



Department of Pacific Affairs

The Role of the United Nations in New Caledonia's Process of Self-Determination

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This Discussion Paper arises from the June 2019 PIPSA (Pacific Islands Political Studies Association) conference with the theme of 'Democracy, Sovereignty and Self-Determination in the Pacific Islands'. Held in Nouméa, it was co-convened by the University of New Caledonia's LARJE (Research Centre for Law and Economics) and the Australian National University's Department of Pacific Affairs. The paper is part of a PIPSA special series building on that theme and examines the role of the United Nations in New Caledonia's process towards self-determination.

The Matignon-Oudinot Agreements¹ — signed in 1988 between the French state and New Caledonian political forces — enabled peace to be restored to New Caledonia by promising a referendum for self-determination in 1998 for those New Caledonians with at least 10 years residence in the archipelago. This involved setting up provincial authorities, two of which, by virtue of the composition of electoral districts, would inevitably be led by pro-independence majorities. This 10-year transition period was accompanied by a deliberate policy of economic, social and cultural rebalancing whose main beneficiary was the 'Melanesian community, originating in the Territory of New Caledonia, the first victim of the imbalances arising from colonisation.'² The question of the composition of the electoral body called upon to adjudicate on the future of the territory has been at the heart of the pro-independence concerns and claims since the movement was born in 1975.

With the Noumea Accord that was signed on 5 May 1998³ between the French government, pro-independence and anti-independence movements, this

question took on a particular dimension that was even more central for the Kanak people because the general idea was to pursue the work of decolonisation begun in 1988. This time, it was about reinforcing the autonomy of institutions that remained organised according to a federal form but were henceforth exclusively led by New Caledonian-elected representatives: the three provinces whose organisation remained unchanged and a New Caledonian executive body that replaced the previous territorial authority. The New Caledonian executive, a general and central authority, was entrusted to a 'collegial' government, so-called because its decisions needed to be taken collegially. Its members lacked individual attributions but had the power to oppose a decision when it came within their area of responsibility. It was represented by a president whose main mission was to coordinate the action of the other members. Moreover, the composition of the government was representative of all the political forces present in the congress, which is in charge of the election of the members by proportional ballot. The elected members of the congress themselves came from provincial assemblies according to a division that was favourable to the pro-independence movement. The process of progressive and irreversible transfer of state powers was beneficial to this local authority whose decision-making body, the congress, was endowed with legislative power in application of the principle of shared sovereignty set out in the Noumea Accord. At the end of the transfer of powers as provided for in the Noumea Accord, the French state no longer held any powers other than sovereignty. The exercise of this power could nevertheless be shared with New Caledonia, in particular in the area of external relations. The members of the provincial assemblies

and the congress were henceforth elected by an electoral body limited to persons who could prove a real and long-standing link with New Caledonia brought together in New Caledonian citizenship, the foundation of a common destiny.

The Noumea Accord specified a 15–20-year period to culminate in a referendum on full sovereignty, with the provision to repeat the referendum twice more if independence was not achieved in the first referendum. The Kanak and New Caledonian residents who settled no later than 1994 were eligible to participate in the referendum. Monitoring of the implementation of the Noumea Accord was carried out by a signatories' committee which met annually in Paris with the prime minister and/or the minister for overseas. Lastly, as a sign of appeasement and as proof of New Caledonia's progress on the path to decolonisation, the Accord explicitly contains the provision that 'the progress towards independence shall be brought to the attention of the UN'.

The United Nations (UN) provided a platform for the FLNKS pro-independence movement⁴ in 1986 to make its voice heard and to oblige France to work towards decolonisation, whereas it was ignored and even vilified by the anti-independence camp. Over the decades, it has managed to affirm its position as an undisputed actor in New Caledonia's independence process. There are several mechanisms at the disposal of the UN that have been mobilised to contribute to the sincerity and the serenity of the New Caledonian self-determination ballot: two visiting missions by the Special Committee on Decolonization, technical support by the United Nations Office for Project Services (UNOPS)⁵ for the drawing up of electoral rolls, and the presence of the Secretary-General during and around the self-determination referendum of 4 November 2018.⁶

By seeking provisions in the area of the right of peoples to self-determination along with those created more recently with a view to the promotion of democracy, the New Caledonian situation is distinctive with regard to international law. The UN has been an intermediary between France and New Caledonia, with France engaging with the UN from 1999 in order to legitimise both its action and its neutrality.

The UN has not only been present but in fact has had a legitimising role in the face of the opposing claims of the pro- and anti-independence movements, thereby contributing to general appeasement.

This discussion paper addresses the support provided by the UN in the conduct of the first self-determination referendum (as stipulated in the Noumea Accord of 5 May 1998) and as part of the judicial framework of the Accord. The paper then examines the role of the UN as seen from France and its impact on the overall process. It concludes by considering the limitations of UN support.

I – Decolonisation, human rights and democracy: Distinct judicial frameworks contributing to the support of New Caledonia

A – *The legal framework of decolonisation*

Following the Second World War, international law established the principle of the right of peoples to self-determination and progressively established a framework that enabled and then encouraged emancipation. Established for the first time by the United Nations Charter, the right of peoples to self-determination became, through the will of the UN members, the basis for decolonisation.

Under article 73 of the UN Charter, administering powers (according to the term adopted by the UN) agree to develop the capacities of populations in non-autonomous territories to 'administer themselves', to take into account their 'political aspirations' and to 'help them in the progressive development of their free political institutions', and above all to regularly communicate information to the UN General Assembly about what has been achieved.

In the face of the lack of collaboration from states with regard to communicating information as provided for under article 73, the General Assembly intervened through various resolutions to present the principle in a variety of forms and define its content and consequences, and to create mechanisms to provide encouragement and monitoring.

- Resolution 1514 (XV) of 14 December 1960 on the granting of independence to colonial countries and peoples (known as the decolonisation charter) mentions the 'equality of nations large or small' and affirms that 'subjecting people to subjugation, domination and foreign exploitation constitutes a denial of the fundamental rights of man' and 'is contrary to the United Nations Charter'. At the same time, it contains the provision that 'immediate measures will be taken in trust territories, non-autonomous territories and all the other territories that

have not yet acceded to independence, to transfer all powers to the peoples in these territories'. It is stated that: 'The lack of preparation in political, economic or social areas or in the area of teaching must never be taken as a pretext to delay independence.'

