remains Possible

Currently at international law once the right to self-determination has been exercised, it expires,[153] because non-self-governing territories are considered to have a "separate and distinct status" at international law until they have exercised their right to self-determination.[154] This safeguards the territorial integrity and political unity of states.[155] However, Res 1541 requires that where territories determine that they will freely associate with another state, they retain the "freedom to modify the status of [their] territory" at a later date.[156] Therefore the right to self-determine again at a later date can be retained in some circumstances.

Any potential fourth option would fall between integration and independence, as free association does. It may be chosen to suit the current needs and desires of the people of the territory, which may change so that the territory may later wish to become independent, or to integrate with another state. The fact that a territory is not ready to take the final step in their self-determination journey should not mean that they are denied the right to determine their current status as they desire.

Some non-self-governing territories have communicated they are not yet ready to self-determine in a way that the UN currently envisages.[157] By providing more options for self-determination now which also allow for further self-determination in the future, allowance is made for these territories to remove themselves from 'colonial' situations in the present, while preserving their right to again self-determine in the future should their aspirations evolve.

F. That There is Sufficient Representative Government Within the Territory

Resolution 1541 requires that where integration is the chosen option for decolonisation, the territory should first "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."[158] This is not a requirement for a choice of independence or free association. However, it should be a requirement for the validity of any act of self-determination for two reasons.

First, in order to prepare itself for an act of self-determination, and to negotiate any necessary agreements where a status other than independence is chosen, a people needs representation to engage in discussion with the UN and other interested parties.

153 Cassesse, above n 50, at 73.
154 GA Res 2625, above n 7.
155 Cassesse, above n 50, at 74.
156 GA Res 1541, above n 5, Principle VII.
157 Connell, above n 13.
158 GA Res 1541, above n 5, Principle IX(a).

Second, once a people has self-determined, it will still need capability to represent itself. If independence is chosen, there will be a need to operate as a sovereign state. If any other status is chosen, there will be a need to communicate with other states and the international community. The people may need to be in a position to take control of certain matters. Should any issue with the self-determination arrangement arise, the people will require capacity to represent itself internationally. If the arrangement provides for a future act of self-determination, the people will need representatives to initiate this act.

G. Conclusion

These broad criteria are designed to ensure, and to satisfy the international community, that a valid act of self-determination has taken place. The lack of substantive criteria allows wide discretion to non-self-governing territories to freely choose their international political status. The focus of the international community should be on the validity of the self-determination process, and not on the outcome. Nothing particularly novel has been suggested. The novelty is the idea that these criteria should be standardised, codified and should apply to all acts of self-determination in respect of non-self-governing territories.

VI. 'Fourth' Options

The remainder of this article suggests four potential 'fourth' options. The discussion is intended to be of general application, though where illustration is necessary the models discussed will be applied to Tokelau as hypotheticals. The discussion does not go into detail about practical applications of these options, as such discussion must be case-specific. The intention in presenting these four options is to draw attention to some of the myriad potential international statuses available and to discuss their possibilities through a self-determination lens.

This article takes the approach that the label placed on any governance arrangement selected by a people is irrelevant, as long the arrangement is freely chosen. The labels placed on these proposals are simply for ease of identification. When considering options, non-self-governing territories should focus on what they wish to achieve from self-determination, rather than on any label.

A. Status Quo

The UNGA should accept a decision from a non-self-governing territory that it wishes to maintain the status quo. Wolfers has suggested that "maintenance of close links with the former colonial rulers, and even the status quo, may be perfectly rational options, and not merely expressions of dependence or reluctance to assume increased responsibility and become at least politically self-reliant."[159]

159 Wolfers, above n 34, at 10.

Non-self-governing territories have requested that this option be available to them. At C24 regional seminars American Samoan representatives have repeatedly said their people wish to retain their current status. In 2006, C24 was told: "The current status of the territory and the United States government is the desired relationship we wish to have … We ask again that American Samoa be delisted as a 'colony' of the United States."[160] In 2012 this was reiterated: "We do not advocate a change in our position of removal from the list of colonised states."[161] In a 2010 constitutional referendum, American Samoan voters rejected proposed changes to their Constitution resulting from a Constitutional Conference held in the same year to discuss increased autonomy for the territory.[162] Similarly, Montserrat has told C24 that it considers itself to be "part of the UK family by choice" and that it should therefore be removed from the list of non-self-governing territories.[163]

