



Parliament of Sint Maarten

Staten van Sint Maarten

To the Hon. Prime Minister and Minister of General Affairs
Ms. S.E. Jacobs
Government Administration Building
Philipsburg

UV/327/2019-2020

Philipsburg, June 16, 2020

Re: Questions from MP G.S. Heyliger-Marten regarding the motion from Parliament and Sint Maarten's status within the Kingdom of the Netherlands

Hon. Prime Minister Jacobs,

Herewith I submit to you questions posed by Member of Parliament Mrs. G.S. Heyliger-Marten pursuant to article 62 of the Constitution and article 69 of the Rules of Order of the Parliament of Sint Maarten.

The letter is self-explanatory.

Yours truly,

R. Brison
President of Parliament



Grisha S. Heyliger-Marten

Member of the Parliament of Sint Maarten

The Hon. Chairman of the Parliament of St. Maarten
Mr. Rolando Brison
Wilhelminastraat # 1
Philipsburg, Sint Maarten


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| STATEN VAN SINT MAARTEN | | |
| Ingek. 08 JUN 2020 | | |
| Volgnr. 151929/19-20 | | |
| Par. | AB | neg |

Philipsburg, June 8th, 2020

Honorable Chairman,

Please find enclosed a letter with attachments addressed to the honorable Prime Minister.

Respectfully,



Grisha Heyliger-Marten
Faction Leader UP faction



Grisha S. Heyliger-Marten

Member of the Parliament of Sint Maarten

The Hon. Prime Minister of St. Maarten
Ms. Silveria Jacobs
Government Administration Building
Soualiga Road #1
Pond Island, Philipsburg
Sint Maarten

Philipsburg, June 8th, 2020

Honorable Prime Minister,

With reference to the motion passed by Parliament on May 20th, 2020, and the follow-up with regards to Sint Maarten's status within the Kingdom of the Netherlands, it is important that the Government of Sint Maarten is well prepared for the process of finalizing the decolonization process, and aware of different developments and available information related to it.

It is also very important that the people of Sint Maarten are aware of their rights based on the UN Charter and international laws, treaties, and conventions, the negative effects of not having exercised these rights for the past decades, and the benefits that exercising their rights will bring to them and the future generations.

As representatives of the people, the Parliament of Sint Maarten has the obligation to both defend those rights and inform the people of how this process is taking place.

The IPKO meeting of this week provides a forum for the representatives from Sint Maarten to inform our partners within the Kingdom of the intentions of the Parliament of Sint Maarten in terms of having the decolonization process of the Caribbean islands finalized as soon as possible. It is also an opportunity to establish the position and commitment of our biggest Partner, the Netherlands, towards finalizing the decolonization of the Caribbean islands.

In light of the above, and the role of the Council of Ministers in the process, I am hereby seeking answers to the following questions from your esteemed office:

1. Were you aware of the attached highlighted sections (I) from chapter six of the doctoral thesis by Dr. Steven Hillebrink regarding the decolonization of the former Netherlands Antilles, and in particular the manner in which the Kingdom Charter ("het Statuut") came about in the early 1950's according to Dr. Hillebrink's academic research?

2. Were you aware of the attached self-government assessment **(II)** carried out by Dr. Carlyle Corbin in 2012?
3. What is your opinion on Dr. Corbin's findings, and in to what extent to you believe they are relevant to finalizing the decolonization process of/for Sint Maarten?
4. Are you aware of the attached exchange **(III)** between Dutch MP André Bosman of the VVD and former Minister Ronald Plasterk during a budget debate in the Dutch Parliament on October 13th, 2016, during which the latter confirmed to the former that article 73 of the UN Charter is still applicable to the Netherlands?
5. What, in your opinion, is the significance of said confirmation by former Minister Plasterk?
6. Are you aware of the attached motion **(IV)** sponsored by MP André Bosman and co-sponsored by MP Ronald van Raak on October 13th, 2016, during that same budget debate, regarding a dialogue between the Government of the Netherlands with the United Nations to finalize the process of decolonization and the right to self-determination together with Aruba, Curaçao, and Sint Maarten?
7. Is it your opinion that that motion is still relevant and can support the finalization of the decolonization process?
8. Were you aware of the attached proposal **(V)** made by Dutch MP Andre Bosman on January 15th, 2019, to change the Kingdom Charter?
9. What is your opinion of Mr. Bosman's proposal, and can you provide the Parliament with this opinion in writing at your earliest convenience?
10. Were you aware of the attached "written statement **(VI)** of the Kingdom of the Netherlands" to the International Court of Justice (ICJ) regarding the "LEGAL CONSEQUENCES OF THE SEPARATION OF THE CHAGOS ARCHIPELAGO FROM MAURITIUS IN 1965"?
11. Were you aware of the attached advisory opinion **(VII)** of the ICJ entitled "LEGAL CONSEQUENCES OF THE SEPARATION OF THE CHAGOS ARCHIPELAGO FROM MAURITIUS IN 1965"?
12. Were you aware of the attached questions **(VIII)** sent to State Secretary Knops by MP André Bosman on August 19th, 2019 regarding the decolonization process of the former Netherlands Antilles, and the attached answers from State Secretary Knops to said questions?
13. What is your opinion on these questions and answers, and can you provide this opinion to the Parliament in writing at your earliest convenience?
14. Can you specifically provide your opinion on State Secretary Knops' statements in answers number 9 and 10 regarding the applicability of article 73 of the UN Charter, which statements contradict the statement by his predecessor Minister Plasterk on October 13th, 2016?
15. Are you aware of the attached statements **(IX)** made by MP André Bosman in the Dutch Parliament on October 8th, 2019?
16. What is your opinion on these statements?
17. Are you aware of the attached media statements **(X)** made by MP Andre Bosman in "Antilliaans Dagblad" of April 8th, 2020?
18. What is your opinion on Mr. Bosman's statement about ("the end of") "het Statuut"?
19. During a debate with the Dutch Parliament on May 20th, 2020, State Secretary Knops stated that a letter was received from the Government of Sint Maarten a week earlier confirming its participation

in a working group about the responsibilities within the Dutch Kingdom. Can you confirm that this letter was sent by the Government of Sint Maarten, and can you please provide the Parliament with both the letter received from State Secretary Knops and the response by the Government of Sint Maarten?

20. Based on the information provided, can you indicate what your views are on (the process of) finalizing the decolonization of the Dutch Caribbean islands and Sint Maarten in particular, as well as the position of the largest Dutch coalition partner, the VVD on this matter?

I look forward to your cooperation in receiving the answers to the above questions in preparation to a public meeting on the matter.

Respectfully submitted,

Sincerely,



Grisha S. Heyliger-Marten
Faction Leader UP faction

Attachments: 10 (ten)



6 | Characterization of the Kingdom Order Under International Law

Between 1951 and 1955 the UN discussed the relationship between the Netherlands and its Caribbean territories in some detail, and a number of authors have written about the Kingdom Charter in English, French, and German, for which reasons the formal aspects of the relationship are well known among the experts on overseas territories and autonomy regimes.¹ Nonetheless, the Kingdom of the Netherlands is categorized in many different ways in the foreign literature. Three main strands of reasoning are prevalent, namely that the Caribbean Countries are integral parts of the Kingdom, associated with the Netherlands or non-self-governing. I will discuss these views, and the UN debate of the 1950s, and try to determine how the Kingdom could be characterized under international law on the basis of the conclusions drawn in the previous Chapters.

6.1 INTEGRAL PART OF THE KINGDOM

There is a number of writers on international law who explicitly or implicitly consider the relations of the Netherlands Antilles and Aruba with the Netherlands as a form of integration, and categorise the Kingdom as a federal, or even as a unitary state.² None of these sources really explain why the Caribbean Countries should be seen as integrated into the Netherlands, although the most convincing element for most writers seem to be the federal traits of the Charter.

Most of these authors base their opinion on the text of the Kingdom Charter, and on an article by *Van Panhuys* of 1958. This article compared the King-

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- 1 The Explanatory Memorandum to the Kingdom Charter, which was submitted to the General Assembly in 1955 by the Netherlands government (UN Doc. A/AC.35/L.206) continues to be an important source for many writers, as well as *Van Panhuys*, who is cited by virtually all authors writing in English on the Kingdom, sometimes as their only source.
 - 2 Rapaport, Muteba & Therattil 1971, p. 70-71, De Smith 1970, p. 32, and Hannum 1996, p. 347 et seq. Others consider the Caribbean Countries as incorporated into the metropolis in the same way as Alaska or Hawaii, or the French DOMs, but these writers must be considered simply misinformed. *See for instance* Crawford 2006, p. 623, Ince 1974, p. 43, Lopes Reyes 1996, p. 74, and Quane 1998, p. 553, note 82. Pakaukau 2004, p. 305 even speaks of 'The literal absorption (rather than decolonization) of several territories by colonizing powers in the 1950s – e.g., Surinam by the Netherlands'.

dom structure to federal states, and to 'colonies of other States on their way to self-government'.³ *Van Panhuys* considers that 'as to their standing under municipal public law, it may be concluded (...) that Surinam and the Netherlands Antilles have been incorporated as autonomous units – on a basis of equality with the Netherlands – into a *ensemble fédératif*'.⁴

Van Panhuys' article has for a long time been the only legal analysis of the Kingdom order of some substance in English, and it has exercised a great deal of influence on the international opinion regarding the Kingdom. Foreign readers of *Van Panhuys* may not be aware that some of the Charter's elements which are most indicative of the integration of the Caribbean Countries into the Kingdom, have rarely been used, and some not at all. The federal elements of the Charter are furthermore mainly constitutional make-up, as I explained *above*.

The Kingdom is clearly not similar to the internationally accepted examples of integration described in Chapter 3. The Kingdom Charter does not make it impossible to realize a form of integration of the three Countries into a single community by jointly creating additional Kingdom affairs, or by creating common legislation and policies based on Article 36 of the Charter, but this possibility has only rarely been used. As a result, the three Countries have their own legislation and pursue their own policies on virtually all subjects, and the Kingdom remains very far removed from any notion an integrated state.

This is not in debate in the Kingdom. There is a long history of Dutch and Caribbean proposals to integrate the Dutch Caribbean islands into the Netherlands, but these proposals have never been received with much enthusiasm by the governments of the Countries, and they are of course in themselves evidence that the islands are not an integral part of the Netherlands.

In recent years, the idea of full integration has gained more popularity, especially with regard to the Netherlands Antilles. It is usually based on the idea that the grave social and economic problems of that island are caused by the autonomy of the Netherlands Antilles, or at least that the autonomy is blocking a solution to the problems.⁵

3 Van Panhuys 1958, p. 22. This sentence should not be interpreted to mean that the author considers Surinam and the Netherlands as colonies, or as not possessing self-government. *Van Panhuys* considers them to be 'self-governing former colonies' (p. 30).

4 Van Panhuys 1958, p. 21. Near the end of his article, *Van Panhuys* calls Surinam and the Netherlands Antilles 'freely associated with the metropolitan country'. It must be remembered, however, that GA Res. 742 (VIII) of 1953, which was the most recent UN instrument on the status of (former) colonial territories at the time when *Van Panhuys* wrote his article, still referred to integrated territories as 'Free Association of a Territory on Equal Basis with the Metropolitan or other country as an Integral Part of That Country or any Other Form'. It seems likely that *Van Panhuys* was thinking of this category.

5 See for instance the Winter 2005 issue of the journal *Christen-Democratische Verkenningen*, which was dedicated to the Antilles and Aruba, and which contained a special section on the integration option. See also Broek & Wijenberg 2005.

The idea of integration has cropped up in many publications in the Netherlands, and also on Curaçao, especially during the rise to power of the radical Curaçaoan labour party *FOL*, and the short-lived Antillean cabinet of M. Louisa-Godett (2003-2004). During this time, public opinion in the Netherlands became convinced that Antillean politicians were not able to provide good government for the islands, and that the Netherlands should take charge, also because the problems of Curaçao were spilling over into the Netherlands.⁶ Some Dutch politicians proposed the full integration of the Netherlands Antilles into the Netherlands, as a province or a municipality, usually as part of a 'take-it-or-leave-it' offer, where 'leave it' clearly meant independence.⁷

Recent statements and publications by individual members of the Dutch political parties *CDA*, *PvdA*, *SP* and *LPF*⁸ and a recent debate in the Senate suggests that it can no longer be simply assumed that a majority in the *Staten-Generaal* would instantly reject the integration of the Netherlands Antilles into the Netherlands.⁹ The policies of the Dutch political parties are not very developed on this subject, and there has been little public debate on it. It might well be that The Hague would balk at the costs of integrating the islands fully into the Netherlands, or recoil from the negative economic effects for some of the islands.¹⁰ There does currently seem to be a consensus in the

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- 6 *De Volkskrant* in an editorial of 11 March 2005 concluded that some form of integration with the Netherlands was the best option for all of the islands of the Antilles. Another newspaper, *NRC Handelsblad*, in a special supplement of 15 November 2003 presented the future of the Netherlands Antilles as a choice between independence or integration.
- 7 Fortuyn's column on this subject (see Fortuyn 2002) was emblematic of this view. According to Fortuyn, the autonomy of the Antilles should be abolished, and a small army of Dutch civil servants should be flown in to set things straight. 'Of course, we will not talk or negotiate this with the corrupt political elite of the Antilles, no, it is simply "take it or leave it"'. See also the article by CDA-members Pikeur and Lamers of 2005. Herben (*LPF*) defended the idea of integration in the *NRC Handelsblad* of 15 November 2003 and *HP* of 12 September 2003 (his *LPF*-colleague Eerdman's proposal to abandon the Antilles was part of Eerdman's application for membership of the new political movement of Wilders, see *de Volkskrant* of 8 January 2005). Van Bommel (*SP*) defended the idea of integration in the *Amigoe* of 6 November 2004 (co-authored by J. Wijenberg) and proposed that this option should be offered in a well-prepared referendum to the populations. Schrijer and Dijsselbloem (*PvdA*) proposed that a referendum should be held on the Antilles in which only two choices would be offered: integration or independence. According to these two politicians the Netherlands should respect the choice of the population, which would 'choose for integration *en masse*' (*de Volkskrant* of 6 July 2004).
- 8 These statements, some of which were cited above, mostly derive from individual party members. Official party policies are usually unclear on this point, or simply non-existent.
- 9 In a debate in the Senate on 14 February 2006, many Senators appeared to have a preference for closer ties with the Netherlands Antilles and Aruba, perhaps even in the form of full integration of the islands (at least the smaller ones) into the Netherlands. See *Handelingen I* 2005/06, p. 18-850 et seq.
- 10 See Smeehuijzen & Ziekenoppasser 2005 for a rough estimate of the costs (to the Dutch treasury and the economy of the islands) of introducing Dutch levels of social security in the Netherlands Antilles and Aruba. The authors admit that a reliable estimate cannot yet be made for lack of research into the costs of all of the different aspects and possible side-

Staten-Generaal that the Kingdom should play a stronger role in the supervision of the internal affairs of the Netherlands Antilles (and possibly also Aruba).¹¹

Antillean and Aruban politicians usually do not react to the Dutch proposals.¹² There are currently no political parties represented in the *Staten* or in the island councils that support the full integration of Aruba or the Netherlands Antilles into the Netherlands. The words '*provincie*' and '*gemeente*' (municipality) are more or less taboo in Caribbean politics, and such a status is considered shameful and colonial by many people, at least on Curaçao, Aruba and St. Maarten. Politicians on the smaller islands do not seem to oppose a larger role for the Netherlands. Opinion polls show that the population is not opposed *per se* to more Dutch control over the local governments, even though the status of '*provincie*' or '*gemeente*' remains unpopular.¹³

In the referenda of 2000, 2004 and 2005, the option of full integration was only on the ballot on Curaçao and St. Eustatius, where it received 25 and 2 percent of the vote respectively. The options of 'direct link with Holland' and 'Kingdom island' that carried the vote on Bonaire and Saba respectively could perhaps be seen as a form of integration, although the precise ramifications of these status options were uncertain at the time the referenda were held.¹⁴

6.1.1 Applying the Criteria of Resolution 1541

The Netherlands Antilles and Aruba are clearly not integrated into the Netherlands, but they are an integral part of the Kingdom. On that level one could apply Principles VIII and IX of Resolution 1541, which contain the criteria for a form of integration that constitutes a full measure of self-government. Some of the writers on international law which characterize the Kingdom as a form

effects of full integration.

- 11 See for instance the motions adopted by the Senate and by the Lower House in February 2006 (*Kamerstukken I* 2005/06, 30 300 IV, B and nr. 32),
- 12 Exceptionally, statements by CDA member of the Lower House Van der Knaap in favour of integration (see *de Volkskrant* of 25 June 2002 and *Algemeen Dagblad* of 12 June 2002) inspired a dismissive response by Antillean premier Ys. Member of the Lower House De Graaf (D66) then asked the state secretary for Kingdom affairs (De Vries, VVD) to react to Van der Knaap's proposals. De Vries avoided the question whether integration would be a good idea, but stated that he did not expect much support for this option in the Netherlands Antilles (*Aanhangsel Handelingen II* 2001/02, nr. 2010211680). When De Graaf himself became minister for Kingdom Affairs shortly thereafter, he stated that integration was 'relatively unthinkable' (*NRC Handelsblad* of 4 March 2004).
- 13 See Oostindie & Verdon 1998. An opinion poll on Curaçao in March of 2005 indicated that a majority of the voters was still in favour of Dutch supervision over the public finances and law enforcement of the island.
- 14 This means that the requirements for integration of Resolution 1541 were not fully met, because the population was not (and could not be) accurately informed about the consequences of its choice.

of integration also conclude that it does not comply with Resolution 1541.¹⁵ It should be remembered that integration has always been considered a suspicious form of self-government at the UN. Since 1960 only one case of integration has been accepted as 'a full measure of self-government'.¹⁶

Resolution 1541 does not demand that an integrated territory should be completely assimilated or incorporated into the mother country. Principle VIII merely demands that the integration should be based on 'complete equality' between the territory and the mother country, and should create 'equal status and rights of citizenship and equal guarantees of fundamental rights and freedoms without any distinction or discrimination' for the inhabitants.

It would be hard to argue that this is the case within the Kingdom. 'Complete equality' between the three Countries was not envisaged, nor realized in 1954. The citizens of the Kingdom are not mentioned in the Charter,¹⁷ which does not contain a catalogue of fundamental rights,¹⁸ but attributes the realization of these rights to the Countries.

In one respect the citizens of the Kingdom have equal status, because they are all Dutch nationals. The right of access and abode in the Countries is regulated by the Countries themselves. The Charter does not guarantee the freedom of movement of persons within the Kingdom. The Netherlands Antilles and Aruba have created regulations that limit the right of abode and

15 De Smith 1970, and Hannum 1996. One source considers that this does not create legal problems as long as the population is happy with its current status (Rapaport, Muteba & Therattil 1971).

16 The Cocos (Keeling) Islands in 1984, see Chapter 3.

17 Articles 31 and 32 mention the inhabitants of the Netherlands Antilles and Aruba, and provide that they cannot be forced to serve in the armed forces of the Kingdom, except on the basis of a regulation adopted by their own Country legislator.

18 An exception is the right to vote in elections, but even this right is not realized 'without any distinction or discrimination' between the citizens of the Countries. The inhabitants of the Country in Europe have the right to vote for the Lower House, and indirectly elect the Senate of the *Staten-Generaal*, which is the parliament of the Country of the Netherlands, but which also functions as the parliament of the Kingdom. Inhabitants of the Caribbean Countries only have the right to vote for the Lower House if they have previously lived in the European part of the Kingdom for at least 10 years (Article B 1 of the *Kieswet*, see also the decision of the Council of State of 21 November 2006 in cases 200607567/1 and 200607800/1 which upheld this rule). The same rule currently applies in the elections for the European parliament, but this rule was challenged in 2004 before the *Raad van State* by two Arubans (Eman & Sevinger, see ABRs 13 July 2004, *Jb* 2004, 308). The Administrative Jurisdiction Division of the *Raad van State* decided to request a preliminary ruling by the Court of Justice of the EC on the meaning of European citizenship in relation to the right to vote for the European parliament (case C-300/04). The Court answered that member states were not obligated to accord the right to vote in the European elections to the inhabitants of OCTs, but considered the Dutch election law in breach of the principle of equality, because it differentiated between Dutch citizens abroad on the one hand, and in the OCTs on the other hand (Decision of 12 September 2006). The *Raad van State* decided that it was up to the Dutch legislator to somehow rectify this situation (judgement of 21 November 2006 in cases 200404446/1 en 200404450/1).

the right to work for Dutch nationals who do not originate from that Country, although these restrictions have been eased in recent years, due to political pressure from the Netherlands and economic advice from organizations such as the IMF. The Netherlands has not put restrictions on the right of abode for Antilleans and Arubans, but such measures have been contemplated on several occasions since the early 1970s, and were recently requested by the Lower House.¹⁹

Equal rights of citizenship and equal protection of fundamental rights would be very hard to realize within a state where almost all government affairs are attributed to three autonomous governments, and which functions almost entirely as three separate legal orders. The three Countries have, moreover, not made this goal a top priority, which has resulted in the current situation where human rights are guaranteed differently in the constitutions of the Countries, and interpreted differently in practice, and where the inhabitants are entitled to very different levels of government protection and services.²⁰ To list all of the differences would require a separate study. It would perhaps even be easier to list the areas in which the three Countries treat their inhabitants in the *same* way, which sometimes happens when a Caribbean Country copies a European Dutch model or adopts norms and standards that the Netherlands applies in a certain area.

Resolution 1541 also sets criteria for the procedure by which a territory may choose to become integrated with an independent state. Principle IX states that the population should be politically developed and should have experience with self-government, and that it should choose for integration through 'informed and democratic processes', and 'with full knowledge of the change in their status'. The process which led to the adoption of the Kingdom Charter can hardly be considered to conform to these criteria. Self-government was introduced in the Netherlands Antilles in 1951, when the negotiations on the Charter were already underway. There was therefore little experience with self-government. Whether the population was aware of the decisions being made and of the consequences these would have for their future, would probably require more historical research, but it seems very unlikely that this was the case. **In any event, the Charter was adopted without a referendum,** and it was not a major subject in any election in the Netherlands Antilles. If, therefore, the Kingdom is seen as a form of integration, it was not arrived at through a proper procedure.

19 *Kamerstukken II* 2004/05, 29 800 VI, nr. 79. At the time of writing of this study, the government was preparing a bill to introduce in parliament. See Oostindie & Klinkers 2001c, p. 340 et seq. for an overview of previous discussions on this subject.

20 During the discussion of the Netherlands report on the ICESCR in 1998, one member of the Committee noted with some concern that the level of protection of economic, social and cultural rights appeared to be much lower in the Netherlands Antilles than in the Netherlands. The representatives of the Netherlands responded that this was the responsibility of the Country governments (E/C.12/1998/SR.15).

Dutch politics seems to become increasingly charmed of the idea of full integration of the islands into the Country of the Netherlands, but the population of the islands – at least of the larger ones – do not appear to support the idea of full integration into the Netherlands. This can only be a tentative conclusion since the Netherlands never used to be prepared to discuss this option, for which reason many Antilleans and Arubans probably always assumed that the Netherlands would not agree to realize it anyway. The perception that most people in the Netherlands would prefer the islands to become independent is also an obvious influence on the opinion of Antilleans and Arubans with regard to the closeness of their ties with the Netherlands.

Summing up, it can be concluded that the Netherlands Antilles and Aruba are not integrated with the Netherlands in the sense of Resolution 1541. They are an integral part of the Kingdom, but this is probably not a meaningful form of integration with regard to Resolution 1541.

6.2 ASSOCIATED WITH THE NETHERLANDS

The Kingdom relations clearly bear some resemblance to the West Indies Associated States of the UK, which were intended by the UK to comply with the UN criteria for free association (*see* Chapter 3). The Netherlands government in the 1960s also considered the Kingdom to be a form of free association. Shortly after Resolution 1541 had been adopted, the Dutch ministry of Foreign Affairs explained that Surinam and the Netherlands Antilles had entered into a free association with the Netherlands based on Principle VI of 1541.²¹

However, it was probably clear to the Netherlands government that some of the essential characteristics of the Kingdom relations did not conform to the UN criteria. The government has tried a number of times to transform the relations into a free association that would comply with the international criteria, and – probably more importantly – which would make clear that the Netherlands was no longer responsible for the internal affairs of the Caribbean Countries.

The first time this happened, it was sparked by Surinam's wish to have a more independent role in international affairs, which was uttered at a Round Table Conference in 1961. Surinam wished to create a 'basic Charter' that would only affirm the Queen as head of state, and would require the Kingdom to guarantee the defence, legal certainty and good governance in the Countries, but would leave Surinam free to pursue its own future in all other matters.

21 BuZa 1961, p. 158.

At the Conference the Netherlands rejected this proposition as impossible and internally contradictory.²²

The Netherlands government thereafter quickly changed its opinion. It started to develop a plan for a 'basic Charter' that would make it possible for the Caribbean Countries to handle their foreign affairs themselves, while maintaining constitutional ties with the Netherlands. It would be up to Surinam and the Netherlands Antilles to decide when this new phase in the relations would commence. The plan also specified that it would be possible for Surinam and the Netherlands to voluntarily proceed to a third phase, namely independence. The plan, which might have led to a form of free association between the Netherlands and Surinam and/or the Netherlands Antilles, was not offered to the Caribbean Countries after Surinam seemed to have lost interest in the idea.²³

In 1973, a Dutch proposal for a 'light' Charter that would have substantially decreased the Kingdom's reserved powers, and which would have created a possibility for unilateral termination, was rejected by Surinam and the Netherlands Antilles. The Netherlands saw the proposal as an intermediate phase towards independence, and a way of freeing the Netherlands government from its unwanted role as guarantor of the Caribbean governments. The Caribbean negotiators seem to have feared that the new Charter would authorize the Netherlands to leave the Caribbean Countries to fend for themselves, while it was clear that the overseas populations were not keen on this at all.²⁴

More recently, the Netherlands government seems to have offered the status of 'free association with the Kingdom' to Aruba, as an alternative to independence or Country status, at various points during the 1980s and 1990s.²⁵ Aruba refused these offers for reasons unknown. The proposals were not discussed publicly.

The Dutch government therefore must have viewed free association as substantially different from Country status under the Charter during this period. But in the Netherlands Antilles, the status of Country within the Kingdom was recently considered to be a form of free association by the island

22 See Meel 1999, p. 325-400, and Oostindie & Klinkers 2001b, p. 49-62. Minister for Foreign Affairs Luns stated at the outset that if Surinam wanted a more independent role in foreign affairs, the Netherlands would require a 'radical solution', meaning the full independence of Surinam. It was concluded that the existing potential of the Charter would be maximized, for instance by establishing a Bureau for Foreign Affairs in Suriname that would operate under the control of the premier of Surinam. Such a Bureau was created for the Netherlands Antilles as well, in 1973.

23 Oostindie & Klinkers 2001b, p. 59-60.

24 The Dutch proposal would have deleted Articles 43, 50 and 51 from the Charter. See Oostindie & Klinkers 2001b, p. 111-2, Bos 1976, p. 137, and Kapteyn 1982, p. 24.

25 See 'Rapport Gemengde commissie toekomst Antillen' (1982), p. 65 et seq., Janus 1993, p. 86, and Munneke 1990. The discussions between Aruba and the Netherlands on a possible 'commonwealth' between the Kingdom and Aruba also tended towards a form of free association.

governments of Curaçao and St. Maarten, and also by the Antillean central government.²⁶ Proposals to include the option of free association on the ballot of the referendum in St. Maarten (2000) and Curaçao (2005) were rejected by the local authorities, one of the reasons apparently being that Country status would be the same as free association.

Quite a number of legal writers also see the Kingdom as a form of association. None of them, however, explicitly consider it to comply with Resolution 1541.²⁷ *Clark*, writing about the concept of free association, considered it arguable that the GA in 1955 considered the Kingdom relations as a form of association.²⁸ At the same time, *Clark* thinks the Kingdom Charter does not comply fully with Resolution 1541, and he treats the Dutch case as an example where the GA apparently applied lower standards.²⁹

Kapteyn also came to the conclusion that the autonomy of the Netherlands Antilles was not up to the standards of Resolution 1541, at least not on paper. The author points to the reserved powers of the Kingdom. Because of the strong position of the Dutch ministers in the Kingdom government and of the Dutch parliament in the procedure for creating Kingdom legislation, *Kapteyn* wonders whether the Kingdom Charter does not create 'a position of subordination' in the sense of Principle V of 1541. The fact that certain changes to the *Staatsregeling* (constitution) of the Netherlands Antilles need the approval of the Kingdom government means that the Caribbean Countries are not free to determine their internal constitution without outside interference.³⁰

The elements listed by *Kapteyn* are indeed inconsistent with Principle VII of Resolution 1541, seen in the light of the UN debates on the Cook Islands

26 See the Report of the Antillean committee of preparation for the Round Table Conference of 2005 ('*Toekomst in zicht*'), dated 12 August 2005, p. 8. See also the legal advice of the directorate for Legislation of the Netherlands Antilles to the prime minister, made public around 6 September 2005. The joint Dutch-Antillean Jesurun Committee seemed to start from the assumption that the status of the Caribbean Countries will have to comply with Principle VII of Resolution 1541 (free association), see p. 42 of the report '*Nu kan het... nu moet het!*' of 8 October 2004.

27 *Broderick*, writing about the British West Indies Associated States, found the example of the Kingdom of the Netherlands 'most instructive' as it was 'indicative of a satisfactory solution reached by a country with a similar problem to the United Kingdom' (*Broderick* 1968, p. 400). *Hintjens* considers that 'the whole arrangement resembles a form of free association' (*Hintjens* 1997, p. 538). Other writers who see the Kingdom as a form of association are *Logemann* 1955, p. 51, *Janus* 1993, p. 36, *Van Rijn* 1999, p. 57, *Tillema* 1989, and *Blaustein/Raworth* 2001, p. 1. See also the paragraph on Constitutional Association in the previous Chapter. During the discussion of the second periodic report of the Netherlands to the HRC, Mr. Wilms, representative of the Netherlands (Aruba) called the relationship an 'association'.

28 Some representatives did indeed use the term 'association', but in 1955, this concept had not yet been developed very clearly at the UN and was also sometimes used to refer to forms of integration with the mother country.

29 *Clark* 1980, p. 48.

30 *Kapteyn* 1982, p. 19-22.

and the UK West Indies Associated States. The practice of the Charter has revealed the existence of a convention that the Netherlands always seeks consensus with the Caribbean Countries before using its powers in the Caribbean, but this does not mean that the Netherlands has relinquished its reserved powers.

I think the Kingdom order partly satisfies the criteria for free association. The practice of the Kingdom is to a large extent in line with Principle VII of Resolution 1541. A number of powers attributed to the Kingdom organs by the Charter do not, however, conform to the UN standards. The reserved powers of the Kingdom government with respect to the legislation and administration of the Caribbean Countries' internal affairs, its authority to appoint a number of key officials in the Caribbean Countries, its power of veto over certain elements of the constitutions of the Caribbean Countries, and its power to legislate for the Caribbean Countries in certain affairs without their consent are not in line with the concept of free association as defined by the UN. Also, the lack of express popular approval of the Country status of the Netherlands Antilles and Aruba makes the Kingdom Charter vulnerable to criticism if it were presented as a form of free association.

If the Kingdom relations were really transformed into a free association, the Netherlands Antilles and Aruba would obtain more freedom in foreign affairs and full control over their own constitution, if they should aspire to achieve those things. Free association does not necessarily mean loss of Dutch nationality, but the people of the islands should realize that free association has been used by metropolitan states to distance themselves from territories for which they no longer want to be responsible, and that a choice for free association often leads to a status which closely resembles full independence.

Also, in order for the Kingdom of the Netherlands to be considered as a form of free association, the Netherlands Antilles and Aruba will have to be recognized internationally as self-governing.³¹ The cases of the Cook Islands and the other examples of association discussed in Chapter 3 even show that international recognition of freely associated status is not enough to guarantee that the territories will be able to function independently in international affairs, but that such recognition will have to be required almost on a case-by-case basis, in which the assistance of the principal state is indispensable.

6.3 ANOTHER FORM OF FULL SELF-GOVERNMENT?

On the basis of the criteria for integration and free association of Resolution 1541, it is not possible to conclude that the Netherlands Antilles and Aruba

31 *Macdonald* considers that for non-state subjects such as associated territories *Crawford's* view applies that 'Recognition, while in principle declaratory, may thus be of great importance in particular cases' (*Macdonald* 1981, p. 239 cites *Crawford* 1979, p. 74).

have achieved a full measure of self-government. This could mean that they are still 'arbitrarily subordinated' in the sense of Principle V of 1541, but it is also possible that they have achieved another form of full self-government. This question was discussed at some length at the UN during 1951 and 1955, and since the GA has the final authority to decide when a territory has achieved a full measure of self-government, it is necessary to take a closer look at how the GA viewed the Kingdom Charter.

6.3.1 The Netherlands Antilles as a NSGT between 1946 and 1951

In 1946, the Netherlands Antilles (at that time still including Aruba³²) was listed as a Non-Self-Governing Territory (NSGT) in GA Resolution 66 (I). The Netherlands had informed the Secretary-General that it administered three Non-Self-Governing Territories: the Netherlands East Indies (Indonesia), Surinam and Curaçao (as the Netherlands Antilles was then still called).³³ This is an important observation, because the application of Chapter XI has been virtually limited by the GA to those territories that were voluntarily listed by the Administering powers in 1946.³⁴

In 1946, Surinam and the Netherlands Antilles were governed similarly to the Crown Colonies of the British empire.³⁵ With respect to the 'internal affairs' of the territories, the Governors could make laws together with the *Staten* which consisted of 10 members elected on the basis of limited suffrage, and 5 members appointed by the Governor. The Netherlands legislator had a principally unlimited right to legislate for the territories 'should the need arise' (*'zoodra de behoefte daaraan blijkt te bestaan'*).³⁶ The budget of the terri-

32 The position of Aruba is slightly different from that of the Netherlands Antilles. It was part of the colony of Curaçao in 1946, but it became a separate Country within the Kingdom in 1986. This change in status probably does not affect Aruba's position with respect to the UN Charter. Leaving aside the reluctance of international law to recognize the breaking up of colonies before independence, changes in the administrative divisions have usually been treated as immaterial to the application of Chapter XI of the Charter. What is important for the application of Chapter XI to Aruba, is the measure of self-government it possesses in relation to the metropolitan government. The GA has not expressed itself on the present status of Aruba, but seeing that this status is similar to the constitutional position of Surinam and the Netherlands Antilles at the time when these territories were discussed by the GA, the opinion of the GA on the Netherlands Antilles and Surinam can probably be applied analogously to Aruba.

33 Some member states challenged the competence of the Netherlands to transmit information on the Netherlands East Indies because that territory had declared its independence in 1946. The Netherlands rejected this challenge by stating that it felt obligated to provide information as long as it exercised sovereignty over the archipelago.

34 The only exception is Oman, which was not listed in 1946, but was discussed at the UN as if it were a NSGT, and perhaps also Algeria. See the previous Chapter.

35 Logemann 1955, p. 48-9.

36 Article 63 of the Constitution of 1938.

teritories needed the approval of the Crown. In case of budget deficits (which were common), the budget was determined by a Dutch act of parliament, which gave rise to considerable interference by the Netherlands parliament with the affairs of the territories.³⁷ All of the territory's legislation could be suspended by the Crown and annulled by the Dutch legislator if it conflicted with the Dutch Constitution, a Dutch act of parliament, or with public interest ('*algemeen belang*').³⁸ If the Governor and the Staten could not reach agreement on a legislative issue, the Netherlands government could settle the issue by a regulation ('*Algemene maatregel van bestuur*').³⁹ The executive powers of the Netherlands government with respect to Surinam and the Netherlands Antilles were no longer unlimited, but existed only when the Dutch Constitution or a Dutch act of parliament provided for them. The Netherlands government was, however, authorized to give instructions to the Governors.

In 1948, universal suffrage was introduced in Surinam and the Netherlands Antilles, and the autonomy of the territories was strengthened. Most importantly, the Netherlands legislator could no longer intervene in the budgets of the territories if they were not balanced.⁴⁰ After the Dutch Constitution had been amended to allow for a new relation between the Netherlands and its overseas territories, the Interim Orders of Government ('*Interimregelingen*') of 1950 (Surinam) and 1951 (Netherlands Antilles) provisionally filled in this new relation.⁴¹ The Interim Orders listed the areas of government for which the Netherlands remained responsible, and established the principle that the Netherlands Antilles and Surinam were autonomous in all other affairs. The executive powers in the territories were entrusted to the governments of the countries, which existed of the Governor and a council of ministers. The ministers became responsible to the *Staten*.

6.3.2 The Netherlands Decides to Stop Transmitting Information under Article 73 *e*

As was described in Chapter 2, Article 73 creates an obligation for the Administering State to supply annually to the Secretary-General 'statistical and other information of a technical nature relating to economic, social, and educational conditions in the territories'. In 1951, the Netherlands government decided

37 See De Gaay Fortman 1947, p. 30. In 1929, Curaçao managed to present a balanced budget. The Lower House of the Netherlands was not prepared to accept that it could no longer discuss the situation in the colony, which was therefore discussed during the debate on the budget for the Ministry of Colonies.

38 Article 64 of the Constitution of 1938.

39 See De Gaay Fortman 1947, p. 37 et seq. and Van Rijn 1999, p. 30 et seq.

40 Oostindie & Klinkers 2001a, p. 105-6, Van Helsdingen 1956, p. 7 et seq. and Van Helsdingen 1957, p. 65-8.

41 See Van Helsdingen 1956, p. 14 for a discussion of the Interim Orders of Government.

that the transmission of such information on Surinam and the Netherlands Antilles was no longer necessary because these territories had become 'quite autonomous as regards domestic affairs', as the Dutch government claimed in an 'Explanatory Note' sent to the Secretary-General. The new constitutional order did not allow the Netherlands government to collect information on the subjects enumerated in Art. 73 *e*, as these subjects now belonged to the internal affairs of Surinam and the Netherlands Antilles.⁴²

It appears from the records of the Council of Ministers of the Netherlands that there existed a firm conviction that the Netherlands could present a strong case, because the Netherlands would really not be able to transmit the information of Article 73 *e* due to the autonomy of the Netherlands Antilles and Surinam.⁴³ Besides, in 1948 the UK, the US and France had unilaterally decided to stop transmitting information on some of their NSGTs as well, which decisions had only met with half-hearted criticism by a few states. But since then, the mood had already changed considerably at the UN, and perhaps the Netherlands should have realized that the anti-colonial members of the UN might try to seize the opportunity and make an example of the Netherlands, a small and at that time unpopular state, by applying Chapter XI of the Charter strictly to the Netherlands Antilles and Surinam.

Before informing the Secretary-General, the Netherlands government had asked the opinion of the governments and the *Staten* of Surinam and the Netherlands Antilles, which agreed that the transmission of information by the Netherlands government was incompatible with the new status of the territories, and that the territories would not co-operate with the gathering and transmitting of information, as this would constitute an infringement on their autonomy. Curiously, the Netherlands seems to have informed the Secretary-General of its decision before it had received the answers of these overseas organs.⁴⁴

The Netherlands government expected that some states would not readily accept the Dutch decision.⁴⁵ The participation of the Netherlands Antilles and Surinam themselves in the defence of the Dutch position was therefore expected to be very important. If the Netherlands could show that the overseas countries considered they had achieved a full measure of self-government and wholeheartedly supported the cessation of transmission of information, it

42 Explanatory Note by the Government of the Netherlands of 31 August 1951, UN Doc. A/AC 35/L 55, reprinted in BuZa 1952a, p. 40.

43 See Oostindie & Klinkers 2001a, p. 303.

44 The *Staten* of Surinam expressed their surprise at this turn of events, and wondered why its opinion had been asked at all. See the secret letter of Governor Klaasesz to Dutch minister Peters of Union Affairs and Overseas Territories of 5 July 1951, cited in Oostindie & Klinkers 2001a, p. 302, note 19.

45 Spits 1952b, p. 239-40.

would become much more difficult for states to oppose it.⁴⁶ For the overseas countries to make a convincing case, it would be important that they could show that they had freely accepted the new legal order, or even better, that they had been granted the freedom to choose between independence and their present status.⁴⁷ However, the Netherlands government was not prepared to even discuss the independence of the territories, and feared that the Netherlands Antilles and Surinam would use this situation as leverage in the negotiations on the new structure of the Kingdom, which were conducted at that time.⁴⁸

Another political factor which complicated the Dutch position was the so-called Monroe doctrine,⁴⁹ which had been reaffirmed at the Inter-American Conference of 1948, at which the Organization of American States was established.⁵⁰ The Conference declared that 'the emancipation of America will not be complete so long as there remain on the continent peoples and regions subject to a colonial regime, or territories occupied by non-American countries'.⁵¹

46 See Oostindie & Klinkers 2001a, p. 301-2 (note 19) for a discussion of the role of the representatives of Surinam and the Netherlands Antilles (Pos and Debrot).

47 Logemann 1955, p. 51.

48 See the code telegram of Netherlands Antilles Governor Struycken, cited in Oostindie & Klinkers 2001a, p. 301-2, note 20. In 1952, the Caribbean governments would indeed exploit this situation during the negotiations on the Kingdom Charter, see Chapter 4, in the paragraph on the right to self-determination.

49 This doctrine was named after US President James Monroe, who stated in 1823 that the United States would regard any attempt by European powers to extend their system to any part of the Western hemisphere as dangerous to the peace and safety of the US. The statement was a warning to the colonial powers of Western Europe, which were at that time rapidly expanding their empires in Africa and Asia, not to attempt to conquer new territories in America. See generally Martin 1978.

50 Kasteel 1956, p. 179, and Van Aller 1994, p. 272.

51 Reproduced in BuZa 1952a, p. 95. At the Conference, Venezuela unofficially interpreted the Monroe doctrine to mean that Aruba, Bonaire and Curaçao really belonged to Venezuela. Reported by the Surinam observer at the Conference, Mr. L.A.H. Lichtveld, see Kasteel 1956, p. 180 and *Keesings Historisch Archief*, No. 891, 7671 A. The Netherlands representative at the UN reported in 1951 that the Latin American states would be guided by this doctrine when considering the case of the Netherlands Antilles and Surinam, BuZa 1952a, p. 24. This expectation was partly inspired by the fact that the Cuban representative cited the first four paragraphs of Resolution XXXIII in the Fourth Committee of the Sixth GA.

6.3.3 Preliminary UN debates on Surinam and the Netherlands Antilles⁵²

In line with GA Res. 448 (V) the Secretary-General in 1951 referred the communication of the Netherlands government to the 'Special Committee on Information transmitted under Article 73 *e* of the Charter'. It soon became clear to the Dutch delegation that a majority among the non-Administering members of the Committee (*i.e.* the Socialist, Latin American, African and Asian states) were not at all inclined to accept the cessation of transmission of information. In the eyes of the Dutch delegation, this attitude sprang from three main reasons. First, a general feeling of distrust towards the Administering States. Second, a lack of understanding of Dutch constitutional law. And third, the fact that the Netherlands government had translated only parts of the Interim Orders of Government, which created suspicion.⁵³ To these reasons might be added that the Netherlands had gained a bad reputation among the non-Administering states because of its attitude in the Indonesian conflict.⁵⁴

The debates in the Special Committee and subsequently in the Fourth Committee of the General Assembly (which deals with issues of decolonization) in 1951 also revealed that a number of states feared that the autonomy granted to the territories might only be of a temporary nature, as the new constitutional structure was laid down in *Interim* Orders. Article II of the Interim Orders increased suspicion among the non-Administering States, as it contained a long list of subjects that remained within the exclusive competence of the Netherlands government. Questions were also raised on the subject of the appointment of the Governors by the Crown, on the powers of the Governors, on the appointment of members of the judiciary, on the relation between the executive and the legislative branch, and on the possibility of reversal of Surinam and Netherlands Antilles legislation by the Netherlands government.⁵⁵

According to the member of the Dutch delegation for Surinam, a number of states had already prepared a sharp draft resolution condemning the Dutch decision, but he convinced them not to submit it.⁵⁶ Instead, the representatives of the non-Administering states argued that consideration of the Netherlands

52 For these debates see generally BuZa 1952a, BuZa 1954b, BuZa 1956a, Gastmann 1964, p. 225-32, Hasan Ahmad 1974, p. 311-30, Paula 1986, Te Beest 1988, Oostindie & Klinkers 2001a, p. 129-32 and the seven contributions by Spits to the journal *Indonesië* listed in the Bibliography.

53 BuZa 1952a, p. 17

54 Cf. Oostindie & Klinkers 2001a, p. 129,

55 See Te Beest 1988 for a discussion of the debates in the Special Committee.

56 Report of Mr. Pos to the Netherlands council of ministers of 29 October 1951, cited in Oostindie & Klinkers 2001b, p. 301, note 19.

communication should be postponed until the constitutional reforms within the Kingdom of the Netherlands had been completed.⁵⁷

In 1953, the issue was discussed at the UN on the basis of a letter by the Netherlands which formed an addition to the Explanatory Note of 1951, and which offered a slightly different legal underpinning of the Netherlands' decision.⁵⁸ The Explanatory Note had claimed primarily that Surinam and the Netherlands Antilles had become fully autonomous with regard to their domestic affairs. The letter of 1953 stressed that the new constitutional relation between the Netherlands and its overseas territories no longer allowed the Netherlands government to collect and transmit the information under Article 73 *e* because this information regarded subjects that were now fully within the autonomous area of Surinam and the Netherlands Antilles. The letter steered away from the subject of the precise extent of the autonomy of the territories, and called attention to the 'constitutional considerations clause' of Article 73 *e*. The Netherlands stated that the factors which should decide whether a full measure of self-government had been achieved should not be applied to this case, as the Dutch cessation of transmission of information was due to constitutional considerations, and not to the achievement of full self-government of the Netherlands Antilles and Surinam. The Netherlands thus tried to separate the obligation under Article 73 *e* from the question of self-government, just as the British government had done in 1949 with respect to Malta.⁵⁹

In the *ad hoc* Committee on Factors the representative of Guatemala suggested a solution to the constitutional obstacles on which the Netherlands based its decision of 1951: the Governors could fulfil the duties of the Netherlands under Article 73 *e*, since they were charged under Article 52 of both Interim Orders with supervising the observance and implementation of treaties and agreements with international organisations in Surinam and the Netherlands Antilles. On the basis of this Article, and as representatives of the King, the Governors could transmit the information required by the UN Charter, the Guatemalan representative argued. The Netherlands delegation did not respond to this suggestion, but the representative of Surinam in the Netherlands delegation observed that the Netherlands government would in any way be unable to act on any recommendations the GA might make, as the subject-

57 Furthermore, it was deemed impossible to assess the relation between the Netherlands and its overseas territories until the GA had formulated the factors which should decide whether a full measure of self-government had been reached. See GA Res. 568 (VI) of 18 January 1952.

58 UN Doc A/AC.67/3. Reprinted in BuZa 1954b, p. 65-68. The letter also made much of a comparison with Article 35 of the Constitution of the International Labour Organisation, a specialized agency of the UN. Article 35 of the ILO Constitution (as amended in 1946) frees states from the obligation to apply conventions to their non-metropolitan territories if 'the subject-matter of the Convention is within the self-governing powers of the territory'.

59 See El-Ayouty 1971, p. 151 et seq.

matter of the reports fell entirely within the autonomous powers of Surinam and the Netherlands Antilles.⁶⁰

During the discussions in the Committee it became clear that the non-Administering members considered the autonomy of the Dutch Caribbean territories insufficient to be termed 'a full measure of self-government'. These members also thought that paragraph *e* of Article 73 should be read in conjunction with the other paragraphs of that Article, which meant that the Netherlands government should continue transmitting reports until Surinam and the Netherlands Antilles had achieved 'a full measure of self-government'. The defence of the Netherlands based on the 'constitutional considerations' clause was rejected. The Netherlands position was supported, however, by the other Administering members, and because the Committee was established on the basis of parity between Administering and non-Administering members, it was unable to reach any conclusion on the matter.⁶¹

The Dutch delegation soon realised that a majority of the UN members did not approve of the cessation of transmission of information. The Netherlands had hoped to profit from the fact that the GA appeared willing to approve the cessation of transmission of information on Puerto Rico by the US which was expected during this same session.⁶²

In the Fourth Committee of the GA, the Netherlands representative implicitly acknowledged that the Surinam and the Netherlands Antilles had not achieved a full measure of self-government. He stated that the territories had not been fully integrated in the sense of Resolution 648 of 1952 (which was a precursor to Resolution 1541) but that constitutional considerations precluded the Netherlands from transmitting information under Article 73 *e*.

The representatives of Surinam and the Netherlands Antilles were allowed to address the Fourth Committee. They again supported the claim that the Netherlands could not provide the information under Article 73 *e* because of the autonomy of the Netherlands Antilles and Surinam. If the Countries themselves would provide it, the Netherlands could not be held responsible for it, nor for the situations which it regarded. The Antillean representative suggested that states might consult the publications that the Netherlands Antilles issued annually on the subjects covered by Article 73 *e*, but the Netherlands Antilles could not be asked to transmit that information to the Netherlands for communication to the UN, as such an action would suggest that the Netherlands government still had jurisdiction over these affairs.⁶³

60 Summary of the debate in the *ad hoc* Committee, UN Doc. AC.67/SR. 6 and 7 (mimeographed only), cited in Engers (1956) p. 178 and in BuZa 1954b, p. 15-19.

61 Report of the Ad Hoc Committee on Factors (Non-Self-Governing Territories), GAOR (VIII), Annexes, Agenda item 33, p. 7 (UN Doc. A/2428).

62 Cf. Spits 1954, p. 450-51, Engers 1956, p. 190-193, and BuZa 1954b, p. 20-21.

63 GAOR (VIII), Fourth Committee, 343rd Meeting, p. 178-81. The full text of the speeches is reproduced in BuZa 1954b, p. 85-90.

During the subsequent debate, the constitutional relation between the Netherlands and the overseas countries did not play an important role, probably because the Netherlands had not claimed a full measure of self-government had been achieved. The relations were nonetheless clearly misrepresented by a number of representatives,⁶⁴ most strikingly by the Indonesian delegate, who stated that the inhabitants of Surinam and the Netherlands Antilles could not vote in the elections for the *Staten*, nor be appointed to the Governing Council, as members of those bodies must possess Dutch nationality.⁶⁵

Only five states spoke in defence of the Netherlands position.⁶⁶ A majority of states was convinced that the Netherlands could find some way to transmit the information required by 73 *e* in order to fulfil its obligations under the UN Charter. Some states also expressed surprise at the attitude of the Netherlands Antilles and Surinam; UN involvement with their territories would be beneficial and would help them develop their self-government. Why would these territories refuse to be helped? Besides, the objections by the overseas countries to the transmission of information could not release the Netherlands from its international obligations.⁶⁷

Many representatives considered that the Netherlands Antilles and Surinam had not achieved a full measure of self-government,⁶⁸ and that the Netherlands itself had conceded this.⁶⁹ Most states doubted whether the Interim Orders really gave a substantial amount of autonomy to the overseas countries.

64 According to the representative of the Soviet Union, Surinam and the Netherlands Antilles were administered by Governors with extensive powers, who were not responsible to the parliaments of the territories. The legislative authority 'was entirely vested in the Parliament and Government of the Netherlands', the Governor appointed the members of the Governing Council and the president of the *Staten*, and the Supreme Court of the Netherlands had jurisdiction in the overseas countries. Although most of these observations were in correct in themselves, they also showed that the Soviet Union was not prepared to discuss the issue on the merits. *see* GAOR (VIII), Fourth Committee, 344th Meeting, p. 183.

65 *See* GAOR (VIII), Fourth Committee, 345th Meeting, p. 191. The representative of Byelorussia also raised this point (345th Meeting, p. 193). Antilleans and Surinamese were in fact already citizens of the Netherlands at this time (as was pointed out by an 'astonished' Dutch representative) and the members of the Governing Councils of both countries already existed entirely of 'members belonging to the indigenous population' (347th Meeting, p. 208).

66 Sweden, Denmark, Belgium, New Zealand, Australia, and the US. The UK and Canada explained their vote against the draft resolution by stating that the UN should have accepted the Dutch decision to stop transmitting information. France also explained its negative vote, but did not go into the question whether the Dutch cessation was justified. Pakistan stated it would be easy to take a decision on the matter (*i.e.* to decide that transmission of information should continue), but preferred to wait until the negotiations on the new constitutional order were completed. Cuba considered a full measure of self-government had not been achieved, but might be achieved after the negotiations on the new Charter had been completed. The Dominican Republic also preferred to wait.

67 *See for instance* the statement by Brazil (GAOR (VIII), 346th Meeting, p. 198).

68 Brazil, Poland, Liberia, Cuba, Soviet Union, Byelorussia, Yugoslavia, Iran, Iraq, India, Mexico and Chile.

69 India, Mexico, Yugoslavia and Iraq.

The fact that there continued to be 'Governors', appointed by the Dutch Crown and not directly responsible to the Staten, was an eyesore to many representatives. The Constitutions and the Interim Orders also appeared to place many important powers in the hands of the Governor, and it was not clear to the representatives that the executive and legislative powers had really been attributed to the ministers and the parliaments. The change in the position of the Governor after 1950/51 had in reality been quite drastic. It was described by one observer as: 'from tsar to servant' (*'van tsaar tot dienaar'*),⁷⁰ but this revolution had been expressed in words that were only comprehensible to those well versed in Dutch constitutional law.

The Plenary of the GA decided by 33 votes to 13 with 8 abstentions that the Netherlands should continue to report (Resolution 747 (VIII) of 1953). The Netherlands stated that it would not carry out the Resolution.⁷¹ The next year, the Netherlands was accused in the GA of violating the Charter, but after the Netherlands had promised it would inform the UN next year on the Kingdom Charter which had been drafted, no further actions were taken.⁷²

6.3.4 The Netherlands Presentation of the New Constitutional Order

In 1955, the Netherlands informed the UN that the Kingdom Charter had officially come into force. In compliance with Resolutions 222 (III) and 747 (VIII), the Netherlands transmitted an English and a Spanish translation of the Kingdom Charter, and an Explanatory Memorandum, also in English and in

70 Reinders 1993, p. 11.

71 GAOR (VIII) 459th Plenary Meeting, p. 319. Eight Latin American states that disapproved of the cessation of transmission of information with respect to the Netherlands Antilles and Surinam only a few minutes later approved the US decision to stop transmitting information on Puerto Rico. These states explained their vote by saying that Puerto Rico had achieved a larger measure of self-government than the Dutch territories under the Interim Orders. It was stated that Puerto Rico had drafted its own Constitution, the people of Puerto Rico had approved its new status in a plebiscite, and its governor was elected through elections in Puerto Rico. The representative of India opposed this position because Puerto Rico was not as autonomous in economic affairs as the Netherlands Antilles and Surinam, and there had been true opposition among the people of Puerto Rico against the new status, which had been absent in the Dutch territories.

72 During the ninth session of the GA, many non-Administering states called on the Netherlands to resume transmitting reports. The representative of the Soviet Union accused the Netherlands of violating the UN Charter. The other non-Administering states were willing (for the time being) to refrain from further actions, as the Netherlands representative had informed the Fourth Committee that agreement had been reached on a Kingdom Charter, which had been approved during 1954 by the parliaments of the Netherlands, Surinam and the Netherlands Antilles. The Netherlands representative promised to report to the Secretary-General within six months after the Kingdom Charter had come into force. See BuZa 1956a, p. 7-12.

Spanish.⁷³ In the letter accompanying these documents, the permanent representative of the Netherlands (*i.e.* the Kingdom) stated that 'the Netherlands Government regard their responsibilities according to Chapter XI of the Charter with regard to [Surinam and the Netherlands Antilles] as terminated'. In other words, Surinam and the Netherlands Antilles had achieved a full measure of self-government, in the view of the Netherlands, even though the autonomy of Surinam and the Netherlands Antilles under the Kingdom Charter was hardly larger than under the Interim Orders. In case the UN should still think that Chapter XI applied, the Netherlands also stated that the constitutional considerations which had prevented the transmission of information since 1951 had 'become even stronger under the new Charter'.

The Netherlands expected the Caribbean Countries to join in the defence of the Kingdom Charter at the UN, and some political pressure was exerted to obtain their support.⁷⁴ Shortly before the UN was to discuss the case, a conflict between the governing council and the Governor of the Netherlands Antilles led the governing council to announce that the Netherlands delegation would not include an Antillean member, and that the Antilles would only send a representative to New York to discuss the problem with the Latin American states.⁷⁵ The Netherlands expressed its concern, and the Governor and the governing council soon settled their differences. The Netherlands Antilles issued a declaration to the UN that:

[the Netherlands Antilles] do not feel like a colony or a dependent territory anymore, they feel like a country, small but proud of its rights and its quality to anyone. The Netherlands Antilles are satisfied with this unique relationship and the Netherlands Antilles in this phase of their political development consider themselves selfgoverning.⁷⁶

The delegation of the Netherlands to the Committee on Information and the GA included representatives of the Netherlands Antilles and Surinam. In the Committee on Information, they were members of the delegation, in the GA they were 'special advisers' to the representatives. This posed an interesting problem from the perspective of international law and the constitutional law of the Kingdom. Did the members of the delegation speak on behalf of their countries or the Kingdom? The Netherlands representative stated that all

73 UN Doc. A/AC.35/L.206. Reproduced in BuZa 1956a.

74 The permanent representative of the Netherlands at the UN, Mr. Schürmann, went to Willemstad to convince the Netherlands Antilles, see Te Beest 1988, p. 53 and Oostindie & Klinkers 2001a, p. 130-1. The Netherlands pressure created some suspicion in the Netherlands Antilles as it was feared the Netherlands wished to force the Netherlands Antilles to declare at the UN that all of its constitutional wishes had been fulfilled by the Charter. The Netherlands might later use such a declaration in case the Netherlands Antilles would wish to change the Charter. See Oostindie & Klinkers 2001a, p. 304, note 27.

75 Te Beest 1988, p. 53.

76 Cited in Oostindie & Klinkers 2001a, p. 130.

members of the delegation represented the Kingdom. This was probably correct, for the Kingdom constitutes the state in international law, and the Kingdom is a member of the UN.⁷⁷ In this sense, all of the statements by all of the members of the delegation must be ascribed to the Kingdom, and the Kingdom must also be considered to be bound by statements of the representatives of Surinam and the Netherlands Antilles, inasmuch as statements at the UN are binding under international law. Apart from the fact that the special advisers sometimes appeared to think that they did speak on behalf of their country,⁷⁸ there was the problem that the delegation did not really speak with one voice. The members of the delegation differed in their interpretation of the new constitutional order of the Kingdom, and the role of the UN, although they did not emphasise these differences.⁷⁹ Nonetheless, it must have been notable to the other delegations at the UN that the Netherlands did not present a completely unified front.

The Netherlands somewhat misrepresented the new constitutional order at the UN. It exaggerated the legal autonomy of the overseas countries and the role of the those Countries in the legislation of the Kingdom. The Netherlands representative for instance claimed that during the 'continued deliberations' after a Minister Plenipotentiary has indicated that he has serious objections to a preliminary opinion of the Council of Ministers of the Kingdom (see Article 12 of the Charter), the Netherlands and the Caribbean Countries would be represented by an equal number of ministers, so as 'to prevent the possibility of the Ministers Plenipotentiary being outvoted or overruled'.⁸⁰ Mr. Ferrier, prime minister of Surinam, claimed in the Fourth Committee that the Ministers Plenipotentiary 'could block any proposed legislation of a general and binding nature if they considered it detrimental to the country'.⁸¹ Neither speaker mentioned the crucial fact that the prime minister of the Netherlands

77 The representatives of India and Ecuador thought differently (*see below*). India considered the delegates of Surinam and the Netherlands 'special advisers of the Netherlands delegation'.

78 Mitrasing 1959, p. 281 et seq. refers to Ferrier and Van Ommeren as representatives of Surinam.

79 *See for instance* the different views Schürmann (the representative of the Netherlands) and the special advisers on the right to self-determination and the right of secession. Schürmann uttered some misgivings to the Netherlands Government about certain remarks by prime minister Jonckheer of the Netherlands Antilles in the Fourth Committee. Jonckheer, on the other hand, is quoted to have said in 1957, during a conflict with The Hague on some other issues, that he would regard his defence of the Kingdom at the UN 'as a show' and that he would 'feel personally betrayed' if The Hague were now to decide against him. *See Oostindie & Klinkers 2001*, p. 131 and p. 305, note 29.

80 GAOR (X), Fourth Committee, 520th Meeting, p. 282-3.

81 GAOR (X), Fourth Committee, 526th Meeting, p. 319.

also takes part in the continued deliberations, so that the Netherlands can in fact always 'outvote or overrule' the Caribbean Countries.⁸²

The Netherlands also attempted to influence the opinion of the UN by translating the text of the Charter in a way that emphasised that the new constitutional order was based on mutual consent. The important phrase '*op voet van gelijkwaardigheid*' in the Preamble was translated as 'on the basis of equality' (in Spanish: '*en pie de igualdad*').⁸³ This was not correct, as '*gelijkwaardigheid*' translates as 'equivalence' ('*equivalencia*' in Spanish), whereas 'equality' or '*igualdad*' translates as '*gelijkheid*' in Dutch.⁸⁴ It is true that these terms are occasionally used interchangeably (for instance in mathematics), but in relation to the Kingdom order a conscious choice was made to use the term equivalence instead of equality.⁸⁵

The Explanatory Memorandum and the representatives of the Netherlands in the UN debates nonetheless repeatedly used the term 'equality', or even 'absolute equality',⁸⁶ which probably explains, at least partly, why so many states' representatives found it necessary to point out that the countries were *not* equal under the Kingdom Charter. Many representatives detected evidence of inequality between the three countries in matters of legislation and administration. It was wondered how the countries could conduct their common interests 'on the basis of equality' in view of the great disparity in the size of the populations of the three countries. Egypt stated there existed no equality between the countries because of the preponderance of the Netherlands in the procedure for Kingdom legislation, and because of the restrictions on the legislative powers of the overseas countries, in particular under Article 44 of the Charter. Many other states agreed the countries were unequal in a legal sense.⁸⁷

On the other hand, the states supporting the Dutch position often defended the Kingdom Charter by referring to the 'equality' it created between the

82 Except when Article 26 of the Kingdom Charter applies. In reply to a question by the representative of Venezuela, prime minister Jonckheer of the Netherlands Antilles admitted that the Netherlands always commanded a majority in these deliberations, as it would 'clearly be unjust' if Surinam and the Netherlands Antilles could impose their will on the Netherlands. But, Jonckheer added, the prime minister of the Netherlands 'by his very position, was able to judge a case impartially'.

83 '*Igualdad*' is usually translated as 'equality'.

84 In a similar sense, see Bos 1976, p. 134, and Munneke 1993, p. 62. See also Van Rijn 1999, p. 73. Logemann 1955, p. 51 translates '*gelijkwaardigheid*' as 'equality of status'. The English translation currently provided on the website of the Ministry of the Interior and Kingdom relations still uses the phrase 'on a basis of equality', as does the translation in Besselink 2004.

85 See Chapter 4, in the paragraph on equivalence and voluntariness.

86 Statement by Mr. Jonckheer, prime minister of the Netherlands Antilles, GAOR (X), Fourth Committee, 520th Meeting, p. 285.