- Resolution 1541 (XV) of 15 December 1960 relating to the principles that must guide the member states to determine whether the obligation to communicate information that is provided for in article 73 of the UN Charter applies to them or not, defines a non-autonomous territory as 'geographically separate and ethnically or culturally distinct from the country administering it'. It also indicates 'that a non-autonomous territory has gained full autonomy: a) when it has become an independent and sovereign State; b) when it has freely associated itself with an independent State; or c) when it has been integrated into an independent State.'

- Going further, and in the face of the difficulties encountered by different peoples or states, by resolution 1654 (XVI) of 27 November 1961 the UN created a body that was entrusted with the application of the two resolutions of 1960. This was the 'Special Committee' that was then called the 'Committee of 24' or the 'Committee on Decolonization'. It is responsible for determining which territories are autonomous and which are not, and for evaluating situations to report on them to the General Assembly.

- Resolution 2625 (XXV) of 24 October 1970 relating to the principles of international law regarding friendly relations and cooperation between states sets out that 'the principle of the equality of rights of peoples and their right to self-determination constitutes a significant contribution to contemporary international law' and indicates that 'the creation of a sovereign and independent State, the free association or integration with an independent State or the acquisition of any other political status that is freely decided by a people constitute for that people the means of exercising their right to self-determination.'

These texts that were a priori not legally binding foreshadowed the customary rules that were in the process of being formed and constituted an important means of exerting pressure on states.

In this way, resolution 41/41 A of 2 December 1986 included New Caledonia on the list of non-autonomous territories under article 73 of the UN Charter, despite very strong opposition from France, which in vain mobilised all its diplomatic power to

avoid this re-enrolment.⁷ It affirms 'the inalienable right of the people of New Caledonia to self-determination and independence in accordance with the provisions of resolution 1514 (XV)'. As a result, each year pro-independence delegations from New Caledonia travelled to New York to present their case to the Committee on Decolonization. Henceforth, the status of New Caledonia was that of a territory to be decolonised and the exercise of powers by France no longer escaped international attention.

From the 1980s, most of the member states of the UN General Assembly were born out of the emancipation process within the framework of decolonisation. Thus, pressure on the administering powers increased. The UN General Assembly designated as 'International Decade of the Elimination of Colonialism', first 1990–2000,⁸ then 2001–2010⁹ and, later, 2011–2020.¹⁰ An action plan was adopted to this effect.

France, after being opposed to the Committee on Decolonization and to the UN General Assembly on the subject of New Caledonia for decades,¹¹ as it considered that New Caledonia did not constitute a non-autonomous territory in the sense of article 73 of the Charter, fully embraced the international law of decolonisation from 1998 and the adoption of the Noumea Accord. Point 3.2.1 of that Accord explicitly makes provision that the 'path towards emancipation shall be brought to the attention of the UN'.

While the relationship between France and the Committee on Decolonization relaxed following the Maignon-Oudinot Accords in 1988, it was only from 1998 that the French government actively collaborated with the UN body. Each year, France provided a report on the implementation of the decolonisation process before the adoption of the resolution on New Caledonia by the General Assembly at the end of the year. It regularly obtained the seal of approval during the general debate in the Fourth Committee on the situation in New Caledonia.

In accordance with the action plan adopted by the UN General Assembly, the president of the government of New Caledonia was consistently encouraged by the Committee on Decolonization to participate in its annual meeting, its regional seminar, that was held either in the Caribbean or on the Pacific, as well as in the work of the Fourth Committee. New Caledonia participated for the first time in 2000, but it was only in 2009 that the president of New Caledonia, accompanied by a delegation representing the whole political spectrum,

spoke before the UN General Assembly.¹² By speaking with a single voice before the UN General Assembly, the government of New Caledonia engaged in a dialogue with the UN. During his stay in New York, President Gomes invited the UN's Committee on Decolonization to hold its regional seminar for the Pacific in New Caledonia.¹³ The purpose was to present to the UN General Assembly the progress made along the 'path towards the emancipation of New Caledonia'.

In 2010, at the occasion of the seminar held in Noumea, New Caledonian political forces gave a complete and consensual picture of the situation in the territory. The point was made that the process that had been undertaken for more than 20 years was based on three pillars: the legitimacy of the communities that coexist in the country; the emancipation of New Caledonia within the framework of the 'sharing of sovereignty with France' for the duration of the Noumea Accord; and political, economic and social rebalancing. The presence of the president of the congress, the president of the North Province and several members of the local government sought to demonstrate a spirit of cooperation.

In the years that followed, New Caledonia was represented at the Fourth Committee's meetings either by the president of the government or the vice-president. It is noteworthy that in 2013, only the president of the congress, Roch Wamytan, the pro-independence leader, made the trip, speaking both as a representative of New Caledonia and as a petitioner for the FLNKS. This attitude created confusion regarding the origin of the message and moved away from the practice of the collegial and consensual expression of the New Caledonian constitutional voice.¹⁴

The FLNKS, in accordance with its policy for seeking international support, was almost always present at the various meetings of the Fourth Committee and it was a petitioner each year before the UN General Assembly.

As for the anti-independence movement, it was only in 2015 that it joined the UN dynamic. As the Fourth Committee's action was perceived as a weapon in the hands of the FLNKS to force New Caledonia's independence, it only started to attract positive attention from anti-independence political parties in the last few years.

B — The judicial framework of UN electoral assistance

Since 1956, the United Nations has participated in various ways in the implementation of electoral processes. However, there is no provision in the UN Charter that directly refers to this question.

Although the first article of the UN Charter established the principle of the right of peoples to self-determination, which was the legal basis for applications for independence by colonised peoples, there was no conventional provision imposing international supervision on self-determination processes. However, the UN, whose composition was evolving through the membership of a large number of former colonies, gradually increased its presence. As early as 1956, the Supervisory Council was in charge of the monitoring of a number of plebiscites, referenda and elections (Togo in 1956, Cameroon in 1959 and Samoa in 1961).¹⁵

This tradition of monitoring the electoral operations in trust territories was subsequently extended in a new form of electoral assistance for the benefit of sovereign states.¹⁶

Once again, the idea is that the right of peoples to self-determination is achieved essentially through elections to which every citizen has the right. It certainly is a right, which was recognised by the Universal Declaration of Human Rights and by article 25 of the International Covenant on Civil and Political Rights, and it is a particularly important right because it has a bearing on the exercise of other human rights.

