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ORIGINAL ARTICLE

INTERNATIONAL LAW AND PRACTICE

Secession, self-determination and territorial disagreements: Sovereignty claims in the contemporary South Pacific

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Abstract

This article maps the legally varied sovereignty claims in the contemporary South Pacific; whether secessionist, self-determination based, or consisting of territorial disputes or lesser disagreements. The analysis reveals that Pacific practice in this domain is consistent with general international law; that despite any fractures at the domestic level, relations between the states and territories of the region is peaceful, that their shared values have instead given rise to innovative solutions to legal problems concerning territory, either through the leveraging of regional institutions – so vital to the region's identity – to pursue claims against metropolitan powers, or through innovative arrangements to alleviate territorial problems left by colonial powers. Indeed, the region is replete with innovative legal solutions based on shared values and peaceful international relations. As such, Pacific practice and engagement with international law can provide a blueprint for others around the globe.

Keywords: indigenous rights; legal personality; secession; self-determination; territorial dispute

1. Introduction

The ocean is prominent in all aspects of Pacific life and indeed the region calls itself the 'ocean continent' (see Figure 1).[1] Comprised of island states and non-self-governing territories (NSGTs), when discussion turns to territory, the issue today is often existential, with a focus on land territory's disappearance as a result of climate change. What is less commonly analysed are the South Pacific's territorial claims, including both active disputes and matters of relatively dormant disagreement, below the threshold of 'dispute' for the purposes of international law.[2] The region's quiet and informal style of diplomacy and consensus-based decision-making – known as the

*The author would like to thank Anja Hilkemeijer for invaluable feedback on earlier drafts – although any errors or oversights remain the author's own. The text is current at 1 December 2020. It does not take into account the February 2021 decision by Micronesian States to withdraw from the Pacific Islands Forum (which will take 12 months to take effect) and which may or may not prove to be a temporary decision. On the withdrawal see G. Fry, 'Pacific Islands Forum Split: Possibilities for Diplomacy', *Devpolicy Blog*, 23 February 2021, available at www.devpolicy.org/the-pacific-islands-forum-split-possibilities-for-pacific-diplomacy-20210223/?utm_source=rss&utm_medium=rss&utm_campaign=the-pacific-islands-forum-split-possibilities-for-pacific-diplomacy-20210223.

[1]See, for instance, the Pacific Islands Forum's statement, 'Blue Pacific's Call for Urgent Global Climate Change Action', 15 May 2019, available at www.forumsec.org/pacific-islands-forum-statement-blue-pacifics-call-for-urgent-global-climate-change-action/.

[2]*Obligations concerning Negotiations relating to the Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. UK)*, Preliminary Objections, Judgment of 5 October 2016, [2016] ICJ Rep. 833, at 849–51, paras. 37–43. On the concept of territorial dispute see M. G. Kohen and M. Hébié, 'Territorial Conflicts and their International Legal Framework', in M. Kohen and M. Hébié (eds.), *Research Handbook on Territorial Disputes in International Law* (2018), 5.

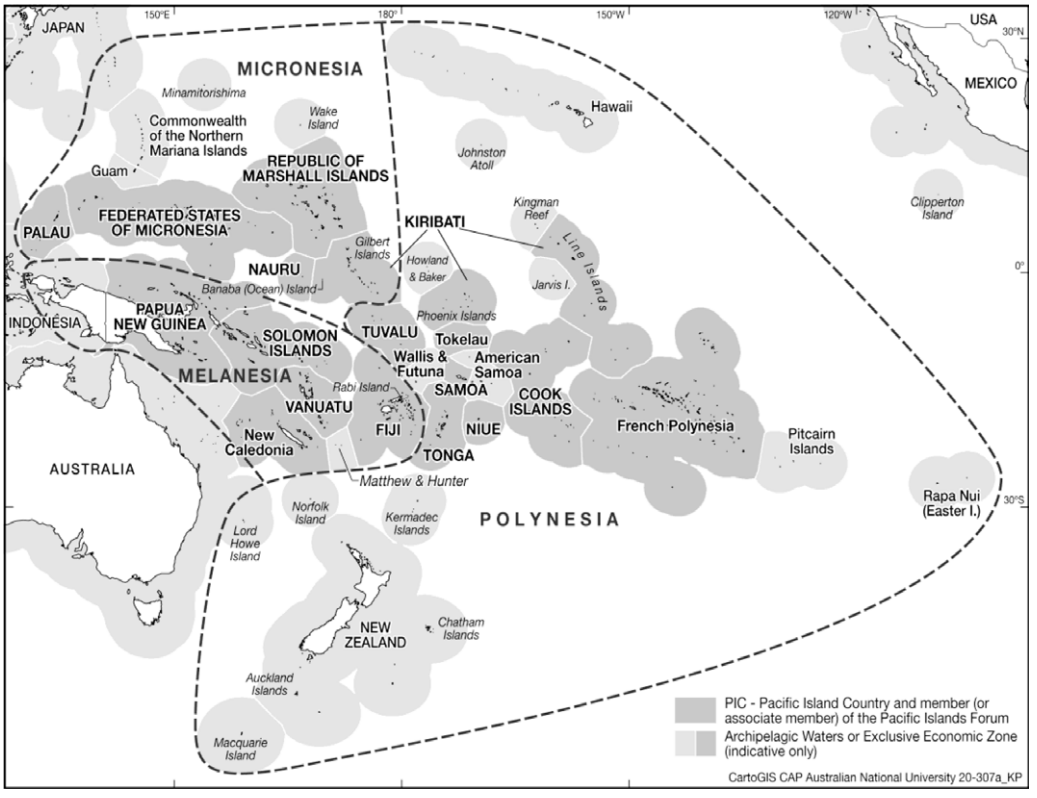

Figure 1. The Ocean Continent.

'Pacific Way' – might explain why trace of disagreement over territory between the Pacific Island Countries[3] (PICs) can be difficult to find. In fact, the reason lies elsewhere: the region's territorial differences overwhelmingly result from colonialism, pitting former colonies and current NSGTs against still present colonial powers. These territorial claims are, in other words, intertwined with matters of self-determination, a principle of great importance to the Pacific both historically and today as the process of decolonization continues. Self-determination is also invoked by those groups with post-independence secessionist claims of their own.

This article provides an overview of these legally varied sovereignty claims in the Pacific: secessionist claims, self-determination claims, and finally, territorial disagreements pitting NSGTs and former colonies against third party metropolitan powers. More specifically, understanding secession and self-determination in the Pacific is a necessary and appropriate backdrop to the region's

[3]Defining the Pacific (or South Pacific as those in the region sometimes call it) is complicated. The PICs are often defined as a sub category of Pacific Island Forum (PIF) members, which is comprised of states having exercised – or NSGTs being well into the process of exercising – their right to self-determination: Cook Islands (which is in free association with New Zealand), Fiji, Kiribati, Republic of the Marshall Islands (which is in free association with the US), Federated States of Micronesia (which is in free association with the US), Nauru, Niue (which is in free association with New Zealand), Palau (which is in free association with the US), Papua New Guinea, Samoa, Solomon Islands, Tonga, Tuvalu, Vanuatu, as well as the NSGTs of New Caledonia (France), French Polynesia (France), and finally, Tokelau (a PIF associate member and New Zealand NSGT). Other Pacific NSGTs are Pitcairn (UK), American Samoa (US) and – sometimes included in the region – Guam (US). Norfolk Island (Australian dependency) is seeking status as a NSGT and the Commonwealth of Northern Marianas (CNMI) is today integrated with the US but was historically part of the Trust Territory of the Pacific Islands. It, together with Hawaii, is generally considered as being outside the region and neither have any independent standing in the PIF. Australia and New Zealand are however important members of the Pacific Islands Forum, but are not PICs.

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few – but legally interesting – territorial disputes and disagreements. One of the most active of these concerns Matthew and Hunter Islands, currently under negotiation between France and Vanuatu.

What emerges from the analysis is that Pacific practice in this domain is consistent with general international law; that there is also little disagreement between the states and territories of the region itself, whose shared values have instead given rise to innovative solutions to their legal problems: either through the leveraging of regional institutions – so vital to the region's identity – to pursue their claims against metropolitan powers, or through innovative arrangements to alleviate problems left by colonial powers. Indeed, the region is replete with innovative legal solutions based on shared values and peaceful international relations. As such, Pacific practice and engagement with international law can provide a blueprint for others around the globe.

2. Explaining the relative lack of inter-state territorial disputes and the dominance of self-determination claims

Inter-state disagreements over territory in the Pacific are rare because, with few exceptions (to be considered below), the territorial integrity of the NSGTs was respected at independence and these territorial units in turn mostly aligned with geographic divisions and rarely cut across ethnic ones. The widespread maintenance by colonial powers of the pre-independence territorial integrity of their colonies is consistent with international law on self-determination (once that right emerged as positive law);[4] and on independence, with the principle of *uti possidetis juris*, as a means of orderly decolonization.[5] That said, after their independence some states in the Pacific faced secessionist claims. This is arguably because nationalism is generally considered weak, notably in Melanesia where the Pacific's biggest population concentrations lie and where there is tremendous ethnic diversity. At the same time, in many other parts of the Pacific the struggle for independence from colonial authority itself remains a work in progress. Indeed, self-determination rather than nationalism is constitutive of identity and thus defines the region, its achievement expressed though membership of the region's pre-eminent political institution, the Pacific Islands Forum (PIF or Forum). It is against this broader background of secessionist and self-determination claims (considered in this Section 2) that today's territorial disputes can be situated (Section 3 below).

2.1 The nature and fate of the region's secessionist movements

The secessionist movements that exist both today and historically are mostly in Melanesia, in the western Pacific. As noted, this is not surprising given its ethnic and linguistic diversity. To illustrate, over 860 languages are spoken in Papua New Guinea (PNG). In Vanuatu, consisting of over 80 islands, over 100 languages are spoken. Today the two most prominent secessionist movements are in West Papua (consisting of the Indonesian provinces of West Papua and Papua) and Bougainville (in PNG). However, a particularly interesting case is in the east, in Polynesia, where an historic claim has been resolved with an innovative legal arrangement. This is the case of Banaba (Ocean Island), which lies in the Republic of Kiribati.

2.1.1 Current secessionist movements

The West Papuan and Bougainville secessionist movements both claim a right to independence on the basis of the right to self-determination. Conceptually however, the two claims differ. In the case of West Papua, the question is whether self-determination is extant despite UN approval of a

[4]On the crystallization of self-determination in 1960 as a right under customary international law see *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, Advisory Opinion of 25 February 2019, [2019] ICJ Rep. 95, at 132, para. 152 (*Chagos Advisory Opinion*).

[5]On this principle see, for instance, S. R. Ratner, 'Drawing a Better Line: *uti possidetis* and the Borders of New States', (1996) 90 *American Journal of International Law* 590.

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self-determination process and the territory's integration into Indonesia in the 1960s. In the case of Bougainville, even if cast in terms of self-determination, independence rests on PNG's consent, pursuant to the procedures agreed to in a peace agreement between the parties,[6] PNG having exercised on behalf of Bougainville and the rest of the former colonial territory, its right to self-determination in 1975 when PNG became independent. The so-called 'one shot' (at independence) rule thus comes into play, which on a traditional analysis bars further legal entitlement to self-determination.[7]

2.1.1.1 West Papua. The West Papuan secessionist struggle is taking place on the Indonesian side of the South Pacific's only land border; a 750km divide between PNG and Indonesia on the island of New Guinea,[8] where illegal logging flourishes in the world's third largest rainforest. West Papua, also variously known as West New Guinea, West Irian, Irian Jaya, and Western New Guinea, is Indonesia's only Pacific Ocean controlled territory.

When Indonesia became independent in 1950, West New Guinea remained under Dutch rule, having been administratively severed from the Dutch East Indies (i.e., pre-independence Indonesia) in 1949 pursuant to a Charter of Transfer of Sovereignty.[9] According to the Indonesian interpretation of the 1949 Charter this separation was provisional, for one year only, whereas the Dutch interpreted the same instrument as providing for a permanent separation. Indonesian-Dutch tensions persisted from 1949–1962 during which time the Dutch advocated almost any alternative to Indonesian sovereignty – whether it was through the creation of a Melanesian Federation or some sort of UN administration of West New Guinea. The US mediated an agreement between the parties in 1962 (the New York Agreement),[10] pursuant to which the UN created its first territorial administration, the UN Temporary Executive Authority (UNTEA) and one of its earliest peacekeeping operations, the UN Security Force in West New Guinea (UNSF).[11] This ultimately saw the Dutch transition out of their position as a post-War Pacific power as jurisdiction over West New Guinea was in 1963 transferred to Indonesia. Still under the terms of the New York Agreement this transfer was to be followed by an 'act of free choice', to be organized by Indonesia before the end of 1969, in order to enable the Papuans to exercise their right to self-determination. A plebiscite was indeed conducted of 'representative councils' in Papua. Those supporting Papuan independence have maintained that this process was unfair. However, on 19 November 1969 the UN General Assembly adopted Resolution 2504 (XXIV) noting that Indonesia had fulfilled its obligations to conduct a plebiscite under the New York Agreement. Thirty-four states abstained from the vote but none voted against.[12]

The issue of self-determination is nonetheless still pursued and there is scope to claim that the situation between Indonesia and West Papua is not simply a matter of Indonesia's domestic jurisdiction, but remains 'in international relations' with the right to self-determination yet to be

[6]Kofi A. Annan, Letter dated 22 October 2001 from the Secretary-General addressed to the President of the Security Council, UN Doc. S/2001/988 (2001), Enclosure II 'Bougainville Peace Agreement', Arts. 4, 59, 298, 325, available at peacemaker.un.org/png-bougainville-agreement2001.

[7]See, for instance, *Reference Re Secession of Quebec* [1998] 2 SCR 217; for an analysis of self-determination claims outside the colonial context see J. Crawford, *The Creation of States in International Law* (2006), 388–418.

[8]See, for a brief description, ibid., at 555–6, 646.

