To Be or Not To Be … Integrated, That is the Problem of Islands

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Historically, decolonisation under United Nations aegis has tended to result in the independence of the territory in question. The free association model has been adopted in only a few cases, and the third option, integration, even more sparingly. This paper suggests that as the remaining nations on the United Nations list of non-self-governing territories become smaller and poorer, greater consideration should be given to the integration model.

D'usage, la quasi-totalité des processus de décolonisation organisés sous l'égide des Nations Unies, avait pour objectif premier et ultime de favoriser une accession à l'indépendance. Dans cette logique, le modèle dit de 'libre association' n'a été que rarement retenu et celui dit de 'l'intégration' encore plus rarement. Cet article, au constat que les nations qui restent encore sur la liste Nations Unies des pays à décoloniser, sont de plus en plus petits et pauvres, préconise cependant que l'on favorise le modèle d'intégration de préférence aux autres modèles de décolonisation.

I INTRODUCTION

The purpose of this report is to consider the constitutional position of some of the smallest of Pacific communities and, against that background, to suggest that in the preparation for self-determination, greater international attention needs to be paid to the status of integration than has been the case in the past. That attention should consider the nature of integration, its relationship to cultural identity, and the right of the people of a self-determining territory to express a view on integration.

These matters are explored with particular reference to the options under international law for bringing to an end non-self-governing status and to five South Pacific examples:[1] Niue, a state which is reviewing its post-self-determination future; Tokelau, a territory which

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1 Niue – population: 1,600; land area: 259 square kilometres; sea area: 390,000 square kilometres; natural resources: agriculture, fish, arable land; nearest land mass: Tonga.

Tokelau – population: 1,450; land area: 12 square kilometres; sea area: 290,000 square kilometres; natural resources: fish; nearest land mass: Samoa.

is contemplating what its post-self-determination situation might be; and two territories, one from Australia and one from New Zealand, that fall outside the purview of the United Nations Special Committee of 24 on Decolonisation[2] but are contemplating futures of greater autonomy of one kind or another. For comparative purposes reference is also made to the Australian Territory of Cocos (Keeling) Islands in the Indian Ocean.

II THE UNITED NATIONS AND SELF-DETERMINATION

The United Nations set the year 2000 – the end of the twentieth century – as its deadline for the ending of colonialism.[3] Though that goal was not achieved,[4] the United Nations is still actively seeking to wind down its decolonisation programme.[5] At the same time, some groups have sought access to the United Nations decolonisation processes, or view those processes as of ongoing interest for them.

The United Nations options of independence, free association, and integration have been identified as indicators of the attainment of full self-government.[6] They range between the

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Norfolk Island – population: 1,800; land area: 34.6 square kilometres; sea area: 350,000 square kilometres; natural resources: palm seeds, fish; nearest land mass: New Zealand.

Chatham Islands – population: 750; land area: 90 square kilometres; natural resources: fish; nearest land mass: New Zealand.

Cocos (Keeling) Islands – population: 635; land area: 14 square kilometres; natural resources: fish; nearest land mass: Indonesia.

The common features of these communities are their small size, isolation, and the sea. On the topic of self-determination generally, see W Twining (ed), *Issues of Self-Determination* (Aberdeen University Press, 1991) and especially chapters 7 and 8 in that volume.

2 The Committee's full title is the Special Committee on the Situation with Regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples.

3 See Press Release GA/COL/2974: 'The goal of eradicating colonialism by the year 2000 should continue to guide the work of the Special Committee on decolonisation'.

4 There are 16 non-self-governing territories remaining:

Administrative power: United Kingdom
Territories: Anguilla, Bermuda, British Virgin Islands, Cayman Islands, Falkland Islands (Malvinas), Montserrat, St Helena, Turks and Caicos Islands, Gibraltar, Pitcairn.

Administrative power: United States
Territories: United States Virgin Islands, American Samoa, Guam.

Administrative power: France
Territory: New Caledonia

Administrative power: New Zealand
Territory: Tokelau

De facto administrative power: Morocco
Territory: Western Sahara.

5 By United Nations General Assembly Resolution ('UN GA Res') 55/146 of 8 December 2000, the United Nations identified the eradication of colonialism as a priority and declared 2001-2010 to be the Second International Decade for the Eradication of Colonialism.

6 The options for self-determination are set out in UN GA Res 1541 (XV), annex, principle VI: 'A Non-Self-Governing Territory can be said to have reached a full measure of self-government

extremes of independence and integration. The international law preference is for independence.[7] A non-self-governing territory should stand on its own feet and the colonists should leave. This preference for independence suggests a return to some unstated, perhaps pre-colonial or primordial, condition.[8] The reality of decolonisation is, however, different, because as a result of the preparation for self-determination the decolonised territory is necessarily going to be very different from the territory that was colonised. This explains, and is explained by, the emphasis in the decolonisation process on the preparation for self-determination,[9] and also by the concerns expressed by a number of countries about the process.[10]

Decolonisation may result in integration or free association with an independent state, but the right to free association or integration is, relative to independence, a constrained one, because it involves an ongoing relationship with such a state. The availability and conditions of these options will in practice depend as much on the coloniser (or another state) as on the colony. International practice to date is that the act of self-determination does not require that the populace of the territory vote on the three options.[11] In some

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by: (a) Emergence as a sovereign independent State; (b) Free association with an independent State; or (c) Integration with an independent State.' See also UN GA Res 2625 (XXV), annex 1, part 5, para 4, regarding 'The principle of equal rights and self-determination of peoples', which lists the three options and adds 'or the emergence into any other political status freely determined by a people'.

The options are mutually exclusive. Only free association allows for future unilateral change, and that is for the freely associated territory to become independent. An integrated territory's future is governed by the absorbing state; a territory that chooses independence could only change that status in accordance with a general principle of international law. But note the reference in UN GA Res 742 (VIII), annex, part 3 to 'the freedom of the population of a […] Territory which has associated itself […] as an integral part […] to modify this status through the expression of their will by democratic means.'

7 See UN GA Res 742 (VIII), art 6; UN GA Res 1514 (XV), art 5.

8 The notion of independence is, in a literal sense, negative – that is to say, there is no dependency. Within the resolutions themselves, the term 'independence' carries with it the positive connotations of 'freedom' and 'liberation', as can be observed in UN GA Res 1514 (XV). Independence as the preference developed in an era in which, for larger colonies, independence was the obvious choice.

9 See in particular article 73 of the United Nations Charter.

10 This concern finds formal expression in the Niue Constitution Act 1974 (NZ), s 7. See also the paper on sustained autonomy by Alison Quentin-Baxter, 'Sustained Autonomy – An Alternative Political Status for Small Islands?' (1994) 24 VUWLR 1. Neither small size nor geographical isolation is an impediment to the exercise of the international legal rights – see preamble of the United Nations Charter: 'the equal rights…of nations large and small'. See also the Cook Islands Legislative Assembly discussion in *The Cook Islands: A Voyage to Statehood* (Ministry of Foreign Affairs and Immigration, Rarotonga, Cook Islands, July 1998), p. 17.