The UN has not accepted ratification of the status quo as an expression of self-determination. This is the wrong approach to take if the primary concern is with colonial peoples' right to choose their international political status. As the American Samoan Governor has told C24: "It is a question of self-determination and each individual situation needs to be viewed according to the desires of the local population."[164] The role of the UN, as argued above, should be to ascertain how the people of each territory wish to self-determine, and give effect to that.

Crawford has suggested that the option of ratifying the status quo could be seen as a phase in the process of self-determination and that therefore a territory that chooses this option should remain subject to Chapter XI.[165] This view ignores the legitimacy of an act of self-determination, as it would have the effect of communicating to those peoples who had freely determined to retain the status quo that they will nonetheless continue to be regarded as colonies. Instead of keeping such a territory on the list, an observer status could be accorded to the territory, as discussed below.

160 Ipulasi Aitofele Sunia "Statement by the Lieutenant Governor of American Samoa to the Pacific Regional Seminar on the Implementation of the Second International Decade for the Eradication of Colonialism: Priorities for Action" (Yanuca, 28-30 November 2006).

161 Toetasi Fure Tuiteleleapaga (on behalf of the Honourable Togiola T A Tulafono) "Statement by the Representative of American Samoa to the Pacific Regional Seminar on the Implementation of the Third International Decade for the Eradication of Colonialism: Current Realities and Prospects" (Quito, 30 May-1 June 2012) at 2.

162 "American Samoa" (23 August 2011) Ministry of Foreign Affairs and Trade <www.mfat.govt.nz>; Tuiteleleapaga, above n 161, at 3.

163 Reuben T Meade "Statement by the Representative of Montserrat to the Pacific Regional Seminar on the Implementation of the Third International Decade for the Eradication of Colonialism: Current Realities and Prospects" (Quito, 30 May-1 June 2012) at 3.

164 Sunia, above n 160, at 2.

165 Crawford, above n 8, at 636-637.

B. Shared Sovereignty Arrangement

Another option is a political status in the nature of a modified condominium relationship, which is defined as "a territory under the joint sovereignty of two or more governing powers."[166]

Condominiums have historically been employed to resolve territorial disputes. A condominium has been suggested as a solution to the territorial disputes in the Falkland Islands[167] and Gibraltar.[168] The suggestion in both cases has been shared sovereignty between the two states in conflict,[169] and has not involved giving sovereignty to the people of the territories.

The type of condominium relationship proposed in this article is a sharing of sovereignty between the people of the non-self-governing territory and another state. This would be a novel arrangement but not a legally impossible one. It will be referred to as a 'shared sovereignty arrangement'.

It is useful to briefly examine past condominium relationships, both successful and unsuccessful, to give an indication of the possibilities of shared sovereignty, and to identify mistakes to avoid.

1. Andorra

Until 1993, the sovereignty of Andorra, a small principality between France and Spain, was shared between the French President and the Spanish Bishop of Urgell as co-princes. This arrangement was the result of thirteenth century arbitration awards.[170] Under the arrangement as it evolved, the people of Andorra largely ran their day-to-day affairs.[171]

In 1993, a new Constitution, approved by popular referendum, came into force.[172] It proclaimed Andorra's independence[173] but retained the co-princes as joint heads of state.[174] This new arrangement was brought about not because the former system was not working, but because it was necessary in modern Europe to clarify and normalise Andorra's status.[175] Under the 1993 Constitution the co-princes still hold powers, but these are now derived solely from the Constitution.[176] Some of these powers are

166 Hannum, above n 44, at 17-18.

167 Martin Dent "Shared Sovereignty: A Solution for the Falkland Islands/Malvinas Dispute" (South Atlantic Council Occasional Papers, No 5, March 1989).