[9]1949 Charter of Transfer of Sovereignty between the Kingdom of the Netherlands and the Republic of Indonesia, 69 UNTS 206.

[10]1962 Agreement between the Republic of Indonesia and the Kingdom of the Netherlands concerning West New Guinea (West Irian), 437 UNTS 273.

[11]UN General Assembly, Agreement between the Republic of Indonesia and the Kingdom of the Netherlands concerning West New Guinea (West Irian), UN Doc. A/RES/1752(XVII)) (1962); 1962 Agreement concerning West New Guinea (West Irian), 437 UNTS 273. For a legal analysis of the UNTEA, which ran from 1 October 1962 to 1 May 1963, see C. Stahn, *The Law and Practice of International Territorial Administration* (2008), 249.

[12]Ibid., at 251–2.

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exhausted.[13] This argument does, however, rest on the hypothesis that under international law in force at the time, the Dutch were legally within their rights in separating West New Guinea from Indonesia in 1949 (thus breaking up the colony's territorial integrity and making West New Guinea a separate unit) and that the 1969 Indonesian plebiscite was indeed illegitimate as a matter of international law. It also assumes that the UN General Assembly's approval of Indonesian integration of the territory is non-binding.

Being prior to the emergence in 1960 of the right of people to self-determination,[14] it is difficult to assert that the law of 1949 prevented the severance of West New Guinea from the rest of the Dutch East Indies. However, it is even harder to challenge the General Assembly's 1969 approval of Indonesia's conduct.[15] As the Court stated in the *Chagos Advisory Opinion*, the General Assembly has a 'crucial role' in respect of self-determination.[16] If one accepts that the discretion of the Assembly (with its subsidiary organ the Committee of 24), to characterize a group as a 'people' is constitutive of their right to self-determination, generating that right for a given group, then surely it follows that the Assembly must also be the arbiter, as representative of the international community, of whether that right has been lawfully exercised. Despite the recommendatory nature of its resolutions, the authority of the Assembly to make legally binding determinations under general international law in respect of self-determination matters is well established. As the ICJ stated in the *Namibia* case which bore on self-determination:

> ... it would not be correct to assume, that because the General Assembly is in principle vested with recommendatory powers, it is debarred from adopting, in specific cases within the framework of its competence, resolutions which make determinations or have operative design.[17]

As the *Namibia* case reveals and indeed, as has more recently been affirmed by the ICJ,[18] the Assembly's decision-making power on self-determination also clearly extends to decisions made in the exercise of an oversight function.[19] This is well established. In the Pacific, the General Assembly has for instance, authoritatively asserted that it did not consider France's 1987 referendum on New Caledonia to be valid and called for a free and authentic act of self-determination.[20] Thus, in relation to West Papua and Resolution 2504, the key to any challenge is whether the Assembly's exercise of discretion in making its determination can be contested – and not whether the referendum was flawed in the eyes of others, something which is generally conceded.[21] The Assembly could of course decide to pass another resolution and list West Papua as an NSGT, but failing that, Resolution 2504 must arguably be challenged in order for a West Papuan right to self-determination to succeed.

[13]On self-determination situations being 'in international relations' see, for instance, UN General Assembly, Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, UN Doc. A/Res/25/2625 (1970).

[14]*Chagos Advisory Opinion*, *supra* note 4, at 134, para. 160.

[15]For the contrasting view that the adoption of the General Assembly resolution is no impediment to the conclusion that the right of self-determination was not lawfully exercised see R. McCorquodale, J. Robinson and N. Peart, 'Territorial Integrity and Consent in the Chagos Advisory Opinion', (2020) 69 *International and Comparative Law Quarterly* 221, at 237.

[16]*Chagos Advisory Opinion*, *supra* note 4, at 135, para. 163.

[17]*Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion of 21 June 1971, [1971] ICJ Rep. 16, at 50, para. 105 (*Namibia Advisory Opinion*).

[18]*Chagos Advisory Opinion*, *supra* note 4, at 136, para. 167.

[19]And indeed, the Assembly's subsidiary body, the Committee on Decolonization, further attests to that power.

[20]UN General Assembly, Question of New Caledonia, UN Doc. A/RES/42/79 (1987), referred to in M. Kohen, *Possession contestée et souveraineté territoriale* (1997), 88, note 54.

[21]See notably J. Saltford, *The United Nations and the Indonesian Takeover of West Papua, 1962–1969* (2003).

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The legal frame for assessing the Assembly's exercise of its discretion is whether '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 of self-determination'.[22] The question does not turn on motives, but rather on interpretation, an objective exercise; specifically whether the Assembly's decision was 'reasonable in relation to the objectives of the relevant law', in this case to the New York Agreement and the law of self-determination[23] – which in respect of the latter, requires a 'freely expressed will and desire' of the people concerned.[24] Whilst the Court bypassed the issue in the *East Timor* case when dealing with Portugal's assertion that Security Council and General Assembly determinations were final on the issue of self-determination,[25] in the much earlier 1948 *Admissions Advisory Opinion* the Court indicated that the General Assembly could appreciate in a discretionary way the factual criteria of the rule in question (Article 4 UN Charter) so long as there was a reasonable connection between its decision and the rule, and the exercise of discretion was performed in good faith.[26] The same reasoning might apply here, although the assessment must bear in mind that the adoption of a resolution by an organ of the United Nations benefits from a presumption of legality.[27]

That said, in the light of the *Chagos Advisory Opinion*, the fact that the former colonial territory of West New Guinea is not currently on the UN Committee for Decolonisation's list of NSGTs does not definitively exclude the right to self-determination. It is also of some moment that in recent years, some Pacific states have called on Indonesia to give effect to a free Papuan vote on their independence whilst also calling for an end to human rights abuses.[28] In that regard, the World Court's 2010 comment in the *Kosovo Advisory Opinion* that 'remedial secession' as a ground for self-determination in the event of egregious human rights abuses elicited 'radically different views'[29] (suggesting by inference that the consistent state practice needed for a customary right did not exist) may or may not still hold today.

More broadly one can note that with the departure of the Dutch, any inter-state territorial dispute between Indonesia and PNG is absent despite kinship ties across the border. This is borne out at the local level. Although the Indonesia-PNG boundary has been delimited since 1895, with some more recent amendment,[30] the border remains porous with recording made of fugitive crossings by West Papuan separatists into PNG prompting occasional Indonesian military led

[22]*Chagos Advisory Opinion*, *supra* note 4, at 136, para. 167.

[23]*Whaling in the Antarctic (Australia v. Japan: New Zealand Intervening)*, Merits, Judgment of 31 March 2014, [2014] ICJ Rep. 226, at 260, para. 97. Note however that not all judges considered correct the exclusion of subjective appreciation. For an assessment see R. Kolb, 'Short Reflections on the ICJ's Whaling Case and the Review by International Courts and Tribunals of "Discretionary Powers"', (2014) 32 *Australian Yearbook of International Law* 135, at 139.

[24]UN General Assembly, Declaration on the Granting of Independence to Colonial Countries and Peoples, UN Doc. A/RES/1514 (XV) (1960), para. 5.

[25]*East Timor (Portugal v. Australia)*, Judgment of 30 June 1995, [1995] ICJ Rep. 90, at 103–4, paras. 30–1.

[26]*Conditions of Admission of a State to Membership in the United Nations (Article 4 of the Charter)*, Advisory Opinion of 28 May 1948, [1948] ICJ Rep. 57, at 63, in Kolb, *supra* note 23, at 142.

[27]*Namibia Advisory Opinion*, *supra* note 17, at 22, para. 20.

[28]See, for instance, the annual statements of the Prime Ministers of Vanuatu before the UN General Assembly from 2016–2018: UN Doc. A/71/PV.19 (2016), at 5; UN Doc. A/73/PV.12 (2018), at 20.

[29]*Accordance with International Law of the Unilateral Declaration of Independence in respect of Kosovo*, Advisory Opinion of 22 July 2010, [2010] ICJ Rep. 403, at 438, para. 82.

[30]1985 Convention between Great Britain and the Netherlands defining the boundaries between the British and Netherland possessions in the island of New Guinea, in P. van der Veur, *Documents and Correspondence on New Guinea's Boundaries* (1966), 108; 1972 Agreement between Australia and Indonesia Concerning Boundaries between Papua New Guinea and Indonesia, 974 UNTS 319. For an analysis see J. R. V. Prescott, 'Problems of International Boundaries with Particular Reference to the Boundary between Indonesia and Papua New Guinea', in R. J. May (ed.), *Between Two Nations: the Indonesia-Papua New Guinea border and West Papua Nationalism* (1986), 1.

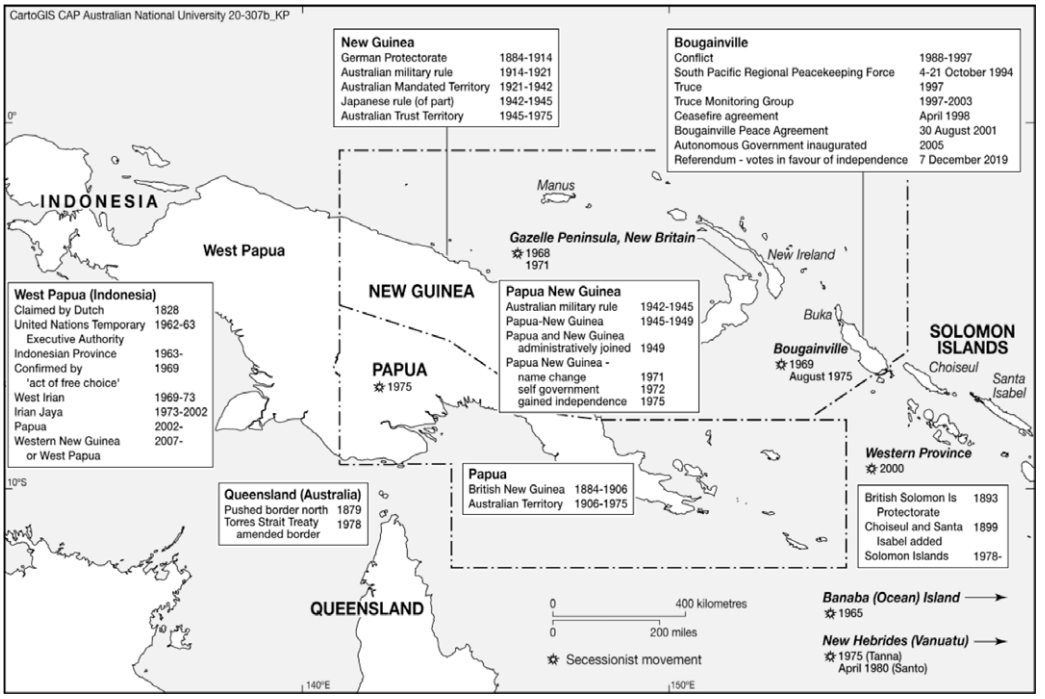

Figure 2. Secessionist Claims.

law enforcement incursions into PNG in hot pursuit.[31] Indonesia has in the past denied that these pursuits occur.[32] Nonetheless, this issue does not appear to give rise to dispute between these two states today, and most pertinently here, no dispute exists in relation to the boundary itself.

2.1.1.2 Bougainville. Unlike Papua, Bougainville does not relate to a split cutting across land territory, the divide instead being more characteristic of the region and its disputes (few though these are): that of a split archipelago (see Figure 2). Here that occurs between the southern tip of PNG's Autonomous Region of Bougainville on the one hand, and the Republic of Solomon Islands'

[31]On recent incursions see Dateline Pacific, 'Border Incursions a Sign that West Papua also a PNG Issue', *Radio New Zealand*, 15 April 2014, available at www.rnz.co.nz/international/programmes/datelinepacific/audio/2592598/border-incursions-a-sign-that-west-papua-also-a-png-issue; J. Blades, 'Line Between PNG and Indonesia Increasingly Blurred, Radio New Zealand International', *Radio New Zealand*, 21 December 2015, available at www.rnz.co.nz/international/pacific-news/292667/line-between-png-and-indonesia-increasingly-blurred. More generally, see R. J. May, '"Mutual Respect, Friendship and Cooperation"? The Papua New Guinea-Indonesia Border and its Effect on Relations between Papua New Guinea and Indonesia', in R. J. May (ed.), *State and Society in Papua New Guinea: the First Twenty-Five Years* (2001), 286. Border Arrangement Treaties concluded, initially by Australia for PNG and then PNG itself with Indonesia, and periodically updated since 1973, provide for co-operation over a border area, including via a Joint Committee. No explicit mention is made for law enforcement operations. The latest of such treaties is the 2013 Basic Agreement on Border Arrangements. The Presidential Decree bringing this agreement into force is found at: Presidential Decree 76, Ratification of the Basic Agreement between the Government of the Republic of Indonesia and the Government of the Independent State of Papua New Guinea on Border Arrangements (2018), LN Number 156, available at peraturan.go.id/peraturan/view.html?id=11e8e0d60fe5b72a881e313533373432. For the earlier agreements see E. Wolfers (ed.), *Beyond the Border: Indonesia and Papua New Guinea South-East Asia and the South Pacific* (1988). 1986 Treaty of Mutual Respect, Friendship and Cooperation 1463 UNTS 9, between the Republic of Indonesia and the Independent State of Papua New Guinea, provides mutual guarantees under the *jus ad bellum*, but again, there is no provision for hot pursuit.

[32]Foreign Ministers Mochtar Kusumaatmadia and Rabbie Namaliu, 'Joint Communique', 29 October 1984, in Wolfers, ibid., at 201–2.

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northern-most Shortland islands on the other. When Germany ceded the Northern Solomon Islands, consisting of a cluster of islands of the Solomon archipelago, to the British in 1899, it retained the most northerly islands of Bougainville (the biggest and richest island of the geographic chain), together with Buka Island. This meant that after time as part of the Australian administered Mandate and later Trust Territory of New Guinea, these islands would ultimately become part of PNG. Today's Autonomous Region of Bougainville still seeks independence from PNG, having fought a bloody conflict from 1988–1997 that only ended with PNG's agreement to allow a Bougainville independence referendum.[33] That referendum, conducted between 23 November and 7 December 2019, resulted in an overwhelming vote for independence. This will, in the first instance, lead to consultations between the Autonomous Bougainville Government and the PNG government. Despite being part of the Solomon archipelago in a geographic sense, it is significant that Bougainville is not seeking integration with the Republic of Solomon Islands.