11 See M Pomerance, *Self-Determination in Law and Practice: the New Doctrine of the United Nations* (Boston, 1982), p. 26: 'It appears then, that the existence of self-determination by means of integrating with an existing State does not entail, for the United Nations, any absolute requirement of prior attainment of independence, nor must independence even have been offered. Moreover, in certain instances, no choice at all need be presented to the people concerned.' See also A Quentin-Baxter, *Self-Government in Free Association with an Independent State: the Applicable Criteria* (paper presented to the Pacific Regional Seminar, Majuro, Republic of the Marshall Islands, May 2000).

instances, the three choices presented by the United Nations resolutions have been voted on, but in others the decolonisation has resulted from a vote in a predetermined form on only one of the options.[12]

Of the communities considered in this report, Niue and the Territory of Cocos (Keeling) Islands achieved full self-government and chose their present political status under United Nations aegis, Tokelau has yet to self-determine, and the Territory of Norfolk Island and the Chatham Islands Territory have not had that opportunity. None is independent, and, beyond the rhetoric of the situation, none is likely seriously to contemplate independence. Realistically, integration and free association are the only two options for self-determination.

For entities of this size and circumstance an important question is what the relative merits or advantages of integration in, and free association with, another state might be. Why would a community choose one of these options rather than the other? A community may, for instance, be concerned with a distinct political future, perhaps with a distinct economic future, or be concerned with maintenance of an identity – a cultural, linguistic, patriotic, or homeland notion[13] – and for that reason may prefer associated statehood to integration.

A Free Association

Between the extremes of integration and independence is free association. According to this option, the country is equipped for and free to become independent but wishes, for the time being, to rely on an inter-country arrangement with the coloniser or another state. Free association requires that the terms of the association be agreed upon. This requires a balancing of, on the one hand, the interests of the colony not to integrate or become independent but nevertheless to make its act of self-determination, and on the other hand, the interests of the coloniser or another state in respect of future relationships with the colony. After self-

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12 See UN GA Res 742 (VIII), part 2, Freedom of Choice: Non-self-governing territories should have the '[f]reedom of choosing on the basis of the right to self-determination of peoples between several positions including independence.'

In Niue, the option on the ballot paper was to answer 'yes' or 'no' to the question: Do you vote for self-government for Niue in free association with New Zealand on the basis of the Constitution and the Niue Constitution Act 1974?

In the Cook Islands the future status of the territory was the chief issue at general elections. The Cook Islanders could vote for a political group or an independent candidate as in any other general election, and the group or candidate eventually elected would decide whether or not to bring into effect the new constitution that set out a relationship of free association with New Zealand. Five main political groups, including independent candidates, contested the elections. Only some of them had, prior to the elections, issued statements of policy with respect to the prospective constitutional changes. See Alison Quentin-Baxter, 'Pacific States and Territories: Cook Islands' in *Laws of New Zealand* (Butterworths, Wellington, 2001), para 7.

In the Cocos (Keeling) Islands the three options were available at the time of the vote.

13 Or, by analogy with human rights principles, the right to recognition of its individual personality. See the Universal Declaration on Human Rights (UDHR), preamble, article 6, and the International Covenant on Civil and Political Rights (ICCPR), preamble, article 16, concerning the inherent dignity of the human person.

determination the state in free association is free to go forward as such, or to go forward alone by choosing complete independence, but can become integrated only by the free choice of the integrating entities. There is no free association if a constitutional right to control the internal government of the territory is retained by the administering power.[14]

While the constitutions of the Cook Islands and Niue are not autochthonous, nevertheless, as reflected in New Zealand's acceptance in their respective Constitution Acts of the consequences of self-determination, New Zealand has no right to intervene in their affairs.[15] Citizenship and some other features of the association arrangements with New Zealand may be interpreted as exceptions to this general principle.

The status of Niueans and Cook Islanders as New Zealand citizens is provided for by the law of the state of New Zealand,[16] though its availability could constitutionally be altered unilaterally by either party. Rejection of the citizenship by the associated state would not in itself affect the rights of the people of that state (but would probably signal a wish to end the free association), but the unilateral denial of that citizenship by the state of New Zealand would be a major breach of the decolonisation agreement and signal a disruption of the association relationship. Such a move would be seen to be a hostile act given, among other things, the likely population consequences for the associated state.[17] The formal legal relationship of the two states would not change by that alone. The New Zealand citizenship right would have been withdrawn by New Zealand from, for example, the people of the Cook Islands, but technically that would not have involved any interference in the government of the Cook Islands. Equally it is not something that the Cook Islands could unilaterally or domestically reverse. In such a case the Cook Islands, or Niue, would need to establish their own citizenship and passport systems to fill the gap created by the withdrawal of New Zealand citizenship.

Many of the Sovereign's prerogative powers have been replaced by the written constitutions of the Cook Islands and Niue. But some aspects of prerogative linger, for example in respect of the honours system and the use of the royal effigy.[18] As with citizenship, the refusal to confer honours or to permit the use of the effigy would not involve an

14 See UN GA Res 1541 (XV), annex, principle VII.

15 See Cook Islands Constitution Act 1965 (NZ), s 3; Niue Constitution Act 1974 (NZ), s 3; Alex Frame, 'The External Affairs and Defence of the Cook Islands' (1987) 17 VUWLR 141; Alex Frame, 'The Constitutional Position of the Cook Islands' in *Laws of the Cook Islands*, 1994, vol 1, 165. See also Alison Quentin-Baxter, 'Pacific States and Territories: Cook Islands' in *The Laws of New Zealand* (Butterworths, Wellington, 2001) paras 10, 12, 29.

16 See Cook Islands Constitution Act 1965 (NZ), s 4; Niue Constitution Act 1974 (NZ), s 4; the Kirk/Henry letters: [1983] AJHR A-10. The issuing of New Zealand passports is governed by the Passports Act 1992 (NZ), which is the law of New Zealand alone.

17 See R Q Quentin-Baxter, 'Second Report to the Niue Island Assembly on the Constitutional Development of Niue' (1999) 30 VUWLR 577.

18 In *McCann-Erickson Ltd v Television NZ Ltd* (HC, 21/12/2000; Master Gambrill, Auckland, CP 9-SD00), the High Court held that the overarching principle was that the 'Sovereign has the control of the use of royal images as an aspect of the Royal Prerogative'. Permission to use the royal effigy must be granted by the Lord Chamberlain's Office.

intervention in the affairs of the states in free association. There is, in respect of prerogative matters, no duty on the Sovereign. The matters may be seen rather as privileges to which any of the parts of the Realm of New Zealand may or may not have access at the discretion of the Sovereign. In principle, the Sovereign would be advised by the responsible ministers of the state concerned. Whether the practice is consistent with principle or Ministers of the State of New Zealand dominate is unclear.

Other matters mentioned in the constitutions of the Cook Islands and Niue which might be seen to suggest New Zealand government involvement in their governments are foreign affairs, defence, and budgetary support.[19] In respect of foreign affairs and defence,[20] the Head of the Realm acts in respect of Niue and the Cook Islands as head of state; the Monarch of the Realm of New Zealand is the head of state of Niue and the Cook Islands.[21] Foreign affairs and defence are expressed as duties, and to the extent that the performance of the duties is required, a state of the Realm would give its advice to the Governor-General of the Realm according to its laws and the Letters Patent. The advice received would be considered in the Executive Council of the Realm of New Zealand, which is grounded in the state of New Zealand.[22]

Budgetary support in relation to Niue places obligations on the state of New Zealand and is justiciable in both Niue and New Zealand.[23] A failure by the state of New Zealand to fulfil this obligation would also breach the free association arrangement and cause economic destabilisation in Niue.[24]

B Integration

1 Integration as a choice

Integration is of particular interest where the result of self-determination will not be independence. The essential nature of integration is simple: the integrating entity is subsumed

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See also the Letters Patent constituting the Office of Governor-General of New Zealand 1983, SR 1983/225 ('Letters Patent'), cl XI, regarding the prerogative of mercy.