From the end of the 1980s, the General Assembly started to adopt resolutions to reinforce the principle of periodic and honest elections by invoking the Universal Declaration of Human Rights and by affirming that 'the authority of public powers rests on the will of the people, such as it is expressed in periodic and honest elections'. These resolutions¹⁷ aimed to reconcile a democratic ideal that was not shared by the whole international community and the principle of non-intervention.

Through respect for the principles of the sovereignty of states and non-interference, the UN's assistance must result from an act of will by the state, except to a certain extent in cases of decolonisation and peacekeeping operations based on chapter VII of the UN Charter. The necessary state consent nevertheless does not confer exclusive power on the UN and its action can only be of a subsidiary nature in relation

to that of the state's. The resolutions in this area recall that 'the first responsibility to organise free and honest elections falls to the governments' or insist on the fact that 'it is not always necessary for the United Nations to provide electoral assistance to member States, except in special circumstances.'

Recently, the UN system has stated more clearly the links that exist between development, peace, human rights, the rule of law, democracy and good governance and has insisted on the holding of free and regular elections. The most significant example is the adoption of the 2030 Agenda for Sustainable Development (2030 Agenda) whose Goal 16 refers to these concepts.

Thus, the last resolution in this area, UN General Assembly resolution 72/164 relating to the reinforcement of the role played by the UN in promoting periodic and honest elections and democratisation that was adopted on 19 December 2017, notes 'with satisfaction that more and more Member States are having recourse to elections as a peaceful means of ascertaining the will of the people.'

This resolution makes the statement that 'the observation of elections by the international community encourages the freedom and fairness of the ballots, the integrity of the electoral process in the applicant countries, the public's trust and the participation of voters and it minimises the risk of unrest linked to elections'. Of course, it reaffirms

that it is the responsibility of the Member States to organise and hold elections while ensuring that they are transparent, free and fair, and that they may, in exercising their sovereignty, ask international organisations to give them the advice or assistance they need to reinforce and develop their institutions and their electoral mechanisms.

Beyond providing advice and other forms of assistance to the states, resolution 72/164 specifies that the UN Secretariat may provide 'additional assistance in the form of mediation and good offices missions.'

The UN therefore only provides electoral assistance to the member states concerned if they expressly request it, or if it is so mandated by the Security Council or the General Assembly. As the Assembly has stated on many occasions, the assistance given by the UN must be objective, impartial and neutral and it must fully respect the principle of sovereignty and take into account that the organisation of elections comes under the responsibility of the member states.¹⁸

In 1991, the Under-Secretary-General for political affairs was appointed as United Nations coordinator for electoral assistance activities. He was supported by the Department of Political and Peacebuilding Affairs (DPPA) and more specifically by the Electoral Assistance Division.

In this regard, the Secretary-General distinguished several types of assistance that could be grouped together in two broad categories. The first category brought together the missions that essentially consisted of material, technical or intellectual assistance. In these cases, all that was required was for a formal request by the state to be sent to the division and for an evaluation mission to have submitted favourable conclusions, in order for assistance to be granted by the coordinator, under the authority of the Secretary-General. The latter therefore had full autonomy, insofar as sending a mission was essentially the result of an agreement between him and the state in question.

The second category brought together the missions where the UN was called upon to be involved as an actor in the process, whether its mandate was to organise the elections or to monitor the results. These missions required an official mandate from the Security Council or the General Assembly.

II – Monitoring, recommendations and concrete action: The mobilisation of UN mechanisms in New Caledonia

A – Visiting mission by the Committee on Decolonization

1 – Visiting mission of 2014: Appropriation by the anti-independence parties

In the special electoral body that was determining New Caledonian citizenship for the provincial elections, strong tensions were emerging between some pro-independence parties, France and the anti-independence parties. In this context, the Committee on Decolonization (C-24) proposed to organise a visiting mission to New Caledonia to monitor the implementation of the Noumea Accord.

Based on the provision for restricting the electoral body established by the Matignon-Oudinot Accords in 1988, the Noumea Accord created New Caledonian citizenship after two decades of struggle by the pro-independence movement. In 2014, the dispute related to the composition of this special electoral body for the election of members to the provincial

assemblies and the congress. In 1999, through the impact of a reservation in interpretation imposed by the Constitutional Council,¹⁹ the electoral body was considered 'slippery'; in other words, it was open to people who could prove they had 10 years residence in New Caledonia, without other conditions. The constitutional revision of 2007²⁰ re-established a condition that the pro-independence movement considered as having been acquired with the Noumea Accord: residence in New Caledonia before 8 November 1998, evidenced by actual enrolment on the electoral roll in 1998. Some pro-independence leaders considered (and continue to consider) that some people had been wrongly enrolled on the special electoral roll because they did not appear on the general electoral roll drawn up in 1998. Even though this did not relate to the electoral roll with a view to the referendum for accession to full sovereignty, which was different again, this special electoral body for the provincial elections and congress was particularly important for the pro-independence movement because, on the one hand, it allowed the country's leaders to be designated and, on the other hand, it listed the citizens who were entitled to become nationals of New Caledonia in the case of independence.

The mission had been generated by Roch Wamytan, president of the congress, in the name of the UC-FLNKS group in the congress who denounced the fraud perpetrated by the state in drawing up the electoral rolls. It had finally been accepted and even desired by France in the interest of transparency.²¹ Locally, as the elections became imminent, some political parties, particularly but not exclusively the anti-independence parties, reluctantly saw the arrival of the C-24 delegation in the territory.

Different political actors began to pay attention to the C-24 mission, in response to the clarity of its mandate (which consisted of observing the implementation of the Noumea Accord, with special focus on the drawing up of the provincial electoral rolls), as well as its desire to meet all stakeholders and its impartiality. In the end, the mission met all the political groups and actors and was able to appreciate for itself the efforts at rebalancing, economic development and training of New Caledonians, as well as the difficulties that had been encountered and the persisting inequalities.