It can be seen that as in the case of West Papua, the issue here is a secessionist movement and the exercise of a claimed right to self-determination. No apparent dispute exists between the states of PNG and Solomon Islands in relation to the territory in question – even if tensions existed between them in the early to mid-1990s when PNG Defence Forces occasionally entered Solomon Islands territory as it sought to quell the Bougainville rebellion.[34]

2.1.2 Historical secessionist movements and the respect for territorial integrity

As noted above the lack of inter-state disagreement over territory can be explained in political terms both by weak nationalism and a fortunate geographic situation where natural divisions tend to correlate with ethnic ones. In legal terms, the rationale lies in the region's respect for the colonial unit's territorial integrity, which on independence converted to respect for the principle of *uti possidetis juris*. In so doing, one sees that the *uti possidetis juris* principle was in this region, as in Latin America and later Africa,[35] a matter of positive international law anchored in state practice since the 1960s when the South Pacific NSGTs began their journey to independence. This outcome was aided by the consistently held position adopted by UN organs – the Trusteeship Council and General Assembly – on self-determination and to that extent these principles could be considered quasi-legislated. The respect for territorial integrity of the colonial unit and its desire to carry it forward to independence is also seen on the ground both in Bougainville's prior claims for independence but also in the region's other historic secessionist claims (detailed below and summarily depicted in Figure 2).

2.1.2.1 Bougainville and other parts of PNG: Bougainville. The Bougainville conflict of 1988-97 was not the first attempt by Bougainville to gain independence. In 1969 the Napidakoe Navitu nationalist society sought a referendum to ask the Bougainville population whether they wished to remain a part of PNG; unite with the New Guinea Islands (Manus, New Britain and New Ireland); join the British Solomon Islands Protectorate (which gained independence in 1978); or become an independent state.[36] Whilst the request for a referendum was refused, the Napidakoe Navitu nonetheless went ahead with a vote in 1970, reporting an overwhelming vote for secession[37] – which did not eventuate, the pre-independence boundaries of PNG being instead maintained.

[33]See A. J. Regan, 'Causes and Courses of the Bougainville Conflict', (1998) 33 *Journal of Pacific History* 269; B. Bohane, 'The Bougainville Referendum and Beyond', *Lowy Institute*, October 2019, available at www.lowyinstitute.org/sites/default/files/Bohane_The%20Bougainville%20referendum%20and%20beyond.pdf.

[34]See I. Scales, 'The Coup Nobody Noticed: The Solomon Islands Western State Movement in 2000', (2007) 42 *Journal of Pacific History* 187, at 193.

[35]*Frontier Dispute (Burkina Faso v. Republic of Mali)*, Judgment of 22 December 1986, [ICJ] Rep. 554, at 565, para. 20.

[36]I. Downs, *The Australian Trusteeship: Papua New Guinea, 1945-1975* (1980), 440.

[37]Ibid.

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In August 1975, just prior to PNG's independence on 16 September 1975 (full internal self-governance having begun on 1 December 1973), the North Solomons Movement declared the independence of the 'Republic of North Solomons' to be effective 1 September 1975. The UN did not recognize the declaration despite the dispatch of a delegation to the UN to that end.[38] The General Assembly's longstanding views on the matter, later reiterated in respect of Bougainville before the Trusteeship Council, favoured the future PNG's territorial integrity, and these affirmed the:

> imperative need to ensure that the national unity of Papua New Guinea was preserved and strongly endorsed the policies of the administering authority and of the Government of Papua New Guinea aimed at discouraging separatist movements and at promoting national unity.[39]

The North Solomons Movement resiled from its declaration of independence shortly before PNG's independence on 16 September 1975[40] and its leaders integrated into the new PNG government.[41]

The Gazelle Peninsula of East New Britain Elsewhere in PNG, to the northwest of Bougainville in East New Britain, the Mataungan Association was a prominent PNG secessionist group.[42] As early as 1971 they called for self-government and told a visiting UN Mission that they wanted land issues resolved by the International Court of Justice.[43] However, like a number of other groups,[44] it has been suggested that the main aim was not secession from PNG, though the Mataungan Association used this as a threat to achieve its more localized ambitions of autonomy.[45] Also created on the Gazelle Peninsula, the Melanesian Independence Front (MIF) had earlier sought to create a new Melanesian federation. Established in 1968, the MIF – like the contemporaneous and equally short-lived Napidakoe Navitu movement noted above – sought to create a newly independent state called Melanesia bringing together the four New Guinea Districts of Manus, New Ireland, New Britain and Bougainville.[46] This movement is separate to the Dutch proposal for a Melanesian Federation noted above in relation to Papua (Western New Guinea) and would die out in 1969.

At this point one can note that these examples reveal that although nationalism is weak, there was some historic appetite for pan-Melanesian federation. Today the Melanesian Spearhead Group (MSG), a sub-regional institutional arrangement, to some extent fulfils that purpose, albeit at an international level. As will be seen below in relation to the contemporary Matthew and Hunter dispute, the MSG can provide leverage for sub-state actors to prosecute their international claims, and so confer upon them a degree of international legal personality, circumventing the

[38]Ibid., at 555.

[39]UN General Assembly, Question of Papua New Guinea, UN Doc. A/RES/3109 (XXVIII) (1973), paras. 4, 5; UN Trusteeship Council, 'Provisional Verbatim Record of the Fourteenth Hundred and Forty-Eight Meeting', UN Doc. T/PV.1448 (1975); UN Trusteeship Council, 'Provisional Verbatim Record of the Fourteenth Hundred and Forty-Ninth Meeting', UN Doc. T/PV.1449 (1975). For a chronology and extracts of debates regarding PNG see 'Australian Practice in International Law 1974–1975', (1978) 6 *Australian Year Book of International Law* 187, at 189–99, and for Australia's position in relation to Bougainville in particular at 191, note 12.

[40]M. Rafiqul Islam, 'Secession Crisis in Papua New Guinea: The Proclaimed Republic of Bougainville and International Law', (1991) 13 *University of Hawaii Law Review* 453, at 462.

[41]J. Giffin, 'Cautious deeds and Wicked Fairies: a Decade of Independence in Papua New Guinea', (1986) 21 *Journal of Pacific History* 183, at 188.

[42]R. May, *State and Society in Papua New Guinea, The First Twenty-Five Years* (2004), 61–3.

[43]Downs, *supra* note 36, at 425.

[44]May, *supra* note 42, at 63–5.

[45]Downs, *supra* note 36, at 425, 441.

[46]Ibid., at 332; T. Banivanua Mar, *Decolonisation and the Pacific, Indigenous Globalisation and the Ends of Empire* (2016), 177.

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'veil' constituted by the colonial power. As will be seen at the regional level the PIF plays the same role, as well as that of excluding others – notably colonial powers – from the region's political processes.

Papua's Besana Group Finally, of particular note is Papua's Besena Group which resisted the unification of the Australian administered Trust Territory of New Guinea with the Australian colony of Papua[47] and declared Papua to be an independent republic in March 1975 just before PNG independence. Historically, the Australian colony of Papua had been governed quite differently to the German colony and later League of Nations Mandate of New Guinea, leading to considerable economic disparities between the two territories. The two were nonetheless administratively joined by Australia in 1949 – despite protest from the UN General Assembly both of Australia's behaviour in this case, but also in relation to the joint administration of other similar territories elsewhere.[48] In Papua's case, as in all the preceding PNG examples, the principle of territorial integrity as a precept of the law of self-determination was respected.

2.1.2.2 The Solomon Islands' Western Breakaway Movement. Whilst most of the region's secessionist movements are found in PNG, the Solomon Islands, a state with over 70 linguistic groups, has experienced significant ethnic strife. Of particular note were the tensions on Guadalcanal from 1998 to 2003 (escalating to a non-international armed conflict by June 2000), pitting the Malaita and Guadalcanal ethnic groups against one another, and culminating in the deployment in 2003 of an Australian led peacekeeping mission known as the Regional Assistance Mission to Solomon Islands (RAMSI).[49]

Of note here however is a rebellion by another group, the Western Breakaway Movement, in the Western Province which sought autonomy in 2000 whilst the Malaita-Guadalcanal conflict was underway.[50] This movement, which prior to the Solomon Islands' independence in 1978 had by some accounts envisaged independence of its own (or at least separation from Malaita)[51], in the late twentieth century merely sought greater autonomy.[52] It is revelatory of the political fragility of some of the Melanesian states. Indeed at this time other Solomon Islands provinces also sought greater autonomy, but with a view to transforming the Solomon Islands into a federation style republic rather than demanding full secession.[53]

2.1.2.3 The New Hebrides' secessionist movements. Just prior to its independence as the Republic of Vanuatu in 1980, the Condominium of New Hebrides experienced revolts on the islands of Espiritu Santo (Santo) – via the initially 'indigenist'[54] Nagriamel movement – and Tanna in the south, via the Tafea movement. These had roots going back to the 1960s, with political crises marking the 1970s, including at least one attempted declaration of independence in 1975.[55] In the 1970s the Nagriamel movement's character changed as alliances were formed with French settlers (the *Mouvement autonome des Nouvelle-Hébrides*) who aligned with French government interests in seeing a post-independent Vanuatu in the form of a confederation with close ties to New Caledonia and by extension, France.[56]

[47]X. Pons, *Le Géant du Pacifique* (1988), 143.

[48]See D. P. O'Connell, *International Law* (1970), vol. I, at 341.

[49]Dates of the armed conflict have been supplied by the ICRC: email from ICRC to author (23 February 2020).

[50]Scales, *supra* note 34, at 188.

[51]Ibid.; C. Dureau, 'Decreed Affinities: Nationhood and the Western Solomon Islands', (1998) 33 *Journal of Pacific History* 197, at 215–16.

[52]R. Monson, 'Hu nao save tok? Women, Men and Land: Negotiating Property and Authority in Solomon Islands', (PhD Thesis, The Australian National University 2012), 296.

[53]Ibid.

[54]See M. Tabani, 'A Political History of Nagriamel on Santo, Vanuatu', (2008) 78 *Oceania* 332.

[55]Ibid., at 340–1; M. Abong, 'Metamorpheses of the Nagriamel', in M. Abong and M. Tabani (eds.), *Kago, Kastom and Kalja: The Study of Indigenous Movements in Melanesia Today* (2018), para. 36.

[56]Tabani, *supra* note 54, at 341.

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In April 1980, three months prior to Ni-Van independence, the rebels in Santo declared the independence of the Vemarana State with the support of businessmen in New Caledonia, American businessmen who sought to create a tax haven, and unofficially, some of the New Hebrides' French administrators.[57] They were supported by other northern groups seeking to join the Vemarana in a Federation of the Northern Islands which, it was hoped, would also be linked with the Tanna movement in the south of today's Vanuatu. The rebels in Tanna also planned to secede but they never issued a declaration of independence.

Despite longstanding French reluctance, in June 1980 the British and French dispatched troops to quell the rebellions. As MacClancy points out 'in true Condominium fashion, the metropolitan governments each [did so] independently (without informing the other of its decision) . . . '.[58] One month later, the South Pacific Forum (known since 2000 as the Pacific Islands Forum) admitted the New Hebrides – then on the eve of its independence – as a new Forum member and called on Britain and France to end the rebellion,[59] fearful that secessionist movements might be encouraged in other Forum island States.[60] Vanuatu would become independent on 30 July 1980 – the first of the French Pacific colonies and last of the UK's to do so.[61] Prior to independence, on 14 July at the Forum's Tarawa meeting, and at the behest of New Hebrides' democratically elected local Chief Minister Walter Lini, and who would become post-independence Prime Minister, the New Hebrides invited the PNG Defence Force to dispatch troops (the Kumul Force) to the territory. Troops would arrive after independence on 18 August 1980 and quelled the Santo rebellion by the end of that month. This was the first international intervention by a Melanesian state onto the territory of another state[62] – done here with Australian logistic and communications support.[63]

The pre-emptive nature of this invitation (having been issued prior to independence), legitimized by the context in which it was made (a Forum meeting) is an interesting one for international law. One criterion for consent to the use of force is that it must be made by the lawful government and that means the state's highest authority.[64] At the time of the consent to the otherwise prohibited force, was this Walter Lini? Did the existence of the Condominium make it unclear who else that might be? At the same time, one of the rules surrounding the right to self-determination is that the forcible struggle to enforce that right cannot entail third party forcible assistance. The implication is that the legitimacy conferred by the Forum on Walter Lini prior to independence, and the implementation or execution of this invitation post-independence made the operation lawful.

Although in this case unsuccessful, the New Hebrides' Nagriamel movement, which ultimately defended French settler interests, has been likened to Mayotte,[65] which remained French despite the rest of the Comoros archipelago – and colonial unit – becoming independent in 1974. The UN General Assembly repeatedly condemned Mayotte's separation from Comoros[66] and today that

[57]J. V. MacClancy, 'From New Hebrides to Vanuatu, 1979-80', (1981) 16 *Journal of Pacific History* 92; S. Henningham, *France and the South Pacific: a contemporary history* (1992), 39–43.

[58]MacClancy, *supra* note 57, at 99. Note that Tabani's account, *supra* note 54, at 343, differs.

[59]Resolution adopted at the 11th South Pacific Forum, Tawara, Republic of Kiribati, 14–15 July 1980, available at www.forumsec.org/eleventh-south-pacific-forum-tarawa-republic-of-kiribati-14-15-july-1980/.

[60]MacClancy, *supra* note 57, at 100.

[61]S. Mohamed-Gaillard, 'Du condominium franco-britannique des Nouvelles-Hébrides au Vanuatu: deux métropoles pour une indépendance', (2011) 133 *Journal de la Société des Océanistes* 309.