168 The Gibraltarian government put the question of shared sovereignty between the UK and Spain to its people in 2002, and 98.97 per cent said no to an Anglo-Spanish condominium: "Q & A: Gibraltar's Referendum" (8 November 2002) BBC <news.bbc.co.uk>.

169 In the case of Gibraltar, the United Kingdom and Spain; and in the case of the Falkland Islands, the United Kingdom and Argentina.

170 AH Angelo "Andorra: Introduction to a Customary Legal System" (1970) 14 Am J Leg Hist 95 at 96-97.

171 See generally: Angelo, above n 170; Dent, above n 167.

172 Duursma, above n 81, at 321.

173 Constitution of the Principality of Andorra, art 1.

174 At art 43.

175 See, for example: *On the Situation in Andorra* Council of Europe Parliamentary Assembly Resolution 946 (1990).

176 At art 44.

exercised solely by the co-princes,[177] while others must be countersigned by the Andorran head of government.[178] Andorra was admitted to UN membership in 1993.[179]

2. New Hebrides

From 1906, until independence in 1980, the New Hebrides (now Vanuatu) was a condominium, with sovereignty shared between France and the UK.[180] It has been described as a "disastrous example" of a condominium.[181] Each administering power had sovereignty over its own nationals, while the indigenous population was governed jointly.[182] Both languages and currencies were official.[183] The executive power of the condominium was exercised in concert by a British Resident Commissioner and a French Resident Commissioner.[184] There were two separate police forces in the country, each with a separate commander.[185] Virtually nothing could be done in the New Hebrides without the joint agreement of both powers.[186]

"Unfortunately the condominium was not the product of a spirit of genuine international cooperation but rather of a shortsighted rivalry which operated to give the joint government as little power as possible."[187] The burden of the excessive governmental machinery caused by the lack of cooperation resulted in an unwieldy administration. "Benign neglect" is said to have characterised the condominium up until the early 1970s when France began to pay more attention to the islands.[188]

The lesson to be learned from this example is that condominium partners need to be engaged and willing to cooperate in the best interests of the territory.

3. Tokelau and Shared Sovereignty

A hypothetical shared sovereignty arrangement for Tokelau could involve the sharing of sovereignty between Tokelau and New Zealand. This could be established by international treaty, and Tokelau would become an international legal entity in its own right, with the appropriate international legal personality. It

177 At art 46.
178 At art 45.
179 *Admission of the Principality of Andorra to membership in the United Nations* GA Res 47/232, A/Res/47/232 (1993).
180 Joel H Samuels "Condominium Arrangements in International Practice: Reviving an Abandoned Concept of Boundary Dispute Resolution" (2007-2008) 29 Mich J Int'l L 727 at 737.
181 Dent, above n 167, at 9.
182 Samuels, above n 180, at 738.
183 At 738.
184 At 738-739.
185 At 739.
186 James Jupp and Marian Sawer "The New Hebrides: From Condominium to Independence" (1979) 33 The Australian Outlook 15 at 17.
187 Linden A Mander "The New Hebrides Condominium" (1944) 13 Pacific Historical Review 151 at 154.
188 Jupp and Sawer, above n 186, at 15.

could have two heads of state: the Queen in Right of New Zealand and the Ulu o Tokelau. In law, they would jointly hold such executive and legislative powers as delegated to them by the arrangement, and would exercise these in concert.

In practice, Tokelau would be self-governing. It is likely that the current governance apparatus would continue.[189] An entrenched Constitution would govern the arrangement. Like the Constitution of Mauritius, this Constitution would provide that the powers of the joint heads of state would be exercised on the advice of the national legislature, unless otherwise prescribed by Constitution or by other Tokelau laws, where they might be exercised by another entity, or by the heads of state in the exercise of their own deliberate judgment.[190] The Constitution and other pieces of Tokelau legislation would then indicate how the joint heads of state would exercise their power.

This option may be attractive because there is room in a shared sovereignty arrangement for full self-government, without the fear that the administering state might cut ties. The security of the current relationship would thus remain. The relationship would allow Tokelau to delegate to New Zealand matters which it does not have the capacity to deal with itself.