87 Iraq, Lebanon, India, Poland, Soviet Union, Ecuador, Venezuela, Yemen, Liberia, Indonesia, and Burma.

countries. Israel, for instance, stated that 'by including the words "on a basis of equality" in the preamble to the Kingdom Charter, the Netherlands had declared an end of the colonial system and had subscribed to the general principle of equality among nations'.⁸⁸

6.3.5 Debate on the Kingdom Charter

In the Committee on Information from Non-Self-Governing Territories of 1955, the Minister Plenipotentiary of Surinam (Mr. Pos) and the Lieutenant Governor of Curaçao (Mr. Gorsira), expounded on the new constitutional structure of the Kingdom and as a gesture of goodwill they submitted 'General Reviews' of the situation in their countries with respect to social, economic and educational affairs. The Netherlands had requested the governments of the Netherlands Antilles and Surinam to prepare these general reviews for the UN,⁸⁹ thereby in fact demonstrating how easy it might be for the Kingdom to fulfil the obligations under Article 73 *e*, but no state representative commented on this fact.

The representatives of Brazil, Burma, China, Guatemala and India posed a large number of rather critical questions on the extent of the autonomous powers of Surinam and the Netherlands Antilles and the procedure for creating Kingdom legislation. These were answered by the representatives of Surinam and the Netherlands Antilles.⁹⁰ To the question whether the inhabitants of Surinam and the Netherlands Antilles had been consulted with respect to their new constitutional status, it was answered that this had not been deemed necessary, 'since all political parties had supported the constitutional changes'.⁹¹ The questions of Guatemala followed the scheme of the third part of the list of factors of GA Resolution 742 (VIII),⁹² which dealt with the integration of a NSGT with the mother country. Guatemala therefore wanted information on the ethnical make-up of the population of Surinam and the Netherlands Antilles, the political development of the territories, the voting rights of illiterate persons, and a number of other subjects. The Guatemalan representative was also interested to know whether the opinion of the populations of the territories had been freely expressed by informed and democratic processes. The Netherlands delegation answered that:

88 GAOR (X), Fourth Committee, 523rd Meeting, p. 302. See also the statement by Mexico, 521st Meeting, p. 291.

89 Te Beest 1988, p. 53, with reference to a letter by the Dutch minister for Overseas Affairs.

90 These questions and answers are summarized in BuZa 1956a, p. 103 et seq.

91 Report of the Committee on Information from Non-Self-Governing Territories, GAOR (X) Supplement No. 16, p. 7-10. UN Doc. A/2908.

92 This Resolution was a precursor to Resolution 1541 of 1960.

The freely elected Parliaments in Surinam and the Netherlands Antilles had un-animously accepted the Charter of the Kingdom of the Netherlands. Negotiations with respect to the Charter had been under way for a number of years, and the questions at issue had been freely discussed in the local press. As a consequence, the population of Surinam and the Netherlands Antilles had been kept fully informed with respect to the constitutional changes which had subsequently been enacted.⁹³

When asked whether the territories had the right to modify their present status, Mr. Pos replied that the Ministers Plenipotentiary of Surinam and the Netherlands Antilles had the right to introduce a bill to amend the Charter, which would have to be approved by the parliaments of the Netherlands, Surinam and the Netherlands Antilles. Mr. Pos furthermore assured the Committee that it would be 'contrary to the established policy of the Netherlands to prevent a partner from leaving the Kingdom if that partner desired to do so'.⁹⁴ This statement probably left the Members wondering how and when this Dutch policy had been 'established', but it was accepted as a promise with regard to the future policies of the Netherlands, and as such it played an important role in the debate in the Fourth Committee.

The Netherlands were convinced that the attitude of the Latin American states would be crucial. The other non-Administering members of the Committee would follow them, as the issue was considered to be of most importance for Latin America. The diplomatic offensive that the Netherlands had deployed during the adjournment of the Committee turned out to have been unsuccessful because none of the Latin American members were now prepared to submit the draft resolution approving the Dutch cessation of transmission of information that the Netherlands had circulated among the members.⁹⁵

Finally, Brazil was found willing to defend the Dutch decision, but in a more marginal way than the Netherlands had hoped. The Netherlands draft resolution had declared that Article 73 no longer applied to the Netherlands Antilles and Surinam. The resolutions on Puerto Rico and Greenland had also declared this, but Brazil estimated that a majority of the Latin American states would not be willing to draw a similar conclusion with regard to the Netherlands Antilles and Surinam. Together with the US, it submitted a draft resolution, which most important paragraph stated that the Committee was of the opinion that:

93 Report of the Committee on Information from Non-Self-Governing Territories, Addendum, GAOR (X) Supplement No. 16A, p. 1. (UN Doc. A/2908/Add.1.) The report does not indicate which member of the Netherlands delegation answered these questions.

94 Report of the Committee on Information from Non-Self-Governing Territories, Addendum, GAOR (X) Supplement No. 16A, p. 1. UN Doc. A/2908/Add.1.

95 Te Beest 1988, p. 57-9 describes the diplomatic efforts by the Netherlands.

(...) the transmission of information under Article 73 *e* of the Charter in respect of Surinam and the Netherlands Antilles is no longer necessary or appropriate.⁹⁶

The draft resolution did not declare that Article 73 in its entirety no longer applied to Surinam and the Netherlands Antilles, nor that those countries had obtained a full measure of self-government, or that they had exercised their right to self-determination, all of which had been declared in the Resolution on Puerto Rico.

The representatives of Brazil did state in the Committee that it considered Surinam and the Netherlands Antilles to be 'self-governing countries'. According to *Te Beest* this statement only referred to self-government in the affairs governed by Article 73 *e*, and not to 'a full measure of self-government'.⁹⁷ This might be true. The well-nigh impossible situation in which some non-Western states must have found themselves led to some creative use of language.

The Netherlands delegation, however, interpreted the statement by Brazil to mean that Brazil considered that Chapter XI no longer applied to Surinam and the Netherlands Antilles, and therefore regretted that the draft resolution did not make this explicit. It stated that:

The Netherlands delegation, in order to avoid unnecessary controversy, was prepared to accept that omission because the conclusion reached in the draft resolution that transmission of information was no longer necessary or appropriate implied that those countries were no longer non-self-governing.

This implication was of course not all that obvious, as the Dutch case in 1953 had been based almost entirely on the constitutional considerations clause of Article 73 *e*, which makes it possible that information is no longer transmitted, even though a full measure of self-government has not been achieved.

The representative of Peru voiced the opinion of many Latin American states and other non-Administering states when he explained why his delegation would abstain from voting on the draft resolution. He conceded that the two territories 'had advanced considerably towards full self-government', and he expressed the hope that they would in the future attain full self-government 'through the exercise of the right of self-determination'. He regretted however that the draft resolution implied that the cessation of information was a consequence of the achievement of full self-government. Even though the territories enjoyed autonomy in the specific fields to which Article 73 *e* of the Charter referred, it was clear that Surinam and the Netherlands Antilles 'remained (...) in a state of dependency in important respects within the

⁹⁶ UN Doc A/AC.35/L.216. See Report of the Committee on Information from Non-Self-Governing Territories, Addendum, GAOR (X) Supplement No. 16A, p. 3. (UN Doc. A/2908/Add.1.)

⁹⁷ *Te Beest* 1988, p. 59.

juridical system and under the authority of the State which had been administering them'. Peru accepted that the Netherlands might be unable to transmit the reports under Article 73 *e*, but Chapter XI contained other obligations which would continue to exist until the Territory had attained a full measure of self-government, at which point the entire Chapter became inapplicable.⁹⁸ The Brazilian-American draft resolution was adopted by the Committee on Information by seven to one votes, with five abstentions.

The Netherlands sent a large delegation to the subsequent debate in the Fourth Committee of the GA. It consisted of a representative of the Netherlands (the country or the Kingdom, this was not made clear), and as 'special advisers' the prime ministers of Surinam and the Netherlands Antilles and the presidents of the *Staten* of the Caribbean countries. The presence of these four representatives of the Netherlands Antilles and Surinam, which eloquently defended the new constitutional order of the Kingdom, appears to have made a considerable impact on the Fourth Committee. Many states, especially those which were not enthusiastic about the Dutch decision to stop transmitting information, commended the Netherlands on the composition of its delegation.

As in the Committee on Information, the debate in the Fourth Committee mainly consisted of a large number of questions posed by non-Administering states.⁹⁹ This was an indication of a greater willingness on the part of states to judge the issue on its merits. Especially the Latin American states seemed determined to obtain an accurate impression of the measure of autonomy obtained by Surinam and the Netherlands Antilles, although Brazil, Mexico and Cuba stated at the start of the debate that they were satisfied with the results laid down in the Kingdom Charter and were prepared to release the Netherlands of its duties under Article 73 *e* without further discussion. This was a clear sign of the changed situation in the GA, as these three states had explicitly declared in 1953 that the Netherlands Antilles and Surinam had not achieved a full measure of self-government. A cynical observer might have concluded afterwards that the large number of questions by non-Administering states was only intended to justify the fact that most of these states abstained or voted in support of the Netherlands position, which needed to be defended to the anti-colonial movement in the UN and elsewhere. The fact remains that the debates revealed how states looked at the new constitutional order of the Kingdom and what they considered to be the obligations of the Kingdom under the UN Charter and other international law.

98 Report of the Committee on Information from Non-Self-Governing Territories, Addendum, GAOR (X) Supplement No. 16A, p. 3. (UN Doc. A/2908/Add.1.)

99 These debates took 8 meetings on 7 days, see GAOR (X), Fourth Committee, 520th-527th Meeting.

Confusion Created by the Charter

Many states complained that the Kingdom Charter was hard to understand. The representative of Haiti complained that 'it was easy to lose one's way in the tangle of those rather contradictory provisions' (concerning an amendment to the Charter that conflicted with the Constitution of the Netherlands).¹⁰⁰

One of the reasons for this was that some of the elements of the new order were not regulated by the Charter itself, but by other legislation of the Kingdom and the countries. A number of representatives therefore asked for the text of the Kingdom act for the Governor ('*Reglement voor de gouverneur*'), the regulations of the countries with respect to the powers of the Governor, and the paragraphs of the Constitution of the Netherlands that were relevant to the Kingdom, 'to dispel certain doubts which still existed'.¹⁰¹ The Netherlands representative did not consider it necessary to supply these documents as 'all provisions directly affecting relations between the countries were contained in the Charter'.¹⁰² A number of representative protested that the Charter clearly delegated legislative powers to the Constitution of the Netherlands (see Article 5, para 1 of the Charter). Schürmann could not deny that the Netherlands Constitution to a large extent determined the composition of the Kingdom organs, but still did not think it necessary to provide the UN with the text of the relevant Articles.

The US agreed that the 'the ingenious arrangement' between the Netherlands, Surinam and the Netherlands led to many misunderstandings and disagreements, for instance on the difference between the *Country* and the *Kingdom* of the Netherlands.¹⁰³ Pakistan asked whether it had been the country that had transmitted information on the Netherlands Antilles and Surinam under Article 73 e.¹⁰⁴ Mr. Schürmann replied that the difference between the Country and the Kingdom only existed since 1954, but that it had been the *Kingdom* government that had transmitted the text of the Charter and the Memorandum to the Secretary-General. The representative of Indonesia then pointed out that this communication had been received from the Netherlands government, which to her apparently meant the country of the Netherlands. Pakistan suggested to strike the word 'Kingdom' from the phrase 'the communication (...) by which the Government of the Kingdom of the Netherlands transmitted to the Secretary-General the constitutional provisions (etc.)' in the preamble of the Brazil-US draft resolution.¹⁰⁵ India, Ecuador, Liberia, Lebanon

100 522nd Meeting, p. 297.

101 Venezuela, Liberia, Thailand, Iraq, Peru, Guatemala and Ecuador.

102 Statements by Schürmann, GAOR (X), Fourth Committee, 520th and 521st Meeting, p. 286 and 292-3.

103 See for instance the statement by Ecuador, 524th Meeting, p. 311.

104 GAOR (X), Fourth Committee, 526th Meeting, p. 325.

105 GAOR (X), Fourth Committee, 527th Meeting, p. 326.

and Syria spoke in support of this suggestion,¹⁰⁶ which was subsequently adopted by the sponsors of the draft resolution and thus found its way into the final text of the Resolution.

It was thereby prevented that the GA might seem to express its approval of the new structure of the Kingdom, or that the GA might seem to agree to the contention that the administration of the Netherlands Antilles and Surinam would be subsumed under the domestic jurisdiction of the Netherlands, and that Article 2, para. 7 of the UN Charter would prevent the GA from discussing the situation in the future. This discussion, and others like it, also showed that the representatives of non-Western states were not readily inclined to accept that the government institutions of the Netherlands could act in two different capacities, or that the Kingdom was not really the Netherlands. Many states considered the Kingdom a legal fiction which bore no resemblance to the real division of power between the Netherlands and the Caribbean countries.

Powers of the Kingdom

The representatives of Iraq and Indonesia stated that Article 44 of the Kingdom Charter gave the Netherlands veto power over matters which fell outside Kingdom affairs, and which should belong to the domestic affairs of Surinam and the Netherlands Antilles.¹⁰⁷ Iraq considered the legislative and executive bodies of the Netherlands were in fact, though not in name, the governing organs of the Kingdom as well, and hoped the Caribbean countries would eventually be granted a more effective representation in the parliament of the Netherlands and in the conduct of Kingdom affairs. A number of representatives also objected to Articles 50 and 51 of the Charter, as it allowed the Kingdom Government to interfere with the internal affairs of Surinam and the Netherlands Antilles.¹⁰⁸ Questions were raised about the powers of the Governors, and whether the legislation regulating the position of the Governor had been promulgated already. Egypt stated that 'political control was reserved to the central government of the Kingdom', by which it meant the government of the country of the Netherlands.

106 GAOR (X), Fourth Committee, 527th Meeting, p. 327-8.

107 GAOR (X), Fourth Committee, 521st Meeting, p. 289, and 526th Meeting, p. 323. Article 44, para. 1 of the Kingdom Charter provides that changes to the constitutions of the Caribbean countries ('*Staatsregelingen*') which relate to fundamental human rights and freedoms, the powers of the Governor, the powers of the Staten, or the judiciary, should be approved by the government of the Kingdom.

108 Articles 50 and 51 give the Kingdom government the power to annul any legislative or executive decision of the Caribbean countries that is in violation of the Kingdom Charter or other Kingdom legislation, an international agreement, or with other interests that are entrusted to or guaranteed by the Kingdom. If an organ of a Caribbean country does not live up to its obligations under the Kingdom legislation or an international agreement, the Kingdom government can decide how these obligations will be met.

Why No Independence?

Many states uttered their surprise or even disbelief at the contention that the Netherlands Antilles and Surinam did not want to become independent. Some simply stated that the Netherlands Antilles and Surinam did strive to become independent.¹⁰⁹ The Philippines wondered why there had been any need for the Kingdom Charter, seeing that the countries could conduct their internal affairs and make their own constitution, which were attributes of a sovereign state. Why had the countries not become fully independent?¹¹⁰ The Soviet Union stated that 'it was scarcely credible (...) that the peoples of the two Territories who had struggled for centuries for independence really did not wish to rid themselves of colonialism and attain independence' and proposed to send a visiting mission in accordance with GA Res. 850 (IX) of 1954.¹¹¹

Mr. Yrausquin, president of the *Staten* of the Netherlands Antilles, assured the Fourth Committee that his country would have no difficulty in realising a change in its existing status, in view of the principles laid down, and the understanding shown by the other parts of the Kingdom.¹¹² The prime minister of the Netherlands Antilles, Mr. Jonckheer, seemed to think that his country had already acquired its independence,¹¹³ but that it would not hesitate to apply to the UN should its relations with the Netherlands develop in a way that was not in conformity with the will of the people. Jonckheer reminded the Fourth Committee of the telegram he and other Antilleans had sent in 1948 to ask the UN and the Pan-American Union (now called the OAS) to support Curaçao in its struggle to obtain democratic rights and to rid itself of the colonial yoke.¹¹⁴ The Netherlands representative reported back to the Netherlands government that he feared Jonckheer had recognized the competence of the UN to continue its involvement with the Kingdom relations by these remarks.¹¹⁵

Mr. Van Ommeren, president of the *Staten* of Surinam, also spoke of 'the acquired independence' of the countries, and of their feeling of complete autonomy, even though 'no formal provision with regard to the subject of

109 For instance Czechoslovakia.

110 521st Meeting, p. 289.

111 524th Meeting, p. 308.

112 520th Meeting, p. 286.

113 Statement by Jonckheer, 520th Meeting, p. 286 (full text reproduced in BuZa 1956a, p. 133): '*Nos sentimos y somos independientes*', which was translated in the GAOR as: 'The country had acquired its independence', and again during the 522nd Meeting ('two independent countries managing their own affairs').

114 *Keesings Historisch Archief*, No. 876, 7535. The GAOR contains no reference to this telegram, but *The Washington Post* reported about it in its edition of 5 March 1948 under the heading 'U.N. Is Asked to Intervene For Independence of Curaçao'. The telegram was at the time widely condemned in Curaçao, see Kasteel 1956, p. 179.

115 Oostindie & Klinkers 2001a, p. 131.

secession has been formulated in the Statute [*sic*].¹¹⁶ Mr. Ferrier, prime minister of Surinam, was the only representative of the overseas countries who did not claim the countries were or felt independent. He admitted that Surinam had not achieved complete autonomy, but that it had freely done so and for good reasons.¹¹⁷ The Netherlands representative did not go into this question, but the Explanatory Memorandum stated that none of the countries could unilaterally change the existing constitutional order.

Opinion of the People

Many states asked whether the opinion of the Antilleans and Surinamese had been requested. Mr. Ferrier answered that 'the peoples concerned had accepted the Charter for the Kingdom'. The discussions on the proposed Charter had been followed by the press in Surinam, so there had been 'no point' in consulting the people directly.¹¹⁸

The representative of Liberia did not consider this consultation very democratic,¹¹⁹ and stated that a referendum was essential.¹²⁰ A few other states agreed.¹²¹ Many other states were satisfied, however, that the populations of the Netherlands Antilles and Surinam had expressed their opinion, albeit indirectly, on the Charter. Thailand for instance considered that there had been 'indirect plebiscites' because the authorities had clearly stated the issue of approval of the Charter during the elections.¹²² The fact that no resistance was perceived to have existed against the new constitutional order in the Caribbean countries appeared to be an important factor for many representatives.¹²³

116 Statement by Van Ommeren, 520th Meeting, p. 284. Full text reproduced in BuZa 1956a, p. 127.

117 520th Meeting, p. 284.

118 522nd Meeting, p. 295.

119 522nd Meeting, p. 296.

120 525th Meeting, p. 317.

121 Afghanistan, Guatemala and Burma.

122 The historical sources actually do not reveal that the negotiations on the Kingdom Charter had been an important issue in the parliamentary elections in the Netherlands Antilles (*see for instance* Reinders 1993, p. 23).

123 The only act of resistance of which the representatives may perhaps have been aware was by a consortium of Surinamese organisations in the Netherlands, which sent a letter to the Secretary-General of the UN in November of 1955 in which they stated that Surinam should continue to be treated as a NSGT. It is not clear whether the Fourth Committee was aware of the letter. The GAOR does not contain a reference to it. In the press in Surinam, the telegram was denounced as 'treacherous' and the senders as 'paria's' who were probably influenced by Communists. *See* Mitrasing 1959, p. 281-2.

Right of Secession?

The Minister Plenipotentiary of Surinam asked the Netherlands government before the start of the debate in the Committee on Information to issue a declaration similar to US President Eisenhower's declaration of 1953, in which he had promised that he would support a Puerto Rican request for independence. The Netherlands refused, because the Netherlands parliament had not been willing to recognise the right of self-determination (including the right of secession) of Surinam and the Netherlands Antilles in the Charter. It would not be acceptable if the government of the Netherlands would now recognise it in an international forum so that the Kingdom would be bound by it.¹²⁴

The states which supported the Netherlands referred to a speech made by the Queen of the Netherlands at the promulgation of the Kingdom Charter, in which she stated that it was 'impossible, that an agreement such as this, would not be based on *complete voluntariness*'.¹²⁵ The interpretation of this speech changed during the debates. At first it was stated by the supporters of the Netherlands that the Netherlands would properly consider any reasonable request by the Netherlands Antilles or Surinam, and that states should simply trust the Netherlands.¹²⁶ Later, the speech was stated to have created a legal right of secession for the Caribbean countries.¹²⁷ Many other states were not satisfied that the Queen's speech was sufficient guarantee for the countries' right of secession.¹²⁸

Right to Self-Determination

The representatives of the Netherlands Antilles claimed that the 'peoples' of the Netherlands Antilles, Surinam and the Netherlands had exercised their right to self-determination in accepting the Charter for the Kingdom and that the Charter recognised the right to self-determination of the countries.¹²⁹ The prime minister of Surinam stated that the Charter was directly based on the principle of self-determination.¹³⁰ The Netherlands representative did not go into this subject, nor did the Explanatory Memorandum.

124 Te Beest 1988, p. 53-4.

125 Speech of 15 December 1954, reproduced in *Schakels*, No. 54 (January 1955), p. 3. Mr. Pos, Minister Plenipotentiary of Surinam, first directed the attention of the members of the Committee on Information to this speech. In Dutch, this text read: '*onbestaanbaar, dat een overeenkomst als deze, anders dan op volledige vrijwilligheid gegrond zou zijn*'.

126 See for instance the statements by the US (521st Meeting, p. 290) and Mexico (521st Meeting, p. 291).

127 See for instance the statements by Lebanon (523rd Meeting, p. 304) and Liberia (525th Meeting, p. 317).

128 Egypt, Poland, Soviet Union, Czechoslovakia, Liberia and Afghanistan.

129 Statements by Jonckheer and Yrausquin, GAOR (X), Fourth Committee, 520th Meeting, p. 284 and 286.

130 GAOR (X), Fourth Committee, 520th Meeting, p. 284.

Some states agreed that the Netherlands Antilles and Surinam had exercised their right to self-determination,¹³¹ or that the countries had been granted the possibility to exercise that right in the future.¹³² Others thought that this right had not yet been exercised because the populations had not been granted the freedom to choose another political status than that laid down in the Kingdom Charter, and feared that the Charter might make it impossible in the future for the populations to exercise that right.¹³³ Most representatives, however, did not explicitly refer to the right to self-determination.

Characterization of the New Legal Order of the Charter

In fact, most states used the term 'association' to refer to the new Kingdom relations.¹³⁴ Unfortunately, the meaning of the term 'association' was in a state of flux in 1955. It did not necessarily refer to what is now known as associated statehood or free association. The third part of Resolution 742 (VIII) of 1953 used the term 'free association' to refer to what would be called 'integration' in Resolution 1541. Mexico and other states referred to this third part of Resolution 742, and perhaps thought the Kingdom should be classified as a form of integration, in today's language.¹³⁵ On the other hand, the debate focussed to a large extent on the right of secession of the Caribbean Countries and on the question whether the Kingdom organs could exert influence on the internal affairs of the Countries. This suggests that the representatives judged the Kingdom as a form of free association.

A number of states claimed that Surinam and the Netherlands Antilles were still NSGTs. India stated that the position of the Netherlands Antilles and Surinam did not fulfil the criteria for full self-government, and that their position was not one of partnership but of dependence. In connection with this, India considered that the member state of the UN was not the new Kingdom, but 'the State of the Netherlands, a European country'. India did not accept that the Kingdom Charter had created a superstructure which exercised the sovereign powers of a state.¹³⁶ Ecuador agreed that the Kingdom was not the member state of the UN.¹³⁷ It explained that 'the tripartite association [of the Kingdom] was between a sovereign State on the one hand and two

131 Belgium and Colombia.

132 Dominican Republic.

133 India, Ecuador and Greece.

134 The US, for instance, considered that the Kingdom had become a 'voluntary association of peoples' (521st Meeting, p. 290). Mexico referred to 'the association between the Netherlands, Surinam and the Netherlands Antilles' (521st Meeting, p. 291).

135 Egypt and Venezuela also referred to the third list of factors (and concluded that the Kingdom relations were not yet up to par).

136 527th Meeting, p. 327. The Indian representative also maintained that Queen Juliana was only Queen of the Netherlands, not of Surinam or the Netherlands Antilles (524th Meeting, p. 309).

137 527th Meeting, p. 328.

"countries", which were not states, on the other'.¹³⁸ Liberia and Syria also appeared to agree with this interpretation of the Kingdom structure.¹³⁹ The Soviet Union and Czechoslovakia stated that the Netherlands Antilles and Surinam were still colonies,¹⁴⁰ but no other states dared draw this conclusion in such unequivocal terms.¹⁴¹

A number of other representatives indicated that they thought a full measure of self-government could only be achieved when the 'Territories' acquired sovereignty or some other form of international personality, after which they might perhaps choose to delegate part of their sovereign powers to another state, or even to integrate with a state on an equal basis with other parts of that state (*i.e.* as a province, state, department or other form of administrative subdivision). The main point of these representatives was that the peoples of Surinam and the Netherlands Antilles had not acquired sovereignty under the Kingdom Charter, and were therefore not yet fully decolonized.¹⁴² The thesis that the Netherlands had defended since 1951 that sovereignty had 'spread out' over the Netherlands Antilles, Surinam and the Netherlands remained controversial.

The discussion on who exactly had provided the information on the Kingdom Charter to the UN (*see above*) revealed that many of the anti-colonial states thought the Kingdom was little more than a paper construction to satisfy the UN, while the real form of government of the Netherlands was that of a state administering two NSGTs.

Lebanon appeared to think that the Kingdom was intended as a federal state when he commented that in most states with 'a pluralistic structure', the constitutionality of statutes was decided by the supreme judicial organ, whereas in the Kingdom that role was exercised by the King (based on Article 50).¹⁴³ Most supporters of the Netherlands did not try to pin a name on the structure of the Kingdom, but merely commended the partners for finding a unique solution to their problems.

A Full Measure of Self-Government?

All states agreed that the Netherlands Antilles and Surinam had achieved *some* measure of self-government, but only a few stated they had achieved a *full* measure, and of these states, at least some used this phrase (confusingly) to

138 524th Meeting, p. 310. The Caribbean countries were not states, according to Ecuador, because they did not possess the right to self-determination.

139 527th Meeting, p. 328.

140 525th Meeting, p. 316.

141 Egypt, Venezuela and Ecuador also applied the third list of factors and concluded that the factors had not yet been fulfilled.

142 Uruguay, Argentina and Peru.

143 522nd Meeting, p. 297.

refer only to the subjects of Article 73 *e*.¹⁴⁴ Of the non-Administering states, some were unwilling to indicate exactly whether they thought the self-government of the Netherlands Antilles and Surinam was sufficient to warrant the title 'a full measure of self-government'. A considerable number of representatives stated that this was not the case,¹⁴⁵ and others, while not explicitly reaching this conclusion, left little doubt that they considered the autonomy of Surinam and the Netherlands insufficient.¹⁴⁶

Application of the Other Paragraphs of Article 73

The representative of Yugoslavia asked Brazil and the US whether the adoption of their draft declaration would mean that the other paragraphs of Article 73 would no longer apply to the Netherlands as well, in which case Yugoslavia would vote against it. The US and Brazil answered that the resolution deliberately did not address the question whether Chapter XI still applied to Surinam and the Netherlands Antilles. The US representative stated that 'the proposal left each representative free to vote on the draft resolution without prejudice to his interpretation of the Chapter as a whole'.¹⁴⁷

This statement offered many non-Administering states a way out of their predicament. They did not wish to vote against a US proposal,¹⁴⁸ but they also did not wish to declare that the Netherlands Antilles and Surinam were self-governing. Many representatives stated in the Fourth Committee that they considered that Paragraphs *a* to *d* of Article 73 would remain to apply to Surinam and the Netherlands Antilles, and that the GA could resume the discussion on these territories at any given time.¹⁴⁹

A number of representatives were not satisfied with the assurances of the US and Brazil, nor with the assurances of Jonckheer that the Netherlands Antilles and Surinam would find their way to the UN should the Netherlands

144 For instance China.

145 Iraq, Poland, Soviet Union, India, Venezuela, Ecuador, Guatemala, Uruguay, Yemen, Czechoslovakia, Liberia, Indonesia, Hungary, Byelorussia, Ukraine, Poland, and Romania. According to Ecuador the administrative autonomy of the countries was less than that enjoyed by municipal governments in many Latin American states (524th Meeting, p. 311).

146 Egypt, Greece, Argentina, Peru, Iran, Afghanistan and Yugoslavia.

147 GAOR (X), Fourth Committee, 524th Meeting, p. 307. The US delegate later stated that: 'He hoped that the differences of opinion among members of the Committee about the interpretation of Chapter XI of the Charter would not prevent the Committee from declaring itself unequivocally on the more limited question before it.' (GAOR (X), Fourth Committee, 525th Meeting, p. 317-18).

148 In 1955, the era of US dominance of the UN had not yet ended (see Luard 1982), although the era of decolonization was about to start (see Luard 1989).

149 Cf. for instance the statements by the delegates of India (GAOR (X), Fourth Committee, 524th Meeting, p. 308), Ecuador (GAOR (X), Fourth Committee, 524th Meeting, p. 311), Peru (GAOR (X), Fourth Committee, 525th Meeting, p. 316-17) and Yugoslavia (GAOR (X), Fourth Committee, 526th Meeting, p. 324).

oppose the will of the peoples of those countries. Ecuador stated the problem clearly:

(...) if it was agreed that all the other obligations [of Article 73] ceased with the obligation to transmit information, the relationship between the Netherlands and the United Nations in respect of its administration of Surinam and the Netherlands Antilles would also cease. The Netherlands, the Netherlands Antilles and Surinam would form a sovereign unit, and obviously any interference in that unit would come under the restrictions laid down in Article 2, paragraph 7, of the Charter of the United Nations. Thus, the doors of the United Nations would be closed to Surinam and the Netherlands Antilles.¹⁵⁰

The Netherlands delegation became aware that India contemplated an amendment that requested the Netherlands to inform the UN of any changes to the Kingdom Charter in the future. The Netherlands undertook 'serious attempts' to convince India not to submit the amendment which was, according to the Netherlands delegation, 'utterly unacceptable' to the Administering States.¹⁵¹ The attempts were apparently successful as India submitted an amendment which merely stated that the present GA Resolution would not prejudice 'the position of the United Nations as affirmed by GA resolution 742 (VIII), and such provisions of the Charter as may be relevant'.¹⁵² In the Fourth Committee, India however explained this amendment by stating that it intended to declare that the decision of the GA only related to Article 73 *e* and that paragraphs *a* to *d* 'remained in force and could be invoked by the GA at any time'.¹⁵³ The amendment aimed to make it possible for some states to at least abstain from the vote on the draft resolution.¹⁵⁴ The Netherlands (Schürmann) stated that it did not agree with the explanations of India, but that it did not seriously object to the wording of the amendment, and that it would therefore abstain from the vote on it. The Indian amendment was adopted by 27 votes to 7 with 18 abstentions.¹⁵⁵

Resolution 945 Adopted

Nine states considered the draft resolution simply unacceptable and announced they would vote against it because the Netherlands Antilles and Surinam were still non-self-governing and the Netherlands should transmit information on

150 524th Meeting, p. 311.

151 BuZa 1956a, p. 28-9.

152 UN Doc. A/C.4/L.423.

153 According to Pakaukau 2004, p. 316, this amendment 'prevented the Dutch from finalizing their 1954 incorporation of Surinam and vested the colonial people with a permanent right to alter their relationship to the Netherlands.'

154 524th Meeting, p. 309.

155 527th Meeting, p. 328.

them.¹⁵⁶ Their arguments were that the autonomy of Surinam and the Netherlands Antilles was restricted by the authorities of the Kingdom organs, which were exercised by the Netherlands and the Governor, who was appointed by the Netherlands. The socialist states maintained that Surinam and the Netherlands Antilles could not secede from the Kingdom and that the population had not been given the opportunity to express its opinion on the Charter.¹⁵⁷

An amendment by Uruguay that reaffirmed 'the competence of the GA to decide whether a Non-Self-Governing Territory has attained the full measure of self-government referred to in Chapter XI of the Charter' was adopted by 29 votes to 13, with 12 abstentions.¹⁵⁸ The representative of Uruguay had explained that he submitted this amendment because the Netherlands Antilles and Surinam were still not fully self-governing. The amendment was intended to offer the peoples of the Netherlands Antilles and Surinam 'a safeguard, an opportunity of coming at a later date to knock at the door of the United Nations, should the need arise'.¹⁵⁹ This could be interpreted as evidence that the majority of the Fourth Committee considered the decolonization of the Netherlands Antilles and Surinam as incomplete, and that the UN remained authorized to discuss the situation under Chapter XI of the UN Charter.¹⁶⁰

The amendment forced the representatives of Belgium to vote against the Brazil-US draft resolution as a whole, and the representatives of Australia and the United Kingdom to abstain. The Brazil-US draft resolution was adopted by 18 votes to 10, with 27 abstentions.

During the 557th Plenary meeting of the GA on 15 December 1955, the draft resolution was adopted as Resolution 945 (X) by 21 to 10 votes, with 33 abstentions.¹⁶¹

156 Afghanistan, Hungary, Liberia, Poland, Romania, Czechoslovakia and the three Soviet Republics.

157 The Soviet Union painted a picture of the new Kingdom order, which left no room for any autonomous decisions by the parliaments of the Netherlands Antilles and Surinam, which was nonetheless almost entirely based on the text of the Charter. The only assertion that was not supported by any Article of the Kingdom Charter was that the Governors could reverse court decision. The Governors are in no way authorized to do this. The only essential element of the new order that the Soviet Union neglected to mention was the responsibility of the Country ministers to the *Staten* for the decisions of the Governor as head of the Country government. The Soviet presentation nonetheless made clear that the reserved powers of the Kingdom were indeed impressive, at least on paper.

158 UN Doc. A/C.4/L.422, GAOR (X), Annexes, Agenda item 32, p. 11.

159 525th Meeting, p. 315.

160 Only Liberia stated in so many words that the Netherlands Antilles and Surinam were still NSGTs (525th Meeting, p. 317). The states which considered that a full measure of self-government had not yet been achieved (*see above*) of course thereby implied that Surinam and the Netherlands Antilles were still NSGTs.

161 In favour voted: Brazil, Canada, China, Colombia, Cuba, Denmark, Dominican Republic, France, Iceland, Israel, Luxembourg, Mexico, Netherlands, Nicaragua, Norway, Pakistan, Philippines, Sweden, Thailand, Turkey, and the US.

6.3.6 What does Resolution 945 Mean for the Status of the Netherlands Antilles and Aruba?

Resolution 945 is an anomaly in the decolonization practice of the GA, since it released an Administering State from its obligation under Article 73 *e* without declaring that the territories in question had become fully self-governing. This conflicts with the annually repeated rule that:

(...) in the absence of a decision by the General Assembly itself that a Non-Self-Governing Territory has attained a full measure of self-government in terms of Chapter XI of the Charter, the administering Power concerned should continue to transmit information under Article 73 *e* of the Charter with respect to that Territory.¹⁶²

As far as I can see, there is only one way to resolve this conflict, and that is by interpreting Resolution 945 to mean that the Netherlands was released from its reporting obligation because of the 'constitutional considerations' mentioned in Article 73 *e*. The Netherlands claimed that it could no longer collect the information required, and transmitting it would suggest a responsibility for subjects that fell within the autonomy of the Caribbean Countries. The Caribbean Countries themselves agreed, and the Netherlands presented this argument as the most important reason why it had stopped reporting, and many states accepted this.¹⁶³

This interpretation is consistent with the fact that while voting on Resolution 945, the representatives were under the assumption that 945 would not prejudice the question whether Chapter XI of the UN Charter and Resolution 742 still applied to the Netherlands Antilles and Surinam and whether those Countries had achieved a full measure of self-government. A number of amendments to the draft resolution intended to make this clear.

It is not certain whether the Principles of Resolution 1541 meant to leave open the possibility that the information transmitted under Article 73 *e* would be reduced to zero. The UK thought that it did, but other states denied this (see Chapter 2). No reference was made to Resolution 945 during the debate

Opposed were: Afghanistan, Belgium, Byelorussia, Czechoslovakia, Hungary, Liberia, Poland, Romania, Ukraine, and the Soviet Union.

Abstaining: Argentina, Australia, Bolivia, Burma, Ceylon, Chile, Costa Rica, Ecuador, Egypt, El Salvador, Ethiopia, Greece, Guatemala, Haiti, Honduras, India, Indonesia, Iran, Iraq, Jordan, Lebanon, New Zealand, Panama, Paraguay, Peru, Saudi Arabia, Spain, Syria, United Kingdom, Uruguay, Venezuela, Yemen, and Yugoslavia.

¹⁶² This sentence was first included in GA Resolution 2870 (XXVI) of 20 December 1971, and from 1986 it is adopted unanimously during each session of the GA.

¹⁶³ An advice to the prime minister of the Netherlands Antilles (published informally around 6 September 2005) claimed that the Netherlands had ceased transmitting information based on the 'constitutional considerations' mentioned in Article 73 *e*. According to the advice, Chapter XI of the Charter and Resolution 1514 simply continued to apply.

preceding Resolution 1541, and it must be assumed that it was not the intention of the GA to retract or reinterpret 945 through the adoption of 1541.

According to a contemporary observer, *Engers*, Resolution 945 meant no more than that the Dutch territories had achieved self-government in the three areas mentioned in article 73 *e* of the UN Charter. The status of Surinam and the Netherlands Antilles remained unchanged (at least *in politicis*) and the GA probably continued to consider itself authorized to take up the issue at a later date if the Kingdom relations would develop in a negative way.¹⁶⁴ According to *Engers*, the Resolution recognized the existence of an intermediary status between self-government and colonial status, because it did not link the cessation of the transmission of information to the achievement of full self-government.¹⁶⁵

This may indeed have been the intention of the GA. There have been other examples of unclear or intermediate status where the GA accepted that the Administering State no longer reported, even though the GA did not explicitly declare that a full measure of self-government had been achieved. And even in the case of the Cook Islands, where the GA *did* declare that full self-government had been achieved, it also declared that it remained competent to discuss the situation under Resolution 1514 if the need arose. These cases show that the GA has not always distinguished very sharply between NSGTs and self-governing territories, and it can be concluded that the Netherlands Antilles and Aruba take up a place somewhere in between these two categories.¹⁶⁶

164 Engers 1956, p. 187. *In a similar sense*, see Kapteyn 1982, p. 20, and Hoeneveld 2005, p. 54.

165 Engers 1956, p. 193. *See in a similar sense* Oppenheim/Jennings & Watts 1992, p. 280.

166 Most of the UN organs appear to think that the Netherlands Antilles and Aruba are no longer NSGTs, although doubts are occasionally visible, also for instance among the treaty bodies that supervise the various UN human rights treaties. *See for instance* the confusion that arose among the members of the CERD on the question whether the Netherlands Antilles and Aruba were NSGTs, when the Committee wished to include a specific observation regarding the Netherlands Antilles and Aruba in its concluding observations on the Netherlands (CERD/C/SR.1272). After Committee member Van Boven had studied the matter, he recommended that all states should be requested to submit information on their NSGTs, and 'given the doubts over the status of Puerto Rico, New Caledonia, Aruba and East Timor, for example, the Committee should not seek to identify the States concerned specifically' (CERD/C/SR.1286, para. 38). The Committee decided to direct this request to the states parties which are administering NSGTs 'or otherwise exercising jurisdiction over Territories' (A/54/18, para. 553 et seq.). Similar doubts were also expressed by members of the HRC during the discussion of the initial report of the Kingdom on the ICCPR (UN Doc. CCPR/C/SR.321 and 322). During the discussion of the Second Periodic Report (1988), it was asked how Aruba could be considered self-governing if good governance was a Kingdom affair, and in relation to this, some members also wondered what the role of the Kingdom was in the safeguarding of human rights and fundamental freedoms (CCPR/C/SR.861, para. 44 and 52).

6.3.7 Could the UN Recommence Its Involvement with the Netherlands Antilles and Aruba?

The reason why the GA accepted the Dutch decision to stop reporting was that the Netherlands Antilles and Surinam appeared happy with the amount of autonomy they had been granted, and that the Netherlands seemed to have promised that it would respect the right to self-determination of the Caribbean populations in the future. It might therefore be assumed that if one of the Caribbean Countries was prevented from achieving independence, or if it otherwise became apparent that the population of a Caribbean Country was no longer happy with its status in the Kingdom, the UN could decide to resume its discussion of the situation under Chapter XI of the Charter (or under Resolution 1514). The debate preceding Resolution 945 made clear that a majority in the GA considered the decolonization of the Dutch Caribbean incomplete.

Apart from the absence of a clear recognition of the continuing right to self-determination, the questions and criticism of the representatives indicated that a number of aspects of the Kingdom Charter were inconsistent with full self-government, namely: the appointment of the Governor and his seemingly wide authorities; Articles 44, 50 and 51; and the dominant position of the Netherlands in the organs of the Kingdom, which have the authority to legislate for the Caribbean Countries without their consent.

It was also wondered whether the political status of Surinam and the Netherlands Antilles was really what the populations wanted, but this was insufficient reason to continue the reporting obligation, most states considered. This was somewhat surprising, as the GA had decided only a year earlier that decisions to stop transmitting information under Article 73 *e* should be examined 'with particular emphasis on the manner in which the right of self-determination has been attained and freely exercised'.¹⁶⁷ In that same resolution the GA had also decided that (if the GA deemed it desirable) a UN mission should visit the territory 'in order to evaluate as fully as possible the opinion of the population as to the status or change in status which they desire'. Only the Soviet Union wondered despairingly why the Fourth Committee would not even consider sending a visiting mission to the Netherlands Antilles and Surinam. In 1967, when the West Indies Associated States of the UK were discussed, the GA decided the UK should continue reporting until the UN had been able to determine – through a visiting mission, or UN supervised plebiscites – that the population really supported the new status. Other cases also showed that after 1960, the GA became more strict in demanding clear evidence of popular support for forms of self-government that fall short of independence.

167 GA Res. 850 (IX) of 22 November 1954.

For this reason, it has often been assumed that Resolution 945 would not have been adopted after 1960.¹⁶⁸ Even shortly after 1955, it was already doubted whether the GA would stick to its decision.¹⁶⁹ Clark wrote in 1980 that 'the continuing validity of the Netherlands decision is dubious in the light of the changed political forces in the GA'.¹⁷⁰ Barbier calls it 'remarkable' that the Dutch territories were not inserted in the Committee's list of 1963.¹⁷¹ There are quite a number of other authors who similarly think Chapter XI of the UN Charter does (or should) still apply to the Kingdom, or that the GA might not confirm its decision of 1955 if it had been asked to do so after 1960.¹⁷² Oppenheim simply puts the Caribbean Countries in a special class of territories whose international status is somewhere in between NSGT and independence, such as Puerto Rico and the British WIAS.¹⁷³ Blaustein also has difficulty categorizing them.¹⁷⁴

The UNITAR study of 1971, on the other hand, considers that the decision of 1955 would have been upheld after 1960 as well, as long as the GA would have been satisfied that the Kingdom Charter really represented the clearly expressed wish of the population.¹⁷⁵ This may well be true, because the GA has never gone against the clearly expressed will of the people in these cases.

168 In this sense, see De Smith 1974, p. 71, Hannum 1996, p. 347 et seq, and Igarashi 2002, p. 62. Kapteyn 1982, p. 21 'seriously doubts' whether the GA would have approved of the Dutch cessation of transmission of information if it had taken place after 1960.

169 Engers 1956, p. 187 and Van Panhuys 1958, p. 30.

170 Clark 1980, p. 49.

171 Barbier 1974, p. 163. According to Barbier, the reason why the Netherlands Antilles and Surinam (and a number of territories of France, the UK and Denmark) were not on the list, was the method used by the Working Group charged with drawing up the list. It created four categories of colonial territories: Trust Territories, other NSGTs on which the administering powers transmitted information, the territories declared non-self-governing by the GA, and South West Africa (Namibia). The Netherlands Antilles and Surinam did not appear to fall into any of these categories, but this did not necessarily mean that the Committee considered the Declaration did not apply to them.

172 See Rigo Sureda 1971, p. 261, De Smith 1974, p. 71, Hannum 1996, p. 333 and 347 et seq., and Igarashi 2002, p. 34-44 and p. 62.

173 Oppenheim/Jennings & Watts 1992, p. 280.

174 In Blaustein's collection of *Constitutions of Dependencies and Territories*, the Netherlands Antilles and Aruba are placed in the category of dependencies which 'have complete internal self-government and operate without interference from the colonial power'. Other territories on the 2002 edition of this list are New Caledonia, Puerto Rico, the Cook Islands, and the US Virgin Islands. Blaustein's categorization is somewhat hard to understand in light of the fact that two or three of these territories are treated as NSGTs by the UN (Puerto Rico is a special case, see Chapter 3). Furthermore, calling the metropolitan state 'colonial power' obviously means that these territories should be considered colonies (see Blaustein/Raworth 2002, p. 2). Blaustein's section on the 'Netherlands Dependencies' states: 'Both are self-governing territories in close association with the Netherlands. Exceptionally in the case of dependencies, these territories are accorded special rights under the Dutch National Constitution. However, they are not an integral part of the Netherlands and thus cannot be considered national territories' (Blaustein/Raworth 2001, p. 1).

175 Rapaport, Muteba & Therattil 1971, p. 26.

But the GA would probably not have approved the situation without a referendum or a visiting mission.

Could the GA retract its decision of 1955? The case of Puerto Rico indicates that the GA will probably not consider Resolution 945 as prohibiting it from discussing the Netherlands Antilles and Aruba as a case of incomplete decolonization, should the need arise. With regard to Puerto Rico, the GA had declared that the territory had become fully self-governing and that it had exercised its right to self-determination, but the US still needed to wage a fierce diplomatic battle to prevent the GA from discussing Puerto Rico in the context of decolonization, and it could not prevent the Decolonization Committee from discussing Puerto Rico. The Netherlands will obviously not be able to exercise the kind of political pressure that the US exercised, and its legal position is also much weaker. The case of New Caledonia furthermore showed that the GA considered itself authorised to revive its involvement with a territory that had not been on the list of NSGTs for 40 years.

But these cases also show that before the GA might take such a step with regard to the Netherlands Antilles or Aruba, it will have to be clear that at a substantial part of the local populations actively opposes the status quo, and a number of UN members will have to have a good reason for attacking the Netherlands. Puerto Rico was a popular subject for the enemies of the US during the Cold War, and the case of New Caledonia was partly created to punish France for its nuclear tests in the Pacific.

If the GA, for whatever reason, decides to review the status of the Netherlands Antilles or Aruba, it would probably use the criteria for free association of Resolution 1541, since the debates of 1955 showed that most representatives tended towards considering the Kingdom as a form of association. As I explained in the previous paragraphs, the Kingdom order does indeed bear more resemblance to free association than integration, although it fulfils the criteria for neither form of self-government.

This would mean that criticism could be expected with regard to the constitutionally guaranteed influence the Netherlands still has in the Netherlands Antilles and Aruba. But the most important question would undoubtedly be whether the population is happy with the current political status of their islands, and whether they have the possibility of exercising a form of 'continuing self-determination'. If the answer to both these questions would be 'yes', then the practice of the UN suggests that the discrepancies between the Kingdom Charter and Principle VII of Resolution 1541 will be glossed over. This would be justified in view of the principle that the right to self-determination should take precedence in any process of decolonization, as I explained in Chapter 2.

The current discussions on a constitutional reform of the Netherlands Antilles raise on other question, since the option is being discussed that one or more of the islands of the Netherlands Antilles might in the future obtain a status in which some or all of the responsibilities that are currently held by

the Netherlands Antilles would revert to the Netherlands, because some of the islands consider themselves too small to handle all of the responsibilities of a Country on their own. The 'constitutional considerations' clause of Article 73 *e* would probably no longer apply in such a situation, and it could be argued that the Kingdom should decide to resume its reporting obligation.¹⁷⁶ There is one precedent for such a decision. When the UK retracted the autonomy of Malta in 1959, it also recommenced transmitting reports to the UN under Article 73 *e*.¹⁷⁷ Since the UK's decision to stop transmitting information on Malta in 1949 was based on similar arguments as the Dutch decision of 1951, this precedent seems particularly relevant. To avoid this situation, it could of course also be decided to create a relation with these islands that would comply with the criteria for integration of Resolution 1541. In that case, the Kingdom government could transmit a copy of the new arrangement to the UN, in conformity with GA Resolution 222 (III), and consider the decolonization of these islands complete, at least with respect to international law.

6.3.8 Conclusion

The status of the Netherlands Antilles and Surinam remained unclear after the GA Resolution of 1955. There existed fundamental disagreement among states on the application of Chapter XI of the UN Charter to Surinam and the Netherlands Antilles. A majority of states seemed to think that the Dutch territories had not really acquired a full measure of self-government.

Opinions on the form of government of the Kingdom differed widely, from a colonial power administering two colonies, to a type of confederation, association, integration, or a construction *sui generis*. Many representatives did not even attempt to characterise the structure of the Kingdom, and there appeared to be a consensus that it was hard to fathom.

The representatives were reluctant to decide whether the Netherlands Antilles and Surinam had exercised their right to self-determination. It appears most states were satisfied that the populations did not openly disapprove of the new status, and that the representatives of the Countries were very happy with it. It was also accepted that the Netherlands would probably not block a wish for independence, if it was expressed by the population of one of the Caribbean Countries. It was also clear that the Countries had obtained self-government in the areas on which the Administering state should report

¹⁷⁶ The Antillean islands of Bonaire, St. Eustatius and Saba recently declared that they thought the Kingdom should resume reporting on them once the Netherlands Antilles had been abolished and the three islands would have 'direct ties' with the Netherlands (see the closing statement of the summit meeting of the islands on constitutional structures in Philipsburg, St. Maarten of 13 and 14 March 2006, reproduced on <http://curacao-gov.an>).

¹⁷⁷ See GAOR (XIV), Fourth Committee, 981st Meeting, para. 43, or the *Repertory of Practice of the UN Organs*, Suppl. No. 2 (1955-59), Vol. 3, para. 105-6.

(economic, social and educational conditions). These three factors were sufficient to warrant the decision that the Netherlands no longer needed to report on the Countries, but the GA refused to declare that the Netherlands Antilles and Surinam had achieved a full measure of self-government, and the Resolution also did not state that the right to self-determination had been exercised, nor that Chapter XI no longer applied.

This decision seems to conflict with the rule that Administering states should continue to report until the GA has declared that a full measure of self-government has been achieved, unless it is interpreted to mean that the obligation to report was suspended because the autonomy of the Countries makes it impossible for the Kingdom government to collect and transmit the information referred to in Article 73 *e*. The UN Charter and Resolution 1541 seem to create this possibility, and it is not inconsistent with the debate in the GA and the arguments presented by the Netherlands in defence of its decision. It would mean that Chapter XI probably continues to apply, and the Netherlands Antilles and Aruba would have an intermediate status between self-governing and Non-Self-Governing Territories.

The GA has failed to issue a clear statement on the status of the Netherlands Antilles and Aruba, but it probably remains authorised to do so in the future. The cases of Puerto Rico and New Caledonia have shown that, given the right circumstances, the UN is prepared to re-inscribe (former) NSGTs on the list. The GA would probably judge the status of the Netherlands Antilles and Aruba by the criteria for free association. As was concluded in the previous Paragraph, the Kingdom does not entirely comply with these criteria. This does not automatically mean, however, that the Countries are 'arbitrarily subordinated' in the sense of Resolution 1541 or that their decolonization is incomplete, as I will discuss in the next Paragraphs.

6.4 'ARBITRARY SUBORDINATION'?

The term 'arbitrary subordination', while central to the question whether a full measure of self-government has been achieved, has been left very vague by the GA. Most of the arguments used in the GA in comparable cases do not really apply to the Kingdom.¹⁷⁸ The relations within the Kingdom are clearly

178 A few arguments could be applied analogously. Iraq, for instance, noted with regard to the Portuguese territories: 'The existence of economic subordination was proved by the fact that (...) the Constitution forbade the overseas provinces to negotiate loans in foreign countries' (GAOR (XV) 4th Comm., 1036th Meeting, para. 16). The Kingdom Charter contains a similar provision (Article 29), which requires the Countries to secure the approval of the Kingdom government before negotiating foreign loans. But the Kingdom government is only allowed to withhold its approval if the interests of the Kingdom are at stake (Borman 2005, p. 190). The government has so far interpreted its authority very restrictively, and only looks at whether the foreign relations of the Kingdom as a whole might be negatively

not comparable to Portuguese rule in Angola, for instance, but they are not all that different from the relation between some of the current NSGTs, for instance Bermuda, with their mother country. It is therefore very difficult, or perhaps even impossible, to decide whether the Caribbean Countries are 'arbitrarily subordinated' purely on the basis of their constitutional position within the Kingdom.

But as was argued in Chapter 2, a correct reading of the right to decolonization should give precedence to the right to self-determination, in the sense of the freedom of choice of the population. This means that the opinion of the population concerned should be the decisive factor when determining whether a situation of 'arbitrary subordination' exists. As the GA has repeatedly recognized, 'all available options for self-determination are valid as long as they are in accordance with the freely expressed wishes of the peoples concerned'.¹⁷⁹

This might mean that an overseas people is kept in a situation of 'arbitrary subordination' when the metropolis does not give it the freedom to determine its own political status. Any status that has been freely chosen by the population, with full awareness of the possible consequences of that choice, can hardly be considered 'arbitrary subordination', especially if the people retains the freedom to choose another status at a later date.¹⁸⁰

It is therefore important to take a closer look at the way in which the present status of the Caribbean Countries has been determined, and whether the population has freely chosen that status.

6.4.1 Have the Netherlands Antilles and Aruba Freely Chosen their Status?

The process leading up to the promulgation of the Kingdom Charter has been described by many authors, most fully by *Klinkers*.¹⁸¹ As was described in Chapter 4, the Netherlands opposed an explicit recognition of the right to self-determination of the Netherlands Antilles and Surinam in the Charter. Despite this, the process could be characterized as a form of self-determination if the populations of the Caribbean territories freely and voluntarily chose to accept the new legal order in the awareness of the consequences, and while there were other options.

affected. The fact that the metropolis is able to promulgate legislation that applies in the overseas territories without their consent was recently proposed at a Regional Seminar of the Decolonization Committee as a litmus test for the absence of self-government (UN Doc. A/59/23 (2004), p. 41). The Kingdom has this power, but only with regard to a few subjects.

179 GA Res. 59/134 (2004).

180 See Chapter 2, in the paragraph on the freedom of choice.

181 Klinkers 1999. This study formed the basis for Oostindie & Klinkers 2001a.

The first draft for the Kingdom Charter was written by the Dutch government, but it was modified on a number of points in the process of negotiations with representatives of Surinam and the Netherlands Antilles.¹⁸² The final text was approved by the parliaments of the Countries, which had been elected on the basis of general suffrage. But as an exercise of the right to self-determination, the process was flawed in some crucial aspects.

Options such as independence or integration with the Netherlands were clearly not on the table, for various reasons. It is impossible to say how the population of the islands would have reacted had they been offered a choice between these or other options, but it is clear that there was not much freedom of choice.

The newspapers in the Netherlands Antilles reported on the negotiations and the ratification process, but it did not form an important issue in any elections in the Netherlands Antilles.

While the Charter was seen as a positive development in the Netherlands Antilles, it was not exactly what the Antillean government had desired,¹⁸³ nor was it the result of a free choice by the population. The debate in the UN in 1955 showed that many representatives did not consider the adoption of the Charter as an expression of the right to self-determination. An analogous application of the standards that the Dutch ministry of Foreign Affairs used in the case of Puerto Rico, should also lead to the conclusion that the procedure for the adoption of the Kingdom Charter did not truly represent an exercise of the right to self-determination.¹⁸⁴

The Dutch government in a position paper of 1990 nonetheless stated that the promulgation of the new legal order of the Kingdom in 1954 represented a form of self-determination.¹⁸⁵ This opinion is still occasionally voiced in the Netherlands.¹⁸⁶ The process of 1954 did resemble an exercise of the right

182 The Constitution of 1948 declared that the relations with Surinam and the Netherlands Antilles would be reformed on the basis of consultations with representatives of the population of those territories (article 208, renumbered as 215 in the Constitution of 1953).

183 The Dutch pressure on the Antilles and Surinam to join in the defence of the Charter at the UN, created a fear that the Netherlands would force the Netherlands Antilles to declare at the UN that all of its constitutional wishes had been fulfilled by the Charter. The Netherlands might later use such a declaration in case the Netherlands Antilles would wish to change the Charter. See Oostindie & Klinkers 2001a, p. 304, note 27.

184 The Dutch ministry of Foreign Affairs in its report of the Eighth Session of the GA criticized the procedure by which Puerto Rico had obtained its new status in 1953. The plebiscites of 1952 could not be considered a real exercise of the right to self-determination, the report claimed, since the population of the territory did not have the possibility to choose for independence or integration in those plebiscites. In the view of the ministry, the Puerto Rican general elections of 1948, at which status was an issue, and during which the political party that promoted Commonwealth received 61% of the votes, could not be put on a par with a plebiscite, as the outcome of these elections were undoubtedly influenced by other issues as well. See Buza 1954b, p. 140.

185 *Kamerstukken II 1989/90*, 21 300 IV, nr. 9, 'Schets voor een gemenebestconstitutie', p. 6.

186 See for instance Hoogers 2005, p. 70.

to self-determination because it led to the creation of a new relation with the Netherlands which also had the approval of the governments and the parliaments of the Netherlands Antilles and Surinam. But the population was not given the opportunity to make a free choice and it can therefore not really be established whether the Kingdom Charter enjoyed the support of the population of the Netherlands Antilles in 1954.

Aruba's Status Aparte

In 1986, when Aruba achieved its separate status under the condition that it would become independent in 1996, no referendum was held, nor when it was afterwards decided that Aruba would not become independent. In 1977, a referendum had been organized on the island, but this suffered from too many defects to represent an accurate gauging of popular opinion.¹⁸⁷

While it was abundantly clear that most Arubans did not want independence, and did not want to be a part of the Netherlands Antilles either, it was (and is) far from clear what kind of relation with the Netherlands exactly had the preference of the population.¹⁸⁸ It is true that Aruba had experienced democratic self-government (as part of the Antilles) for over thirty years when it achieved its *status aparte*. But the negotiations between the Netherlands and Aruba on the continuation of the *status aparte* after 1996 were conducted on government level and the general public was not directly involved. It also remained unclear which options were actually available to the island, apart from independence. While it may be accepted that Aruba's decision to stay

187 The referendum offered the population of Aruba a choice between independence as part of a federation of the Netherlands Antilles, or independence for Aruba on its own. Opposition party AVP boycotted the referendum because it considered that the option of a separate status within the Kingdom should also be offered. Another opposition party, PPA, called on its supporters not to vote. The turn-out was 70%, which was only slightly lower than for the local elections of that same year, but 14% of the votes was invalid. 82% of the votes cast was in favour of independence separate from the Netherlands Antilles. Only 4% of the votes was in favour of becoming independent as part of the Netherlands Antilles (see Van Benthem van den Bergh et al. 1978, p. 129 for the exact figures). The referendum has been widely criticized because it offered too little freedom of choice, the information provided on the options was vague and confusing, and because there were a number of flaws in the voting procedure (see Van Benthem van den Bergh et al. 1978, p. 28, Van Aller 1994, p. 381, and Van Rijn 1999, p. 55-6). It is generally considered unlikely that a majority of the Aruban population was really in favour of independence in 1977. No research or opinion polls have ever shown a substantial portion of Arubans to be in favour of independence (see Oostindie & Verton 1998, p. 25 et seq). The vote was therefore interpreted to mean that a majority of Arubans wanted to be separated from Curaçao, but not from the Kingdom (Van Rijn 1999, p. 56, Oostindie & Verton 1998, p. 26, and Oostindie & Klinkers 2001c, p. 83).

188 According to Verton 1990, p. 203, an opinion poll during the elections of 1985 on Aruba showed that 'a majority of those canvassed had voted affirmatively for separate status for Aruba within the Kingdom. This is not entirely in line with the numbers Verton provides on p. 216: 37% of the voters supported 'the relations as they are', while 50% desired a closer relation with Holland as an overseas province, and 11% would chose independence.

a part of the Kingdom, but not a part of the Netherlands Antilles, did not appear to against the wishes of the population, it would go too far to say that the status of Aruba under the Kingdom Charter was created on the basis of a free and informed choice by the Aruban people.

Dissatisfaction with the Charter

Fifty years of Kingdom Charter have witnessed much dissatisfaction with the legal order it has created, for very different reasons, and from many different corners. Nonetheless, there has never appeared to be majority among the population of the Netherlands Antilles (as a whole) or Aruba in support of moving towards a fundamentally different relation with the Netherlands, by which I mean independence or complete integration with the Netherlands. The few political parties on the islands which campaigned for such a fundamentally different status never received much support during elections. Many parties are officially in favour of independence, but only at some very distant future date. It should be noted, however, that the party system on the islands does not so much revolve around issues, but around personalities and client relations.

Opinion polls and research such as *Ki sorto di Reino?* ('What Kind of Kingdom?') indicate that most islanders would like to see some changes to the relations with the Netherlands that are not supported by most of the political parties represented in the Caribbean parliaments.¹⁸⁹ This is of course not uncommon in a system of representative democracy, but in the context of self-determination, it means that regard should be had to the risk that a parliament may not always adequately represent the will of the 'peoples' when it comes to changes to the territory's political status,¹⁹⁰ which was clearly shown by the referenda of 1993 and 1994.

The Referenda

The referenda that have been held on the Netherlands Antilles since 1993 were organized to decide whether the Country should stay together, or whether each island should seek direct relations with the Netherlands, or become independent. They mainly concerned the relations of the islands to each other. Consequently, the outcome of these referenda only had limited value for determining the desired relation with the Netherlands. The only thing that really became clear in 1993 and 1994 was that the populations of the islands

189 *Ki sorto di Reino* revealed that there existed substantial majorities on the islands for closer relations with the Netherlands and more involvement by the Netherlands government, whereas political parties on the islands are generally opposed to that (Oostindie & Verton 1998).

190 See also Chapter 3 in the paragraph on popular consent.

wanted to stick together, and that none of the islands wanted to become independent, at least not on its own, and not in the near future.

In the referenda of 2000, 2004 and 2005, the choice was again mainly between staying together as a Country, or breaking up the Netherlands Antilles. This time, a majority of the population on most islands chose to break up the Country. But again, it remained rather unclear what relation the islanders desired with the Netherlands. On Bonaire and Saba, a majority chose for 'direct relations' with the Netherlands, although it was not clear what form these relations should take. On Curaçao and St. Maarten a majority chose for *status aparte*, which probably meant that the islanders desired a status comparable to that of Aruba. St. Eustatius chose to keep the Netherlands Antilles together, creating a paradox that was built into the recognition of the right to self-determination of the individual islands in 1981.

The outcome of these referenda can be interpreted as a vote against full independence, since this option was on the ballot on all islands, and it received very few votes. But at the same time, the option of 'status quo' also attracted very few votes on most islands. These referenda can therefore hardly be taken as a free and voluntary acceptance of the legal order of the Kingdom. I will discuss them further in the context of the right to self-determination of the individual islands (see Chapter 8).

The Right to Self-Determination Exhausted?

It is occasionally defended that the peoples of the Netherlands Antilles and Aruba have already exercised their right to self-determination in 1954, and this proposition sometimes leads to the conclusion that the islands no longer have a right to self-determination, at least not in the sense of a right to decolonization under international law.¹⁹¹ This conclusion is not valid, not only because the Charter was not intended to have this effect in 1954,¹⁹² but also because it starts from an implicit argument – namely that the right to self-determination cannot be exercised more than once – which is false. An exercise of the right to self-determination can only be considered final (in the context of decolonization) if it leads to independence, or perhaps when it leads to a

191 This proposition was defended most recently in an editorial of *De Volkskrant* on 11 April 2005, as a reaction to the claim by the Referendum Committee of Curaçao that the outcome of the referendum would be binding on the Netherlands. See also Hoogers 2005.