19 See Alison Quentin-Baxter, 'Niue's Relationship of Free Association with New Zealand' (1999) 30 VUWLR 589; Alex Frame, 'The External Affairs and Defence of the Cook Islands' (1987) 17 VUWLR 141.

20 See Niue Constitution Act 1974 (NZ), s 6; Cook Islands Constitution Act 1964 (NZ), s 5.

21 Constitution of Niue, article 1; Constitution of the Cook Islands, article 2.

22 See Letters Patent, cl III, VII, and VIII. The advice is effectively from the associated state to the head of state of New Zealand, New Zealand being the state that will fulfil the duties – see Alex Frame, 'The External Affairs and Defence of the Cook Islands' (1987) 17 VUWLR 141; Alison Quentin-Baxter, 'Pacific States and Territories: Cook Islands' in *Laws of New Zealand* (Butterworths, Wellington, 2001) para 27.

23 Niue Constitution Act 1974 (NZ), s 8. It seems that in principle administrative action taken in fulfilment of those obligations could be judicially reviewed.

24 The overwhelming support for free association in Niue prior to the referendum held on 3 September 1974 for self-determination is analysed in the pre-referendum *Report to the Niue Island Assembly on the Constitutional Development of Niue* [1971] AJHR A-4, 5. Professor R Q Quentin- Baxter suggested

into the absorbing state.[25] The reality, however, will be as varied as the parties. At the core may be little more than that the fate of the parts of a state will, after integration, be determined by the law of the whole without other reference to the pre-integration parts. It is a process of amalgamation, absorption, or fusion, which will necessarily affect the absorbed and the absorber.

Decolonisation by way of integration may seem to suggest active choice on the part of the colony, and a passive coloniser. However, where integration is with the administering power, the coloniser will necessarily be as active in the pre-self-determination period as in the case of free association. Many matters will concern the absorbing state. Representation of the integrating territory in the absorbing state's legislature and the financial cost of provision of integrated social services and welfare payments will be important factors.[26] Financially, independence could be the least expensive self-determination option for a

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in this report that the three issues of overriding importance that led to the decision to aim towards internal self-government and free association with New Zealand were (1) the wish of Niueans to retain New Zealand citizenship, (2) the absolute assurance given by New Zealand that financial and administrative aid would be continued, and (3) the concern by the people of Niue to retain their own identity.

25 The international law and constitutional law perspectives on independence and free association are similar – the states are separate or they are one. See the Kirk / Henry Letters [1983] AJHR A-10. In integration, the territory disappears at international law, but at constitutional law the territory is absorbed into an existing whole.
Integration is not precluded by geographical isolation: Penrhyn is as much part of the Cook Islands as Rarotonga is, the Cocos (Keeling) Islands are part of Australia, and Tokelau could be part of New Zealand. Equally, Rapanui, although at a considerable distance from the continent, is an integral part of Chile. And Reunion, in the Southern Indian Ocean, is a *département* of France.

26 Budgetary support analysis: the cost to the New Zealand government of Niue's free association relationship in 2001-2002 was $6,250,000. This includes spending on education, health, other social costs, forestry, tourism, and a general programme of assistance – see Ministry of Foreign Affairs and Trade website at http://www.mfat.govt.nz/foreign/regions/sthpacific/country/niuepaper.html#ODA.
This figure may be compared with an estimate of what the cost might be to New Zealand if Niue were integrated rather than an associated state. (The following simplistic analyses fail to take into account invisible costs to New Zealand in either arrangement).
Estimation = (1,600 (the population of Niue) x $147.89 (the basic amount per week of the community wage for a single person of 25 years or more) x 52 weeks) = $12,304,448. This is almost double the current budgetary support given to Niue. This analysis assumes that every Niuean will be on the community wage.
An alternative way of estimating the cost of integrating Niue could be to multiply the average New Zealand government welfare spending (on unemployment, training, sickness, invalids, domestic purposes, widows, orphans and unsupported children, transitional retirement, New Zealand Superannuation, and veterans) per capita of New Zealand residents by the population of Niue. 1,600 x $134.51 (weekly expenditure on benefits and pension per capita by New Zealand government) x 52 weeks = $11,191,232. This estimate is nearly double the current budgetary support given to Niue.
Currently, the expenditure by the New Zealand government on the pre-self-determination relationship with Tokelau is $7,350,000 per annum. The cost of integration can be estimated as follows:
1,450 (population of Tokelau) x $147.89 (community wage) x 52 weeks = $11,150,906. An alternative way of calculating the cost to New Zealand is: 1,450 x $134.51 x 52 weeks = $10,142,054. The cost might be slightly higher for New Zealand if Tokelau were to choose to become fully integrated.

colonial power because it can provide freedom from financial responsibility towards the former territory.

An express right to integrate may be difficult to identify, but nevertheless the administering power should offer the status of integration if that is requested, or desired, by the territory. This follows from the nature of the relationship between the administering state and the non-self-governing territory. The role of the administering state is made clear in articles 2 and 73 of the United Nations Charter. The interests of the territory are 'paramount', the position of the administering state is that of a trustee with a sacred trust to honour,[27] and the state is required to fulfil its obligations under the Charter in good faith. Further, all states responsible for non-self-governing territories must both 'promote the realisation of the right of self-determination and […] respect that right'.[28]

United Nations General Assembly Resolution 742 indicates that self-determination processes are governed by the specifics of each case,[29] while Resolution 1541 emphasises the free choice of the territory, respect for the individual and cultural characteristics of the territory, and speaks of integration in terms of 'complete equality'.[30] This is supported by the discussion in Resolution 2625, in relation to integration as a mode of fulfilling the right to self-determination.[31]

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27 This phraseology has particular resonance for the common lawyer. Something of the idealism but not necessarily all of the fiduciary implications are found in the parallel French and Spanish texts with their references respectively to '*une mission sacrée*' and '*un encargo sagrado*'.

In this context it is also interesting to note the difference in emphasis in the French and English versions of articles 1.2 and 73b of the United Nations Charter. For example, article 1.2 'the principle of equal rights and self-determination of peoples' is in French '*principe de l'egalité de droits des peuples et de leur droit à disposer d'eux-mêmes*', and article 73b 'to develop self-government' is '*de développer leur capacité de s'administrer elles-mêmes*'.

28 ICCPR, art 1(3).

29 See UN GA Res 742 (VIII), para 4.

30 See UN GA Res 1541 (XV), annex, principles VIII, IX: '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 people 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 though informed and democratic processes, impartially conducted and based on adult universal suffrage. The United Nations could, when it deems necessary, supervise these processes.'

For a specific view on the right to representation see, in respect of the US Virgin Islands, the Brief of Amicus Curiae prepared by the Allard K Lowenstein International Human Rights Law Clinic, Yale Law School, in *Krim M Ballentine v USA*, DC of the Virgin Islands, civil case no 1999-130.

31 See UN GA Res 2625 (XXV), annex 1, part 5.

It is consistent with the nature and purpose of self-determination that there be a fiduciary duty on the administering state to make available the option of integration (and, for that matter, free association). The international community has prescribed the self-determination options; choosing among them is the right (or, some may say, the duty) of the non-self-governing territory. If a question were to arise as to the reasonableness of the terms of free association or integration offered by an administering state, that could only be determined by the United Nations as part of its process of accepting, or not accepting, that the consequence of the exercise of the right of self-determination has been the attainment of a full measure of self-government.