C. Internationalised Territory

The proposal of an internationalised territory is also derived from historical examples of how territories with unusual characteristics have been governed. Internationalised territories most frequently came about because of territorial disputes. An adapted form of internationalised territory might be appropriate for the self-determination of a non-self-governing territory. This solution would provide security to the peoples of a non-self-governing territory, which would come in the form of the guardianship of the international community.

Ydit defined internationalised territories as: "populated areas, established for an unlimited period as special political entities, whose supreme sovereignty is vested in, and partly (or exclusively) exercised by … the 'United Nations Organisation'".[191] Wilde refined this definition, stating that the only sovereignty exercised by the UN in internationalised territories is 'sovereignty-as-administration' and not 'sovereignty-as-title'.[192]

Two types of internationalised entities are considered: Danzig, which was an internationalised territory like that defined by Ydit and Wilde; and Tangier, which is better described as 'territory under international administration'.[193] Tangier is perhaps more like a plural condominium than an internationalised territory.

189 See: Angelo and Pasikale, above n 11; Hooper, above n 14; Angelo, above n 16; and "Tokelau" (15 August 2012) Ministry of Foreign Affairs and Trade <www.mfat.govt.nz>.

190 See Constitution of Mauritius, art 64.

191 Méir Ydit *Internationalised Territories from the "Free City of Cracow" to the "Free City of Berlin": A Study in the Historical Development of a Modern Notion in International Law and International Relations (1815-1960)* (A W Sythoof, Leiden, 1961) at 320.

192 Ralph Wilde *International Territorial Administration: How Trusteeship and the Civilising Mission Never Went Away* (Oxford University Press, Oxford, 2008) at 148.

193 Ydit, above n 191, at 27.

1. The Free City of Danzig

Danzig (now Gdansk) was a semi-autonomous city state from 1920 until 1939. This status was created by the Treaty of Versailles[194] to provide Poland with access to the sea while recognising that 95 per cent of the city's population was ethnically German.[195] The city's territory was not vested in any state, but was distinct.[196] The city was placed under League of Nations' protection, and its Constitution was subject to a League of Nations' guarantee.[197] By international treaty, Poland undertook to provide Danzig's foreign relations, an arrangement described as "a combination of an agency arrangement with a right of veto."[198] Poland also enjoyed a range of other rights.[199]

Crawford argues that the territory was essentially a state.[200] It had an elected Legislative Assembly, which had almost full competence in domestic matters and also elected the Senate (executive power).[201] At the same time, the League of Nations had a right, and a duty, to intervene in the event of an erroneous application by Danzig of its own constitution.[202] The Constitution of the city could not be changed without League of Nations' consent.[203]

2. The International City of Tangier

As a result of a series of international agreements in the early twentieth century, the city of Tangier was accorded an international status.[204] A special international administration was established in Tangier following a 1923 Treaty between Great Britain, France and Spain.[205] The continuing sovereignty of the Sultan of Morocco was recognised, as was his jurisdiction over the native population.[206] According to the treaty, the powers to be exercised by the international administration were delegated by the Sultan.[207] The Sultan was represented by a Mendoub in the territory who had supreme authority over the native population.[208]

194 *The Treaty of Peace between the Allied and Associated Powers and Germany, the Protocol annexed thereto, the Agreement respecting the military occupation of the territories of the Rhine, and the Treaty between France and Great Britain respecting Assistance to France in the event of unprovoked aggression by Germany* (signed 28 June 1919), arts 100-108.

195 Crawford, above n 8, at 236.

196 At 238.

197 At 238.

198 At 238, interpreting the decision in *Free City of Danzig and the ILO* (Advisory Opinion) (1930) PCIJ (series B) No 18, at 13.

199 See Ydit, above n 191, at 197-211.

200 Crawford, above n 8, at 240.

201 Ydit, above n 191, at 192.

202 *Treatment of Polish Nationals and Other Persons of Polish Origin or Speech in the Danzig Territory (Advisory Opinion)* (1932) PCIJ (series A/B) No 44, at 21.