192 Dutch minister Kernkamp, in a letter to the Governing Council of Surinam, explained in 1952 that Surinam would not 'use up' its right to self-determination if the Charter referred to this right (Van Helsdingen 1957, p. 198). A majority of the members of the *Staten-Generaal* appeared to share this view. Senator Algra (ARP), for instance, stated that he did not think the right to self-determination would be extinguished by the Kingdom Charter. He pointed out that territories such as Surinam could not be compared with regions such as Friesland. Only two right-wing members of the Lower House considered that the right to self-determination would be extinguished by the Charter. See further Chapter 4.

complete form of integration (see Chapter 3). Since the Kingdom relations currently most resemble a form of association, it should be assumed that the Caribbean populations have a continuing right to self-determination, as Resolution 1541 proclaims, and which was confirmed during the debates on the Cook Islands and the West Indies Associated States of the UK. The governments of the Countries and the Kingdom have consistently held that the populations of the Caribbean islands still have a right to self-determination, whether they have exercised it in 1954 or not.

6.4.2 Conclusion

The Kingdom Charter is not based on a free choice by the populations of the Caribbean Countries. It is clear that most islanders do not desire full independence in the near future, but what kind of relation they want with the Netherlands is not certain. Two series of referenda have been held on the question whether the Netherlands Antilles should stay together, but the populations have never been given the opportunity to make a free choice regarding their relations with the Netherlands.

6.5 CONCLUSION

The Kingdom order does not comply fully with any of the recognized forms of decolonization as defined by GA Resolution 1541. The Netherlands Antilles and Aruba are not integrated into the Netherlands, and the fact that they are an integral part of the Kingdom is not very meaningful for the application of Principles VIII and IX of Resolution 1541. The Kingdom relations are more similar to a form of free association, because the Countries are autonomous in most areas and the Charter mainly provides a structure for voluntary cooperation. A number of aspects of the Kingdom order do not, however, comply with the UN criteria for an acceptable form of free association. These mainly concern the powers of the Kingdom (*i.e.* the Netherlands) to intervene in the affairs of the Caribbean Countries without their consent.

That raises the question whether the Kingdom might be an *unacceptable* form of government under the law of decolonization, namely one based on 'arbitrary subordination', in which case the Netherlands Antilles and Aruba should perhaps be considered as Non-Self-Governing Territories under the UN Charter. The Kingdom Charter was discussed at length in the GA, but the representatives could not agree on the characterization of the Kingdom order, nor on the questions whether the Netherlands Antilles and Surinam remained NSGTs, whether they had exercised their right to self-determination, and whether the Caribbean Countries had achieved a full measure of self-government. A majority of states seemed to think that the answer to these last two

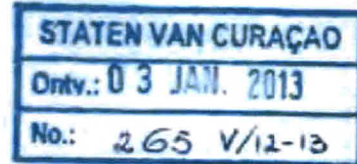
questions should be 'no'. A Resolution was adopted which should probably be interpreted to mean that Chapter XI of the UN Charter continued to apply to the Netherlands Antilles and Surinam, even though the Kingdom was released from its obligation under Article 73 *e*.

It could be argued that the right to self-determination, defined as the freedom of choice, leaves open the possibility that a dependent people freely chooses a status that is not fully self-governing according to the standards of Resolution 1541, and which creates a subordinate position for that people. The essential criterion for the acceptability of such a status should be whether the population has truly made that choice in freedom and with due knowledge of the ramifications of its choice. In that case, the remaining elements of subordination could not be considered 'arbitrary', but should perhaps be seen as an acceptable side effect of continuing a constitutional relation between a European state and a distant island territory that considers itself too small to become independent.

The populations of the Netherlands Antilles and Aruba have never directly expressed their support for the political status that the Kingdom Charter has created for their islands. Neither independence nor complete integration into the Netherlands appears to have the support of a majority of the population on any of the islands. It is unclear what status *would* have the support of a majority of the population.

In view of all this, it would be hard to deny that Chapter XI of the UN Charter still applies to the Kingdom of the Netherlands, as well as the law of decolonization and self-determination as codified in GA Resolutions 1514, 1541 and 2625. This means that the political decolonization of the Dutch Caribbean is not yet complete under the terms of international law, and that there still exists an international obligation for the Kingdom under Article 73 of the UN Charter to strive towards the completion of the process of decolonization. Only when it becomes clear (preferably through a referendum) that each island has obtained a status that enjoys the support of the populations could the Kingdom be considered a successful form of decolonization.

II



Ivar Asjes

Miembro di Parlamento di Kòrsou
Miembro del Parlamento de Curacao
Member of the Parliament of Curaçao
Lid van de Staten van Curaçao



Na: Presidente di Parlamento
Sr. M.C.F. Franco
Plasa Wilhelmina # 4
Presente.

Kòrsou, 2 di yanüari 2013

Tópiko: Rapòrt di Dr. Carlyle G. Corbin.

Apresiabel Sr. Presidente,

Athunto mi ta entregá e rapòrt, titulá: "*Assessment of self-governance sufficiency in conformity with internationally-recognised standards*" di e eksperto internashonal, Dr. Carlyle G. Corbin na Sr. Presidente.

E rapòrt aki, kual mi a risibí durante e periodo ku mi persona a fungi komo Presidente di Parlamento, ta duna ehekushon konkreto na un di e moshonnan ku Parlamento a aprobá durante su reunion di 11 di òktober 2011. Ta trata aki di moshon # III, kual (entre otro) ta bisa lo siguiente: "*Parlamento lo aserká, e eksperto internashonal, Dr. Carlyle Corbin pa asesora Parlamento den e strategia ku Parlamento ta bai hiba den e foro internashonal*".

E motibu ku mi ta entregá e rapòrt menshoná na e momentu aki ta ku entretantu e Parlamentario- i Gobernantenan nobo di Kòrsou a huramentá. Den e kuadro aki mi ta urgi Sr. Presidente pa manda kopia di e rapòrt aki pa tur (kolega-)miembro di Parlamento i alabes pa Gobièrnu di Kòrsou.

Atentamente,



Ivar Asjes
Miembro di Parlamento
Tel: 512-0520

**Assessment of self-governance sufficiency in conformity
with internationally-recognised standards**

Country Curacao

Dr. Carlyle G. Corbin
International Advisor on Governance
And Multilateral Diplomacy

August 2012

Summary

The Caribbean is perhaps the most politically diverse region in such a small aquatic geographical space. Apart from the independent states, the region includes a variety of non-independent countries (NICs) in varying stages of political and constitutional advancement including semi-autonomous countries, non self-governing territories and integrated jurisdictions in differing political relationships with extra-regional states. The Netherlands Antilles, as a five-island 'autonomous' country within the Kingdom of the Netherlands, underwent a process of political fragmentation in 2010 with three of the islands (Bonaire, Saba and Statia) becoming partially integrated, 'public entities' of the Kingdom, and the remaining two (Curacao and Sint Maarten) becoming separate 'autonomous' countries structured as the previous arrangement of the Netherlands Antilles.

Over one year after the political transformation, questions have emerged as to whether the new Dutch 'autonomous' arrangements after 2010 meet the minimum standards of full self-government in view of the transfer of specific competencies from the 'autonomous' countries to the Kingdom. An examination of the extensive self-governance mandate through the application of specific indicators derived from the United Nations (U.N.) Charter, U.N. General Assembly resolutions, and relevant human rights conventions, reveals that the autonomous country model beginning at its inception in 1954 was significantly deficient in meeting the prevailing international standards of full self-government in place at the time. A review of the U.N. debates conducted in the first half of the 1950s on the de-listing of the Netherlands Antilles from non self-governing territorial status drew specific attention to the prevailing political imbalance between the autonomous' country and the cosmopole.

By extension, the present governance model in place in Curacao emerging from the 2010 dismantlement process of the Netherlands Antilles further reduced the level of self-government to a diminished autonomous model, and is not in compliance with contemporary international standards of full self-government.

Four potential pathways identified in the realisation of a full measure of self-government for Country Curacao include:

1. The inscription/re-inscription on the U.N. list of non self-governing territories;
2. An approach to the relevant petitioning mechanisms of the international human rights conventions in relation to inalienable right to self-determination;
3. The potential re-structuring of the Kingdom of the Netherlands as a commonwealth of independent states.
4. Initiation of a process for full and separate independence, and economic and political relations with the wider international community on the basis of political equality of independent states.

Until any of the four alternatives are realised, Country Curacao will remain in an unequal, semi-autonomous political status out of conformity with international standards of full political equality.

I. Non-Independent Countries -The historical context

In the immediate post-emancipation period from the middle to the late 19th century, the Caribbean region was governed by a host of European powers under varying colonial arrangements. By the latter half of the 20th Century, many of these Caribbean countries had achieved a full measure of self-government through independence, free association or integration. Others remain in varying stages of dependency status into the second decade of the 21st Century designated as the Third International Decade for the Eradication of Colonialism.

Curacao is a part of a political and constitutional mosaic of overseas countries and territories (OCTs) in the Caribbean reflecting periodic substantial political and

constitutional change under increasingly complex dependency, semi-autonomous or integrated/partially integrated arrangements. These changes often reflect modifications of form rather than substance, and in some cases are indicative of political and constitutional stagnation with measures urgently required to avoid fossilisation.

Internationally-recognised classifications used to define the respective governance models of non self-governing, self-governing or integrated remain the most accurate benchmarks in assessing political and constitutional evolution for the non-independent countries of the Caribbean. In this regard, the period of the 1990s, following the independence of Namibia and Timor Leste, reflected little significant political change. This lack of progress was maintained through most of the first decade of the new century when the region only witnessed internal colonial reforms or other minimal constitutional developments in some of the non-independent Caribbean countries (NICCs).¹

In the last quarter of 2010, noteworthy political changes in a number of the countries were experienced. A discussion of these recent changes descriptive of the non-independent Caribbean was discussed in depth at the 2011 Sir Arthur Lewis Institute for Social and Economic Studies of the University of the West Indies in Kingston, Jamaica.² This issue is to be further examined at the March 2012 conference of the University College of the Cayman Islands.

Research conducted at the global level confirms that the Caribbean/Atlantic include seven of the sixteen non self-governing territories (NSGTs) listed by the United Nations (U.N.), namely the Turks and Caicos Islands, Cayman Islands, Montserrat, British Virgin Islands, Anguilla, Bermuda and the US Virgin Islands. Whilst some internal colonial reforms and adjustments have been made or are ongoing in the U.K. – administered territories, in particular, The powers delegated – as opposed to devolved - to

¹ Corbin, Carlyle, "A View of the Metropole" in *Governance in the Non-Independent Caribbean – Challenges and Opportunities in the Twenty-first Century*. Kingston-Miami: Ian Randle Publishers, 2009, 254.

² Corbin, Carlyle, "Self-Governance Deficits in Caribbean Non-Independent Countries." *Overseas Territories Review*. (2011): 1-7.

these jurisdictions have proven to be predictably reversible with the overall imbalance of political power remaining intact, and often reinforced and/or expanded as reverse delegation of power is often unilaterally applied. Not surprisingly, legitimate acts of self-determination have yet to be undertaken.

A similar internal constitutional drafting exercise has stalled in the U.S. Virgin Islands due to lack of funding made available to complete the process, whilst Puerto Rico (whose self-governing status is routinely questioned) has held a number of referenda on political status options during the 1980s and 1990s which have only served to reinforce the political stalemate which has delayed their self-determination process. A new non-binding plebiscite is scheduled for the fall of 2012.

None of these internal constitutional procedures in either the U.K. or U.S. territories constitute legitimate act of self-determination, and were never designed to change the prevailing power relationship between the territory and the Administering power.

All of these varying non self-governing political status arrangements contain significant democratic deficiencies, and the 'modernised' dependency models emerging from various colonial reform processes remain well short of international standards for full self-governance with absolute political equality.

It is in the second category of Self-Governing Autonomous Countries (SGCs) where noteworthy changes occurred serving to restructure the governance model. In this vein, the dismantling of the Netherlands Antilles in October, 2010 was effected with the emergence of two additional 'self-governing autonomous countries' (SGCs) of Curacao and Sint Maarten, along with the annexation/ partial integration by the Netherlands of Bonaire, St. Eustatius and Saba.³

³ This annexation/partial integration of Bonaire, Saba and St. Eustatius have resulted in three new European Union borders in the Caribbean with implications for Caribbean integration, security and sovereignty.

Unlike the United Kingdom general reticence toward referenda (only the Cayman Islands conducted a plebiscite to adopt its new constitution in 2009). The changes in the former Dutch autonomous country of the Netherlands Antilles relied on the referendum process as referenda were held between 2000 and 2005 in each of the five islands which comprised the grouping. The referendum results did not yield the intended clarity, however, particularly in the smaller islands of Bonaire and Statia where there were significant differences in interpretation of the status option between Dutch and island officials. Bonaire subsequently attempted a second referendum with a fuller range of political options, and more reasonable voter residency requirements, but the process was annulled by the Dutch.

Emerging from the process of dismantlement was an increase in the number of 'self-governing autonomous countries' in the region from three to four, with two new (lesser autonomous) models in Curacao and Sint Maarten joining Aruba and (arguably) Puerto Rico. It may be recalled that Aruba had initiated the political fragmentation process in 1986, but has not been affected by added 'supervision' applied by the Kingdom government to Curacao and Sint Maarten using creative interpretations of the Kingdom Charter (later discussed in the present analysis).

Changes to the third category of integrated jurisdictions reflect a political realignment with the concomitant addition of the three Dutch 'public entities' to the existent three French integrated departments of Guadeloupe, Martinique and French Guiana. This doubled to six the number of integrated jurisdictions (IJs) in the Caribbean which are fully or partially integrated with member states of the European Union (France, Netherlands). Additional changes in the governance structure of the French overseas (integrated) department of Guadeloupe and its former dependencies constituted a separate political fragmentation process with respect to the islands of (French) St. Martin and St. Bartholomey (St. Barts), both of which were heretofore under the administrative jurisdiction of Guadeloupe. The most recent arrangements extend separate collectivity status to St. Martin providing direct ties with France, rather than via Guadeloupe, with a

similar status also emerging for St. Barts. Both could emerge in the self-governing autonomous country category depending on the evolution of the existent model.

At the same time, the possibility of a fundamental shift from political integration to a more autonomous arrangement for Martinique and French Guiana (similar to the model of Maohi Nui/French Polynesia in the Pacific) was defeated in a 2010 referendum largely due to a dearth of accurate information on the nature of the autonomous model on offer, and further influenced by the political influence from the highest political levels in Paris which had issued warnings of potentially reduced economic support from France if a shift to an autonomous arrangement was selected.

As of 2012, the composition of the non-independent Caribbean continues to evolve.

II. Political and Constitutional Evolution of the Netherlands Antilles

The 1996 report of the Netherlands submitted in compliance with its international obligations as a State party to international human rights instruments is widely regarded as the most comprehensive treatise on the Netherlands interpretation of the political and constitutional development of the Netherlands Antilles, and remains a reference point in subsequent Netherlands reports on compliance with international agreements. The 1996 report provided a summary of the Dutch perspective on the evolution of the Netherlands Antilles to that point:⁴

The Netherlands Antilles is an autonomous part of the Kingdom of the Netherlands and consists of five islands: Bonaire with its capital Kralendijk, Curaçao with its capital Willemstad, Saba with its capital The Bottom, St. Eustatius with its capital Oranjestad and St. Martin (sic) with its capital Philipsburg. These are part of a chain of islands between North and South America known as the Antilles.

⁴ Core Document forming part of the Reports of States Parties - Netherlands: the Netherlands Antilles; International Human Rights Instruments, HRI/CORE/1/Add.67. 11 March 1996.

.....

The Leeward Islands were originally inhabited by the Arawacs (sic) and the Windward Islands by the Caribs. The Windward Islands were "discovered" in 1493. In 1499 the Leeward Islands were "discovered" by the Spaniard Alonso de Ojeda. Saba and St. Eustatius were taken over by the Dutch in 1632, the Leeward Islands in 1634 and the southern part of St. Martin (sic) in 1648.

It is to be highlighted that Curacao, in particular, served as a major transit point for enslaved Africans who were transported to other regions, with some estimates of 2,500 to 3,000 persons transferred "annually between the second half of the seventeenth century to the first quarter of the eighteenth century."⁵ Several revolts against the enslavement took place in 1750 and 1795, respectively, with the ultimate abolition of slavery in 1863.

With respect to constitutional history, the Netherlands 1996 report noted that:

The first Constitution of the Netherlands was enacted by the Dutch Parliament in 1865. It has since been revised several times. The most important revision was that in 1954, which resulted in the establishment of the "Statuut", the Kingdom's Charter, the principal statutory instrument within the Kingdom of the Netherlands, which regulates internal self-government for the islands of the Netherlands Antilles.

Regarding the 'right of self-determination,' the Netherlands advised the United Nations in its 1996 report that:

The electoral system provides adequate safeguards for the right to self-determination for the Netherlands Antilles. This right was also explicitly recognized in top-level consultations between the Netherlands Antilles (including Aruba at that time), the separate island territories and the Netherlands held in The Hague in October 1981. None of the countries or islands taking part in the conference opposed the exercise of the right to self-determination. Thus agreement was reached on the right of the island populations to determine their own political future independently. At a subsequent Round Table Conference between the Netherlands Antilles,

⁵ Romer-Kenepa, Nolda. "Some Short Notes on Curacao." A paper delivered to the 36th Session of the Caribbean Studies Association, World Trade Center. 2011.

the separate island territories and the Netherlands, held in The Hague from 7 to 12 March 1983, it was established that Aruba would exercise its right to self-determination.

With respect to future political and constitutional structure, the 1996 report of the Netherlands made reference to the first referendum held in Curacao in 1993:

After lengthy negotiations between politicians of the different island territories of the Netherlands Antilles, in which several models for the future constitutional relations between the islands were discussed, Curaçao subsequently decided to hold a plebiscite on 19 November 1993, under United Nations supervision.

The Report went on to describe the plebiscite process and the results of the vote in Curacao:

In order for the plebiscite to be a meaningful expression, and to comply with international standards, the people of the five islands had four options to choose from:

- (a) Remaining part of the Netherlands Antilles;
- (b) Becoming an autonomous country within the Kingdom of the Netherlands;
- (c) Becoming a part of the Netherlands; and
- (d) Becoming an independent State.

At this stage, the four alternatives were regarded as being in conformity with the three options of political equality defined in U.N. Resolution 1541 (XV) of 1960. Accordingly, the plebiscite options of maintenance of the five-island autonomous status, and separate autonomous status, were projected as being in conformity with free association, whilst “becoming a part of the Netherlands” and “becoming an independent State” were seen as consistent with political integration and independence, respectively. Regarding the outcome of the 1993 referendum, the 1996 Report noted that:

The results of the Curacao) referendum, in which 56.8 per cent of the registered voters participated, showed that out of a total of 67,413 votes cast, 48,857 (73.6 per cent) were in favour of maintaining the existing status of Curacao within the Netherlands Antilles.

The Netherlands report also drew certain conclusions from similar referenda held in the other four islands of the Antilles during the period:

As a result of the same circumstances and discussions regarding the constitutional future of the other island territories (Bonaire, Saba, St. Eustatius and St. Martin [sic]) it was also decided to hold plebiscites on these islands, based on their respective rights of self-determination. These plebiscites were organised along exactly the same lines as the referendum held in Curaçao. On all the islands, a vast majority (approximately 90 per cent) of the voters were in favour of maintaining the existing status of the island territories within the Netherlands Antilles.

According to the report,

(The) results provide(d) a strong political basis for the continuation of the present constitutional structure between the islands of the Netherlands Antilles, although some modifications will be needed to secure the further development of the relations between the individual islands."

The 1996 Netherlands report also projected the structure of the Kingdom in similar fashion to the reports submitted by the Netherlands to the U.N. General Assembly from 1951 through 1955 vis a vis the Netherlands Antilles (discussed later in the present analysis):

The present constitutional structure of the Kingdom of the Netherlands dates from 1954, when, after several years of study, discussion and negotiation, the Netherlands, Suriname and the Netherlands Antilles (then including Aruba) decided to establish a new constitutional order under which (according to the Charter of the Kingdom, the constitutional document which was promulgated) they would "conduct their internal affairs autonomously and in their common interest on a basis of equality and [...] accord each other reciprocal assistance". Thus the Kingdom, while remaining one sovereign entity under international law, came to consist of three co-equal partners which have distinct identities and are fully autonomous in their internal affairs.

Since then, two important changes have taken place. In 1975, Suriname decided - with the full assent of the partners - to leave the Kingdom and become a sovereign State in its own right. In 1986, Aruba became a separate country within the Kingdom, under the Charter of the Kingdom, and therefore now has the same constitutional status as the two other countries, the Netherlands and the Netherlands Antilles.

The 1996 report further described the constitutional structure of the Kingdom in this fashion:

The Charter of the Kingdom, the highest constitutional instrument of the Kingdom, is a legal document *sui generis*, which is based upon its voluntary acceptance by the three countries (the Netherlands, the Netherlands Antilles and Aruba). It comprises three essential parts.

“The first part defines the association between the three countries, which is federal in nature. The fact that together the three countries form one sovereign entity implies that a number of matters need to be administered by the countries together, through the institutions of the Kingdom (whenever possible, bodies established in the various countries participate in the conduct of these affairs). These “Kingdom affairs” include the maintenance of independence, defence, foreign relations, the safeguarding of fundamental human rights and freedoms, legal stability and proper administration.

The 1996 report went on to say that the “relationship between the Countries of the Kingdom (was) as autonomous entities”...which “consult and coordinate in matters which are not Kingdom affairs but in which a reasonable degree of coordination is in the interest of the Kingdom as a whole.” The report also described “the autonomy of the countries (as)...the principle underlying the Charter (with) the countries govern(ing) themselves according to their wishes, subject only to certain conditions imposed by their being part of the Kingdom (emphasis added). In this connection, the report referred to “elementary principles of democratic government, observance of the Charter and Kingdom legislation, and the adequate functioning of the country’s bodies..(as) matters of concern to the whole realm.”

In retrospect, the 1996 report revealed that the autonomy and equality being projected were significantly qualified by specific caveats such as the power of the Kingdom to impose ‘certain conditions’ as mentioned above. This effectively raised fundamental questions regarding whether the Charter was deficient with respect to autonomy of the former Netherlands Antilles in relation to the requisite political equality under internationally accepted standards, even as it continued to be projected in this manner. The activation of heretofore dormant Charter provisions allowing for Kingdom intervention in the internal affairs of the ‘autonomous’ countries would play an

enormously significant future role when Curacao (and Sint Maarten) became autonomous countries in their own right in 2010.

It is to be recalled that the relevant provisions of the Charter setting forth what has amounted to a 'conditional autonomy' had been highlighted by numerous U.N. member States in the extensive deliberations before the U.N. Committee on Information, the U.N. Fourth Committee and the U.N. General Assembly itself during international examination between 1950 - 1955 on whether the Netherlands Antilles should be "de-listed" by the U.N. as a non self-governing territory. This is examined in a later section of the present analysis.

In a subsequent 2008 report ⁶ submitted by the Netherlands to the U.N. Human Rights Committee, pursuant to international legal obligations under the International Covenant on Civil and Political Rights (ICCPR), the Netherlands provided an update to the constitutional history of the 1996 report. In this regard, the later report revealed the results of the "non-binding or advisory referendums" conducted in the five islands between 2000 and 2005 (held in Curacao, in 2005) with particular reference to compliance with Article 1 of the Covenant on the 'Right to Self-Determination.'

The relevant documents of the deliberations of the 2008 Human Rights Committee do not reveal whether consideration was given to the inconsistency of the "non-binding" nature of the referenda versus the binding requirements of a legitimate self-determination process. In fact, such an 'advisory' exercise would not have constituted a legitimate act of self-determination by international standards despite the assertion that "the referendums were organised and carried out in accordance with United Nations criteria." ⁷ Even as the "referendum must be understood in the context of...the

⁶ Consideration of Reports submitted by States parties under Article 40 of the Covenant, Addendum Antilles. International Covenant on Civil and Political Rights (ICCPR); Human Rights Committee. CCPR/C/NET/4/Add.2. 9 June 2008.

⁷ U.N. participation in the referendum process did provide for a sense of legitimacy notwithstanding the 'advisory' nature of the exercises in the five islands.

assertion of the right to self-determination as defined by the United Nations,”⁸ it should not, however, be considered as the fulfillment of a self-determination act because of its ‘advisory’ nature and the insufficiency of equality in the ‘autonomous’ models on offer.

It is within this context that the results of the 2000-2005 plebiscites initiated the process of the dismantling of the Antilles, with the voters of Sint Maarten (2000) and Curacao (2005) selecting separate autonomous country status at 69.9 per cent and 68 per cent, respectively, with Bonaire (at 59.5 %) and Saba (at 86 %) opting to pursue “direct ties with the Netherlands.”⁹ Statia also settled for the ‘direct ties’ option after first selecting to remain in the Antilles constellation (which would no longer exist).

In ratifying the referendum results, the Curacao Island Government insisted that the autonomous country status to be negotiated with the Netherlands had to be no less autonomous than that held by Aruba, although this became problematic following the Netherlands insistence on certain conditionalities before agreeing to the separate status. This served to confirm the ‘non-binding nature’ of the referendum insofar as the Netherlands saw no obligation to implement the referendum results without a reduction in autonomy from what had been previously enjoyed by the Netherlands Antilles and Aruba. Such ‘reversed autonomy’ was considered using existent provisions of the Kingdom Charter providing for unilateral Dutch authority which had not necessarily been interpreted so broadly in the past with respect to Curacao.

The subsequent four party-talks among representatives of the Netherlands, the Netherlands Antilles (the existent central government), and Curacao and Saint Maarten (both of which had chosen separate autonomous country status) began in earnest with a

⁸ Goede Miguel P. “Electoral Notes on the referendum in Curacao held on May 2009.” Paper presented to the Caribbean Studies Association, University of the West Indies. Kingston, Jamaica May, 2010.

⁹ Interestingly, the options available among the four referenda were not identical in terminology nor definition, and curiously, there was no option for autonomous country status for the voters of Saba. Further, the voters of Statia chose to remain as “part of the Netherlands Antilles” but since the other three islands chose other options, Statia reverted to the ‘direct ties with the Kingdom’ choice which had been selected by Saba and Bonaire.

series of agreements based on discussions surrounding the proposed Netherlands conditionalities which would have to be agreed if required debt forgiveness was to be extended. In this connection, the Netherlands described the procedure in a subsequent 2008 report in compliance with Article I of the International Covenant on Civil and Political Rights with specific reference to the right to self-determination:

On 22 October 2005 the five islands concluded an outline agreement with the governments of the Netherlands and the Netherlands Antilles. It was decided to start a process intended to result in a new constitutional status for the five islands within the Kingdom. At the same time the socioeconomic and financial problems of the Netherlands Antilles are to be tackled. The aim is to give the islands a good starting point. This process was officially instituted on 26 November 2005 by means of a Round Table Conference (RTC) of the five islands, the Netherlands, the Netherlands Antilles and Aruba. The RTC resolved to formulate joint criteria governing legal certainty, good governance and fundamental rights and freedoms...¹⁰

A pact emanated from the Round Table Conference (RTC) of November, 2005 which provided the final perspective and target date for the new constitutional arrangements. The RTC also produced a consensus which agreed “criteria and norms (which) would be set to which the constitutions, legislation and government apparatus of the entities within the Kingdom must comply,”¹¹ along with a target date for achieving the constitutional changes. The formal end of the Netherlands Antilles, initially set for 1 July 2007, was postponed to 15 December 2008, and again delayed due to the intensity of the negotiations surrounding the proposed conditionalities, leading to the final date of 10th October 2010 when Country Curacao and Country Sint Maarten were created.

The accords culminated with the Final Declaration signed by the parties in November 2006 endorsing, *inter alia*, the agreed arrangements which would include significant debt relief for the new autonomous countries with the caveat of Kingdom

¹⁰ Consideration of Reports submitted by States parties under Article 40 of the Covenant – Netherlands International Covenant on Civil and Political Rights (ICCPR); Human Rights Committee. CCPR/C/NET/4 30 July 2008.

¹¹ Final Declaration of the government meeting concerning the future constitutional status of Curacao and Sint Maarten. 2nd November 2006

Government supervision in areas heretofore under the jurisdiction of the autonomous Netherlands Antilles, and remaining under the autonomous country of Aruba which was largely unaffected by the changes. Whether the 'reversed autonomy' fell below the minimum standards of self-government is examined later in the present paper.

III. Origins and Methodology of the Present Analysis

The present assessment on Country Curacao is undertaken to determine whether the present political and constitutional arrangements of this 'autonomous' country meet internationally-recognised standards of self-determination and consequent decolonisation with respect to the attainment of a full measure of self-government, with the realisation that democratic governance can only be achieved with the full application of the principle of absolute political equality.

In this connection, the origin of this assessment of the level of self governance sufficiency in Curacao into the second year of a separate political status was achieved in 2010 can be traced, in many respects, to earlier deliberations conducted by the relevant United Nations (U.N.) bodies on the political adequacy of the former Netherlands Antilles at its birth. Curacao had been the capital of the Netherlands Antilles until the 2010 political fragmentation/dismantlement of the five-island autonomous country¹²

The specific question which this assessment seeks to address is whether the political status which emerged for Curacao resulting from the separation of the islands is sufficiently autonomous to meet contemporary international standards of a full measure of self-government. Correlative to this point is whether the original autonomous model of the Netherlands Antilles presented to the United Nations in the first half of the 1950s met the early self-governance criteria in place at that time. These issues are examined in

¹² Corbin, Carlyle. "Self-Determination or Annexation: the case of Bonaire," *Overseas Territories Report* (2009): 1-2.

chronological fashion beginning with the U.N. assessment of the evolution of the Netherlands Antilles.

The methodology used in the present analysis constitutes a thorough examination of the U.N. documentation on the deliberations of the relevant U.N. committees during their consideration of the Kingdom of the Netherlands regarding its international responsibilities under Article 73 of the U.N. Charter. The methodology also included a broader review of the extensive international mandate on self-determination emanating from U.N. General Assembly resolutions and from international human rights instruments.

The elements of this international mandate have been synthesised into specific measurements in key functional areas which serve as indicators on the level and extent of self-governance. In this connection, the relevant indicators differ with respect to whether the non-independent Caribbean country concerned is 1) formally listed as non self-governing, 2) regarded as autonomous or semi-autonomous, or 3) partially or fully integrated into an independent state. In this context, the second set of indicators is utilised in the present assessment of Country Curacao.

IV. International review of self-governance sufficiency

In examining the present level of self-governance sufficiency of Country Curacao after the first year, it is instructive to begin at the outset of the autonomous period of the erstwhile Netherlands Antilles of which Curacao served as the capital, corresponding with the recognition by the international community of the concept of autonomous governance at its earliest stages.

These original U.N. deliberations on the Netherlands Antilles were undertaken over a six year period beginning in 1950 when the autonomous country was composed of the five island jurisdictions described above, plus Aruba before its own attainment of 'status aparte' in 1986. The change in designation from colony to 'autonomous country'

was made pursuant to the adoption of amendments to the Netherlands Constitution in 1948 which set forth the then-four countries in the Kingdom (Netherlands, Indonesia, Suriname, and the Netherlands Antilles).

This occurred a few short years after the original list of non self-governing territories was adopted by the U.N. General Assembly in 1946, and at a time when the criteria for full self-government was in its early stages of development. The original U.N. list of non self-governing territories (NSGTs) was compiled with the concurrence of U.N. member States including the Kingdom of the Netherlands which had agreed to provide information to the U.N. on evolutionary developments in the territory.¹³

Thus, the new 'autonomous' Netherlands Antilles, along with Surinam, were projected as equal political partners with the Netherlands, suggesting the absence of a power imbalance vis a vis the Kingdom. Accordingly, an "Interim Order of government for the Netherlands Antilles and the Constitution defined the power and competence of the territory" with the Interim Order elaborating on the demarcation of power between the Netherlands and the Netherlands Antilles providing for a Dutch-appointed Governor "vested with wide powers."¹⁴

These changes in the Kingdom structure occurred simultaneously with the adoption by the U.N. of its 1948 resolution on "Cessation of the transmission of information under Article 73 (e) of the Charter"¹⁵ which considered, *inter alia*, that:

(2)...having regard to the provisions of Chapter XI of the Charter, it is essential that the United Nations be informed on any change in the constitutional position and status of any such territory as a result of which

¹³ United Nations (U.N.) General Assembly Resolution 66-1 on "Transmission of Information under Article 73(e) of the U.N. Charter." 14th December 1946.

¹⁴ Igarashi, Masahiro, *Associated Statehood in International Law* (The Hague/London/New York, 2002), 34-35.

¹⁵ United Nations (U.N.) General Assembly Resolution 222 (III) on "Cessation of the transmission of information under Article 73 (e) of the Charter." 3 November 1948.

the responsible Government concerned thinks it unnecessary to transmit information in respect of that territory under Article 73 (e) of the Charter...

The confirmation of this process served as the legislative authority for U.N. review of the political status of the 'autonomous' countries created as the result of the changes in the Kingdom structure.

U.N. REVIEW PROCESS - 1951

From the earliest U.N. deliberations, the focus of the member States was concentrated on the recognition of the political power imbalance in the territories and a willingness to examine any changes in their political and constitutional structures which would indicate that a qualitative leap had been achieved from dependency to self-governing status. For the Netherlands Antilles, the Netherlands argued in an explanatory note submitted to the U.N. that "the Netherlands Antilles and Suriname had become autonomous as regards domestic affairs" and that (the two 'autonomous' countries) expressed the opinion that the transmission of information could no longer be regarded as compatible with the status of the territories they represented."¹⁶

This contention was contained in a 1951 submission to the U.N. in which the Netherlands Government expressed the view that "the Netherlands Antilles and Suriname ceased to be Non Self-Governing Territories within the meaning of Article 73 (e) of the Charter of the United Nations."¹⁷

¹⁶ Igarashi, Masahiro. *supra* note 14 at 35.

¹⁷ United Nations Document A/AC.35/L.55, 12 September 1951

U.N. REVIEW PROCESS – 1952

The U.N. General Assembly subsequently adopted its first resolution¹⁸ on the Netherlands Antilles in January, 1952 making reference, *inter alia*, to the U.N. examination of the Netherlands submission by the U.N. *Special Committee on Information transmitted under Article 73(e) of the Charter*. The Assembly by the same resolution decided to examine the Netherlands submission in the light of any report prepared by the U.N. “Ad Hoc Committee (created in 1952)¹⁹ to carry out a further study on “the 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.” The Assembly also indicated its interest in examining the outcome of a conference of representatives of the Netherlands, the Netherlands Antilles and Surinam which convened in 1952, and any new arrangements which may have resulted from those deliberations.

By December 1952, the U.N. Fourth Committee (a Committee of the Whole) further examined the question and debated the contention of the Netherlands that under the Interim Law, a full measure of self-government in internal affairs had been granted to the ‘autonomous’ countries. The General Assembly subsequently proceeded to adopt a resolution in December, 1952 recognising the work of the previous Ad hoc Committee, approving a list of factors on the attainment of a full measure of self-government, and establishing a new Ad hoc Committee with instructions to continue and carry out a more thorough study of the factors in determining a full measure of self-government.²⁰

¹⁸ United Nations (U.N.) General Assembly Resolution 568 (VI) on “Cessation of the transmission of information under Article 73 (e) of the Charter in respect of the Netherlands Antilles and Surinam.” 18 January 1952.

¹⁹ United Nations (U.N.) General Assembly Resolution 567 ((VI) on “Future Procedures for the continuation of the study of 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.” 18 January 1952.

²⁰ United Nations (U.N.) General Assembly Resolution 648 ((VII) on “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” 10 December 1952.

U.N. REVIEW PROCESS - 1953

The new Ad hoc Committee created in 1952 discussed the question of the Netherlands Antilles and Surinam the following year in 1953, during which time the Netherlands submitted to the U.N. Secretary-General that the constitutional transition underway in both territories was leading to a position of “close co-operation with the Netherlands on the basis of equality of rights within the framework of the Kingdom...”

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At the same time, the Netherlands Government also questioned the applicability of the criteria which had been adopted by the U.N. General Assembly to that point contending that full self-government was determined by the territories’ control of economic, social and educational affairs. Some developed country governments agreed with this position, whilst other mostly developing countries continued to point to the executive powers of the Dutch-appointed governor as clear indication that the territories had not achieved a full measure of self-government.

Without sufficient support for the Netherlands argument among the U.N. member States, the General Assembly adopted a resolution in November 1953 which took note of the negotiations between the Netherlands on the one hand, and the two territories on the other, and which acknowledged progress made by the two territories towards self-government.²² The Assembly did not concur that the territories had yet achieved self-government.

U.N. REVIEW PROCESS – 1954

In 1954, the Netherlands informed the U.N. Fourth Committee that agreement has been reached on a new Kingdom Charter which resulted in autonomous governance for

²¹ Igarashi, Masahiro. *supra* note 14 at 37.

²² United Nations (U.N.) General Assembly Resolution 747 ((VIII) on “Cessation of transmission of information under Article 73 (e) of the Charter in respect of the Netherlands Antilles and Suriname.” 27 November 1953.

the Netherlands Antilles and Surinam. Without specific regard to the Dutch territories, U.N. member States raised a series of questions during the committee deliberations about the method by which such decisions on self-determination should be made. Accordingly, recommendations were set forth for United Nations visiting missions to be utilised to directly ascertain the popular will of the people, rather than relying solely on the argument of the Administering Power, and in some respects, supported by the accommodationist governing elites in the territories concerned.

The General Assembly subsequently adopted in November, 1954 a resolution which emphasised the importance of “the manner in which the right of self-determination has been attained and freely exercised,” and endorsed the method of sending U.N. visiting missions to the territories “to evaluate as fully as possible the opinion of the population as to the status, or change in status, which they desire “during the time when the population is called upon to decide on its future status or change of status.”²³

U.N. REVIEW PROCESS - 1955

In May, 1955 the U.N. Committee on Information on Information conducted a thorough discussion of the Kingdom Charter with the Netherlands reiterating their earlier position that “decisions on Kingdom affairs had to be taken jointly by the three countries on the basis of equality.” In its formal submission to the Committee, the Netherlands Government argued that:

- 1) “The (Kingdom) Charter was based on the principles that the Netherlands, Surinam and the Netherlands Antilles has expressed freely their will to accept a new constitutional order...;that the three countries each exercised autonomy in internal affairs, (and) that decisions on

²³ United Nations (U.N.) General Assembly Resolution 850 (IX) on “Consideration of communications relating to the cessation of the transmission of information under Article 73 (e) of the Charter.” 22 November 1954.

Kingdom affairs had to be taken jointly by the three countries on the basis of equality" (*emphasis added*).²⁴

In the same submission to the U.N. this political equality was subsequently qualified by the following:

2) Except in matters of defence, foreign affairs, nationality and a few other subjects which were the prerogatives of the Kingdom (*emphasis added*), the three countries had exclusive authority to take final decisions." (*emphasis added*)

The Netherlands put forth a new strategic position in its submission that it was "no longer the Administering Member in respect of Suriname and the Netherlands Antilles but (rather) an equal partner in the Kingdom" and thus "the Netherlands had neither the right nor the power to transmit information on these countries as provided for in Article 73 (e) of the United Nations Charter." The Dutch argued that this "rendered it constitutionally impossible to continue the annual reporting."²⁵ This strategy was designed to place pressure on the U.N. to concur with the Dutch position.

Substantive questions had been raised throughout the period by U.N. member States regarding the level, nature and sufficiency of the political equality of the Netherlands Antilles and Surinam which were being projected by the Netherlands as self-governing. Some of these queries focused on whether the inhabitants of the territories had been formally consulted regarding the new status, the method of nominating judges, whether the representatives of the territories had the right to vote in the Parliament of the Kingdom and whether there were limitations on the number of representatives from those territories. Additional questions were raised on the power of the Netherlands to annul legislation in the 'autonomous countries.'

²⁴ General Assembly Official Records: Tenth Session . Report of the Committee on Information from Non Self-Governing Territories (Supplement No. 16 (A/2908). New York, 1955.

²⁵ This conclusion was contained in the summary of the U.N. proceedings contained in the Repertory of Practice of United Nations Organs, 1945-54.

The Netherlands response did not necessarily engender confidence in the substance of its argument, as the Netherlands replied that parliamentary laws were binding on the territories – even as their delegates did not have the right to vote in the Parliament - and that Kingdom parliamentary measures opposed by the territories could be passed over their objection by a three-fifths majority of the Parliament. It was stated that the territories, during the deliberations on the new Charter, had preferred these arrangements in lieu of parliamentary voting rights. It was further argued by the Netherlands that since elections were held in 1954 in the Netherlands Antilles, and would be held “at a later date in Surinam,” it was not necessary to hold special elections on popular acceptance of the Kingdom Charter since all political parties reportedly had supported the changes.

Despite the clear indications of political inequality between the Netherlands on the one hand, and the Netherlands Antilles and Surinam on the other, the developed country members of the Committee (the United States, Australia, France et al) expressed support for the de-listing of the two territories from the U.N. list of non self-governing territories consistent with their own respective positions as administering Powers of non self-governing and/or trust territories, and the apparent desire to maintain ultimate authority over these territories even after qualified ‘self-government’ had been proclaimed.

On the other hand, the developing countries (Brasil, China, Guatemala, India, Iraq, Peru et al) - a number of which had emerged themselves from colonialism - and in some cases, slavery - expressed their reservations for the removal of the two territories from the list, based on the inconsistencies of the arguments presented and the objective reality that the new arrangements for the ‘autonomous countries’ did not meet the prevailing standards of full political equality. It was, nevertheless, acknowledged that these new political arrangements represented progress *towards* self-government, but not the attainment thereof. These developing countries called for a more fuller examination of the questions raised.

The U.N. Committee on Information took up the question again in September, 1955 where the Netherlands restated its position that it was "no longer appropriate for information to be transmitted to the U.N. in respect of the Netherlands Antilles and Suriname..." and that "the promulgation of ...(the Kingdom) Charter marked the beginning of full and equal partnership between the three countries..."²⁶ The question was raised by the developing countries as to whether the new political arrangements complied with the criteria developed by the U.N. General Assembly in 1953, in particular, whether the 'autonomous' countries were "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 or in any other form."²⁷

The Netherlands representative countered that his government had reserved its position on the applicability of the 1953 resolution, and boldly asserted that "the competence of the General Assembly in this field was not recognised by the Netherlands Government." (*emphasis added*) Nevertheless, the Netherlands representative went on to acknowledge that the 'autonomous' arrangements did not comply with the 1953 U.N. criteria. In explanation, the Netherlands representative told the Committee on Information that the Parliaments in the Netherlands Antilles and Surinam "had unanimously accepted the Charter," and regarding whether these 'autonomous' countries had the freedom to modify their political status, the Netherlands argued that it was sufficient that the ministers plenipotentiary of the respective countries "had the right to introduce (but not vote on) a bill for amendment of the Charter and modification of the(ir) status in the Parliament of the Kingdom."

Regarding the lack of voting rights, the Netherlands representative further argued that the vote in the Kingdom Parliament for the 'autonomous' countries would have had "negligible influence in Kingdom affairs" due to their relatively small populations. The

²⁶ General Assembly Official Records: Tenth Session . Report of the Committee on Information from Non-Self-Governing Territories (Supplement No. 16 (A/2908/Add. 1). New York, 1955

²⁷ United Nations (U.N.) General Assembly Resolution 742 (VIII) on "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." 27 November 1953

Netherlands representative asserted in the discussions before the Committee vote that the Netherlands (alone) had the right to decide when its territory had reached the status where the obligation under Article 73 (e) ceased.

However, there was significant evidence that the 'autonomous' political model in place in the Netherlands Antilles and Surinam was not in compliance with the criteria for full self-government in existence at the time, and that "the measure of self-government provided for in the Charter of the Kingdom did not warrant a release from the obligations of Article 73 (e)." ²⁸ A number of delegations also stated their conclusion that the two territories had not yet attained a full measure of self-government. ²⁹

It was noted during the committee adoption of the resolution that "even if this special (reporting) obligation should cease, Chapter XI of the (U.N.) Charter contained other obligations which would continue to exist until the Territory had attained a full measure of self-government, at which point the entire chapter would become inapplicable."³⁰ This brought into focus the fact that throughout the U.N. deliberations on the disposition of the Netherlands Antilles and Suriname, Article 73 (e) of the U.N. Charter on the transmission of information had taken precedence to the virtual exclusion of other key provisions of the Charter, in particular, Article 73 (b) which focused specifically on self-government. In this connection, Article 73 (b) requires that :

Members of the U.N. which have or assume responsibilities for the administration of territories whose peoples have not yet attained a full measure of self-government recognise the principle that the interests of the inhabitants are paramount, and accept as a sacred trust the obligation

²⁸ Statement of the Representative of Iraq to the Committee on Information from Non Self-Governing Territories. 8th September 1955.

²⁹ Statement of the Representative of India to the Committee on Information from Non Self-Governing Territories. 8th September 1955

³⁰ Statement of the Representative of Peru to the Committee on Information from Non Self-Governing Territories. 8th September 1955

to promote...the well being of the inhabitants of these territories, and to this end,

(a)...

(b) to develop self-government, to make due account of the political aspirations of the peoples and to assist them in the progressive development of their free political institutions, according to the particular circumstances of each territory and its peoples and their varying stages of advancement.

In this regard, it was also noted in the Committee on Information deliberations that:

It was clear that, under the new constitutional structure, Suriname and the Antilles, although juridical collectivities or entities forming part of the Kingdom, remained, nevertheless, in a state of dependency in important respects within the juridical system and under the authority of the State which had been administering them; but it was no less certain that they enjoyed autonomy in the specific fields to which Article 73 (e) of the Charter referred." (in particular, in the economic, social and educational fields).³¹

This conclusion supports a contemporary interpretation of the U.N. Charter that the obligations of member States do not end with compliance with the reporting requirements on the matters covered in Article 73 (e) of the U.N. Charter, but also continue under Article 73 (b) until such time as full self-government is achieved.³²

³¹ *Id.*

³² Formal procedures were developed in the 1990s (if not enacted) for the U.N. to determine whether non self-governing governance models presented to it are in compliance with the requirements of the promotion of self-government under Article 73 (b). No such review procedures have been put in place for the 'autonomous' countries.

Relatedly, in the discussions leading to the Committee vote, the Netherlands representative expressed its willingness to accept the “omission” in the resolution of an assertion that the Netherlands Antilles and Surinam had achieved a full measure of self-government, arguing again that the release from the reporting requirements of Article 73 (e) “implied that the countries were no longer non self-governing.” This was an implication which was not necessarily shared by most of the member States of the Committee, but there was insufficient elaboration on the relevance of Article 73 (b) to the process.

The Committee went on to adopt the text of the resolution on 8th September 1955 which made reference to the “political advancement achieved,” but no reference that the ‘autonomous’ countries had actually attained a full measure of self-government. Instead, the resolution pointed to the “approval of the new constitutional order by the peoples of the Netherlands Antilles and Surinam in reference to the concurrence of the respective Parliaments with the new Kingdom Charter.” This skirted the issue of self-governance sufficiency, and was the result of a political decision of a majority of member States rather than a determination based on the merit of the argument.

One developed country, which itself administered a number of non self-governing territories and a multi-island trust territory³³, expressed regret for the abstentions of most of the “non Administering members” and argued “the efforts of dependent peoples toward a greater degree of self-government should be recognised.”³⁴ In fact, reference had been made to progress, but it was the insufficiency of the self-governance of the new arrangements which remained in question. A number of developed country administering Powers articulated their reticence towards acknowledging the very competence of the U.N. to determine when a territory was to be de-listed.³⁵ This attitude prevails to present

³³ Trust territories are administered pursuant to Chapter XII of the U.N. Charter.

³⁴ Statement of the Representative of the United States to the Committee on Information from Non Self-Governing Territories. 8th September 1955

³⁵ Statements of the Representatives of Australia, France and United Kingdom, respectively, to the Committee on Information from Non Self-Governing Territories. 8th September 1955

day with a number of administering Powers formally withdrawing their cooperation from the U.N. review process of the territories.

ADOPTION BY THE U.N. GENERAL ASSEMBLY - 1955

Diplomatic discussions at the U.N. General Assembly's Fourth Committee in November, 1955 repeated many of the same arguments heard at the Committee on Information several months prior, reinforcing the nature of the democratic deficiencies with respect to the 'autonomous' countries. One developing country representative summarised several key substantive objections to the removal of the two territories from the U.N. list as articulated to varying degrees by a number of other countries:

It was significant...that under the system of association established by the Kingdom Charter political control was reserved to the central Government of the Kingdom, which therefore became the principal partner. Furthermore, Kingdom affairs as enumerated in Article 3 of the (Kingdom) Charter included a number of matters of vital importance to the internal development of the Territories from the economic and ethnical point of view.

Apart from Kingdom affairs, the legislative power of local authorities was subject to considerable restrictions, in particular under Article 44. (There was also) the absence from the Charter of a clear provision ensuring the freedom of the populations of the two countries to modify their status through the expression of their will by democratic means.³⁶

³⁶ Statement of the Representative of Egypt to the Fourth Committee of the U.N. General Assembly. 28 November 1955.

Nevertheless, the General Assembly, upon the recommendation of its Fourth Committee, ultimately adopted its resolution ³⁷ of December, 1955 which deemed as “appropriate” the “cessation of the transmission of information (by the Netherlands) under Article 73 (e) of the U.N. Charter in respect of the Netherlands Antilles and Surinam.” In the end, the U.N. General Assembly remained silent on the question of the continued applicability of Article 73 (b) to the former territories now deemed sufficiently ‘autonomous.’

The successor Committee on the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples created in 1961 (replacing the earlier Committee on Information)— following the 1960 adoption of the Decolonisation Declaration - began to focus significant attention on its Article 73 (b) responsibilities. Through the application of this legislative authority, the self-government and political equality of many Caribbean (as well as Africa, Asia and Pacific) countries were achieved between the 1960s through 1990. By the end of the Cold War in the early 1990s, however, the process slowed due to insufficient implementation of U.N. resolutions on decolonisation.

IMPLICATIONS FOR THE SELF-DETERMINATION OF COUNTRY CURACAO

From the extensive deliberations undertaken on the de-listing of the erstwhile Netherlands Antilles by the respective U.N. committees and General Assembly, a number of conclusions can be drawn with specific relevance to the contemporary self-determination process of Curacao and the envisaged attainment of a full measure of self-government consistent with international standards and principles.

First and foremost, despite the serious misgivings expressed by a variety of member States as to the self-governance sufficiency of the Netherlands Antilles, the U.N.

³⁷ United Nations (U.N.) General Assembly Resolution 945 (X) on “Communication from the Government of the Netherlands concerning the Netherlands Antilles and Surinam.” 15 December 1955.

General Assembly removed the territory from U.N. consideration even as the issue of the lack of the requisite complete political equality had been left unresolved.

It was understood, for example, that the type of political association vis a vis countries under the Kingdom Charter maintained the political control with the central Kingdom Government. The additional restrictive nature of the legislative powers of the respective parliaments of the 'autonomous' countries had also been repeatedly cited, as was the absence of clear authority of these countries to modify their status without external interference (this was further elaborated in the Decolonisation Declaration adopted some five years later).

Still further elements inconsistent with the requisite measure of self-government were being claimed by the Netherlands included the overall predominance of Kingdom executive and legislative authority, either acting through the appointed governor or directly via the unilateral authority of the Kingdom Parliament in defined areas, and in fairly vague and open-ended references providing the Kingdom great latitude in deciding what would constitute a valid intervention into the affairs of the 'autonomous' country. The legitimacy of the process was also questioned.

According to one analysis:

Many States considered that independence or self-government must be achieved not only in form but also in content...(and that) since...there had been no plebiscite in the Netherlands Antilles or Surinam there was a fundamental question as to 'the legitimacy of the means used to ascertain the will of the people.' There remained, therefore, the ultimate question as to whether the two countries had really attained a full measure of self-government within the framework of the Kingdom of the Netherlands.³⁸

³⁸ Igarashi, Masahiro, *supra* note 14 at 43.

All things considered, the adoption of the U.N. General Assembly resolution in 1955 to de-list the Netherlands Antilles and Surinam was a decision motivated by the prevailing international political dynamic of the period with insufficient weight of numbers to carry the anti-colonial perspective. Further, the adoption of the resolution to delist was more reflective of an acknowledgement by the U.N. of consistent cooperation by the Netherlands Government with the U.N. review process in comparison to a far lesser engagement of the other developed countries which administered territories.

The adoption of the resolution was far less reflective of the efficacy of the political argument utilised by the Netherlands Government that the territories had achieved sufficient self-government. It was widely acknowledged that the political and constitutional arrangements of the 'autonomous' status of the Netherlands Antilles did not conform to the internationally recognised standards of the period due to the political inequalities and democratic deficiencies in the governance model.

It may have also reflected a concession to the *fait accompli* strategy of the Netherlands (referenced earlier) which had announced that it had unilaterally decided to cease transmission of information to the U.N. with regards to the Netherlands Antilles.

Overall, the ultimate U.N. decision, in view of the demonstrated lack of political equality for the Netherlands Antilles and Surinam under the Kingdom Charter, was a most disappointing aspect of the U.N. decolonisation process during the period. Even as the criteria for a full measure of self-government during that time was less developed, it was certainly sufficient to make the substantive determination regarding the inequalities and democratic deficiencies of the Netherlands Antilles model. In context, the U.N. General Assembly decision did precede by some five years the acceleration of the decolonisation movement at the beginning of the 1960s when the critical mass was achieved among the developing countries to demand an end to colonialism in all of its forms and manifestations, and when the requirements for certification of full self-government had been more developed.

This, unfortunately, left the 'autonomous' countries such as the Netherlands Antilles and Surinam (and others such as Puerto Rico) in the 'decolonisation periphery' with no U.N. process in place to re-evaluate their political and constitutional arrangements which fell significantly short of the full measure of self-government by the standards of this earlier period, and certainly by the standards of the 1960 Decolonisation Declaration with its companion resolutions. That these territories had been earlier delisted by the U.N. during a time when the composition of the U.N. membership was far more accommodating to creative forms of continued colonialism is a matter of the historical record, as illustrated above.

Accordingly, the present political and constitutional arrangements of Country Curacao (and similarly, Country Sint Maarten), within the framework of the Kingdom Charter, should be seen from the perspective that even the predecessor arrangements which had been in place for the Netherlands Antilles and Surinam suffered from significant democratic deficiencies (as articulated in the aforementioned deliberations of the U.N.). By extension, the admittedly lesser autonomous governance model in Curacao which emerged from the dismantlement of the erstwhile Netherlands Antilles in 2010 is judged to be further inconsistent with the political equality of even the earlier U.N. standards, and certainly by the contemporary standards as defined in U.N. resolutions following the adoption of the Decolonisation Declaration in 1960. An elaboration of the pre and post-1960 standard constitute the comprehensive legislative authority and international mandate for the self-determination process for Curacao, and is outlined in Part V of the present assessment.

V. The International Mandate for Self Determination

The U.N. Charter in its first chapter on purposes and principles defines as a primary purpose of the world body "to develop friendly relations among nations based on

respect for the principle of equal rights and self-determination of peoples...”³⁹ The U.N. role in this process was delineated in the provision of the U.N. Charter containing the Declaration Regarding Non Self-Governing Territories (NSGTs).⁴⁰ This provision (earlier discussed) commits the individual U.N. member states which administer territories whose peoples have not attained a full measure of self-government to “develop self-government (in those territories), to take due account of the political aspirations of the peoples, and to assist them in the progressive development of their free political institutions, according to the political circumstances of each territory and its peoples and their varying stages of advancement.”⁴¹

The concept of ‘self-government’ at the formation of the U.N. was not well-defined, and subsequent resolutions of the General Assembly, as well as international conventions, were needed to give substance and refinement to the principle.

Accordingly, the General Assembly in 1952 adopted a resolution on “future procedures for the continuation of the study of 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.”⁴² Later the same year, a second resolution on “the right of peoples and nations to self-determination” was adopted.⁴³

Both resolutions initiated the process of identifying a full measure of self-government through the political options of independence, internal self-government, and integration, while emphasising that for the standard of self-government to be met, “freedom from control or interference by the government of another state in respect of the internal government of the territory was required,” along with “complete autonomy in respect of economic and social affairs.”

³⁹ U.N. Charter 1945. Chapter 1, Article 1(2).

⁴⁰ *Id.* at Chapter XI, Article 73 (a) - (e)

⁴¹ *Id.* at Chapter XI, Article 73 (b)

⁴² U.N. General Assembly Resolution 567 (VI) of Jan. 18, 1952.

⁴³ U.N. General Assembly Resolution 637 (VII) of Dec. 16, 1952.

In 1953, the General Assembly defined self-government as independence or the attainment of other separate systems of self-government,⁴⁴ and recommended these concepts be used “as a guide in determining whether any territory, due to changes in its constitutional status, might no longer be within the scope of Chapter XI of the U.N. Charter.”⁴⁵ The resolution also emphasized “the requirement that there must be freedom from control or interference...in respect of the internal government (legislative, executive, judiciary and administration of the territory).”

This resolution marked the beginning of the articulation of certain minimum standards required in the process of attaining self-government,⁴⁶ noting that “the manner in which territories... can become fully self-governing is primarily through the attainment of independence, although it is recognized that self-government can also be achieved by association with another state or group of states if this is done freely and on the basis of absolute equality.”⁴⁷

The Assembly subsequently adopted a resolution in 1957 confirming the relevancy of the General Assembly to “reach conclusions” on whether a territory had effectively exercised its right to self-determination.⁴⁸

The Decolonisation Declaration

This condition of *absolute equality* and a clearer definition of legitimate options

⁴⁴ U.N. General Assembly Resolution 742 (VIII) of Nov. 27, 1953.

⁴⁵ Conceptual framework for the review of the constitutional and juridical status of the Non Self-Governing Territories and on progress in the implementation of the 1960 Declaration on the Granting of Independence to Colonial Countries and Peoples. Working Paper Submitted by Chile, United Nations Decolonization Committee. U.N. Document A/AC.109/1999/20. 10 June 1999.

⁴⁶ Comments on the Conceptual framework for the review of the constitutional and juridical status of the Non Self-Governing Territories and on progress in the implementation of the 1960 Declaration on the Granting of Independence to Colonial Countries and Peoples. Working Paper Submitted by St. Lucia, United Nations Decolonization Committee. U.N. Document A/AC.109/1999/21; 15 June 1999.

⁴⁷ *Id.*

⁴⁸ U.N. General Assembly Resolution 1051 (XI) of 20 February 1957.

of self-government were further refined in the landmark Decolonization Declaration of 1960⁴⁹ which contained a set of “principles which should guide members in determining whether or not an obligation exists to transmit information (on the NSGTs).” This Declaration, and a companion resolution on principles of political equality,⁵⁰ served to further refine the basis for what constitutes self-government. The Declaration stated that “all peoples have the right to self-determination (and) by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.” This set the stage for the inclusion of provisions on the ‘inalienable right to self-determination’ in subsequent human rights conventions.⁵¹ and more recent reiterations in U.N. resolutions to self-determination as a fundamental human right.

The Decolonisation Declaration pointed to the inconsistency of colonialism with the principles of the U.N. Charter, and identified political dependency as an impediment to the promotion of world peace and cooperation. It emphasized that “immediate steps (should) be taken (in territories) which have not yet attained independence to transfer all powers to the peoples of the territories without any conditions or reservations in accordance with their freely expressed will and desire...” The applicability to the small island territories of the principles contained in the Declaration has been reaffirmed annually by the U.N. General Assembly.

Options of Political Equality

The General Assembly also adopted in 1960 a companion resolution to the Declaration outlining “principles which should guide (U.N.) members in determining whether or not an obligation exists to transmit the information called for under Article 73 (e) of the (U.N.) Charter.”⁵² This companion resolution focused on political equality and clarified earlier attempts at defining ‘self-government’ by clearly recognising the three options of independence, free association and integration. These options have

⁴⁹ U.N. General Assembly Resolution 1514 (XV) of 14 December 1960.

⁵⁰ U.N. General Assembly Resolution 1541 (XV) of 15 December 1960.

⁵¹ International Covenant on Economic, Social and Cultural Rights. 1966. Part 1, Article 1(1) et al.

⁵² See *supra* note 50 at Annex.

remained the basis for defining self-government into the 21st Century, and as in the case of the Decolonisation Declaration, is continually reaffirmed by the U.N. General Assembly. In this connection, the definitions of the options of free association and integration, as alternatives to independence, provide a set of minimum standards for the attainment of political equality by the people of the remaining small island territories in the Caribbean.

Regarding free association, the companion resolution provided that this arrangement “shall be the result of a free and voluntary choice by the peoples of the territory concerned expressed through informed and democratic processes.” This option should “respect the individuality and cultural characteristics of the territory and its peoples, and retain 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.” The right to determine the internal constitution “without outside interference, in accordance with due constitutional processes and the freely expressed wishes of the people” was identified as a requisite characteristic of legitimate free association.

Regarding the option of political integration with an independent state, the companion resolution required that the arrangement 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.” Under this model, the people of both territories should have “equal status and rights of citizenship and equal guarantees of fundamental rights and freedoms without any distinction or discrimination.” Political integration also required that the people of the former territory which integrates with an independent country “should have equal rights and opportunities for representation and effective participation at all levels in the executive, legislative and judicial organs of government.”

In 1970, the General Assembly adopted Resolution 2625 (XXV) which repeated many of the principles of equal rights and self-determination contained in earlier

resolutions, and reaffirmed that the three options of independence, integration or free association constituted the achievement of implementing the right to self-determination. The resolution also made reference to “the emergence of any other political status freely determined by the people” as a mode of implementing the right to self-determination. This has sometimes been used to provide legitimacy to a form of ‘colonialism by consent,’ even if the internal governance arrangements would fall short of the achievement of a full measure of self-government with political equality. In fact, the intent of the reference in Resolution 2625 (XXV) was to recognise the emergence of differing and flexible self-governing political models, with the understanding that the minimum level of political equality, and the attainment of a full measure of self-government, remained an essential prerequisite, as consistently reaffirmed in the legislative authority contained in U.N. resolutions to that point.

The legislative authority for absolute political equality and a full measure of self-government, as codified in the above provisions, and those which have been subsequently adopted, remain wholly applicable to the contemporary process of self-determination for both the remaining non self-governing territories and those autonomous countries which have not achieved a full measure of self-government.

VI. Indicators of Self-Governance

The prevailing international mandate for self-government with full political equality constitutes part of the jus gentium, and serves as the basis for assessing the power relationship between the autonomous country and the cosmopole. The present examination is conducted through the application of specific indicators within the political arena of self governance to ascertain compliance with the minimum acceptable standards of the contemporary mandate described in Part V. This assessment determines whether the political model is in conformity with internationally recognised principles of full self-governance whilst also illustrating the extent and nature of any applicable democratic deficit which may exist in the relevant governance model.

In this connection, the present assessment begins from the historical basis by examining the erstwhile political relationship between the Netherlands Antilles and the Kingdom of the Netherlands with the understanding that the basis of the new arrangements was not meant to modify the original governance model of limited 'autonomy,' and the main political document of governance (the Kingdom Charter) was not fundamentally altered. Accordingly, the successor arrangements are analysed from this chronological perspective.

The present examination is undertaken from the vantage point of Curacao as an 'autonomous' country even with the existence of certain qualifying elements consistent with political integration, e.g. common citizenship. As in the case of the British and United States dependency governance models, such citizenship is similarly conditioned by the inequality of political and other rights of the citizens, and would not meet the criteria of complete political equality.