The mission report invited France to pursue its presentation of all the relevant elements of New Caledonian reality. It underlined the extent to which the opportunities to speak before the C-24 had been taken by all the parties to enable their points of view to be heard.

With regard to the process of revision of the electoral rolls, the report did not make any comments on the substance but it did enumerate all the points that seemed to raise questions. The report insisted on the fact that it was up to the parties to the Noumea Accord to reach agreement to correct the dysfunctions that had been noted and suggested that the functioning of the special administrative commissions in charge of the revision of electoral rolls should be revised.²² These recommendations were taken into account and political compromises were found during the meetings of the signatories' committees (steering committees for the Noumea Accord) in 2015 and 2016.²³

If it was difficult to evaluate the real impact of the conclusions and recommendations of the C-24 arising from its report on the perception of difficulties by New Caledonian political leaders, it could be said that that the visit had the effect of bringing calm, or rather a non-dramatisation of the problem, and probably encouragement. The C-24 was careful to evoke the existence of a 'common destiny' for all New Caledonians, the fundamental idea behind the compromises of the Noumea Accord. In this regard, it was concerned by the 'fragile' sociopolitical context and invited all parties to engage in a calm dialogue to face the situation after 2018.

With regard to the implementation of the Noumea Accord, it recommended that France pursue initiatives for the creation and reinforcement of the capabilities of New Caledonians with a view to the transfer of powers in order to allow them to 'decide on their future' and finally, it called on a greater integration of New Caledonia in the Asia-Pacific region.

It is interesting to note that several of these recommendations have been developed over recent years, notably in the area of management training and regional integration, with New Caledonia joining the Pacific Island Forum.

This visit, more specifically and historically, established the foundations for a relationship of trust between the UN and the anti-independence parties, while at the same time sparking a realisation among the leaders supporting the continuation of New Caledonia's

position within France of the importance of making their voice heard in the international community.

From 2014, apart from a few exceptions, the anti-independence movement was also a petitioner that addressed the Fourth Committee of the General Assembly.

In the same vein, following the visit, France was represented in the annual seminars of the C-24. However, it was no longer represented by diplomats accustomed to this sort of exercise, but by officials from the Republic's High Commission in New Caledonia, who were in a position to provide pertinent insights into the evolution of the situation on the ground.

2 — The visiting mission of 2018: Confirmation of trust and objectification of the situation

The second visit by the Committee on Decolonization was as a result of an initiative by the committee itself. After being endorsed in a consensual manner by the signatories' committee on 2 November 2017, the visit took place in New Caledonia in March 2018, in other words a few months before the self-determination referendum, and ended in Paris with a meeting with the minister for overseas. The mandate that the mission had set itself was to 'collect information first hand on the situation relating to the various aspects of the application in New Caledonia of the Noumea Accord of 1998, and to assist the territory, in accordance with the Accord, in the preparation of the self-determination referendum'. The delegation, led by Cuba, stressed that the mission was impartial and did not intend to interfere in the referendum. Any resolution of the question of New Caledonia was the prerogative of the parties involved, particularly New Caledonian people.

With regard to its observations, beyond stating that the situation regarding security was 'calm and peaceful', the report²⁴ noted that the overall situation was 'uncertain and fragile', which could be linked to heightened level of criminal activity. The preparations for the referendum were deemed to be 'on a good path and well underway' (a clear improvement compared to 2014), with a view to achieving a result that would be acceptable to everyone. It went into detail regarding the measures taken over the previous few years to prepare for the referendum in the best conditions and praised the efforts in this area on several occasions as well as, more generally, the political will to remedy the economic and social imbalances that had been observed in New Caledonia.

The observations and recommendations did not reopen the question of the electoral body that had been at the heart of political concerns in 2017 and that had been addressed on the occasion of the signatories' committee in December.

The Committee on Decolonization noted that several of the recommendations had already been implemented since the conclusion of the signatories' committee on 27 March 2018 (awareness campaign, presence of UN agencies during the referendum, implementation of an arrangement for security).

The representatives of Cuba, Indonesia, Papua New Guinea and Iraq who were members of the mission expressed some concern regarding the choice of the wording of the question asked at the referendum and the lack of communication regarding the consequences of the result. While they observed progress in economic and social areas following the implementation of the rebalancing policy, they considered that 'much still needs to be done to eliminate inequalities' and noted 'the persistence of thinly veiled racial discrimination, particularly with regard to the Kanaks'.

B — Electoral assistance in New Caledonia

With regard to the New Caledonian situation, the strategies for mobilising the electoral assistance mechanisms implemented both by France and the UN deserve closer examination. The UN was mobilised both for the drawing up of the electoral rolls and for the observation, or rather the 'non-observation' of the self-determination referendum.

1 — The drawing up of electoral rolls

Within the framework of the limited working group on the electoral rolls established by the French state in 2014, the representatives of the Caledonian Union²⁵ requested that the state allow the participation of the UN in the electoral work. This request came on the one hand within the context of suspicions of fraud on the part of a section of the pro-independence political groups with regard to enrolment on the provincial special electoral roll, and on the other hand, from a desire by the New Caledonian partners to see an evolution in the format of the special administrative commissions in charge of the revision of the electoral rolls.

The composition of the commissions was in fact considered unbalanced, engendering a risk of decision-making without any coherence and according to the

wishes of questionable majorities (for the record, they were composed of a magistrate, a state representative and four voters appointed in a balanced manner in terms of the political spectrum). This difficulty had been highlighted in the conclusions of the C-24 mission report in 2014, following exchanges with the pro-independence parties²⁶ and with the magistrates in charge of the revisions of the electoral rolls.²⁷

In this context, the members of the extraordinary signatories' committee of 5 June 2015 proposed to add 'an independent qualified individual' to each of the special administrative commissions. A political consensus emerged around the idea that these individuals could be experts appointed by the UN.²⁸ There were therefore 14 experts in total who each sat on special administrative commissions as 'an independent qualified individual' in accordance with decree no. 2015-1753 of 23 December 2015. The 15th expert was in charge of coordinating the team.