[62]Ibid., at 320.

[63]Henningham, *supra* note 57, at 42–3, 196.

[64]O. Corten, *Law Against War: The Prohibition on the Use of Force in Contemporary International Law* (2010), 266.

[65]Mohamed-Gaillard, *supra* note 61, at 319.

[66]UN General Assembly, Question of the Comorian island of Mayotte, UN Doc. A/RES/31/4 (1976), to UN General Assembly, Importance of the universal realization of the right of peoples to self-determination and of the speedy granting of independence to colonial countries and peoples for the effective guarantee and observance of human rights, A/RES/49/151 (1994), referred to in J. Crawford, *The Creation of States in International Law* (2006), 645, at note 191. For later developments in respect of the Comoros, including the later independence declaration of the Comoros island of Anjouan, see F. Ouguergouz and D. L. Tehindrazanarivello, 'The question of secession in Africa', in M. Kohen (ed.), *Secession: International Law Perspectives* (2006), 257, at 270–1.

condemnation finds legal support in the ICJ's 2019 Advisory Opinion on the analogous pre-independence separation of the Chagos Archipelago from Mauritius.

2.1.2.4 Banaba (Ocean Island). Thus far all the historic instances of attempted secessions in the South Pacific have yielded the same result: since the emergence of the right to self-determination in the 1960s, primacy has always been given to the territorial integrity of the self-determination unit, even when the initial joining of two units – the case of Papua and New Guinea – was contested by the UN. The same primacy to territorial integrity is confirmed in the final example discussed below, but this situation is perhaps the most interesting since this confirmation of the principle of territorial integrity comes at the expense of a people's connection to their territory.

The Polynesian island of Banaba or Ocean Island (Figure 1) was initially part of the Gilbert and Ellice Islands Colony (GEIC). Following a pre-independence referendum held in December 1974, the GEIC divided into the independent states of Kiribati (considered part Micronesian, part Polynesian) and Tuvalu (considered Polynesian). After lengthy debate, Banaba remained part of Kiribati. It is however quite distinct. Geographically it resembles (the relatively proximate) Nauru with large phosphate deposits that were mined by the British since the early 1900s.[67] Following Japanese occupation of the island during the Second World War, and to enable further exploitation of the island's lucrative resources, in 1942 the British purchased, and then in 1945 relocated Banaba's population to, the Fijian island of Rabi. Banaban descendants are today Fijian citizens, but the island and its inhabitants are governed by the Banaban Rabi Council of Leaders. Whilst the Banabans have ownership of most of Rabi, the island remains subject to Fijian sovereignty[68] and the fact that it is an integral part of Fiji has never been doubted. That said, despite Banabans not being Kiribati citizens, the Rabi Council of Leaders sends Banaban representation to the Kiribati parliament.[69] This innovative arrangement is protected by the I-Kiribati Constitution and attaches rights to the descendants of the 'former indigenous inhabitants of Banaba'.[70] As will be seen, indigenous connections are particularly important in all parts of the Pacific and in this instance one can see how the region's newly independent states found an original solution to respect their cultural ties and to share their institutions as a means of doing so.

Significantly, in 1965 – and so prior to the breakup of the GEIC – Banaba argued for its own independence. The UK countered this in the UN by arguing in favour of the territorial integrity of the colony[71] (in the same year that the British severed the Chagos Archipelago from Mauritius).[72] Indeed, Fiji would take up the same argument claiming it would not tolerate any severance of its territory,[73] although the Banabans were not seeking secession of Rabi from Fiji, but rather of Ocean Island from Kiribati. The UN Committee of 24 did not support the Banaban case for independence but directed the UK to find a solution that would give Banaba control over its natural resources.[74] Whilst consideration was given to Banaban arguments in favour of the free association of Ocean Island with Kiribati, ultimately the island remained within the new state – subject nonetheless as a matter of its domestic constitutional law to the representation rights of Banabans.

[67]On the history see D. Scarr, *Fragments of Empire: A History of the Western Pacific High Commission, 1877–1914* (1967), 270–8.

[68]See J. McAdam, 'Self-determination and Self-governance for Communities Relocated across International Borders: The Quest for Banaban Independence', (2017) 24 *International Journal on Minority and Group Rights* 428, at 436–7. More generally, K. M. Teaiwa, *Consuming Ocean Island: Stories of People and Phosphate from Banaba* (2015).

[69]See Chapter IX (Secs. 117–25) of the Constitution of Kiribati (1979), available at www.paclii.org/ki/legis/consol_act/cok257.pdf.

[70]Ibid., at Sec. 125.

[71]McAdam, *supra* note 68, at 442.

[72]Indeed, in the same year there were unsuccessful attempts to relocate the population of neighbouring Nauru to Curtis Island: M. Barbier, *Le Comité de décolonisation des Nations Unies* (1974), 611. On Nauru, see *Certain Phosphate Lands in Nauru (Nauru v. Australia)*, Preliminary Objections, Judgment of 26 June 1992, [1992] ICJ Rep. 240.

[73]McAdam, *supra* note 68, at 443.

[74]Ibid., at 447.

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Reports indicate that some Banabans would today like to return to Banaba.[75] In this regard it is material that the initial population transfer to Rabi occurred at the end of the Second World War and so before any right to self-determination for NSGTs arose. Even were self-determination found to have been denied in this case, it is interesting that the ICJ has recently asserted that any resettlement issues would be a matter of human rights law.[76] The interim conclusion in this regard is that territory more so than people appear to characterize the right to self-determination for the purposes of international law – perhaps a banal observation given the equal importance that states attach to territory.

2.2 Self-determination as constitutive of the region

There are multiple instances in the South Pacific where an established right to self-determination remains to be fulfilled. The UN's list of NSGTs, contains a large number of South Pacific territories – of the 17 current NSGTs, six are in the Pacific,[77] just behind the Caribbean, which has seven.[78] Indeed this list might increase as today Australia's Pacific Ocean dependency of Norfolk Island (which since 1856 houses a large number of Pitcairn Island descendants) has petitioned the UN' Special Committee on Decolonization for listing as a NSGT following Canberra's withdrawal of the island's autonomy in 2016.[79] In the past Australia has strenuously resisted any such attempts.[80]

Today New Caledonia is prominent amongst the UN list: after a long struggle two independence referendums were held but failed in 2018 and 2020 respectively with one more to be held, probably in 2022. New Caledonia had been reinstated on the UN list of NSGTs in 1986[81] (having been absent from it since 1947)[82] at the request of Australia and New Zealand along with the PICs. It is an interesting case, though not unusual in the region, because it involves not only the self-determination of a people within the meaning of General Assembly Resolution 1514 (1960), but also one to be exercised by an indigenous people.[83] Indeed, most if not all Pacific NSGTs have large indigenous populations within the scope of the UN Declaration on the Rights of Indigenous Peoples:[84] French Polynesia (whose listing as a NSGT in 2013 is staunchly opposed by France), Guam, American Samoa, Tokelau – and indeed not on that list though aspiring to be there, the Papuans in West Papua.

As noted, a colonially dominated people can enjoy a right to self-determination even if they are not on the UN's list of NSGTs and there are several such candidates in the Pacific. An interesting case is Hawaii which is culturally and geographically part of the region (but as will be seen, not so politically). Hawaii was removed from the UN's list of NSGTs following a 1959 referendum and

[75]UN Office for the Coordination of Humanitarian Affairs, 'Finding a New Home Away from Home', 1 December 2015, available at www.unocha.org/story/finding-new-home-away-home; Minority Rights Group International, 'World Directory of Minorities and Indigenous Peoples: Fiji Islands – Banabans', 2008, available at www.minorityrights.org/minorities/banabans/.

[76]*Chagos Advisory Opinion*, *supra* note 4, at 43, para. 181.

[77]They are: New Caledonia, French Polynesia, Guam, American Samoa, Pitcairn Islands, and Tokelau.

[78]For a map of NSGTs see UN, 'Non-Self-Governing Territories', available at www.un.org/dppa/decolonization/en/nsgt. This map shows that 15 of the 17 NSGTs territories are islands, the exceptions being Gibraltar and Western Sahara.

[79]See generally the 'Norfolk Island People for Democracy' website: www.nipeoplefordemocracy.com/post/final-decision-from-un-imminent. Norfolk Island has also lodged a complaint against Australia before the Human Rights Committee: Complaint No. 3274/2018 of 8 March 2018.

[80]'Australian Practice in International Law 1974–1975', *supra* note 39, at 224.

[81]UN General Assembly, Implementation of the Declaration on the Granting of Independence, UN Doc. A/RES/41/41 A (1986).

[82]A list was created by the General Assembly pursuant to UN General Assembly, Transmission of Information under Art. 73e of the Charter, UN Doc. A/RES/66(I) (1946).

[83]Report of the Special Rapporteur on Kanak of New Caledonia notes that the New Caledonian situation is one where there is both a right to self-determination and the rights of indigenous people: UNCHR, 'Report of the Special Rapporteur on the rights of indigenous peoples, James Anaya', UN Doc. A/HRC/18/35/Add.6 (2011), paras. 14–17.

[84]UN General Assembly, United Nations Declaration on the Rights of Indigenous Peoples, UN Doc. A/RES/61/295 (2007) (adopted by 144 votes in favour; four votes against; 11 abstentions).

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the territory's accession to the status of a state in the US union. However, scope for reopening the matter – at least as an in-principle proposition under international law – arose in 1993 when the US Congress adopted a resolution recognizing the illegality of both the 1893 de facto annexation of Hawaii (contrary to treaties then in force and undertaken without Washington's approval), as well as the later official 1898 US annexation of the kingdom[85] when Hawaii 'ceded' sovereignty to the US.[86] The 1993 Resolution[87] consists of two substantive paragraphs. The first contains an 'acknowledgement and apology' for these events, although the US Supreme Court has interpreted this to be 'conciliatory and precatory' and not creative of substantive rights; the resolution's second paragraph then stipulating: 'Nothing in this Joint Resolution is intended to serve as a settlement of any claims against the United States.'[88] The US Supreme Court has interpreted this provision as a disclaimer.[89] The Resolution nonetheless calls for reconciliation and whilst Hawaii's indigenous population is divided on how this is to be pursued, some favour sovereignty.[90] It must be recognized that this population is small – and it is perhaps for that reason (as well as the argument that the right to self-determination was exhausted in 1959), that the principal debate centres on indigenous rights, rather than that of independence and a restoration of de jure sovereignty.

Not only do the New Caledonian and Hawaiian situations illustrate both the imbrication of indigenous rights with that of self-determination in the region but also, how the Pacific as a region is constructed politically. Hawaii is not generally considered a political member of the Pacific, a status reserved for those entities having exercised their right to self-determination and who choose independence from, rather than integration with, the colonial power.[91] Admission to the PIF attests to this achievement. That said, the Forum admits entities who enter into free association with other states.[92] Significantly, it has been quick to admit NSGTs prior to full statehood, but whose independence as a result of the self-determination process is imminent. Thus, PNG was admitted in 1974 – after full internal self-governance in December 1973 and just before independence in September 1975. As noted above the New Hebrides was admitted on the eve of its independence. New Caledonia, together with French Polynesia, currently in the midst of the self-determination processes were (perhaps prematurely) admitted to the Forum in 2018.

In this way, since the early 1970s, as decolonization progressed, self-determination has come to frame the South Pacific, its exercise determining the region's legitimate representatives and thus the place of each territorial entity within or outside the region as a political community, the latter personified by the PIF.[93] Unlike the region's other principal organization, the South Pacific Commission (now the Pacific Community), created by the colonial powers in 1947 to co-ordinate social and economic activities apolitically, the PIF was created by the newly independent states as

[85]US House of Representatives Joint Resolution 259, Joint Resolution to Provide for Annexing the Hawaiian Islands to the United States, 55th Congress, 2nd Session 30 Statutes at Large 750 (1898).

[86]See J. M. van Dyke and M. K. MacKenzie, 'An Introduction to the Rights of the Native Hawaiian People', (2006) *Hawaii Bar Journal* 63. See the attempt in 2001 to have a Permanent Court of Arbitration tribunal pronounce on the matter from the perspective of international law. The claim was, however, found to be inadmissible: *Larsen v. Hawaiian Kingdom*, Arbitral Award of 5 February 2001, PCA Case No. 1999-01. See for comment D. J. Bederman and K. R. Hilbert, 'Lance Paul Larsen v The Hawaiian Kingdom', (2001) 95 *American Journal of International Law* 927.

[87]US, Simultaneous Joint Resolution 19, Joint resolution to acknowledge the 100th anniversary of the January 17, 1893 overthrow of the Kingdom of Hawaii, and to offer an apology to Native Hawaiians on behalf of the United States for the overthrow of the Kingdom of Hawaii, 103rd Congress, 1st Session 107 Statutes at Large 1510 (1993).

[88]*Hawaii v. Office of Hawaiian Affairs*, 556 US 163 (2009).

[89]Ibid.

[90]See van Dyke and MacKenzie, *supra* note 86, at 63.

[91]For this reason Hawaii's territorial disagreements with the US federal authorities, for instance over Johnston (Kalama) Atoll, are not considered further here.

[92]See *supra* note 3 for further explanation.

[93]See S. Heathcote, 'Agreement Establishing the Pacific Islands Forum', (2018) 8 *Oxford Database on International Organisations*.

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the pre-eminent political arrangement. It excluded and continues to exclude those territories that are yet to exercise their right to self-determination, just as it excludes from membership the colonial powers – with the exception of New Zealand (more clearly a Pacific nation) and Australia (perhaps in some respects a Pacific nation). And it is in fact, the failure to liquidate colonial situations that gives rise to the current legal issues over the status of territory.

3. Current international territorial disputes and disagreements

Today, two types of territorial disagreement exist in the Pacific 'in international relations' within the meaning of international law – and thus of international concern rather than domestic jurisdiction. On the one hand are the disputes between independent PICs, which are exceptionally rare, and on the other, claims by NSGTs against colonial powers (Tokelau re Swains) as well as by those states in free association with the other claimant and thus where there is a situation of some de facto dependency (Marshall Islands re Wake).