It is, thus, more appropriate to apply to Country Curacao the relevant indicators designed to assess the 'Self-Governing Autonomous Countries' (SGACs). This is consistent with the fact that the Dutch governance model has historically been presented as indicative of an 'autonomous' political structure with respect to the Caribbean countries, rather than as a form of political integration. This is seen in the characterisation of the model in the Kingdom Charter, as well as in the Netherlands argument before the U.N. (earlier discussed). It should also be noted that the partial integration of Bonaire, Saba and St. Eustatius by the Kingdom has resulted in significant political inequalities, but elaboration on this point is outside the scope of the present study. Suffice to say that the new "public entity" status with its inherent political inequalities does provide some clarity of political distinction between an 'autonomous' country on the one hand and the Dutch model of partial integration on the other.⁵³

⁵³ The actual political model of the three islands is best described as that of 'partial integration' because of the clear democratic deficits vis a vis political and other rights.

In this context, the indicators utilised to determine self-governance sufficiency for the autonomous countries are based on the overall assessment of the political power relationship between that country and the cosmopole, and of the general extent and level of mutual consent between the two countries. In this connection, the relevant indicators include the extent of unilateral applicability of constitutional provisions, laws and regulations of the cosmopole; and the nature of the extension of treaties of the cosmopole. Additional indicators examined include the freedom of the autonomous country to modify its prevailing political status and to determine its internal constitution without external interference. Further determinants include the extent of ownership and control of the natural resources, including marine resources, by the 'autonomous' country, and the extent of autonomous participation in international and regional organisations. The nature of external military activities and the autonomy of the judiciary are also important indicators in the overall assessment.

The indicators of self-governance are analysed through the examination of the prevailing political and constitutional documents governing the political model. In the case of Country Curacao, these include (but are not limited to) the relevant provisions of such documents as the Kingdom Charter, the constitution of the former Netherlands Antilles, the Regulation for the Governor of the Netherlands Antilles, the Defence Act for the Netherlands Antilles and the Island Regulation of the Netherlands Antilles. With respect to the new political arrangements after separate country status, the documents of focus are the Constitution of Country Curacao and the various qualifier arrangements which have affected the level of autonomous governance and balance of political power between the cosmopole and the 'autonomous' Curacao.

Nature of applicability of constitutional provisions, laws and treaties

The issue of whether the Kingdom Charter provided the requisite autonomous governance for the former Netherlands Antilles has been routinely raised as early as the U.N. deliberations of the 1950s on the de-listing of the former Netherlands Antilles from

U.N. consideration, as earlier discussed in the present analysis.⁵⁴ Scholarly analyses have also examined various aspects of the Kingdom Charter in form and practice beginning with reference in its preamble to:

“...a new constitutional order...in which (the three countries)...will conduct their internal interests autonomously and their common interests on a basis of equality...” among the countries.⁵⁵

Whilst the political arrangement was routinely projected as one which had met the prevailing international standards of the time, the stated ‘autonomous’ governance and political equality was qualified by a number of Charter provisions which can be interpreted as a window of opportunity for unilateral Kingdom intervention in the internal affairs of the individual autonomous countries – even as these provisions may have been considered dormant.

In this connection, Article 43 (1) of the Charter provides the autonomous countries with the power to “promote” the “observance of fundamental human rights and freedoms, legal certainty and proper administration.” Article 43 (2), however, goes on to clarify the autonomous power with the provision that “the safeguarding of these rights and freedoms...and proper administration shall be a Kingdom affair.” Thus, the power to determine what constitutes “proper administration” (or ‘good governance’ in contemporary parlance) lies with the Kingdom.

At first glance, such powers of unilateral Kingdom intervention would appear inconsistent with Article 3 (2) which recognises a “mutual consent” requirement as it relates to matters outside the areas defined in Article 3 (1) (a-h) which “enumerate the matters which fall within the category of Kingdom affairs.”⁵⁶ In practice, however, the

⁵⁴ See Chapter IV

⁵⁵ Igarashi, Masahiro, *supra* note 14. See also Hillebrink, S., *Political Decolonization and Self-Determination: The Case of the Netherlands Antilles and Aruba* (2007).

⁵⁶ See Franck, Thomas M., *Control of Sea Resources by Semi-Autonomous States*, Carnegie Endowment for International Peace (1978).

reference in Article 43 (2) to the power of the Kingdom to safeguard proper administration/good governance takes precedence over other Kingdom provisions which have been projected as providing a degree of requisite mutuality largely seen – and projected - as consistent with international standards. These powers lay the foundation for the exercise by the Kingdom of the power of unilateral intervention in areas which might have been considered the internal affairs of the ‘autonomous’ country.

In respect of the specific applicability of Kingdom legislation to the autonomous countries, a number of articles of the Kingdom Charter set forth an elaborate procedure for mutual consultation through the participation of the ministers plenipotentiary of the ‘autonomous’ countries. As described in one analysis:

...while the government and parliament of the Netherlands may proceed to make laws applicable to the Antilles in the limited number of fields reserved for common (Kingdom) jurisdiction, the Antilles Government...does have a limited say – a degree of participation and some powers of delay – when these matters are being considered in the Hague.⁵⁷

However, these consultative mechanisms, including the ability to procedurally ‘delay’ legislation, is not consistent with the mutual consent provision of Article 3(2) of the Kingdom Charter. Accordingly, the provisions of Article 12 (1-5) of the Charter provide for a consultative process in regards to the applicability of Kingdom legislation, with the clear understanding that the final determination on the applicability of legislation is to be made by the Kingdom Council of Ministers. A similar consultative process pursuant to Article 13 of the Charter allows for the appointment of representatives by the Kingdom (with ‘autonomous’ country concurrence) to “participate in the proceedings of the Council of State” related to Kingdom statutes or ordinances “which are to apply” to the ‘autonomous’ countries.

⁵⁷ *Id.*

Consistent with the consultation process, Article 15 of the Charter goes further to provide for the ministers plenipotentiary and other “special delegates” of the ‘autonomous countries’ to “initiate a draft for a Kingdom statute.” By Article 17, these representatives can attend debates in the States-General to “furnish information.”

Regarding the extension of treaties, Article 25 of the Kingdom Charter provides that the ‘autonomous’ countries cannot be bound by international and financial agreements entered into by the Kingdom. Accordingly, a consultation process is established in Article 27 regarding the “preparation of (such) agreements.” According to one clarifying analysis, the autonomous countries can be “involved in the conclusion of treaties which affect them (with) such treaties sent to their (‘autonomous’ country) parliaments, but not for their consent” (emphasis added).⁵⁸ In a similar vein, it is to be noted that the ‘autonomous’ country can “negotiate international agreements with foreign states (but must)...then request the Kingdom to conclude such an agreement on their behalf.”⁵⁹ In the end, the final determination on the applicability of treaties is ultimately a Kingdom decision, particularly when such non-application might be considered by the Kingdom to be inconsistent with its interests.

Overall, the consultative procedures governing the application of Kingdom laws, regulations and treaties to the ‘autonomous’ countries provide for an elaborate consultation process between the cosmopole and the ‘autonomous’ countries. The process allows for a level of formal discussion on such applicability far exceeding the more restricted consultation process in play between the cosmopole and a non self-governing territory where the degree of consultation is minimal at best.⁶⁰ Nevertheless, mutual consultation, however laudable, is not mutual consent, and as such, this process does not

⁵⁸ Hillebrink, Steven, *Political Decolonization and Self-Determination: The Case of the Netherlands Antilles and Aruba* (Netherlands, 2007), 144-145

⁵⁹ *Id* at 145

⁶⁰ U.N. resolutions on non self-governing territories routinely cite as inconsistent with full self-government the unilateral authority of the administering power to legislate for the territories “without their consent and often against their will.”

meet the minimum international standards sufficient for recognition as a status of full political autonomy.

Autonomy of the Judiciary

Closely aligned with the applicability of constitutional provisions, laws and treaties is the indicator of the autonomy of the judiciary vis a vis applicable Kingdom and country laws. Whilst it is considered that there is significant autonomy in this regard, this is qualified by the fact that justices of the Joint High Court of Justice are appointed by the Kingdom for life after consultation with the Governor as the representative of the Kingdom. The Kingdom appointment of judges in the High Court is significantly less autonomous than that of even dependency governance models, in particular the U.S. territorial model where the elected head of the territorial government appoints the judges of the territory's courts (with the consent of the elected Legislature), whilst the cosmopole appoints judges to a separate U.S. court located in the territory with jurisdiction over the laws of the cosmopole unilaterally applied.

In the case of the former Netherlands Antilles, the judicial system had mainly been derived from the Dutch system, and before the dismantlement, the judiciary was comprised of "a Court of First Instance seated in each of the island territories and a Court of Appeals seated in Curacao also handling appeals from Aruba courts," (with further) appeals... possible with the Supreme Court of the Netherlands seated in the Hague.⁶¹ The members of the (joint) Court of Appeal "act as judges, presiding alone, in first instance courts."⁶²

There were also provisions for special administrative courts to determine the lawfulness of decisions made under the various Acts. In the context of the 'autonomous' country relationship with the cosmopole, the Governor "as a representative of the Kingdom of the Netherlands...may propose that the Queen, as head of State of the Kingdom, suspend or annul any administrative measure enacted by the Government of

⁶¹ StvB Dutch Caribbean Lawyers, <http://www.stvb.an/laws.htm>. Accessed 15th December 2011.

⁶² See *supra* note 4.

the Netherlands Antilles which (in the view of the Governor) contains provisions violating human rights and freedoms.”

Another aspect of the Netherlands Antilles relationship relates to the Kingdom appointment of the Attorney General who headed the Office of Public Prosecution, and had the sole power to institute criminal proceedings. Additionally, in the case of war or internal crisis, the constitutional guarantee of legal rights could be abridged, and disputes “regarding the division of powers between the judiciary and other authorities are to be decided shall be regulated by Act of (the Kingdom) Parliament.”⁶³

The division of authority in the judiciary of the Netherlands Antilles was similar to that of other non-independent countries including the access for judicial appeal to the courts of the cosmopole⁶⁴ with the singular exception that the cosmopole had the authority to appoint the judges of the national courts. Coupled with the Kingdom authority to appoint the Attorney General, the power relationship in this area is more akin to that of a dependent territory than that of an ‘autonomous’ country.

Freedom to modify the internal constitution and to adopt legislation

A fundamental principle of an autonomous governance arrangement is the right “to determine...(the) internal constitution without outside interference in accordance with due constitutional processes and the freely expressed wishes of the people.”⁶⁵ A related principle is the retention “for the people 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.”⁶⁶

⁶³ See *supra* note 4.

⁶⁴ As of 2012, a number of independent Caribbean countries continue to use the appeal process of the United Kingdom Privy Council in place during their previous colonial period even as the Caribbean Court of Justice has been formed to retain the highest level of appeal in the region.

⁶⁵ See *supra* note 50 at Annex.

⁶⁶ *Id.*

Regarding the internal constitution, it is recognised that Article 44 of the Kingdom Charter indicates that the autonomous countries “may not amend their constitutions with regard to a number of subjects without the approval of the Kingdom Government (which) can therefore block certain amendments to the internal constitution” of the ‘autonomous’ country concerned.⁶⁷ The principle of mutual consent understood to be sufficient for authentic autonomous governance appears to be nullified by Article 44 (among other articles) through the clear subordination of the ‘autonomous’ country to the administrative determination of the Kingdom Government resulting in a significant democratic deficit in the ‘autonomous’ political arrangement.

Regarding the freedom of the ‘autonomous’ country to modify its political status – an important fundamental principal of the right of the people to self-determination - the only expressed procedure is that which was inserted in the Kingdom Charter in 1985 related to the separation of Aruba from the Netherlands Antilles.⁶⁸ In effect, the right to self-determination for the ‘autonomous’ countries is generally recognised as a right to independence, whilst the Kingdom reserves the authority to determine the nature and extent of any modification of the prevailing political status towards a genuine status of free association or full integration, respectively. The 2009 referendum in Curacao seems to have dismissed the choice of political integration whilst leaving open the opportunity for a future move to independence.

Corollary to the principles of autonomous determination of the internal constitution, and the authority to change the prevailing political status, is the power of the ‘autonomous’ country to enact its own legislation. The existence of the veto of legislation by a cosmopole is a function normally associated with the non self-governing territory political status, and is a fundamental element of the British and United States dependency models in the Caribbean rather than associated with an autonomous governance model. Nevertheless, Article 50 of the Kingdom Charter declares that “legislative and administrative measures” adopted in the ‘autonomous’ countries can be

⁶⁷ See *supra* note 59 at 141.

⁶⁸ Hillebrink, Steven, *supra* note 59 at 157

unilaterally deemed “inconsistent with the Charter, an international arrangement, a Kingdom statute or Kingdom Ordinance, or (inconsistent) with interests whose promotion or protection is a Kingdom affair.” In this regard, the ‘autonomous country law “may be suspended or annulled by the King as Head of the Kingdom...”

An even broader manifestation of this constitutional unilateralism with far reaching implications is the provision in Article 51 in which “the Kingdom government can also adopt Kingdom regulations to provide for situations when an organ (of the autonomous country)...does not live up to its duties under the Charter, a treaty a Kingdom Act or a Kingdom regulation...”⁶⁹ As one analyst concluded, “these are potentially very broad powers, and it is the Kingdom government itself that decides when they should be used.”⁷⁰

By extension, the Constitution of the Netherlands Antilles⁷¹ vested executive power in the Governor who as representative of the Kingdom had statutory powers in relation to the finances and domains of the federal territory; the grant of pardon; and the authority to pass federal ordinances on subjects concerning the internal affairs of the ‘autonomous’ country as well as to promulgate federal regulations. The Governor had further authority to withhold ratification of legislation deemed objectionable.⁷²

In a similar vein, at the island level, the Lieutenant Governor chaired the Island Council under the specific island regulations, and served “toward the execution of the task of the (Netherlands-appointed) Governor” who was the representative of the Kingdom.⁷³ Under the section on higher supervision, the Lt. Governor had the authority to suspend promulgation of an island ordinance or island resolution if it conflicted with a

⁶⁹ Hillebrink, Steven, *supra* note at 149-150.

⁷⁰ *Id* at 151.

⁷¹ Constitution of the Netherlands Antilles, Text published in P.S. 1955 No. 32 amended by P.S. 1966 – 197. Articles 14-18, p. 3.

⁷² *Id*, Articles 72, 76, 78 (2) (2nd), p. 14 – 16.

⁷³ The Islands Regulation of the Netherlands Antilles, Third Chapter (The Lt. Governor). Articles 67, 69.

treaty or other international agreement, with a law or royal resolution, or with the general interest of the Kingdom.⁷⁴ Additional provisions provided the Lt. Governor with the authority to suspend an island ordinance or resolution if it were deemed in conflict with a federal ordinance or resolution, or with the general interest of the Netherlands Antilles.⁷⁵

The constitutional and regulatory mechanisms of consultation between the cosmopole and the 'autonomous' countries provide an elaborate process which serves to subordinate the authority of the 'autonomous' countries to modify their internal constitution and to enact legislation without due regard for the ultimate superior position of Kingdom governance, representing a significant democratic deficit in the model.

Participation in international and regional organisations

International and regional organisations often maintain a range of membership categories to facilitate the widest possible degree of participation in the work of the institution concerned. The category of associate membership (and the lesser inclusive observer status) is intended to facilitate the work of the institution for reasons such as historical ties, geographic proximity, or the broadening of the resource base or external market.

The category of associate membership is usually reserved for non-independent countries (NICs) in a particular region depending on the nature of the governance model. An important criteria in this light is the sufficiency of autonomy for the elected government of the country to participate in its own right in international institutions.

In the case of the self-governing autonomous countries (SGACs), the authority to participate in international organisations is often outlined in the constitutional document governing the autonomous political status. Accordingly, in the case of the 'autonomous' countries in the Caribbean associated with the Kingdom of the Netherlands, Article 28 of

⁷⁴ *Id* at Article 98.

⁷⁵ *Id* at Article 99.

the Kingdom Charter provides that these countries may “accede to membership of international organisations.” This provision qualifies Article 3 of the same Charter which recognises foreign relations as an overall “Kingdom affair.” This implies a degree of flexibility vis a vis autonomous representation in international organisations as long as the practice does not conflict with the foreign policy of the Kingdom.

In this connection, the former Netherlands Antilles ⁷⁶ and Aruba had autonomous international organisation participation before the 2010 dismantlement and the successor autonomous countries are expected to continue in that vein. Saba, St. Eustatius and Bonaire as ‘public entities’ of the Dutch Kingdom do not have sufficient autonomy to join international organisations in their own right. ⁷⁷

In practice, approval of the Kingdom government is required in many organisations in which an autonomous country may wish to join consistent with the admissions practices of the international organisation concerned. This is especially the case in United Nations-related bodies where the requirement exists for the country which has the ultimate authority over the international relations of a non-independent country ⁷⁸ to make the request for membership, associate membership or observer status, as appropriate. ⁷⁹ In particular regional organisations, a formal indication of concurrence of

⁷⁶ The former Netherlands Antilles was formerly an observer to various CARICOM committees until the transformation of the CARICOM structure in favour of ministerial councils.

⁷⁷ The French overseas departments of Martinique, Guadeloupe and French Guiana are fully integrated into the French Republic as overseas departments, and also do not exercise sufficient autonomous governance to participate in international organisations in their own right. This does not preclude other arrangements facilitating trade and technical cooperation through memoranda of understanding such as those in place between Martinique and several OECS countries.

⁷⁸ Most international organisations make no distinction between non self-governing territories and autonomous countries for purposes of admission, and respond only to the request by a sovereign state on behalf of the non-independent country concerned.

⁷⁹ Membership/associate membership of the former Netherlands Antilles included the following U.N. bodies: Economic Commission for Latin America and the Caribbean; the Universal Postal Union; the U.N. Educational, Scientific and Cultural Organisation; and the World Meteorological Organisation. Hemispheric bodies include Latin American Parliament. Caribbean regional bodies include the Association of Caribbean States and the Caribbean Development and Cooperation Committee.

the cosmopole is required along with a direct for a membership status from the non-independent country concerned.

The exercise of autonomous international organisation participation is a critical component to the process of evolution towards full self-government, and was developed in the Netherlands Antilles to a significantly greater extent than in other Caribbean non-independent countries. The concomitant autonomous decision-making within the non-voting framework for non-independent countries in play in most international bodies is an element of the governance model which was particularly progressive in the Netherlands Antilles. The maintenance and expansion of such international organisation participation by autonomous countries is in furtherance of the advancement towards a fully autonomous model.

Ownership and control of the natural resources

The ownership, control and disposal of natural resources by the people of non-independent countries are long-standing principles enshrined in U.N. resolutions for decades. Even as the resolutions relate specifically to the non self-governing territories, they are understood to be applicable within the context of the inalienable right to self-determination. Thus, it is within this context that the disposition of these resources would be recognised as a prerequisite to the attainment of full self-government within the context of a fully-autonomous governance model, notwithstanding the specific elements of the given cosmopole-autonomous country relationship. Accordingly, in the 2011 resolution of the U.N. General Assembly, the international community recognises the necessity of “effective measures to safeguard and guarantee the inalienable rights of the peoples of the Non-Self-Governing Territories to their natural resources, and to establish and maintain control over the future development of those resources...”⁸⁰

⁸⁰ U.N. General Assembly Resolution 65/117 on Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples of 10th December 2010.

From a broader perspective, it was recalled in a 2004 U.N. Special Rapporteur's Report that the U.N. General Assembly in 1958 had established the Commission on Permanent Sovereignty over Natural Resources and had "instructed it (the Commission) to conduct a full survey of the status of permanent sovereignty over natural wealth and resources as a "basic constituent of the right to self-determination." ⁸¹

Subsequently, General Assembly Resolution 1803 (XVII) was adopted in 1962 which gave the "principle momentum under international law in the decolonization process... declar(ing) that 'peoples and nations' had a right to permanent sovereignty over their natural wealth and resources, and that violation of this right was contrary to the spirit and principles of the (U.N.) Charter..." ⁸²

According to the Special Rapporteur:

While the principle originally arose as merely a political claim by newly independent States and colonized peoples attempting to take control over their resources, and with it their economic and political destinies, in 1966 permanent sovereignty over natural resources became a general principle of international law when it was included in common article 1 of both International Covenants on Human Rights. ⁸³

Accordingly, the first article of the International Covenant on Civil and Political Rights (ICCPR), and the International Covenant on Economic, Social and Cultural Rights (ICESCR), respectively set forth that:

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. All peoples may, for their own ends, freely dispose of

⁸¹ See Erica-Irene A. Daes. "*Indigenous peoples' permanent sovereignty over natural resources.*" Final report of the Special Rapporteur, U.N. Economic and Social Council (E/CN.4/Sub.2/2004/30), 13th July 2004.

⁸² *Id.*

⁸³ *Id.*

their natural wealth and resources without prejudice to any obligations arising out of international economic cooperation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.”

The Special Rapporteur’s Report went on to point out that:

Article 47 of the (ICCPR) and Article 25 of the ICESCR) further state that ‘nothing in the present Covenant shall be interpreted as impairing the inherent right of all peoples to enjoy and utilize fully and freely their natural wealth and resources.

These references set forth specific limitations under international law on the authority of the cosmopole to “arbitrarily and without compensation nationalize or confiscate foreign property in its efforts to freely dispose of its natural wealth and resources.” Reference is also made to Articles 47 and 25 of the two respective Covenants which were designed to ensure that “States did not impose or support ‘imperialist policies and practices tending to control the economy of developing countries and ... impair thereby their political independence.”⁸⁴

The United Nations has adopted more than 80 resolutions on this question, and the principles of the permanent sovereignty over natural resources have been included in a variety of treaties. As the U.N. Special Rapporteur concluded, “the right of permanent sovereignty over natural resources was recognized because it was understood early on that without it, the right of self-determination would be meaningless.”

It is against these clear standards set by international law on this principle that the disposition of natural resources in autonomous countries is weighed. With respect to the

⁸⁴ Id

former Netherlands Antilles,⁸⁵ the establishment and control of the economic zone is regarded by the Netherlands as “... part of the foreign relations power of the Kingdom in its totality, while the enactment of rules and regulations applicable to the zone has been delegated” to the autonomous countries.⁸⁶ Consistent with this unilateral Kingdom authority, the Netherlands enacted the ‘Territorial sea of the Kingdom in the Netherlands Antilles(Extension) Act (Rijkswet)’ on 9 January 1985 which set forth that “the territorial sea of the Kingdom in the Netherlands Antilles shall be extended to twelve nautical miles, in accordance with rules to be laid down by general administrative order ...”

The same year, the ‘Decree of 23 October 1985 governing the implementation of section 1 of the Territorial Sea of the Kingdom in the Netherlands Antilles (Extension) Act’ was adopted which delineated the borders between the islands of the Antilles and neighboring countries. Earlier Kingdom measures enacted to govern the marine resources of the Netherlands Antilles also set forth the Kingdom predominance over the control of the marine resources and environment. In this connection, the Kingdom enacted the ‘Decree of 6 July 1993 establishing a fisheries zone for the Netherlands Antilles and Aruba’ and the earlier ‘Kingdom Act of 27 May 1999 establishing an exclusive economic zone of the Kingdom.’ In this regard, the 1999 Act set forth that:

The outer limit of the exclusive economic zone shall be determined by order in council in the case of the Netherlands and by order in council for the Kingdom in the case of the Netherlands Antilles or Aruba (emphasis added).

In the exclusive economic zone, in accordance with the restrictions laid down by international law, the Kingdom shall have:

⁸⁵ Franck, Thomas M. *supra* note 57 at 14-15.

⁸⁶ *Id.* At 15

(a) Sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living, of the waters superjacent to the seabed and of the seabed and its subsoil, and with regard to other activities for the economic exploitation and exploration of the zone, such as the production of energy from water, currents and winds;

(b) Jurisdiction with regard to the establishment and use of artificial islands, installations and structures, marine scientific research, and the protection and preservation of the marine environment.

Most recently, the Netherlands issued the 'Decree of 10 June 2010 determining the outer limit of the exclusive economic zone of the part of the Kingdom of the Netherlands situated in the Caribbean (Exclusive Economic Zone of the Part of the Kingdom of the Netherlands Situated in the Caribbean [Outer Limits] Decree).'

As evidenced in other aspects of the governance model earlier discussed, the Netherlands has interpreted the control of natural resources, and in particular marine resources, to be specifically within the purview of a Kingdom function. Aspects of this could be reversibly delegated, but not devolved to the 'autonomous' countries. This determination limits significantly the ability of ownership, control and disposal of these resources by the autonomous country, and is inconsistent with recognised international legal principles cited above. The authority of the 'autonomous' country to enact ordinances does not supersede the overarching power of the Kingdom in this area, and this is inconsistent with international standards on the ownership, control and disposal of natural resources by non-independent countries.

Nature of external military activities

It is typical of autonomous arrangements that matters related to defence are generally controlled by the cosmopole. Consistent with this approach, Article 3 of the Kingdom Charter sets forth the “maintenance of the independence and the defence of the Kingdom” as a Kingdom affair, whilst Article 11 of the Charter applies to the ‘autonomous’ countries relevant “agreements or arrangements” related to the defence of their respective territory. Article 21 of the Kingdom Charter further provides that the King, “in the event of war or other exceptional circumstances in which immediate action is required” may circumvent the provisions of Article 16 which sets forth the consultative capacity of the ‘autonomous’ legislative body to examine Kingdom legislation before it is applied.

Additional provisions of the Kingdom Charter include Article 31 which provides for compulsory service in the armed services of the Kingdom pursuant to country ordinance. Article 33, however, provides for Kingdom “requisitioning and use of property, restrictions on title and rights of use, the requisitioning of services and billeting for defence purposes” by Kingdom Act - with provisions for compensation.

Subsequent provisions in the defence area serve to merge external and internal considerations. In this connection, Article 34 (1) indicates that:

In the event of war or a threat of war(,) or if a threat to or the disturbance of internal peace and order might seriously damage the Kingdom's interests, the King may, to maintain or maintain external security, declare any part of the territory to be in a state of war or a state of emergency.

Article 34 (2) provides that such determination is a Kingdom affair, whilst Article 34 (3) provides for transfer of civilian authority to the military of the Kingdom with freedom of the press and assembly, and the “inviolability of dwelling and correspondence” subject to suspension by the Kingdom. Further, Article 34 (4) proclaims

that “in the event of war, a state of emergency has occurred,” and as such, “military criminal law and military criminal jurisdiction may be declared wholly or partially applicable to any person in a manner determined by Kingdom Act.” The ‘Defence Act of the Netherlands Antilles’ provided further elaboration on the disposition of the ‘autonomous countries vis a vis military considerations.

Within this framework, a number of conclusions can be drawn in relation to the unilateralism of applicability of procedures in relation to the defence relationship between the cosmopole and the ‘autonomous’ country. One noteworthy provision in this regard is the blurring of reference to Kingdom authority in external, as well as perceived internal threats to Kingdom interests. As such determination is an overall Kingdom affair with some degree of limited consultation with the ‘autonomous’ country, the question as to whether internal protest in the ‘autonomous’ country over the applicability of Kingdom laws/regulations, or other issues, might be seen by the Kingdom authorities as sufficiently adverse to ‘Kingdom interests’ that the extraordinary measures as contained in the above provisions could be unilaterally applied.

In a broader sense, the relationship of non-independent countries and the military activities of the cosmopole has been a particular concern of the U.N. General Assembly. In this connection, the Assembly has historically adopted a series of resolutions in the 1990s which have called on the cosmopolitan countries which administered territories:

“...to terminate (or, ‘to eliminate the remaining’) military activities in the territories under their administration and to eliminate military bases there in compliance with the relevant resolutions of the General Assembly, and urge(d) them not to involve those territories in any offensive acts or interference against states.”⁸⁷

⁸⁷ See U.N. General Assembly Resolution 48/52 on *Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples*, 10th December 1993, op. 10. Also see U.N. General Assembly Resolution 51/146 on *Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples*, 13th December 1996, op. 9.

By 2000, the U.N. focus was refined to indicate that such military activities “should not run counter to the rights and interests of the peoples of the Territories concerned especially their right to self-determination, including independence...” whilst repeating its earlier calls for termination of such activities, and for the “eliminat(ion) of the remaining military bases in compliance with the relevant resolutions of the General Assembly.” The later resolutions also called for the promotion of “alternative sources of livelihood for the peoples of the Territories concerned” in apparent consideration for the fact that military activity in some territories may have impact on their economies.⁸⁸

Given the clear predominance of the Kingdom in the Charter provisions on defence and related matters cited above, it would be difficult to conclude that there was requisite compliance with the existent legislative authority in relation to the nature of military activities, especially as such activities may affect the right to self-determination.

A most recent illustration to this effect involves the termination in May 2004 of the fifty-year United States military presence in Venezuela, and the subsequent renewal in 2005 of the U.S.- Dutch contract to widen the use of its military bases on Curacao and Aruba close to the coast of neighboring Venezuela coast. In 1999 the Netherlands and the U.S. had signed an agreement for the establishment of Forward Operating Locations (FOLs) providing that the American military could airports on the two islands of Aruba and Curacao. Pursuant to the 2005 agreement, activities of the U.S. military included the stationing of planes from which flights were reportedly launched into Venezuelan air space, officially for surveillance of possible drug interdiction activities, but also for monitoring purposes in relation to tense relations between Venezuela and the U.S.⁸⁹

⁸⁸ See U.N. General Assembly Resolution Res. 55/147 of *on Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples*. 8 December 2000, op. 12. Also see U.N. General Assembly Resolution 57/140 *on Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples*. 11th December 2002. op. 12.

⁸⁹ See “*US Threatens Venezuela. Netherlands has Granted US Military Use of its Islands in the Caribbean*” Global Research. 14th January 2010.

Such involuntary involvement of the 'autonomous' country of Curacao as a base for activities deemed hostile by a neighboring country – under the rationalisation that defence is a Kingdom affair- stretches the bounds of interpretation of the relevant provisions of the Kingdom Charter. The use of the autonomous countries for these purposes by a third country is inconsistent with the right of self-determination of Curacao.

The overall assessment of the indicators of self-governance based on internationally-recognised criteria, as examined through the prevailing arrangements in place before the dismantlement of the Netherlands Antilles, serves as the fundamental basis for examining the nature and extent of autonomous governance into the second year of Country Curacao, and whether the successor arrangements have had any appreciable effect on the level and nature of the 'autonomous' model.

VII. Country Curacao - Diminished Autonomy

The successor arrangements to the erstwhile Netherlands Antilles constellation in place in the 'autonomous' country of Curacao must be seen in the context of the pre-dismantlement governance model which has been concluded in the present assessment as not meeting the minimum criteria and standards for full autonomy according to international principles. With this democratically deficient model of autonomy as a starting point, the successor 'autonomous' arrangements were further qualified by 'mutual agreements' which have served to further reduce – perhaps temporarily – the level of functional autonomy in place during the pre-dismantlement period. The result is a greater political power imbalance in the 'autonomous' relationship which had heretofore been routinely projected in initial terms as a political arrangement of equal partners. This further diminution of autonomy was implemented without regard to any changes in the Kingdom structure, but rather through creative interpretations of existing provisions through either the formulation of "mutual agreements" or the spectre of unilateral Kingdom intervention under Articles 43 of the Kingdom Charter heretofore seen only as

a last resort. Articles 50 and 51 of the Charter are also seen in the context of mechanisms to effect unilateral intervention, and inconsistent with full autonomous governance.

Thus, particular note must be taken of the “mutual agreements,” pursuant to Article 38 of the Kingdom Charter, and emerging from the final Round Table Conference (RTC) on 26 November 2005 of the Kingdom Government, the central government of the erstwhile Netherlands Antilles, and the island governments of Curacao and Sint Maarten, respectively. The talks resulted in the conclusion of agreements concerning the desired ‘final perspective’ with certain ‘criteria and norms’ required by the Kingdom before agreeing the dismantlement. Thus, key elements of the subsequent Final Declaration of 2nd November 2006 included mandates in a number of areas heretofore under the purview of the ‘autonomous’ government. These areas included the structure of the Common Court of Justice, prosecutorial procedures and the prison system, the police, and the application and implementation of international treaties.⁹⁰

Additionally, the mandates of the Final Declaration included the commitment to “procure the sound starting position” for the new ‘autonomous’ countries through the payment by the Kingdom of the consolidated debt of Curacao and Sint Maarten. The debt relief was conditioned, however, only after “the realization and complete implementation of the political agreement,” and with the mandatory involvement of the Kingdom in the financial management of the two countries.⁹¹ The mandates went further to require that the ‘autonomous’ country comply with detailed “financial norms (including) a balanced budget and a balanced long-term perspective...maintaining internationally accepted budget definitions,” and that these “financial norms (be) imbedded into a consensus royal law (ex. Article 38, section 2 of the Charter).⁹²

⁹⁰ See Final Declaration of the Government Meeting concerning the future constitutional status of Curacao and Sint Maarten, 2nd November 2006 in The Hague.

⁹¹ *Id.* at 10

⁹² *Id.* at 11

The mandates went further to require financial supervision “in the form of a supervisor” during the transition period leading to dismantlement in 2010, as well as subsequent “supervision in the new constitutional structure...to supervise the compliance with the financial norms for Curacao and Sint Maarten.”⁹³

The Final Declaration of 2006 provided for a commitment to evaluate the new constitutional structures after the first five-year period, according to mutually agreed assessment criteria, with the aim of adaptation ‘where necessary.’ Taken together, these conditionalities contained in the Final Declaration resulted in the stage being set for a significantly diminished autonomy which was, then, formalised with the adoption of a number of Kingdom Consensus Laws giving effect to the dismantlement.⁹⁴

Apart from the adoption of the five Kingdom Acts formally establishing the new countries, updating the regulations on the governors of the two new countries, and the setting of maritime borders were also the approval of specific consensus Kingdom laws on financial supervision, the establishment of the joint Court of Justice,⁹⁵ public ministries, police forces and the establishment of law enforcement council. It is suggested that “...even if the consensus Kingdom act(s) concern only internal affairs, (it) means that the Caribbean (autonomous) countries can no longer decide unilaterally with regard to these affairs.”⁹⁶

⁹³ *Id.* at 12

⁹⁴ Pursuant to Article 38 of the Kingdom Charter, the Kingdom Consensus Laws, or Consensus Kingdom Acts, require the consent of the legislative bodies of the ‘autonomous’ countries.

⁹⁵ According to *StvB Dutch Caribbean Lawyers*: “This Act regulates the organization of the court system for Curaçao, Aruba, Sint Maarten and the BES Islands. The Combined Court of Justice is charged with jurisprudence in civil, criminal and administrative law in each of the former island territories of the Netherlands Antilles including Aruba. The Combined Court of Justice has therefore jurisdiction in Curaçao, Aruba and Sint Maarten and, as a foreign court, also in the BES Islands. The Combined Court of Justice consists of a Court in First Instance for each of the three countries (Curaçao, Aruba and Sint Maarten) and for the BES Islands together, as well as one Court of Appeals that can seat on each of the islands. Appeal from judgments of the Court of Appeals is possible with the Supreme Court of the Netherlands, seated in The Hague.” (“The laws of the Jurisdictions formerly constituting the Netherlands Antilles.” <http://www.stvb.an/laws.htm>)

⁹⁶ See “*Building a New House: Towards New Caribbean Futures in an Age of Uncertainty.*” Paper presented for the Caribbean Studies Association Annual Conference. 30th May – 3rd June 2011.

The particular consensus Act related to financial supervision was especially problematic in view of the un-democratic nature of enforcement mechanisms for the new financial arrangements. The Curacao Island Council during its 2009 session to consider the Consensus Laws had deliberated heavily on this question of diminished financial autonomy before narrowly endorsing the measures. It was evident that if the laws had not been approved, the entire process of separate country status might have been placed in jeopardy, whilst direct unilateral intervention by the Kingdom under other Charter provisions might have been utilised to achieve the same intention under the broad interpretation of the Kingdom guarantee of ‘good governance.’

In the end, the ability to remove a consensus act has become the subject of considerable debate with the position of the Chair of the Curacao Parliament arguing that the consensus laws contravene the autonomous affairs of the country and that Curacao has the right to terminate their validity.⁹⁷ It was also argued that the consensus laws created “an asymmetric relation within the Kingdom.”⁹⁸

Concluding Observations

The attainment of a full measure of self-government can be a painstaking and arduous process for many small island developing countries which have not attained a full measure of self-government. The experience of Curacao is no exception as its political history has been shaped by inconsistent interpretation and application of policies within the framework of the perception of mutuality between the countries of the Kingdom.

In many respects, this has served to delay the full implementation of the inalienable right of self-determination which is guaranteed by the U.N. Charter and

⁹⁷ See Opening Statement of Ivar Asjes to the Inter Parliamentary Consultations of the Kingdom (IPOK), Sint Maarten. January, 2012.

⁹⁸ Comment of Helmin Wiels, member of the Curacao Parliament, during the general debate of IPOK, January, 2012

relevant human rights conventions earlier cited. This right has been further elaborated in decades of United Nations resolutions, particularly since 1960, giving added clarity and specificity to the international mandate on self-determination which is recognised as applicable to Country Curacao (as well as to Country Sint Maarten).

It is evident that the challenges to the self-determination of Curacao, within the context of the Charter of the Kingdom of the Netherlands, reflects a consistent struggle by the people to attain full self-government with political equality consistent with international law and principles. Thus, the developments which have taken place in the aftermath of the dismantlement of the former Netherlands Antilles is but the latest chapter in that struggle, and the diminished autonomy in the present post-dismantlement political environment is but the latest manifestation in the historical record of deficient autonomous governance which has served to impede speedy progression towards full self-government.

The petitions to the international community made by the Kingdom as early as 1948 that its Caribbean territories had become self-governing due to certain amendments to the Kingdom Charter were not convincing given the extensive number of matters remaining under the direct control of the Kingdom, and the clear democratic deficit of the political arrangements.

In specific terms, considerable doubt remained as to whether the level of autonomy and political equality extended to the territories through the 1954 Kingdom Charter constituted significant self-government. In this connection the requirement of complete political equality was seen as inconsistent with continued Kingdom retention of final political control. Thus, even the relevant U.N. Resolution of 1955 removing the Netherlands Antilles from U.N. oversight came with the caveat that there was a self-governance deficit inherent in the political arrangement, and that the removal from the U.N. list of non self-governing territories came "without prejudice" to the requirements of full self-government contained in the emerging criteria.

As one Curacao analyst aptly surmised,

“With hindsight one may even consider that the Charter of 1954 did not lay the foundation for respectful and trustful relationships, but may have had buried inside the seeds for artificial and hypocritical relationships of unequal partners.”⁹⁹

In retrospect, the removal of the Netherlands Antilles from United Nations review took place some five years before the adoption in 1960 of the landmark Decolonization Declaration (1514 XV) which confirmed the right to self-determination, and its companion resolution 1541 (XV) which outlined the minimum standards for self-government. Thus, it is questionable whether the designation of full self-government through autonomy would have been applied to the Netherlands Antilles after 1960 when the more elaborate and updated standard of criteria for self-government was adopted by the U.N.

In any case, the earlier arguments presented by the Netherlands at the U.N. that any Kingdom residual unilateral authority would not likely be exercised under the new Kingdom Charter are insufficient to justify the existence of such provisions into the post-dismantlement period. The fundamental issue was – and remains - not whether this unilateral power may or may not be exercised, but rather, that this unilateral power exists in law. The position of some in the Netherlands leadership has been repeatedly stated that the ‘guarantee function’ of the Charter under Article 43 is “not designed to make the Kingdom and the Kingdom government the ultimate judge in disputes about constitutional rights, legal security and proper governance,” and that threatening to use the guarantee function every time “one disagrees on each other’s policy erodes the meaning or erodes the autonomy of the countries.”¹⁰⁰

⁹⁹ Curiel, George. Decolonization Management in the Kingdom of the Netherlands – An unpredictable journey to establish enduring relationships between Kingdom partners (undated)

¹⁰⁰ See news account of a paper on “*The guaranteeing of rights and freedoms, legal security and proper governance in the Kingdom of the Netherlands*” submitted to the First and Second Chambers of the Dutch Parliament, by Piet Hein Donner, Dutch Minister of Home Affairs and Kingdom Relations. As reported in the Daily Herald (Sint Maarten). 18th July 2011.

This is a laudable political position, but nevertheless, such interventionist powers have been utilised on a number of occasions, and is continually threatened to be imposed by Kingdom political actors when their interpretation of Kingdom Charter provisions are challenged from Curacao.

It is ironic that whilst the results of referenda held in Curacao in 1993 and 2005 reflected support for the retention of, at least, the level of 'self-governing' status exercised by the former Netherlands Antilles, what has emerged has been a significantly diminished autonomy not in conformity with international principles of full self-government. It is a significant downgrade from the level of autonomy exercised by the former Netherlands Antilles, and that exercised by Aruba since 1986.

Most egregious are the consensus laws on financial matters, forced on the 'autonomous' governments in exchange for promised debt relief, with the threat that if the financial autonomy was not ceded, the economic recovery package would not be forthcoming. In fact, the restructuring of the debt as a result of the dismantling of the former Netherlands Antilles should have never been a condition for the process of political and constitutional advancement. In this context, the 'sound starting position' agreed in the Final Declaration of 2006 was not provided as Curacao was left with a significant debt placing Country Curacao on a less than sound economic footing from the outset. The interpretation that consensus laws cannot be terminated without the approval of the Dutch Government implies that the temporary supervision could be in place indefinitely, and the effect of these laws is further illustration of political inequality and diminished autonomy.

The establishment of an internal independent financial supervisor, for example, would be more consistent with autonomous governance to support the financial management process of Curacao, and would correct the political inequality which has emerged in area of financial management emanating from this particular successor agreement. Indeed, political equality cannot be achieved unless this unilateral supervisory

role of the Kingdom comes to an end with financial supervision properly placed with mechanisms created by the Government of Curacao, rather than with a Kingdom Financial Supervisory Commission which can circumvent the budgetary powers and authority of the democratically-elected Curacao Parliament.

As one scholar on the subject has succinctly concluded, “the Kingdom Charter is not based on a free choice by the population of the Caribbean countries” and “the Kingdom order does not comply fully with any of the recognised forms of decolonisation...”¹⁰¹ In this connection, as it was determined:

The Kingdom relations are more similar to a form of free association...but a number of aspects of the Kingdom order do not, however, comply with the U.N. criteria for an acceptable form of free association. These mainly concern the powers of the Kingdom to intervene in the affairs of the Caribbean countries without their consent. That raises the question whether the Kingdom might be an unacceptable form of government under the law of decolonization, namely one based on 'arbitrary subordination,' in which case the... (autonomous countries) should be considered non self-governing under the U.N. Charter.¹⁰²

Accordingly, by the same conclusion, “...the political decolonisation of the Dutch Caribbean is not yet complete under the terms of international law, and that there still exists an international obligation for the Kingdom under Article 73 of the U.N. Charter to strive toward the completion of the process of decolonization.”¹⁰³

Such determinations invoke a number of potential alternative pathways which might be explored in completing the decolonisation process in Country Curacao when the determination is made by the relevant political actors that the diminished autonomy must be corrected.

¹⁰¹ Hillebrink, *supra* note, at 59

¹⁰² *Id.*

¹⁰³ *Id.*

One such path would be to seek the inscription/re-inscription of Curacao on the U.N. list of non self-governing territories. It is interesting that the original commitment of the Netherlands in 1946 was to transmit information to the U.N. under Article 73 of the U.N. on the "Netherlands Indies, Suriname and Curacao."¹⁰⁴ If this approach is taken, it would have to be determined at what point the U.N. was officially updated by the Netherlands to reflect the 'Netherlands Antilles,' and therefore, whether any move for inclusion of Curacao under U.N. review would be regarded as a 'listing' - or a 're-listing.' However, this is a matter outside the scope of the present study.

Suffice to say that the mechanism of inclusion of Curacao on the U.N. list would be a function of intense international politics, and would be easier to achieve if the Netherlands – and the wider European Union - concurred with this approach. Further, support from the Latin American and Caribbean Group would be instrumental in any such an initiative.

Apart from U.N. inscription is the utilisation of the petitioning procedures of the relevant international human rights conventions referenced earlier, and which are applied by the Kingdom to the 'autonomous' countries. This process would be specifically directed at compliance with the international principles of the right to self-determination and full political equality.

A third potential approach would be in the context of a broader restructuring within the Kingdom towards the creation of a Union of Independent States.¹⁰⁵ This would guarantee the legal personality of each of the member States similar to the structure of the commonwealth countries comprised of former British colonies with a common monarch. The Europe Union (E.U.) model, on the other hand, might be more incompatible with Curacao interests given that the E.U. is effectively a union of countries

¹⁰⁴ See U.N. General Assembly Resolution Res. 66-1 on transmission of Information under Article 73 (e) of the Charter. 14 December 1946 which produced the first of list on non self-governing territories. Also note that the subsequent U.N. list produced in 1963 was published after U.N. de-listing of the Netherlands Antilles in 1955.

¹⁰⁵ See *supra* note 97 at 18.

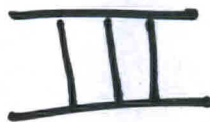
in close geographical proximity,¹⁰⁶ and that it is a model which strives for economic and functional integration, and common decision-making in areas such as foreign policy.

Full and separate independence with full membership in regional organisations and trading arrangements is yet another alternative way forward. This would provide full, unfettered authority to enter into international agreements with other independent States – including the Netherlands – on the basis of political equality.

Until the time when any of these – or other - alternative routes to full self-determination is decided, the prevailing governance model which remains in place is prone to being unilaterally defined to suit Kingdom interests at any given time, subject to the whims of constantly changing political alignments which continue to characterise Dutch politics.

Accordingly, upon review of the overall self-governance sufficiency of the prevailing model in place in Curacao emerging from the dissolution of the Netherlands Antilles, it is the conclusion of this assessment that the political arrangements have resulted in a governance model of diminished autonomy and democratic deficit. This model of governance is, therefore, not in conformity with contemporary international standards required for a full measure of self-government through autonomy.

¹⁰⁶ Notwithstanding the so-called 'outermost regions' of the French West Indies in the Caribbean, Mayotte in the Indian Ocean, et al which are politically integrated into E.U. member States.



Excerpts from:

Plenair verslag

**Tweede Kamer, 12e vergadering
Donderdag 13 oktober 2016**

- Aanvang **10:15 uur**
- Sluiting **23:47 uur**
- Status **Gecorrigeerd**

De heer **Bosman** (VVD):

Belangrijk is artikel 73, want dat vraagt van de voormalige kolonisorator om de landen te begeleiden naar volledige zelfstandigheid. Ik heb in mijn inbreng aangegeven dat wij op de helft zijn aangekomen. Het Statuut geeft geen volledige zelfstandigheid aan de landen. De vraag is dus wanneer dat daadwerkelijk gaat gebeuren. We moeten wel kiezen. Vallen we onder artikel 73 en moeten we dus invulling geven aan dat artikel om tot volledige zelfstandigheid te komen of vallen we niet onder dat artikel en staan we vrij om te doen wat we willen?

Minister **Plasterk**:

Het tempo waarin wijzigingen worden aangebracht en ook de vraag of zij überhaupt worden aangebracht is in de eerste plaats aan de landen daar. Ik kan mij heel goed voorstellen dat er een bestendige situatie is, waarin men er prijs op blijft stellen geen eigen leger te hebben en waarin het leger van het Koninkrijk der Nederlanden ook een verdedigende rol heeft in andere landen van het Koninkrijk. Dat geldt ook voor posten van Buitenlandse Zaken en eventuele andere taken. Dat kan ik mij goed voorstellen. Ik vind ook niet dat dit een onderdeel van een koloniaal verleden is.

De heer **Bosman** (VVD):

Nu snap ik het niet meer. Vallen wij nu onder artikel 73, ja of nee? Zo simpel is het. Als we daaronder vallen en we daar een verplichting toe hebben vanuit artikel 73 van het VN-Handvest, hoofdstuk 11, dan moeten we daar invulling aan geven. Dan is het niet vrijblijvend en kunnen we niet tegen de eilanden zeggen dat zij maar moeten kijken wat zij doen. Nee, dan is er een actieve verantwoordelijkheid om tot volledige onafhankelijkheid te komen.

Minister **Plasterk**:

Zo is dat, maar binnen die onafhankelijkheid kan men natuurlijk best kiezen voor een statelijk verband, waarin de Koning van het Koninkrijk der Nederlanden ook de Koning van Curaçao is en waarin buitenlandse zaken wordt gedaan door de organisatie zoals wij die nu kennen.

De heer **Bosman** (VVD):

Ik ben heel blij dat de minister het gemenebest omarmt. Hij is daar in het verleden wel wat kritischer over geweest en ik ben blij dat hij dit nu naar zich toe trekt. **Het is een heel simpele ja-nee-vraag: vallen wij onder artikel 73 van het VN-Handvest?**

Minister **Plasterk**:

Ik heb al "ja" gezegd.

De heer **Bosman** (VVD):

Maar dat betekent automatisch dat er een actieve plicht is om te komen tot volledig zelfbestuur en volledige zelfbeschikking van Aruba, Curaçao en Sint-Maarten en, sterker nog, ook van Bonaire en Sint-Eustatius. Dat is een actieve verplichting. We kunnen niet zeggen dat we wel kijken hoe het met die eilanden gaat. Dan moeten we in gesprek en moeten we een tijdpad afspreken om ergens te

komen. Het kan niet zo zijn dat deze minister zegt dat we achterover kunnen gaan zitten om te kijken wat er gebeurt. Nee, die verantwoordelijkheid is dan actief. We moeten dus actief aan de slag om te komen tot volledige zelfbeschikking en onafhankelijkheid van de landen. Dan kunnen ze daarna nog altijd beslissen of zij een gemenebest willen of niet. Ik vind dat een heel goed plan.

Minister Plasterk:

Ik zie daar geen tegenstelling in. Men heeft die zelfbeschikking. Die vloeit voort uit het Handvest van de Verenigde Naties. Ik heb in al mijn contacten met de regering van Curaçao, Aruba en Sint-Maarten niet de indruk dat zij op basis van het zelfbeschikkingsrecht uit het Koninkrijk der Nederlanden wensen te stappen. Integendeel. Zij wensen daar binnen te blijven. Je kunt vervolgens een debat voeren over de vraag wat dan precies de verantwoordelijkheden zijn die wel en niet op Koninkrijksniveau worden geregeld, maar dat dit statelijk verband er is, is niet in strijd met artikel 73 van het Handvest van de Verenigde Naties.

De heer Bosman (VVD):

We zijn dus niet gedekoloniseerd, want de eilanden zijn niet onafhankelijk. Dat is de kern. Ze hebben niet vanuit een onafhankelijke positie kunnen kiezen voor het bestand waar ze nu in zitten. Dat is de kern.

Minister Plasterk:

Dat is geen tegenstelling.

De heer Bosman (VVD):

Nee, maar er moet een actieve rol zijn.

De voorzitter:

Eén tegelijk, want het is een interessant debat.

De heer Bosman (VVD):

Er dient een verplichting te zijn van Nederland. We vallen onder artikel 73, zo zegt de minister net zelf. We zijn dus niet gedekoloniseerd. We hebben de verplichting om te komen tot volledig zelfbestuur van de landen. Dat is een verplichting, een opdracht. Die moet er komen. We kunnen niet zeggen dat de landen niet willen. Dat is een keuze op het moment dat zij volledig onafhankelijk zijn. Dan kunnen zij de keuze maken of zij onafhankelijk blijven dan wel toetreden tot welk bestand dan ook.

Minister Plasterk:

Dan verschillen wij van mening. Je kunt zeggen: Suriname, dat is nu echt gedekoloniseerd in de termen van de heer Bosman. Dat zou mijn keuze niet zijn. Ik geloof niet — maar goed, dat moet men zelf beoordelen — dat het land daar nu beter van geworden is. Ik denk dat de situatie waarin pakweg Curaçao, het grootste land in het Caribisch deel van het Koninkrijk, zich bevindt, beter en verkieslijk is. Ik heb ook geen reden om te denken dat men daar van af wil. Als uit referenda, verkiezingen en meerderheden in de staten blijkt dat de bevolking van Curaçao er anders over oordeelt, dan zou er een moment kunnen komen dat men één, twee of oneindig veel stappen zet om een grote afstand te kiezen ten opzichte van het Koninkrijk. Ik bepleit dat niet, geen misverstand, maar dat zelfbeschikkingsrecht heeft men en dat is niet in strijd met het Handvest van de Verenigde Naties.

De heer **Bosman** (VVD):

Het is altijd goed om naar mij te luisteren, zou ik tegen de heer De Graaf willen zeggen.

Voorzitter. Het is vandaag 8 oktober 2019. Over twee dagen is het 10-10-2019, exact negen jaar na het tekenen van het nieuwe Statuut en het ingaan van een nieuwe periode van het Koninkrijk. Wat hebben die afgelopen negen jaar ons en het Koninkrijk gebracht en, vooral, wat heeft het de bevolking op de eilanden gebracht? Dat is wel een terugblik waard, zou ik zeggen.

Over de ontwikkelingen op Bonaire, Saba en Sint-Eustatius wil ik aangeven dat dit kabinet serieus stappen zet ter verbetering van de positie van de inwoners van de eilanden. Staatssecretaris van Sociale Zaken en Werkgelegenheid Tamara van Ark heeft concrete stappen gezet om te komen tot een sociaal minimum. Dat is een belangrijk onderdeel om te komen tot een betere inkomenspositie van de mensen op de eilanden Bonaire, Saba en Sint-Eustatius. Een belangrijk onderdeel van het sociaal minimum zijn de kosten van het levensonderhoud. Het is namelijk heel makkelijk om het inkomen te verhogen zonder dat je de kostenkant goed bekijkt.

De Kamer heeft recentelijk een schriftelijk overleg gevoerd met het gehele kabinet ten aanzien van de verschillende ontwikkelingen op de eilanden Bonaire, Saba en Sint-Eustatius. De antwoorden zijn nog niet geheel bemoedigend en de Kamer heeft vervolgvragen aangekondigd. De kostenkant van de problematiek moet namelijk zeker aangepakt worden. Een eiland met 1.500 inwoners kan niet rendabel investeren in een energievoorziening. Internet voor een kleine gemeenschap is altijd duur. Verbindingen tussen de eilanden met kleine volumes maakt vliegen kostbaar. Daar gaan we dus zeker nog op doorvragen.

Het lokale bestuur op Bonaire, Saba en Sint-Eustatius kan en moet ook veel meer zelf doen. Ik haal mijn jarenlange pleidooi voor landbouw maar weer eens aan. Ook voor het zelf gaan importeren van voedsel, los van de vaste invoerlijnen en de vaste spelers op het terrein, heb ik vaker gepleit. Beide gaan nu voorzichtig een begin krijgen. Over de landbouw op Bonaire blijf ik nog steeds de vraag houden waar het miljoen per jaar heen is gegaan, want er is geen spa de grond ingegaan voor dat miljoen per jaar. Dat kan niet waar zijn, want landbouw zorgt voor gezond voedsel tegen lagere prijzen. Gelijktijdig levert het werkgelegenheid op, die van belang is om weer een inkomen te krijgen waarmee mensen weer een bestaan op kunnen bouwen. Daarmee is de cirkel bijna rond.

De zorg over armoede onder ouderen is een zorg die de VVD deelt. Het is dan ook juist van belang om de kosten van het levensonderhoud voor die groep naar beneden te brengen. Hun verdien capaciteit is zeer beperkt, of je zou toch weer moeten kijken naar het subsidiëren van de inkomstenkant. Zeker goedkopere voeding die op het eiland zelf wordt verbouwd, is dan van essentieel belang, naast het verlagen van de kosten voor wonen, elektriciteit en internet, om maar een paar vaste lasten te noemen.

Maar ook de infrastructuur, de wegen, is iets wat voortvarender kan en moet worden aangepakt. Dat ligt op het terrein van de collega van Infrastructuur en Waterstaat, begrijp ik. Ik zal dit in de schriftelijke ronde dan ook zeker aan de orde stellen bij haar. Ik denk dat we het nu toch moeten melden, want het zijn zaken die binnen het Koninkrijk afgesproken worden. Eigenlijk was het een nulmeting. Als je kijkt naar 10-10-2010, is de nulmeting van waar infrastructuur aanwezig is en waar we uit gaan komen, nooit echt goed gebeurd. We zijn daar nooit echt goed uitgekomen.

Het bestuur op Bonaire mag sowieso wel wat kritischer zijn, zeg ik tegen de staatssecretaris. Ik heb begrepen dat het openbaar lichaam nieuwe auto's heeft aangeschaft en dat er ook een aantal in de dieselvans zijn gekocht. Zo veel kilometers worden er toch niet gemaakt op het eiland, vraag ik de staatssecretaris. Waarom is er niet gekozen voor elektrisch vervoer? Het gaat om beperkte afstanden en er is heel veel zon waardoor je kunt opladen met zonne-energie. Misschien heb ik het helemaal mis, maar dat hoor ik dan graag van de staatssecretaris.

We moeten wel constateren dat de vrije uitkering van de eilanden geen gelijke tred heeft gehouden met de uitgaven en verantwoordelijkheden van de eilanden. De eilanden knopen nu de eindjes aan elkaar met incidentele meevallers. Dat kan nooit de bedoeling zijn geweest. Die tekortkoming komt ook duidelijk naar voren in het advies van de Raad van State. Hoe gaat de staatssecretaris dit ondervangen?

In de voorlichting van de Raad van State komt ook duidelijk naar voren dat alle eilanden verschillend zijn. Dat zal u niet verbazen, want ik heb dat vaker gezegd. BES bestaat niet. Het zijn de eilanden Bonaire, Saba en Sint-Eustatius. Ik ben blij dat dit nu bestuurlijk wordt doorgevoerd. Ik hoop ook dat dit ambtelijk zijn beslag gaat krijgen, want hoe minder bemoeienis vanuit Den Haag, hoe beter eigenlijk. Maar versterk de lokale besturen dan wel om daadwerkelijk invulling te geven aan hun eigen bestuurstaken.

Voorzitter. Ik wil niet vooruitlopen op alle andere problemen die er nog zijn, want de staatssecretaris heeft aangegeven dat we daar nog serieus over gaan praten, omdat het advies net uit is.

De heer Van Raak (SP):

Ik had vorig jaar voorgesteld om de Rijksvertegenwoordiger op te heffen en Saba gewoon als Saba te behandelen, Statia als Statia en Bonaire als Bonaire. Ik zie dat nu ook terugkomen in het advies van de Raad van State. Daar ben ik heel blij mee. Is de heer Bosman het er namens de VVD mee eens dat de Rijksvertegenwoordiger in ieder geval op termijn, maar liefst snel, opgeheven kan worden?

De heer Bosman (VVD):

Ja, maar daar stond nog een toevoeging bij, namelijk dat er toch wel een soort klankbord zou moeten zijn om even met elkaar te bediscussiëren wat de verstandigste weg is om zo'n gezaghebber niet gelijk op het bordje van de minister neer te zetten en vice versa. Ik ben dus heel benieuwd hoe die structuur precies zal zijn en wat de rol precies zal zijn. Want dit klinkt toch een beetje als Rijksvertegenwoordiger zonder de functie van de Rijksvertegenwoordiger. Ik ben een beetje op zoek naar hoe dat gaat. Maar ik ben het er helemaal mee eens dat we het goed moeten regelen. Er moeten niet te veel lagen zijn. Aan de andere kant moet het lokale bestuur wel in staat zijn om te doen wat het moet doen.

De heer Van Raak (SP):

Daar heb ik een vervolgvraag over. De heer Bosman was erbij toen we op ons initiatief in januari 2015 een Saba summit hadden. Daar is afgesproken dat Saba meer zelf zou gaan doen, bijvoorbeeld op het gebied van werkvergunningen. Elk jaar heeft de Tweede Kamer Kamerbreed gezegd dat Saba zelf werkvergunningen moet kunnen verschaffen. De Kamer is zelfs zo boos geweest dat ze drie staatssecretarissen heeft uitgenodigd om een apart overleg te houden over de werkvergunningen op Saba. Tot mijn grote spijt en verdriet zijn we bijna vijf jaar later en is dit niet geregeld. Is de heer Bosman het met mij eens dat dit geen manier van doen is en dat we tegenover de bevolking van Saba in ons hemd staan als wij als Tweede Kamer vijf jaar lang moet vechten om Saba werkvergunningen te kunnen laten geven en dat gewoon niet lukt?

De heer Bosman (VVD):

Ik deel de teleurstelling van collega Van Raak. We hebben daar een goed gesprek over gehad, ook met de ambtenaren die bezig waren om dat toch te regelen. Dan kom je in het Nederlandse woud van regelgeving en juridische zaken terecht. Het is verjuridiseerd. Ik ben op zoek naar een pilot, een eenvoudige oplossing voor de discussie die we nu voeren. Bruce Zegers is op bezoek geweest. Hij zegt: we zijn druk aan het bouwen. De haven wordt gebouwd. Huizen worden gebouwd. Hotels worden gebouwd en het enige probleem is: bouwvakkers. Bouwvakkers! We krijgen ze niet binnen en we kunnen ze niet aannemen. Die zorg deel ik dus. Kan er geen pilot komen voor dit soort overduidelijke zaken? Als hiervoor geen mensen aanwezig zijn op een eiland als Saba, helpen we de economische ontwikkeling daar eigenlijk de vernieling in, omdat

Saba niet in staat is om die mensen binnen te krijgen. Misschien moeten we daar toch naar op zoek gaan in de schriftelijke ronde.

De voorzitter:
Gaat u verder.

De heer Bosman (VVD):

Het Statuut is ook de relatie tussen Nederland, Aruba, Curaçao en Sint-Maarten. Met de aanpassing van 10-10-10 zijn Curaçao en Sint-Maarten ook een autonoom land geworden naast Aruba. Terugkijkend naar de afgelopen negen jaar kan ik niet anders dan concluderen dat het Statuut niet werkt. Het piept, het kraakt en het schuurt binnen het Koninkrijk, omdat niemand ook maar enig idee heeft wie waarvoor verantwoordelijk is. Het is het cafetariastatuut: als het je uitkomt, ben je ervan, maar als het lastig is, duik je allemaal. Ja, dan duiken we allemaal, including me.

Samen met collega Van Raak van de SP ben ik al heel lang bezig om te komen tot een werkbaar Statuut. Samen met collega Van Raak heb ik een initiatiefnota geschreven om te komen tot een gemenebest van onafhankelijke landen binnen het Koninkrijk. We wilden het vooral als discussiestuk neerleggen, zodat andere landen en partijen met hun ideeën zouden komen. Het bleef angstvallig stil aan de andere kant van de oceaan.

In de brief van de staatssecretaris over de uitvoering van de motie-Van Raak cum suis schrijft de staatssecretaris: "Zoals de motie zelf nadrukkelijk erkent, is hiervoor ook draagvlak nodig bij de Caribische landen van het Koninkrijk. Teneinde dit draagvlak vast te stellen, heb ik de ministers-presidenten van Aruba, Curaçao en Sint Maarten schriftelijk verzocht om een gezamenlijke werkgroep te vormen, waarin op ambtelijk niveau de knelpunten met betrekking tot voornoemd thema in kaart kunnen worden gebracht en een proces kan worden ingericht. Na ommekomst van de reacties van de ministers-presidenten van Aruba, Curaçao en Sint Maarten zal ik u informeren over het vervolg."

Voorzitter. Ik zet er een goede fles wijn op dat er geen gezamenlijke werkgroep gaat komen. Nog een fles wijn erop dat deze werkgroep niet bij elkaar gaat komen. Ik doe er een etentje bovenop met de stelling dat er geen proces zal worden ingericht. En niet omdat ik geloof dat deze staatssecretaris het niet kan — als iemand het kan, is hij het wel — maar dit is namelijk hoe het gaat binnen het Koninkrijk. Aruba, Curaçao en Sint-Maarten hebben helemaal geen behoefte aan een aanpassing van het Statuut. Er zouden eens afspraken gemaakt worden over wie waarvoor verantwoordelijk is. Dan kun je als Arubaanse minister-president Nederland niet meer de schuld geven van het niet aan kunnen pakken van de corruptie.