The mission entrusted to these experts consisted of observing, on the one hand, the revision work relating to the special electoral roll for the election of members of the provincial assemblies and congress (known as 'LESP — liste électorale spéciale provinciale [provincial special electoral roll]²⁹) and on the other hand, the initial work to establish the special electoral roll for the New Caledonian referendum with a view to accession to full sovereignty (known as 'LESC — liste électorale spéciale consultation [referendum special electoral roll]'). They were asked to draw up an activity report relating to the implementation of the operations for submission to the minister for overseas and the president of the congress of New Caledonia, no later than one month after each revision of each of the two special electoral rolls in question.

These electoral experts, even though they were formally appointed by the French state, were designated and coordinated by UNOPS, which was in charge of supplying services for the system of the United Nations and its member states, notably operational and logistical support and other forms of support for the electoral process.

The experts were well received and carried out quality work. They did not hesitate to make themselves available to the political groups that desired it, although they refused to extend their expertise to political considerations. Their presence allowed the work to take place in a calm atmosphere, even if some contentious

appeals were brought before the court at the end of the procedure for revising the rolls.

The results were deemed to be positive both by the state and by the New Caledonian actors. The reception of the mission report confirmed this evaluation. Although improvements to the way the commissions functioned were suggested, the UN experts did not note any fraud in electoral matters and the recommendations that were set out were largely followed by the French state (outreach campaign for enrolment on the rolls, updating of some files that were useful for revising rolls, training of municipal officers in charge of the elections).

Taking into account the crucial years of 2017 and 2018, new missions for assistance in the revision work for the special electoral rolls in 2017 were requested by the French state. The UN expert's mission was renewed in 2017 and in the following years, to relative indifference. New Caledonians were accustomed to the presence of the UN, although it had initially been perceived by many as interference. New reports, which did not give rise to objections or political commentaries, noted the progress that had been achieved.

In 2018, the group of experts also took part in operations for the complementary revision of these rolls between March and August 2018. Three mission reports were submitted by this group of experts at the end of June for the ordinary revisions, at the end of August for the complementary revision of the provincial electoral roll (LESP), and at the end of September for the revision of the LESC. This last report notes that 'the experts have noted real consensual efforts this year, 2018, to achieve completeness in the LESC'. This statement should be linked to the recommendations made by James Anaya, special rapporteur on the rights of indigenous peoples, in the report of his visit to New Caledonia in 2011. Anaya had considered that

efforts should be made to increase the participation of the Kanak in electoral life and to eliminate everything that could be an obstacle to this participation. Special attention should be paid to enrolling Kanaks in the electoral lists for the purposes of future referenda on the status of New Caledonia.³⁰

This issue had been taken into account by the partners in the Noumea Accord who agreed at the end of 2017³¹ on a systematic enrolment on the referendum

electoral roll, without any administrative steps, for all persons with customary civil status (i.e. the Kanak).

2 — The ‘non-observation’ of the self-determination ballot

From 2017, as political partners began to anticipate that the results of the referendum would not be accepted, the notion of UN oversight of the ballot gained in popularity. The UN had earned the trust of everyone, including France, which had reacted badly in 1987 to the criticisms expressed by some states, including the member countries of the Pacific Islands Forum, who wanted the referendum to be carried out under UN monitoring.³² The situation was very different in 1987 because it was a referendum that was forced on the pro-independence supporters. The FLNKS contested the conditions for enrolment on the electoral rolls and particularly the fact that this was open to residents who could only prove three years residence. They launched a call to boycott and the situation deteriorated very quickly, ending with the taking of hostages in the Ouvéa grotto in 1988. Whereas France claimed otherwise in 1987, today no-one still considers this referendum as an act of self-determination.

One of the paradoxes of the New Caledonian political context was that, on the one hand, France was asked to take sides, and on the other hand, it was criticised for its lack of impartiality. The presence of the UN not only strengthened its position of neutrality but also was likely to bring an additional guarantee regarding the honesty of the ballot.

The question that was then raised concerned the type of electoral assistance to be implemented. The Noumea Accord placed New Caledonia in a decolonisation process that was likely to justify the involvement of UN observers, as had been the case in the past. The regional example that was regularly cited is that of Samoa. But the independence referendum of Samoans was held in the context of the end of the trusteeship, which was the legal foundation for the involvement of the UN. In Tokelau, the referendum took place in the presence of a Committee on Decolonization.

As has been noted, the electoral observation currently carried out by the UN must not only respond to a request from the state but must also be the subject of a mandate from the Security Council or the General Assembly, most often within the framework of a peacekeeping operation or a process for consolidating peace.

These were the mechanisms for electoral assistance within the register of democracy and human rights that were mobilised to accompany the implementation of the referendum procedure and, more specifically, the deployment under the coordination of UNOPS of a group of electoral experts before and during the referendum. The purpose of the mission was to assist in the implementation of the referendum and to report to the UN Secretary-General on the political environment and the technical organisation of the referendum.

This assistance mission, even if it came within the global context of the UN monitoring New Caledonia's decolonisation, which was desired by the FLNKS and formalised by the Noumea Accord, had no legal link to the Committee on Decolonization and obeyed the mechanisms of democracy supported by the UN. In this regard, reference can be made to the last resolution relating to New Caledonia that was adopted in December 2018³³ in which the General Assembly ‘welcomes the fact that the administering power has communicated to the Special Committee the final report of the mission of electoral experts who were sent to New Caledonia.’ It was therefore up to France to communicate or not the conclusions of the electoral assistance missions to the C-24.

The mission report submitted a few weeks after the referendum of 4 November revisited the history, the position of the various political actors and the measures taken with a view to the organisation of the referendum. It contained a positive evaluation of the implementation of the electoral campaign (§32 and 74), which was credited to the French government (‘in particular the French government has played a decisive role in the success of the referendum, notably through the personal involvement of the Prime Minister’). While pointing to the failings of the ballot, particularly with regard to the exercise of the right to vote by proxy and the absence of enrolments of potential voters on the electoral rolls, the report recognised that ‘the electoral operations took place transparently and legally’.

Seven recommendations were formulated, most of which fell within the framework of the measures already taken on the national level or came under the cooperation with the United Nations (dialogue with all the parties, implementation of an economic, social and cultural policy centring on the reduction of inequalities, improvement of the electoral files, an awareness campaign in relation to the election stakes).

