United Nations Nations Unies

HEADQUARTERS • SIEGE NEW YORK, NY 10017

TEL.: 1 (212) 963.1234 • FAX: 1 (212) 963.4879

Distr. RESTRICTED
CRS/2009/DP.2

ORIGINAL: ENGLISH

SECOND INTERNATIONAL DECADE FOR THE ERADICATION OF COLONIALISM

Caribbean regional seminar on the implementation of the Second International Decade for the Eradication of Colonialism: challenges and opportunities in the process of decolonization in today's world

Frigate Bay, Saint Kitts and Nevis
12 to 14 May 2009

DISCUSSION PAPER

PRESENTATION

BY

DR. CARLYLE CORBIN

Challenges and Opportunities in the Process of Decolonisation of the Non Self Governing Territories in the Caribbean Region

United Nations Caribbean Regional Seminar,
St. Kitts-Nevis
May 2009

Dr. Carlyle Corbin
International Advisor on Governance

Dr. Carlyle Corbin is an international advisor on global governance and former Minister of State for External Affairs of the U.S. Virgin Islands Government. He has served as a United Nations (U.N.) expert on self-determination for over a decade, and as independent expert for the United Nations Development Programme on U.N. missions to Bermuda, and to the Turks and Caicos Islands, respectively. He has also been constitutional advisor to the *Anguilla Constitutional and Electoral Reform Committee,* political advisor to several chairs of the U.N. Decolonisation Committee, *Secretary-General* of the *Inter-Virgin Islands Council* between the governments of the British and US Virgin Islands and Secretary-General of the Offshore Governors' Forum comprised of the governments of American Samoa, Guam, the Northern Mariana Islands, Puerto Rico and the US Virgin Islands.

He has served as political advisor to the U.S. Virgin Islands Fifth Constitutional Convention, and as a member of the U.S. Virgin Islands Political Status *Commission.* He has lectured extensively on governance and political development at *Bermuda College*, the *University of the South Pacific*, the *University of Copenhagen*, the *University of Puerto Rico* and the *University of the West Indies.* He is the author of two United Nations studies on the participation non-independent countries in the United Nations system, four books and numerous scholarly articles on political and constitutional advancement.

Introduction

At the mid-point of this penultimate year of the Second International Decade for the Eradication of Colonialism, the United Nations continues to seek ways and means to implement the decolonisation mandate for the remaining, mostly small-islands, non self-governing territories in conformity with the United Nations Charter, relevant UN General Assembly and Economic & Social Council (ECOSOC) resolutions, and the self-determination provisions of the respective human rights conventions.

Whilst the political status evolution of the Caribbean territories has not significantly progressed since the first I*nternational Decade for the Eradication of Colonialism (IDEC)* during the period 1991-2000, a number of initiatives were taken to facilitate internal reforms of the existing dependency governance models.

In the UK-administered territories in the Caribbean, these measures took the form of territorial reviews of the existent constitutions with recommendations which must be acceptable to the administering power within the parametres of the dependency governance model. In the US-administered territories in this region, in particular the US Virgin Islands, reform of the dependency governance model was envisaged through the election of a local convention responsible for drafting a constitution to replace the administering power law governing the territory. Drafting a local constitution, however, itself is not sufficient to bring about a full measure of self-government, as evidenced by Puerto Rico which has had a constitution since 1952, but still has not attained full self-government. The Non Aligned Movement (NAM) at the meeting of the governing council in Havana in May, 09 have advocated for the issue of Puerto Rico taken up by the General Assembly.

Neither the US nor the UK dependency model appear intended to bring about genuine decolonisation, but rather focuses on "modernisation," of the existent political status. Dependency "modernisation" is often portrayed as a legitimate and acceptable means of replacing decolonisation. In the case of the US territories, relatively new policy is to redefine the territorial arrangements as internal matters not subject to international law, and the relevancy of the longstanding UN criteria for the attainment of self-government is then questioned.

The present paper will examine the parameters of the constitutional review processes underway in the Caribbean territories vis a vis international law and principles and the power balance/imbalance between the territories and their respective administering powers.

The paper will also examine the present international criteria for full self-government, and will offer a few new ideas on how the decolonisation process can be advanced.