Ik citeer die minister-president van Aruba: "Aruba heeft ambitieuze beleidsvoornemens op het gebied van integriteit. De uitvoering van de plannen loopt echter vertraging op vanwege de druk die vanuit Nederland wordt uitgeoefend om de overheidsuitgaven, met name de personeelskosten, te verlagen." Dan heb je het niet begrepen. Het probleem van de personeelskosten is namelijk juist de basis van al die problemen. Nepotisme en vriendjespolitiek leiden ertoe dat bestuurders denken dat ze voordeeltjes moeten geven aan al die vrienden en bekenden. Dat wil kennelijk maar niet doordringen bij bestuurlijk Aruba.

Op Sint-Maarten is binnen tien jaar het negende kabinet aan de lat. Waarom valt een kabinet? Omdat de nieuwe meerderheid geen pottenkijkers uit Nederland wil. Er gaat zo meteen bijna 500 miljoen besteed worden op het eiland. Daar willen mensen persoonlijk een graantje van meepikken. En dus vooral geen toezicht op de bouw van een vliegtuigterminal. Vooral niet de expertise en governance van Schiphol, geen kleine speler in dit gebied, benutten, maar het gewoon weer helemaal zelf regelen. Dan kost het nieuwe dak van de terminal 1.500 dollar per vierkante meter. Voor die vierkantemeterprijs kun je een huis laten bouwen. Niet zomaar een huis, een riant huis. Iemand wordt er rijk van, maar het gaat ten koste van de lokale bevolking.

En gekozen volksvertegenwoordigers — hoewel: vertegenwoordigers? — laten het gebeuren. Daar kun je als Nederland of als Koninkrijk niks aan doen.

Gelukkig is er wel succes geboekt met het Team Bestrijding Ondernijning, ook weer een initiatief van collega Van Raak en mijzelf om extra researchcapaciteit te creëren om de ondernijnende criminaliteit aan te pakken. Bestuurders op Aruba, Curaçao en Sint-Maarten maken zich sinds de komst van het TBO al veel drukker om een goede en menswaardige gevangenisopvang. Ze zouden er zomaar eens zelf in kunnen verdwijnen. Volgend jaar loopt het programma af. Is er al zicht op verlenging van dit succesvolle project, zo vraag ik de staatssecretaris.

De tegenwerking en bestuurlijke onwil op de eilanden zijn vaak nog te groot. De financiële belangen op een klein eiland zijn ook vaak heel groot. Het is heel moeilijk om de druk te weerstaan op een klein eiland. Ook daar heeft de VVD begrip voor. **Maar zo doorpolderen in het Statuut is voor de VVD geen optie meer.**

De heer **Van Dam** (CDA):

Ik ging heel verwachtingsvol naar dit debat toe. Ik dacht: collega Bosman heeft een steen bij zich. Want in de krant heeft hij aangekondigd dat hij een steen in de vijver gaat gooien.

De heer **Bosman** (VVD):

Ja.

De heer **Van Dam** (CDA):

Wat heeft u nog meer gezegd? Althans, dat wordt gezegd. **U bent klaar met de afspraken tussen Nederland, Curaçao, Aruba en Sint-Maarten en het Statuut kan in de prullenbak.**

De heer **Bosman** (VVD):

Ja.

De heer **Van Dam** (CDA):

Als het gaat om consequente standpunten, moet ik collega Bosman één ding nageven: in de tien jaar dat hij zich al met hart en ziel voor deze portefeuille inzet en in het ene jaar dat ik hem hierin heb meegemaakt, heb ik hem op dit punt heel consequent gezien. Maar collega Bosman eindigde met de quote: "Ik wil dit wel, maar zo'n gesprek komt nooit van de grond. We hebben het al eerder gezien, maar het gaat toch niet wat worden." Dus dan denk ik bij mijzelf, met alle respect: roept u dit nu weer om het te roepen? U weet dat we vastzitten aan het Statuut. Gaat u met oorlogsschepen optrekken naar de eilanden? Wat is nou echt het perspectief dat u voor ogen hebt?

De heer **Bosman** (VVD):

Collega Van Dam is net te vroeg. Ik begin net. Hier komt het verhaal over het Statuut.

De **voorzitter**:

Nou, dan stel ik voor dat u even het vervolg afwacht, meneer Van Dam.

De heer **Van Dam** (CDA):

Ik wacht op de steen.

De **voorzitter**:

Die wordt zo gegooid, denk ik.

De heer **Bosman** (VVD):

Ik heb nog zeven minuten, voorzitter.

De voorzitter:

Ja, gaat uw gang.

De heer Bosman (VVD):

Voorzitter. De VVD is dan ook van mening dat veel rigoureuzere stappen nodig zijn om het Koninkrijk tot een werkbaar geheel te maken. Er moet een deadline komen en Nederland moet gewoon aangeven dat bij het niet behalen van een deadline Nederland uit het Statuut stapt en we niet meer gehouden zijn aan de afspraken binnen het Statuut, daarmee de facto een Gemenebest van onafhankelijke landen creërend. Pas als er druk op komt te staan, zal er beweging gaan komen.

En nu is het ook de tijd. Uit de verschillende vragen van mij en antwoorden van het kabinet blijkt dat we niet meer in een dekoloniseringsperiode zitten, maar dat we nu in een Koninkrijksverband zitten. En dat was een vraag die ik al vaker had gesteld. Vallen we nog onder artikel 73 van het VN-Handvest? Dat is dus niet meer zo. Dat is goed om te weten, maar dat heeft ook consequenties voor alle landen. Daarom is een aanpassing van het Statuut nu dus essentieel. Als er geen sprake meer is van dekolonisatie en we dus in een postkoloniale fase zitten, is het tijd om daadwerkelijk tot gelijkwaardigheid binnen het Koninkrijk te komen. Want wat ik nog steeds niet begrijp, is dat de voormalige koloniën, nadat ze eenmaal hebben gekozen voor hun status, gedekoloniseerd zijn maar wel het recht behouden tot uittreding. Op basis waarvan hebben zij dan het recht tot uittreding als we praten over het postkoloniale tijdperk, vraag ik de staatssecretaris.

In zijn beantwoording schrijft de staatssecretaris dat het gaat om het ongeschreven Koninkrijksrecht. Is dat Koninkrijksrecht dan wel eeuwigdurend en, zo ja, waarom dan? Als het gaat om erkenning door de partners binnen het Koninkrijk van het recht tot eenzijdig uittreden, wanneer kan Nederland dan op die erkenning rekenen? Hoe krijgen wij als Nederland de erkenning tot uittreding? Want uittreding uit het Koninkrijk heeft niets meer met kolonialisme te maken, het gaat dus om wederzijdse erkenning.

De Nederlandse overheid werkt trouwens ook mee aan de verwarring ten aanzien van het Koninkrijk. In de schriftelijke beantwoording van mijn vragen geeft de staatssecretaris aan dat de inbreng van de wettelijke statement was gedaan door de Nederlandse regering. En dat is bijzonder want het Internationaal Strafhof kent het land Nederland helemaal niet. Sterker nog, de titel zoals die is gebruikt luidt: "International Court of Justice, Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, written statement of the kingdom of the Netherlands". Dus niet Nederland maar "the kingdom". Het Koninkrijk wordt om een geschreven advies gevraagd. Dan is het wel heel bijzonder dat daar waar het gaat om dekolonisatie, de landen binnen het Koninkrijk niet wordt gevraagd naar hun mening. Opeens is dan het Koninkrijk weg en gaat het over de Nederlandse regering. Als het Europees Hof voor de Rechten van de Mens Nederland aanspreekt over misstanden op Sint-Maarten en Curaçao met "the Netherlands" dan wijzen we snel naar het Koninkrijk en zijn we er niet van. Dat laatste is ook terecht, maar het geeft de totale schizofrenie weer van dit Koninkrijk in het Statuut waarop het is gebaseerd.

Want wat is het Koninkrijk nu? Wie is nu de regering van het Koninkrijk? Daar komt ook een heel uitgebreid antwoord op omdat er geen eenduidig antwoord is te geven. De kern van het antwoord is dat de landen van het Koninkrijk betrokken worden bij de besluitvorming die de landen raakt. Dat gebeurt dan in de Rijksministerraad maar wordt gedaan door een ambtenaar van het land Aruba, Curaçao of Sint-Maarten. Het zijn namelijk vertegenwoordigers die namens het land zitting nemen in de Rijksministerraad. Maar wat zijn dan de onderwerpen die de landen raken, vraag ik de staatssecretaris. Mag ik aannemen dat als er over defensie wordt gesproken, het gaat over een belang dat de landen raakt? Het gaat namelijk ook over hun veiligheid. Maar ook het economisch belang van Nederland raakt de belangen van Aruba, Curaçao en Sint-Maarten, want economische groei in Nederland helpt de landen. Ik durf zelfs te stellen dat het Nederlandse monetair beleid de belangen raakt van de landen, want als de rente in Nederland stijgt, gaan de landen meer rente betalen over hun leningen.

Ik weet natuurlijk niet wat er besproken wordt in de Rijksministerraad maar ik durf te beweren dat als de landen niet specifiek benoemd worden op de agenda van de Rijksministerraad er geen sprake is van het belang voor het Koninkrijk. En dat is natuurlijk een hele bijzondere figuur. Het Koninkrijk bestaat namelijk altijd en de belangen binnen het Koninkrijk zijn gedeelde belangen. Waarom is er dan geen sprake van een permanent bestuur met een permanente bezetting? Graag een toelichting van de staatsecretaris.

Want als het Koninkrijk altijd bestaat, dan moet de Koninkrijksregering van samenstelling veranderen. Dan kan het niet meer zo zijn dat er een vertegenwoordiger van een van de landen aanschuift. Dat is ook conform het door Nederland zelf gegeven statement: "if States are not conducting themselves in compliance with the principle of equal rights and self-determination of peoples and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour". Dan moet de regering van het Koninkrijk dus een heel andere vorm gaan krijgen. Is de staatssecretaris dat met mij eens?

Voorzitter. Als we geen duidelijkheid krijgen over wie verantwoordelijk is voor wat en als we maar doorpolderen in dit cafetaria-statuut, dan is het voor de VVD tijd om duidelijke stappen te gaan ondernemen: dan wordt het tijd om het Statuut in de prullenbak te gooien.

Dank u wel.

De heer **Van Raak** (SP):

Ik ben heel benieuwd naar de uitvoering van mijn motie. Die verzocht te kijken of landen bereid zijn om te spreken over een nieuwe verdeling van verantwoordelijkheden. Ik durf daarbij geen weddenschap met de heer Bosman aan te gaan, want dat kost me twee flessen wijn. Hij wil dan ook nog eens goede flessen wijn hebben, en ik ben maar een eenvoudige socialist. Maar begint die discussie niet met het feit dat ook Nederland in die discussie een opvatting of een visie heeft op het Koninkrijk?

De heer **Bosman** (VVD):

Dat is het mooie van de discussie die we, ook schriftelijk, hebben gevoerd. We zitten nu in een postkoloniaal tijdperk. Daarin zijn we eigenlijk allemaal niet meer gehouden aan die koloniale zaken die vallen onder artikel 73. Juist nu is het het moment om ook vanuit Nederland te zeggen wat wij willen. Daarom zeg ik als VVD'er ook: joh, als het niet werkt, dan stoppen we ermee. Dan kun je uitzoeken wat je wil, maar dan stoppen we ermee.

De heer **Van Raak** (SP):

Ik loop hier al lang mee in de Kamer. We hebben in het verleden als Kamer de regering om een visie gevraagd. Dat was nog onder Donner. Toen kregen we een donneriaans rapport — daar stond dus niks in. Als de heer Bosman het meent, en ik ben van harte met hem eens dat de tijden zijn veranderd en dat het Koninkrijk is mislukt ...

De heer **Bosman** (VVD):

Het Statuut, bedoelt u.

De heer **Van Raak** (SP):

Het Statuut is mislukt. Dan lijkt het me goed om ermee te beginnen om aan de Nederlandse regering een visie op het Koninkrijk en op de verdeling van verantwoordelijkheden te vragen. Zo'n stuk zou namelijk volgens mij een heel goed uitgangspunt zijn voor een discussie met de andere landen. Ze worden dan namelijk gedwongen om daar een reactie op te schrijven.

De heer **Bosman** (VVD):

De motie vraagt volgens mij om gezamenlijk te komen tot een herverdeling van verantwoordelijkheden. Ik denk dat het van belang is dat wij als Nederland ook aangeven waar het piept en schuurt. Wij moeten als Nederland aangeven: jongens, luister, binnen dit Statuut hebben wij hier moeite mee, daar een probleem mee en daar een probleem mee, maar wij zien

kansen voor dit en dit. Volgens mij is dat een prima soort van uitgangsnote waarin je kunt aangeven: joh, dit is wat wij vinden; wat vinden jullie? Laten we dan maar eens kijken of we bij elkaar komen. En misschien kost dat me dan wel twee flessen wijn en een etentje!

De voorzitter:

Jullie zijn het steeds met elkaar eens, zie ik! Klopt dat?

De heer Bosman (VVD):

Nou, we komen een heel eind.

De voorzitter:

De heer Van der Graaf.

De heer De Graaf (PVV):

Zeg maar "De Graaf".

De voorzitter:

Sorry, meneer De Graaf.

De heer De Graaf (PVV):

Geeft niks, voorzitter. Het is alweer dinsdagmiddag.

De voorzitter:

Het is mevrouw Van der Graaf, maar de heer Dé Graaf.

De heer De Graaf (PVV):

Dank aan de heer Bosman voor zijn uiteenzetting. Het is namelijk niet eens een schizofrene situatie, maar misschien wel een quadrofrene situatie of een oligofrene situatie! Er zijn zo veel actoren, zo veel juridische geschriften, zo veel statuten en noem maar op. Ik denk dat het voor heel veel mensen heel duidelijk is geworden hoe moeilijk de zaak in elkaar steekt, door het betoeg van de heer Bosman. Dus dank daarvoor.

Maar dan komt de volgende stap. "Het Statuut opheffen", zegt de heer Bosman. Dan is het Statuut er dus niet meer. Wat is dan voor de heer Bosman de volgende stap, behalve de twee flessen wijn en het etentje, en het praten over een visie? Wat wordt concreet de volgende stap?

De heer Bosman (VVD):

Dat heb ik opgeschreven. Naar mijn idee hebben we dan nog steeds het Koninkrijk, maar geen Statuut meer. Dat betekent dat je vier onafhankelijke landen hebt binnen het Koninkrijk.

De heer De Graaf (PVV):

Oké, dat maakt het toch iets duidelijker dan daarnet. Dan heb je dus vier onafhankelijke landen binnen het Koninkrijk. Is dat dan het gemenebest waar de heer Bosman het eerder over heeft gehad in zijn initiatiefnota? Wat gebeurt er dan met de drie bijzondere gemeenten die we in het Koninkrijk hebben? In mijn eigen inbreng heb ik gezegd dat het een beetje op de Marktplaatsoptie lijkt die we zelf weleens benoemd hebben in het verleden. Dat was een jaar of tien, elf terug. Ik wil boter bij de vis, maar ik begrijp nu dat het Koninkrijk gewoon blijft bestaan. Dan blijven dus ook de interne en onderlinge problemen gewoon bestaan.

De heer Bosman (VVD):

Nee, want het mooie is dat je, als je onafhankelijk bent, verantwoordelijk bent voor je eigen problematiek. Als je dan wilt samenwerken, doe je dat op basis van gelijkwaardigheid, waarbij je kan vragen om hulp maar waarbij je ook kan zeggen: joh, zoals jij het geregeld hebt, ga ik het niet doen. We hebben nu het Statuut met een waarborgfunctie; de landen zijn zelfstandig verantwoordelijk voor het waarborgen van goed bestuur. Maar dat wordt ook nog eens

gewaarborgd door het Koninkrijk via artikel 43, lid 2. Daarmee ontstaat een verantwoordelijkheid voor zaken waarvan de VVD wil kunnen zeggen: wacht even, zoals jullie dat regelen, willen we dat niet. Het is van belang dat je dat helder maakt als er vier onafhankelijke landen zijn binnen het Koninkrijk. Bonaire, Saba en Sint-Eustatius horen gewoon bij Nederland. Als zij andere keuzes willen maken, is dat aan hen, maar het gaat mij nu specifiek om de vier landen binnen het Koninkrijk.

De voorzitter:

De heer De Graaf, tot slot op dit punt.

De heer De Graaf (PVV):

Ik heb nog een korte praktische vraag aan het eind, want wij zouden het inderdaad kort houden. Krijgen we deze week, in deel twee van dit debat — donderdagmorgen geloof ik — dan een motie van de heer Bosman waarin inderdaad wordt gesteld dat het Statuut moet worden opgeheven?

De heer Bosman (VVD):

Dat zou zomaar kunnen. Ik ga even kijken. We geven natuurlijk eerst altijd even ruimte aan de staatssecretaris — dat vind ik netjes — in plaats van direct te zeggen dat we een motie gaan indienen. Ik luister dus eerst naar de staatssecretaris. Maar ik kan me voorstellen dat de regering het moeilijker vindt om dat zomaar neer te leggen. Dat zou zomaar kunnen, ja.

De heer Van Dam (CDA):

Ik kom toch toe aan mijn tweede termijn ...

De voorzitter:

Die steen waar u naar gevraagd heeft, hè?

De heer Van Dam (CDA):

Ja, ik zocht naar die steen. Ik moet zeggen dat die steen het beste te kwalificeren is — ik waarschuw collega Van Raak maar — als oude wijn in nieuwe zakken. Ik wil de heer Bosman toch wat vragen. U weet dat ik er fundamenteel anders tegenover sta. Ik zie de Koninkrijksverbanden als familieverbanden, en van je familie ontdoe je je ook niet op een dinsdagmiddag. U bent vast op de hoogte van de situatie op Sint-Maarten. Vorige week hebben de leden van de Kiesraad daar hun baan opgezegd. Dat vind ik een enorm democratische daad. Zo zijn er op al die eilanden nieuwe generaties, die andere dingen willen. Wat is nou het verhaal van de VVD voor die mensen? Dat is toch eigenlijk gewoon de mensen in de steek laten? Ik kan het niet anders zeggen.

De heer Bosman (VVD):

Maar dat is een beetje een koloniale gedachte. Die ben ik voorbij. Ik vind namelijk dat we mensen in hun kracht moeten zetten. Het is juist van belang dat de problemen opgelost worden op de eilanden en dat men weet dat er maar één verantwoordelijke is voor het oplossen van die problemen, namelijk de eilanden zelf. Het is een beetje alsof je een alcoholverslaafde iedere keer weer een beetje alcohol geeft: joh, hier, je krijgt toch nog een beetje. Nee, het gaat erom wie waarvoor verantwoordelijk is. Daar moet je in een keer duidelijk over zijn: dit is jouw verantwoordelijkheid, pak die op, doe het, regel het.

De heer Van Dam (CDA):

Als wij mede-Koninkrijksgenoten vergelijken met alcoholverslaafden, ben ik even uitgepraat.

De heer Bosman (VVD):

Die is heel makkelijk. Het was een voorbeeld in algemene termen, over het risico dat je mensen niet van een probleem afhelpt, maar het blijft ondersteunen. Als de heer Van Dam dat niet wil zien, vind ik dat heel jammer. Dat is een gemiste kans, want het is een probleem en als je dat niet wilt aanpakken, dan blijven we doormodderen en doorpolderen. Dat is heel jammer.

Mevrouw Diertens (D66):

Ik probeer een beetje rustig te blijven, maar de stoom komt zo onderhand uit mijn oren. Dit is inderdaad oude wijn in nieuwe zakken. We kennen het verhaal van de heer Bosman onderhand wel. Wat ik zo erg vind, is dat u schermt met de uitspraak "wij willen niet koloniaal zijn". Maar als ik naar u kijk en u zie staan — ik heb me erg verdiept in het onderwerp van een lezing die ik vrijdagavond moet geven over Het Witte Geweten — dan denk ik: u bent wel heel erg koloniaal bezig op dit moment. Bent u ...

De heer Bosman (VVD):

Sorry hoor, voorzitter, maar ik vind dit echt verbazingwekkend.

Mevrouw Diertens (D66):

Bent u dat met mij eens?

De heer Bosman (VVD):

Nee, dit is bijna een persoonlijk feit. Ik vind het verbazingwekkend. Het betekent namelijk dat je als Nederland niets mag zeggen over de toekomst van je eigen land, van het Statuut, van de organisatie waar we in zitten, van zaken waar we ook verantwoordelijk voor zijn. Moeten we stilzitten op de achterbank en kijken wat er gebeurt met Nederland, met het Koninkrijk, met het Statuut? Moeten we dan maar zien wat er gebeurt? Moeten we volledig onze ogen dichtdoen voor de problemen die er zijn zonder die aan te durven pakken? Ik ben een volksvertegenwoordiger van Nederland. Namens de VVD zit ik in de Kamer en kaart ik problemen aan. Ik heb er een verantwoordelijkheid in om die op te pakken en te benoemen en zo veel mogelijk samen te werken. Maar als mensen niet samen willen werken, moet ik toch stappen zetten.

Mevrouw Diertens (D66):

Dat is dan misschien wel het verschil: dat ik mij ook een volksvertegenwoordiger voel van Caribisch Nederland. Ik vind dat u wel met hele grote stappen thuis de problemen analyseert, want die zijn oppervlakkig geanalyseerd. Ik denk gewoon dat we daarin met z'n allen nog wel een diepgang kunnen maken. Ik denk dat we op de goede weg zijn, dat we de afgelopen jaren met deze staatssecretaris een aantal goede stappen hebben gemaakt. Ik hoop dat u het met me eens bent dat we die weg misschien ook een kans moeten geven. Bent u dat met me eens?

De heer Bosman (VVD):

Mevrouw Diertens doet het wel vaker: zij vergelijkt appels met peren. Ik heb het namelijk niet over Caribisch Nederland gehad. Dat heb ik vier keer gezegd, en misschien wel vaker. Ik heb gesproken over de landen binnen het Koninkrijk. Mijn hele verhaal gaat over de landen binnen het Koninkrijk. Die verantwoordelijkheid heb ik iedere keer benoemd, waarbij het autonome landen zijn die eigen verantwoordelijkheden hebben. Die zijn specifiek benoemd in het Statuut. Als je praat over Caribisch Nederland; natuurlijk heb ik daar een verantwoordelijkheid voor. Die zorg heb ik ook benoemd. Daar zet ik ook stappen voor. Als er iemand praat over landbouw, dan ben ik het. Als iemand vindt dat het eten goedkoper moet worden, dan ben ik het. Dus ik vind het belachelijk, echt belachelijk, dat mevrouw Diertens dit op die manier durft te zeggen.

Mevrouw Özütok (GroenLinks):

Toen ik het begin van het betoog van de heer Bosman hoorde, werd ik een beetje blij. Ik dacht: hé, dat gaat nu ook echt over de mensen die binnen het Koninkrijk wilden blijven. Daarom zijn deze relaties ook tot stand gekomen. Dat was allemaal voor mijn tijd. Wij hebben een Statuut waarin het een en ander bestuurlijk wordt geregeld. Ik ben het met u eens dat het bestuurlijk in die relaties niet alleen maar zonneschijn is. Dat onderstreep ik. Maar het is een feit dat die mensen nog steeds behoefte hebben aan begeleiding en ondersteuning en dat zij verwachtingen hebben. Laat u die nu allemaal in de steek?

De heer Bosman (VVD):

Dan wil ik even precies weten wie mevrouw Özütok nu bedoelt met "al die mensen".

Mevrouw **Özütok** (GroenLinks):
In de landen.

De heer **Bosman** (VVD):
U heeft het over de landen, over Aruba, Curaçao en Sint-Maarten?

Mevrouw **Özütok** (GroenLinks):
Ja.

De heer **Bosman** (VVD):
Ik laat niemand in de steek. De VVD laat niemand in de steek. Wij zeggen alleen — en volgens mij is dat heel normaal — dat het landen zijn met eigen Staten, met verkiezingen, met een regering, met een begroting, met verantwoordelijkheden als het gaat om het beleggen van geld, het toetsen van die begroting, het kijken waar het geld blijft, het bespreken van nepotisme en het reageren op mensen die zeggen: joh, je steekt het geld in je eigen zak. Ik laat niemand in de steek. Alleen, het is wel de verantwoordelijkheid van Aruba, Curaçao en Sint-Maarten, en niet de mijne.

Mevrouw **Özütok** (GroenLinks):
Dit verhaal hebben we vaker gehoord: dat het in de visie van de heer Bosman niet de verantwoordelijkheid van Nederland is. Maar dit zijn de relaties. U kunt het toch niet maken dat u zegt: ik neem afscheid van u en u bekijkt het maar. Dat is de werkelijke situatie die de heer Bosman hier eigenlijk bepleit.

De heer **Bosman** (VVD):
Nee, wat meneer Bosman hier bepleit, is dat de landen Aruba, Curaçao en Sint-Maarten zich aan de afspraken gaan houden, dat ze hun begroting op orde krijgen. Dat heb ik continu gezegd, dat heb ik de hele tijd gezegd. Ik heb gezegd: als je je niet aan je afspraken houdt, dan heb je een cafetariastatuut. Zo heb ik dat genoemd. Iedere keer maar weer een beetje kiezen wat we wel en wat niet willen. Het gaat erom dat die verantwoordelijkheden daar liggen. Op het moment dat iedereen zegt: o, maar meneer Bosman wil ze het Statuut uit duwen ... Nee, dan gaat mevrouw Özütok ervan uit dat Aruba, Curaçao en Sint-Maarten zich nooit aan de afspraken gaan houden. Dat kan ook. Maar volgens bedoelt mevrouw Özütok dat zeker niet.

De **voorzitter**:
Dank u wel, meneer Bosman. Dan geef ik nu het woord aan mevrouw Özütok namens GroenLinks.



Vergaderjaar 2016–2017

34 550 IV

Vaststelling van de begrotingsstaten van Koninkrijksrelaties (IV) en het BES-fonds (H) voor het jaar 2017

Nr. 10

MOTIE VAN DE LEDEN BOSMAN EN VAN RAAK

Voorgesteld 13 oktober 2016

De Kamer,

gehoord de beraadslaging,

overwegende dat de Verenigde Naties na 1945 een proces van dekolonisatie hebben ingezet en dat het Handvest van deze internationale organisatie uitgaat van het ontwikkelen van zelfbestuur voor die gebieden die nog geen volledig zelfbestuur hebben;

constaterende dat het Statuut voor het Koninkrijk der Nederlanden in 1954 een stap was in het dekolonisatieproces;

constaterende dat Aruba, Curaçao en Sint-Maarten enerzijds autonome landen binnen het Koninkrijk der Nederlanden zijn, maar anderzijds deel uitmaken van datzelfde Koninkrijk der Nederlanden;

constaterende dat het Statuut voor het Koninkrijk der Nederlanden niet het einddoel was en is om recht te doen aan de volledige zelfbeschikking van alle landen binnen het Koninkrijk;

verzoekt de regering, met de Verenigde Naties te overleggen om gezamenlijk met Aruba, Curaçao en Sint-Maarten, te komen tot een definitieve vervulling van het zelfbeschikkingsrecht van alle landen van het Koninkrijk en de Kamer voor 1 juli 2017 over de uitkomst van dat overleg te informeren,

en gaat over tot de orde van de dag.

Bosman
Van Raak



Vergaderjaar 2018–2019

35 119 (R2116)

Voorstel van rijkswet van het lid Bosman tot wijziging van het Statuut voor het Koninkrijk der Nederlanden teneinde mogelijk te maken dat Curaçao en Sint Maarten net als Aruba zelfstandig kunnen opteren voor de beëindiging van de in het Statuut neergelegde rechtsorde en bij wijziging van de Grondwet regels te stellen voor het geval Bonaire, Sint Eustatius of Saba wensen geen deel uit te maken van het staatsbestel van Nederland

Nr. 1

GELEIDENDE BRIEF

Aan de Voorzitter van de Tweede Kamer der Staten-Generaal

's-Gravenhage, 15 januari 2019

Hierbij doe ik u overeenkomstig het bepaalde in artikel 114 van het Reglement van Orde een voorstel van rijkswet toekomen tot wijziging van het Statuut voor het Koninkrijk der Nederlanden teneinde mogelijk te maken dat Curaçao en Sint Maarten net als Aruba zelfstandig kunnen opteren voor de beëindiging van de in het Statuut neergelegde rechtsorde en bij wijziging van de Grondwet regels te stellen voor het geval Bonaire, Sint Eustatius of Saba wensen geen deel uit te maken van het staatsbestel van Nederland.

De memorie van toelichting, die het wetsvoorstel vergezelt, bevat de gronden waarop het rust.

Bosman

Vergaderjaar 2018–2019

35 119 (R2116)

Voorstel van rijkswet van het lid Bosman tot wijziging van het Statuut voor het Koninkrijk der Nederlanden teneinde mogelijk te maken dat Curaçao en Sint Maarten net als Aruba zelfstandig kunnen opteren voor de beëindiging van de in het Statuut neergelegde rechtsorde en bij wijziging van de Grondwet regels te stellen voor het geval Bonaire, Sint Eustatius of Saba wensen geen deel uit te maken van het staatsbestel van Nederland

Nr. 2

VOORSTEL VAN RIJKSWET

Wij Willem-Alexander, bij de gratie Gods, Koning der Nederlanden, Prins van Oranje-Nassau, enz. enz. enz.

Allen, die deze zullen zien of horen lezen, saluut! doen te weten:

Alzo Wij in overweging genomen hebben, dat het wenselijk is in het Statuut voor het Koninkrijk der Nederlanden vast te leggen dat Curaçao en Sint Maarten net als Aruba zelfstandig kunnen opteren voor de beëindiging van de constitutionele verhouding zoals die is neergelegd in het Statuut en bij wijziging van de Grondwet regels te stellen voor het geval Bonaire, Sint Eustatius of Saba wensen geen deel uit te maken van het staatsbestel van Nederland;

Zo is het, dat Wij, de Afdeling advisering van de Raad van State van het Koninkrijk gehoord, en met gemeen overleg der Staten-Generaal, de bepalingen van het Statuut voor het Koninkrijk in acht genomen zijnde, hebben goedgevonden en verstaan, gelijk Wij goedvinden en verstaan bij deze:

ARTIKEL I

Het Statuut voor het Koninkrijk der Nederlanden wordt als volgt gewijzigd:

A

In paragraaf 5 wordt voor artikel 55 een artikel ingevoegd, luidende:

Artikel 54

Bij wijziging van de Grondwet worden regels gesteld voor het geval Bonaire, Sint Eustatius of Saba wensen geen deel uit te maken van het staatsbestel van Nederland.

B

Artikel 58 wordt als volgt gewijzigd:

1. Het eerste lid komt te luiden:

1. Aruba, Curaçao en Sint Maarten kunnen elk afzonderlijk bij landsverordening verklaren dat zij de rechtsorde neergelegd in het Statuut ten aanzien van hun land willen beëindigen.

2. Het derde lid vervalt.

C

Artikel 59 vervalt.

D

Artikel 60 wordt als volgt gewijzigd:

1. Het eerste lid komt te luiden:

1. Na vaststelling van de landsverordening overeenkomstig artikel 58 en goedkeuring van de toekomstige constitutie door de Staten van Aruba, Curaçao onderscheidenlijk Sint Maarten wordt overeenkomstig het gevoelen van de regering van Aruba, Curaçao onderscheidenlijk Sint Maarten bij koninklijk besluit het tijdstip van beëindiging van de in het Statuut neergelegde rechtsorde bepaald.

2. In het tweede lid vervalt de tweede zin.

ARTIKEL II

Deze rijkswet treedt in werking op een bij koninklijk besluit te bepalen tijdstip.

Lasten en bevelen dat deze in het Staatsblad, in het Afkondigingsblad van Aruba, in het Publicatieblad van Curaçao en in het Afkondigingsblad van Sint Maarten zal worden geplaatst en dat alle ministeries, autoriteiten, colleges en ambtenaren die zulks aangaat, aan de nauwkeurige uitvoering de hand zullen houden.

Gegeven

De Minister-President, Minister van Algemene Zaken,

De Staatssecretaris van Binnenlandse Zaken en Koninkrijksrelaties,

Vergaderjaar 2018–2019

35 119 (R2116)

Voorstel van rijkswet van het lid Bosman tot wijziging van het Statuut voor het Koninkrijk der Nederlanden teneinde mogelijk te maken dat Curaçao en Sint Maarten net als Aruba zelfstandig kunnen opteren voor de beëindiging van de in het Statuut neergelegde rechtsorde en bij wijziging van de Grondwet regels te stellen voor het geval Bonaire, Sint Eustatius of Saba wensen geen deel uit te maken van het staatsbestel van Nederland

Nr. 3

MEMORIE VAN TOELICHTING

I. ALGEMEEN DEEL

1. Inleiding

Het Koninkrijk der Nederlanden bestaat uit de landen Nederland, Aruba, Curaçao en Sint Maarten. Het Statuut voor het Koninkrijk der Nederlanden regelt de verhoudingen tussen de vier landen. In het Statuut is geregeld dat slechts één van de vier landen, Aruba, zelfstandig bij landsverordening kan verklaren dat het de rechtsorde neergelegd in het Statuut ten aanzien van Aruba wil beëindigen. Deze anomalie trekt de verhoudingen binnen het Koninkrijk scheef. De initiatiefnemer wenst de verhoudingen recht te zetten door in het Statuut te regelen dat niet alleen Aruba, maar ook Curaçao en Sint Maarten kunnen verklaren dat ze de rechtsorde neergelegd in het Statuut ten aanzien van hun land willen beëindigen.

De eilanden Bonaire, Sint Eustatius en Saba zijn door de laatste Statuutswijziging deel van het land Nederland binnen het Koninkrijk geworden en daarmee niet meer in het Statuut beschreven. Dat is een omissie. Vanuit het perspectief van dekolonisatie blijft het een onvervreemdbaar recht van voormalige koloniën om zich uit te spreken over hun eigen toekomst. Deze eilanden dienen daarom ook de mogelijkheid te hebben om hun eigen keuze te maken ten aanzien van hun toekomst, net als Aruba, Curaçao en Sint Maarten. Het is ook van belang te voorkomen dat de eilanden Bonaire, Sint Eustatius en Saba buiten het secessierecht komen te vallen, waarbij het uittreden van Bonaire, Sint Eustatius en Saba net zo onmogelijk zou worden als een onafhankelijk Texel. Om die reden worden Bonaire, Sint Eustatius en Saba weer opgenomen in het Statuut.

Het kiezen van de eigen toekomst van de voormalige koloniën dient aan de minst mogelijke vorm van eisen te worden begrensd. Binnen het handvest van de VN staan richtlijnen hoe te handelen als een meerderheid

van de inwoners een toekomst los van het koloniserende land wenst.¹ Als de landen en eilanden in het Caribisch gebied van het Koninkrijk zichzelf nog regels wensen voor te schrijven is dat aan ieder land en eiland zelf en dient dat buiten de regeling van het Statuut te blijven juist omdat dit om de individuele keuzes gaat van de verschillende landen en eilanden.

Het Statuut heeft bepaald dat bij de Grondwet is voorzien in de positie van Bonaire, Sint Eustatius en Saba binnen het staatsbestel van Nederland.² Het onderhavige wetsvoorstel regelt dat bij wijziging van de Grondwet tevens regels worden gesteld voor het geval Bonaire, Sint Eustatius of Saba wensen geen deel meer uit te maken van het staatsbestel.

2. Voorgeschiedenis

Het Statuut voor het Koninkrijk der Nederlanden is tot stand gekomen in 1954. De wens was om de verhouding tussen het Europees deel van Nederland en de voormalige koloniën op een meer evenwichtige wijze te regelen. Oorspronkelijk maakten Suriname en de Nederlandse Antillen deel uit van het Statuut. Aruba, Curaçao, Sint Maarten, Bonaire, Sint Eustatius en Saba waren onderdeel van de Nederlandse Antillen. In 1975 werd Suriname onafhankelijk en is het Statuut dienovereenkomstig gewijzigd.

In 1994 is het Statuut nogmaals gewijzigd. Aruba wilde de mogelijkheid open laten te kiezen voor onafhankelijkheid en wenste uitdrukkelijk in het Statuut op te nemen op welke wijze die onafhankelijkheid tot stand zou kunnen komen. Dit is opgenomen in de huidige artikelen 58, 59 en 60 van het Statuut. De Nederlandse Antillen, die destijds een apart land binnen het Koninkrijk vormden, hadden geen behoefte aan een dergelijke voorziening.³

In 2010 zijn de staatskundige verhoudingen binnen het Koninkrijk opnieuw grondig gewijzigd. De Nederlandse Antillen zijn opgeheven en naast Aruba worden ook Curaçao en Sint Maarten aparte landen binnen het Koninkrijk. De eilanden Bonaire, Sint Eustatius en Saba zijn deel geworden van het land Nederland.

Op 14 december 2011 is in Den Haag een Koninkrijksconferentie gehouden. Er werd voornamelijk gesproken over de nieuwe staatskundige verhoudingen sinds 2010. De Minister-Presidenten van Aruba, Curaçao en Sint Maarten en de Minister van Binnenlandse Zaken en Koninkrijksrelaties van Nederland hebben een document ondertekend met de conclusies van de conferentie. Conclusie V luidt:

«Bij een volgende wijziging van het Statuut voor het Koninkrijk worden de artikelen 58, 59 en 60 aangepast in de zin dat Curaçao en Sint Maarten naast Aruba worden ingevoegd.»⁴

¹ Zie ook paragraaf 4: Verhouding tot internationaal recht.

² In het inmiddels vervallen artikel 54 van het Statuut stond dat bij de Grondwet wordt voorzien in de positie van Bonaire, Sint Eustatius en Saba binnen het staatsbestel van Nederland. Daar is vervolgens in voorzien in artikel 132a van de Grondwet, waarna artikel 54 van het Statuut is vervallen.

³ C. Borman, Het Statuut voor het Koninkrijk (Deventer, 2012), pagina 40.

⁴ Zie de besluitenlijst van de Koninkrijksconferentie 2011 in de bijlage bij Kamerstuk 33 000 IV, nummer 50.

In 2014⁵ en 2015⁶ zijn opnieuw Koninkrijksconferenties gehouden. Hierbij is echter niet teruggekomen op het voornemen om artikel 58, 59 en 60 van het Statuut te wijzigen.

3. Hoofdpijnen van het wetsvoorstel

Aruba, Curaçao en Sint Maarten

Het wetsvoorstel regelt dat artikel 58, dat gaat over de beëindiging van de rechtsorde zoals neergelegd in het Statuut, niet enkel geldt voor Aruba maar ook voor Curaçao en Sint Maarten. Dit is conform de afspraken van de Koninkrijksconferentie van 2011. Tevens regelt het wetsvoorstel dat de noodzaak tot het houden van een referendum vervalst. Dit is een onnodige drempel voor het mogelijke streven naar onafhankelijkheid van de landen. Ook komt de eis van een meerderheid van twee derden van de stemmen van het aantal zitting hebbende leden te vervallen. Het zou onrechtvaardig zijn als een meerderheid van 65 procent onafhankelijkheid wil, maar dit niet wordt toegestaan omdat een tweederde meerderheid vereist is. Een gewone meerderheid is voldoende om de wens tot onafhankelijkheid te uiten.

Als een land de rechtsorde neergelegd in het Statuut wil beëindigen, dient het een schets op te stellen van een toekomstige constitutie met bepalingen inzake de grondrechten, regering, vertegenwoordigend orgaan, wetgeving en bestuur, rechtspraak en wijziging van de constitutie. Krijgt dat voorstel een meerderheid in de Staten van het land, dan wordt bij koninklijk besluit een tijdstip vastgesteld voor beëindiging van de in het Statuut neergelegde rechtsorde. Het spreekt voor zich dat deze keuze niet lichtvaardig zal worden gemaakt. Het is mogelijk dat Aruba, Curaçao of Sint Maarten zelf bij landsverordening nadere regels stellen omtrent het afgeven van de verklaring om de rechtsorde te beëindigen. Het Statuut staat niet in de weg aan een dergelijke landsverordening. Deze regels kunnen onder andere de voorwaarde van een referendum inhouden. De landsverordening is een meer geschikte plek om dit te regelen dan het Statuut.⁷

Bonaire, Sint Eustatius en Saba

Daarnaast regelt het wetsvoorstel dat Bonaire, Sint Eustatius en Saba kunnen aangeven dat zij geen deel wensen uit te maken van het staatsbestel van Nederland. Momenteel hebben zij die mogelijkheid niet. De eilanden hebben sinds 2010 de positie van openbaar lichaam zoals bedoeld in artikel 134 van de Grondwet. Sinds 1 november 2017 luidt artikel 132a van de Grondwet:

«1. Bij de wet kunnen in het Caribische deel van Nederland andere territoriale openbare lichamen dan provincies en gemeenten worden ingesteld en opgeheven.

2. De artikelen 124, 125 en 127 tot en met 132 zijn ten aanzien van deze openbare lichamen van overeenkomstige toepassing.

⁵ Zie de besluitenlijst van de Koninkrijksconferentie 2014 in de bijlage bij Kamerstuk 33 750 IV, nummer 37.

⁶ Zie de besluitenlijst van de Koninkrijksconferentie 2015 in de bijlage bij Kamerstuk 33 845, nummer 11.

⁷ Overigens zijn de meningen over de volkenrechtelijke noodzaak voor een referendum voor onafhankelijkheid verdeeld. Zie S. Hillebrink, «Het referendum als democratisch slot op de deur van het Koninkrijk», THEMIS 2017–4, pagina 183–189.

3. In deze openbare lichamen worden verkiezingen gehouden voor een kiescollege voor de Eerste Kamer. Artikel 129 is van overeenkomstige toepassing.

4. Voor deze openbare lichamen kunnen regels worden gesteld en andere specifieke maatregelen worden getroffen met het oog op bijzondere omstandigheden waardoor deze openbare lichamen zich wezenlijk onderscheiden van het Europese deel van Nederland.»

Artikel 132a is in de Grondwet gekomen ter uitvoering van artikel 54 van het Statuut, dat per november 2017 is vervallen. Artikel 54 van het Statuut luidde:

«1. Bij wijziging van de Grondwet wordt artikel 1, tweede lid, vervallen verklaard op het moment dat bij de Grondwet wordt voorzien in de positie van Bonaire, Sint Eustatius en Saba binnen het staatsbestel van Nederland.

2. Dit artikel vervalt indien onder toepassing van het voorgaande lid artikel 1, tweede lid, vervallen wordt verklaard.»

De grondwetswijziging ter uitvoering van artikel 54 van het Statuut is in december 2011 naar de Tweede Kamer gestuurd.⁸ Dit wetsvoorstel is op 23 oktober 2012 in de Tweede Kamer en op 25 oktober 2016 in de Eerste Kamer aangenomen. De tweede lezing van de grondwetswijziging⁹ is op 12 september 2017 in de Tweede Kamer en op 31 oktober 2017 in de Eerste Kamer aangenomen. Na inwerkingtreding zijn artikel 54 en het tweede lid van artikel 1 van het Statuut vervallen.

Het onderhavige wetsvoorstel stelt voor om het vervallen artikel 54 van het Statuut opnieuw in te vullen met een delegatiegrondslag voor een nieuwe grondwetswijziging. Artikel 54 van het Statuut zal na inwerkingtreding van dit initiatiefwetsvoorstel komen te luiden:

«Bij wijziging van de Grondwet worden regels gesteld voor het geval Bonaire, Sint Eustatius of Saba wensen geen deel uit te maken van het staatsbestel van Nederland.»

Vervolgens is het aan de regering om een Grondwetswijziging in gang te zetten om hiertoe regels te stellen. De initiatiefnemer kan zich voorstellen dat artikel 132a van de Grondwet wordt uitgebreid met een delegatiebepaling om bij een wet in formele zin nadere regels te stellen waarop Bonaire, Sint Eustatius of Saba kunnen aangeven geen deel meer te willen uitmaken van het staatsbestel van Nederland en welke vervolgstappen hiervoor vereist zijn. Ook kunnen regels gesteld worden voor het geval dat alleen Bonaire, Sint Eustatius of Saba zich wil afscheiden terwijl de andere eilanden dat niet willen, of het geval dat meerdere eilanden zich tegelijkertijd willen afscheiden en al dan niet gezamenlijk als onafhankelijke landen willen doorgaan. Hiertoe zou de Wet openbare lichamen Bonaire, Sint Eustatius en Saba (ook wel: Wolbes) gewijzigd kunnen worden. Zoals gezegd is het aan de regering om uitvoering te geven aan de vereiste wijzigingen in Grondwet en wet in formele zin nadat het nieuwe artikel 54 van het Statuut in werking is getreden. Onderhavig initiatiefwetsvoorstel introduceert slechts de delegatiebepaling in het Statuut.

⁸ Verklaring dat er grond bestaat een voorstel in overweging te nemen tot verandering in de Grondwet, strekkende tot het opnemen van een constitutionele basis voor de openbare lichamen Bonaire, Sint Eustatius en Saba en het regelen van de betrokkenheid van hun algemeen vertegenwoordigende organen bij de verkiezing van de leden van de Eerste Kamer, Kamerstuk 33 131.

⁹ Verandering in de Grondwet, strekkende tot het opnemen van een constitutionele basis voor Caribische openbare lichamen en het regelen van een kiescollege voor de Eerste Kamer, Kamerstuk 34 702.

4. Verhouding tot internationaal recht

Voormalige koloniën hebben het onvervreembare recht om hun eigen weg te kiezen. Dit vloeit voort uit het VN-Handvest (met name artikel 73) en resoluties van de Verenigde Naties over dekolonisatie.¹⁰ In de resoluties is bepaald dat:

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

De voormalige kolonisator mag dit streven naar onafhankelijkheid niet tegenhouden. Het wetsvoorstel is in die zin volledig in lijn met het internationaal recht. Sterker nog, gesteld kan worden dat het wetsvoorstel materieel helemaal geen verandering teweeg brengt. Het enige wat het wetsvoorstel doet is dat volkenrechtelijke rechten en verplichtingen gecodificeerd worden in Nederlands recht.¹¹

5. Uitvoeringsaspecten

Aruba, Curaçao en Sint Maarten

Indien Aruba, Curaçao of Sint Maarten besluit de rechtsorde zoals neergelegd in het Statuut te beëindigen, dient er een koninklijk besluit te worden opgesteld om een tijdstip te bepalen. Tevens dient het Statuut te worden gewijzigd om aan de wens van het land te voldoen. Dit vergt uitvoering van de overgebleven landen van het Koninkrijk. Verder dient een goede regeling te worden getroffen tussen het land dat de rechtsorde wil beëindigen en de overige landen van het Koninkrijk.

Bonaire, Sint Eustatius en Saba

Ook dient de regering een grondwetswijziging in gang te zetten ter uitvoering van het nieuwe artikel 54 van het Statuut. In deze grondwetswijziging zullen regels worden gesteld voor het geval Bonaire, Sint Eustatius of Saba wensen geen deel uit te maken van het staatsbestel van Nederland. Het is mogelijk dat deze specifieke regeling in de Grondwet een delegatiebepaling bevat. Dat zou betekenen dat, na inwerkingtreding van de Grondwetswijziging, in een wet in formele zin nadere regels gesteld kunnen worden voor de situatie dat Bonaire, Sint Eustatius of Saba wensen geen deel uit te maken van het staatsbestel van Nederland. Het huidige artikel 132a lid 4 van de Grondwet kent een soortgelijke delegatiebepaling.

II. ARTIKELSGEWIJZE TOELICHTING

Artikel I

Onderdeel A

Artikel 54 geeft de opdracht om bij wijziging van de Grondwet regels te stellen voor het geval Bonaire, Sint Eustatius of Saba wensen geen deel uit te maken van het staatsbestel van Nederland. Een soortgelijke

¹⁰ Zoals Resolutie 1514 (XV) van 14 december 1960 en Resolutie 1654 (XVI) van 27 november 1961.

¹¹ Zie ook C. Borman, Het Statuut voor het Koninkrijk (Deventer, 2012), pagina 41.

delegatiebepaling in het Statuut om de Grondwet te wijzigen is niet uniek. Het voormalige artikel 54 van het Statuut, dat per 17 november 2017 is vervallen, kende deze staatsrechtelijke figuur ook.

Onderdeel B

In artikel 58 worden naast het land Aruba ook de landen Curaçao en Sint Maarten genoemd. Tevens komt de eis van een meerderheid van twee derden te vervallen.

Onderdeel C

De noodzaak tot het houden van een referendum over de beëindiging van de rechtsorde komt te vervallen.

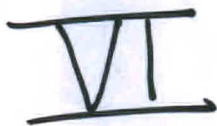
Onderdeel D

In het eerste lid van artikel 60 worden naast Aruba ook Curaçao en Sint Maarten genoemd. In het tweede lid vervalt de verwijzing naar het referendum. Ook vervalt de verwijzing naar de eis van een meerderheid van ten minste twee derden van de stemmen van het aantal zitting hebbende leden. Het is aan Aruba, Curaçao en Sint Maarten zelf om te bepalen op welke wijze de goedkeuring van de toekomstige constitutie moet plaatsvinden.

Artikel II

Artikel II regelt de inwerkingtreding van de rijkswet, welke is voorzien op een bij koninklijk besluit te bepalen tijdstip.

Bosman



INTERNATIONAL COURT OF JUSTICE

**LEGAL CONSEQUENCES OF THE SEPARATION OF THE CHAGOS
ARCHIPELAGO FROM MAURITIUS IN 1965**

(REQUEST FOR AN ADVISORY OPINION)

WRITTEN STATEMENT OF THE KINGDOM OF THE NETHERLANDS

27 February 2018

1. Introduction

1.1 In Resolution 71/292, adopted on 22 June 2017, the General Assembly of the United Nations decided, pursuant to Article 65 of the Statute of the International Court of Justice, to request the Court to render an advisory opinion on the following questions:

(a) “Was the process of decolonization of Mauritius lawfully completed when Mauritius was granted independence in 1968, following the separation of the Chagos Archipelago from Mauritius and having regard to international law, including obligations reflected in General Assembly resolutions 1514 (XV) of 14 December 1960, 2066 (XX) of 16 December 1965, 2232 (XXI) of 20 December 1966 and 2357 (XXII) of 19 December 1967?”;

(b) “What are the consequences under international law, including obligations reflected in the above-mentioned resolutions, arising from the continued administration by the United Kingdom of Great Britain and Northern Ireland of the Chagos Archipelago, including with respect to the inability of Mauritius to implement a programme for the resettlement on the Chagos Archipelago of its nationals, in particular those of Chagossian origin?”.

1.2 In its Order of 14 July 2017, the Court designated 30 January 2018 as the time limit within which written statements on the question may be presented to it, by the United Nations and States entitled to appear before the Court, in accordance with Article 66.2 of the Court’s Statute.

1.3 As the Kingdom of the Netherlands is a Member State of the United Nations and by virtue of Article 92 of the Charter of the United Nations (UN Charter) also a Party to the Statute of the Court, it wishes to avail itself of the opportunity afforded by the Court’s Order of 14 July 2017 to make a written statement on the abovementioned request by the General Assembly for an advisory opinion of the Court.

1.4 It is submitted that the question put before the Court essentially relates to the international legal rules applicable to the exercise and realization of the right of self-determination of peoples, as well as the international legal consequences of a possible violation of the right of self-determination, in the context of decolonization.

1.5 According to the Kingdom of the Netherlands, the right of self-determination of peoples is not exhausted by a one-off exercise, but a permanent, continuing, universal and inalienable right with a peremptory character. However, there are essential differences between the colonial and post-colonial context in regard of the entitlement of peoples to the particular implementation of this right. In *Accordance with International Law of the Unilateral Declaration of Independence by the Provisional Institutions of Self-Government of Kosovo*, the Kingdom of the Netherlands has expressed its views in regard of a number of aspects related to the implementation of the right of self-determination in the post-colonial context. In this submission, the Kingdom of the Netherlands expresses its views in respect of the subject, legal status, implementation and exercise of the right of self-determination in the colonial context, with particular attention to the transition from the implementation of the right of self-determination in the colonial context to the implementation and exercise of the right of self-determination in the post-colonial context.

2. Scope of the right of self-determination

2.1 Relevant international instruments contain comparable formulations regarding the content of the right of self-determination of peoples. Paragraph 2 of Resolution 1514 states:

“[a]ll peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.”

An identical formulation has been included in Articles 1 of the 1966 Covenants. Resolution 2625 states:

“By virtue of the principle of equal rights and self-determination of peoples enshrined in the Charter of the United Nations, all peoples have the right freely to determine, without external interference, their political status and to pursue their economic, social and cultural development, and every State has the duty to respect this right in accordance with the provisions of the Charter.”

And Article 20(1) of the African Charter holds that “[a]ll peoples [...] shall have the unquestionable right to self-determination. They shall freely determine their political status and shall pursue their economic and social development according to the policy they have freely chosen.”

2.2 It is submitted that, on the basis of these formulations in international treaties and authoritative United Nations’ declarations, the right of self-determination of peoples relates to the determination of the political status of a people, and the pursuit of its economic, social and cultural development and future. On the basis of these formulations, it must also be concluded that the decisions on the political status and the economic, social and cultural development are made by the people itself, or its legitimate representatives, not by others. Moreover, such decisions shall be made in full freedom, without any outside pressure or interference.

2.3 The right of self-determination is a right that was of crucial importance to the decolonization of dependent territories and peoples. However, from the outset it must be observed that decolonization was only one particular manifestation of the exercise and implementation of this right. As observed by Judge Kreća in his dissenting opinion in the *Case concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*:

“[t]he fact that in the Court’s practice [...], the right to [...] self-determination has been linked to non-self-governing territories cannot be interpreted as a limitation of the scope of the right to self-determination *rationae personae*, but as an application of universal law *ad casum*.” (*ICJ Reports 1996*, p. 595, at para. 72).

2.4 Indeed, from its inclusion in the Charter of the United Nations, the concept of self-determination of peoples developed from a legal principle into a right of peoples that was implemented in a particular manner in the context of decolonization. It is submitted, however, that the right of self-determination of peoples continues to apply in the post-colonial era. As will be elaborated below (para. 3.32), the exercise and realization of the right of self-determination by a people in a colonial context in accordance with the applicable rules of international law terminates the status of such a people as a ‘colonial people’ and their territory as a ‘colonial territory’. Together with the termination of that status, the entitlement to decolonization and the related modes of implementation of the right of self-determination in the context of decolonization also come to an end. In case the relevant people of the colonial territory have opted, in full freedom, for integration in or association with an existing State, this does not, however, end the applicability of the right of self-determination to that people nor does it terminate the corresponding legal obligation of the State in which the territory has been integrated, or with which the territory has become associated, to respect and promote the right of self-determination of that people in the new, post-colonial situation. Moreover, it is

submitted, in the case that a people of a colonial territory chooses, in full freedom, to establish an independent State, under international law this newly established State is obliged to respect and promote the right of self-determination of the peoples residing within its international boundaries.

2.5 The arguments above are based on the view of the Kingdom of the Netherlands that the right of self-determination of peoples is a permanent, continuing, universal and inalienable right with a peremptory character (see also Written Statement of the Kingdom of the Netherlands, 17 April 2009, para. 3.2) that extends beyond situations of decolonization and foreign occupation. The right of self-determination has been included in several international instruments that do not, or do not exclusively, deal with situations of decolonization or foreign occupation. Reference can be made to Articles 1 of the 1966 Covenants, General Assembly Resolution 2625, the African Charter on Human and Peoples' Rights, Section I.2 of the 1993 Vienna Declaration and Programme of Action, as adopted by the World Conference on Human Rights, and Part VIII of the Final Act of the Conference on Security and Co-operation in Europe. A common feature of these instruments is that they all refer to "all peoples" and not merely to 'colonial' or 'oppressed' peoples as the holders of the right of self-determination; a terminology which in itself denotes a universal and continuous character of at least some aspects of the right of self-determination.

2.6 In the context of the advisory proceedings before this Court in *Accordance with International Law of the Unilateral Declaration of Independence by the Provisional Institutions of Self-Government of Kosovo*, the Kingdom of the Netherlands submitted that under international law a distinction must be made between situations in which the right of self-determination is

"exercised in a manner that preserves international boundaries (internal self-determination) or in a manner that involves a change of international boundaries (external self-determination)" (Written Statement of the Kingdom of the Netherlands, 17 April 2009, para. 3.5).

In the colonial context, the right of self-determination can be realized through independence, association or integration. It is submitted that in the post-colonial era the right of self-determination of peoples must, in principle, be exercised within the international boundaries of the State in which a people resides and that it is this internal dimension of the right of self-determination that is referred to in Articles 1 of the 1966 Covenants as well as in the other international instruments referred to above.

2.7 Even though in the post-colonial era the right of self-determination must, in principle, be exercised within the international boundaries of a State, situations exist in which a legitimate claim to external self-determination can be made by a people. In such post-colonial situations, the right of self-determination can still be realized through independence, association or integration through (a) the dissolution of a State, (b) the merger of one or more States, or (c) the secession from a State. On the basis of the right of self-determination, peoples residing in a State may, by free and consensual agreement, decide to dissolve a State and create two or more States on its territory or allow one or more of those peoples to secede from that State (consensual secession). Such a consensual agreement can be agreed *ad hoc* or embedded in, for instance, the Constitution of a State. The Kingdom of the Netherlands continues to be of the opinion that in the post-colonial era a right to unilateral secession only arises when particular substantive and procedural conditions that apply cumulatively have been met: (a) a persistent and serious violation of the right to internal self-determination of the people concerned (substantive condition), such as the absence of a government representing the whole people belonging to the

territory of the State (Resolution 2625), and the exhaustion, in good faith, by the people concerned of all available remedies to exercise its right to self-determination within the international boundaries of the State (procedural condition), or (b) the existence of widespread and grave violations of fundamental rights of the members of the people concerned (substantive condition). In regard of the procedural condition the Kingdom of the Netherlands stated in *Accordance with International Law of the Unilateral Declaration of Independence by the Provisional Institutions of Self-Government of Kosovo*:

“all avenues must have been explored to secure respect for the and the promotion of the right of self-determination through available procedures, including through bilateral negotiations, the assistance of third parties and, where accessible or agreed, recourse to domestic and/or international courts and arbitral tribunals” (Written Statement of the Kingdom of the Netherlands, 17 April 2009, para. 3.11).

In the same Written Statement, the Kingdom of the Netherlands continued by stating:

“The right to political self-determination may [thus] evolve into a right to external self-determination in exceptional circumstances, in unique cases or cases *sui generis*. This is an exception to the rule and should therefore be narrowly construed. The resort to external self-determination [via unilateral secession] is an *ultimum remedium*” (Written Statement of the Kingdom of the Netherlands, 17 April 2009, para. 3.11).

3. The right of self-determination and decolonization

Legal status of the right of self-determination in the context of decolonization

3.1 After self-determination was proclaimed by the United States and the United Kingdom during World War II in the Atlantic Charter (Third Principle), self-determination was subsequently included in the Charter of the United Nations. The principle of self-determination is referred to twice in the Charter. Article 1(2) mentions as one of the purposes and principles of the United Nations:

“[t]o 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.”

The second reference to self-determination is in Article 55(c) of the Charter. However, the UN Charter did not define the content of the principle of self-determination nor did it define the term ‘peoples’. Through the adoption of numerous resolutions in the following years, in particular by the General Assembly, insights were given into the content of the principle and its subject in the context of decolonization.

3.2 As United Nations’ and State practice developed, it became clear that Chapter XI and Chapter XII of the UN Charter became the background for the evolution of self-determination from a principle into a positive legal right in the field of decolonization in the first two decades after the establishment of the United Nations.

Although self-determination was not explicitly mentioned, the principle underlies Chapter XI and Chapter XII of the Charter, of which Chapter XII can be seen as the successor regime to the League of Nation’s Mandate System, having essentially similar purposes. Chapter XI, on the other hand, laid down a rather new regime for Non-self-governing territories which were referred to in Article 73 of the Charter as “territories whose peoples have not yet attained a full measure of self-government”. In this way, the scope of application of the notion of self-determination was substantially expanded in comparison to the era of the League of Nations.

Pursuant to Article 73(e), under which “Members of the United Nations which have or assume responsibilities for the administration of territories whose peoples have not yet attained a full measure of self-government” were to “transmit regularly to the Secretary-General for information purposes, subject to such limitation as security and constitutional considerations may require, statistical and other information of a technical nature relating to economic, social, and educational conditions in the territories for which they are respectively responsible other than those territories to which Chapters XII and XIII apply”, the Secretary-General invited Member States to give their opinion with regard to the factors that should be taken into account in determining whether or not a territory constituted a non-self-governing territory (UN Doc. A/47, 29 June 1946, and UN Doc. A/47, Ann. I to VIII and Add. 1 and Add. 2). On the basis of the information received, seventy-four territories constituting territories under Article 73 of the Charter were listed by the General Assembly in its Resolution 66(I) (UN Doc. A/Res/66 (I), 14 Dec. 1946). In 1960, four Spanish and nine Portuguese territories (UN Doc. A/Res/1542 (XV), 15 Dec. 1960) and, in 1962, Southern Rhodesia (UN Doc. A/Res/1747 (XVI), 28 June 1962) were added to the list of Non-self-governing territories by the General Assembly. In 1963 the list was expanded with the addition of Western Sahara (UN Doc. A/5514, Annex III). In 1986 New Caledonia (UN Doc. A/Res/41/41, 2 Dec. 1983) and in 2013 French Polynesia (UN Doc. A/Res/67/265, 17 May 2013) were re-listed.

Both Chapter XI and Chapter XII provided for a gradual development of Non-self-governing territories towards self-government, or, in the case of Trust Territories, towards independence “as may be appropriate” (Article 76(b)). But in the early 1950s, this policy of progressive and gradual development towards increased self-government was put under pressure more and more by the General Assembly (see, e.g., UN Doc. A/Res/637 (VII), 16 Dec. 1952). Eventually, the General Assembly set aside the policy of gradual development and replaced it with a policy which asserted that subject and dependent or colonial territories should immediately be granted independence.

3.3 General Assembly Resolution 1514 (XV) (“Declaration on the Granting of Independence to Colonial Countries and Peoples”) was of fundamental importance to the development of self-determination into a right of colonial territories and peoples. The Resolution was adopted with eighty-nine Member States voting in favour, no vote against, and nine abstentions. In the Preamble, the General Assembly stresses “[t]he necessity of bringing to a speedy and unconditional end colonialism in all its forms and manifestations” as one of the main objectives of the Resolution. In its operative part, the General Assembly declares that:

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.
2. All peoples have the right to self-determination; by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.
3. Inadequacy of political, economic, social or educational preparedness should never serve as a pretext for delaying independence.
4. All armed action or repressive measures of all kinds directed against dependent peoples shall cease in order to enable them to exercise peacefully and freely their right to complete independence and the integrity of their national territory shall be respected.
5. Immediate steps shall be taken, in Trust and Non-self-governing territories or all other territories which have not yet attained independence, to transfer all powers to the peoples of those territories, without any conditions or reservations, in accordance with their freely expressed will and desire, without any distinction as to race, creed or colour, in order to enable them to enjoy complete independence and freedom.

6. Any attempt aimed at the partial or total disruption of the national unity and the territorial integrity of a country is incompatible with the purposes and principles of the Charter of the United Nations.”
7. All States shall observe faithfully and strictly the provisions of the Charter of the United Nations, the Universal Declaration of Human Rights and this Declaration on the basis of equality, non-interference in the internal affairs of all states, and respect for the sovereign rights of all peoples and their territorial integrity.”

3.4 In Resolution 1514, the General Assembly refers to self-determination as a *right* and not as a principle. This raises the question whether the General Assembly regarded self-determination as a right under international customary law at the time of the adoption of Resolution 1514. The Kingdom of the Netherlands is of the view that this question must be answered in the affirmative.