III — Some limits to the positive support by the UN

Ultimately, the UN's support for the process of emancipation of New Caledonia is generally regarded as virtuous by all of the stakeholders. The UN, and particularly the Committee on Decolonization, regard it as a source of enhancement of its action, whereas the process is making little progress in the 17 other non-autonomous territories that it is in charge of monitoring. For France, it provides a means of legitimising and achieving its action both in the eyes of local partners and the international community, which regularly presents New Caledonia as an example of positive decolonisation. The New Caledonian political groups seek in it a safeguard against the risks of extremist excesses and a guarantee of the monitoring of the implementation of the Noumea Accord.

Nevertheless, some aspects of the recommendations that are regularly formulated by the C-24, electoral experts or the UN General Assembly merit some remarks. Without claiming to be exhaustive, three categories of requests have attracted our attention. The first concerns the information provided to the New Caledonian population regarding the consequences of the results of the referendum. The second corresponds to the recommendations that are sometimes very firm, whose aim is to request France to act with regard to the power transferred to New Caledonia, in which it no longer has any powers. The last concerns migration issues.

A — The absence of initiatives to provide information to the Caledonian people on the implications of their choice

It is regularly stated that it is important to make the populations in the non-autonomous territories aware of the options offered to them in exercising their right to self-determination. In the more recent resolutions, the General Assembly has insisted more particularly on the responsibility of the administering power in this area (information for the New Caledonian people on the nature of self-determination), as well as on the support that the UN is likely to offer in this regard.

Before the election, the administering power sent each voter a notification³⁴ aimed at presenting the consequences of 'Yes' and the consequences of 'No'. This was of course a somewhat perilous exercise, because the description of the consequences was at the very heart of the referendum's electoral campaigns, in

which the political leaders were invested. Moreover, the French state could not speak about any consequences other than the legal consequences of full sovereignty. Similarly, and insofar as the Noumea Accord was an interim arrangement, it was impossible for France to specify the consequences in the case of a refusal by New Caledonians to accede to full sovereignty. France could not anticipate the consequences, regardless of the choice made by the New Caledonians.

As a result, it was a strictly legal notification limited to enumerating the immediate consequences which, undoubtedly, provided little clarification for New Caledonians who were legitimately and primarily concerned by the impact on their wellbeing and their daily life. A similar paper was distributed with a view to the referendum of 4 October 2020: same question, same notification.

As for the General Assembly, it assigned a mission to the Committee on Decolonization to 'ensure that the appropriate UN bodies undertake an awareness campaign aimed at helping the people in the territory to better understand the options being offered to them with regard to self-determination', while reaffirming that 'at the end of the day, it is up to the New Caledonian people themselves to freely and equitably determine their future political status, in accordance with the applicable provisions of the United Nations Charter, the Declaration on the Granting of Independence to Colonial Countries and Peoples and its relevant resolutions'.³⁵

It proposed to 'establish political education programmes in the territory in order to make the population aware of its right to self-determination, taking into account the different legitimate political statuses that might be envisaged on the basis of principles that are clearly defined in its resolution 1541 (XV) and its other resolutions and relevant decisions'.

However, nothing was specified regarding the provisions for the implementation of this mission. In fact, the options referred to by the General Assembly are a subject of political dispute in New Caledonia. The pro-independence supporters only back the single resolution 1541 (XV) of 15 December 1960, which indicates that a 'non-autonomous territory has gained full autonomy: a) when it has become an independent and sovereign State; b) when it has freely associated itself with an independent State; or c) when it has been integrated into an independent State'. On the other hand, the anti-independence supporters favour

resolution 2625 (XXV) of 24 October 1970. Insofar as it does not prejudice the result of the choice of the people, who have the right to choose to remain dependent, this resolution specifies that a people may exercise their right of free disposition by 'the creation of a sovereign and independent State, the free association and integration with an independent State or the acquisition of any other political status that is freely decided by a people.'

B — The absence of awareness of the real autonomy of New Caledonia

The second type of recommendation to gain our attention is the one relating to the economic situation and the exploitation of mineral resources. The UN General Assembly calls on

the administering power to take appropriate measures to protect and guarantee the inalienable right of New Caledonians over their natural resources and the right to remain masters of the future values of those resources, and asks the administering power to take all necessary steps to protect the rights of ownership of New Caledonians.³⁶

However, in New Caledonia, the French state no longer holds any power over natural resources (with the exception of those linked to nuclear power) or over possession of assets: nickel, chrome, cobalt, rare earths, hydrocarbons; biological and non-biological resources of the EEZ (Exclusive Economic Zone), the continental shelf and the territorial seas; property rights. All powers in these areas have been transferred and are now the responsibility of the authorities in the provinces or of New Caledonia (congress and government).³⁷

Regardless of the reality of the situation, the UNGA's insistence and its determination to assign this responsibility to the administering power is more than paradoxical. It denotes intellectual dishonesty or the inability of the institution to move beyond the Manichaeian concept of decolonisation. In that sense, it contains the seeds of a rejection of the Noumea Accord as a process of decolonisation.

France finds itself in a difficult position in the face of the admonitory requests of the UNGA, which were in response to the New Caledonians' concerns conveyed through UN bodies. In an unfortunate initiative in 2018, France sought to add questions of economic and social development to the agenda of

the signatories' committee. This was rejected by the pro-independence parties, which refused to recognise France's interest in subjects relating to powers that had already been transferred. One of the pro-independence parties left the signatories' committee table when these questions were raised.³⁸

It will therefore be difficult for France to respond to the UNGA's request formulated in the last resolution that aims to 'implement the 2030 Agenda for Sustainable Development in the territory in order to build a sustainable community and not leave anyone behind.'

This is attempting the impossible and it is urgent that the UN take into account the reality of the decolonisation process set out by the Noumea Accord, based on a progressive transfer of powers and competencies from the French state to New Caledonian institutions. France, the administering power, no longer bears responsibility over the vast majority of powers in New Caledonia. The UN's injunctive recommendations addressed to France can lead to an erroneous perception of the legal and political situation in New Caledonia and places the progress made over the last 20 years in a negative perspective.