203 Ydit, above n 191, at 191.

204 These began with the 1906 Algeciras Act: see C G Fenwick "The International Status of Tangier" (1921) 23(1) Am J Int'l L 140 at 141.

205 Fenwick, above n 204, at 141. A treaty, to which Italy was also a party followed in 1928, to remedy the defects in the 1923 agreement.

206 Ydit, above n 191, at 164.

207 At 264.

208 At 264.

An International Legislature was established with 27 representatives from eight foreign powers, as well as Muslim and Jewish inhabitants of Tangier who were appointed by the Mendoub. A Committee of Control made up of representatives of seven international powers could veto the decisions of this Assembly. There was a French administrator (later Spanish) with three deputies from Italy, Spain (later France), and Great Britain. There was a police force under the charge of a Spaniard, and a Mixed Court with magistrates from five European countries. In 1957, as a result of World War II, Tangier became an integral part of Morocco.

3. Tokelau as an Internationalised Territory

Under a hypothetical internationalised territory arrangement, Tokelau would retain sole sovereignty over its territory. It could choose an international administration comprised of certain states interested in the welfare of the territory,[209] or it might ask the UN to perform the functions required of the international administration. Though a regional organisation would perhaps be a better option than the UN because of its sensitivity to local culture, there is no regional organisation that would be competent to undertake such a role in relation to Tokelau.[210]

Tokelau could choose for itself a high level of self-government under governance arrangements and institutions similar to the current ones. The arrangement could be regulated by an entrenched Constitution and responsibility for most matters could remain with the Tokelau government, except for those it might choose to delegate to its international administration. The international administration could be required to consult with Tokelau in discharging delegated powers.

This option would provide a mix of self-government and security to a non-self-governing territory wishing to self-determine. Its advantage over the shared sovereignty arrangement is that it does not require a close relationship with any one state, and it does not require the territory to share its sovereignty.

D. 'Enhanced Integration'

The final option proposed is an autonomy relationship falling between free association and integration. As noted above, free association (at least in the Pacific) has come very close to independence.[211] Clark suggested that Res 2625's fourth option, though a mystery, seems to allow for a closer relationship with other states than free association.[212] Quentin-Baxter has already suggested a new model called 'sustained autonomy', with elements of

209 This suggestion is similar to the trust corporation suggestion made in Angelo and Townend, above n 8, at 249-250 in relation to Pitcairn Island.

210 The Pacific Islands Forum would seem a natural choice, but has no legal personality of its own.

211 Quentin-Baxter, above n 105, at 1.

212 Clark, above n 8, at 64. This view is also expressed in Masahiro Igarashi *Associated Statehood in International Law* (Kluwer Law International, The Hague, 2002) at 149 cited in Rúa-Jovet, above n 8, at 165.

free association and of integration, as an option for those territories which are yet to self-determine.[213] The model suggested by this paper derives from that idea, and looks to examples of where a status which lies closer to integration than to independence has worked, and could work (with modifications) for non-self-governing territories. The proposed model will be referred to as 'enhanced integration'.

This model would allow for a close relationship with the administering state, akin to integration, but with wide autonomy over most internal matters (and/or the option for later devolution of powers), and the option for a later act of self-determination if so desired. The suggestion may seem less a fourth option than a modified version of free association. That is inevitable if free association is conceived of as a pendulum whereby if independence sits at one end of the pendulum and integration at the other, then free association lies somewhere in between.[214] However, the proposed model differs from any current model of free association, and seeks to avoid the problems identified in Part III with the current model of free association.