2 *The laws after integration*

The assumption of integration is that the absorbing state will go on as usual, and that the governance of the integrated entity will be determined by the absorber. Integration is a choice, but the quality or nature of that choice is at large.

To say that 'everything will be the same' for the absorbed as in the absorbing state ignores the fact that most if not all states admit diversity of legal regimes within their borders for historical, cultural, religious, linguistic, economic, geographical, or other reasons. The question of integration is therefore to know the terms of the merger and which elements of diversity will be tolerated within the absorbing state.[32] The crucial point is that after integration the colony will have its power to control the terms of its participation in the greater entity determined by the entity itself. The powers of the absorbed entity, and those of its people, will be those set out in the constitution of the absorber.

After integration the former non-self-governing territory will be 'within', 'part of', or 'an element of' the other, depending on the political consequence, the territorial consequence, or the social context. However, none of this discloses the nature of the rules of social ordering within the state. Will there be, for instance, a unitary or a federal system?[33] Is there to be a common fiscal, welfare, criminal, landholding, or family law system, or a uniform interpretation of human rights? It might be assumed that there would be, but even in New Zealand and Australia the answer is not a clear affirmative. On the other hand the common face to the outside world (citizenship, defence, international relations) is, perhaps, one area of commonality. Such things aside, there is considerable diversity even in the small unitary state of New Zealand.

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32 Professor Quentin-Baxter would have agreed: 'Integration need not […] be incompatible with Niue's need to keep its own political institutions. At the present stage of constitutional development, the New Zealand Parliament has unlimited legal power to make laws for Niue; but in practice it deals only with a small range of Niuean matters – and then only with full regard to the wishes of the Government and people of Niue. There is in principle no reason why such an arrangement should not continue on some mutually acceptable basis after Niue has ceased to be a dependent territory.' See *Report to the Niue Island Assembly on the Constitutional Development of Niue* [1971] AJHR A-4, 8.

33 Integration into a federal state offers a number of alternatives not available when integrating into a unitary state is contemplated. From a constitutional perspective the Tokelau status quo suggests an integration similar to but just short of a federal arrangement.

The content of integration is therefore a primary concern. The self-determining community needs to know what is behind the label, and since all the laws of the absorbing state are unlikely to apply to the integrating territory, what modifications to the respective legal systems, if any, will be made for integration.

3 The status quo as integration

In a technical constitutional sense, before self-determination all non-self-governing territories are likely to be part of the administering state and integrated in it, at least in the sense that they are part of no other state.[34] It might therefore be argued that it would be anomalous if, by deferral or neglect of the international right to self-determination, a non-self-governing territory were able to enjoy a position – the status quo[35] – that would not be available to it if it exercised its right to self-determination.

The international law view of the status quo is that every colonial territory has a 'status separate and distinct from the territory of the State administering it' which continues until self-determination.[36] The status quo is not a free association option unless it contains the constitutional freedom for the territory to leave the association; the status quo is not an integration option at international law except on the basis of 'complete equality' between the peoples of the territory and the absorbing State. This equality requires equal civil and political rights of the people in the two communities.[37]

International human rights instruments such as the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights ('ICCPR') present relevant ideals of equality: the right to freedom of movement and residence,[38] the right to take part in government,[39] access to the public service,[40] the right to social security,[41] and to basic standards of living.[42] These will have an important role to play in the relationship of the absorbed and the absorber, as will the cultural protection principles of, for instance, article 27 of the ICCPR. But a problem of islands of the South Pacific, and particularly those for which integration is an issue, is their small population. On a suffrage basis their participation in the democratic processes of the absorber will count for little. Geographical isolation may

34 Being 'an integral part of' or 'integrated in' is the constitutional reality of being a non-self-governing territory.

35 In another sense the status quo could refer to the conditions of pre-self-determination self-government and relate to a condition of free association.

36 See UN GA Res 2625 (XXV), annex, para 1, part 4, cl 6.

37 See ICCPR, article 26.

38 UDHR, article 13(1); ICCPR, article 12.

39 UDHR, article 21(1); ICCPR, article 25(a).

40 UDHR, article 21(2); ICCPR, article 25(c).

41 UDHR, article 22; International Covenant on Economic, Social and Cultural Rights (ICESCR), article 9.

42 UDHR, article 25; ICESCR, article 11.

in the end be the best protection of cultural identity, just as economic factors may be the biggest instrument of cultural change.[43]

In the spectrum of possibilities, from total absorption within a state through to independence, the status quo of a non-self-governing territory will fall closer to the free association end of the integration range rather than the total absorption end. This results from the requirement of the self-determination process that the territory be prepared for and reach an advanced state of internal self-government that is consistent with the realistic exercise of the right to self-determination by the choice of any one of the three United Nations options.[44]

C Self-determination and Tradition

Free association has an appeal for traditional communities and often appears to have the support of traditional leaders.[45] It is however difficult to think of a country that has ended colonialism with a vote for independence or free association, where the role of customary law and customary leaders is stronger than it was before decolonisation.

Self-determination is not a traditional or customary choice, and its outcome is not a traditional or customary law outcome. It is therefore not surprising that self-determination often empowers persons who would not be empowered by tradition. Tradition may promote self-determination, but nevertheless the self-determination process sets up a tension with, and is inherently hostile to, tradition. From a traditional viewpoint, self-determination may result in a new form of colonialism being embedded in the nation by way, for instance, of imported institutions. Whether then the old colonialism (integration) is more or less favourable to a self-determining nation than the new (free association or independence) may well have no easy answer.[46]

Self-determination is, by its nature, a potent vehicle for domestic change. To that extent an administering state may, where it wishes to maintain a close relationship with a former non-self-governing territory, be gratified that the choice is one of free association rather than integration. Where the choice is for integration, responsibility in respect of the ongoing

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43 Arguably the Cook Islands or Niue may have greater cultural protection under their relationship with New Zealand than were they independent. A population base of less than 2000 would be hard-pressed to retain cultural identity in the modern world without external resource support. It is also possible in that situation that integration may offer a greater range of (financial) resources to protect cultural identity than would independence.

44 See UN GA Res 1541 (XV), annex, principle II, and UN GA Res 742 (VIII), annex, for the list of factors indicative of the free association of a territory on an equal basis with the Metropolitan or other country as an integral part of that country.

45 A straw poll conducted in Tokelau in the mid-1990s not only showed predominant support for the idea of free association, but also that support for the alternatives was from the younger members of the communities.

46 Is it possible to conceive of ending colonial status in a manner consistent with customary law? If so, would the onus for this change lie with the coloniser more strongly than with the colonised? For example, does the coloniser have to retract its claim to govern, returning sovereignty to those who held it prior to colonisation? This is complicated by, amongst other things, the lapse of time.

changes in the territory is that of the absorbing state, whereas a state in free association has alone responsibility for handling domestic change.

III FIVE EXAMPLES

A Australia – Norfolk Island and the Cocos (Keeling) Islands

Norfolk Island is an island Territory of the Commonwealth of Australia. It has been a part of the Commonwealth of Australia since 1914,[47] but was not placed on the United Nations list of non-self-governing territories.[48] As a Territory it is governed under article 122 of the Constitution of the Commonwealth of Australia.[49] Its situation as part of Australia can therefore be usefully contrasted with that of the Territory of the Cocos (Keeling) Islands, which became part of Australia in 1955 and was placed on the United Nations list.