C — The difficulty of grasping the problem of population flows

Lastly, the Committee on Decolonization 'asks the administering power to take all necessary measures to address the concerns relating to the promotion of the systematic welcoming of foreign immigrants to New Caledonia.'³⁹ In fact, New Caledonia does not have any immigration problems from overseas. Is the committee referring to the French, to the population flow from metropolitan France? If this is indeed the intended meaning, then it would echo point no. 11 of the action plan for the second international decade for the elimination of colonialism, which makes provision that 'administering powers should ensure that the exercise of the right to self-determination is not impeded by changes to the demographic composition owing to immigration or the movement of populations in the territories that they administer'. This point,⁴⁰ which is at the heart of the New Caledonian conflict, has never been the subject of an official in-depth study by an independent body.

This is one of the reasons why the Caledonian Union is asking that the UN carry out a decolonisation audit. The request, which was endorsed by all the

political partners, did not come to fruition in 2018 because the UN Secretary-General considered that it was not a prerogative of the UN. In this way, the UN itself placed a limit on the support given to New Caledonia. In the end, on the occasion of the XIXth signatories' committee on 10 October 2019, 'concerning the decolonisation audit, it was decided to launch a call for tender based on the specifications validated at the end of 2017'.

This point, which is one of the most sensitive political subjects, deserves to be addressed and handled by a neutral body to render the debate more objective and dispassionate. Regardless of which authority undertakes this task, its approach must follow the provisions set out by the Noumea Accord, as the UN systemically does. Failing this, the risk of destabilisation of a situation that is deemed by the UN to be fragile, is immense.

What is at stake is the identification of the people who hold the right to self-determination. As a settler colony, New Caledonia has seen the Indigenous Kanak population cohabiting with communities of various origins. The Kanak people, who today represent around 40 per cent of the population, are recognised in the Noumea Accord, which also recognises the legitimacy of the other New Caledonian populations. The preamble of the Noumea Accord affirms that: 'Today it is necessary to establish the bases for citizenship of New Caledonia, allowing the original people, along with the men and women who live there, to constitute a human community that affirms their common destiny.' Thus, the question of the definition of those who are entitled to the right to self-determination is theoretically resolved by the Noumea Accord; and the resolutions of the UNGA incorporate this reality by endorsing the notion of a New Caledonia people. But the temptation to question this historical achievement should not be underestimated. This is why Roch Wamytan emphasised that the right to self-determination is 'a right whose exercise is reserved for peoples who, at a given moment in their history, were colonised by European peoples who came to the Pacific in search of lands to colonise or to evangelise'; and why he denounced 'the 'mass immigration' encouraged by France that could 'bury' the claims for independence', as mentioned in the cover document of the meetings of the Committee on Decolonization of 22 June 2018.⁴¹

Conclusion

Support provided by the UN for the referendum of 2018 was repeated in 2020: experts were present from March within the framework of the annual revision of the electoral roll, and there was a non-observation mission around the second self-determination ballot planned for 4 October. Only the health context has changed. In order to protect the country, which has not had any case of local contamination by COVID-19, all the UN representatives who had been commissioned for the ballot were required to observe a strict two-week lockdown in a hotel in Noumea in order to be able to meet the local actors and be deployed in the polling stations.

On the eve of the second referendum for the accession to full sovereignty as provided for in the Noumea Accord, there was no evidence to suggest that the result would be very different from that of the vote on 4 November 2018, which had seen the victory of the 'No' vote with 56.67 per cent of the votes, with a participation rate of 81 per cent. The atmosphere during the campaign nevertheless seemed more tense between the pro-independence supporters and the French state. The FLNKS criticised France for having violated the constitutional principle of irreversibility of the transfer of power by entrusting the representative of France in New Caledonia with the power to take the necessary measures for managing the health crisis on the one hand, and on the other hand for having shown partiality by authorising the anti-independence supporters to use the colours of the national flag in the referendum campaign. There is no doubt that these tensions will be brought to the attention of the UN experts and that the 2020 report will mention them. Moreover, whereas in 2018, the opposing forces agreed on the necessity of a notification from the state that was limited to the immediate strict legal aspects, the FLNKS deplored the lack of involvement of the national bodies in the construction of the next phase, in the case of the victory of the 'Yes' vote. The pro-independence request aimed, above all, to obtain an undertaking from France regarding the maintenance of French nationality for all nationals of Kanaky–New Caledonia.

At the end of the Noumea Accord referendum process, the delicate problem that the Committee on Decolonization should consider is that of the removal of New Caledonia from the list of non-autonomous countries under article 73 of the UN Charter.

The response is clear in the case of accession to independence, but not so obvious in the case of a triple victory of the ‘No’ vote. In the latter case, the New Caledonian people, to whom reference is made in the annual resolutions of the General Assembly relating to New Caledonia, will have exercised their right to self-determination and will have decided to remain part of an independent state. The Noumea Accord, which is mute on this subject, simply contains the provision that

if the response is still negative, the political partners will meet to examine the situation that is thereby created’ and that ‘for as long as the consultations do not achieve the new political organisation that is suggested, the political organisation established by the 1998 Accord will remain in force, in its final phase of evolution, without the possibility of going backwards, as this irreversibility is constitutionally guaranteed.

From these formulations and from the transitory nature of the Noumea Accord, it should be understood that negotiations must be organised so as to reach an agreement on the organisation of the institutions and the link with the French Republic. The anti-independence supporters, who call for an enduring agreement, state that they are nevertheless not opposed to a compromise integrating a mechanism allowing New Caledonians to launch a referendum with a view to acceding to independence. In such a scenario, will the UN, that has supported the emancipation process and that has expressed no reservations regarding the validity of the ballot, apply its own resolutions containing the provision ‘that a non-autonomous territory has reached full autonomy: ... c) when it has been integrated into an independent State’? The UN may also consider maintaining the capacity for an option for independence in the new institutional provision which legitimises being maintained on the list of the territories to be decolonised, or that the persistence of the pro-independence claim from part of the New Caledonian people freezes the situation. In other words, for the UN, is independence ultimately the only valid path to decolonisation?