Of the inter-state claims, one can note that as between the PICs themselves, both Fiji and Tonga claim Minerva Reef which appears to lie in Fiji's exclusive economic zone (EEZ). However Minerva Reef is fully submerged at high tide, and so is not capable of being reduced to sovereignty according to recent judicial pronouncements.[94] Few, if any, other disputes exist between the PICs today although Vanuatu and Fiji have recorded disagreement over Vanuatu's dispute with France over Matthew and Hunter islands. That dispute brings into play the geography of archipelagos, self-determination and indigenous rights.

3.1 Matthew (Umaenupne) and Hunter (Leka) Islands

France (for New Caledonia) and Vanuatu both claim sovereignty over the Matthew and Hunter Islands, two very small volcanic outcrops at the southern tip of the Vanuatu archipelago. Prior to its independence, the Condominium of New Hebrides was a joint colonial protectorate, with a legal personality distinct from both Great Britain and France individually, although France and the UK each retained jurisdiction over their own nationals.[95]

On both sides of the Hunter and Matthew disagreement, the precise grounds for the claim to title have not been clearly asserted[96] and the matter is currently under negotiation. France generally asserts that the two islands had 'always been an integral part of New Caledonia'[97] – and so presumably since 1853 when New Caledonia and her (undefined) 'dependencies' were annexed by France. The New Hebrides being, at the time, clearly excluded from the category of New Caledonian dependency, Matthew and Hunter might also be excluded on this basis. Other accounts of the French position hold that France annexed the islands in

[94] *Territorial and Maritime Dispute (Nicaragua v. Colombia)*, Judgment of 19 November 2012, [2012] ICJ Rep. 624, at 641, para. 26; *South China Sea Arbitration (Philippines v. China)*, Award of 12 July 2016, PCA Case 2013-19, at 132, para. 309. For an earlier pronouncement that low tide elevations are neither islands nor land territory and are thus incapable of generating maritime zones, but querying whether they might constitute 'territory' and hence be susceptible to appropriation: *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain)*, Merits, Judgment of 16 March 2001, [2001] ICJ Rep. 40, at 101–2, para. 205.

[95] For a detailed analysis of the regime see D. P. O'Connell, 'The Condominium of the New Hebrides', (1968–1969) 43 *British Year Book of International Law* 71.

[96] One recent account concludes that Vanuatu is sovereign over the islands: M. Mosses, 'Revisiting the Matthew and Hunter Islands Dispute in Light of the Recent Chagos Advisory Opinion and Some other Relevant Cases: An Evaluation of Vanuatu's Claims relating to the right to Self-determination, Territorial Integrity, Unlawful Occupation and State Responsibility under International Law', (2019) 66 *Netherlands International Law Review* 475.

[97] See, for instance, the French statement that it '. . . exercises full sovereignty over Matthew and Hunter Islands, which have always been an integral part of the French territory of New Caledonia': Communication from the Government of France to the UN Secretariat, 6 December 2010, available at www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/DEPOSIT/communicationsredeposit/mzn78_2010_fra_en.pdf.

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1929.[98] Most French accounts also refer to a 1965 decision of the New Hebrides' Joint Court[99] which purportedly confirmed Hunter and Matthew's legal attachment to New Caledonia;[100] a position reiterated by France and (according to France) by the UK, immediately after Vanuatu's independence when that position was contested by the then newly independent state's Prime Minister, Walter Lini.[101]

Vanuatu's argument in support of its claim to sovereignty, whilst resting on title as successor state to the New Hebrides – and thus requiring demonstration of a prior title vested in the Condominium[102] – is otherwise also unclear. It does not appear to rest solely on contiguity, not in itself a root of title[103] unless it can be shown that these tiny islands are mere dependencies.[104] The difficulty for both Vanuatu and France in this regard is that although geographically forming part of the Ni-Vanuatu archipelago, the islands may be located closer to New Caledonia's Walpole Island than to Vanuatu's southern island of Anatom.[105] With no clear indication that the islands are dependencies the argument for title arguably lies elsewhere,[106] bearing in mind that whilst 'proximity as such is not necessarily determinative of legal title',[107] it may give rise to a presumption.[108] One argument favouring Ni-Vanuatu sovereignty can be derived by inference from the French position. As the French have phrased it – and as would appear from the written answers given to questions in the French Parliament in 1983 – Vanuatu's claim is that an agreement was struck between France and the British by which France ceded the islands to the New Hebrides.[109] This line of argument emerges because the French records deny that any act of cession occurred. Another line of argument for Vanuatu is that '[i]n 1965 the United Kingdom occupied the two islands which were attached to the Condominium of New Hebrides'.[110] The author of this argument does not elaborate. What is clear is that Vanuatu's southern indigenous groups have longstanding customary attachments to these two islands, something conceded in French official statements[111] and recorded in the literature.[112]

[98]For instance, A. Willemez, 'Flashpoint: South Pacific – Vanuatu and New Caledonia', *Centre for International Maritime Security*, 16 January 2014, available at www.cimsec.org/south-pacific/9356.

[99]The Joint Court exercised Condominium jurisdiction. For a description see O'Connell, *supra* note 95, at 122–7.

[100]Reported in J. Charpentier, 'Pratique française du droit international - 1983', (1983) 29 *Annuaire français de droit international* 850, at 931.

[101]This is the statement of the then French Prime Minister in reply to a written question No. 29278, asked by Mr Lafleur in the Assemblée nationale on 6 June 1983: No. 29278, *J.O. – ANQ* 6 juin 1983, at 2494, reported in Charpentier, ibid., at 931–2.

[102]Assuming a delimitation of those spaces by colonial authorities, the principle of *uti possidetis* applies: *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras)*, Judgment of 8 October 2007, [2007] ICJ Rep. 659, at 701–27, paras. 132–227, especially at 707, paras. 156–7.

[103]See, for instance, *Minquiers and Ecrehos (France v. UK)*, Judgment of 17 November 1953, [1953] ICJ Rep. 47. For an assessment in respect of islands see S. Murphy, 'International Law Relating to Islands', (2016) 386 *Recueil des Cours de l'Académie de Droit International de La Haye* 9, at 106–8.

[104]*Dispute concerning the Beagle Channel (Argentina v. Chile)*, (1977) XXI RIAA 53, at 145, para. 108.

[105]This is similar to the *Territorial and Maritime Dispute (Nicaragua v. Honduras)*, *supra* note 102, at 709, para. 164.

[106]*Island of Palmas Case (Netherlands v. USA)*, (1928) II RIAA 829.

[107]*Territorial and Maritime Dispute (Nicaragua v. Honduras)*, *supra* note 102, at 708, para. 161.

[108]*Territorial Sovereignty and Scope of the Dispute (Eritrea v. Yemen)*, (1998) XXII RIAA 209, at 314–15, paras. 461–4.

[109]Reply by the French Minister for Foreign Affairs to a written question from Mr Edouard Frédéric-Dupont, 27 June 1983: No. 3118, *J.O. - ANQ* 27 juin 1983, at 2885.

[110]Mosses, *supra* note 96, at 477.

[111]*Supra* note 109, at 2885.

[112]J. T. MacClancy, 'Vanuatu since Independence: 1980–1983', (1984) 19 *Journal of Pacific History* 100, at 107. Whilst France does not appear to be arguing title on the basis of an occupation, one can nonetheless note that even uninhabited territories, as these two islands certainly are, are not *terra nullius* making them susceptible to occupation, if they belong to political entities – which may well be the appropriate characterization accorded to traditional owners here. M. Hébié, 'The Acquisition of Original Titles of Territorial Sovereignty in the Law and Practice of European Colonial Expansion', in Kohen and Hébié, *supra* note 2, at 87. On the requirements for an occupation in the Pacific see M. Hébié, ibid., at 74–5; B. Orent and P. Reinsch, 'Sovereignty over Islands in the Pacific', (1941) 35 *American Journal of International Law* 443, cited by Hébié, ibid., at 83.

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Since the adoption of UN Convention on the Law of the Sea (UNCLOS) and the creation of the EEZ, small islands such as Hunter and Matthew, which adorn the Pacific Ocean, have of course taken on heightened importance. Not surprisingly, France, well aware of Vanuatu's claim since at least 1980, has delimited its baselines on the assumption that Hunter and Matthew are French. Whilst these two outcrops are clearly above water at high tide and are therefore islands within the meaning of Article 121 of UNCLOS,[113] France has claimed an EEZ on the assumption that Hunter and Matthew are capable of sustaining human or economic life of their own. The combined claimed EEZ is 190,000 km^2[114] (indicatively shown on Figure 1), underscoring the great interest to states in laying claim to these micro territories. Interestingly, were Vanuatu sovereign over the two islands, they would form part of the Vanuatu archipelago and so could benefit from archipelagic baselines, thus obviating the need to demonstrate that the islands are capable of sustaining life within the meaning of Article 121 UNCLOS.[115]

The delimitation process undertaken by France and Vanuatu of their maritime boundaries in the area reveals a series of public acts in respect of their respective claims to the islands. These acts have clearly arisen after the crystallization of the dispute which arguably occurred on Ni-Van independence in 1980 (as noted), but they reveal the existence of a dispute and its on-going nature. Between 2007 and 2012, claims by both parties to extended continental shelves directed the UN's Commission on the Limits of the Continental Shelf not to pronounce in respect of the islands.[116] Both parties have adopted legislation including the islands within their maritime boundaries[117] and have protested officially the other claimant's domestic legislation.[118] France has always been quick to point out any failure by Vanuatu to protest French acts.[119] This includes Vanuatu's failure to object when France deposited with the UN a 1983 Franco-Fijian treaty delimitating their EEZ and which establishes the limits of their maritime spaces to the east of Matthew and Hunter.[120] This general pattern of claim and counter-claim and indeed protest and counter-protest can in fact be traced to Vanuatu's independence in 1980 when Prime Minister Walter Lini claimed the islands for the newly independent state, making it safe to assume that the dispute arose, at the latest, in 1980.[121]

So, is there a basis to either state's sovereignty claim? Pre-independence acts in respect of the islands do exist and as such can inform the analysis,[122] including notably the French annexation of 1929, if proven. As no record exists of agreements between the powers and local tribes in the New

[113] *Territorial and Maritime Dispute (Nicaragua v. Colombia)*, *supra* note 94, at 679, para. 139.

[114] France, 'Decree No. 2002-827 of 3 May 2002 - Decree defining the straight baselines and closing lines of bays used to determine the baselines from which the breadth of French territorial waters adjacent to New Caledonia is measured', (2004) 53 *Law of the Sea Bulletin* 58.

[115] Baselines have indeed been drawn by Vanuatu in its *Maritime Zones Act No. 6 of 2010* (Republic of Vanuatu): Official Gazette, Extraordinary Gazette Number 12, 18 June 2010, available at www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/vut_2010_Act06.pdf.

[116] See X. de la Gorce, 'Plateau continental étendu Nouvelle Calédonie/contestation Vanuatu', Lettre du Secrétaire général de la mer au Président de la Commission des limites du plateau continental, Paris, 18 July 2007, available at www.un.org/Depts/los/clcs_new/submissions_files/fra07/fra_letter_july2007.pdf. Translation at www.un.org/Depts/los/clcs_new/submissions_files/fra07/fra_letter_july2007_english.pdf. Preliminary Information submitted by the Republic of Vanuatu to the Commission on the Limits of the Continental Shelf 10 August 2009, available at www.un.org/Depts/los/clcs_new/submissions_files/preliminary/vut_2009_revisedpreliminaryinfo.pdf.

[117] For France, see *supra* note 114, and for the Republic of Vanuatu, see *supra* note 115.

[118] Communication from the Government of France to the UN Secretariat, *supra* note 97.

[119] Ibid.

[120] 1983 Agreement relating to the delimitation of their economic zone (with annex and maps), 1597 UNTS 435.

[121] For acts not listed here see MacClancy, *supra* note 112, at 107–8.

[122] Contrast the situation in the *Territorial and Maritime Dispute (Nicaragua v. Honduras)*, *supra* note 102, at 708–10, paras. 160–8.

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Hebrides,[123] the assumption must be made that there was no cession of territory but that the 1929 acquisition (if proven) was an occupation of a *terra nullius*. For the other side, Condominium acts in respect of the islands appear to be negligible. Moreover, events surrounding the New Hebrides Joint Court decision of 1965 appear to confirm French title.[124] Material held at the UK's National Archives indicate that in 1965 two individuals approached the New Hebrides Joint Court to register title to the islands.[125] However, the French member of the Joint Court did not allow the case to be heard, claiming that it fell outside the Joint Court's jurisdiction because the islands were New Caledonian dependencies (thus alluding to France's 1853 annexation noted above) and so the matter was removed from the court's list.[126] In a letter from the UK's Colonial Office to its Foreign Office the view was expressed that although the file relative to the islands could not be found, 'they [the UK] were content with the assertion that Matthew and Hunter belonged to New Caledonia'.[127] Neither of these statements are, if made unilaterally, of any consequence: the Condominium was for France and the UK individually, a foreign entity.[128] Only a decision of the Condominium itself can have any legal bearing on the matter. Problematically however for Vanuatu, is a subsequent letter dated 22 November 1965 from the French and British Resident Commissioners – i.e., from the Condominium itself – confirming that the islands were New Caledonian dependencies.[129]

One can note that this occurred against a backdrop of considerable uncertainty. A confidential note of 2 March 1965 records that just prior to the First World War, both France and the UK denied attachment of the islands to New Caledonia and the New Hebrides respectively.[130] Moreover, official correspondence relates that as late as 1962, maps variously showed the islands to be French (New Caledonian), New Hebridean, and even Australian.[131] This suggests that prior to 1962, although the islands were administered from the New Hebrides, there was, in light of the purported 1929 French act of annexation, doubt as to where sovereignty lay. It was only in 1976 that France transferred the administration of the islands to New Caledonia. Even if this transfer provides some potential indication of prior New Hebridean title, the Joint Commissioner's concession in 1965 to accept France's claim arguably relinquishes any claim to the islands that might have previously existed.[132] The inherent weakness in the condominium regime, which effectively allowed France, through a patent conflict of interest of the French appointed Resident Commissioner, to secure its own rights over those of the Condominium, effectively leads to

[123]A detailed study of the South Pacific's nineteenth and early twentieth century treaties makes no mention of any with New Hebridean chiefs: T. Bennion, 'Treaty-Making in the Pacific in the Nineteenth Century and the Treaty of Waitangi', (2004) 35 *Victoria University of Wellington Law Review* 165.