1 Cocos (Keeling) Islands

The Cocos Islanders exercised their right to self-determination on 6 April 1984. Eighty-eight percent of the votes were for integration. Before 1984 the islands were governed from Canberra under the Cocos (Keeling) Act 1955 (Cth). The major legal change since self-determination has been the repeal of much pre-self-determination legislation,[50] the application of Commonwealth tax and welfare law, and the extension of the law of Western Australia as the residual source of law.[51] Socially, the main change that occurred on Cocos Islands was the end of the Clunies-Ross dominance.[52] Identity, in these particular

47 For the history of the relationship with the colonies of New South Wales and Tasmania, see the preamble to the Norfolk Island Act 1979 (Cth) and the description in *Newbury v R* (1965) 7 FLR 34. See also Mason J in *Berwick Ltd v Gray* (1976) 133 CLR 603, 608.

48 Norfolk Island was never placed on the United Nations colonial territories list because it was said not to meet the criteria set by the United Nations for determining non-self-governing status. The criteria were that the territory had to be geographically separate and ethnically and/or culturally distinct from the country administering it – see UN GA Res 1541 (XV), annex, principles IV, V. A 1975 Senate Report noted that Norfolk Island's population is ethnically and culturally akin to that of the mainland – see the National Archives of Australia website: http://www.dotrs.gov.au/terr/norfolk/general.htm.

49 See *Berwick Ltd v Gray* (1976) 133 CLR 603, 607: 'The power conferred by section 122 is a plenary power capable of exercise in relation to Territories of varying size and importance which are at different stages of political and economic development. It is sufficiently wide to enable the passing of laws providing for the direct administration of the Territory by the Australian Government without separate territorial administrative institutions or a separate fiscus'.

50 See generally Cocos (Keeling) Islands Self-Determination (Consequential Amendments) Act 1984 (Cth).

51 Section 7A of the Cocos (Keeling) Islands Act 1955 (Cth) lists the hierarchy of laws as: Commonwealth Acts, Territory Ordinances, continued legislation of Cocos Islands (including some from its Singapore era), and Western Australian law.

52 In 1886 the British Crown granted all the land on the islands above the high-water mark to George Clunies-Ross and his heirs and successors. The Crown reserved the right to resume possession of the land for public purposes. In 1978, the Australian Government purchased from the Clunies-Ross family all property interests in the Territory other than the family residence and the surrounding land. In 1983, the Australian government moved to compulsorily acquire the remaining

circumstances, has probably been strengthened with integration because the processes of self-determination have empowered the local community.[53]

The Cocos Islands currently has an Administration and a Shire Council.[54] The Administration is responsible for the provision of services relating to utilities, airport management, public transport, marine services, and public building maintenance. The Shire Council, modelled on the local government law of Western Australia,[55] has the power to advise the Administrator on any matter affecting the Territory, to comment on all legislation proposed for the Territory, and to prepare and enact by-laws. The Council is responsible among other things for the housing on the main island, horticultural and road maintenance services, garbage collection, and tip maintenance. The Court system for the Territory has, since 1992, been that of Western Australia.[56]

2 Norfolk Island

As an integral part of Australia,[57] Norfolk Island has argued vigorously and persistently for greater autonomy.[58] Its arguments appear, short of achieving the option of free association or independence, to have been very successful.

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land and house. The constitutionality of the acquisition was challenged and denied by the High Court – see *Clunies-Ross v Commonwealth* (1984) 155 CLR 198. The Clunies-Ross family was declared bankrupt in 1983 and the Government took possession of its property – see *Europa World Yearbook* 1998, 475. For part of the aftermath see *Re Clunies-Ross* (1987) 72 ALR 241.

53 See Cocos (Keeling) Islands Act 1955 (Cth), s 18: 'The institutions, customs, and usages of the Malay residents of the Territory shall, subject to any law in force in the Territory from time to time, be permitted to continue in existence'. This section was not altered by the act of self-determination. See also the UN report *Question of the Cocos (Keeling) Islands* (A/39/494, 17 September 1984), appendix II, paras 12, 17.

54 See Administration Ordinance 1975. The administration is controlled by an Administrator who is appointed by the Governor-General – see Administration Ordinance 1975.

55 See Local Government Act 1995 (WA).

56 See Cocos (Keeling) Islands Act 1955 (Cth), part IVAA.

57 The question of whether Norfolk Island was part of the Commonwealth of Australia was not dealt with by the High Court until 1976 in the case of *Berwick Ltd v Gray* 133 CLR 603. At page 609, Mason J stated that it was 'abundantly clear that Norfolk Island forms part of the Commonwealth of Australia'.

58 See generally *Submissions of the Norfolk Island Government to the Distribution of Powers Advisory Committee of the Australian Constitutional Commission* (Norfolk Island, 1986); *Submission of the Norfolk Island Government to the Inquiry into Australia's Relations with the Pacific* (Norfolk Island, 1987), para 4: 'The future of the Island's relationship with Australia should involve a greater degree of self-government', para 8: 'The dominant feature of the relationship has been the tension between local autonomy and mainland control'; *Submission of the Norfolk Island Government to the Australian Constitutional Commission* (Norfolk Island, 1987), para 1: 'The Norfolk Island Government submitted […] that the Constitution should be amended (1) to make it clear that Norfolk Island is not appropriately to be regarded as 'part of' the Commonwealth, but as a dependency of the Commonwealth', para 13: 'There is a long history on the Island of opposition to annexation by a mainland polity', para 17: 'Norfolk Island […] seeks recognition of the individual status of the Island by constitutional guarantee'.

The first statutes recognised the islands as a Territory and established a basic governmental structure.[59] The Norfolk Island Act 1979 (Cth) took the matter further with an elaborate and progressive administrative power-sharing system between Kingston and Canberra.[60] Recent controversy has arisen over the failure of the Commonwealth government to satisfy expectations, and in 1999 there was an indication by the Commonwealth that there might be a reduction in the powers of the Norfolk Island government.[61] The debate can be expected to continue. With a resident population of 2000 it is more likely that greater autonomy rather than independence is the real object of the sporadic altercations with the Commonwealth government.[62]

Norfolk Island, as a Territory under the authority of the Commonwealth of Australia, has no international status independent of Australia. It is a 'part of the Commonwealth'.[63] The 1979 Act provides for the Territory's legislative, administrative, and judicial systems.[64] The Legislative Assembly, consisting of nine members elected for a term of three years,[65] has wide powers to make laws for the peace, order and good government of the Territory.[66] The Norfolk Island government controls its own fiscus and raises revenue under its own system of laws.[67]

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59 See the Norfolk Island Act 1913 (Cth), under which Norfolk Island came under the Commonwealth government, and the Norfolk Island Act 1957 (Cth), which provided for local legislation; the Governor-General was empowered to make Ordinances for matters listed in the Second Schedule to the Act. These were of a local nature, for example, roads, footpaths and bridges, and street stalls.

60 See the final two paragraphs of the preamble to the Norfolk Island Act 1979 (Cth).

61 In 1999 the Australian Government introduced the Norfolk Island Amendment Bill 1999. The purpose of the amendment was to alter the assent procedures of the Norfolk Island Legislative Assembly in relation to firearms. In addition the amendment was intended to bring the Norfolk Island Legislative Assembly's electoral provisions more in line with those of other Australian legislatures and to simplify the process of appointing the Norfolk Island Deputy Administrator. A referendum was held on Norfolk Island shortly after the Bill's introduction and 74 percent voted against these alterations. The Norfolk Island Legislative Assembly then called on the Australian Government to withdraw the Bill and to begin formal negotiations instead. Although the Australian Government purported not to be swayed by the outcome of the referendum, the Bill was not passed.