This model might look like a modified version of the current arrangements in Aruba or Bougainville. Aruba (as part of the Netherlands Antilles) was originally on the list of non-self-governing territories but was removed in 1953 with the consent of the UNGA.[215] This removal occurred before the expression of the criteria in Res 1541 which non-self-governing territories must now meet in order to be removed from the list. Hillebrink argues that Aruba meets neither the Res 1541 criteria for integration, nor for free association.[216]

1. Aruba

Aruba is a constituent country of the Kingdom of the Netherlands by virtue of the Kingdom Charter of 1954. Under that Charter the Netherlands Antilles and Suriname became autonomous and self-governing entities within the Kingdom.[217] Aruba was part of the Antilles until 1986 when it was granted *status aparte* (becoming an autonomous country within the Kingdom) because of disputes caused by Curacao's domination of the Antilles.[218] The *status aparte* was granted on the condition (imposed by the

213 Quentin-Baxter, above n 105, at 1.

214 I G Bertram and R F Watters *New Zealand and its small island neighbours: a review of the New Zealand policy towards the Cook Islands, Niue, Tokelau Islands, Kiribati and Tuvalu* (Institute of Policy Studies, Victoria University of Wellington, Wellington, 1984) at 34.

215 *Cessation of the transmission of information under Article 73 e of the Charter in respect of the Netherlands Antilles and Surinam* GA Res 747, VIII (1953).

216 Steven Hillebrink "Political Decolonization and Self-Determination: The Case of the Netherlands Antilles and Aruba" (PhD Dissertation, Leiden University, 2007) at 237.

217 Robertico Croes and Lucita Moernir Alam "Decolonization of Aruba within the Netherlands Antilles" in Betty Sedoc-Dahlberg (ed) *The Dutch Caribbean: Prospects for Democracy* (Gordon and Breach, New York, 1990) at 81. Suriname became independent in 1975.

218 Rosemarijn Hoefte "Thrust Together: The Netherlands Relationship with its Caribbean Partners" (1996) 38(4) Journal of Interamerican Studies and World Affairs 35 at 39; Croes and Alam, above n 217, at 81 and 83.

state of the Netherlands) that Aruba would become independent in 1996.[219] However, when the independence date arrived, the government of Aruba cancelled it.[220]

Aruba has its own constitution and is autonomous in most respects. It controls its own constitution, except for in a few reserved areas (such as fundamental human rights, the powers of Parliament and the courts, and the authority of the Governor), which require the approval of the Kingdom government if they are to be amended.[221] The Kingdom has a duty to safeguard fundamental rights and freedoms, legal certainty and good government in Aruba.[222] In respect of Kingdom affairs such as foreign affairs, defence and nationality, Aruba is not autonomous.[223] Aruba may conduct its own foreign affairs but may not undermine the interests of the Kingdom, and cannot conclude treaties.[224] Aruba's autonomy is irrevocable, except with Aruba's consent, and is guaranteed in the Kingdom Charter.[225] The Kingdom government includes the Dutch sovereign, the Ministers of the Country of the Netherlands, and one Minister Plenipotentiary for each Dutch Caribbean country – as such the Dutch Ministers command a majority. The Dutch Ministers also have greater power within the Kingdom Government.[226] Political control over the Kingdom Government is exercised solely by the Dutch Parliament, which also approves Kingdom legislation and treaties.[227]

The Kingdom Charter provides that Arubans may choose to become independent.[228] This provision was added at Aruba's request and requires two-thirds of the members of the legislature to opt for independence with the support of at least 50 per cent of those entitled to vote in a popular referendum.[229]

2. Bougainville

Bougainville was never on the list of non-self-governing territories. Ethnically and geographically Bougainville forms part of the Solomon Islands archipelago but legally it is an autonomous region of Papua New Guinea (PNG). It is resource-rich. Bougainville's current status resulted from a civil war which lasted from 1988 to 1997, arising from land and mining issues related to a copper mine.[230] As a result of the peace process, the government

219 Hoefte, above n 218, at 39-40; Croes and Alam, above n 217, at 81.
220 Hoefte, above n 218, at 48.
221 At 141.
222 At 149.
223 At 143.
224 At 144-145.
225 At 145.
226 At 146.
227 At 147.
228 Statuut voor het Koninkrijk der Nederlanden (Charter of the Kingdom of the Netherlands) 1954, arts 58-60.
229 At art 58.
230 Peter Reddy "Reconciliation in Bougainville: Civil War, Peacekeeping and Restorative Justice" (2008) 11 Contemporary Justice Review 117 at 118-119.