[124]Neither France nor Vanuatu were prepared to provide the author with the decision, but documents in the National Archives in London. See Foreign and Commonwealth Office, File FCO 141/13277.

[125]Letter addressed to Mssrs Henri Martinet and Robert Paul, dated 22 November 1965, Port Vila, signed by B. Buteri, FCO 141/13277, Doc 28D.

[126]Ibid.

[127]Letter dated 7 October 1965 to British Resident Commissioner, from Colonial Office, FCO 141/13277, Doc. 23. See also Telegram from the British Resident Commissioner to the FCO, dated 20 February 1973, Ref CF 270/44, FCO 141/13277, Doc. 29.

[128]See, for instance, M. G. Kohen, 'Is the Notion of Territorial Sovereignty Obsolete?', in M. A. Pratt and J. A. Brown (eds.), *Borderlands Under Stress* (2000), 35, at 41–2.

[129]Letter from their Honours, the British and French Judges of the Joint Court, 22 November 1965, FCO 141/13277, Doc. 28C.

[130]Note from AM Wilke to FH Brown, Colonial Office, FCO 141/13277, Doc. 21.

[131]Letter dated 18 December 1962, No. 7 JC, FCO 141/13277, Doc. 28A. On the evidentiary value of maps see K. Del Mar, 'Evidence in Territorial Disputes', in Kohen and Hébié, *supra* note 2, 417, at 426–8. Where maps provide conflicting answers, as here, other titles of greater persuasiveness and of greater value should be found: *Arbitral Award Relating to the Issue of Control and sovereignty over Aves Island (Venezuela v. Netherlands)*, (1865) XXVIII RIAA 115, 121.

[132]On abandonment see K. Parlett, 'State conduct in territorial disputes beyond effectivités: recognition, acquiescence, renunciation and estoppel', in Kohen and Hébié, *supra* note 2, 169, at 183–5 and references therein.

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the conclusion that on the evidence available today, France (on behalf of New Caledonia), rather than Vanuatu, has a stronger claim to sovereignty over the islands.

In his address to the 67th session of the UN General Assembly (2012), Vanuatu's Prime Minister noted that negotiations had begun on the dispute between France and Vanuatu.[133] These appear to have already been underway in 2010.[134] In 2013, the new Prime Minister Kalosil reiterated the claim, putting it in the context of Vanuatu's indigenous people's close cultural affiliation with the islands.[135] These were the terms in which the matter was put:

> Since our independence 33 year [sic] ago, the indigenous people of my country are still concerned that part of our maritime and cultural jurisdiction including Umaenupne (Mathew) and Leka (Hunter) Islands, south of Vanuatu were withheld by France. And in doing so, the people of our country were denied the right to exercise full political freedom and inherent cultural rights, preventing the indigenous people of the Southern Province of our country to fulfil and protect their cultural and traditional obligations in connecting its people to their land, sovereign since time immemorial.
>
> These two islands are of paramount importance because they form the basis of the establishment of our unique cultural framework connecting our cultural island group known as Tafea islands. It is this cultural framework that had governed and defined who we are and our livelihood long before the administrative colonial powers began to explore and govern our shores. Sadly, today, our indigenous people continue to be denied access to these cultural and sacred Islands.
>
> My Government calls upon the Community of Nations in this assembly to uphold the principles of respect on the rights of our indigenous people and their livelihood and for the Government of France to allow our indigenous people of Tafea to have access to their forefathers land, Umaenupne and Leka Island, in the Republic of Vanuatu.[136]

In 2014, Prime Minister Natuman addressed the General Assembly stating that the work of the UN Special Rapporteur on the Rights of Indigenous Peoples, James Anaya had brought the question of Hunter and Matthew to the attention of the Human Rights Council's 21st Session and in 2012 the French had responded and expressed an openness to dialogue.[137] What the Prime Minister sought in this 2014 speech was to:

> ... allow our indigenous peoples to resume the rights to fully exercise their cultural and spiritual obligations in the two islands of Umaenupne (Mathew) and Leka (Hunter), and to revive the traditional routes of our ancestors in the Tafea province.[138]

It would appear that the claim to sovereignty was not being pursued in that speech. Moreover, Vanuatu's subsequent speeches to the General Assembly from 2015 (70th session) to 2018 (73rd

[133]Statement by the Right Honourable M. S. K. Livtuvanu, Prime Minister of the Republic of Vanuatu, before the Sixty-Seventh Session of the UNGA, 28 September 2012, available at gadebate.un.org/sites/default/files/gastatements/67/VU_en.pdf.

[134]Statement by the Right Honourable E. Napatei, Prime Minister of the Republic of Vanuatu, '9th Legislature, Second Ordinary Session of 2010', *Hansard Report of the Republic of Vanuatu*, at 43, para. 104, available at parliament.gov.vu/images/hansard_report/french_version/2010/DeuSessOrdLUNDI_15_NOVEMBRE2010.pdf.

[135]Statement by the Right Honourable M. C. Kalosil, Prime Minister of the Republic of Vanuatu before the Sixty-Eighth Session of the UNGA, 28 September 2013, available at gadebate.un.org/en/68/vanuatuandgadebate.un.org/sites/default/files/gastatements/68/VU_en.pdf.

[136]Ibid., at 5.

[137]Statement delivered by the Honourable J. Y. Natuman, Prime Minister of Vanuatu before the Sixty-Ninth Session of the UNGA, 29 September 2014, at 6, available at gadebate.un.org/sites/default/files/gastatements/69/VU_en.pdf.

[138]Ibid.

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session) make no mention of Matthew and Hunter. More recently press reports indicate otherwise.[139]

Regardless of who is currently sovereign over Hunter and Matthew, in 2009 New Caledonia's national liberation movement (NLM),[140] the *Front de libération nationale kanak et socialiste* (FLNKS), signed an agreement (the Kéamu Accord) with the FLNKS stipulating that it would restore the islands to Vanuatu once New Caledonia was independent.[141] The FLNKS reaffirmed their support for Vanuatu's claim in 2019, citing the close cultural ties between the islands and Vanuatu. The 1998 Noumea Accord between the French and FLNKS stipulates that the territorial integrity of New Caledonia must be maintained.[142] This provision undoubtedly intends to prevent a Mayotte style situation where one part of the population prefers to remain attached to France, but it also commits France to maintaining New Caledonia's territorial integrity, including Matthew and Hunter, should they prove to attach to New Caledonia. The Noumea Accord also stipulates that for the time being international relations are exclusively a matter for the French government: whilst New Caledonia has no autonomy in this sphere, it is nonetheless to be associated with the French state in the exercise of this function.[143]

Both the Kéamu Accord and the Noumea Accord (which from the perspective of French law is seen as a 'federating' and so domestic law instrument)[144] raise interesting issues as to their status under international law given that New Caledonia is a NSGT with a right to self-determination, as well as the increasing recognition of indigenous rights over land as articulated in Article 26 of the 2007 Declaration on the Rights of Indigenous Peoples.[145] Article 26 affirms the fundamental connection between indigenous peoples and the lands that they have traditionally used or occupied. This means the matter is not purely domestic. Were Matthew and Hunter a New Caledonian dependency, the question arises: from the perspective of international (as opposed to French) law, who has the legal capacity to bind that territory – France or the FLNKS as the NLM? One is reminded here that an NLM can conclude certain treaties within the sphere of their competence,[146] such as cease-fire agreements, but that more generally their personality is limited.[147] The Tribunal in the Abyei arbitration found, for example, that neither a Comprehensive Peace Agreement nor an Arbitration Agreement between Sudan and the Sudanese People's Liberation Movement Army were treaties but rather were 'agreements between the government of a sovereign State, on the one hand, and, on the other, a political party/movement, albeit one which those agreements recognize may – or may not – govern over a sovereign state in the near future'.[148] Moreover, NLMs are unable to conclude multilateral treaties. Arguably, however, legal personality can vary not only according to the entity itself, but also the region in which it operates.

In the Pacific, one can recall in respect of Vanuatu that in 1980 the incoming post-independence regime, during a transitional period but before independence, consented to the

[139]See 'Nouvelle-Calédonie: querelles autour des îles Hunter et Matthew', *Le Figaro*, 12 March 2019, available at www.lefigaro.fr/flash-actu/nouvelle-caledonie-querelles-autour-des-iles-matthew-et-hunter-20190312.

[140]Describing representation in New Caledonia see: Special Committee on the Situation with regard to the Implementation of the Declaration of Granting Independence to Colonial Countries and Peoples, 'New Caledonia: Working paper prepared by the Secretariat', UN Doc. A/AC.109/2019/11 (2019), at 5–9, paras. 3–21.

[141]Ibid.

[142]Accord sur la Nouvelle Calédonie signé à Nouméa, (1998) 121 *Journal Officiel de la République Française* 8039, Art. 5, available at www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000555817&categorieLien=id.

[143]Ibid., Art. 3.2.1. See V. Goesel-Le Bihan, 'La Nouvelle Calédonie et l'Accord de Nouméa, un processus de décolonisation inédit', (1998) 44 *Annuaire français de droit international* 24, at 42.

[144]Ibid.

[145]Declaration on the Rights of Indigenous Peoples, *supra* note 84.

[146]Y. le Bouthillier and J. F. Bonin, 'Article 3: International agreements not within the scope of the present Convention', in O. Corten and P. Klein (eds.), *The Vienna Conventions on the Law of Treaties: a Commentary* (2011), vol. I, 66, at 73.

[147]Ibid.

[148]*Delimitation of the Abyei Area (Government of Sudan v. People's Liberation Movement Army)*, (2009) XXX RIAA 145, at 309, para. 427.

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(post-independence) deployment of PNG troops in Vanuatu. In that case Chief Minister Walter Lini had been elected, which is not the case of the FLNKS which is one of several parties in a diverse New Caledonian Congress.[149] And if the FLNKS has a degree of international personality by virtue of its membership of the sub-regional institutional arrangement, the Melanesian Spearhead Group, New Caledonia has since 1999 been represented at the regional level – in the Forum – by the President of the Government of New Caledonia and this has always been by an anti-independence politician. Nonetheless, given the emphasis on the self-determination-territory nexus, the question remains whether the FLNKS – or some movement representative of New Caledonia rather than colonial France – have the right to determine the status of territory by virtue of international law directly. One view, which reconciles the situation, is that the people's representative (traditionally the NLM) is sovereign over the colonial territory without necessarily having legal capacity internationally to exercise that sovereignty.[150] In the case at hand, this arguably means that France can speak but only on behalf of the New Caledonian people – and the MSG has identified the FLNKS in that regard. Thus, any arrangement reached pending New Caledonia's full exercise of its right to self-determination is to be undertaken jointly which, happily, is what the Noumea Accord provides from the domestic law perspective. What this means is that arguably in relation to Hunter and Matthew, as a matter of international law, France should take into account the FLNKS' views – including notably, that expressed in the Kéamu Accord.

A solution inspired from the Torres Strait on the Australia/PNG border, could be useful in resolving this dispute. It is one that respects the indigenous rights of those traditionally connected to the islands. Prior to PNG independence, the Australian state of Queensland had progressively extended its border northwards, ultimately coming very close to mainland PNG. As a result, on PNG independence in 1975, PNG and Australia had to negotiate sovereignty over certain islands and the establishment of maritime boundaries in an area close to the PNG mainland. In undertaking this task, an important consideration was the traditional way of life of the Torres Strait Islanders and adjacent coastal Papua New Guineans and consequently both freedom of movement and fishing rights were preserved in a 'protected zone' extending both north and south of the maritime boundary.[151] The zone encompasses the land, sea, airspace, seabed and subsoil of the designated area; it extends environmental protections; and also creates a Torres Strait Joint Advisory Council to assist in implementation.[152] Without wishing to revert to a solution approximating the condominium, this might nonetheless prove to be an effective solution, at least pending New Caledonia's fulfilment of its right to self-determination.

Finally one can note that even though France has not ratified International Labour Organization (ILO) Convention 169 relative to Indigenous Peoples in Independent Countries, the tribunal in the Abyei award noted that it 'enshrines a positive duty on the part of states to safeguard the rights of peoples to their traditional land use';[153] the tribunal concluding that as a matter of general principle and in the absence of agreement to the contrary, traditional rights

[149]See D. Fisher, 'New Caledonia's Independence Referendum: Local and Regional Implications', *Lowy Institute*, 8 May 2019, available at www.lowyinstitute.org/publications/new-caledonia-s-independence-referendum-local-and-regional-implications.

[150]Kohen, *supra* note 20, at 117–18.

[151]K. Ryan and M. White, 'The Torres Strait Treaty', (1976) 7 *Australian Year Book of International Law* 87, at 92, 103–10; 1978 Treaty concerning sovereignty and maritime boundaries in the area between the two countries, including the area known as Torres Strait, and related matters (with annexes), 1429 UNTS 207. For a list of similar treaties relative to other parts of the globe see the *Delimitation of the Abyei Area* Award, *supra* note 148, para. 761, note 1263. More recently, the agreement between France and Madagascar over Tromelin Island, cited in Murphy, *supra* note 103, at 111. That case involves the joint management of resources pending resolution of the dispute over sovereignty. In the Pacific, the islands of Canton and Enderbury were jointly managed pursuant to an agreement between the US and UK, pending resolution of the question of sovereignty, claimed by both states.

[152]Ibid.

[153]*Delimitation of the Abyei Area*, *supra* note 148, at 264, paras. 763–5.