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Author notes

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Endnotes

1. The [Matignon-Oudinot Accords](#) that took place on 26 June 1988 in New Caledonia.
2. Explanatory memorandum for the draft bill that would become Law no. 88–1028 of 8 November 1988 containing the statutory and preparatory provisions for self-determination in New Caledonia in 1998.
3. The text of the accord and its preamble can easily be consulted on the [government of New Caledonia](#) website. To understand the Noumea Accord, see Faberon (2002).
4. Front de Libération Kanak et Socialiste [Kanak and Socialist National Liberation Front].
5. UNOPS is an operational body of the United Nations providing a large range of services, notably with regard to technical advice and project implementation, in order to help the UN and its partners to implement humanitarian projects and projects for the development and consolidation of peace and security.
6. First self-determination referendum in the process of emancipation provided for in the Noumea Accord of 5 May 1998. Provision is made in the Accord for up to three referenda, in the case of a negative vote in the first two.
7. New Caledonia, like French Polynesia, originally appeared on the list of autonomous territories supplied by France and was the subject of a de facto removal from that list following the adoption of the Constitution of the IVth Republic on 27 October 1946.
8. UN General Assembly Resolution 43/47, *International decade of elimination of colonialism*, A/RES/43/47 (22 December 1988).
9. UN General Assembly Resolution 55/146, *Second international decade of elimination of colonialism*, A/RES/55/146 (8 December 2000).
10. UN General Assembly Resolution 65/119, *Third international decade of elimination of colonialism*, A/RES/65/119 (10 December 2010).
11. For a complete history see Regnault (2013).
12. See the United Nations, [Fourth Committee Hears from Petitioners on Questions of New Caledonia, United States Virgin Islands, Western Sahara, as Decolonization Debate](#)

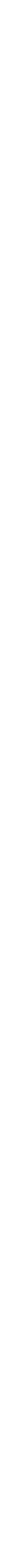
- [Continues](#), press release, 6 October 2009; and the website of the [Legal and Economic Research Laboratory](#).
13. See the [speech by Philippe Gomes](#), president of the government of New Caledonia, 6 October 2009.
 14. See the [speech by Roch Wamytan on 11 October 2013](#).
 15. Merle (1961).
 16. Concerning the history of electoral assistance, see the [ROP website](#).
 17. Resolutions by the UN General Assembly, *Reinforcement of the efficiency of periodic and honest elections*, A/RES/43/157 (8 December 1988), § 1; A/RES/44/146 (15 December 1989), § 1; A/RES/45/150 (18 December 1990), § 1; A/ROES/46/137 (17 December 1991), § 2.
 18. See the directive of 11 May 2012, United Nations Coordinator for electoral assistance (11/5/2012), Ref. FP/01/2012.
 19. [Décision n° 99-410 DC du 15 mars 1999](#), Organic Law relating to New Caledonia (Partial non-conformity — proviso — organic reclassification).
 20. Constitutional Law no. 2007-237 of 23 February 2007 modifying article 77 of the constitution [Electoral body of New Caledonia].
 21. The French government communicated very little about this visit, thereby aiming to preserve its neutrality. However, its attitude towards this visit is set out in part I relating to the history of the visit from the report on the United Nations' visiting mission to New Caledonia, 18 June 2014 (AC.109/2014/20/Rev.1), AG (18/6/2014).
 22. Modified Organic Law (LO) no. 99-209 of 19 March 1999 relating to New Caledonia, article 189 II.
 23. See the [statements of conclusions of the committees of the signatories to the Noumea Accord](#).
 24. UNGA (2/4/2018) (A/AC.109/2018/20).
 25. Pro-independence political party, member of the FLNKS.
 26. See UNGA (18/6/2014), point no. 68 in the part relating to the conversations with the Political and Citizenship Commission of the FLNKS: 'Another speaker stated that the special administrative commissions had a political rather than a legal operation, which explained their dysfunctional nature. The fact that they are presided over by a magistrate was not a sufficient guarantee. The majority system meant that in the special administrative commissions in the South province, where immigrants were particularly numerous, the votes were almost systematically distributed in the same manner, in other words three to two, with the State and anti-independence representatives often on one side and the magistrate and the representative of the FLNKS on the other.' A/AC.109/2014/20/Rev.1.
 27. See UNGA (18/6/2014), point no. 73 in the part relating to the conversations with magistrates: 'The mission was informed that the commissions made their decisions by majority vote and that the magistrate, in his capacity as president, had the power to decide in the case of a tied vote. The members of the commissions did not all interpret the criteria for enrolment on the 1998 electoral list in the same way. In the case of contradictory interpretations within the same commission, the magistrate must adhere to the final decision made by the majority of votes. Consequently, it was impossible to maintain a position or an interpretation of the law that was strictly legal.' A/AC.109/2014/20/Rev.1.
 28. In accordance with decree no. 2015-1753 of 23 December 2015, independent qualified individuals must, in addition to being French speakers, be experienced in electoral matters. Above all, they must present guarantees of impartiality and independence as well as a good knowledge of electoral procedures in New Caledonia.
 29. On the provincial electoral body see notably: Gohin (2006), act 1107; Verpeaux (7/3/2007); Clinchamps (2008); Hipeau (2014).
 30. CDH (14/9/2011), A/HRC/18/35/Add.6, para. 76.
 31. See the statement of conclusions of the XVIth committee of signatories to the Noumea Accord of 2 November 2017.
 32. Repertory of Practice Followed by the United Nations Bodies, Supplement no. 7, Volume V, Articles 73 to 91 of the Charter, 1 January 1985 to 31 December 1988, United Nations.
 33. UN General Assembly Resolution 73/115, *Question of New Caledonia*, A/RES/73/115 (7 December 2018).
 34. See [state notification on the stakes of the referendum of 4 November 2018](#).
 35. Resolution A/RES/73/115 (7 December 2018), point 4.
 36. *Ibid.*, point 18.
 37. See articles 6, 18, 21 III 4°, 22 10° and 11° and 46 of the Organic Law no. 99-209 of 19 March 1999 relating to New Caledonia.
 38. On the site of NC Première, see Boscher and Ponchelet (14/12/2018).
 39. UNGA (18/6/2014), A/AC.109/2014/20/Rev.1, point 115.
 40. See Muckle (2009).
 41. See Coverage of meetings, United Nations General Assembly, Special Committee on Decolonization, 2018 session, 10th plenary session, 22 June 2018, '[Special Committee on Decolonization Approves 22 Draft Resolutions, Decisions as It Concludes Two-Week Session](#)', GA/COL/3327.

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