3.5 It is recalled that, as early as 1952, the General Assembly adopted a number of resolutions under the title of “The right of peoples and nations to self-determination”. In these resolutions, it was stated that “the States Members of the United Nations shall recognize and promote the realization of the right of self-determination of peoples of Non-Self-Governing and Trust Territories who are under their administration” (UN Doc. A/Res/637 A-B-C, 16 Dec. 1952). And in 1953 the General Assembly adopted a resolution containing factors which should be used by the Assembly as a guide in determining whether a territory is still or no longer within the scope Chapter XI of the Charter. The Resolution declared that “each concrete case should be considered and decided upon in the light of the particular circumstances of that case and taking into account the right of self-determination of peoples” (UN Doc. A/Res/742 (VIII), 27 Nov. 1953). In addition, Resolution 1188 (XII), adopted by the General Assembly in 1957, reaffirms in its first operative paragraph that those member States bearing responsibility “for the administration of Non-Self-Governing Territories shall promote the realization and facilitate the exercise of the right [of self-determination] by the peoples of such Territories”.

3.6 Of the thirteen States abstaining from voting with respect to the draft of Resolution 1188 (XII) as a whole, a number of States voted against paragraph 1 of the draft. These States included those States that administered colonial territories. It has sometimes been suggested that if the principal colonial powers voted against or abstained from voting with regard to resolutions proclaiming self-determination as a right of peoples, it seems impossible to state that a rule of customary law had emerged at the relevant time. However, this conclusion would not seem to be supported by the debates preceding the adoption of the draft of Resolution 1188 (XII). As comes to the fore from the debates, for many (colonial) States the principal reason for voting against or abstaining from voting in 1957 was not so much the use of the term ‘right’, but the fact that according to these States self-determination was not confined to the populations of Non-self-governing territories (see, e.g., UN GAOR, 12th Sess., Third Comm., 821st mtg., 26 Nov. - 3 Dec. 1957: United Kingdom (pp. 303, para. 4, and 325, para. 62: “[the United Kingdom] had voted against operative paragraph 1, since even in independent States the principle of self-determination could be disregarded [...]”); the Netherlands (p. 313, para. 4: the Kingdom of the Netherlands “emphasized the distinction between internal and external self-determination and expressed [its] surprise that some representatives limited their views to the colonial side of the question, whereas there many peoples outside the colonial sphere who would like to exercise their right of self-determination and were unable to do so”); Canada (p. 319, para. 2: “the discussion has shown that the question of self-determination was not confined to situations relating to traditional colonialism”); New Zealand (p. 321, para. 21: “it had been suggested that self-determination was a practical question only in cases of NSGT’s. Article 1

of the draft Covenants [on Human Rights] had however not been adopted on such premises. It could hardly be explained to a large segment of the world public, including the subjects of police States, that the right of self-determination was in their cases a kind of constitutional fiction. Such an interpretation would deprive the [draft] Covenants [on Human Rights] and the United Nations of all moral authority”).

3.7 It would appear that there was not only *opinio juris* in regard of the character of the right of self-determination as a right under customary international law in the course of the 1950s, but also widespread state practice reflected in the fact that some thirty non-self-governing and Trust Territories achieved independence prior to the adoption of Resolution 1514 on 14 December 1960. Moreover, if the terminology used by the General Assembly in its resolutions on the right of self-determination between 1952 and 1957 is compared with the terminology used in Resolution 1514, the latter is formulated in a much more mandatory manner by which the impression at least is created that this Resolution aims at expressing the applicable law. It would therefore appear that Resolution 1514 reflects an existing rule of customary international law insofar as a right of self-determination for “colonial countries and peoples” is concerned.

3.8 In any event, it would appear that the right of self-determination in the sense of a right of peoples in a colonial context to choose either independence, association or integration developed into a rule of customary international law in the course of the 1960s. This is reflected in the numerous resolutions adopted both by the Security Council and by the General Assembly affirming the existence of a right of self-determination, as well as in the dismantling of almost the entire dependency system in terms of Non-self-governing territories, Trust Territories and other colonial territories in the course of the 1960s and 1970s. In this respect, it should be noted that, in its advisory opinion on *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, the Court stated:

“the last fifty years [...] have brought important developments. These developments leave little doubt that the ultimate objective of the sacred trust was the self-determination and independence of the peoples concerned. In this domain, as elsewhere, the *corpus iuris gentium* has been considerably enriched [...].”
(*ICJ Reports 1971*, p. 16, at para. 52)

3.9 It is, furthermore, submitted that the obligation to respect and promote the right of self-determination of peoples in a colonial context, as well as the obligation to refrain from any forcible action which deprives such peoples of this right, is an obligation arising under a peremptory norm of international law. During the discussions preceding the adoption of Resolution 2625 in 1970, States have characterized the right of self-determination as “a fundamental principle of contemporary international law binding on all States” (A/AC.125/SR.41 (Poland)), “one of the fundamental norms of contemporary international law” (A/AC.125/SR.40 (Yugoslavia)), “one of the most important principles embodied in the Charter” (A/AC.125/SR.69 (Japan)), “a universally recognized principle of contemporary international law” (A/AC.125/SR.70 (Cameroon)), and “indispensable for the existence of community of nations” (A/AC.125/SR.68 (United States)). The fundamental character of the right of self-determination has been stressed with regard to the process of decolonization, and in that respect it has been explicitly qualified by States as a peremptory norm of international law (Spain, *Western Sahara case*, *ICJ Pleadings*, Vol. I, pp. 206-208; Algeria, *Western Sahara case*, *ICJ Pleadings*, Vol. IV, pp. 497-500; Morocco, *Western Sahara case*, *ICJ Pleadings*, Vol. V, 179-80; Guinea-Bissau, *Case Concerning the Arbitral Award of 31 July 1989*, (Guinea-

Bissau v. Senegal), ILR, Vol. 83, p. 1 at p. 24; and A/AC.125/SR.70, 4 Dec. 1967, p. 4 (Romania)). The right to self-determination has been characterized as an “inalienable right” (e.g. S/Res/264, 20 March 1969); 1993 Vienna Declaration and Programme of Action, as adopted by the World Conference on Human Rights, Section I.2; 1984 General Comment No. 12 of the Human Rights Committee on Articles 1 of the 1966 Covenants, para. 2). In the *East Timor* case, the Court observed that the right of self-determination “is one of the essential principles of contemporary international law” and described as “irreproachable” the assertion that the right of peoples to self-determination has an *erga omnes* character (*ICJ Reports 1995*, p. 90, at para. 29). In its advisory opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, the Court observed that the obligation to respect the right of peoples to self-determination is an obligation *erga omnes* (*ICJ Reports 2004*, p. 136, at para. 155). And with reference to the *East Timor* case, the International Law Commission describes “the obligation to respect the right of self-determination” as a norm whose peremptory character is “generally accepted” (Commentary to Article 40 of the Draft Articles on Responsibility of States for Internationally Wrongful Acts, para. 5). The International Law Commission continues by stating:

“[s]o far, relatively few peremptory norms have been recognized as such. But various tribunals, national and international, have affirmed the idea of peremptory norms in contexts not limited to the validity of treaties. Those peremptory norms that are clearly accepted and recognized include the prohibitions of aggression, genocide, slavery, racial discrimination, crimes against humanity and torture, and the right to self-determination” (Commentary to Article 26 of the Draft Articles on Responsibility of States for Internationally Wrongful Acts, para. 5).

3.10 The Court has recognized the existence in international law of peremptory norms in the *Case Concerning Armed Activities on the Territory of the Congo (New Application: 2002), Jurisdiction of the Court and Admissibility of the Application (ICJ Reports 2006*, p. 32, at para. 64).

The subject of the right of self-determination and the principle of territorial integrity

3.11 Although the UN Charter refers to self-determination of “peoples”, and Resolution 1514 proclaims that “all peoples” have the right to self-determination, United Nations’ practice until the mid-1960s reveals that it was mainly the right of self-determination in a colonial context which was developed during that period.

3.12 In its advisory opinion on *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, the Court observed that the development of the scope of the right of self-determination was not limited to Trust Territories. In particular, the Court stated that:

“the subsequent development of international law in regard to non-self-governing territories, as enshrined in the Charter of the United Nations, made the principle of self-determination applicable to all of them. The concept of the sacred trust was confirmed and expanded to all “territories whose peoples have not yet attained a full measure of self-government” (Art. 73). Thus it clearly embraced territories under a colonial regime.” (*ICJ Reports 1971*, p. 16, at para. 52)

3.13 An indication of what constitutes a non-self-governing territory as the object of the right to self-determination was given in Resolution 1541 which defines a non-self-governing territory in Principle IV as a “territory which is geographically separate and is distinct ethnically and/or

culturally from the country administering it". This phrasing is often referred to as the 'salt water barrier' or 'salt water' theory. Principle IV is supplemented by Principle V which lays down possible additional criteria for the determination of a non-self-governing territory.

3.14 United Nations decolonization practice was almost entirely along the lines of the 'salt water barrier'. Thus, the identified object of the right of self-determination during this period of history was – in addition to Trust Territories – a territory, as the Court noted in its advisory opinion on *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, "under a colonial regime" (*ICJ Reports 1971*, p. 16, at para. 52). By doing so, the Court, in accordance with the overwhelming majority of cases of United Nations' decolonization practice, applied a territorial rather than an ethnical definition of the subject or holder of the right of self-determination in the context of decolonization.

3.15 This territorial definition of the subject or holder of the right of self-determination is inextricably linked to the applicability of the principle of territorial integrity to the colonial territory in regard of the implementation of the right of self-determination.

In Resolution 1514, the General Assembly stipulates in paragraph 6 that:

"[a]ny attempt aimed at the partial or total disruption of the national unity and the territorial integrity of a country is incompatible with the purposes and principles of the Charter of the United Nations."

In addition, paragraph 4 of the same Resolution stresses that "the integrity of [the] national territory [of dependent peoples] shall be respected". The term "country" in paragraph 6 of Resolution 1514 would seem to refer to "Trust and Non-Self-Governing Territories or all other territories which have not yet attained independence" (paragraph 5 of Resolution 1514). The practice of the United Nations and its Member States may be taken to suggest that this paragraph on the principle of territorial integrity of a colonial territory is a reflection of international customary law. The Kingdom of the Netherlands would like to make three observations in this respect.

3.16 First, according to the Kingdom of the Netherlands, neither Resolution 1514 nor subsequent State practice in the field of decolonization should be interpreted in a way that the title to the colonial territory of the administering State became illegal or void *ab initio*. The Charter of the United Nations does not regard the existence of colonies or colonial regimes as a violation of international law *per se*. What it did mean, it is submitted, was that a positive legal rule was developed which held that States administering these territories were under an obligation to decolonize these colonial territories in accordance with the wishes of the inhabitants of these territories. In those cases where, in violation of this obligation, administering States did not transfer sovereignty to the people or authorities of the colonial territory, the right of self-determination of the people of the colonial territory prevailed over any claim by the administering State to the maintenance of its sovereignty over the colonial territory. Therefore, no violation of the principle of territorial integrity occurred when the people of a colonial territory chose to dissolve the bonds with the State administering the colonial territory without the administering State's consent.

Second, the applicability of the principle of territorial integrity to the colonial territory meant that States administering colonial territories, as well as third States, were under an international legal obligation to respect the territorial integrity of the colonial territory. A prime example of a violation of this principle is formed by South Africa's attempt to fragment Namibia by

creating a number of 'bantustans'. The United Nations declared this conduct illegal and contrary to the provisions of the Charter of the United Nations (see, e.g., UN Doc. S/Res/ 264, 20 March 1969; UN Doc. S/Res/301, 20 Oct. 1971; UN Doc. S/Res/366, 17 Dec. 1974; UN Doc. S/Res/385, 30 Jan. 1976. See also UN Doc. A/Res/2372 (XXII), 12 June 1968; UN Doc. A/Res/2403 (XXIII), 16 Dec. 1968; UN Doc. A/Res/31/146, 20 Dec. 1976).

Third, it would appear that in United Nations' and State practice the right of self-determination was interpreted *in the light of* the principle of territorial integrity, which meant that the fragmentation of the colonial territory before the realization of independence (or integration or association) as a result of unilateral secession by a segment of the colonial population was not accepted by the United Nations and the international community at large.

3.17 In sum, in the context of decolonization the right of self-determination was applied to all inhabitants of a colonial territory and not to minority, ethnical groups or segments of the population within that territory. The holder of the right of self-determination or 'right to decolonization' was thus primarily territorially defined. Therefore, as a general rule, self-determination had to be granted to Trust Territories and Non-self-governing territories as a whole. But exceptions were accepted.

3.18 The United Nations' insistence on the preservation of the territorial integrity of a dependent or colonial territory did not form a bar to partition, but only if that was the clear wish of the majority of all inhabitants of the territory in question. For instance, in the case of the non-self-governing territory of the Gilbert and Ellice Islands, the General Assembly first agreed to an administrative division of the colonial territory and subsequently approved the partition of the colony as a result of the express wishes of the inhabitants of the Ellice Islands resulting from a referendum, which became the State of Tuvalu (see UN Docs. A/Res/32/407, 28 Nov. 1977 and A/Res/3288 (XXIX), 13 Dec. 1974). Furthermore, mention may be made of the separation of the Trust Territory of Ruanda-Urundi in two separate States, Rwanda and Burundi (see UN Doc. A/Res/1746 (XVI), 27 June 1962) and the division, following the results of plebiscites held among the people of Northern Cameroons and the people of Southern Cameroons, by the United Kingdom of the Trust Territory of British Cameroons into a southern and northern region, of which the former acceded to Cameroon and the latter to Nigeria (see UN Doc. A/Res/63 (I), 13 Dec. 1946, A/Res/1350(XIII), 13 May 1959 and A/Res/1608(XV), 21 April 1961). Another example is formed by the division of the 'strategic' Trust Territory of the Pacific Islands in 1978 with the agreement of the inhabitants expressed in referendums and the Trusteeship Council (see UN Doc. S/Res/683, 22 Dec. 1990 and Report of the Trusteeship Council to the Security Council on the Trust Territory of the Pacific Islands, 1977-1978, UN SC Official Records, 33rd year, Special Supplement No. 1, p. 75 *ff.*). Four separate entities were created, three of which became independent States, namely the Federated States of Micronesia, Palau and the Marshall Islands, and one – the Northern Mariana Islands – came to be associated with the United States. Following the freely expressed wishes of the people concerned, the United Nations was prepared to accept the partition of these colonial territories.

3.19 In conclusion, in the context of the decolonization of colonial territories, administering States as well as third States were obliged under international law to respect the territorial integrity of the colonial territory. Partition of the colonial territory was only permitted if that was the clear wish of the majority of all inhabitants of the territory in question. This condition of the freely expressed wishes of the people concerned constitutes a core principle in the exercise of the right of self-determination which will be discussed in more detail in para. 3.23 below.

Decolonization and the realization of the right of self-determination

3.20 One day after the adoption of Resolution 1514, on 15 December 1960, the General Assembly adopted Resolution 1541 (XV) (“Principles which should guide Members in determining whether or not an obligation exists to transmit the information called for under Article 73 e of the Charter”). Principle VI mentions three results on the basis of which it must be “concluded that a non-self-governing territory had reached a full measure of self-government”:

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

3.21 As stated in Resolution 1541, any specific territorial status chosen by the inhabitants of a colonial territory in their exercise of self-determination, whether this concerned independence, association or integration of the territory, meant that the colonial territory and people “had reached a full measure of self-government” and had thus realized the right of self-determination, at least in the context of decolonization.

3.22 It must be noted that ‘independence’ is but one mode of realizing the right of self-determination by a colonial territory. In numerous resolutions of the General Assembly on decolonization, self-determination has been connected with independence – so much that it has been popularly (and incorrectly) assumed that the terms were synonymous in theory or, at least, that they were so in United Nations’ practice. As stated in Principle V (‘The principle of equal rights and self-determination of peoples’) of Resolution 2625, any other political status chosen by a people in a colonial context, short of independence, integration or association, can also be considered as a realization of the right of self-determination:

“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 by that people.”

The principle of ‘free choice’

3.23 Resolution 1514 states that the choice by a people in a colonial context for a particular political status should be “freely” determined by that people (para. 2). Principle VII of Resolution 1541 states that association

“should be the result of the free and voluntary choice by the peoples of the territory concerned expressed through informed democratic processes”,

and Principle IX(b) that 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 [...]”

3.24 Even though Resolution 1541 specifies the general ramifications for the implementation of the requirement of a ‘free’ determination by a people in a colonial context in regard of

integration and association, it is submitted that United Nations' and State practice shows that this requirement equally applies to a choice for independence "or the emergence into any other political status freely determined by a people" (Resolution 2625). As was stated by Judge Nagendra Singh in his Declaration in *Western Sahara*, "ascertaining the freely expressed will of the people [is] the very *sine qua non* of all decolonization" (*ICJ Reports 1975*, p. 12, at p. 81).

3.25 The principle that the determination of the future political status by a people shall be free and a genuine expression of the will of the people as the subject of the right of political self-determination is also reflected in other international instruments dealing with decolonization: "freely to determine their political status" (Articles 1 of the 1966 Covenants), "freely to determine, without outside interference, their political status" (Resolution 2625).

3.26 This core principle, which may be referred to as the 'principle of free choice', has been confirmed by the Court in the *Western Sahara* case, where, on the basis of Resolution 1514 and its own statements in *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, the Court stated that "the application of the right to self-determination requires a free and genuine expression of the will of the people concerned" (*ICJ Reports 1975*, p. 12, at para. 55). The Court continued by defining "the principle of self-determination [...] as the need to pay regard to the freely expressed will of peoples" (*ICJ Reports 1975*, p. 12 at para. 59).

3.27 According to the Court in the *Western Sahara* case, only in those instances where a population of a colonial territory "did not constitute a 'people' entitled to self-determination" (as in the case of Gibraltar where the inhabitants were not considered to constitute a people for the purpose of external self-determination; see UN Doc. A/Res/2353 (XXII), 19 Dec. 1967) or when the conviction existed "that a consultation was totally unnecessary, in view of special circumstances," the obligation "to pay regard to the freely expressed will of peoples" could be dispensed with (*ICJ Reports 1975*, p. 12, at para. 59). Or as put by Judge Singh in his Declaration in this case: "the principle of self-determination could be dispensed with only if the free expression of the will of the people was found to be axiomatic in the sense that the result was known to be a foregone conclusion or that consultations had already taken place in some form or that special features of the case rendered it unnecessary" (*ICJ Reports 1975*, p. 12, at p. 81).

3.28 While recalling Resolution 1514, the General Assembly declared in Resolution 54/90, addressing the future status of a number of Non-self-governing territories, that "referendums, free and fair elections and other forms of popular consultation play an important role in ascertaining the wishes and aspirations of the people" and it recognized "that all available options for self-determination of the Territories are valid as long as they are in accordance with the freely expressed wishes of the peoples concerned" (UN Doc. A/Res/54/90, 4 Feb. 2000 ('Resolution Adopted by the General Assembly on the Report of the Special Political and Decolonization Committee')).

3.29 United Nations practice with respect to requiring compliance with the principle of free choice appears practically uniform. Compliance with the principle was sought, to be guaranteed by the United Nations, through the organization and supervision of elections, referenda and/or plebiscites, especially in cases where association or integration would presumably be the result

of the exercise of self-determination. Examples include the British Togoland Trust Territory (UN Doc. A/Res/944(X), 15 Dec. 1955), French Togoland (UN Doc. A/Res/1182(XII), 29 Nov. 1957), Western Samoa (A/Res/1569(XV), 18 Dec. 1960), the Cook Islands (A/Res/2005(XIX), 18 Feb. 1965), Equatorial Guinea (A/Res/2067(XX), 16 Dec. 1965), the New Zealand Territory of Niue (A/Res/3285(XXIX), 13 Dec. 1974), the Northern Marianas (A/Res/2160(XLII), 4 June 1975) and the French Comoros Islands (A/Res/3161(XXVIII), 14 Dec. 1973). In cases where the population of the colonial territory was expected to opt for independence, the wishes of the people were normally to be established by the usual political processes of the territory, save for those special cases where it was considered necessary to make special arrangements as, for example, with regard to the Ellice Islands in 1974 where a referendum – leading to independence – was held in the presence of United Nations observers (see Report of the United Nations Visiting Mission to the Gilbert and Ellice Islands, (A/AC. 109/L 984), 1974 and A/Res/3288(XXIX), 13 Dec. 1974). Thus, as a matter of principle, strict democratic standards were required for association or integration, while the choice for independence had to be free, but not necessarily based on ‘democratic’ verification standards, that is, in accordance with (the Western view of) the principle of ‘one man one vote’. For instance, an acceptable procedure of consultation with leaders of opinion and organizations took place in Bahrain pursuant to an agreement between Iran and the United Kingdom in 1970. The latter had been a protecting power and the former had claimed sovereignty. Under their agreement, a representative of the United Nations Secretary-General consulted representative leaders in Bahrain in the course of March - April 1970 and concluded in his report that “the Bahrainis [...] were virtually unanimous in wanting a fully independent sovereign State” (UN Doc. S/9772, 30 Apr. 1970, p. 11). The report was unanimously endorsed by the Security Council (UN Doc. S/Res/278, 11 May 1970).

3.30 In practice, “the will of the people” meant the will of the majority of the inhabitants of a colonial territory (H. Gros Espiell, *Implementation of United Nations Resolutions Relating to the Right of Peoples Under Colonial and Alien Domination to Self-Determination*, Study Prepared by the Special Rapporteur, UN Doc. E/CN.4/Sub.2/-405 (Vol. 1), 20 June 1978, pp. 10-11). In those cases where serious doubts existed as to the genuine expression of the wish for independence, additional safeguards were required. The situation of Southern Rhodesia under the Smith régime serves as a prime example. In this respect, reference can be made to the Security Council’s determination of the invalidity of the proclamation of independence by the white minority régime in Southern Rhodesia in 1965 (S/Res/216, 12 Nov. 1965) and the Council’s subsequent demand for “arrangements [...] for a peaceful and democratic transition to genuine majority rule and independence”, which arrangements “include the holding of free and fair elections on the basis of universal adult suffrage under United Nations supervision” in order to “effect the genuine decolonization of the Territory” (S/Res/423, 14 March 1978). The Lancaster House Agreement of 12 December 1979 called for elections and a transition period under British rule. The Agreement was endorsed by the Security Council (S/Res/463, 2 Feb. 1980), which no longer demanded United Nations supervision of the elections, but which did require the United Kingdom to create conditions in Southern Rhodesia to ensure free, democratic and fair elections resulting in genuine majority rule, calling upon “all Member States to respect only the free and fair choice of the people of Zimbabwe” (S/Res/463, 2 Feb. 1980, para. 9).

3.31 In respect of the principle of free choice, the Kingdom of the Netherlands considers that, in principle, negotiations between the administering State and the (legitimate representatives of

the) inhabitants of the colonial territory about the future relationship between the territory and the administering State do not form part of the exercise of the right of self-determination by the people concerned. Such negotiations may involve arrangements on future military cooperation or development cooperation as well as matters regarding citizenship. However, if negotiations on such future cooperation are used by the administering State to influence the act of free choice by the people concerned, this may amount to unlawful interference and thus to a violation of the right of self-determination of this people.

Termination of colonial status

3.32 It is submitted that once the inhabitants of a colonial territory have, through their freely expressed will, genuinely exercised their right to self-determination through a choice for either independence, integration or association or the emergence into any other political status, the colonial status of the territory and the people concerned comes to an end. Practice shows that in cases of Non-self-governing territories this termination of colonial status is formalized through the removal of the territory by the General Assembly from the United Nations list of Non-self-governing territories. This also means that the obligations contained in Article 73 of the UN Charter no longer apply to the former administering State. In cases of Trust Territories, the Trusteeship Agreement with the Trustee is terminated. The practice of the United Nations in regard of Non-self-governing territories has been practically uniform in declaring, subsequent to a report by an administering State on the genuine exercise of the right to self-determination by the inhabitants of the colonial territory and a verification of that process by the United Nations, that the transmission of information under Article 73 e of the Charter could cease, after which the territory is removed from the United Nations list of Non-self-governing territories. Examples are Puerto Rico (A/RES/748(VIII) 27 Nov. 1953), Greenland (A/RES/849(IX) 22 Nov. 1954), the Netherlands Antilles and Surinam (A/RES/945(X) 15 Dec. 1955), Alaska and Hawaii (A/RES/1469(XIV) 12 Dec. 1959), Nyasaland (A/RES/1953(XVIII) 11 Dec 1963), Malta (A/RES/1950(XVIII) 11 Dec 1963), Cook Islands (A/RES/2064(XX) 16 Dec. 1965), Niue Island (A/RES/3285(XXIX) 13 Dec 1974), Cocos (Keeling) Islands (A/RES/39/30 5 Dec. 1984), and East Timor (A/RES/56/282, 1 May 2002).

As for Trust Territories, the Trust Agreement was terminated after a verification of the realization of the objectives of the Agreement. Examples are Somaliland (Somalia) (A/RES/1418(XIV), 5 Dec. 1959), Ruanda-Urundi (A/RES/1746(XVI), 27 June 1962), Western Samoa (A/RES/1626(XVI) 18 Oct. 1961), Zanzibar (A/RES/1642(XVI) 6 Nov. 1961), Nauru (A/RES/2347(XXII) 19 Dec. 1967), Papua (A/RES/3284(XXIX) 13 Dec. 1974), and Palau (SC/RES/956 (1994) 10 Nov. 1994).

3.33 Thus, the entitlement of peoples in a colonial context to exercise the right of self-determination through either independence, integration or association or the emergence into any other political status comes to an end after such a people has freely chosen for any of these options. From that moment onwards, the right of self-determination evolves into an entitlement of that people to exercise this right within the boundaries of the State in which this people resides (internal self-determination). Without prejudice to the possibility of consensual secession, the right to external self-determination through unilateral secession is, under international law, only applicable as an *ultimum remedium* (see para. 2.7, above).

4. Violation of the right of self-determination

Self-determination and obligations and rights erga omnes

4.1 Under the law of self-determination, the administering State is under an obligation to respect and promote the right of self-determination of the inhabitants residing in the administered colonial territory. These inhabitants have a corresponding right *vis-à-vis* the administering State to have their right to self-determination respected and promoted. This situation thus concerns an obligation and a corresponding right *erga singulum*. A violation of the right of self-determination by the administering State amounts to an internationally wrongful act that entails the international responsibility of that administering State.

4.2 It is submitted that the obligation of the administering State to respect and promote the right of self-determination of the inhabitants residing in the administered colonial territory is not only owed *vis-à-vis* the inhabitants of the colonial territory, but also *vis-à-vis* the international community as a whole. This obligation is an obligation *erga omnes*. As a result, a violation of the right of self-determination of the inhabitants of the colonial territory by the administering State does not only entail the international responsibility of the administering State in respect to the inhabitants of the colonial territory, but also in respect to third States.

4.3 In the *Barcelona Traction* case, the Court drew “an essential distinction” between obligations owed to particular States and those owed “towards the international community as a whole” (*ICJ Reports 1970*, p. 32, at para. 33). With regard to the latter, the Court went on to state that “[i]n view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*”. The Court provided a non-exhaustive list of obligations owed to the international community as a whole, including “the principles and rules concerning the basic rights of the human person [...]” (*ICJ Reports 1970*, p. 32, at para. 34). In its advisory opinion on *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, the Court explicitly recognized that the obligation to respect the right of self-determination constituted an obligation *erga omnes* (*ICJ Reports 2004*, p. 136, at para. 155). With reference to the *East Timor* case, the International Law Commission observes that the obligation to respect the right of self-determination is an obligation to the international community as a whole (Commentary to Chapter III and to Article 48 of the Articles on Responsibility of States for Internationally Wrongful Acts, para. 3 and para. 2, respectively).

4.4 It is submitted, however, that not only the obligation to respect the right of self-determination, but also the obligation to *promote the realization* of this right constitutes an obligation *erga omnes*. In this respect the Court in the *Wall* case directly connects the *erga omnes* character of the obligation of States in regard of the right of self-determination to the terms of General Assembly Resolution 2625 (XXV), which states:

“Every State has the duty to promote, through joint and separate action, realization of the principle of equal rights and self-determination of peoples, in accordance with the provisions of the Charter, and to render assistance to the United Nations in carrying out the responsibilities entrusted to it by the Charter regarding the implementation of the principle [...]” (*ICJ Reports 2004*, p. 136, at para. 156 (emphasis added))

The obligation of States not only to respect, but also to promote the realization of the right of self-determination is also contained in Article 1(3) of the 1966 Covenants, and, it is submitted, must be regarded as a rule of international customary law.

4.5 However, the right of self-determination does not only give rise to an obligation *erga omnes*. In the *East Timor* case the Court held:

“[i]n the Court’s view, Portugal’s assertion that the right of peoples to self-determination, as it evolved from the Charter and from United Nations practice, has an *erga omnes* character, is irreproachable.” (*ICJ Reports 1995*, p. 90, at para. 29).

It is submitted that this finding of the Court is of an essentially different nature than the Court’s statements in the *Barcelona Traction* case and the *Wall* case, and is of fundamental importance to the legal protection of the right of self-determination of peoples under international law. In the view of the Kingdom of the Netherlands, the Court’s qualification of the right of self-determination as a *right* that shall be respected *erga omnes* means that a people is not only entitled to respect for its right of self-determination *vis-à-vis* the State within which international boundaries that people resides, but also *vis-à-vis* all other States and, indeed, the international community as a whole. In regard to decolonization this means that the inhabitants of a colonial territory are not only entitled to respect for their right of self-determination *vis-à-vis* the administering State, but also *vis-a-vis* the international community as a whole. In turn, the members of the international community are under a corresponding obligation to respect the right of self-determination of the inhabitants of the colonial territory. It is submitted that, given the Court’s statements in the *Barcelona Traction* case and the *Wall* case and because of the fundamental character of the right of self-determination under international law, the corresponding obligation on the part of the members of the international community must be deemed to have an *erga omnes* character as well.

Legal consequences of a violation of the right of self-determination

4.6 It has been submitted above (para. 3.1 *ff*, above) that the inhabitants of a colonial territory, whether it concerns a Trust Territory, a non-self-governing territory, or any “other territories which have not yet attained independence” (paragraph 5 of Resolution 1514), have a right to self-determination on the basis of which they shall be enabled to freely determine their future political status through a choice for either independence, integration or association or the emergence into any other political status.

4.7 It has also been observed (paras. 3.11 – 3.19, above) that the principle of territorial integrity in regard to colonial territories meant that States administering colonial territories as well as third States were under an international legal obligation to respect the territorial integrity of colonial territories. Furthermore, it was set out that the United Nations’ insistence on the preservation of the territorial integrity of a dependent or colonial territory did not form a bar to partition, but only if that was the clear wish of the majority of all inhabitants of the territory in question.

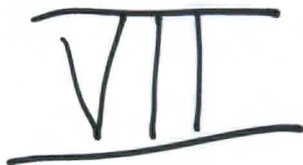
4.8 Against this background, the Kingdom of the Netherlands wishes to make three observations. First, it is submitted that the right of self-determination of the people concerned is violated if it has been established that (a) the partition of a colonial territory has not resulted from the freely expressed wishes of the inhabitants of the colonial territory or (b) approval for partition of the colonial territory has been obtained by the administering State or a third State through the exercise of pressure of any nature on the inhabitants or their legitimate representatives. If the intended result of such conduct by the administering State is to maintain

a legal title to part of the colonial territory or if the intended result of such conduct by a third State is to obtain such a legal title, it is submitted that no such title can be maintained or will be transferred under international law. Given the peremptory character of the right of self-determination of colonial territories and peoples, any such title is null and void *ab initio*, in accordance with the principle *ex injuria jus non oritur*. This also means that the right of self-determination of the people concerned would still be applicable to that part of the colonial territory that has been detached from the colonial territory in violation of international law. However, the absence of freely expressed consent by the inhabitants of a colonial territory or their representatives in regard of the partition of the colonial territory should be clearly established.

4.9 Second, the corollary of the right *erga omnes* of the inhabitants of a colonial territory is the obligation of third States to respect the right of self-determination of the inhabitants of that colonial territory. As has been observed above (para. 4.5, above), it is submitted that this obligation incumbent on third States is itself an obligation *erga omnes*. This means that the conduct of a third State, whether or not in conjunction with the conduct of the administering State, in violation of the right of self-determination of the inhabitants of a colonial territory under the responsibility of the administering State amounts to an internationally wrongful act entailing the international responsibility of that third State. Such responsibility arises not only *vis-à-vis* the inhabitants of the colonial territory, but also *vis-à-vis* third States who have a legal interest in the protection of the right of self-determination of the inhabitants of the colonial territory.

4.10 Finally, Article 41 of the Articles on the Responsibility of States for Internationally Wrongful Acts requires third States not to recognize as lawful a situation created by a serious breach of a peremptory norm of general international law. In its Commentary to Article 41, the International Law Commission observed that “[t]he obligation applies to “situations” created by these breaches, such as, for example, attempted acquisition of sovereignty over territory through the denial of the right of self-determination of peoples” (para. 5). The Commission continued by observing that the obligation of non-recognition “not only refers to the formal recognition of these situations, but also prohibits acts which would imply such recognition.” This international legal rule and its applicability in cases of a violation of the right of self-determination of peoples has been confirmed by the Court. In the *Namibia* case, the Court observed that “the termination of the Mandate and the declaration of the illegality of South Africa’s presence in Namibia are opposable to all States in the sense of barring *erga omnes* the legality of a situation which is maintained in violation of international law” (*ICJ Reports 1971*, p. 16, at para. 126). The same obligations are reflected in the resolutions of the Security Council and General Assembly concerning the situation in Rhodesia (e.g. S/Res/216, 12 Nov. 1965) and the Bantustans in South Africa (e.g. A/Res/31/6 A of 26 Oct. 1976). In its advisory opinion on *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, the Court, after having concluded that the obligation *erga omnes* to respect the right of self-determination of the Palestinian people had been violated (*ICJ Reports 2004*, p. 136, at para. 155), observed that “[g]iven the character and the importance of the rights and obligations involved [...] all States are under an obligation not to recognize the illegal situation resulting from the construction of the wall in the Occupied Palestinian Territory, including in and around East Jerusalem.” The Court continued by stating that all States “are also under an obligation not to render aid or assistance in maintaining the situation created by such construction”. Furthermore, the Court observed “[i]t is also for all States, while respecting the United Nations Charter and international law, to see to it that any impediment, resulting from the construction of the wall, to the exercise by the Palestinian people of its right to self-determination is brought

to an end” (*ICJ Reports 2004*, p. 136, at para. 159). In sum, the Kingdom of the Netherlands submits that, given the peremptory character of the right of self-determination, a serious breach of the right of self-determination obliges all States not to recognize the situation created as a result of that breach and not to render aid or assistance in maintaining the situation created as a result of the serious breach of that right.



INTERNATIONAL COURT OF JUSTICE

YEAR 2019

**2019
25 February
General List
No. 169**

25 February 2019

**LEGAL CONSEQUENCES OF THE SEPARATION OF THE CHAGOS ARCHIPELAGO
FROM MAURITIUS IN 1965**

Events leading to the adoption of General Assembly resolution 71/292 requesting an advisory opinion.

Geographic location of Mauritius in the Indian Ocean — Chagos Archipelago, including the island of Diego Garcia, administered by the United Kingdom during colonization as a dependency of Mauritius — Adoption on 14 December 1960 of the Declaration on the Granting of Independence to Colonial Countries and Peoples (General Assembly resolution 1514 (XV)) — Establishment of the Special Committee on Decolonization (“Committee of Twenty-Four”) to monitor the implementation of resolution 1514 (XV) — Lancaster House agreement between the representatives of the colony of Mauritius and the United Kingdom Government regarding the detachment of the Chagos Archipelago from Mauritius — Creation of the British Indian Ocean Territory (“BIOT”), including the Chagos Archipelago — Agreement between the United States of America and the United Kingdom concerning the availability of the BIOT for defence purposes — Adoption by the General Assembly of resolutions on the territorial integrity of non-self-governing territories — Independence of Mauritius — Forcible removal of the population of the Chagos Archipelago — Request by Mauritius for the BIOT to be disbanded and the territory restored to it — Creation of a marine protected area around the Chagos Archipelago by the United Kingdom — Challenge to the creation of a marine protected area by Mauritius before an Arbitral Tribunal and decision of the Tribunal.

* *

Jurisdiction of the Court to give the advisory opinion requested.

Article 65, paragraph 1, of the Statute — Article 96, paragraph 1, of the Charter — Competence of the General Assembly to seek advisory opinions — Request made in accordance with the Charter — Questions submitted to the Court are legal in character.

Argument that there is no exact statement of the question upon which an opinion is required — Any lack of clarity in the questions cannot deprive the Court of its jurisdiction — Arguments examined by the Court when it analyses the questions put by the General Assembly.

The Court has jurisdiction to give the advisory opinion requested.

* * *

Discretion of the Court to decide whether it should give an opinion.

Integrity of the Court's judicial function — Only "compelling reasons" may lead the Court to refuse to exercise its judicial function.

Argument that advisory proceedings are not suitable for determination of complex and disputed factual issues — Sufficient information on the facts at the disposal of the Court.

Argument that the Court's response would not assist the General Assembly in the performance of its functions — Determination of the usefulness of the opinion left to the requesting organ.

Argument that an advisory opinion by the Court would reopen the findings of an Arbitral Tribunal — Opinion given to the General Assembly, not to States — Principle of res judicata does not preclude the rendering of an advisory opinion — Issues determined by the Arbitral Tribunal not the same as those before the Court.

Argument that the questions asked relate to a pending territorial dispute between two States, which have not consented to its settlement by the Court — Questions relate to the decolonization of Mauritius — Active role played by the General Assembly with regard to decolonization — Issues raised by the request located in the broader frame of reference of decolonization — The Court not dealing with a bilateral dispute by giving an opinion on legal issues on which divergent views are said to have been expressed by the two States — Giving the opinion requested does not have the effect of circumventing the principle of consent by a State to the judicial settlement of its dispute with another State.

No compelling reasons for the Court to decline to give the opinion requested by the General Assembly.

* *

Factual context of the separation of the Chagos Archipelago from Mauritius and the removal of Chagossians from the archipelago.

Discussions between the United Kingdom and the United States on the use of certain British-owned islands in the Indian Ocean for defence purposes — Agreement between the two parties for the establishment of a military base by the United States on the island of Diego Garcia.

Discussions between the Government of the United Kingdom and the representatives of the colony of Mauritius with respect to the Chagos Archipelago — Fourth Constitutional Conference held in London in September 1965 involving representatives of the two parties — Lancaster House agreement — Agreement in principle by representatives of the colony of Mauritius to the detachment of the Chagos Archipelago from the territory of Mauritius.

Situation of the Chagossians — Entire population of Chagos Archipelago forcibly removed from the territory between 1967 and 1973 and prevented from returning — Compensation paid by the United Kingdom to certain Chagossians — Various proceedings initiated by Chagossians before United Kingdom courts, the European Court of Human Rights and the Human Rights Committee — Committee's recommendations that Chagossians should be able to exercise their right to return to their territory — Today Chagossians are dispersed in several countries, including the United Kingdom, Mauritius and Seychelles — By virtue of United Kingdom law and judicial decisions of that country, they are not allowed to return to the archipelago.

* *

Language of the questions posed in resolution 71/292 — Competence of the Court to clarify the questions put to it for an advisory opinion — No need to reformulate the questions in this instance — No need for the Court to interpret restrictively the questions put by the General Assembly.

* *

Question of whether the process of decolonization of Mauritius was lawfully completed having regard to international law.

Consequences under international law arising from the continued administration by the United Kingdom of the Chagos Archipelago.

Decolonization of Mauritius not conducted in a manner consistent with the right of peoples to self-determination — United Kingdom's continued administration of the Chagos Archipelago constitutes a wrongful act entailing the international responsibility of that State — Continuing character of the unlawful act — United Kingdom under an obligation to bring an end to its administration of the Chagos Archipelago as rapidly as possible — Modalities for completing the decolonization of Mauritius to be determined by the General Assembly.

Obligation of all Member States to co-operate with the United Nations to put the modalities for completing the decolonization of Mauritius into effect — Resettlement on the Chagos Archipelago of Mauritian nationals, including those of Chagossian origin, is an issue relating to the protection of the human rights of those concerned — Issue should be addressed by the General Assembly during the completion of the decolonization of Mauritius.

ADVISORY OPINION

Present: President YUSUF; Vice-President XUE; Judges TOMKA, ABRAHAM, BENNOUNA, CANÇADO TRINDADE, DONOGHUE, GAJA, SEBUTINDE, BHANDARI, ROBINSON, GEVORGIAN, SALAM, IWASAWA; Registrar COUVREUR.

On the legal consequences of the separation of the Chagos Archipelago from Mauritius in 1965,

THE COURT,

composed as above,

gives the following Advisory Opinion:

1. The questions on which the advisory opinion of the Court has been requested are set forth in resolution 71/292 adopted by the General Assembly of the United Nations (hereinafter the "General Assembly") on 22 June 2017. By a letter dated 23 June 2017 and received in the Registry on 28 June 2017, the Secretary-General of the United Nations officially communicated to the Court the decision taken by the General Assembly to submit these questions for an advisory opinion. Certified true copies of the English and French texts of the resolution were enclosed with the letter. The resolution reads as follows:

“The General Assembly,

Reaffirming that all peoples have an inalienable right to the exercise of their sovereignty and the integrity of their national territory,

Recalling the Declaration on the Granting of Independence to Colonial Countries and Peoples, contained in its resolution 1514 (XV) of 14 December 1960, and in particular paragraph 6 thereof, which states that any attempt aimed at the partial or total disruption of the national unity and the territorial integrity of a country is incompatible with the purposes and principles of the Charter of the United Nations,

Recalling also its resolution 2066 (XX) of 16 December 1965, in which it invited the Government of the United Kingdom of Great Britain and Northern Ireland to take effective measures with a view to the immediate and full implementation of resolution 1514 (XV) and to take no action which would dismember the Territory of Mauritius and violate its territorial integrity, and its resolutions 2232 (XXI) of 20 December 1966 and 2357 (XXII) of 19 December 1967,

Bearing in mind its resolution 65/118 of 10 December 2010 on the fiftieth anniversary of the Declaration on the Granting of Independence to Colonial Countries and Peoples, reiterating its view that it is incumbent on the United Nations to continue to play an active role in the process of decolonization, and noting that the process of decolonization is not yet complete,

Recalling its resolution 65/119 of 10 December 2010, in which it declared the period 2011-2020 the Third International Decade for the Eradication of Colonialism, and its resolution 71/122 of 6 December 2016, in which it called for the immediate and full implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples,

Noting the resolutions on the Chagos Archipelago adopted by the Organization of African Unity and the African Union since 1980, most recently at the twenty-eighth ordinary session of the Assembly of the Union, held in Addis Ababa on 30 and 31 January 2017, and the resolutions on the Chagos Archipelago adopted by the Movement of Non-Aligned Countries since 1983, most recently at the Seventeenth Conference of Heads of State or Government of Non-Aligned Countries, held on Margarita Island, Bolivarian Republic of Venezuela, from 13 to 18 September 2016, and in particular the deep concern expressed therein at the forcible removal by the United Kingdom of Great Britain and Northern Ireland of all the inhabitants of the Chagos Archipelago,

Noting also its decision of 16 September 2016 to include in the agenda of its seventy-first session the item entitled ‘Request for an advisory opinion of the International Court of Justice on the legal consequences of the separation of the Chagos Archipelago from Mauritius in 1965’, on the understanding that there would be no consideration of this item before June 2017,

Decides, in accordance with Article 96 of the Charter of the United Nations, to request the International Court of Justice, pursuant to Article 65 of the Statute of the Court, to render an advisory opinion on the following questions:

- (a) 'Was the process of decolonization of Mauritius lawfully completed when Mauritius was granted independence in 1968, following the separation of the Chagos Archipelago from Mauritius and having regard to international law, including obligations reflected in General Assembly resolutions 1514 (XV) of 14 December 1960, 2066 (XX) of 16 December 1965, 2232 (XXI) of 20 December 1966 and 2357 (XXII) of 19 December 1967?';
- (b) 'What are the consequences under international law, including obligations reflected in the above-mentioned resolutions, arising from the continued administration by the United Kingdom of Great Britain and Northern Ireland of the Chagos Archipelago, including with respect to the inability of Mauritius to implement a programme for the resettlement on the Chagos Archipelago of its nationals, in particular those of Chagossian origin?.'

2. By letters dated 28 June 2017, the Registrar gave notice of the request for an advisory opinion to all States entitled to appear before the Court, pursuant to Article 66, paragraph 1, of the Statute.

3. By an Order dated 14 July 2017, the Court decided, in accordance with Article 66, paragraph 2, of the Statute, that the United Nations and its Member States were likely to be able to furnish information on the questions submitted to it for an advisory opinion, and fixed 30 January 2018 as the time-limit within which written statements might be submitted to it on those questions and 16 April 2018 as the time-limit within which States and organizations having presented a written statement might submit written comments on the other written statements.

4. By letters dated 18 July 2017, the Registrar informed the United Nations and its Member States of the Court's decisions and transmitted to them a copy of the Order.

5. Pursuant to Article 65, paragraph 2, of the Statute, the Secretary-General of the United Nations, under cover of a letter dated 30 November 2017 from the United Nations Legal Counsel, communicated to the Court a dossier of documents likely to throw light upon the questions formulated by the General Assembly, which was received in the Registry on 4 December 2017.

6. By a letter dated 10 January 2018 and received in the Registry the same day, the Legal Counsel of the African Union requested, first, that the African Union be permitted to furnish information, in writing and orally, on the questions submitted to the Court for an advisory opinion, and, secondly, that it be granted an extension of one month for the filing of its written statement.

7. By an Order dated 17 January 2018, the Court decided that the African Union was likely to be able to furnish information on the questions submitted to the Court for an advisory opinion and that it might do so within the time-limits fixed by the Court. By the same Order, the Court further decided to extend to 1 March 2018 the time-limit within which all written statements might be presented to the Court, in accordance with Article 66, paragraph 2, of the Statute, and to extend to 15 May 2018 the time-limit within which States and organizations having presented a written statement might submit written comments, in accordance with Article 66, paragraph 4, of the Statute.

8. By letters dated 17 January 2018, the Registrar informed the United Nations and its Member States, as well as the African Union, of the Court's decisions and transmitted to them a copy of the Order.

9. Within the time-limit thus extended by the Court in its Order of 17 January 2018, written statements were filed in the Registry, in order of their receipt, by Belize, Germany, Cyprus, Liechtenstein, Netherlands, United Kingdom of Great Britain and Northern Ireland, Serbia, France, Israel, Russian Federation, United States of America, Seychelles, Australia, India, Chile, Brazil, Republic of Korea, Madagascar, China, Djibouti, Mauritius, Nicaragua, the African Union, Guatemala, Argentina, Lesotho, Cuba, Viet Nam, South Africa, Marshall Islands and Namibia.

10. By a communication dated 5 March 2018, the Registry informed States having presented written statements, as well as the African Union, of the list of participants having filed written statements in the proceedings and explained that the Registry had set up a dedicated website from which those statements could be downloaded. By the same communication, the Registry further informed those States and the African Union that the Court had decided to hold hearings which would open on 3 September 2018.

11. On 14 March 2018, the Court decided, on an exceptional basis, to authorize the late filing of the written statement of the Republic of Niger.

12. On the same day, the Registrar informed the United Nations, and those of its Member States which had not presented written statements, that written statements had been filed in the Registry. By the same communication, the Registrar also indicated that the Court had decided to hold hearings which would open on 3 September 2018, during which oral statements and comments might be presented by the United Nations and its Member States, regardless of whether or not they had submitted written statements and, as the case may be, written comments.

13. On 15 March 2018, the Registrar communicated a full set of the written statements received in the Registry to all States having submitted written statements, as well as to the African Union.

14. By communications dated 26 March 2018, the United Nations and its Member States, as well as the African Union, were asked to inform the Registry, by 15 June 2018 at the latest, if they intended to take part in the oral proceedings.

15. Within the time-limit as extended by the Court in its Order of 17 January 2018, written comments were filed in the Registry, in order of their receipt, by the African Union, Serbia, Nicaragua, United Kingdom of Great Britain and Northern Ireland, Mauritius, Seychelles, Guatemala, Cyprus, Marshall Islands, United States of America and Argentina.

16. Upon receipt of those written comments, the Registrar, by communications dated 16 May 2018, informed States having presented written statements, as well as the African Union, that written comments had been submitted and that those comments could be downloaded from a dedicated website.

17. On 22 May 2018, the Registrar transmitted a full set of the written comments to all States having submitted such comments, as well as to the African Union.

18. By letters dated 29 May 2018, the Registrar transmitted to the United Nations, and to all its Member States that had not participated in the written proceedings, a full set of the written statements and written comments filed in the Registry.

19. By letters dated 21 June 2018, the Registrar communicated to the United Nations and its Member States, as well as to the African Union, the list of participants in the oral proceedings and enclosed a detailed schedule of those proceedings.

20. By letters dated 26 June 2018, the Registrar informed Member States of the United Nations participating in the oral proceedings, as well as the African Union, of certain practical arrangements regarding the organization of those proceedings.

21. By a letter dated 2 July 2018, the Philippines informed the Court that it would no longer be making a statement during the oral proceedings. By letters dated 10 July 2018, the Registrar informed Member States of the United Nations participating in the oral proceedings and the African Union accordingly.

22. Pursuant to Article 106 of the Rules of Court, the Court decided to make the written statements and written comments submitted to it accessible to the public with effect from the opening of the oral proceedings.

23. In the course of the hearings held from 3 to 6 September 2018, the Court heard oral statements, in the following order, by:

for the Republic of Mauritius:

H.E. Sir Anerood Jugnauth, GCSK, KCMG, QC, Minister Mentor, Minister of Defence, Minister for Rodrigues of the Republic of Mauritius,

Mr. Pierre Klein, Professor at the Université libre de Bruxelles,

- Ms Alison Macdonald, QC, Barrister at Matrix Chambers, London,
- Mr. Paul S. Reichler, Attorney at Law, Foley Hoag LLP, member of the Bar of the District of Columbia,
- Mr. Philippe Sands, QC, Professor of International Law at University College London, Barrister at Matrix Chambers, London;
- for the United Kingdom of Great Britain and Northern Ireland:*
- Mr. Robert Buckland, QC, MP, Solicitor General,
- Mr. Samuel Wordsworth, QC, member of the Bar of England and Wales, Essex Court Chambers,
- Ms Philippa Webb, member of the Bar of England and Wales, 20 Essex Street Chambers,
- Sir Michael Wood, KCMG, member of the Bar of England and Wales, 20 Essex Street Chambers;
- for the Republic of South Africa:*
- Ms J. G. S. de Wet, Chief State Law Adviser (International Law), Department of International Relations and Co-operation;
- for the Federal Republic of Germany:*
- H.E. Mr. Christophe Eick, Ambassador, Legal Adviser, Federal Foreign Office, Berlin,
- Mr. Andreas Zimmermann, Professor of International Law, University of Potsdam;
- for the Argentine Republic:*
- H.E. Mr. Mario Oyarzábal, Ambassador, Legal Adviser, Ministry of Foreign Affairs and Worship,
- Mr. Marcelo Kohen, Professor of International Law, Graduate Institute of International and Development Studies, Geneva, Member and Secretary-General of the Institut de droit international;
- for Australia:*
- Mr. Bill Campbell, QC,
- Mr. Stephen Donaghue, QC, Solicitor General of Australia;
- for Belize:*
- Mr. Ben Juratowitch, QC, Attorney at Law, Belize, and admitted to practice in England and Wales, and in Queensland, Australia, Freshfields Bruckhaus Deringer;
- for the Republic of Botswana:*
- Mr. Chuchuchu Nchunga Nchunga, Deputy Government Attorney, Attorney General's Chambers, Botswana,
- Mr. Shotaro Hamamoto, Professor of International Law, Kyoto University, Japan;
- for the Federative Republic of Brazil:*
- H.E. Ms Regina Maria Cordeiro Dunlop, Ambassador of the Federative Republic of Brazil to the Kingdom of the Netherlands;

- for the Republic of Cyprus:* H.E. Mr. Costas Clerides, Attorney General of the Republic of Cyprus,
Ms Mary-Ann Stavrinides, Attorney of the Republic, Law Office of the Republic of Cyprus,
Mr. Polyvios G. Polyviou, Chryssafinis & Polyviou LLC;
- for the United States of America:* Ms Jennifer G. Newstead, Legal Adviser, United States Department of State;
- for the Republic of Guatemala:* Mr. Lester Antonio Ortega Lemus, Minister Counsellor, Co-Representative of Guatemala,
H.E. Ms Gladys Marithza Ruiz Sánchez De Vielman, Ambassador, Representative of Guatemala;
- for the Republic of the Marshall Islands:* Mr. Caleb W. Christopher, Legal Adviser, Permanent Mission of the Republic of the Marshall Islands to the United Nations, New York;
- for the Republic of India:* H.E. Mr. Venu Rajamony, Ambassador of India to the Kingdom of the Netherlands;
- for the State of Israel:* Mr. Tal Becker, Legal Adviser, Ministry of Foreign Affairs,
Mr. Roy Schöndorf, Deputy Attorney General (International Law), Ministry of Justice;
- for the Republic of Kenya:* H.E. Mr. Lawrence Lenayapa, Ambassador of the Republic of Kenya to the Kingdom of the Netherlands,
Ms Pauline Mcharo, Deputy Chief State Counsel, Office of the Attorney General of Kenya;
- for the Republic of Nicaragua:* H.E. Mr. Carlos José Argüello Gómez, Ambassador of Nicaragua to the Kingdom of the Netherlands;
- for the Federal Republic of Nigeria:* Mr. Dayo Apata, Solicitor General of the Federal Republic of Nigeria, Permanent Secretary, Federal Ministry of Justice;
- for the Republic of Serbia:* Mr. Aleksandar Gajić, Chief Legal Counsel at the Ministry of Foreign Affairs;
- for the Kingdom of Thailand:* H.E. Mr. Virachai Plasai, Ambassador of the Kingdom of Thailand to the United States of America;
- for the Republic of Vanuatu:* Mr. Robert McCorquodale, Brick Court Chambers, member of the Bar of England and Wales,
Ms Jennifer Robinson, Doughty Street Chambers, member of the Bar of England and Wales;

for the Republic of Zambia:

Mr. Likando Kalaluka, SC, Attorney General,

Mr. Dapo Akande, Professor of Public International Law,
University of Oxford;

for the African Union:

H.E. Ms Namira Negm, Ambassador, Legal Counsel of the
African Union and Director of Legal Affairs
Directorate,

Mr. Mohamed Gomaa, Legal Counsellor and Arbitrator,

Mr. Makane Moïse Mbengue, Professor of International
Law, University of Geneva, and Affiliate Professor,
Institut d'études politiques, Paris.

24. At the hearings, a Member of the Court put a question to Mauritius, which replied in writing, as requested, within the prescribed time-limit. The Court having decided that the other participants could submit comments or observations on the reply given by Mauritius, written comments were filed in the Registry, in order of their receipt, by the African Union, Argentina, United Kingdom of Great Britain and Northern Ireland and United States of America. Another Member of the Court put a question to all the participants in the oral proceedings, to which Australia, Botswana and Vanuatu, Nicaragua, United Kingdom of Great Britain and Northern Ireland, Mauritius, Argentina, United States of America and Guatemala, in that order, replied in writing, as requested. The Court having decided that the other participants could submit comments or observations on the replies thus given, Mauritius, the African Union and United States of America submitted such comments or observations in writing.

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I. EVENTS LEADING TO THE ADOPTION OF THE REQUEST FOR THE ADVISORY OPINION

25. Before examining the events leading to the adoption of the request for the advisory opinion, the Court recalls that the Republic of Mauritius consists of a group of islands in the Indian Ocean comprising approximately 1,950 sq km. The main island of Mauritius is located about 2,200 km south-west of the Chagos Archipelago, about 900 km east of Madagascar, about 1,820 km south of Seychelles and about 2,000 km off the eastern coast of the African continent.

26. The Chagos Archipelago consists of a number of islands and atolls. The largest island is Diego Garcia, located in the south-east of the archipelago. With an area of about 27 sq km, Diego Garcia accounts for more than half of the archipelago's total land area.

27. Although Mauritius was occupied by the Dutch from 1638 to 1710, the first colonial administration of Mauritius was established in 1715 by France which named it *Ile de France*. In 1810, the British captured *Ile de France* and renamed it Mauritius. By the Treaty of Paris of 1814, France ceded Mauritius and all its dependencies to the United Kingdom.

28. Between 1814 and 1965, the Chagos Archipelago was administered by the United Kingdom as a dependency of the colony of Mauritius. From as early as 1826, the islands of the Chagos Archipelago were listed by Governor Lowry-Cole as dependencies of Mauritius. The islands were also described in several ordinances, including those made by Governors of Mauritius in 1852 and 1872, as dependencies of Mauritius. The Mauritius Constitution Order of 26 February 1964 (hereinafter the "1964 Mauritius Constitution Order"), promulgated by the United Kingdom Government, defined the colony of Mauritius in section 90 (1) as "the island of Mauritius and the Dependencies of Mauritius".

29. In accordance with General Assembly resolution 66 (I) of 14 December 1946, the United Kingdom as the administering Power regularly transmitted information to the General Assembly under Article 73 (e) of the Charter of the United Nations concerning Mauritius as a non-self-governing territory. The information submitted by the United Kingdom was included in several reports of the Fourth Committee (Special Political and Decolonization Committee) of the General Assembly. In many of these reports, the islands of the Chagos Archipelago, and sometimes the Chagos Archipelago itself, are referred to as dependencies of Mauritius. In its 1947 Report, Mauritius is described as comprising the island of Mauritius and its dependencies among which are mentioned the island of Rodriguez and the Oil Islands group of which the principal island is Diego Garcia. The Report of 1948 collectively referred to all of the islands as "Mauritius". The Report of 1949 states that "there are dependent upon Mauritius a number of islands scattered over the Indian Ocean, of which the most important is Rodriguez . . . Other dependencies are: Chagos Archipelago . . . Agalega and Cargados Charajos".

30. On 14 December 1960, the General Assembly adopted resolution 1514 (XV) entitled "Declaration on the Granting of Independence to Colonial Countries and Peoples" (hereinafter "resolution 1514 (XV)"). On 27 November 1961, the General Assembly, by resolution 1654 (XVI), established the United Nations Special Committee on Decolonization (hereinafter the "Committee of Twenty-Four") to monitor the implementation of resolution 1514 (XV).

31. In February 1964, discussions commenced between the United States of America (hereinafter the "United States") and the United Kingdom regarding the use by the United States of certain British-owned islands in the Indian Ocean. The United States expressed an interest in establishing military facilities on the island of Diego Garcia.

32. On 29 June 1964, the United Kingdom also commenced talks with the Premier of the colony of Mauritius regarding the detachment of the Chagos Archipelago from Mauritius. At Lancaster House, talks between representatives of the colony of Mauritius and the United Kingdom Government led to the conclusion on 23 September 1965 of an agreement (hereinafter the "Lancaster House agreement", described in more detail in paragraph 108 below).

33. On 8 November 1965, by the British Indian Ocean Territory Order 1965, the United Kingdom established a new colony known as the British Indian Ocean Territory (hereinafter the "BIOT") consisting of the Chagos Archipelago, detached from Mauritius, and the Aldabra, Farquhar and Desroches islands, detached from Seychelles.

34. On 16 December 1965, the General Assembly adopted resolution 2066 (XX) on the "Question of Mauritius", in which it expressed deep concern about the detachment of certain islands from the territory of Mauritius for the purpose of establishing a military base and invited the "administering Power to take no action which would dismember the Territory of Mauritius and violate its territorial integrity".

35. On 20 December 1966, the General Assembly adopted resolution 2232 (XXI) on a number of territories including Mauritius. The resolution reiterated that

"any attempt aimed at the partial or total disruption of the national unity and the territorial integrity of colonial Territories and the establishment of military bases and installations in these Territories is incompatible with the purposes and principles of the Charter of the United Nations and of General Assembly resolution 1514 (XV)".

36. The talks between the United Kingdom and the United States resulted in the conclusion on 30 December 1966 of the "Agreement concerning the Availability for Defence Purposes of the British Indian Ocean Territory" and the conclusion of an Agreed Minute of the same date.

37. Based on the 1966 Agreement, the United States and the United Kingdom agreed that the Government of the United Kingdom would take any "administrative measures" necessary to ensure that their defence needs were met. The Agreed Minute provided that, among the administrative measures to be taken, was "resettling any inhabitants" of the islands. The inhabitants of the Chagos Archipelago are referred to as Chagossians and, sometimes, as the "Ilois" or "islanders". In this Opinion these terms are used interchangeably.

38. On 10 May 1967, Sub-Committee I of the Committee of Twenty-Four reported that:

"By creating a new territory, the British Indian Ocean Territory, composed of islands detached from Mauritius and Seychelles, the administering Power continues to violate the territorial integrity of these Non-Self Governing Territories and to defy resolutions 2066 (XX) and 2232 (XXI) of the General Assembly."

39. On 15, 17 and 19 June 1967, the Committee of Twenty-Four examined the Report of Sub-Committee I and adopted a resolution on Mauritius. In this resolution, the Committee "[d]eplores the dismemberment of Mauritius and Seychelles by the administering Power which violates their territorial integrity, in contravention of General Assembly resolutions 2066 (XX) and 2232 (XXI) and calls upon the administering Power to return to these Territories the islands detached therefrom".

40. On 7 August 1967, general elections were held in Mauritius and the political parties in favour of independence prevailed.

41. On 19 December 1967, the General Assembly adopted resolution 2357 (XXII) on a number of territories including Mauritius, and reaffirmed what it had declared in resolution 2232 (XXI) (see paragraph 35 above).

42. On 12 March 1968, Mauritius became an independent State and on 26 April 1968 was admitted to membership in the United Nations. Sir Seewoosagur Ramgoolam became the first Prime Minister of the Republic of Mauritius. Section 111, paragraph 1, of the 1968 Constitution of Mauritius, promulgated by the United Kingdom Government before independence on 4 March 1968, defined Mauritius as “the territories which immediately before 12th March 1968 constituted the colony of Mauritius”. This definition did not include the Chagos Archipelago in the territory of Mauritius.

43. Between 1967 and 1973, the entire population of the Chagos Archipelago was either prevented from returning or forcibly removed and prevented from returning by the United Kingdom. The main forcible removal of Diego Garcia’s population took place in July and September 1971.

44. On 11 April 1979, in a discussion on the detachment of the Chagos Archipelago, Prime Minister Ramgoolam told the Mauritian Parliament “we had no choice”.

45. In July 1980, the Organisation of African Unity (hereinafter the “OAU”) adopted resolution 99 (XVII) (1980) in which it “demands” that Diego Garcia be “unconditionally returned to Mauritius”.

46. On 9 October 1980, the Mauritian Prime Minister, at the thirty-fifth session of the United Nations General Assembly, stated that the BIOT should be disbanded and the territory restored to Mauritius as part of its natural heritage.

47. In July 2000, the OAU adopted Decision AHG/Dec.159 (XXXVI) (2000) expressing its concern that the Chagos Archipelago was “excised by the colonial power from Mauritius prior to its independence in violation of UN Resolution 1514”.