62 In principle, federalism provides more scope for greater autonomy.

63 *Berwick Ltd v Gray* (1976) 133 CLR 603, 605 Barwick CJ.

64 The system is more extensive than those of a local government nature. Compare with Lord Howe Island – population: 369; land area: 11km long and 2.8km at its widest point; nearest land mass: Australia. Also see the Lord Howe Island Act 1953 (NSW).

65 See Norfolk Island Act 1979 (Cth), ss 31-45.

66 See Norfolk Island Act 1979 (Cth), s 19(1): 'Subject to this Act, the Legislative Assembly has power, with the assent of the Administrator or the Governor-General, as the case may be, to make laws for the peace, order and good government of the Territory.' The matters of legislative competence are set out in Schedules 2 and 3 to the Act. Schedule 2 (93 items) is an extended version of Schedule 2 of the 1957 Act. Significant additions to the 1957 list are communications matters, corporate affairs, public moneys, and private law. The Assembly is least controlled by outside authority in respect of Schedule 2 matters. Schedule 3 (10 items) includes fishing, customs, immigration, education, labour law, and social security. The Assembly's power is constrained by powers of reservation (Administrator) or disallowance (Governor-General).

67 Norfolk Island Act 1979 (Cth), s 19(3).

Commonwealth laws are the superior laws of the Territory but do not apply to Norfolk Island unless expressed to do so.[68] Next in authority are Ordinances made by the Governor-General, followed by the laws of the Legislative Assembly. Commonwealth executive government is represented by an Administrator, who is appointed by the Governor-General,[69] and responsible to the Commonwealth Minister for Territories. The Administrator is the senior Commonwealth government representative in the Territory. Until 1992, residents of Norfolk Island were not entitled to vote in elections for the Federal Parliament.[70] Australian income tax is not payable on income derived from within the Territory of Norfolk Island.[71] In addition, the Norfolk Island government operates its own social security system in which benefits are payable at levels of around 80 percent of those on the mainland.

3 Summary

These two Australian examples suggest that in terms of their economies and cultural identity there would be no reason for the communities in question to favour free association over integration. Political status, both international and domestic, is the difference.

B New Zealand

The Realm of New Zealand has international identity in that the Head of State of the three component states is described as the Head of State for the Realm. Otherwise there are five internationally identified entities: the states (of New Zealand, the Cook Islands and Niue, the latter two being free to leave the Realm at their choice) and two territories (Tokelau and the Ross Dependency, for which the state of New Zealand is responsible). Necessarily, the state of New Zealand is not free to leave the Realm. It has nowhere to go; the present Realm is predicated on its existence.[72]

1 Niue

Niue became a British protectorate in 1900 and was formally annexed to the Colony of New Zealand in 1901. Now it is a state within the Realm of New Zealand in free association with the state of New Zealand. Niue was placed by New Zealand on the list of the United Nations Decolonisation Committee and was, through the 1960s and until 1974, prepared by the development of internal self-government for the exercise of its right to self-determination. Discussion during that period identified a relationship of free association with New Zealand as the preferred decolonisation option.[73] The Niue Island Assembly so decided and the

68 Norfolk Island Act 1979 (Cth), s 18.

69 Norfolk Island Act 1979 (Cth), s 6.

70 See the Norfolk Island (Electoral and Judicial) Amendment Act 1992 (Cth).

71 Norfolk Island Act 1979 (Cth), s 64.

72 Note the composition of the Executive Council of the Realm of New Zealand, Letters Patent, cls VII, VIII.

73 In 1962, when Niue was consulted by the New Zealand government as to its future status, the three alternatives of integration, independence, and free association were presented. At this time the Niue Island Assembly made it clear that the goal should be internal self-government, in a relationship of free association with New Zealand. From that moment the New Zealand government no longer had to consider the alternative of integration – see RQ Quentin-Baxter, *Report to the Niue Island Assembly on the Constitutional Development of Niue* [1971] AJHR A-4, 7.

self-determination poll (the result of which was accepted by the United Nations) offered voters the choice of accepting or rejecting free association in the agreed form. The result of the vote was substantially in favour of free association on the given terms. The decisive factors for Niue were retention of cultural identity, and the fact that New Zealand was willing to guarantee for the future the provision of necessary administrative support. In addition, in the relationship of free association Niue was to be treated on a basis of equality with New Zealand and with mutual respect of laws.

The consequence of the act of self-determination was the immediate shift to an entrenched constitution and an autonomous legislature.[74] Had the self-determination poll gone the other way, Niue would have remained a non-self-governing territory of New Zealand for United Nations Charter purposes.[75]

Since self-determination Niue has progressively reduced its actual and formal constitutional links with the state of New Zealand,[76] and the state of New Zealand has reduced its direct budgetary support to Niue.[77] Niue has also exercised its state rights on the international stage both in bilateral and multilateral treaties. Some of these international undertakings would have been no different in substance had Niue been integrated into the state of New Zealand.[78] Some others were possible only because Niue was not part of New Zealand.[79] Equally, since 1974 Niue has domestically done things, or omitted to do things, that would undoubtedly have been handled differently were Niue part of the state of New Zealand.[80]

Niue has changed little of its pre-1974 law. There has, however, been one amendment to the Constitution. That came in 1992 and, among other things, altered the structure of the court system.[81] The ongoing work of the Constitutional Review Committee has not resulted in further amendments. There was, however, a report in 2000 that provides a contemporary overview of the free association relationship and the reaction of Niueans to that status as

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74 See Niue Constitution Act 1974 (NZ), ss 3, 4.

75 The Referendum Ordinance of 1974 provided that the result of the referendum would be determined by a simple majority of validly cast votes. If the total number of valid affirmative ballots exceeded the total number of valid negative ballots, the Constitution Act would be brought into effect and Niue would be self-governing.

76 The latest of many developments is the opening of a Niue High Commission in Wellington.

77 Niue received $10,973,000 in 1995, and $6,250,000 for the year 2001-2002, from the New Zealand Official Development Assistance Programme. These figures are available on the Ministry of Foreign Affairs and Trade website: http://www.mfat.govt.nz/nzoda/pub.html#annrev.

78 See, for example, the Treaty Between the Government of the United States of America and the Government of Niue on the Delimitation of a Maritime Boundary (1997).

79 See, for example, the Partnership Agreement Between the Members of the African, Carribean and Pacific Group of States, of the one Part, and the European Community and its Member States, of the other Part (signed in Cotonou, Benin, 23 June 2000).

80 For example, human rights implementation and offshore banking.

81 Constitution Amendment (No 1) Act 1992 (Niue), s 4.

recorded in a Niue government-supported survey.[82] The prime concern expressed in that survey remains cultural integrity and identity protection and for that reason free association was identified as the favoured status for Niue's future.[83]

Had for instance, in an integration context, the Niue Government been a local government body under the Local Government Act 1974 of New Zealand, what might have been different?[84] Citizenship would not have been and could not be an issue. The budgetary support issue would have remained but been played out in different arenas potentially to no lesser effect. The international assistance would have been lost. Public service pay rates would have been at New Zealand rates,[85] and as a part of the state of New Zealand residents in Niue would have been resident in New Zealand for social welfare purposes.[86] Perhaps the population decline would have been less.[87] The economic risks taken to attain economic security would certainly not have been taken.