Mandate and Parametres of the Internal Constitutional Processes

The process of constitutional review in the UK-administered territories in the Caribbean emanates from the 1999 *White Paper for Progress and Prosperity*. Whilst the first principle enunciated in the White Paper indicated that the new relationship "would be founded on self-determination," [1] a short transitional timetable to independence was offered as the only alternative to the present dependency status. It therefore appeared that real autonomy would only come within the context of a relatively short timetable for independence.

Thus, the relevancy of autonomous political arrangements such as the free association model in the Netherlands Antilles in the Caribbean, the Home Rule arrangements in Greenland and the Faroe Islands with Denmark in the North Atlantic; the autonomous arrangements of the Cook Islands and Niue with New Zealand in the Pacific; the free associated statehood of the Micronesia, Marshall Islands and Palau in the Pacific with the US are essentially dismissed, and the earlier *West Indies Associated States* arrangement -were no longer "on offer" according to the Parliamentary Undersecretary Bill Rammel in a 2003 policy communication. This determination was taken even as free association continues to be unanimously reaffirmed annually as a valid option by the UN General Assembly for all of the remaining territories.

With respect to the US Virgin Islands, the mandate and parametres of writing a constitution in the US Virgin Islands, as in the case of the UK-administered territories - is similarly the function of the enabling legislation of the administering power. Thus, the authority is given to the territory to draft a constitution, but only *"within the existing territorial-Federal relationship."* [2] of dependency status. Specifically, the law states that a constitution for the US Virgin Islands:

> "shall recognize, and be consistent with, the sovereignty of the United States over the (US) Virgin Islands ..., and the supremacy of the provisions of the Constitution, treaties, and laws of the United States applicable to the (US) Virgin Islands..."

In addition to the US Virgin Islands, the other US-administered territories of American Samoa, Guam and the Northern Mariana Islands in the Pacific, and Puerto Rico in the Caribbean, are all governed in a similar fashion pursuant to the relevant clause of the US Constitution which deals with "territory and other property." [3] Thus, these territories are not "part of the US," but rather "owned" by the US, according to the US Constitution. The concept of the territories as property has added sensitivity given the territory's historical legacy of slavery under Denmark. In the US-administered territories, then, the matter of changing the political status is addressed separately from that of the internal constitutional modernisation.

In the US Virgin Islands, the only political status referendum was held in 1993, but suffered from insufficient information and resources. Requests for financial assistance from the administering power, most recently in 2008, for the political education programme on the constitution were denied. The UN Working Paper on the US

Virgin Islands (A/AC.109/2009/14) refers to "the need for more funding for the Constitutional Convention from the Administering Power. In reality, there has been no such funding to date from the administering power.

Accordingly, the parametres of the constitutional review process of the dependent territories in the Caribbean are restricted to reforming the present arrangements without any real devolution of power, although some reversible delegation of power lies is facilitated. In the case of the UK-administered territories, the final decision-making power lies in the retention of the functions and special responsibilities of the appointed Governor, as reflected in the "modernised constitutions." The 2006 *Constitution Order in the Turks and Caicos Islands* is an illustration, while similar provisions in the 2007 *Constitutional Order of the British Virgin Islands*, and the draft constitution to be considered by the territory's electorate in a referendum in the Cayman Islands in May, 2009 generally retain these powers of the governor in similar fashion including:

- The caveat that the governor "shall consult the Cabinet on the formulation of policy," but this can be overturned in the exercise of the governor's functions "when acting under instructions ...by the Queen through a Secretary of State or on the basis of the discretion or judgment of the governor. [4]

- The overriding unilateral authority of the administering power through the governor's functions, special responsibilities and reserved powers which also provide for the withholding of assent to legislation adopted by the elected government, and the disallowance of laws by the administering power.

Again, there is scope for delegation of authority to the elected government in the modernised constitutions, but such delegation is reversible. This includes the authority to even "act against any advice given to him or her by the Cabinet," [5] which itself is pressed over by the governor, rather than an elected representative. The continued use of 'order in council' is further illustration of what was termed by one member of the House of Commons in the 2008 parliamentary debate of the *Foreign Affairs Committee Report* on the Overseas Territories as *"an extremely undemocratic process that bypasses any democratic accountability."* [6] The UN General Assembly, most recently by resolution of 2008, has reflected:

> "the concern at the procedure followed by some administering powers, contrary to the wishes of the territories themselves, of amending or enacting legislation for application to the territories, either through orders in council, in order to apply to the territories the international treaty obligations of the administrative power, or through the unilateral application of laws and regulations." [7]

The recommendations of the last several seminars, most recently in 2008, have gone further to emphasise that:

> "As long as the administering powers exercise unilateral authority to make laws and other regulations affecting the non self-governing territories without their consent, pursuant to such methods as legislation, orders in

> council and other methods, A territory should not be considered self-governing."