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have 'usually been deemed to remain unaffected by any territorial delimitation'.[154] If this reflects customary international law, then even if France were sovereign over Matthew and Hunter and no arrangement could be made with Vanuatu, traditional owners have a right to their traditional land use.

3.2 Disputes involving NSGTs and states in free association

Two disagreements are prominent. One concerns the dispute between the Marshall Islands (a state freely associated with the US) and the US over sovereignty to Wake Island (Enen-kio). The other disagreement is between Tokelau, a NSGT and current New Zealand dependency, and the US in relation to Swains/Olohega, sometimes written as Olosenga, and which is currently administered by American Samoa, a US NSGT (see Figure 3).

3.2.1 Wake Island (Enen-Kio)

Wake Island (Enen-Kio) is located north of the equator to the west of Hawaii.[155] The Republic of Marshall Islands considers itself sovereign over Enen-kio and has drawn maritime boundaries accordingly.[156] This island is currently claimed and administered by the US and is classed under US law as a territory that is 'unincorporated' (thus with no prospect of becoming a state in the Union) and 'unorganised' (and thus with no constitution or government of its own).[157]

The Marshall Islands' claim to Wake is that Spain ceded the island to Germany at the same time as – but not by virtue of – the conclusion of the Hispano-German Protocol of 17 December 1885.[158] That Protocol was concluded following Pope Leo XIII's mediation of a dispute[159] between Germany and Spain relative to the neighbouring Caroline and Palaos (Pelew or Palau) islands. The Pope's mediation attributed sovereignty over these islands to Spain on the basis of its occupation – there being no need at the time for this to be effective[160] – but noting the active presence of German traders (habilitated to exercise state functions and claim title on behalf of Germany) called on Spain to establish institutions of state in the area and accord German traders rights of access and establishment.[161]

By expressly stipulating the co-ordinates of the Caroline and Palaos islands, the mediation and subsequent Hispano-German Protocol of 1885, establish that Wake Island (19N and 166E) lies just to the east of the Carolines and Palaos and so within the geographic area of the Marshall Islands. Germany was at the time active over the Marshall Islands and would, in 1885 – one month after the Pope's mediation – declare it a protectorate (all German colonies were termed 'protectorate', which is misleading since acquisition of title would occur by unilateral Imperial decree).[162]

[154]Ibid, at 265, para. 766.

[155]Wake lies North of the equator but the Marshall Islands being a Forum member, it can be considered a 'South Pacific' territory.

[156]Republic of Marshall Islands Maritime Zones Declaration Act 2016.

[157]Note that American Samoa is also unincorporated and unorganized but in fact has a constitution and government of its own.

[158]1885 Protocol between Germany and Spain, respecting the Caroline and Pelew Islands, 76 BFSP 294. This was recognized by Great Britain, conditional on German recognition of the same, in the 1886 Protocol between Great Britain and Spain, respecting the Sovereignty of Spain over the Carolines and Pelew Islands, 77 BFSP 1147.

[159]1885 Mediation of Pope Leo XIII on the Question between Germany and Spain relative to the Caroline and Pelew Islands, 76 BFSP 293.

[160]Hébié, *supra* note 112, at 84–5.

[161]1886 Mediation of Pope Leo XIII, ibid. The Spanish decree giving effect to that decision is: Spanish Decree, respecting the Government of the Caroline and Pelew Islands, 77 BFSP 815. Also M. Lindley, *The Acquisition and Government of Backward Territory in international law: being a treatise on the law and practice relating to colonial expansion* (1926), 149; G. Scholefield, *The Pacific: Its Past and Future and the Policy of the Great Powers from the 18th Century* (1919), 183–4.

[162]C. H. Alexandrowic, 'Le rôle des traités dans les relations entre les puissances européennes et les souverains africains (aspects historiques)', in D. Armitage and J. Pitts (eds.), *The Law of Nations in Global History* (2017), 227.

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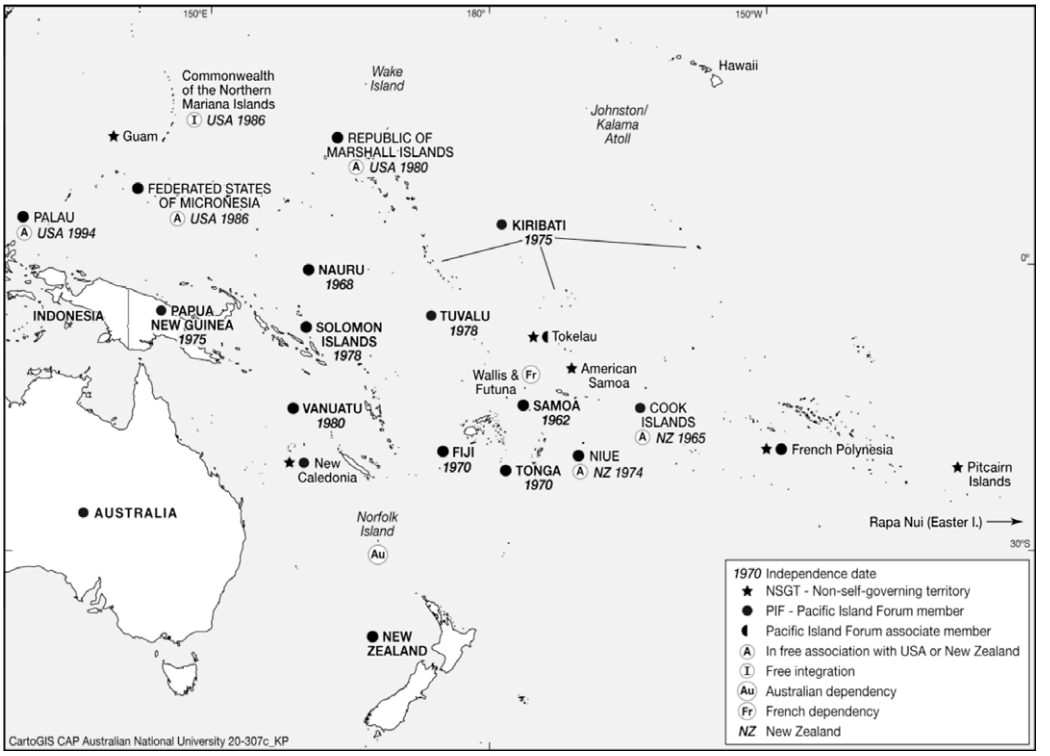

Figure 3. Self Determination in the South Pacific.

This protectorate was recognized one year later, in 1886, by the British as falling to the German sphere of influence.[163] Wake's location is thus established as outside the Carolines and Palaos and probably within the Marshall Islands.

Historian Dirk Spennemann, who has undertaken a forensic analysis of the German Foreign Office archives of the time, states that among the Spanish territories ceded at the same time as the 1885 Hispano-German Protocol's conclusion were both Wake and Johnston (Kalama) atolls.[164] This Spanish cession of Wake to Germany is referenced in an 1899 letter from von Bulow to the German ambassador in Washington, leading Spennemann to conclude that in the eyes of Germany and Spain at least, Germany was sovereign over Wake island.[165] In addition to this cession by Spain, Germany's claim to Wake has been said to derive from earlier agreements that it concluded in 1878 with the local chiefs. Whether or not the latter agreements were at the time considered treaties within the meaning of contemporaneous international law, such acts could under the international law then in force, nonetheless create 'suzerainty over the native state [that] becomes the basis of territorial sovereignty as towards other members of the community of

[163]1886 Declaration between Great Britain and Germany, relating to the Demarcation of the British and German Spheres of Influence in the Western Pacific, 77 BFSP 42.

[164]D. Spennemann, 'The United States Annexation of Wake Atoll, Central Pacific Ocean', (1998) 33 *Journal of Pacific History* 239. Today, Johnston is also 'unorganised and unincorporated' under US law, having been severed from Hawaii despite the latter's claim to it, and also, is like Wake, used as a military installation: J. M. van Dyke et al., 'The Legal Status of Johnston Atoll and its Exclusive Economic Zone', (1988) 10 *University of Hawaii Law Review* 183.

[165]Spennemann, ibid.

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nations'.[166] Finally, in case there were any doubts as to Wake's location, Spain would ultimately cede the Carolinas and Palau to Germany on 12 February 1899. However, the US claims to have acquired title either one year earlier (in 1898), or one month earlier (in January 1899).

US title to Wake, which is without fresh water and traditionally uninhabited, is sometimes said to derive from the 1898 Treaty of Paris by which Spain ceded the Philippines and Guam to the US, although no mention is made of Wake Island in that treaty and it is indeed considered to be a weak basis for the assertion of sovereignty given the clear geographic co-ordinates of the 1875 (and so prior) Hispano-German agreement.[167] Other, more frequent, accounts indicate that Wake Island was claimed for the US on 17 January 1899 by Commander Taussig on the USS Bennington.[168] An article co-signed by US President Franklin D. Roosevelt asserts that there was no confirmatory action by Congress of this move,[169] although Spennemann documents some acts of display of sovereignty undertaken on the day of the claim.[170]

Significantly, Germany itself never strenuously defended its title over Wake Island, being more concerned in the 1880s–1890s, to secure Samoa. Whether this amounted to an abandonment of sovereignty, with the requisite *animus* and *corpus* is not clear.[171] It is nonetheless important for legal purposes that Germany's claim to Wake was forgotten following the First World War when it lost its Pacific territories and, as a result, unlike the other German Pacific territories north of the equator, Wake Island did not effectively form part of the Japanese administered South Pacific Mandate created in 1922. German abandonment furnishes the strongest legal footing for the US' annexation of the island in 1934 (incidentally, a year after Japan withdrew from the League of Nations but maintained administration over the Marshall Islands) when on 29 December 1934 President Roosevelt, by executive order placed Wake Island under the control and jurisdiction of the Secretary of Navy.[172]

Assuming no prior abandonment by Germany – which can only operate if 'manifested clearly and without any doubt'[173] – and indeed that initial German title can be sufficiently proved, did German sovereignty over Wake persist? Or was sovereignty removed from Germany by operation of the law given that this would be the effect of the Mandate system in respect of all Axis held territories,[174] even if the League mistakenly forgot to include the island (both nominally and as a matter of fact on the ground) within that regime? This too leaves open the possibility of US annexation in 1934. A similar result might be achieved by operation of the – not undisputed – principle of acquisitive prescription,[175] although the Marshallese lack of opportunity to protest, as an entity

[166]*Island of Palmas Case*, *supra* note 106. For a more recent analysis: *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening)*, Counter-Claims, Judgment of 10 October 2002, [2002] ICJ Rep. 303, at 405, para. 205. For a compelling critique of the nineteenth century international law on acquisition to title to territory see A. Anghie, 'Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law', (1999) 40 *Harvard International Law Journal* 1. On Pacific treaties see Bennion, *supra* note 123.

[167]Spennemann, *supra* note 164, at 239–47.

[168]F. D. Roosevelt and J. S. Reeves, 'Agreement Over Canton and Enderbury Islands', (1939) 33 *American Journal of International Law* 521, at 525.

[169]Ibid.

[170]Spennemann, *supra* note 164, at 240.

[171]See the *Clipperton Island Case (France v. Mexico)*: V. Emmanuel, 'Arbitral Award on the Subject of the Difference Relative to the Sovereignty over Clipperton Island (France v Mexico)', (1932) 26 *American Journal of International Law* 390. On abandonment of small remote islands see Murphy, *supra* note 103, at 101–2.

[172]Ibid.

[173]*Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore)*, Judgment of 23 May 2008, [2008] ICJ Rep. 12, at 51, para. 122.

[174]See the separate opinion of Sir Arnold McNair in *International Status of South-West Africa*, Advisory Opinion of 11 July 1950, [1950] ICJ Rep. 128, at 155.

[175]For doubts as to the status of acquisitive prescription and an analysis of the relevant cases: M. Kohen, 'Title and *effectivités* in Territorial Disputes', in Kohen and Hébié, *supra* note 2, 145, at 154–6. On private law analogies more generally in this area of law see R. O'Keefe, 'Legal Title versus *Effectivités*: Prescription and the Promise and Problems of Private Law Analogies', (2011) 13 *International Community Law Review* 147.

under Mandate and Trust, should in this case be taken into account. If on the other hand, as Spennemann argues,[176] the territory was by operation of the law, in fact within the ambit of the Japanese Pacific Mandate following the First World War and the subsequent post Second World War Trust Territory of the Pacific Islands, then Wake should have reverted to the Marshall Islands upon the latter's independence and decision to enter into free association with the US.[177]

It may be that there are insufficient facts to determine sovereignty over Wake. But as in the case of Hunter and Matthew, Wake is also of significant cultural importance to the Marshallese and in the event that sovereignty cannot be established, the opportunity to draw upon the international law of indigenous peoples as it develops through instruments such as the 2007 Declaration, provides one avenue for at least a partial satisfaction of Marshall Island demands. Indeed, the Torres Strait solution might be the very well suited to this end, recalling also that traditional rights might be asserted even in the absence of agreement as seen above in relation to Matthew and Hunter – assuming its customary status given that the US, like France, has not ratified ILO Convention 169. The difficulty in this case is the strategic importance of Wake Island to the US which currently uses it for military purposes. But the US has already used undisputed Marshall Islands territory in the same way – the nuclear testing at Bikini and Enewetak Atolls when the Marshall Islands was part of the Strategic Trust.

3.2.2 The Guano Islands Act (1856) and Swains (Olohega/Olosenga) Island

The US claims a number of islands in the Pacific under the 1856 Guano Islands Act. This provides that subject to conditions, private US citizens can claim uninhabited islands, islets, cays as well as rocks, for guano production, with the consequence that the territory then 'appertains' to the US.[178] Whilst the Clipperton Island case (Clipperton also being located in the Pacific) shows that the conferral of a guano concession can amount to a display of sovereignty, the meaning of the term 'appertain' in the 1856 Act does not necessarily refer to sovereignty.[179] Certainly, the aim of the instrument – as was so often the case in colonial practice – was to enable exclusive use of the territory without concomitant responsibilities internally.[180] In two cases, the US Supreme Court confirmed this purported effect of the 1856 Act from the perspective of US law: the rights of exclusive possession to the exclusion of other states are acquired externally, albeit without the responsibilities that are ordinarily entailed by sovereignty internally. Whilst these judicial pronouncements might be seen by some to support the conferral of sovereignty, the US executive has repeatedly denied as much,[181] and indeed, under US law it would appear that the executive, rather than the judiciary, is the authority in matters of sovereignty over territory.[182] Moreover, the grants under the Act were only temporary, until the exhaustion of the guano deposits, strengthening the conclusion that under the Guano Islands Act, the requisite intention to acquire sovereignty was absent.