48. On 1 April 2010, the United Kingdom announced the creation of a marine protected area in and around the Chagos Archipelago. On 20 December 2010, Mauritius instituted proceedings against the United Kingdom pursuant to Article 287 of the United Nations Convention on the Law of the Sea (hereinafter “UNCLOS” or “the Convention”) before an Arbitral Tribunal constituted under Annex VII of the Convention, challenging the creation of a marine protected area by the United Kingdom. In those proceedings, Mauritius submitted, *inter alia*, that (1) the

United Kingdom was not entitled to declare a marine protected area or other maritime zones in and around the Chagos Archipelago as it was not a coastal State within the meaning of UNCLOS; (2) the United Kingdom was not entitled to declare unilaterally a marine protected area or other maritime zones because Mauritius had rights as a coastal State within the meaning of Articles 56, paragraph 1, and 76, paragraph 8, of UNCLOS; (3) the United Kingdom should not take any steps to prevent the Commission on the Limits of the Continental Shelf from making recommendations to Mauritius in respect of any submission that Mauritius may make to that Commission regarding the Chagos Archipelago; and (4) the marine protected area was incompatible with the United Kingdom's obligations under UNCLOS.

49. On 27 July 2010, the African Union adopted Decision 331 (2010), in which it stated that the Chagos Archipelago, including Diego Garcia, was detached "by the former colonial power from the territory of Mauritius in violation of [General Assembly] Resolutions 1514 (XV) of 14 December 1960 and 2066 (XX) of 16 December 1965 which prohibit colonial powers from dismembering colonial territories prior to granting independence".

50. On 18 March 2015, the Arbitral Tribunal constituted under Annex VII of UNCLOS rendered an award in the *Arbitration regarding the Chagos Marine Protected Area between Mauritius and the United Kingdom* (hereinafter the "*Arbitration regarding the Chagos Marine Protected Area*"). The Tribunal found, in its Award, that it lacked jurisdiction on Mauritius' first, second and third submissions, but had jurisdiction to consider Mauritius' fourth submission. With respect to the first submission, the Tribunal observed that "[t]he parties' dispute regarding sovereignty over the Chagos Archipelago does not concern interpretation or application" of UNCLOS. On the merits, the Arbitral Tribunal found, *inter alia*, that, in establishing the marine protected area surrounding the Chagos Archipelago, the United Kingdom had breached its obligations under Article 2, paragraph 3, Article 56, paragraph 2, and Article 194, paragraph 4, of the Convention, and that the United Kingdom's undertaking to return the Chagos Archipelago to Mauritius, when no longer needed for defence purposes, was legally binding.

51. On 30 December 2016, the 50-year period covered by the 1966 Agreement came to an end; however, it was extended for a further period of twenty years, in accordance with its terms.

52. On 30 January 2017, the Assembly of the African Union adopted resolution AU/Res.1 (XXVIII) on the Chagos Archipelago which resolved, among other things, to support Mauritius with a view to ensuring "the completion of the decolonization of the Republic of Mauritius".

53. On 23 June 2017, the General Assembly adopted resolution 71/292 requesting an advisory opinion from the Court (see paragraph 1 above). Having recalled the events leading to the adoption of that request, the Court now turns to the consideration of the questions of jurisdiction and discretion.

II. JURISDICTION AND DISCRETION

54. When the Court is seized of a request for an advisory opinion, it must first consider whether it has jurisdiction to give the opinion requested and if so, whether there is any reason why the Court should, in the exercise of its discretion, decline to answer the request (see *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996 (I)*, p. 232, para. 10; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004 (I)*, p. 144, para. 13; *Accordance with International Law of the Unilateral Declaration of Independence in respect of Kosovo, Advisory Opinion, I.C.J. Reports 2010 (II)*, p. 412, para. 17).

A. Jurisdiction

55. The Court's jurisdiction to give an advisory opinion is based on Article 65, paragraph 1, of its Statute which provides that "[t]he Court may give an advisory opinion on any legal question at the request of whatever body may be authorized by or in accordance with the Charter of the United Nations to make such a request".

56. The Court notes that the General Assembly is competent to request an advisory opinion by virtue of Article 96, paragraph 1, of the Charter, which provides that "[t]he General Assembly . . . may request the International Court of Justice to give an advisory opinion on any legal question".

57. The Court now turns to the requirement in Article 96 of the Charter and Article 65 of its Statute that the advisory opinion must be on a "legal question".

58. In the present proceedings, the first question put to the Court is whether the process of decolonization of Mauritius was lawfully completed having regard to international law when it was granted independence following the separation of the Chagos Archipelago. The second question relates to the consequences arising under international law from the continued administration by the United Kingdom of the Chagos Archipelago. The Court considers that a request from the General Assembly for an advisory opinion to examine a situation by reference to international law concerns a legal question.

59. The Court therefore concludes that the request has been made in accordance with the Charter and that the two questions submitted to it are legal in character.

60. One of the participants in the present proceedings has argued that the Court lacks jurisdiction because the questions asked "ostensibly relate to one topic, but . . . in fact relate to a different topic". Moreover, it contended that there is no "exact statement of the question upon which an opinion is required" within the meaning of Article 65, paragraph 2, of the Statute. According to the same participant, the questions put to the Court do not reflect the real issues, which relate to sovereignty rather than decolonization.

61. The Court is of the view that the arguments raised in these proceedings in relation to Article 65, paragraph 2, of its Statute do not deprive it of jurisdiction to render the advisory opinion. When faced with similar arguments in its Advisory Opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, the Court observed that “lack of clarity in the drafting of a question does not deprive the Court of jurisdiction. Rather, such uncertainty will require clarification in interpretation, and such necessary clarifications of interpretation have frequently been given by the Court.” (*Advisory Opinion, I.C.J. Reports 2004 (I)*, pp. 153-154, para. 38.) The Court will examine these arguments in paragraphs 135 to 137 below.

62. The Court accordingly has jurisdiction to give the advisory opinion requested by resolution 71/292 of the General Assembly.

B. Discretion

63. The fact that the Court has jurisdiction does not mean, however, that it is obliged to exercise it:

“The Court has recalled many times in the past that Article 65, paragraph 1, of its Statute, which provides that ‘The Court may give an advisory opinion . . .’, should be interpreted to mean that the Court has a discretionary power to decline to give an advisory opinion even if the conditions of jurisdiction are met.” (*Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004 (I)*, p. 156, para. 44; *Accordance with International Law of the Unilateral Declaration of Independence in respect of Kosovo, Advisory Opinion, I.C.J. Reports 2010 (II)*, pp. 415-416, para. 29.)

64. The discretion whether or not to respond to a request for an advisory opinion exists so as to protect the integrity of the Court’s judicial function as the principal judicial organ of the United Nations (*Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004 (I)*, pp. 156-157, paras. 44-45; *Accordance with International Law of the Unilateral Declaration of Independence in respect of Kosovo, Advisory Opinion, I.C.J. Reports 2010 (II)*, pp. 415-416, para. 29).

65. The Court is, nevertheless, mindful of the fact that its answer to a request for an advisory opinion “represents its participation in the activities of the Organization, and, in principle, should not be refused” (*Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase, Advisory Opinion, I.C.J. Reports 1950*, p. 71; *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights, Advisory Opinion, I.C.J. Reports 1999 (I)*, pp. 78-79, para. 29; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004 (I)*, p. 156, para. 44). Thus, the consistent jurisprudence of the Court is that only “compelling reasons” may lead the Court to refuse its opinion in response to a request falling within its jurisdiction (*Legal*

Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004 (I), p. 156, para. 44; *Accordance with International Law of the Unilateral Declaration of Independence in respect of Kosovo, Advisory Opinion, I.C.J. Reports 2010 (II)*, p. 416, para. 30).

66. The Court must satisfy itself as to the propriety of the exercise of its judicial function in the present proceedings. It will therefore give careful consideration as to whether there are compelling reasons for it to decline to respond to the request from the General Assembly.

67. Some participants in the present proceedings have argued that there are “compelling reasons” for the Court to exercise its discretion to decline to give the advisory opinion requested. Among the reasons raised by these participants are that, first, advisory proceedings are not suitable for determination of complex and disputed factual issues; secondly, the Court’s response would not assist the General Assembly in the performance of its functions; thirdly, it would be inappropriate for the Court to re-examine a question already settled by the Arbitral Tribunal constituted under Annex VII of UNCLOS in the *Arbitration regarding the Chagos Marine Protected Area*; and fourthly, the questions asked in the present proceedings relate to a pending bilateral dispute between two States which have not consented to the settlement of that dispute by the Court.

68. The Court will now turn to the examination of these arguments.

1. Whether advisory proceedings are suitable for determination of complex and disputed factual issues

69. It has been argued by some participants that the questions raise complex and disputed factual issues which are not suitable for determination in advisory proceedings. Those participants have contended that in these proceedings the Court does not have sufficient information and evidence to arrive at a conclusion on the complex and disputed questions of fact before it.

70. Other participants have maintained that the factual issues before the Court are not complex and that what really matters is the Court’s interpretation of those facts.

71. The Court recalls that in its Advisory Opinion on *Western Sahara* when it was faced with the same argument, it concluded that what was decisive was whether it had

“sufficient information and evidence to enable it to arrive at a judicial conclusion upon any disputed questions of fact the determination of which is necessary for it to give an opinion in conditions compatible with its judicial character” (*I.C.J. Reports 1975*, pp. 28-29, para. 46).

72. Moreover, the Court recalls that, in its Advisory Opinion on *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, it held that

“to enable [it] to pronounce on legal questions, it must also be acquainted with, take into account and, if necessary, make findings as to the relevant factual issues” (*I.C.J. Reports 1971*, p. 27, para. 40).

73. The Court observes that an abundance of material has been presented before it including a voluminous dossier from the United Nations. Moreover, many participants have submitted written statements and written comments and made oral statements which contain information relevant to answering the questions. Thirty-one States and the African Union filed written statements, ten of those States and the African Union submitted written comments thereon, and twenty-two States and the African Union made oral statements. The Court notes that information provided by participants includes the various official records from the 1960s, such as those from the United Kingdom concerning the detachment of the Chagos Archipelago and the accession of Mauritius to independence.

74. The Court is therefore satisfied that there is in the present proceedings sufficient information on the facts before it for the Court to give the requested opinion. Accordingly, the Court cannot decline to answer the questions put to it.

2. Whether the Court’s response would assist the General Assembly in the performance of its functions

75. It has been argued by some participants that the advisory opinion requested would not assist the General Assembly in the proper exercise of its functions. These participants have maintained that the General Assembly has not been actively engaged in the decolonization of Mauritius since 1968. In particular, they have asserted that, after Mauritius became independent in March 1968, it was removed from the list of territories being monitored by the Committee of Twenty-Four and that the Chagos Archipelago was never added to that list. Other participants have argued that the Court’s response would be useful to the General Assembly, which continued to be active after 1968 in considering the question of Mauritius and the detachment of the Chagos Archipelago.

76. The Court considers that it is not for the Court itself to determine the usefulness of its response to the requesting organ. Rather, it should be left to the requesting organ, the General Assembly, to determine “whether it needs the opinion for the proper performance of its functions” (*Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, I.C.J. Reports 2010 (II)*, p. 417, para. 34). The Court recalls that, in its Advisory Opinion on *Legality of the Threat or Use of Nuclear Weapons*, it did not accept an argument that the Court should refuse to respond to the General Assembly’s request on the ground that the General Assembly had not explained to the Court the purposes for which it sought an opinion. The Court observed that:

“it is not for the Court itself to purport to decide whether or not an advisory opinion is needed by the Assembly for the performance of its functions. The General Assembly has the right to decide for itself on the usefulness of an opinion in the light of its own needs.” (*I.C.J. Reports 1996 (I)*, p. 237, para. 16.)

77. In the Advisory Opinion on *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, the Court stated that it “cannot substitute its assessment of the usefulness of the opinion requested for that of the organ that seeks such opinion” (*I.C.J. Reports 2004 (I)*, p. 163, para. 62). The Court recalls that “[i]n any event, to what extent or degree its opinion will have an impact on the action of the General Assembly is not for the Court to decide” (*Western Sahara, Advisory Opinion, I.C.J. Reports 1975*, p. 37, para. 73).

78. It follows that in the present proceedings the Court cannot decline to answer the questions posed to it by the General Assembly in resolution 71/292 on the ground that its opinion would not assist the General Assembly in the performance of its functions.

3. Whether it would be appropriate for the Court to re-examine a question allegedly settled by the Arbitral Tribunal constituted under UNCLOS Annex VII in the *Arbitration regarding the Chagos Marine Protected Area*

79. Certain participants have argued that an advisory opinion by the Court would reopen the findings of the Arbitral Tribunal in the *Arbitration regarding the Chagos Marine Protected Area* that are binding on Mauritius and the United Kingdom.

80. Other participants have contended that *res judicata* does not apply in these proceedings because the same parties are not seeking to litigate the same issue that has already been definitively settled between them in an earlier case.

81. The Court recalls that its opinion “is given not to States, but to the organ which is entitled to request it” (*Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase, Advisory Opinion, I.C.J. Reports 1950*, p. 71). The Court observes that the principle of *res judicata* does not preclude it from rendering an advisory opinion. When answering a question submitted for an opinion, the Court will consider any relevant judicial or arbitral decision. In any event, the Court further notes that the issues that were determined by the Arbitral Tribunal in the *Arbitration regarding the Chagos Marine Protected Area* (see paragraph 50 above) are not the same as those that are before the Court in these proceedings.

82. It follows from the foregoing that the Court cannot decline to answer the questions on this ground.

4. Whether the questions asked relate to a pending dispute between two States, which have not consented to its settlement by the Court

83. Some participants have argued that there is a bilateral dispute between Mauritius and the United Kingdom regarding sovereignty over the Chagos Archipelago and that this dispute is at the core of the advisory proceedings. According to those participants, to determine the issues in the present proceedings, the Court would be required to arrive at conclusions on certain key points such as the effect of the 1965 Lancaster House agreement. Certain participants have contended that the dispute over sovereignty, which arose in the 1980s in bilateral relations, is the “real dispute” that motivates the request. These participants have further contended that Mauritius’ claims in the *Arbitration regarding the Chagos Marine Protected Area* revealed the existence of a bilateral territorial dispute between that State and the United Kingdom. Therefore, to render an advisory opinion would contravene “the principle that a State is not obliged to allow its disputes to be submitted to judicial settlement without its consent” (*Western Sahara, Advisory Opinion, I.C.J. Reports 1975*, pp. 24-25, paras. 32-33; *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase, Advisory Opinion, I.C.J. Reports 1950*, p. 71).

84. Other participants have maintained that there is no territorial dispute between the United Kingdom and Mauritius that would prevent the Court from giving the advisory opinion requested. In particular, they have argued that the questions put to the Court by the General Assembly concern issues located in a broader frame of reference, that is, the law of decolonization and the exercise of the right to self-determination. Some participants have argued that the dispute between Mauritius and the United Kingdom relating to territorial sovereignty over the Chagos Archipelago could neither have arisen independently nor could it be detached from the question of decolonization. Other participants have contended that the United Kingdom, having undertaken in 1965 to return the Chagos Archipelago to Mauritius once it was no longer needed for defence purposes, recognized that the archipelago belonged to Mauritius, and accordingly there could be no territorial dispute.

85. The Court recalls that there would be a compelling reason for it to decline to give an advisory opinion when such a reply “would have the effect of circumventing the principle that a State is not obliged to allow its disputes to be submitted to judicial settlement without its consent” (*Western Sahara, Advisory Opinion, I.C.J. Reports 1975*, p. 25, para. 33).

86. The Court notes that the questions put to it by the General Assembly relate to the decolonization of Mauritius. The General Assembly has not sought the Court’s opinion to resolve a territorial dispute between two States. Rather, the purpose of the request is for the General Assembly to receive the Court’s assistance so that it may be guided in the discharge of its functions relating to the decolonization of Mauritius. The Court has emphasized that it may be in the interest of the General Assembly to seek an advisory opinion which it deems of assistance in carrying out its functions in regard to decolonization:

“The object of the General Assembly has not been to bring before the Court, by way of a request for advisory opinion, a dispute or legal controversy, in order that it may later, on the basis of the Court’s opinion, exercise its powers and functions for the peaceful settlement of that dispute or controversy. The object of the request is an

entirely different one: to obtain from the Court an opinion which the General Assembly deems to be of assistance to it for the proper exercise of its functions concerning the decolonization of the territory.” (*Western Sahara, Advisory Opinion, I.C.J. Reports 1975*, pp. 26-27, para. 39.)

87. The Court observes that the General Assembly has a long and consistent record in seeking to bring colonialism to an end. From the earliest days of the United Nations, the General Assembly has played an active role in matters of decolonization. Article 1, paragraph 2, of the Charter establishes, as one of the purposes of the United Nations, respect for the principle of equal rights and self-determination of peoples. In this regard, the Court notes that Chapter XI of the Charter of the United Nations relates to non-self-governing territories and that the first article in that Chapter, Article 73, provides that administering powers of non-self-governing territories are required, *inter alia*, to “transmit regularly to the Secretary-General for information purposes . . . statistical and other information of a technical nature relating to economic, social, and educational conditions in the territories for which they are respectively responsible”. This information was considered by the Fourth Committee (Special Political and Decolonization Committee) of the General Assembly and included in its reports. The work of the Committee continued until 1961 when the Committee of Twenty-Four was established.

88. The Court therefore concludes that the opinion has been requested on the matter of decolonization which is of particular concern to the United Nations. The issues raised by the request are located in the broader frame of reference of decolonization, including the General Assembly’s role therein, from which those issues are inseparable (*Western Sahara, Advisory Opinion, I.C.J. Reports 1975*, p. 26, para. 38; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004 (I)*, p. 159, para. 50).

89. Moreover, the Court observes that there may be differences of views on legal questions in advisory proceedings (*Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971*, p. 24, para. 34). However, the fact that the Court may have to pronounce on legal issues on which divergent views have been expressed by Mauritius and the United Kingdom does not mean that, by replying to the request, the Court is dealing with a bilateral dispute.

90. In these circumstances, the Court does not consider that to give the opinion requested would have the effect of circumventing the principle of consent by a State to the judicial settlement of its dispute with another State. The Court therefore cannot, in the exercise of its discretion, decline to give the opinion on that ground.

91. In light of the foregoing, the Court concludes that there are no compelling reasons for it to decline to give the opinion requested by the General Assembly.

III. THE FACTUAL CONTEXT OF THE SEPARATION OF THE CHAGOS ARCHIPELAGO FROM MAURITIUS

92. The Court notes that the questions submitted to it by the General Assembly relate to the separation of the Chagos Archipelago from Mauritius and the legal consequences arising from the continued administration by the United Kingdom of the Chagos Archipelago (see paragraph 1 above). Before addressing these questions, the Court deems it important to examine the factual circumstances surrounding the separation of the archipelago from Mauritius, as well as those relating to the removal of the Chagossians from this territory.

93. In this regard, the Court notes that, prior to the separation of the Chagos Archipelago from Mauritius, there were formal discussions between the United Kingdom and the United States and between the Government of the United Kingdom and the representatives of the colony of Mauritius.

A. The discussions between the United Kingdom and the United States with respect to the Chagos Archipelago

94. In February 1964, talks commenced between the Governments of the United Kingdom and the United States on the "strategic use of certain small British-owned islands in the Indian Ocean" for defence purposes. During these talks, the United States expressed an interest in establishing a military communication facility on Diego Garcia. At the end of the talks, it was agreed that the United Kingdom delegation would recommend to its Government that it should be responsible for acquiring land, resettling the population and providing compensation at the United Kingdom Government's expense; that the Government of the United States would be responsible for construction and maintenance costs and that the United Kingdom Government would assess quickly the feasibility of the transfer of the administration of Diego Garcia and the other islands of the Chagos Archipelago from Mauritius.

95. According to a Memorandum of the United Kingdom Foreign Office, the United Kingdom was of the view that the course of action that would best satisfy its major interests would appear to be to detach Diego Garcia and other islands in the Chagos Archipelago from Mauritius prior to the latter's independence, and to place these islands under the direct administration of the United Kingdom, and that this action could be done by Order in Council. The United Kingdom considered that it had the constitutional power to take such action without the consent of Mauritius, but that such an approach would expose it to criticism in the United Nations. The same document also indicated that such criticism would lose most of its force if prior acceptance by the Mauritian Ministers of the detachment was obtained by the United Kingdom, whether such acceptance was obtained by positive consent or by acquiescence. The document further stated that it would best suit the interests of the United Kingdom if the detachment of the Chagos Archipelago was presented to Mauritius as "*a fait accompli*" or at most if Mauritius was told of the United Kingdom's plans "at the last moment".

96. According to a declassified internal United Kingdom document dated 23 and 24 September 1965 (Record of UK-US Talks on Defence Facilities in the Indian Ocean, United Kingdom, FO 371/184529), the Governments of the United Kingdom and the United States

considered that, rather than detaching the islands of the Chagos Archipelago from Mauritius and the islands of Aldabra, Farquhar and Desroches from Seychelles in two separate operations, their interests would be better served by carrying out the detachment "as a single operation" in order to avoid "a second row" in the United Nations. According to the same document, during the talks, the United Kingdom explained to the United States that the detachment of the Chagos Archipelago from Mauritius would take place in three stages; in the final stage it was envisaged that, when the defence facilities were installed on an island, "it would be free from local civilian inhabitants".

97. The discussions between the United Kingdom and the United States led to the conclusion of the 1966 Agreement for the establishment of a military base by the United States on the Chagos Archipelago (see paragraph 36 above).

**B. The discussions between the Government of the United Kingdom
and the representatives of the colony of Mauritius
with respect to the Chagos Archipelago**

98. The 1964 Mauritius Constitution Order, promulgated by the United Kingdom Government, established a Legislative Assembly consisting of 40 elected members, the Speaker and the Chief Secretary *ex officio* and up to 15 members nominated by the Governor. The nominated members of the Legislative Assembly held office at the pleasure of the Governor. There was established a Council of Ministers for Mauritius consisting of 10 to 13 appointed members, the Chief Secretary of Mauritius and the Premier of Mauritius; and temporary members who could replace an appointed member who was ill or absent from the island of Mauritius. The Members of the Council were appointed by the Governor, after consultation with the Premier. They had to be Members of the Legislative Assembly. In the discussions between the Government of the United Kingdom and the representatives of the colony of Mauritius, the latter was represented by the Premier of Mauritius, or by the Premier and other Members of the Council of Ministers.

99. In 1964, the Committee of Twenty-Four reported that the Constitution of Mauritius did not allow the representatives of the people to exercise real powers, and that authority was virtually all concentrated in the hands of the United Kingdom Government (see paragraph 172 below).

100. On 29 June 1964, Mr. John Rennie, the Governor of Mauritius, discussed with Sir Seewoosagur Ramgoolam, the Premier of Mauritius, the idea of detaching the Chagos Archipelago from Mauritius. Although he was favourably disposed to providing "facilities", the Premier indicated that he preferred a long-term lease rather than detachment.

101. On 19 July 1965, the Governor of Mauritius was instructed by the Colonial Office to inform the Mauritian Council of Ministers of the proposal to detach the Chagos Archipelago by constitutionally separating it from Mauritius. On 30 July 1965, the Governor of Mauritius informed the Colonial Office that the Council of Ministers opposed the detachment because of the negative public reaction that it would receive in Mauritius. The Governor indicated that the Council of Ministers expressed a preference for a long-term lease of the islands, while the United Kingdom indicated that a lease was not acceptable.

102. On 3 September 1965, Sir Seewoosagur Ramgoolam and Sir Anthony Greenwood, the United Kingdom's Secretary of State for the Colonies, met in London prior to the start of the Fourth Constitutional Conference and agreed that the discussion on the detachment and the constitutional conference should be kept separate. However, it appears that this approach was later modified to link both matters in a possible package deal.

103. On 7 September 1965, the Fourth Constitutional Conference commenced in London and ended on 24 September 1965. Previous constitutional conferences were held in July 1955, February 1957 and June 1961. During the Fourth Constitutional Conference, there were several private meetings on defence matters. The first meeting on 13 September 1965 was attended by Sir Seewoosagur Ramgoolam, Sir Anthony Greenwood, and Mr. John Rennie. At the meeting, the Premier stated that Mauritius preferred a lease rather than a detachment of the Chagos Archipelago. Following the meeting, the United Kingdom Foreign Secretary and the Defence Secretary concluded that if Mauritius would not agree to the detachment, they would have to "adopt the Foreign Office and Ministry of Defence recommendation of 'forcible detachment and compensation paid into a fund'".

104. On 20 September 1965, during a meeting on defence matters chaired by the United Kingdom Secretary of State, the Premier of Mauritius again stated that "the Mauritius Government was not interested in the excision of the islands and would stand out for a 99-year lease". As an alternative, the Premier of Mauritius proposed that the United Kingdom first concede independence to Mauritius and thereafter allow the Mauritian Government to negotiate with the Governments of the United Kingdom and the United States on the question of Diego Garcia. During those discussions, the Secretary of State indicated that a lease would not be acceptable to the United States and that the Chagos Archipelago would have to be made available on the basis of its detachment.

105. On 22 September 1965, a Note was prepared by Sir Oliver Wright, Private Secretary to the United Kingdom's Prime Minister, Sir Harold Wilson. It read:

"Sir Seewoosagur Ramgoolam is coming to see you at 10:00 tomorrow morning. The object is to frighten him with hope: hope that he might get independence; Fright lest he might not unless he is sensible about the detachment of the Chagos Archipelago. I attach a brief prepared by the Colonial Office, with which the Ministry of Defence and the Foreign Office are on the whole content. The key sentence in the brief is the last sentence of it on page three."

106. The key last sentence referred to above read:

"The Prime Minister may therefore wish to make some oblique reference to the fact that H.M.G. have the legal right to detach Chagos by Order in Council, *without* Mauritius consent but this would be a grave step." (Emphasis in the original.)

107. On 23 September 1965 two events took place. The first event was a meeting in the morning of 23 September 1965 between Prime Minister Wilson and Premier Ramgoolam. Sir Oliver Wright's Report on the meeting indicated that Prime Minister Wilson told Premier Ramgoolam that

“in theory there were a number of possibilities. The Premier and his colleagues could return to Mauritius either with Independence or without it. On the Defence point, Diego Garcia could either be detached by order in Council or with the agreement of the Premier and his colleagues. The best solution of all might be Independence and detachment by agreement, although he could not of course commit the Colonial Secretary at this point.”

108. The second event on the same day was a meeting on defence matters held at Lancaster House between Premier Ramgoolam, three other Mauritian Ministers and the United Kingdom Secretary of State. At the end of that meeting, the United Kingdom Secretary of State enquired whether the Mauritian Ministers could agree to the detachment of the Chagos Archipelago on the basis of undertakings that he would recommend to the Cabinet. The undertakings in the Lancaster House agreement, contained in paragraph 22 of the Record of the Meeting of 23 September 1965, were:

- “(i) negotiations for a defence agreement between Britain and Mauritius;
- (ii) in the event of independence an understanding between the two governments that they would consult together in the event of a difficult internal security situation arising in Mauritius;
- (iii) compensation totalling up to £3[million] should be paid to the Mauritius Government over and above direct compensation to landowners and the cost of resettling others affected in the Chagos Islands;
- (iv) the British Government would use their good offices with the United States Government in support of Mauritius' request for concessions over sugar imports and the supply of wheat and other commodities;
- (v) that the British Government would do their best to persuade the American Government to use labour and materials from Mauritius for construction work in the islands;
-
- (vii) that if the need for the facilities on the islands disappeared the islands should be returned to Mauritius”.

The Premier of Mauritius informed the Secretary of State for the Colonies that the proposals put forward by the United Kingdom were acceptable in principle, but that he would discuss the matter with his other ministerial colleagues.

109. On 24 September 1965, the Government of the United Kingdom announced that it was in favour of granting independence to Mauritius.

110. On 6 October 1965, the Secretary of State for the Colonies communicated to the Governor of Mauritius the United Kingdom's acceptance of the following additional understanding that had been sought by the Premier of Mauritius:

- (i) the British Government would use their good offices with the United States Government to ensure that the following facilities in the Chagos Archipelago would remain available to the Mauritius Government as far as practicable:
 - (a) navigational and meteorological facilities;
 - (b) fishing rights;
 - (c) use of air strip for emergency landing and for refuelling civil planes without disembarkation of passengers.
- (ii) that the benefit of any minerals or oil discovered in or near the Chagos Archipelago should revert to the Mauritius Government.

This additional understanding was eventually incorporated into the final record of the meeting at Lancaster House and formed part of the Lancaster House agreement.

111. In a Minute sent on 5 November 1965 to the United Kingdom Prime Minister, the Secretary of State for the Colonies expressed concern that the United Kingdom would be accused of "creating a . . . colony in a period of decolonisation and of establishing new military bases when we should be getting out of the old ones". The Foreign Office also advised that "the islands chosen have virtually no permanent inhabitants".

112. On 5 November 1965, the Governor of Mauritius informed the United Kingdom Secretary of State that the Mauritius Council of Ministers "confirmed agreement to the detachment of the Chagos Archipelago". The Governor noted that agreement had been given on the conditions set out in paragraph 22 of the Record of the Meeting of 23 September 1965 (which contained the Lancaster House agreement) and that the Council of Ministers had formulated an additional understanding.

C. The situation of the Chagossians

113. In the early nineteenth century, several hundred persons were brought to the Chagos Archipelago from Mozambique and Madagascar and enslaved to work on coconut plantations owned by British nationals who lived on the island of Mauritius. In the 1830s, 60,000 enslaved persons in Mauritius, including those in the Chagos Archipelago, were set free.

114. Following the 1966 Agreement (see paragraph 36 above), between 1967 and 1973, the inhabitants of the Chagos Archipelago who had left the islands were prevented from returning. The other inhabitants were forcibly removed and prevented from returning to the islands (see paragraph 43 above).

115. On 16 April 1971, the BIOT Commissioner enacted the Immigration Ordinance 1971, which made it unlawful for any person to enter or remain in the Chagos Archipelago without a permit. It also provided for the Commissioner to make an order directing the removal of such a person from the Chagos Archipelago (*Chagos Islanders v. Attorney General and BIOT Commissioner* (2003) EWHC 2222, para. 34).

116. In the oral proceedings, the United Kingdom reiterated that it “fully accepts that the manner in which the Chagossians were removed from the Chagos Archipelago, and the way they were treated thereafter, was shameful and wrong, and it deeply regrets that fact”.

117. On 4 September 1972, by virtue of an agreement concluded between Mauritius and the United Kingdom, Mauritius accepted payment of the sum of £650,000 in full and final discharge of the United Kingdom’s undertaking given in 1965 to meet the cost of resettlement of persons displaced from the Chagos Archipelago. On 24 March 1973, Prime Minister Ramgoolam wrote to the British High Commissioner in Port Louis, acknowledging receipt of the sum of £650,000, but emphasizing that the payment did not affect the verbal agreement on minerals, fishing and prospecting rights reached at Lancaster House on 23 September 1965 and was subject to the remaining Lancaster House undertakings, including the return of the islands to Mauritius without compensation if the need for use by the United Kingdom of the islands no longer existed.

118. In February 1975, Mr. Michel Vencatessen, a former resident of the Chagos Archipelago, brought an action against the United Kingdom Government claiming damages for intimidation, deprivation of liberty and assault in relation to his removal from the Chagos Archipelago in 1971. In 1982, the claim was stayed by agreement of the parties.

119. On 7 July 1982, an agreement was concluded between the Governments of Mauritius and the United Kingdom, for the payment by the United Kingdom of the sum of £4 million on an *ex gratia* basis, with no admission of liability on the part of the United Kingdom, “in full and final settlement of all claims whatsoever of the kind referred to in Article 2 of this Agreement against . . . the United Kingdom by or on behalf of the Ilois”. According to Recital 2 of the preamble to the Agreement, the term “Ilois” has to be understood as those who went to Mauritius on their departure or removal from the Chagos Archipelago after November 1965. Article 2 provides:

“The claims referred to in Article 1 of this Agreement are solely claims by or on behalf of the Ilois arising out of:

- (a) All acts, matters and things done by or pursuant to the British Indian Ocean Territory Order 1965, including the closure of the plantations in the Chagos Archipelago, the departure or removal of those living or working there, the termination of their contracts, their transfer to and resettlement in Mauritius and their preclusion from returning to the Chagos Archipelago (hereinafter referred to as “the events”); and
- (b) Any incidents, facts or situations, whether past, present or future, occurring in the course of the events or arising out of the consequences of the events.”

Article 4 requires Mauritius “to procure from each member of the Ilois community in Mauritius a signed renunciation of the claims”.

120. The sum of approximately £4 million paid by the United Kingdom was disbursed to 1,344 islanders between 1983 and 1984. As a condition for collecting the funds, the islanders were required to sign or to place a thumbprint on a form renouncing the right to return to the Chagos Archipelago. The form was a one-page legal document, written in English, without a Creole translation. Only 12 persons refused to sign (*Chagos Islanders v. Attorney General and BIOT Commissioner* (2003) EWHC 2222, para. 80).

121. In 1998, Mr. Louis Olivier Bancoult, a Chagossian, instituted proceedings in the United Kingdom courts challenging the validity of legislation denying him the right to reside in the Chagos Archipelago. On 3 November 2000, judgment was given in his favour by the Divisional Court which ruled that the relevant provisions of the 1971 Ordinance be quashed (*Regina (Bancoult) v. Secretary of State for Foreign and Commonwealth Affairs & another (No 1)* (2000)). The United Kingdom Government did not appeal the ruling and it repealed the 1971 Ordinance that had prohibited Chagossians from returning to the Chagos Archipelago. The United Kingdom’s Foreign Secretary announced that the United Kingdom Government was examining the feasibility of resettling the Ilois.

122. On the same day that the Divisional Court rendered the judgment in Mr. Bancoult’s favour, the United Kingdom made another immigration ordinance applicable to the Chagos Archipelago, with the exception of Diego Garcia (Ordinance No 4 of 2000). The ordinance provided that restrictions on entry into and residence in the archipelago would not apply to the Chagossians, given their connection to the Chagos Islands. In its written statement, the United Kingdom has submitted that, following the adoption of that ordinance, none of the Chagossians returned to live there although there was no legal bar to them doing so. Chagossians were however not permitted to enter or reside in Diego Garcia.

123. On 6 December 2001, the Human Rights Committee, constituted under the International Covenant on Civil and Political Rights, in considering the periodic reports submitted by the United Kingdom under Article 40 of the said Covenant, noted “the State party’s acceptance that its

prohibition of the return of Ilois who had left or been removed from the territory was unlawful". It recommended that "the State party should, to the extent still possible, seek to make exercise of the Ilois' right to return to their territory practicable".

124. In June 2002, a feasibility study commissioned by the BIOT Administration concerning the Chagos Archipelago was completed. It was carried out in response to a request made by former inhabitants of the Chagos Archipelago to be permitted to return and live in the archipelago. The study indicated that, while it may be feasible to resettle the islanders in the short term, the costs of maintaining a long-term inhabitation were likely to be prohibitive. Even in the short term, natural events such as periodic flooding from storms and seismic activity, were likely to make life difficult for a resettled population. In 2004, the United Kingdom issued two orders in Council: the British Indian Ocean Territory (Constitution) Order 2004 and the British Indian Ocean Territory (Immigration) Order 2004. These orders declared that no person had the right of abode in the BIOT nor the right without authorization to enter and remain there.

125. In 2004, Mr. Bancoult challenged the validity of the British Indian Ocean Territory (Constitution) Order 2004 and the British Indian Ocean Territory (Immigration) Order 2004 in the courts of the United Kingdom. He succeeded in the High Court. An appeal was brought by the Secretary of State for Foreign and Commonwealth Affairs against the decision of the High Court. The Court of Appeal upheld the decision of the High Court that the orders were invalid on the basis that their content and the circumstances of their adoption constituted an abuse of power by the United Kingdom Government (*Regina (Bancoult) v. Secretary of State for Foreign and Commonwealth Affairs (No 2)* (2007)).

126. On 30 July 2008, the Human Rights Committee, in considering another periodic report submitted by the United Kingdom, took note of the aforementioned decision of the Court of Appeal. On the basis of Article 12 of the International Covenant on Civil and Political Rights, the Committee recommended that:

"The State party should ensure that the Chagos islanders can exercise their right to return to their territory and should indicate what measures have been taken in this regard. It should consider compensation for the denial of this right over an extended period."

127. The Secretary of State for Foreign and Commonwealth Affairs appealed the decision of the Court of Appeal (see paragraph 125) upholding Mr. Bancoult's challenge of the validity of the British Indian Ocean Territory (Constitution) Order 2004. On 22 October 2008, the House of Lords upheld the appeal by the Secretary of State for Foreign and Commonwealth Affairs.

128. On 11 December 2012, the European Court of Human Rights, in the *Chagos Islanders v. United Kingdom* case, declared inadmissible an application made by a group of 1,786 Chagossians against the United Kingdom for breach of their rights under the European Convention on Human Rights. One of the grounds for the decision was that the claims of the applicants had been settled through implementation of the 1982 Agreement between Mauritius and the United Kingdom.

129. On 20 December 2012, the United Kingdom announced a review of its policy on resettlement of the Chagossians who were forcibly removed from, or prevented from returning to, the Chagos Archipelago. A second feasibility study, carried out between 2014 and 2015, was commissioned by the BIOT Administration to analyse the different options for resettlement in the Chagos Archipelago. The feasibility study concluded that resettlement was possible although there would be significant challenges including high and very uncertain costs, and long-term liabilities for the United Kingdom taxpayer. Thereafter, on 16 November 2016, the United Kingdom decided against resettlement on the “grounds of feasibility, defence and security interests and cost to the British taxpayer”.

130. On 8 February 2018, the Supreme Court of the United Kingdom rendered its judgment in the case of *Regina (on the application of Bancoult No. 3) v. Secretary of State for Foreign and Commonwealth Affairs* (2018). The case was brought by Mr. Bancoult on behalf of a group of Chagossians who were forcibly removed from the archipelago. In the proceedings, Mr. Bancoult challenged the declaration of a marine protected area by the United Kingdom around the Chagos Archipelago. Mr. Bancoult, the appellant, contended that the marine protected area had been established for the improper purpose of rendering impracticable the resettlement of the Chagos islanders on the archipelago. He claimed that this was evidenced by a diplomatic cable sent by the United States Embassy in London to departments of the United States Government in Washington, to elements in its military command structure and to its Embassy in Port Louis, Mauritius. The cable recorded a 2009 meeting in which United States and United Kingdom officials discussed the reasons for the establishment of the marine protected area. The cable was subsequently leaked and published in two national newspapers. The issue in the appeal was the admissibility of the cable. The Supreme Court held that the cable was inadmissible in evidence on the ground that its inviolability as part of the mission’s archive protected its privacy.

131. To date, the Chagossians remain dispersed in several countries, including the United Kingdom, Mauritius and Seychelles. By virtue of United Kingdom law and judicial decisions of that country, they are not allowed to return to the Chagos Archipelago.

IV. THE QUESTIONS PUT TO THE COURT BY THE GENERAL ASSEMBLY

132. Having reviewed the factual background of the present request for an advisory opinion, the Court will now examine the two questions put by the General Assembly:

Question (a): “Was the process of decolonization of Mauritius lawfully completed when Mauritius was granted independence in 1968, following the separation of the Chagos Archipelago from Mauritius and having regard to international law, including obligations reflected in General Assembly resolutions 1514 (XV) of 14 December 1960, 2066 (XX) of 16 December 1965, 2232 (XXI) of 20 December 1966 and 2357 (XXII) of 19 December 1967?”

Question (b): “What are the consequences under international law, including obligations reflected in the above-mentioned resolutions, arising from the continued administration by the United Kingdom of Great Britain and Northern Ireland of the Chagos Archipelago, including with respect to the inability of Mauritius to implement a programme for the resettlement on the Chagos Archipelago of its nationals, in particular those of Chagossian origin?”

133. Some participants have asked the Court to reformulate both questions or to interpret them restrictively. In particular, they have contested the assumption that the resolutions referred to in Question (a) would create international obligations for the United Kingdom, thereby prejudging the answer the Court is requested to give. They have also contended that the legal questions really at issue concern the matter of sovereignty over the Chagos Archipelago, which is the subject of a bilateral dispute between Mauritius and the United Kingdom.

134. One participant has asserted that the General Assembly’s request, which does not expressly refer to the legal consequences for States of the continued administration by the United Kingdom of the Chagos Archipelago, should be interpreted in such a way as to limit the advisory opinion to the functions of the United Nations, excluding all issues that concern States, in particular, Mauritius and the United Kingdom.

135. The Court recalls that it may depart from the language of the question put to it where the question is not adequately formulated (*Interpretation of the Greco-Turkish Agreement of 1 December 1926 (Final Protocol, Article IV), Advisory Opinion, 1928, P.C.I.J., Series B, No. 16*) or does not reflect the “legal questions really in issue” (*Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt, Advisory Opinion, I.C.J. Reports 1980, p. 89, para. 35*). Similarly, where the question asked is ambiguous or vague, the Court may clarify it before giving its opinion (*Application for Review of Judgement No. 273 of the United Nations Administrative Tribunal, Advisory Opinion, I.C.J. Reports 1982, p. 348, para. 46*). Although, in exceptional circumstances, the Court may reformulate the questions referred to it for an advisory opinion, it only does so to ensure that it gives a reply “based on law” (*Western Sahara, Advisory Opinion, I.C.J. Reports 1975, p. 18, para. 15*).

136. The Court considers that there is no need for it to reformulate the questions submitted to it for an advisory opinion in these proceedings. Indeed, the first question is whether the process of decolonization of Mauritius was lawfully completed in 1968, having regard to international law, following the separation of the Chagos Archipelago from its territory in 1965. The General Assembly’s reference to certain resolutions which it adopted during this period does not, in the Court’s view, prejudice either their legal content or scope. In Question (a), the General Assembly asks the Court to examine certain events which occurred between 1965 and 1968, and which fall within the framework of the process of decolonization of Mauritius as a non-self-governing territory. It did not submit to the Court a bilateral dispute over sovereignty which might exist between the United Kingdom and Mauritius. In Question (b), which is clearly linked to Question (a), the Court is asked to state the consequences, under international law, of the continued administration by the United Kingdom of the Chagos Archipelago. By referring in this way to international law, the General Assembly necessarily had in mind the consequences for the subjects of that law, including States.

137. It is for the Court to state the law applicable to the factual situation referred to it by the General Assembly in its request for an advisory opinion. There is thus no need for it to interpret restrictively the questions put to it by the General Assembly. When the Court states the law in the exercise of its advisory function, it lends its assistance to the General Assembly in the solution of a problem confronting it (*Western Sahara, Advisory Opinion, I.C.J. Reports 1975*, p. 21, para. 23). In giving its advisory opinion, the Court is not interfering with the exercise of the General Assembly's own functions.

138. The Court will now consider the first question put to it by the General Assembly, namely whether the process of decolonization of Mauritius was lawfully completed having regard to international law.

**A. Whether the process of decolonization of Mauritius was lawfully completed
having regard to international law (Question (a))**

139. In order to pronounce on whether the process of decolonization of Mauritius was lawfully completed having regard to international law, the Court will determine, first, the relevant period of time for the purpose of identifying the applicable rules of international law and, secondly, the content of that law. In addition, since the General Assembly has referred to some of the resolutions it adopted, the Court, in determining the obligations reflected in these resolutions, will have to examine the functions of the General Assembly in conducting the process of decolonization.

1. The relevant period of time for the purpose of identifying the applicable rules of international law

140. In Question (a), the General Assembly situates the process of decolonization of Mauritius in the period between the separation of the Chagos Archipelago from its territory in 1965 and its independence in 1968. It is therefore by reference to this period that the Court is required to identify the rules of international law that are applicable to that process.

141. Various participants have stated that international law is not frozen at the date when the first steps were taken towards the realization of the right to self-determination in respect of a territory.

142. The Court is of the view that, while its determination of the applicable law must focus on the period from 1965 to 1968, this will not prevent it, particularly when customary rules are at issue, from considering the evolution of the law on self-determination since the adoption of the Charter of the United Nations and of resolution 1514 (XV) of 14 December 1960 entitled "Declaration on the Granting of Independence to Colonial Countries and Peoples". Indeed, State practice and *opinio juris*, i.e. the acceptance of that practice as law (Article 38 of the Statute of the Court), are consolidated and confirmed gradually over time.

143. The Court may also rely on legal instruments which postdate the period in question, when those instruments confirm or interpret pre-existing rules or principles.

2. Applicable international law

144. The Court will have to determine the nature, content and scope of the right to self-determination applicable to the process of decolonization of Mauritius, a non-self-governing territory recognized as such, from 1946 onwards, both in United Nations practice and by the administering Power itself. The Court is conscious that the right to self-determination, as a fundamental human right, has a broad scope of application. However, to answer the question put to it by the General Assembly, the Court will confine itself, in this Advisory Opinion, to analysing the right to self-determination in the context of decolonization.

145. The participants in the advisory proceedings have adopted opposing positions on the customary status of the right to self-determination, its content and how it was exercised in the period between 1965 and 1968. Some participants have asserted that the right to self-determination was firmly established in customary international law at the time in question. Others have maintained that the right to self-determination was not an integral part of customary international law in the period under consideration.

146. The Court will begin by recalling that “respect for the principle of equal rights and self-determination of peoples” is one of the purposes of the United Nations (Article 1, paragraph 2, of the Charter). Such a purpose concerns, in particular, the “Declaration regarding non-self-governing territories” (Chapter XI of the Charter), since the “Members of the United Nations which have or assume responsibilities for the administration of territories whose peoples have not yet attained a full measure of self-government” are obliged to “develop [the] self-government” of those peoples (Article 73 of the Charter).

147. In the Court’s view, it follows that the legal régime of non-self-governing territories, as set out in Chapter XI of the Charter, was based on the progressive development of their institutions so as to lead the populations concerned to exercise their right to self-determination.

148. Having made respect for the principle of equal rights and self-determination of peoples one of the purposes of the United Nations, the Charter included provisions that would enable non-self-governing territories ultimately to govern themselves. It is in this context that the Court must ascertain when the right to self-determination crystallized as a customary rule binding on all States.

149. Custom is constituted through “general practice accepted as law” (Article 38 of the Statute of the Court). The Court has emphasized that both elements, namely general practice and *opinio juris*, which are constitutive of international custom, are closely linked:

“Not only must the acts concerned amount to a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it. The need for such a belief, i.e., the existence of a subjective element, is implicit in the very notion of the *opinio juris sive necessitatis*. The States concerned must therefore feel that they are conforming to what amounts to a legal obligation. The frequency, or even habitual character of the acts is not in itself enough.” (*North Sea Continental Shelf, Judgment, I.C.J. Reports 1969*, p. 44, para. 77.)

150. The adoption of resolution 1514 (XV) of 14 December 1960 represents a defining moment in the consolidation of State practice on decolonization. Prior to that resolution, the General Assembly had affirmed on several occasions the right to self-determination (resolutions 637 (VII) of 16 December 1952, 738 (VIII) of 28 November 1953 and 1188 (XII) of 11 December 1957) and a number of non-self-governing territories had acceded to independence. General Assembly resolution 1514 (XV) clarifies the content and scope of the right to self-determination. The Court notes that the decolonization process accelerated in 1960, with 18 countries, including 17 in Africa, gaining independence. During the 1960s, the peoples of an additional 28 non-self-governing-territories exercised their right to self-determination and achieved independence. In the Court’s view, there is a clear relationship between resolution 1514 (XV) and the process of decolonization following its adoption.

151. As the Court has noted:

“General Assembly resolutions, even if they are not binding, may sometimes have normative value. They can, in certain circumstances, provide evidence important for establishing the existence of a rule or the emergence of an *opinio juris*. To establish whether this is true of a given General Assembly resolution, it is necessary to look at its content and the conditions of its adoption; it is also necessary to see whether an *opinio juris* exists as to its normative character.” (*Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996 (I)*, pp. 254-255, para. 70.)

152. The Court considers that, although resolution 1514 (XV) is formally a recommendation, it has a declaratory character with regard to the right to self-determination as a customary norm, in view of its content and the conditions of its adoption. The resolution was adopted by 89 votes with 9 abstentions. None of the States participating in the vote contested the existence of the right of peoples to self-determination. Certain States justified their abstention on the basis of the time required for the implementation of such a right.

153. The wording used in resolution 1514 (XV) has a normative character, in so far as it affirms that “[a]ll peoples have the right to self-determination”. Its preamble proclaims “the necessity of bringing to a speedy and unconditional end colonialism in all its forms and manifestations” and its first paragraph states that “[t]he subjection of peoples to alien subjugation, domination and exploitation constitutes a denial of fundamental human rights [and] is contrary to the Charter of the United Nations”.

This resolution further provides that “[i]mmediate steps shall be taken, in Trust and Non-Self-Governing Territories or all other territories which have not yet attained independence, to transfer all powers to the peoples of those territories, without any conditions or reservations, in accordance with their freely expressed will and desire”. In order to prevent any dismemberment of non-self-governing territories, paragraph 6 of resolution 1514 (XV) provides that:

“Any attempt aimed at the partial or total disruption of the national unity and the territorial integrity of a country is incompatible with the purposes and principles of the Charter of the United Nations.”

154. Article 1, common to the International Covenant on Civil and Political Rights and to the International Covenant on Economic, Social and Cultural Rights, adopted on 16 December 1966, by General Assembly resolution 2200 A (XXI), reaffirms the right of all peoples to self-determination, and provides, *inter alia*, that:

“The States Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations.”

155. The nature and scope of the right to self-determination of peoples, including respect for “the national unity and territorial integrity of a State or country”, were reiterated in the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations. This Declaration was annexed to General Assembly resolution 2625 (XXV) which was adopted by consensus in 1970. By recognizing the right to self-determination as one of the “basic principles of international law”, the Declaration confirmed its normative character under customary international law.

156. The means of implementing the right to self-determination in a non-self-governing territory, described as “geographically separate and . . . distinct ethnically and/or culturally from the country administering it”, were set out in Principle VI of General Assembly resolution 1541 (XV), adopted on 15 December 1960:

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

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

157. The Court recalls that, while the exercise of self-determination may be achieved through one of the options laid down by resolution 1541 (XV), it must be the expression of the free and genuine will of the people concerned. However, “[t]he right of self-determination leaves the General Assembly a measure of discretion with respect to the forms and procedures by which that right is to be realized” (*Western Sahara, Advisory Opinion, I.C.J. Reports 1975*, p. 36, para. 71).

158. The right to self-determination under customary international law does not impose a specific mechanism for its implementation in all instances, as the Court has observed:

“The validity of the principle of self-determination, defined as the need to pay regard to the freely expressed will of peoples, is not affected by the fact that in certain cases the General Assembly has dispensed with the requirement of consulting the inhabitants of a given territory. Those instances were based either on the consideration that a certain population did not constitute a ‘people’ entitled to self-determination or on the conviction that a consultation was totally unnecessary, in view of special circumstances.” (*Western Sahara, Advisory Opinion, I.C.J. Reports 1975*, p. 33, para. 59.)

159. Some participants have argued that the customary status of the right to self-determination did not entail an obligation to implement that right within the boundaries of the non-self-governing territory.

160. The Court recalls that the right to self-determination of the people concerned is defined by reference to the entirety of a non-self-governing territory, as stated in the aforementioned paragraph 6 of resolution 1514 (XV) (see paragraph 153 above). Both State practice and *opinio juris* at the relevant time confirm the customary law character of the right to territorial integrity of a non-self-governing territory as a corollary of the right to self-determination. No example has been brought to the attention of the Court in which, following the adoption of resolution 1514 (XV), the General Assembly or any other organ of the United Nations has considered as lawful the detachment by the administering Power of part of a non-self-governing territory, for the purpose of maintaining it under its colonial rule. States have consistently emphasized that respect for the territorial integrity of a non-self-governing territory is a key element of the exercise of the right to self-determination under international law. The Court considers that the peoples of non-self-governing territories are entitled to exercise their right to self-determination in relation to their territory as a whole, the integrity of which must be respected by the administering Power. It follows that any detachment by the administering Power of part of a non-self-governing territory, unless based on the freely expressed and genuine will of the people of the territory concerned, is contrary to the right to self-determination.

161. In the Court’s view, the law on self-determination constitutes the applicable international law during the period under consideration, namely between 1965 and 1968. The Court noted in its Advisory Opinion on *Namibia* the consolidation of that law:

“the subsequent development of international law in regard to non-self-governing territories, as enshrined in the Charter of the United Nations, made the principle of self-determination applicable to all of them” (*Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971*, p. 31, para. 52).

162. The Court will now examine the functions of the General Assembly during the process of decolonization.

3. The functions of the General Assembly with regard to decolonization

163. The General Assembly has played a crucial role in the work of the United Nations on decolonization, in particular, since the adoption of resolution 1514 (XV). It has overseen the implementation of the obligations of Member States in this regard, such as they are laid down in Chapter XI of the Charter and as they arise from the practice which has developed within the Organization.

164. It is in this context that the Court is asked in Question (a) to consider, in its analysis of the international law applicable to the process of decolonization of Mauritius, the obligations reflected in General Assembly resolutions 2066 (XX) of 16 December 1965, 2232 (XXI) of 20 December 1966 and 2357 (XXII) of 19 December 1967.

165. In resolution 2066 (XX) of 16 December 1965, entitled "Question of Mauritius", having noted "with deep concern that any step taken by the administering Power to detach certain islands from the Territory of Mauritius for the purpose of establishing a military base would be in contravention of the Declaration, and in particular of paragraph 6 thereof", the General Assembly, in the operative part of the text, invites "the administering Power to take no action which would dismember the Territory of Mauritius and violate its territorial integrity".

166. In resolutions 2232 (XXI) and 2357 (XXII), which are more general in nature and relate to the monitoring of the situation in a number of non-self-governing territories, the General Assembly

"[r]eiterates its declaration that any attempt aimed at the partial or total disruption of the national unity and the territorial integrity of colonial Territories and the establishment of military bases and installations in these Territories is incompatible with the purposes and principles of the Charter of the United Nations and of General Assembly resolution 1514 (XV)".

167. In the Court's view, by inviting the United Kingdom to comply with its international obligations in conducting the process of decolonization of Mauritius, the General Assembly acted within the framework of the Charter and within the scope of the functions assigned to it to oversee the application of the right to self-determination. The General Assembly assumed those functions in order to supervise the implementation of obligations incumbent upon administering Powers under the Charter. It thus established a special committee tasked with examining the factors that would enable it to decide "whether any territory is or is not a territory whose people have not yet attained a full measure of self-government" (resolution 334 (IV) of 2 December 1949). It has been

the Assembly's consistent practice to adopt resolutions to pronounce on the specific situation of any non-self-governing territory. Thus, immediately after the adoption of resolution 1514 (XV), it established the Committee of Twenty-Four tasked with monitoring the implementation of that resolution and making suggestions and recommendations thereon (resolution 1654 (XVI) of 27 November 1961). The General Assembly also monitors the means by which the free and genuine will of the people of a non-self-governing territory is expressed, including the formulation of questions submitted for popular consultation.

168. The General Assembly has consistently called upon administering Powers to respect the territorial integrity of non-self-governing territories, especially after the adoption of resolution 1514 (XV) of 14 December 1960 (see, for example, General Assembly resolutions 2023 (XX) of 5 November 1965 and 2183 (XXI) of 12 December 1966 (Question of Aden); 3161 (XXVIII) of 14 December 1973 and 3291 (XXIX) of 13 December 1974 (Question of the Comoro Archipelago); 34/91 of 12 December 1979 (Question of the islands of Glorieuses, Juan de Nova, Europa and Bassas da India)).

169. The Court will now examine the circumstances relating to the detachment of the Chagos Archipelago from Mauritius and determine whether it was carried out in accordance with international law.

4. Application in the present proceedings

170. It is necessary to begin by recalling the legal status of Mauritius before its independence. Following the conclusion of the 1814 Treaty of Paris, the "island of Mauritius and the Dependencies of Mauritius" [*l'île Maurice et les dépendances de Maurice*"], including the Chagos Archipelago, were administered without interruption by the United Kingdom. This is how the whole of Mauritius, including its dependencies, came to appear on the list of non-self-governing territories drawn up by the General Assembly (resolution 66 (I) of 14 December 1946). It was on this basis that the United Kingdom regularly provided the General Assembly with information relating to the existing conditions in that territory, in accordance with Article 73 of the Charter. Therefore, at the time of its detachment from Mauritius in 1965, the Chagos Archipelago was clearly an integral part of that non-self-governing territory.

171. In the Lancaster House agreement of 23 September 1965, the Premier and other representatives of Mauritius, which was still under the authority of the United Kingdom as administering Power, agreed in principle to the detachment of the Chagos Archipelago from the territory of Mauritius. This agreement in principle was given on condition that the archipelago could not be ceded to any third party and would be returned to Mauritius at a later date, a condition which was accepted at the time by the United Kingdom.

172. The Court observes that when the Council of Ministers agreed in principle to the detachment from Mauritius of the Chagos Archipelago, Mauritius was, as a colony, under the authority of the United Kingdom. As noted at the time by the Committee of Twenty-Four: "the present Constitution of Mauritius . . . do[es] not allow the representatives of the people to exercise

real legislative or executive powers, and that authority is nearly all concentrated in the hands of the United Kingdom Government and its representatives” (UN doc. A/5800/Rev.1 (1964-1965), p. 352, para. 154). In the Court’s view, it is not possible to talk of an international agreement, when one of the parties to it, Mauritius, which is said to have ceded the territory to the United Kingdom, was under the authority of the latter. The Court is of the view that heightened scrutiny should be given to the issue of consent in a situation where a part of a non-self-governing territory is separated to create a new colony. Having reviewed the circumstances in which the Council of Ministers of the colony of Mauritius agreed in principle to the detachment of the Chagos Archipelago on the basis of the Lancaster House agreement, the Court considers that this detachment was not based on the free and genuine expression of the will of the people concerned.

173. In its resolution 2066 (XX) of 16 December 1965, adopted a few weeks after the detachment of the Chagos Archipelago, the General Assembly deemed it appropriate to recall the obligation of the United Kingdom, as the administering Power, to respect the territorial integrity of Mauritius. The Court considers that the obligations arising under international law and reflected in the resolutions adopted by the General Assembly during the process of decolonization of Mauritius require the United Kingdom, as the administering Power, to respect the territorial integrity of that country, including the Chagos Archipelago.

174. The Court concludes that, as a result of the Chagos Archipelago’s unlawful detachment and its incorporation into a new colony, known as the BIOT, the process of decolonization of Mauritius was not lawfully completed when Mauritius acceded to independence in 1968.

B. The consequences under international law arising from the continued administration by the United Kingdom of the Chagos Archipelago (Question (b))

175. Having established that the process of decolonization of Mauritius was not lawfully completed in 1968, the Court must now examine the consequences, under international law, arising from the United Kingdom’s continued administration of the Chagos Archipelago (Question (b)). The Court will answer this question, drafted in the present tense, on the basis of the international law applicable at the time its opinion is given.

176. Several participants in the proceedings before the Court have argued that the United Kingdom’s continued administration of the Chagos Archipelago has consequences under international law not only for the United Kingdom itself, but also for other States and international organizations. The consequences mentioned include the requirement for the United Kingdom to put an immediate end to its administration of the Chagos Archipelago and return it to Mauritius. Some participants have gone further, advocating that the United Kingdom must make good the injury suffered by Mauritius. Others have considered that the former administering Power must co-operate with Mauritius regarding the resettlement on the Chagos Archipelago of the nationals of the latter, in particular those of Chagossian origin.

In contrast, one participant has contended that the only consequence for the United Kingdom under international law concerns the retrocession of the Chagos Archipelago when it is no longer needed for the defence purposes of that State. Finally, a few participants have taken the view that the time frame for completing the decolonization of Mauritius is a matter for bilateral negotiations to be conducted between Mauritius and the United Kingdom.

As regards the consequences for third States, some participants have maintained that those States have an obligation not to recognize the unlawful situation resulting from the United Kingdom's continued administration of the Chagos Archipelago and not to render assistance in maintaining it.

* * *

177. The Court having found that the decolonization of Mauritius was not conducted in a manner consistent with the right of peoples to self-determination, it follows that the United Kingdom's continued administration of the Chagos Archipelago constitutes a wrongful act entailing the international responsibility of that State (see *Corfu Channel (United Kingdom v. Albania), Merits, Judgment, I.C.J. Reports 1949*, p. 23; *Gabčíkovo-Nagymaros Project (Hungary/Slovakia), Judgment, I.C.J. Reports 1997*, p. 38, para. 47; see also Article 1 of the Articles on Responsibility of States for Internationally Wrongful Acts). It is an unlawful act of a continuing character which arose as a result of the separation of the Chagos Archipelago from Mauritius.

178. Accordingly, the United Kingdom is under an obligation to bring an end to its administration of the Chagos Archipelago as rapidly as possible, thereby enabling Mauritius to complete the decolonization of its territory in a manner consistent with the right of peoples to self-determination.

179. The modalities necessary for ensuring the completion of the decolonization of Mauritius fall within the remit of the United Nations General Assembly, in the exercise of its functions relating to decolonization. As the Court has stated in the past, it is not for it to "determine what steps the General Assembly may wish to take after receiving the Court's opinion or what effect that opinion may have in relation to those steps" (*Accordance with International Law of the Unilateral Declaration of Independence in respect of Kosovo, Advisory Opinion, I.C.J. Reports 2010 (II)*, p. 421, para. 44).

180. Since respect for the right to self-determination is an obligation *erga omnes*, all States have a legal interest in protecting that right (see *East Timor (Portugal v. Australia), Judgment, I.C.J. Reports 1995*, p. 102, para. 29; see also *Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain), Second Phase, Judgment, I.C.J. Reports 1970*, p. 32, para. 33). The Court considers that, while it is for the General Assembly to pronounce on the modalities required to ensure the completion of the decolonization of Mauritius, all Member States must co-operate with the United Nations to put those modalities into effect. As recalled in the Declaration on the Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations:

“Every State has the duty to promote, through joint and separate action, realization of the principle of equal rights and self-determination of peoples, in accordance with the provisions of the Charter, and to render assistance to the United Nations in carrying out the responsibilities entrusted to it by the Charter regarding the implementation of the principle” (General Assembly resolution 2625 (XXV)).

181. As regards the resettlement on the Chagos Archipelago of Mauritian nationals, including those of Chagossian origin, this is an issue relating to the protection of the human rights of those concerned, which should be addressed by the General Assembly during the completion of the decolonization of Mauritius.

182. In response to Question (b) of the General Assembly, relating to the consequences under international law that arise from the continued administration by the United Kingdom of the Chagos Archipelago, the Court concludes that the United Kingdom has an obligation to bring to an end its administration of the Chagos Archipelago as rapidly as possible, and that all Member States must co-operate with the United Nations to complete the decolonization of Mauritius.

*

* *

183. For these reasons,

THE COURT,

(1) Unanimously,

Finds that it has jurisdiction to give the advisory opinion requested;

(2) By twelve votes to two,

Decides to comply with the request for an advisory opinion;

IN FAVOUR: *President* Yusuf; *Vice-President* Xue; *Judges* Abraham, Bennouna, Cançado Trindade, Gaja, Sebutinde, Bhandari, Robinson, Gevorgian, Salam, Iwasawa;

AGAINST: *Judges* Tomka, Donoghue;

(3) By thirteen votes to one,

Is of the opinion that, having regard to international law, the process of decolonization of Mauritius was not lawfully completed when that country acceded to independence in 1968, following the separation of the Chagos Archipelago;

IN FAVOUR: *President* Yusuf; *Vice-President* Xue; *Judges* Tomka, Abraham, Bennouna, Cançado Trindade, Gaja, Sebutinde, Bhandari, Robinson, Gevorgian, Salam, Iwasawa;

AGAINST: *Judge* Donoghue;

(4) By thirteen votes to one,

Is of the opinion that the United Kingdom is under an obligation to bring to an end its administration of the Chagos Archipelago as rapidly as possible;

IN FAVOUR: *President* Yusuf; *Vice-President* Xue; *Judges* Tomka, Abraham, Bennouna, Cançado Trindade, Gaja, Sebutinde, Bhandari, Robinson, Gevorgian, Salam, Iwasawa;

AGAINST: *Judge* Donoghue;

(5) By thirteen votes to one,

Is of the opinion that all Member States are under an obligation to co-operate with the United Nations in order to complete the decolonization of Mauritius.