of PNG and Bougainvilleans reached a Peace Agreement which included provision for greater autonomy for Bougainville, as well as for a future referendum for Bougainvilleans to decide their political status.[231]

The autonomy arrangements are provided for in Organic Laws, in the national Constitution, and in the Bougainville Constitution and they cannot be amended by the national government without the consent of the Bougainville legislature.[232] A long list of executive powers and functions can be obtained by the Bougainville government on an exclusive basis (eg the power to establish a judiciary and a public service) with very few powers reserved for the national government (eg foreign affairs). Furthermore, in the exercise of some of its powers, the national government is required to consult with Bougainville.[233] A joint supervisory body has been established to oversee the implementation of these arrangements, and to act as a forum for dispute resolution where necessary. This body has equal representation from Bougainville and the National Government.[234]

Bougainville's right to a future political status referendum is guaranteed in PNG's Constitution.[235] Such a referendum may only be held when certain conditions have been met, including weapons disposal and the existence of good governance in Bougainville.[236] It is to be held no earlier than 10 years but within 15 years of the first election of a government for Bougainville.[237] The Bougainville Legislative Assembly will decide, within these constraints, when and if it is held.[238] The referendum result will be non-binding, and the Governments of PNG and Bougainville are required to consult over the result of the referendum.[239]

3. Tokelau and 'Enhanced Integration'

Were Tokelau to take up this option, its territory would remain an integral part of the Realm of New Zealand. However, as it would not be integrated in terms of Res 1541, there would be no need to provide for representation of Tokelauans in the New Zealand Parliament, which would probably be fruitless and culturally difficult.

Tokelau would likely continue to self-govern as it already does, but autonomy in devolved matters would be more clearly provided for, and the path towards further autonomy would be more clearly laid out. New Zealand's law-making powers in respect of the areas under Tokelau's control

231 Bougainville Peace Agreement (signed at Arawa, 30 August 2001).
232 Yash P Gai and Anthony J Regan "Unitary State, Devolution, Autonomy, Secession: State Building and Nation Building in Bougainville, Papua New Guinea" in Baldacchino and Milne, above n 94, at 109.
233 At 110.
234 At 110.
235 Constitution of the Independent State of Papua New Guinea, arts 338-343.
236 At art 338(3)-(5).
237 At art 338(2).
238 Constitution of the Autonomous Region of Bougainville, art 194.
239 Constitution of the Independent State of Papua New Guinea, art 342; Gai and Regan, above n 232, at 111.

could be removed. The ability for New Zealand to legislate for Tokelau in those areas which remain within New Zealand's control would be retained. Provision could be made for further devolution of power to Tokelau. Some guarantees by New Zealand as to citizenship and financial assistance, for example, could be provided for in an international treaty regulating the arrangement.

E. General Considerations Relating to the Proposed Options

1. Flexibility Versus Certainty

A vast range of matters needs to be considered in crafting a self-determination arrangement, including citizenship, immigration, transport and communications, financial assistance, administration and governance, public services, trade, taxation, foreign affairs, human rights protection, welfare, and the extent of internal self-government.[240]

The non-self-governing territory will consider some matters to be non-negotiable. These will need to be specifically regulated in any governance arrangement. For example, access to New Zealand might be a non-negotiable matter for Tokelau, and guarantees as to continuing access might be necessary in any governance arrangement, whether or not that takes the form of citizenship.[241]

Other matters the territory considers less important may be best left to evolve organically as self-determination arrangements mature. The challenge for any non-self-governing territory aspiring to a status such as those suggested above will be to find an appropriate balance between flexibility[242] and certainty.[243] An overly prescriptive arrangement may result in conflicts over interpretation and prevent appropriate responses to unforeseen situations. An overly flexible arrangement might result in an evolution that differs from what was foreseen in an undesired way.

2. International Treaty Versus Domestic Constitutional Arrangements

Non-self-governing territories will want guarantees as to those matters they consider of greatest importance. There will also need to be a guarantee that the people will be able to modify their status at a later date if the models are to meet the criteria suggested in Part V. There are two main ways this can be achieved. These guarantees can be placed in domestic law documents as in the cases of Aruba and Bougainville. However, these are

240 See, for example, Angelo and Townend, above n 8, at 245-247 for a discussion of some of the matters in relation to Pitcairn.