In practice the US administration of the 70 or so claimed territories under the Guano Islands Act has been described as chaotic.[183] Sometimes the islands did not even fall within the terms of

[176]Spenneman, *supra* note 164, at 247.

[177]The Trust over the Marshall Islands was ended by UN Security Council, Resolution 683, UN Doc. S/RES/683 (1990).

[178]See C. Duffy Burnett, 'The Edge of Empire and the Limits of Sovereignty: American Guano Islands', (2005) 57 *American Quarterly* 779.

[179]The view taken by Kohen, *supra* note 20, at 220. See also R. W. Smith, 'The Maritime Boundaries of the United States', (1981) 71 *Geographical Review* 395, at 410, where his view on the 1856 Act is that: '[t]he American claim had virtually no legal merit . . . '.

[180]Duffy Burnett, *supra* note 178, at 798, citing M. Koskenniemi, *The Gentle Civiliser of Nations* (2001), 152. See also Anghie, *supra* note 166.

[181]Duffy Burnett, ibid., at 797.

[182]*Jones v. United States*, 137 US 202 (Sup. Ct. 1890), at 212, cited by A. Clanton, 'The Men who Would be King: Forgotten Challenges to US Sovereignty', (2008) 26 *UCLA Pacific Basin Law Journal* 1, at 6.

[183]Duffy Burnett, *supra* note 178, at 787.

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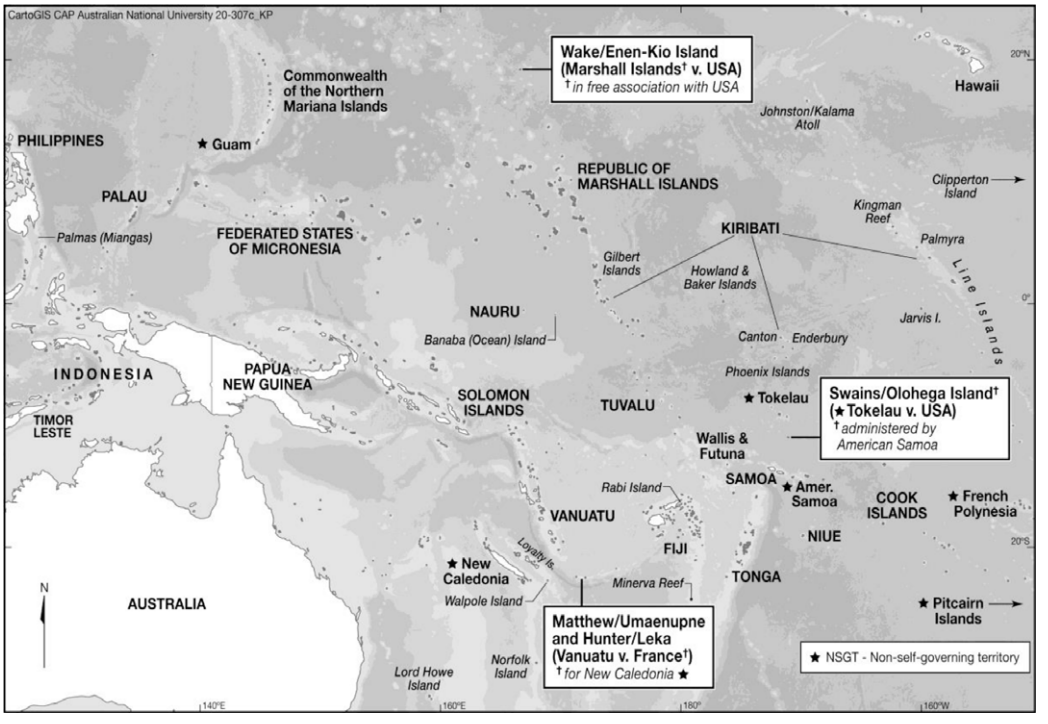

Figure 4. Territorial Disputes and Lesser Disagreements.

the 1856 Act. For instance, Palmyra, with a 'variable and temporary' population of between four and 20 people,[184] (administratively severed from Hawaii but remaining incorporated – and so eligible to become a state in the US union) turned out not to consist of guano. It is not surprising that these claims would often be followed up by acts more immediately recognized by international law for the acquisition of title, although in a few cases the solutions were innovative.

One of these concerned the islands of Canton and Enderbury, located in the Phoenix group in Micronesia and now part of Kiribati (see Figure 4). Both islands were claimed by US under the Guano Islands Act, but then abandoned, and then claimed by Great Britain, a London based company establishing business there.[185] The islands were, however, seen as good aircraft landing strips, and so these two states concluded an agreement in 1939 to establish joint governance over the territory without prejudice to the question of sovereignty. By precluding for either of themselves a preponderance of influence, the colonial powers could enjoy the attributes of sovereignty in the remote territories of the Pacific without its inconveniences or responsibilities – and in doing so, forestall further dispute amongst themselves. Ultimately the situation over Canton and Enderbury would be liquidated by the Treaty of Tarawa (1979), pursuant to which both the UK and US relinquished their claims and the islands would become a part of Kiribati.[186]

Indeed, most of the territories claimed in connection with the Guano Islands Act have been liquidated by treaty (see Figure 4): in 1979 (US-Kiribati treaty); 1980 (the treaty between US–New Zealand (on behalf of Tokelau) and the treaty between US-Cook Islands); and 1983 (US-Tuvalu

[184]Central Intelligence Agency, 'The World Factbook', available at cia.gov/the-world-factbook/.

[185]F. D. Roosevelt and J. S. Reeves, *supra* note 168, at 525.

[186]1979 Treaty of friendship (with agreed minute) (US-Kiribati), 1643 UNTS 239 (Treaty of Tarawa); The Kiribati Independence Order 1979, SI 1979/719.

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treaty).[187] Pursuant to the Treaty of Tarawa, the US retained Kingman Reef and Palmyra Atoll, as well as Jarvis, Howland and Baker islands.[188] It also relinquished its claim to 15 islands – eight in the Phoenix Group and five in the Line Group. (Kiribati, Treaty of Friendship and Territorial Sovereignty, 23 September 1979).[189] Finally one can note that some of the islands are the subject of competing claims as between Hawaii and the US – the case of Palmyra and Cornwallis.[190]

One of the territories claimed originally by virtue of the Guano Islands Act and which remains in contention despite the conclusion of a maritime boundary treaty, is Swains/Olohega Island. This small island is geographically part of the Tokelau chain[191] (see Figure 4). Tokelau protests the US claim of sovereignty; the latter claiming to have annexed the island by passage of a joint Resolution of Congress on 4 March 1925 subsequent to settlement there by a US national pursuant to the 1856 Guano Island Act. Leaving aside geography and cultural features, Tokelau appears to have asserted some basis of claim to the island by virtue of its prior occupation by a Frenchman by the name of Tyrel.[192] Certainly at the time of its discovery by Spain in 1606, Swains was inhabited by Polynesians and it is claimed that it was in 'indigenous Tokelauan hands' in 1840 when a US whaler, Captain Swain visited the island, although the island would apparently be claimed by the British at about the same time.[193] It would however never be considered by the British as part of the three islands called the Union group (being today's Tokelau) that had been annexed by Captain Oldham for the British in 1888.[194] Tokelau itself was part of the GEIC until 1926 when its administration was transferred to New Zealand (and formally ceded in 1948). Swains Island is currently administered by American Samoa, a NSGT. Tokelau remains a New Zealand dependency and also listed by the UN as a NSGT.

By virtue of a maritime delimitation treaty of 2 December 1980 between the US and New Zealand known as the Tokehega Treaty, New Zealand renounced any claim to Swains Island.[195] This was done as part of a broader settlement also including the Cook Islands[196] and would see the US renounce claims to seven other islands in the region: Pukapuka (Danger), Manahiki, Rakahanga, Penrhyn (claimed by the Cook Islands) and Atafu (Duke of York Island), Nukunono (Duke of Clarence Island) and Fakaofo (Bowditch Island) – the latter three being Tokelau itself![197] Wikileaks correspondence nonetheless reveals that in 2007 the US asked New Zealand to recognize US sovereignty over Swains after Tokelau alleged that Tokelau was sovereign over the island,[198] revealing that the matter is still in some contention.

[187]Treaty of Tarawa, ibid.; 1980 Treaty on the delimitation of the maritime boundary between Tokelau and the United States of America (New Zealand-United States of America), 1643 UNTS 251; 1980 Treaty between the United States of America and the Cook Islands on Friendship and Delimitation of the Maritime Boundary between the United States of America and the Cook Islands, 1676 UNTS 223; 1979 Treaty of friendship between the United States of America and Tuvalu, 2011 UNTS 79.

[188]F. Bunge, 'Kiribati', in F. Bunge and M. Cooke (eds.), *Oceania: a Regional Study* (1985), 280.

[189]Ibid.

[190]Clanton, *supra* note 182, at 44.

[191]On the island's discovery: H. E. Maude, 'Post Spanish Discoveries in the Central Pacific', (1961) 70 *Journal of the Polynesian Society* 67, at 102. On Tokelau itself: A Hooper, 'Tokelau: A Sort of "Self-Governing" Sort of "Colony"', (2008) 43 *Journal of Pacific History* 331.

[192]A. Hooper, 'A Tokelau Account of Olosega', (1975) 10 *Journal of Pacific History* 89. One should note, however, that this might describe an island of the Manuia Group of American Samoa: A. Angelo and H. Kirifi, 'The Treaty of Tokehega – an Exercise in Law Translation', (1987) 17 *Victoria University of Wellington Law Review* 125, at 127, note 7. However, see the contradictory statement at 127, note 9.

[193]Clanton, *supra* note 182, at 8–9.

[194]W. P. Morrell, *Britain in the Pacific* (1960), 265.

[195]Treaty on the delimitation of the maritime boundary between Tokelau and the United States of America, *supra* note 187.

[196]Treaty between the United States of America and the Cook Islands on Friendship and Delimitation of the Maritime Boundary between the United States of America and the Cook Islands, *supra* note 187.

[197]R. W. Smith, 'The Maritime Boundaries of the United States', (1981) 71 *Geographical Review* at 395, at 410.

[198]N. Maclellan, 'The Region in Review: International Issues and Events 2010', (2011) 23 *The Contemporary Pacific* 440, at 444.

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Assuming Tokelau could establish prior title (which is not readily apparent), the question of whether New Zealand could in 1980 – clearly after the emergence of the right to self-determination – renounce Swains on behalf of Tokelau and thus break up its territorial integrity is an interesting one. If it did so unlawfully, the 1980 treaty would be invalid, in accordance with the terms of Article 53 of the Vienna Convention on the Law of Treaties (1969) – assuming self-determination was by 1980 peremptory – and consequently requiring a reconsideration of all the islands renounced by New Zealand and the US in that agreement. Significantly, however, the signing ceremony of the 1980 treaty was concluded in the presence of the Tokelauan chief and indeed co-signed by him. Moreover, the preamble, an aid to the treaty's interpretation, provides that the treaty is concluded pending Tokelau's exercise of its right to self-determination. It would be difficult to prove that this was not a matter of free will, but that would certainly be the argument that Tokelau would want to make in order to revise the question of sovereignty over Swains/Olohega.

4. Conclusion

Having mapped the Pacific's various sovereignty claims – a task that the legal literature has to date overlooked – one sees that the colonial carve-up of the region occasionally separated local populations from their traditional and cultural lands and that this invariably occurred when colonial borders cut across natural archipelagos; the very locations where today one finds most of the Pacific's sovereignty claims: Bougainville; Hunter and Matthew; Wake and Swains. But these disagreements exist against a broader context: first, one of general compliance by the PICs with the rules of international law relative to territory. Already during the decolonization process, the territorial integrity of the self-determination units was accepted pre-independence, as was the principle of *uti possidetis juris* on independence. Modern inter-state territorial disputes amongst the PICs are rare to non-existent, and despite internal ethnic strife occasionally precipitating the movement of people across borders (such as from West Papua to PNG or from Bougainville to the Solomon Islands) and the political fragility of some states (such as the Solomon Islands), secessionist claims, like other territorial claims, have never led to inter-state hostilities.

Second, self-determination remains unfinished business. The region still counts six NSGTs and at least one entity (Norfolk Island) seeks to join that group. In cases where international territorial (as opposed to secessionist) claims exist, they do so against current and former colonial powers, all of whom currently control the territories in question (Hunter and Matthew, Swains and Wake). Whilst some claims may be hard to prove (e.g., Swains), opportunity nonetheless exists to shape future territorial settlements in a way that remains true to the region's values; and in particular the shared respect and understanding amongst the PICs of indigenous attachment to traditional lands. The increasing opposability under international law of indigenous rights strengthens that prospect. Innovative solutions have been developed to achieve this end – even in cases where the former colonial power retains control of the contested territory. The legal solution adopted in the Torres Strait (with Australia, a former colonial power) is an illustration. The case of Banaba another, where independently of foreign powers, an innovative solution was found. Moreover, the region's political institutions - both the Forum and sub-regionally, the MSG – empower those deemed by the newly independent states to belong to the region. As seen on the eve of Vanuatu's independence, these international institutions can confer a degree of capacity and thus some international legal personality on sub-state entities pending their independence. In this way indigenous voices can be leveraged. This has lessons for those NSGTs with territorial claims, but also for Vanuatu in respect of Hunter and Matthew given its agreement with the FLNKS in the Kéamu Accord.

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