IN FAVOUR: *President* Yusuf; *Vice-President* Xue; *Judges* Tomka, Abraham, Bennouna, Cançado Trindade, Gaja, Sebutinde, Bhandari, Robinson, Gevorgian, Salam, Iwasawa;

AGAINST: *Judge* Donoghue.

Done in French and in English, the French text being authoritative, at the Peace Palace, The Hague, this twenty-fifth day of February, two thousand and nineteen, in two copies, one of which will be placed in the archives of the Court and the other transmitted to the Secretary-General of the United Nations.

(Signed) Abdulqawi Ahmed YUSUF,
President.

(Signed) Philippe COUVREUR,
Registrar.

Vice-President XUE appends a declaration to the Advisory Opinion of the Court; Judges TOMKA and ABRAHAM append declarations to the Advisory Opinion of the Court; Judge CANÇADO TRINDADE appends a separate opinion to the Advisory Opinion of the Court; Judges CANÇADO TRINDADE and ROBINSON append a joint declaration to the Advisory Opinion of the Court; Judge DONOGHUE appends a dissenting opinion to the Advisory Opinion of the Court; Judges GAJA, SEBUTINDE and ROBINSON append separate opinions to the Advisory Opinion of the Court; Judges GEVORGIAN, SALAM and IWASAWA append declarations to the Advisory Opinion of the Court.

(Initialed) A.A.Y.

(Initialed) Ph.C.

VIII

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Kenmerk
2019-0000490003

Uw kenmerk

Datum 27 september 2019
Betreft Beantwoording Kamervraag lid Bosman over het
dekolonisatieproces van de voormalig Nederlandse Antillen,
2019Z15876, ingezonden 21 augustus 2019)

Hierbij bied ik u de antwoorden aan op de schriftelijke vragen die zijn gesteld door het lid Bosman (VVD) over het dekolonisatieproces van de voormalig Nederlandse Antillen. Deze vragen werden ingezonden op 21 augustus 2019, met kenmerk 2019Z15876.

De staatssecretaris van Binnenlandse Zaken en Koninkrijksrelaties,

drs. R.W. Knops

2019Z15876

**Vragen van het lid Bosman (VVD) aan de staatssecretaris van
Binnenlandse Zaken en Koninkrijksrelaties over het
dekolonisatieproces van de voormalig Nederlandse Antillen
(ingezonden 21 augustus 2019)**

Vraag 1

Kent u de "written statement of the Kingdom of The Netherlands" van 27 Februari 2018?

Antwoord

Ja.

Vraag 2

In artikel 3.21 staat dat indien een bevolking eenmaal heeft gekozen voor een bepaalde status, dit gelijk staat aan het bereiken van "full self government" in de context van dekolonisatie; welke specifieke keuze van de landen Aruba, Curaçao en Sint Maarten en de eilanden Bonaire, Saba en Sint Eustatius, in het kader van de Nederlandse dekolonisatie, was het moment van het bereiken van "full self government" van de voormalige Nederlandse koloniale gebieden?

Antwoord

Aruba, Curaçao, Sint Maarten, Bonaire, Sint Eustatius en Saba hebben – als onderdelen van de Nederlandse Antillen – volledig zelfbestuur, zoals bedoeld in artikel 73 VN-Handvest, bereikt in 1954, toen Nederland, Suriname en de Nederlandse Antillen uit vrije wil de nieuwe rechtsorde van het Statuut voor het Koninkrijk der Nederlanden aanvaardden. De overeengekomen rechtsorde kreeg in 1955 internationale erkenning van de Algemene Vergadering van de Verenigde Naties (AVVN) in Resolutie 945, waarna Suriname en de Nederlandse Antillen werden verwijderd van de lijst van niet-zelfbesturende gebieden van de VN.

Vraag 3

In VN resolutie 1514 van 14 december 1960 wordt gesproken over het feit dat een keuze voor een bepaalde status op basis moet zijn van een vrije keuze van de bevolking (citaat: "should be the result of the free and voluntary choice by the peoples of the territory concerned expressed through informed democratic processes") 2); hoe vrij waren de voormalige Nederlandse koloniën in het maken van hun eigen keuze gezien de ontstaansgeschiedenis van het Statuut?

Antwoord

De voormalige Nederlandse koloniën die onderdeel werden van de rechtsorde van het Statuut – Suriname en de Nederlandse Antillen – hebben deze rechtsorde in

vrijheid aanvaard. Op nationaal niveau werd de juridische grondslag hiervoor gevestigd in 1948, toen in de Grondwet de weg werd vrijgemaakt voor een nieuwe rechtsorde voor de verschillende gebiedsdelen van het Koninkrijk. Artikel 211 van de Grondwet van 1948 bepaalde dat de totstandkoming van deze nieuwe rechtsorde 'door vrijwillige aanvaarding langs democratische weg' diende te geschieden. Deze opdracht vormde het startsein voor een serie van conferenties en overleggen, verspreid over een aantal jaren, tussen delegaties van Nederland, Suriname en de Nederlandse Antillen over de vormgeving van de aangekondigde rechtsorde. Uiteindelijk, in 1954, resulteerden deze conferenties en overleggen in het ontwerp van het Statuut. Dit ontwerp werd vervolgens voorgelegd aan de parlementen van de betrokken gebiedsdelen, die enige maanden later met het Statuut instemden; in Suriname en de Nederlandse Antillen met algemene stemmen. De leden van de Staten van Suriname en de Nederlandse Antillen werden sinds 1948 op grond van algemeen kiesrecht voor mannen en vrouwen gekozen. In dat verband is het van belang op te merken dat de verwijzing in AVVN resolutie 1514 naar een vrije keuze van de bevolking niet impliceert dat het zelfbeschikkingsrecht door koloniale gebieden onder internationaal recht slechts legitiem uitgeoefend kon worden wanneer er sprake was van een referendum. De praktijk van de VN ten aanzien van dekolonisatie laat zien dat een verscheidenheid aan democratische methoden voor het vaststellen van de wil van de bevolking werd geaccepteerd. Deze varieerden van referenda en verkiezingen tot (meerderheids-) besluiten door representatieve politieke organen van het koloniale gebied.

Vraag 4

Kunt u aangeven waarom er jaren van onderhandelingen tussen Nederland en de Nederlandse Antillen nodig waren om de landen van de voormalige koloniën hun recht op zelfbeschikking te geven?

Antwoord

Het ontwerpen of ingrijpend hervormen van een staatkundige ordening neemt normaal gesproken de nodige tijd in beslag, zeker als daartoe overeenstemming dient te worden bereikt tussen verschillende actoren. Zoals in het vorige antwoord uiteengezet, heeft het zes jaar geduurd voordat de nieuwe rechtsorde, waartoe de Grondwet van 1948 de opdracht gaf, met het Statuut voor het Koninkrijk werd gerealiseerd. In deze periode werd, op grond van een reeks van door Nederland, Suriname en de Nederlandse Antillen in 1948 overeengekomen resoluties, eerst een ontwerp voor een rijkgrondwet vervaardigd. Tegen de structuur van de rijkgrondwet rezen echter bezwaren. Een nieuw, korte tijd later aangetreden Nederlands kabinet vond deze te topzwaar voor het Koninkrijk; aan Caribische zijde werd gevreesd voor een braindrain van politici. Ondertussen werd de aandacht van de politiek opgeëist door ontwikkelingen rond Nederlands-Indië, waarmee de discussie over de staatkundige toekomst van de Caribische gebiedsdelen tot dan toe sterk had samengehangen. Toen na de onafhankelijkheid van Indonesië de draad van de onderhandelingen weer werd opgepakt, nam de Nederlandse regering definitief afstand van het ontwerp voor de rijkgrondwet en bereidde zij in 1950 een concept voor van een vereenvoudigde regeling, 'Schets van een Statuut, regelende de status van

Suriname en de Nederlandse Antillen in het Koninkrijk der Nederlanden' geheten. Over deze Schets werd in 1952 een conferentie gehouden, die uiteindelijk in mei 1954 met succes kon worden afgerond. Hiermee lag de weg vrij voor de formele totstandkoming van het Statuut, enige maanden later dat jaar.

Vraag 5

Welke rol heeft Nederland gespeeld in die onderhandelingen? Welke ruimte kregen de voormalige koloniën om hun eigen, vrije keuze te maken? Is er sprake geweest van druk dan wel beperking van de vrije keuze voor de voormalige Koloniën?

Antwoord

In de onderhandelingen over een nieuwe rechtsorde binnen het Koninkrijk opereerden afgevaardigden van Nederland, Suriname en de Nederlandse Antillen op voet van gelijkheid met elkaar. Afgevaardigden van de laatste twee gebieden waren gedurende dit traject dan ook volledig vrij om hun eigen keuzes te maken ten aanzien van het ontwerp hiervoor. Dit wil niet zeggen dat Suriname en de Nederlandse Antillen in staat waren om eenzijdig te bepalen hoe de nieuwe rechtsorde werd ingericht. Weliswaar vormde de aanvaarding van deze rechtsorde een daad van vrije keuze, maar over de inhoud hiervan diende overeenstemming te worden bereikt door alle drie de actoren, dus ook door Nederland.

Vraag 6

Als er sprake is geweest van onderhandelingen en daarmee beperkingen van de vrije keuze van de voormalige koloniën, hoe kwalificeert u dan het volgende citaat in paragraaf 3.13 uit de voornoemde written statement 3): "However, if negotiations on such future cooperation are used by the administering State to influence the act of free choice by the people concerned, this may amount to unlawful interference and thus to a violation of the right of self-determination of this people"?

Antwoord

Voorop moet worden gesteld dat onderhandelingen over de toekomstige (staatkundige) relaties tussen een koloniaal gebied en de staat die het gebied bestuurt geen onderdeel uitmaken van de uitoefening van het zelfbeschikkingsrecht door een koloniaal gebied. Het plaatsvinden van onderhandelingen betekent daarom ook geenszins dat daarmee automatisch de vrije keuze van een koloniaal gebied voor een bepaalde politieke status wordt beperkt. AVVN Resolutie 1541 vereist dat integratie van een niet-zelfbesturend gebied dient te geschieden op 'voet van volledige gelijkheid' tussen de bevolking van het voormalige koloniale gebied en de onafhankelijke staat waarmee de integratie plaatsvindt. Dit sluit uit dat de onafhankelijke staat het koloniale gebied een bepaalde politieke status oplegt, maar het sluit ook uit dat het koloniale gebied eenzijdig de voorwaarden bepaalt waaronder de integratie plaatsvindt. Terwijl de keuze voor integratie dus vrijelijk dient plaats te vinden, zal doorgaans onderhandeld moeten worden over de voorwaarden waaronder een dergelijke integratie plaatsvindt. Dit was ook het geval ten aanzien van de integratie van de

Nederlandse Antillen en Suriname. De nieuwe rechtsorde die in de Grondwet van 1948 werd aangekondigd vergde behalve de instemming van Suriname en de Nederlandse Antillen ook de instemming van Nederland. Dit maakte onderhandelingen onvermijdelijk. De voor het zelfbeschikkingsrecht essentiële daad van vrije keuze werd verricht, toen in 1954 de in vrijheid gekozen parlementen van Suriname en de Nederlandse Antillen het Statuut voor het Koninkrijk aanvaardden.

Vraag 7

Zijn in de onderhandelingen om te komen tot dekolonisatie beperkingen aan de landen opgelegd in hun keuzes vanwege tekortkomingen in de voormalige koloniën van politieke-, economische-, sociale- of onderwijstechnische aard? Zo ja, hoe verhoudt zich dat met artikel 3 van het VN handvest 1514 dat aangeeft: "3. Inadequacy of political, economic, social or educational preparedness should never serve as a pretext for delaying independence"?

Antwoord

Nee, zie het antwoord op vraag 6.

Vraag 8

In paragraaf 3.23 van het written statement staat ook dat om te komen tot integratie dit "... 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 [...]." 4); hoe moet dit gelezen worden in het kader van de integratie van Sint Eustatius in het Nederlandse bestel zonder dat de inwoners van Sint Eustatius daar hun keuze in hebben kunnen maken?

Antwoord

Bovenstaande passage is afkomstig uit AVVN-resolutie 1541. Deze resolutie heeft, evenals de eerder aangehaalde AVVN-resolutie 1514, betrekking op de uitoefening van het zelfbeschikkingsrecht in een koloniale fase. De integratie van Sint Eustatius in het Nederlandse staatsbestel vond plaats in 2010, dus ruime tijd nadat deze fase voor de Nederlandse Antillen (waar Sint Eustatius onderdeel van was) met de totstandkoming van het Statuut en verwijdering van de lijst van niet-zelfbesturende gebieden een afronding kreeg. Zoals hieronder, in het antwoord op vraag 10, nader uiteen wordt gezet, laat deze afronding overigens onverlet dat het zelfbeschikkingsrecht in de post-koloniale fase die na 1954 aanbrak altijd is blijven gelden in de bewuste gebieden. Om deze reden is aan de staatkundige hervorming van het Koninkrijk een omstandig democratisch proces voorafgegaan. De bevolking van Sint Eustatius sprak zich in 2005 in een referendum in meerderheid uit voor behoud van het land de Nederlandse Antillen. Deze uitkomst bleek, vanwege andere referendumresultaten in Sint Maarten, Curaçao, Bonaire en Saba, echter niet haalbaar, waarna de eilandsraad van Sint Eustatius in een motie de bereidheid uitsprak om te komen tot nieuwe staatkundige verhoudingen. In het daaropvolgende besluitvormingsproces is door vertegenwoordigers van de inwoners van Sint Eustatius op verschillende momenten ingestemd met de

voorstellen voor nieuwe verhoudingen. Voor de wilsvaststelling van een bevolking erkent het internationale recht een verscheidenheid aan democratische methoden. Hoewel de integratie in het Nederlandse staatsbestel niet de eerste keuze vormde van de inwoners van Sint Eustatius, hebben zij (via hun vertegenwoordigende organen) deze keuze uiteindelijk gemaakt in het kader van een democratisch proces.

Vraag 9

In artikel 3.32 van het written statement wordt geschreven dat: "It is submitted that once the inhabitants of a colonial territory have, through their freely expressed will, genuinely exercised their right to self-determination through a choice for either independence, integration or association or the emergence into any other political status, the colonial status of the territory and the people concerned comes to an end." 5); blijkt hieruit dat het Koninkrijk der Nederlanden niet meer onder artikel 73 van het Handvest van de VN valt?

Antwoord

Ja.

Vraag 10

Hoe verhoudt zich dat tot de uitspraak van uw ambtsvoorganger tijdens de behandeling van het begrotingshoofdstuk Koninkrijksrelaties (IV) voor het begrotingsjaar 2017, waarin hij aangeeft dat het Koninkrijk nog steeds onder artikel 73 VN handvest valt?

Antwoord

Bij de beantwoording van deze vraag is het van belang om voorop te stellen dat het zelfbeschikkingsrecht van de Caribische delen van het Koninkrijk na de totstandkoming van het Handvest van de Verenigde Naties in 1945 steeds heeft gegolden en dat vandaag ook nog onverkort doet. Dit is door de Nederlandse regering meermaals erkend en kan ook op deze plek nog eens worden benadrukt. Ten opzichte van de situatie in oktober 2016, toen mijn ambtsvoorganger bovengenoemde uitspraak deed, is echter wel de grondslag van dit zelfbeschikkingsrecht gepreciseerd. Thans, na een nadere juridische analyse van de materie, is haar positie dat artikel 73 VN Handvest sedert de totstandkoming van het Statuut niet meer van toepassing is op Sint Eustatius en dat het zelfbeschikkingsrecht van de Caribische (ei)landen post-koloniaal van aard is. Deze precisering heeft overigens geen wezenlijke juridische gevolgen voor de betreffende (ei)landen. Zij laat namelijk onverlet dat Aruba, Curaçao, Sint Maarten, Bonaire, Sint Eustatius en Saba eenzijdig kunnen bepalen om de rechtsorde van het Koninkrijk te verlaten. Deze eenzijdige uittredingsmogelijkheid is, in ieder geval sinds het proces naar onafhankelijkheid van Suriname in de jaren 1974 en 1975, door de partners binnen het Koninkrijk meermaals erkend; zodanig dat inmiddels wordt aanvaard dat de bewuste mogelijkheid voor die (ei)landen waarvoor zij niet is gecodificeerd – alle Caribische delen behalve Aruba – de status heeft van ongeschreven Koninkrijksrecht. Wenst een Caribisch

(ei)land niet uit het Koninkrijk te treden maar verandering van status binnen het Koninkrijk, dan kan het op grond van het zelfbeschikkingsrecht in vrijheid zijn keuze voor een bepaalde status kenbaar maken en daarover in overleg treden met de overige partners binnen het Koninkrijk. Voor de uiteindelijke verwezenlijking van een verandering van de staatkundige verhoudingen binnen het Koninkrijk zijn wel de medewerking en instemming van die partners nodig.

Vraag 11

Heeft de VN-resolutie 1514 terugwerkende kracht? Zo ja, is dat met de landen en eilanden Aruba, Curaçao, Sint Maarten, Bonaire, Saba en Sint Eustatius besproken?

Antwoord

AVVN-Resolutie 1514 betreft de dekolonisatie van koloniale gebieden. Indien een gebied door de VN niet langer wordt aangemerkt als een koloniaal of niet-zelfbesturend gebied, dan vervalt daarmee ook de toepasselijkheid van AVVN-resolutie 1514. Ten aanzien van de Nederlandse Antillen en Suriname is deze situatie van toepassing sinds de integratie in het Koninkrijk in 1954.

Vraag 12

Wat is de zienswijze van de bovengenoemde landen ten aanzien van het definitief zijn van de dekolonisatie? Is daar formeel mee ingestemd?

Antwoord

De hierboven genoemde schriftelijke inbreng waarin de Nederlandse regering haar standpunt uiteenzet omtrent het karakter van het zelfbeschikkingsrecht, handelt niet over de Caribische delen van het Koninkrijk maar betreft een juridische procedure bij het Internationaal Gerechtshof over de dekolonisatie van Mauritius. Het is niet gebruikelijk om dergelijke schriftelijke of mondelinge inbreng in juridische procedures af te stemmen met de Caribische partners binnen het Koninkrijk. Daarvoor bestond ook inhoudelijk geen aanleiding, omdat de precisering in het standpunt van de regering, zoals hierboven uitgelegd, geen wezenlijke gevolgen voor deze partners met zich bracht.

Vraag 13

Is deze zienswijze ten aanzien van de dekolonisatie zoals verwoord in het written statement van februari 2018 gedeeld met de Tweede Kamer? Zo nee, waarom niet?

Antwoord

Vanwege het ontbreken van wezenlijke juridische gevolgen voor de Caribische (ei)landen is deze zienswijze niet met de Tweede Kamer gedeeld. Het 'written statement' is een procesdocument in een adviesprocedure dat is bestemd voor het Internationaal Gerechtshof en dat is ingediend na een verzoek daartoe door het Hof. Het is het prerogatief van het Hof om te besluiten of en wanneer een dergelijk document openbaar wordt gemaakt. In het kader van de

adviesprocedure inzake de dekolonisatie van Mauritius heeft het Hof besloten om procesdocumenten, waaronder het 'written statement' van Nederland, op de dag van de start van de hoorzitting openbaar te maken.

Vraag 14

Wat is er veranderd in de zienswijze van het kabinet in de periode tussen de uitspraak ten aanzien van artikel 73 van het VN handvest van uw ambtsvoorganger en het schrijven van het zgn. "written statement" waarin staat dat dekolonisatie na een eerste keuze van de voormalige koloniën definitief is? Hoe zijn de landen en eilanden van het Caribisch deel van het Koninkrijk betrokken bij de totstandkoming van het "written statement"?

Antwoord

Zie het antwoord op de vragen 10 en 12.

Vraag 15

Bent u bekend met het "[in] accordance with international law of the unilateral declaration of independence by the provisional institutions of self-government of Kosovo. Written statement of the Kingdom of The Netherlands"?

Antwoord

Ja.

Vraag 16

In paragraaf 3.7 van het written statement staat: "[...] if States are not conducting themselves in compliance with the principle of equal rights and self-determination of peoples as described above and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour" 9), afkomstig uit VN-resolutie 2625 10); kunt u aangeven wie of wat, in de context van het Koninkrijk, de rol van 'government' heeft binnen het Koninkrijk conform de eisen van het VN handvest?

Antwoord

Het begrip 'government' in AVVN-resolutie 2625 heeft een brede strekking. Er wordt niet slechts de (centrale) regering van een staat mee bedoeld, maar de overheid in ruime zin, dus inclusief de wetgevende en rechtsprekende organen van een staat. In de context van het Koninkrijk vervullen bijgevolg meerdere actoren een rol bij het vertegenwoordigen van de bevolking. In dit verband valt allereerst uiteraard te wijzen op de wetgever van het Koninkrijk. Dit is een samengesteld orgaan, waarin de vertegenwoordiging van de burgers van het Caribisch deel van het Koninkrijk op verschillende manieren is georganiseerd. Burgers van Caribisch Nederland worden vertegenwoordigd in beide Kamers van de Staten-Generaal en worden bij de samenstelling hiervan in gelijke mate betrokken als burgers van Europees Nederland. Burgers van Aruba, Curaçao en Sint Maarten beschikken over een eigen parlement. Deze parlementen, de Staten,

worden bij het proces van rijkswetgeving betrokken via een in het Statuut neergelegde procedure. Bij het vertegenwoordigen van de bevolking is in de tweede plaats een belangrijke rol weggelegd voor de regering van het Koninkrijk, zowel in haar hoedanigheid als onderdeel van de rijkswetgever als waar zij optreedt als uitvoerende macht. Voor burgers van Caribisch Nederland geldt wederom wat ook voor burgers van Europees Nederland geldt: zij kiezen de leden van de Tweede Kamer, waarna een kabinet wordt geformeerd dat het vertrouwen van de Kamer geniet. Voor de vertegenwoordiging van burgers van Aruba, Curaçao en Sint Maarten is in het Statuut de figuur van de Gevolmachtigde minister in het leven geroepen. Deze functionarissen maken deel uit van de rijksministerraad en handelen hierin namens de regeringen van hun landen, die, via het vehikel van verkiezingen, op hun beurt weer gelegitimeerd worden door de bevolkingen hiervan. De Gevolmachtigde ministers hebben stemrecht in de rijksministerraad en vergaderen mee over Koninkrijksaangelegenheden, welke hun land raken.

Vraag 17

Indien op vraag 16 het antwoord de Rijksministerraad is, kunt u dan aangeven hoe het vertegenwoordigen van alle mensen binnen het Koninkrijk binnen de Rijksministerraad is geborgd? Hoe verhoudt zich dat met het slechts hebben van een raadgevende stem van de Gevolmachtigde Ministers in deze Rijksministerraad conform het Reglement van Orde voor de Ministerraad 11), artikel 3 lid 1a?

Antwoord

Zie wat betreft het eerste gedeelte van de vraag het antwoord op vraag 16. Met betrekking tot het tweede gedeelte van de vraag zij gewezen op het feit dat Gevolmachtigde ministers in de Rijksministerraad geen raadgevende stem hebben, maar volwaardig stemrecht, evenals ministers van het Nederlandse kabinet. Artikel 3 lid 1 sub a van het Reglement van orde voor de ministerraad ziet toe op de in artikel 10 lid 2 van het Statuut beschreven mogelijkheid dat Aruba, Curaçao of Sint Maarten een *lands*minister afvaardigt om naast de Gevolmachtigde minister aan de Rijksministerraad deel te nemen.

Vraag 18

Kunt u alle vragen separaat beantwoorden?

Antwoord

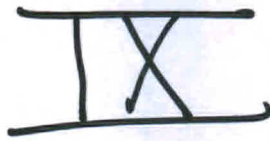
Ja.

Vraag 19

Kunt u de vragen beantwoorden voor de komende plenaire begrotingsbehandeling in oktober a.s.?

Antwoord

Ja.



De heer **Bosman** (VVD):

Het is altijd goed om naar mij te luisteren, zou ik tegen de heer De Graaf willen zeggen.

Voorzitter. Het is vandaag 8 oktober 2019. Over twee dagen is het 10-10-2019, exact negen jaar na het tekenen van het nieuwe Statuut en het ingaan van een nieuwe periode van het Koninkrijk. Wat hebben die afgelopen negen jaar ons en het Koninkrijk gebracht en, vooral, wat heeft het de bevolking op de eilanden gebracht? Dat is wel een terugblik waard, zou ik zeggen.

Over de ontwikkelingen op Bonaire, Saba en Sint-Eustatius wil ik aangeven dat dit kabinet serieus stappen zet ter verbetering van de positie van de inwoners van de eilanden. Staatssecretaris van Sociale Zaken en Werkgelegenheid Tamara van Ark heeft concrete stappen gezet om te komen tot een sociaal minimum. Dat is een belangrijk onderdeel om te komen tot een betere inkomenspositie van de mensen op de eilanden Bonaire, Saba en Sint-Eustatius. Een belangrijk onderdeel van het sociaal minimum zijn de kosten van het levensonderhoud. Het is namelijk heel makkelijk om het inkomen te verhogen zonder dat je de kostenkant goed bekijkt.

De Kamer heeft recentelijk een schriftelijk overleg gevoerd met het gehele kabinet ten aanzien van de verschillende ontwikkelingen op de eilanden Bonaire, Saba en Sint-Eustatius. De antwoorden zijn nog niet geheel bemoedigend en de Kamer heeft vervolgvragen aangekondigd. De kostenkant van de problematiek moet namelijk zeker aangepakt worden. Een eiland met 1.500 inwoners kan niet rendabel investeren in een energievoorziening. Internet voor een kleine gemeenschap is altijd duur. Verbindingen tussen de eilanden met kleine volumes maakt vliegen kostbaar. Daar gaan we dus zeker nog op doorvragen.

Het lokale bestuur op Bonaire, Saba en Sint-Eustatius kan en moet ook veel meer zelf doen. Ik haal mijn jarenlange pleidooi voor landbouw maar weer eens aan. Ook voor het zelf gaan importeren van voedsel, los van de vaste invoerlijnen en de vaste spelers op het terrein, heb ik vaker gepleit. Beide gaan nu voorzichtig een begin krijgen. Over de landbouw op Bonaire blijf ik nog steeds de vraag houden waar het miljoen per jaar heen is gegaan, want er is geen spa de grond ingegaan voor dat miljoen per jaar. Dat kan niet waar zijn, want landbouw zorgt voor gezond voedsel tegen lagere prijzen. Gelijktijdig levert het werkgelegenheid op, die van belang is om weer een inkomen te krijgen waarmee mensen weer een bestaan op kunnen bouwen. Daarmee is de cirkel bijna rond.

De zorg over armoede onder ouderen is een zorg die de VVD deelt. Het is dan ook juist van belang om de kosten van het levensonderhoud voor die groep naar beneden te brengen. Hun verdien capaciteit is zeer beperkt, of je zou toch weer moeten kijken naar het subsidiëren van de inkomstenkant. Zeker goedkopere voeding die op het eiland zelf wordt verbouwd, is dan van essentieel belang, naast het verlagen van de kosten voor wonen, elektriciteit en internet, om maar een paar vaste lasten te noemen.

Maar ook de infrastructuur, de wegen, is iets wat voortvarender kan en moet worden aangepakt. Dat ligt op het terrein van de collega van Infrastructuur en Waterstaat, begrijp ik. Ik zal dit in de schriftelijke ronde dan ook zeker aan de orde stellen bij haar. Ik denk dat we het nu toch moeten melden, want het zijn zaken die binnen het Koninkrijk afgesproken worden. Eigenlijk was het een nulmeting. Als je kijkt naar 10-10-2010, is de nulmeting van waar infrastructuur aanwezig is en waar we uit gaan komen, nooit echt goed gebeurd. We zijn daar nooit echt goed uitgekomen.

Het bestuur op Bonaire mag sowieso wel wat kritischer zijn, zeg ik tegen de staatssecretaris. Ik heb begrepen dat het openbaar lichaam nieuwe auto's heeft aangeschaft en dat er ook een aantal in de dieselvans zijn gekocht. Zo veel kilometers worden er toch niet gemaakt op het eiland, vraag ik de staatssecretaris. Waarom is er niet gekozen voor elektrisch vervoer? Het gaat om beperkte afstanden en er is heel veel zon waardoor je kunt opladen met zonne-energie. Misschien heb ik het helemaal mis, maar dat hoor ik dan graag van de staatssecretaris.

We moeten wel constateren dat de vrije uitkering van de eilanden geen gelijke tred heeft gehouden met de uitgaven en verantwoordelijkheden van de eilanden. De eilanden knopen nu de eindjes aan elkaar met incidentele meevallers. Dat kan nooit de bedoeling zijn geweest. Die tekortkoming komt ook duidelijk naar voren in het advies van de Raad van State. Hoe gaat de staatssecretaris dit ondervangen?

In de voorlichting van de Raad van State komt ook duidelijk naar voren dat alle eilanden verschillend zijn. Dat zal u niet verbazen, want ik heb dat vaker gezegd. BES bestaat niet. Het zijn de eilanden Bonaire, Saba en Sint-Eustatius. Ik ben blij dat dit nu bestuurlijk wordt doorgevoerd. Ik hoop ook dat dit ambtelijk zijn beslag gaat krijgen, want hoe minder bemoeienis vanuit Den Haag, hoe beter eigenlijk. Maar versterk de lokale besturen dan wel om daadwerkelijk invulling te geven aan hun eigen bestuurstaken.

Voorzitter. Ik wil niet vooruitlopen op alle andere problemen die er nog zijn, want de staatssecretaris heeft aangegeven dat we daar nog serieus over gaan praten, omdat het advies net uit is.

De heer Van Raak (SP):

Ik had vorig jaar voorgesteld om de Rijksvertegenwoordiger op te heffen en Saba gewoon als Saba te behandelen, Statia als Statia en Bonaire als Bonaire. Ik zie dat nu ook terugkomen in het advies van de Raad van State. Daar ben ik heel blij mee. Is de heer Bosman het er namens de VVD mee eens dat de Rijksvertegenwoordiger in ieder geval op termijn, maar liefst snel, opgeheven kan worden?

De heer Bosman (VVD):

Ja, maar daar stond nog een toevoeging bij, namelijk dat er toch wel een soort klankbord zou moeten zijn om even met elkaar te bediscussiëren wat de verstandigste weg is om zo'n gezaghebber niet gelijk op het bordje van de minister neer te zetten en vice versa. Ik ben dus heel benieuwd hoe die structuur precies zal zijn en wat de rol precies zal zijn. Want dit klinkt toch een beetje als Rijksvertegenwoordiger zonder de functie van de Rijksvertegenwoordiger. Ik ben een beetje op zoek naar hoe dat gaat. Maar ik ben het er helemaal mee eens dat we het goed moeten regelen. Er moeten niet te veel lagen zijn. Aan de andere kant moet het lokale bestuur wel in staat zijn om te doen wat het moet doen.

De heer Van Raak (SP):

Daar heb ik een vervolgvraag over. De heer Bosman was erbij toen we op ons initiatief in januari 2015 een Saba summit hadden. Daar is afgesproken dat Saba meer zelf zou gaan doen, bijvoorbeeld op het gebied van werkvergunningen. Elk jaar heeft de Tweede Kamer Kamerbreed gezegd dat Saba zelf werkvergunningen moet kunnen verschaffen. De Kamer is zelfs zo boos geweest dat ze drie staatssecretarissen heeft uitgenodigd om een apart overleg te houden over de werkvergunningen op Saba. Tot mijn grote spijt en verdriet zijn we bijna vijf jaar later en is dit niet geregeld. Is de heer Bosman het met mij eens dat dit geen manier van doen is en dat we tegenover de bevolking van Saba in ons hemd staan als wij als Tweede Kamer vijf jaar lang moet vechten om Saba werkvergunningen te kunnen laten geven en dat gewoon niet lukt?

De heer Bosman (VVD):

Ik deel de teleurstelling van collega Van Raak. We hebben daar een goed gesprek over gehad, ook met de ambtenaren die bezig waren om dat toch te regelen. Dan kom je in het Nederlandse woud van regelgeving en juridische zaken terecht. Het is verjuridiseerd. Ik ben op zoek naar een pilot, een eenvoudige oplossing voor de discussie die we nu voeren. Bruce Zagers is op bezoek geweest. Hij zegt: we zijn druk aan het bouwen. De haven wordt gebouwd. Huizen worden gebouwd. Hotels worden gebouwd en het enige probleem is: bouwvakkers. Bouwvakkers! We krijgen ze niet binnen en we kunnen ze niet aannemen. Die zorg deel ik dus. Kan er geen pilot komen voor dit soort overduidelijke zaken? Als hiervoor geen mensen aanwezig zijn op een eiland als Saba, helpen we de economische ontwikkeling daar eigenlijk de vernieling in, omdat

Saba niet in staat is om die mensen binnen te krijgen. Misschien moeten we daar toch naar op zoek gaan in de schriftelijke ronde.

De voorzitter:

Gaat u verder.

De heer **Bosman** (VVD):

Het Statuut is ook de relatie tussen Nederland, Aruba, Curaçao en Sint-Maarten. Met de aanpassing van 10-10-10 zijn Curaçao en Sint-Maarten ook een autonoom land geworden naast Aruba. Terugkijkend naar de afgelopen negen jaar kan ik niet anders dan concluderen dat het Statuut niet werkt. Het piept, het kraakt en het schuurt binnen het Koninkrijk, omdat niemand ook maar enig idee heeft wie waarvoor verantwoordelijk is. Het is het cafetariastatuut: als het je uitkomt, ben je ervan, maar als het lastig is, duik je allemaal. Ja, dan duiken we allemaal, including me.

Samen met collega Van Raak van de SP ben ik al heel lang bezig om te komen tot een werkbaar Statuut. Samen met collega Van Raak heb ik een initiatiefnota geschreven om te komen tot een gemeenebest van onafhankelijke landen binnen het Koninkrijk. We wilden het vooral als discussiestuk neerleggen, zodat andere landen en partijen met hun ideeën zouden komen. Het bleef angstvallig stil aan de andere kant van de oceaan.

In de brief van de staatssecretaris over de uitvoering van de motie-Van Raak cum suis schrijft de staatssecretaris: "Zoals de motie zelf nadrukkelijk erkent, is hiervoor ook draagvlak nodig bij de Caribische landen van het Koninkrijk. Teneinde dit draagvlak vast te stellen, heb ik de ministers-presidenten van Aruba, Curaçao en Sint Maarten schriftelijk verzocht om een gezamenlijke werkgroep te vormen, waarin op ambtelijk niveau de knelpunten met betrekking tot voornoemd thema in kaart kunnen worden gebracht en een proces kan worden ingericht. Na ommekomst van de reacties van de ministers-presidenten van Aruba, Curaçao en Sint Maarten zal ik u informeren over het vervolg."

Voorzitter. Ik zet er een goede fles wijn op dat er geen gezamenlijke werkgroep gaat komen. Nog een fles wijn erop dat deze werkgroep niet bij elkaar gaat komen. Ik doe er een etentje bovenop met de stelling dat er geen proces zal worden ingericht. En niet omdat ik geloof dat deze staatssecretaris het niet kan — als iemand het kan, is hij het wel — maar dit is namelijk hoe het gaat binnen het Koninkrijk. Aruba, Curaçao en Sint-Maarten hebben helemaal geen behoefte aan een aanpassing van het Statuut. Er zouden eens afspraken gemaakt worden over wie waarvoor verantwoordelijk is. Dan kun je als Arubaanse minister-president Nederland niet meer de schuld geven van het niet aan kunnen pakken van de corruptie.

Ik citeer die minister-president van Aruba: "Aruba heeft ambitieuze beleidsvoornemens op het gebied van integriteit. De uitvoering van de plannen loopt echter vertraging op vanwege de druk die vanuit Nederland wordt uitgeoefend om de overheidsuitgaven, met name de personeelskosten, te verlagen." Dan heb je het niet begrepen. Het probleem van de personeelskosten is namelijk juist de basis van al die problemen. Nepotisme en vriendjespolitiek leiden ertoe dat bestuurders denken dat ze voordeeltjes moeten geven aan al die vrienden en bekenden. Dat wil kennelijk maar niet doordringen bij bestuurlijk Aruba.

Op Sint-Maarten is binnen tien jaar het negende kabinet aan de lat. Waarom valt een kabinet? Omdat de nieuwe meerderheid geen pottenkijkers uit Nederland wil. Er gaat zo meteen bijna 500 miljoen besteed worden op het eiland. Daar willen mensen persoonlijk een graantje van meepikken. En dus vooral geen toezicht op de bouw van een vliegtuigterminal. Vooral niet de expertise en governance van Schiphol, geen kleine speler in dit gebied, benutten, maar het gewoon weer helemaal zelf regelen. Dan kost het nieuwe dak van de terminal 1.500 dollar per vierkante meter. Voor die vierkantemeterprijs kun je een huis laten bouwen. Niet zomaar een huis, een riant huis. Iemand wordt er rijk van, maar het gaat ten koste van de lokale bevolking.

En gekozen volksvertegenwoordigers — hoewel: vertegenwoordigers? — laten het gebeuren. Daar kun je als Nederland of als Koninkrijk niks aan doen.

Gelukkig is er wel succes geboekt met het Team Bestrijding Ondernijning, ook weer een initiatief van collega Van Raak en mijzelf om extra researchcapaciteit te creëren om de ondernijnde criminaliteit aan te pakken. Bestuurders op Aruba, Curaçao en Sint-Maarten maken zich sinds de komst van het TBO al veel drukker om een goede en menswaardige gevangenisopvang. Ze zouden er zomaar eens zelf in kunnen verdwijnen. Volgend jaar loopt het programma af. Is er al zicht op verlenging van dit succesvolle project, zo vraag ik de staatssecretaris.

De tegenwerking en bestuurlijke onwil op de eilanden zijn vaak nog te groot. De financiële belangen op een klein eiland zijn ook vaak heel groot. Het is heel moeilijk om de druk te weerstaan op een klein eiland. Ook daar heeft de VVD begrip voor. **Maar zo doorpolderen in het Statuut is voor de VVD geen optie meer.**

De heer **Van Dam** (CDA):

Ik ging heel verwachtingsvol naar dit debat toe. Ik dacht: collega Bosman heeft een steen bij zich. Want in de krant heeft hij aangekondigd dat hij een steen in de vijver gaat gooien.

De heer **Bosman** (VVD):

Ja.

De heer **Van Dam** (CDA):

Wat heeft u nog meer gezegd? Althans, dat wordt gezegd. **U bent klaar met de afspraken tussen Nederland, Curaçao, Aruba en Sint-Maarten en het Statuut kan in de prullenbak.**

De heer **Bosman** (VVD):

Ja.

De heer **Van Dam** (CDA):

Als het gaat om consequente standpunten, moet ik collega Bosman één ding nageven: in de tien jaar dat hij zich al met hart en ziel voor deze portefeuille inzet en in het ene jaar dat ik hem hierin heb meegemaakt, heb ik hem op dit punt heel consequent gezien. Maar collega Bosman eindigde met de quote: "Ik wil dit wel, maar zo'n gesprek komt nooit van de grond. We hebben het al eerder gezien, maar het gaat toch niet wat worden." Dus dan denk ik bij mijzelf, met alle respect: roept u dit nu weer om het te roepen? U weet dat we vastzitten aan het Statuut. Gaat u met oorlogsschepen optrekken naar de eilanden? Wat is nou echt het perspectief dat u voor ogen hebt?

De heer **Bosman** (VVD):

Collega Van Dam is net te vroeg. Ik begin net. Hier komt het verhaal over het Statuut.

De **voorzitter**:

Nou, dan stel ik voor dat u even het vervolg afwacht, meneer Van Dam.

De heer **Van Dam** (CDA):

Ik wacht op de steen.

De **voorzitter**:

Die wordt zo gegooid, denk ik.

De heer **Bosman** (VVD):

Ik heb nog zeven minuten, voorzitter.

De voorzitter:

Ja, gaat uw gang.

De heer Bosman (VVD):

Voorzitter. De VVD is dan ook van mening dat veel rigoureuzere stappen nodig zijn om het Koninkrijk tot een werkbaar geheel te maken. Er moet een deadline komen en Nederland moet gewoon aangeven dat bij het niet behalen van een deadline Nederland uit het Statuut stapt en we niet meer gehouden zijn aan de afspraken binnen het Statuut, daarmee de facto een Gemenebest van onafhankelijke landen creërend. Pas als er druk op komt te staan, zal er beweging gaan komen.

En nu is het ook de tijd. Uit de verschillende vragen van mij en antwoorden van het kabinet blijkt dat we niet meer in een dekolonisatietijd zitten, maar dat we nu in een Koninkrijksverband zitten. En dat was een vraag die ik al vaker had gesteld. Vallen we nog onder artikel 73 van het VN-Handvest? Dat is dus niet meer zo. Dat is goed om te weten, maar dat heeft ook consequenties voor alle landen. Daarom is een aanpassing van het Statuut nu dus essentieel. Als er geen sprake meer is van dekolonisatie en we dus in een postkoloniale fase zitten, is het tijd om daadwerkelijk tot gelijkwaardigheid binnen het Koninkrijk te komen. Want wat ik nog steeds niet begrijp, is dat de voormalige koloniën, nadat ze eenmaal hebben gekozen voor hun status, gedekoloniseerd zijn maar wel het recht behouden tot uittreding. Op basis waarvan hebben zij dan het recht tot uittreding als we praten over het postkoloniale tijdperk, vraag ik de staatssecretaris.

In zijn beantwoording schrijft de staatssecretaris dat het gaat om het ongeschreven Koninkrijksrecht. Is dat Koninkrijksrecht dan wel eeuwigdurend en, zo ja, waarom dan? Als het gaat om erkenning door de partners binnen het Koninkrijk van het recht tot eenzijdig uittreden, wanneer kan Nederland dan op die erkenning rekenen? Hoe krijgen wij als Nederland de erkenning tot uittreding? Want uittreding uit het Koninkrijk heeft niets meer met kolonialisme te maken, het gaat dus om wederzijdse erkenning.

De Nederlandse overheid werkt trouwens ook mee aan de verwarring ten aanzien van het Koninkrijk. In de schriftelijke beantwoording van mijn vragen geeft de staatssecretaris aan dat de inbreng van de written statement was gedaan door de Nederlandse regering. En dat is bijzonder want het Internationaal Strafhof kent het land Nederland helemaal niet. Sterker nog, de titel zoals die is gebruikt luidt: "International Court of Justice, Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, written statement of the kingdom of the Netherlands". Dus niet Nederland maar "the kingdom". Het Koninkrijk wordt om een geschreven advies gevraagd. Dan is het wel heel bijzonder dat daar waar het gaat om dekolonisatie, de landen binnen het Koninkrijk niet wordt gevraagd naar hun mening. Opeens is dan het Koninkrijk weg en gaat het over de Nederlandse regering. Als het Europees Hof voor de Rechten van de Mens Nederland aanspreekt over misstanden op Sint-Maarten en Curaçao met "the Netherlands" dan wijzen we snel naar het Koninkrijk en zijn we er niet van. Dat laatste is ook terecht, maar het geeft de totale schizofrenie weer van dit Koninkrijk in het Statuut waarop het is gebaseerd.

Want wat is het Koninkrijk nu? Wie is nu de regering van het Koninkrijk? Daar komt ook een heel uitgebreid antwoord op omdat er geen eenduidig antwoord is te geven. De kern van het antwoord is dat de landen van het Koninkrijk betrokken worden bij de besluitvorming die de landen raakt. Dat gebeurt dan in de Rijksministerraad maar wordt gedaan door een ambtenaar van het land Aruba, Curaçao of Sint-Maarten. Het zijn namelijk vertegenwoordigers die namens het land zitting nemen in de Rijksministerraad. Maar wat zijn dan de onderwerpen die de landen raken, vraag ik de staatssecretaris. Mag ik aannemen dat als er over defensie wordt gesproken, het gaat over een belang dat de landen raakt? Het gaat namelijk ook over hun veiligheid. Maar ook het economisch belang van Nederland raakt de belangen van Aruba, Curaçao en Sint-Maarten, want economische groei in Nederland helpt de landen. Ik durf zelfs te stellen dat het Nederlandse monetaire beleid de belangen raakt van de landen, want als de rente in Nederland stijgt, gaan de landen meer rente betalen over hun leningen.

Ik weet natuurlijk niet wat er besproken wordt in de Rijksministerraad maar ik durf te beweren dat als de landen niet specifiek benoemd worden op de agenda van de Rijksministerraad er geen sprake is van het belang voor het Koninkrijk. En dat is natuurlijk een hele bijzondere figuur. Het Koninkrijk bestaat namelijk altijd en de belangen binnen het Koninkrijk zijn gedeelde belangen. Waarom is er dan geen sprake van een permanent bestuur met een permanente bezetting? Graag een toelichting van de staatssecretaris.

Want als het Koninkrijk altijd bestaat, dan moet de Koninkrijksregering van samenstelling veranderen. Dan kan het niet meer zo zijn dat er een vertegenwoordiger van een van de landen aanschuift. Dat is ook conform het door Nederland zelf gegeven statement: "if States are not conducting themselves in compliance with the principle of equal rights and self-determination of peoples and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour". Dan moet de regering van het Koninkrijk dus een heel andere vorm gaan krijgen. Is de staatssecretaris dat met mij eens?

Voorzitter. Als we geen duidelijkheid krijgen over wie verantwoordelijk is voor wat en als we maar doorpolderen in dit cafetariastatuut, dan is het voor de VVD tijd om duidelijke stappen te gaan ondernemen: dan wordt het tijd om het Statuut in de prullenbak te gooien.

Dank u wel.

De heer **Van Raak** (SP):

Ik ben heel benieuwd naar de uitvoering van mijn motie. Die verzocht te kijken of landen bereid zijn om te spreken over een nieuwe verdeling van verantwoordelijkheden. Ik durf daarbij geen weddenschap met de heer Bosman aan te gaan, want dat kost me twee flessen wijn. Hij wil dan ook nog eens goede flessen wijn hebben, en ik ben maar een eenvoudige socialist. Maar begint die discussie niet met het feit dat ook Nederland in die discussie een opvatting of een visie heeft op het Koninkrijk?

De heer **Bosman** (VVD):

Dat is het mooie van de discussie die we, ook schriftelijk, hebben gevoerd. We zitten nu in een postkoloniaal tijdperk. Daarin zijn we eigenlijk allemaal niet meer gehouden aan die koloniale zaken die vallen onder artikel 73. Juist nu is het het moment om ook vanuit Nederland te zeggen wat wij willen. Daarom zeg ik als VVD'er ook: joh, als het niet werkt, dan stoppen we ermee. Dan kun je uitzoeken wat je wil, maar dan stoppen we ermee.

De heer **Van Raak** (SP):

Ik loop hier al lang mee in de Kamer. We hebben in het verleden als Kamer de regering om een visie gevraagd. Dat was nog onder Donner. Toen kregen we een donneriaans rapport — daar stond dus niks in. Als de heer Bosman het meent, en ik ben van harte met hem eens dat de tijden zijn veranderd en dat het Koninkrijk is mislukt ...

De heer **Bosman** (VVD):

Het Statuut, bedoelt u.

De heer **Van Raak** (SP):

Het Statuut is mislukt. Dan lijkt het me goed om ermee te beginnen om aan de Nederlandse regering een visie op het Koninkrijk en op de verdeling van verantwoordelijkheden te vragen. Zo'n stuk zou namelijk volgens mij een heel goed uitgangspunt zijn voor een discussie met de andere landen. Ze worden dan namelijk gedwongen om daar een reactie op te schrijven.

De heer **Bosman** (VVD):

De motie vraagt volgens mij om gezamenlijk te komen tot een herverdeling van verantwoordelijkheden. Ik denk dat het van belang is dat wij als Nederland ook aangeven waar het piept en schuurt. Wij moeten als Nederland aangeven: jongens, luister, binnen dit Statuut hebben wij hier moeite mee, daar een probleem mee en daar een probleem mee, maar wij zien

kansen voor dit en dit. Volgens mij is dat een prima soort van uitgangsnote waarin je kunt aangeven: joh, dit is wat wij vinden; wat vinden jullie? Laten we dan maar eens kijken of we bij elkaar komen. En misschien kost dat me dan wel twee flessen wijn en een etentje!

De voorzitter:

Jullie zijn het steeds met elkaar eens, zie ik! Klopt dat?

De heer Bosman (VVD):

Nou, we komen een heel eind.

De voorzitter:

De heer Van der Graaf.

De heer De Graaf (PVV):

Zeg maar "De Graaf".

De voorzitter:

Sorry, meneer De Graaf.

De heer De Graaf (PVV):

Geeft niks, voorzitter. Het is alweer dinsdagmiddag.

De voorzitter:

Het is mevrouw Van der Graaf, maar de heer De Graaf.

De heer De Graaf (PVV):

Dank aan de heer Bosman voor zijn uiteenzetting. Het is namelijk niet eens een schizofrene situatie, maar misschien wel een quadrofrene situatie of een oligofrene situatie! Er zijn zo veel actoren, zo veel juridische geschriften, zo veel statuten en noem maar op. Ik denk dat het voor heel veel mensen heel duidelijk is geworden hoe moeilijk de zaak in elkaar steekt, door het betoog van de heer Bosman. Dus dank daarvoor.

Maar dan komt de volgende stap. "Het Statuut opheffen", zegt de heer Bosman. Dan is het Statuut er dus niet meer. Wat is dan voor de heer Bosman de volgende stap, behalve de twee flessen wijn en het etentje, en het praten over een visie? Wat wordt concreet de volgende stap?

De heer Bosman (VVD):

Dat heb ik opgeschreven. Naar mijn idee hebben we dan nog steeds het Koninkrijk, maar geen Statuut meer. Dat betekent dat je vier onafhankelijke landen hebt binnen het Koninkrijk.

De heer De Graaf (PVV):

Oké, dat maakt het toch iets duidelijker dan daarnet. Dan heb je dus vier onafhankelijke landen binnen het Koninkrijk. Is dat dan het gemenebest waar de heer Bosman het eerder over heeft gehad in zijn initiatiefnota? Wat gebeurt er dan met de drie bijzondere gemeenten die we in het Koninkrijk hebben? In mijn eigen inbreng heb ik gezegd dat het een beetje op de Marktplaatsoptie lijkt die we zelf weleens benoemd hebben in het verleden. Dat was een jaar of tien, elf terug. Ik wil boter bij de vis, maar ik begrijp nu dat het Koninkrijk gewoon blijft bestaan. Dan blijven dus ook de interne en onderlinge problemen gewoon bestaan.

De heer Bosman (VVD):

Nee, want het mooie is dat je, als je onafhankelijk bent, verantwoordelijk bent voor je eigen problematiek. Als je dan wilt samenwerken, doe je dat op basis van gelijkwaardigheid, waarbij je kan vragen om hulp maar waarbij je ook kan zeggen: joh, zoals jij het geregeld hebt, ga ik het niet doen. We hebben nu het Statuut met een waarborgfunctie; de landen zijn zelfstandig verantwoordelijk voor het waarborgen van goed bestuur. Maar dat wordt ook nog eens

gewaarborgd door het Koninkrijk via artikel 43, lid 2. Daarmee ontstaat een verantwoordelijkheid voor zaken waarvan de VVD wil kunnen zeggen: wacht even, zoals jullie dat regelen, willen we dat niet. Het is van belang dat je dat helder maakt als er vier onafhankelijke landen zijn binnen het Koninkrijk. Bonaire, Saba en Sint-Eustatius horen gewoon bij Nederland. Als zij andere keuzes willen maken, is dat aan hen, maar het gaat mij nu specifiek om de vier landen binnen het Koninkrijk.

De voorzitter:

De heer De Graaf, tot slot op dit punt.

De heer De Graaf (PVV):

Ik heb nog een korte praktische vraag aan het eind, want wij zouden het inderdaad kort houden. Krijgen we deze week, in deel twee van dit debat — donderdagmorgen geloof ik — dan een motie van de heer Bosman waarin inderdaad wordt gesteld dat het Statuut moet worden opgeheven?

De heer Bosman (VVD):

Dat zou zomaar kunnen. Ik ga even kijken. We geven natuurlijk eerst altijd even ruimte aan de staatssecretaris — dat vind ik netjes — in plaats van direct te zeggen dat we een motie gaan indienen. Ik luister dus eerst naar de staatssecretaris. Maar ik kan me voorstellen dat de regering het moeilijker vindt om dat zomaar neer te leggen. Dat zou zomaar kunnen, ja.

De heer Van Dam (CDA):

Ik kom toch toe aan mijn tweede termijn ...

De voorzitter:

Die steen waar u naar gevraagd heeft, hè?

De heer Van Dam (CDA):

Ja, ik zocht naar die steen. Ik moet zeggen dat die steen het beste te kwalificeren is — ik waarschuw collega Van Raak maar — als oude wijn in nieuwe zakken. Ik wil de heer Bosman toch wat vragen. U weet dat ik er fundamenteel anders tegenover sta. Ik zie de Koninkrijksverbanden als familieverbanden, en van je familie ontdoe je je ook niet op een dinsdagmiddag. U bent vast op de hoogte van de situatie op Sint-Maarten. Vorige week hebben de leden van de Kiesraad daar hun baan opgezegd. Dat vind ik een enorm democratische daad. Zo zijn er op al die eilanden nieuwe generaties, die andere dingen willen. Wat is nou het verhaal van de VVD voor die mensen? Dat is toch eigenlijk gewoon de mensen in de steek laten? Ik kan het niet anders zeggen.

De heer Bosman (VVD):

Maar dat is een beetje een koloniale gedachte. Die ben ik voorbij. Ik vind namelijk dat we mensen in hun kracht moeten zetten. Het is juist van belang dat de problemen opgelost worden op de eilanden en dat men weet dat er maar één verantwoordelijke is voor het oplossen van die problemen, namelijk de eilanden zelf. Het is een beetje alsof je een alcoholverslaafde iedere keer weer een beetje alcohol geeft: joh, hier, je krijgt toch nog een beetje. Nee, het gaat erom wie waarvoor verantwoordelijk is. Daar moet je in een keer duidelijk over zijn: dit is jouw verantwoordelijkheid, pak die op, doe het, regel het.

De heer Van Dam (CDA):

Als wij mede-Koninkrijksgenoten vergelijken met alcoholverslaafden, ben ik even uitgepraat.

De heer Bosman (VVD):

Die is heel makkelijk. Het was een voorbeeld in algemene termen, over het risico dat je mensen niet van een probleem afhelpt, maar het blijft ondersteunen. Als de heer Van Dam dat niet wil zien, vind ik dat heel jammer. Dat is een gemiste kans, want het is een probleem en als je dat niet wilt aanpakken, dan blijven we doormodderen en doorpolderen. Dat is heel jammer.

Mevrouw Diertens (D66):

Ik probeer een beetje rustig te blijven, maar de stoom komt zo onderhand uit mijn oren. Dit is inderdaad oude wijn in nieuwe zakken. We kennen het verhaal van de heer Bosman onderhand wel. Wat ik zo erg vind, is dat u schermt met de uitspraak "wij willen niet koloniaal zijn". Maar als ik naar u kijk en u zie staan — ik heb me erg verdiept in het onderwerp van een lezing die ik vrijdagavond moet geven over Het Witte Geweten — dan denk ik: u bent wel heel erg koloniaal bezig op dit moment. Bent u ...

De heer Bosman (VVD):

Sorry hoor, voorzitter, maar ik vind dit echt verbazingwekkend.

Mevrouw Diertens (D66):

Bent u dat met mij eens?

De heer Bosman (VVD):

Nee, dit is bijna een persoonlijk feit. Ik vind het verbazingwekkend. Het betekent namelijk dat je als Nederland niets mag zeggen over de toekomst van je eigen land, van het Statuut, van de organisatie waar we in zitten, van zaken waar we ook verantwoordelijk voor zijn. Moeten we stilzitten op de achterbank en kijken wat er gebeurt met Nederland, met het Koninkrijk, met het Statuut? Moeten we dan maar zien wat er gebeurt? Moeten we volledig onze ogen dichtdoen voor de problemen die er zijn zonder die aan te durven pakken? Ik ben een volksvertegenwoordiger van Nederland. Namens de VVD zit ik in de Kamer en kaart ik problemen aan. Ik heb er een verantwoordelijkheid in om die op te pakken en te benoemen en zo veel mogelijk samen te werken. Maar als mensen niet samen willen werken, moet ik toch stappen zetten.

Mevrouw Diertens (D66):

Dat is dan misschien wel het verschil: dat ik mij ook een volksvertegenwoordiger voel van Caribisch Nederland. Ik vind dat u wel met hele grote stappen thuis de problemen analyseert, want die zijn oppervlakkig geanalyseerd. Ik denk gewoon dat we daarin met z'n allen nog wel een diepgang kunnen maken. Ik denk dat we op de goede weg zijn, dat we de afgelopen jaren met deze staatssecretaris een aantal goede stappen hebben gemaakt. Ik hoop dat u het met me eens bent dat we die weg misschien ook een kans moeten geven. Bent u dat met me eens?

De heer Bosman (VVD):

Mevrouw Diertens doet het wel vaker: zij vergelijkt appels met peren. Ik heb het namelijk niet over Caribisch Nederland gehad. Dat heb ik vier keer gezegd, en misschien wel vaker. Ik heb gesproken over de landen binnen het Koninkrijk. Mijn hele verhaal gaat over de landen binnen het Koninkrijk. Die verantwoordelijkheid heb ik iedere keer benoemd, waarbij het autonome landen zijn die eigen verantwoordelijkheden hebben. Die zijn specifiek benoemd in het Statuut. Als je praat over Caribisch Nederland; natuurlijk heb ik daar een verantwoordelijkheid voor. Die zorg heb ik ook benoemd. Daar zet ik ook stappen voor. Als er iemand praat over landbouw, dan ben ik het. Als iemand vindt dat het eten goedkoper moet worden, dan ben ik het. Dus ik vind het belachelijk, echt belachelijk, dat mevrouw Diertens dit op die manier durft te zeggen.

Mevrouw Özütok (GroenLinks):

Toen ik het begin van het betoog van de heer Bosman hoorde, werd ik een beetje blij. Ik dacht: hé, dat gaat nu ook echt over de mensen die binnen het Koninkrijk wilden blijven. Daarom zijn deze relaties ook tot stand gekomen. Dat was allemaal voor mijn tijd. Wij hebben een Statuut waarin het een en ander bestuurlijk wordt geregeld. Ik ben het met u eens dat het bestuurlijk in die relaties niet alleen maar zonneshijn is. Dat onderstreep ik. Maar het is een feit dat die mensen nog steeds behoefte hebben aan begeleiding en ondersteuning en dat zij verwachtingen hebben. Laat u die nu allemaal in de steek?

De heer Bosman (VVD):

Dan wil ik even precies weten wie mevrouw Özütok nu bedoelt met "al die mensen".

Mevrouw **Özütok** (GroenLinks):
In de landen.

De heer **Bosman** (VVD):
U heeft het over de landen, over Aruba, Curaçao en Sint-Maarten?

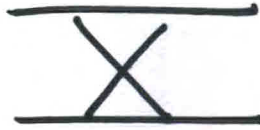
Mevrouw **Özütok** (GroenLinks):
Ja.

De heer **Bosman** (VVD):
Ik laat niemand in de steek. De VVD laat niemand in de steek. Wij zeggen alleen — en volgens mij is dat heel normaal — dat het landen zijn met eigen Staten, met verkiezingen, met een regering, met een begroting, met verantwoordelijkheden als het gaat om het beleggen van geld, het toetsen van die begroting, het kijken waar het geld blijft, het bespreken van nepotisme en het reageren op mensen die zeggen: joh, je steekt het geld in je eigen zak. Ik laat niemand in de steek. Alleen, het is wel de verantwoordelijkheid van Aruba, Curaçao en Sint-Maarten, en niet de mijne.

Mevrouw **Özütok** (GroenLinks):
Dit verhaal hebben we vaker gehoord: dat het in de visie van de heer Bosman niet de verantwoordelijkheid van Nederland is. Maar dit zijn de relaties. U kunt het toch niet maken dat u zegt: ik neem afscheid van u en u bekijkt het maar. Dat is de werkelijke situatie die de heer Bosman hier eigenlijk bepleit.

De heer **Bosman** (VVD):
Nee, wat meneer Bosman hier bepleit, is dat de landen Aruba, Curaçao en Sint-Maarten zich aan de afspraken gaan houden, dat ze hun begroting op orde krijgen. Dat heb ik continu gezegd, dat heb ik de hele tijd gezegd. Ik heb gezegd: als je je niet aan je afspraken houdt, dan heb je een cafetariastatuut. Zo heb ik dat genoemd. Iedere keer maar weer een beetje kiezen wat we wel en wat niet willen. Het gaat erom dat die verantwoordelijkheden daar liggen. Op het moment dat iedereen zegt: o, maar meneer Bosman wil ze het Statuut uit duwen ... Nee, dan gaat mevrouw Özütok ervan uit dat Aruba, Curaçao en Sint-Maarten zich nooit aan de afspraken gaan houden. Dat kan ook. Maar volgens bedoelt mevrouw Özütok dat zeker niet.

De **voorzitter**:
Dank u wel, meneer Bosman. Dan geef ik nu het woord aan mevrouw Özütok namens GroenLinks.



ARUBA

ANDRÉ BOSMAN: HET MOET ANDERS

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Van onze correspondent

Oranjestad - Parlementariër André Bosman (VVD) is een notoire criticaster van het financiële beleid van de regeringen van Aruba, Curaçao en Sint Maarten. In niet mis te verstane bewoordingen reageert hij op de verzoeken om financiële steun van de landen. „Na tien jaar aandringen van mijn kant op het hervormen van de overheidsfinanciën, het diversifiëren van de economie en het aanpakken van het financieel beheer moet ik helaas constateren dat daar weinig tot niks van terecht is gekomen. Het op orde hebben van je eigen financiën binnen het Koninkrijk is ook tonen van solidariteit. Kennelijk is die solidariteit van mindere orde. Nu moet de Nederlandse belastingbetaler, die de afgelopen tien



jaar wel hard heeft gewerkt om de staatsschuld terug te werken en het begrotingstekort om te buigen, weer betalen voor de landen die geen stappen hebben gezet om hun financiën op orde te brengen.”

„En als ik dit zeg zie ik de commentaren alweer komen. Dat ik hardvochtig ben, geen begrip voor de eilanden, op een machtsovername uit ben en geen respect heb voor het bestuur van de landen. Dat laatste klopt trouwens. Ik zie namelijk nog geen of te weinig beweging om stappen te zetten om de financiën de goede weg op te helpen. “ „En dan de claim dat alle schuld boven de 40 procent bbp maar als gift gedaan moet worden. Hoe werkt dat op Aruba? Die zaten de afgelopen jaren al op 80 procent en schieten nu door naar de 130 procent. En maar beloven dat ze de financiën op orde hebben of gaan krijgen. Dat was al een belofte onder Eman I en II. Nu kabinet Wever-Croes aan het roer staat wordt het echt niet beter. En of de Nederlandse belastingbetaler maar even wil betalen, zonder voorwaarden en als gift.”

„Wil ik helpen? Jazeker! Ga ik helpen? Jazeker. Maar niet zonder voorwaarden en niet zonder nieuwe afspraken. Maar wat mij betreft is dit het einde van het Statuut. Bij crises kunnen de landen hun autonomie niet waarmaken en stort alles in. We zullen dus nieuwe en harde afspraken moeten maken voor de toekomst. Afspraken waarbij het duidelijk is wat de verantwoordelijkheid is van de landen. Maar dat het Statuut anders moet, is voor mij glashelder.”

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