241 For example Draft Treaty of Free Association between New Zealand and Tokelau, art 3 (appended to Townend, above n 30).

242 Exemplified in the free association arrangements for the Cook Islands and Niue. The relationship in those arrangements is essentially governed by six sections of their Constitution Acts: Cook Islands Constitution Act 1964 (New Zealand); Niue Constitution Act 1974 (New Zealand).

243 Exemplified in the Palau arrangement, which runs to hundreds of pages and is very specific.

not strictly enforceable at international law.[244] The other option is to include the guarantees in international agreements governed by, and enforceable at, international law.

3. Observer Status as an International Safeguard

This article proposes that where a non-self-governing territory chooses a 'fourth' option, it may be removed from the list of non-self-governing territories. The information transmitting responsibilities of the administering state will cease and thus the safeguard of regular international scrutiny of the relationship will end. This safeguard can be replicated by according UNGA observer status to the territory, granting the territory the ability to participate in meetings of the UNGA. The UNGA accords observer status to non-member states.[245] The basis for observer status is not in the Charter, but in general practice and UNGA Resolutions.[246] Since 1974, certain National Liberation Movements have been allowed to participate in the UNGA as observers.[247] It would not be much of a stretch to extend such participation rights to self-determined, but not independent, territories.

4. Communication and Cooperation

The 'fourth' options involve sharing of governance responsibilities between two or more states/entities. Communication and cooperation are important in ensuring the smooth running of territories under these arrangements. In the cases of Aruba and Bougainville, forums have been established to allow for dialogue and dispute resolution. The early free association arrangements for the Cook Islands and Niue did not provide for such a platform, which resulted in issues when the Cook Islands Premier was expected to communicate with the New Zealand Prime Minister through the Ministry of Foreign Affairs and Trade rather than directly as traditionally Heads of State/Government do. By providing for high-level communication in any agreement, such offence may be avoided. Disputes can be quickly resolved, and day-to-day administrative matters would be dealt with more easily.

F. Conclusion

The four options outlined above may in practice not be very different from each other, or from the current situation in some of the non-self-governing territories. In theory they are however, because they will be self-determined. These various options provide a platform for considering how the aspirations of non-self-governing territories can be realised, and how examples of various historical and current international statuses might assist in that realisation.

244 Philipp Wunderlin "Decolonisation – Greenland as a Model for the 21st Century" (LLM Research Paper, Victoria University of Wellington, 2009) at 19; Angelo and Townend, above n 8, at 230.

245 The Vatican and Palestine.

246 "About Permanent Observers" United Nations <www.un.org>.

247 Shaw, above n 43, at 246. *Observer Status for the Palestine Liberation Organization* GA Res 3237, XXIX (1974). Palestine is now recognised as a non-member observer state.

VII. Conclusion

In order to fulfill its decolonising mission the UN must adopt greater flexibility in considering appropriate outcomes of self-determination. This article has suggested that part of the reason for the stalling of decolonisation rests with the inadequacy of the current options available for self-determination. The UN has been very prescriptive in what it considers to be appropriate options for non-self-governing territories.

The proposal in this article is two-fold. First, the right to self-determination needs to take precedence over current conceptions of what decolonisation should entail. A non-self-governing territory that has freely determined its future political status, even an interim one, should no longer be considered 'non-self-governing'. The exercise of free choice transforms a colonial relationship into a relationship of an entirely different nature (perhaps more akin to a partnership, depending on what status is chosen) and thus decolonisation will have occurred. Second, in order to allow for free choice, the UN must be open to models of self-determination beyond those outlined in Res 1541. This is allowed for in Res 2625. The role of the UN in the decolonisation process should be one of scrutinising the act of self-determination to ensure it is valid, rather than scrutinising the outcome.

Four solutions have been suggested that explore the wide array of international statuses which various territories and entities hold and have held, and such statuses could be held in the future by some of the present non-self-governing-territories, should those territories so determine.