The fact that more than 90 percent of land in Niue is held in accordance with custom would almost certainly have been unaffected by a decision for integration into New Zealand. The protection of the customary land system was instituted by New Zealand,[88] and is a regime that exists (albeit in a different form) in New Zealand itself in respect of Maori land. If anything the land system in Niue may have been weakened since 1974, by the shift in 1992 from a system with an independent Land Court of Niue to one with a Land Division within the general common-law adversarial setting of the High Court of Niue.[89]

There is no evidence that Niue would have been less culturally protected under integration than under its present status. On the cultural front, however, protection on any scenario would have been difficult with a small and declining population. Culture does not prosper in deserted villages. Nor does the cultural touchstone of land prosper if untended.

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82 *Constitutional Review Committee Report* (Fale Fono, Niue, December 2000).

83 The survey was conducted as part of a poll (nationwide and of Niue residents in New Zealand, though not in Australia). The Joint Consultative Group was established in 1999 to make recommendations to both the New Zealand and Niue governments on how best to enhance their constitutional partnership. The Foreword to the Constitutional Reform Committee Report describes free association as the best of both worlds: those who want to integrate do so by migrating to New Zealand using their New Zealand citizenship, and those who want to be independent stay in Niue. The view is that of the Chairman of the Constitutional Review Committee.

84 Developments concerning the Chatham Islands since 1990 are perhaps indicative of the minimum that Niue could have expected.

85 Compare the Constitution of Niue, article 69(3).

86 See UDHR, article 22; ICESCR, article 9. Compare with the Cocos Islands UN Report, p 67 para 14: 'Sickness benefits are among the social security benefits that will shortly be extended to the people of Cocos […] Other social security benefits […] include the family allowance and the aged persons and invalid persons pensions.'

87 In 1974 there were 4,009 people living in Niue; there are now 1,600.

88 See Niue Act 1966 (NZ), part XIII.

89 See Constitution of Niue, article 37 (as amended by the Constitution Amendment (No 1) Act 1992 (Niue), s 4).

2 Tokelau

Tokelau is stated to be part of New Zealand,[90] and has, for most of the time since becoming a part of New Zealand in 1949, been administered by New Zealand as a central government function. New Zealand inherited Tokelau with some laws already in place,[91] and, like the Cook Islands and Niue, developed it as a subordinate legal system within the Realm of New Zealand. In the case of Tokelau, the development has been relatively small and non-interventionist. On a day-to-day basis customary law is administered by the elders and provides for social ordering at the local level. Tokelau is on the United Nations list of non-self-governing territories and is now actively building internal self-government.

The externally mandated requirements of self-determination have somewhat bemused Tokelau, and successive missions from the United Nations in 1976, 1981, and 1986 were shortly told that Tokelau was happy as it was, and that self-determination was not on the Tokelau agenda. In 1994, for a variety of reasons (mostly external), Tokelau advised the United Nations visiting mission that it was prepared to contemplate self-determination on certain conditions.[92] Tokelau still had no self-determination plan or timetable, but advised that if there were any predisposition to a self-determination outcome, the Tokelau choice was for free association and for free association with New Zealand. This predisposition was consistent with the expectations of the government of New Zealand and consistent with the experience of New Zealand in respect of the Cook Islands and Niue.[93]

Much progress was made in the late 1990s by Tokelau and New Zealand in the development of self-government for Tokelau, and in the removal of some of the many physical impediments to the development of viable government at the national (as distinct from the village) level. Those changes, which brought with them greater responsibilities for Tokelau, a greater responsiveness of Tokelau on national issues, and a high level of interaction with New Zealand on a government-to-government basis, led to a slight shift in Tokelau's perception of self-determination.

In 1999, at the same time as Tokelau was being more active on international issues, it gave notice that although independence was not within its national sights, either integration or free association might be.[94] As the 1999 statement indicated, there is much about integration that is not known. Current national patterns provide the likely basis for integration of legal systems, protection of landholding regimes, and general application of fiscal and welfare legislation, but much remains unclear.[95]

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90 Tokelau Act 1948 (NZ), s 3.

91 Mostly inherited from the British colonial, Gilbert and Ellice Islands, era.

92 See *New Wind, New Waters, New Sail – the Emerging Nation of Tokelau* (UN Doc A/AC 109/2009), para 19.

93 Western Samoa had chosen independence, but that case was readily distinguishable.

94 There were in the late 1990s some straw polls that indicated a degree of support, particularly among younger members of the resident population, for integration.

95 A separate criminal law? A separate family law?

The new timetable and mandate for the Committee of 24 and its working party place pressure on the United Nations (and on New Zealand) to clarify the agenda in respect of all territories of the colonial type. The Tokelau reaction to the declaration of the Second International Decade for the Eradication of Colonialism remains to be seen. Tokelau is actively strengthening the cultural foundations of its government, and is consolidating internal self-government at every opportunity.[96] In decolonisation terms this is consistent with all the self-determination options. With the transfer to Tokelau of full responsibility for its public service in July 2001,[97] and the election of the fourth national government of Tokelau in January 2002, the scene is being set for renewed consideration of the self-determination issues. Tokelau can be expected to be asking more of New Zealand about the conditions of its future as a distinct Pacific community, whether as an associated state, an integrated territory, or otherwise.

3 The Chatham Islands

New Zealand has promoted free association for its non-self-governing territories and Australia has promoted integration for its. What is the mix of reasons for these patterns? Are they economic? Strategic? Political? How relevant is it that Australia is a federal state and New Zealand a unitary state? On the basis of isolation, lack of natural resources, and small resident population, the Cocos (Keeling) Islands, Niue and Tokelau are very much alike.

With this in mind, the Chatham Islands,[98] with the contiguous resource of the exclusive economic zone, has thought about international rights to self-determination.[99] The Chatham Islands has a smaller population than Norfolk Island, but otherwise is in a situation more like it than any of the other islands discussed in this article.[100] The Chatham Islands is not on the United Nations list, and so has to argue its case with central government in Wellington in much the same way as Norfolk Island argues its case in Canberra. The Chatham Islands, however, starts from a constitutional position much less distinct from the rest of the country

96 See for example the Modern House of Tokelau initiative, which is returning power to the villages so as to revert back to traditional leadership. See Kelihiano Kalolo in *The Contemporary Pacific* (Spring 2000) 246, (Spring 2001) 255.

97 The Tokelau Amendment Act 1999 (NZ) made possible the withdrawal of the New Zealand State Services Commission as public service employer. The Tokelau legislature passed the necessary local legislation in February 2001. The final legal step is the designation by New Zealand of the date of effect of the 1999 Amendment; this was done in the Tokelau (Employer for Tokelau Public Service) Order 2001, SR 2001/98.

98 Land area – Chatham Island: 90 square kilometres, Pitt Island: 6.2 square kilometres; population: 750; nearest land mass: New Zealand; natural resource: fish. For further information, see *Rekohu: A Report on Moriori and Ngati Mutunga Claims in the Chatham Islands* WAI 64, Waitangi Tribunal Report, 2001.

99 'The view of the majority of Chatham Islanders was very clearly expressed to the Prime Minister in a petition [that stated] that the majority of Chatham Islanders actually did not want to be attached to any New Zealand electorate any longer, but wanted to be an independent State' – see Ruth Dyson (25 July 1995) 549 NZPD 8097-8098.

100 Contrast with the situation in Lord Howe Island – see the Lord Howe Island Act 1953 (NSW).

than that of Norfolk Island. The legal structures provide for local government on the Chatham Islands, but that local government is within the general framework of the local government legislation that applies to the local authorities on the main islands of New Zealand.[101]

The Chatham Islands Council Act 1995 (NZ) establishes the Council as the territorial authority and provides specific adaptations of general legislation to the local circumstances. Notably there is provision to 'levy dues on goods imported into or exported from the Chatham Islands Territory by any means whatsoever'.[102]

When in the late 1980s there was a heightened degree of political activity in the Chatham Islands, and the new economic policies of the government in Wellington began to be felt, a special arrangement was made to meet the specificities of the Chatham Islands situation.[103] The primary result was the establishment of the Chatham Islands Trust Fund.[104] Any possibility of greater autonomy or self-determination was denied.

In 1995, unexpectedly, the Chatham Islands was denominated a Territory.[105] This may have been a simple political motion without substance,[106] but unless the word 'territory' is to be deprived of conventional legal meaning, it would be reasonable to attribute some substantive connotation to the term. As much was indicated by the concerns expressed by the Minister in his speech reporting the Bill back to Parliament after Select Committee consideration,[107] and also by an Opposition speaker who, perhaps reflecting the cause of

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101 See Local Government Act 1974 (NZ).

102 Chatham Islands Council Act 1995 (NZ), s 14. Such a power for the Chatham Islands has existed since 1 April 1937.

103 'For the Chathams […] the process for the immediate future requires a 'partnership' approach [… T]he only chance of success is as suggested to work in partnership with Government […] In economic terms, Chathams is an island state' – see letter from A Preece, Chairman of the Chatham Islands District Council, to Dr Michael Bassett, Minister of Internal Affairs (18 November 1989).

104 Chatham Islands Enterprise Trust (file number WN/521 667) was incorporated under the Charitable Trusts Act 1957 (NZ). The Trust is responsible for the meatworks, electricity and the airport on the Chatham Islands.

105 The Local Government Law Reform Bill 1994 (69-1) spawned the Chatham Islands Council Bill 1995 (69-2A). The 69-1 Bill had proposed changing the name of the Chatham Islands County Council to the Chatham Islands District Council. But see the Chatham Islands Council Act 1995 (NZ), ss 5, 6: 'There is hereby constituted a district, to be known as 'The Chatham Islands Territory', which district comprises the islands known as the Chatham Islands and the area of the territorial sea adjoining those islands. […] A territorial authority to be known as the Chatham Islands Council is hereby constituted for the Chatham Islands Territory.'

106 The Hon Graeme Lee, Chairman of the Internal Affairs and Local Government Committee, affirmed this view when he said 'I think it is wise to talk about that name [(territory)] with some constraint, so that it cannot be construed as meaning more than the meaning that has been given – that is, that there is a territorial element in the interests and responsibilities of the Chatham Islands Council' – see second reading of the Chatham Islands Council Bill (25 July 1995) 549 NZPD 8096.

107 The Hon John Banks, Minister of Local Government, felt 'uneasy that calling the new district a "territory" carries implications and a promise that may be never be fulfilled. While the Chatham Islands are a unique part of New Zealand they are a part of this country.' Later in his speech, the Minister added that the Chatham Islands Council Bill 'is not about creating some semi-independent

the Minister's unease, claimed that the 'real issues, which are not addressed in this Bill, may in future have to be addressed.'[108]

In relation to the Chatham Islands, is New Zealand daring to tread where Australia fears to, or is New Zealand setting out on the path already cleared by Australia in respect of its Territories? If the latter, what is the relevance for a self-determining Tokelau or an already self-determined Niue? And may integration and free association for these small islands be in practice more about content than label?

IV CONCLUSION

The five communities considered in this paper all have a distinct cultural identity, all but Chatham Islands have a language of their own, all are small and geographically isolated from the main land mass of the state of which they are a part or with which they are associated, and all have their position recognised by a special statute. None has its own citizenship. Beyond that there are few commonalities. On an integration scale there is little difference between the Chatham Islands and the Cocos (Keeling) Islands, which, of the five, are clearly the most integrated into the metropolitan state. The Cocos (Keeling) Islands are distinguished by their own territorial government structures, which flow from the nature of the federal constitution. Though the Chatham Islands lacks the distinctive attributes of government of a separate territory, it does have its own Trust, a recognised identity, and a special duties regime. The least integrated is, by definition, Niue. There are few features that differentiate it from Tokelau, except that Tokelau does not have full internal governmental power or full international legal personality. Norfolk Island sits in the middle of the group. It clearly lacks international legal personality but is otherwise different from Tokelau and Niue, mainly because Norfolk Islanders vote in federal elections and are subject to Commonwealth of Australia human rights legislation.[109]

Tokelau and Norfolk Island are by domestic law both constitutionally integral parts of their respective parent states and both have substantial self-government. If both had the right to self-determination and both opted for independence or free association, what would change from the status quo? Or, to ask the question in a different way, if each were to choose integration what would change? Where is the fine line between integration and free

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entity with a different constitutional status from other local authorities' – see Hon John Banks (25 July 1995) 549 NZPD 8092.

At the Select Committee stage, the Chatham Islands County Council had recommended that all references to the Chatham Islands District Council be replaced by references to the Chatham Islands Territory so as to recognise that the Islands are a unique part of New Zealand due, in part, to their geographical location, isolation and population size. This recommendation was supported by Te Runanga O Wharekauri Rekohu in their submission that also noted that the new label 'recognises the spatial independence of the Chatham Islands from mainland New Zealand, and promotes the Chathams as an autonomous New Zealand territory'.

108 She had earlier noted 'the majority of Chatham Islanders actually did not want to be attached to any New Zealand electorate any longer but wanted to be an independent state' – see Ruth Dyson (25 July 1995) 549 NZPD 8097-8098.

109 Tokelauans have no suffrage right in the New Zealand elections.

association, and where, on the spectrum of ways of implementing the right of self-determination, is the status quo of a territory?[110] Externally there will be a difference in capacity. Internally equality of rights would need to be assured, but otherwise integration need make no difference other than the future restriction on choice.

All this suggests that the focus in self-determination of small islands should be on the features of a future relationship to the colonial state rather than on the label to be given to that relationship. The label appropriate at the national and international level, to the relationship and its chosen features, will follow as a consequence.[111]

This paper advocates exploring the content of integration by territories and administering states more fully than has been done to date. This is seen as relevant both in itself and as a positive aspect of the pre-self-determination process. If culture and identity are prime concerns for a non-self-governing territory it would not harm, and may help, seriously to address those matters as part of the development of internal self-government in the lead-up to self-determination. If the desired social culture is in place and functioning in the pre-self-determination period, it may be that it will continue in the post-self-determination period. The self-determination process may then avoid being taken hostage by the culture. The approach proposed places emphasis on the process of self-determination, rather than on the choice at self-determination.

The actual choice at self-determination may be no different because of these considerations, but having taken them into account, the basis of the self-determination choice will be more transparent. For a non-self-governing territory the point of difference in favour of free association over integration may, for instance, be found to be not the preservation of culture but rather a desire to preserve political status, distrust of the associated entity (by either or both parties), uncertainty as to the future, or a desire to assert pride in self-sufficiency.

Ultimately it is important to the integrity of the process that all the United Nations' choices be voted on by the populace. The populace should, in terms of the General Assembly resolutions, have the opportunity to express a view on each of the options as they have been specifically identified in relation to the factors significant to the future of the self-determining territory.

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110 That is, of a non-self-governing territory/colony fully prepared for self-determination/independence in accordance with the United Nations norms.

111 The paper has proceeded on the basis that it is possible conceptually to distinguish the three UN ways of attaining a full measure of self-government. It may be that there is no determinative set of characteristics for, for example, free association, and that characteristics which in one case have been given the integration label have in another case been described as free association. This is a question that requires further investigation.