Thus, the recent political developments in the Turks and Caicos Islands are illustration of the use of such unilateral authority which can result in the reversal of any delegation of power which might be given to a territory in a territorial constitution, with the very constitution itself subject to unilateral suspension. If nothing more, these actions have re-affirmed the non self-governing nature of these territories, effectively countering any argument that modernised constitutions have somehow created self-government by extending a form of reversible delegation in these territories in the Caribbean.

Similarly, the US-administered territories are also projected as self-governing even as the reality is that the Congress of the administering power, in which the territories have no voting representation maintains unilateral authority, and routinely applies laws and regulations to the territory. In fact, the very existence of the elected government is subject to the legislative grace of the same Congress, according to the decisions of the courts of the Administering Power.

Yet, even with the clear democratic deficit inherent in this dependency model, a 2008 policy statement of the administering power sought to negate the applicability of the UN decolonisation mandate to the territories it administers, terming these arrangements as internal political issues not subject to the United Nations, while questioning the use of the phrase "non self-governing" as applied to these territories. This policy, itself, is inconsistent with the administering power's own 2007 *Periodic Report of the United States to the UN Committee on the Elimination of Racial Discrimination Concerning the International Convention on the Elimination of all forms of racial discrimination* which stated that:

> Neither the land area nor the basic federal-state organization of the United States has changed since submission of the Initial U.S. Report in 2000. Nor has there been change in the relationship between the United States and the outlying areas under U.S. jurisdiction – Puerto Rico, the Virgin Islands, American Samoa, Guam, the Northern Mariana Islands, and several very small islands.

So if nothing has changed in the political relationship, it is difficult to determine just what constitutes their being termed as self-governing. The prevailing deficiencies of political rights of the people of the territories serves to counter the argument that these territories somehow became self-governing, and this position is inconsistent with Article 73 (b) of the UN Charter, the International Covenants on Civil and Political Rights and other relevant human rights instruments. In fact, the dependency status by its very nature cannot provide for full political rights for the people of the territories.

Thus, the adoption of a local constitution in the US Virgin Islands, as in the case of the UK-administered territories, will not change the non self-governing dependency status with all of the democratic deficiencies inherent therein. Thus, inserted in the draft document presently being finalised by the end of May deadline is a clarifying provision that states the following:

Self-Determination Not Affected

'Establishment of local constitutional self-government pursuant to this constitution shall not preclude or prejudice the further exercise in the future by the people of the Virgin Islands of the right of self-determination regarding the ultimate political status of the unincorporated territory."

Even within this context, a number of areas of autonomy are being recommended for inclusion in the draft US Virgin Islands constitution including the control of natural resources including marine resources, cultural identification of the native population and the recognition of the historical legacy of the people. Ironically, many of the issues to be include are based on UN resolutions which provide protections to peoples of the non self-governing territories. It is to be determined whether the US Congress will concur with some of these new concepts given their unilateral authority to apply its laws and regulations to the territories. It is also to be determined whether the diversity of the electorate would support the inclusion of these elements when voting on the document in referendum.

International Criteria for Full Self-Government

In any case, a fundamental question, is whether the minimum requirements of democratic legitimacy are met by a political system of modernised dependency governance where unilateral authority prevails over a territory by a government in which the territory has insufficient political participation. It is difficult to understand the rationale of legitimisation of colonialism, even in its modernised form.

This thinking can be traced back to the beginning of the 1990s when it became clear that most of the remaining non self-governing territories were small islands in the Caribbean and Pacific. Thus, the focus of the international community began to broaden to include integration and free association, as recognised options of political equality along with independence. This was fine.

It appeared, however, that some administering powers sought to stretch this visibility further by beginning to promote existent colonial governance models as legitimate forms of self-government, even as these dependency arrangements did not provide for an acceptable mode of democratic governance through political equality. It has been on this point that the struggle has been waged through the first and now the end of the second IDEC, as both the administering powers with territories in this region had discontinued formal participation from the Decolonisation Committee, and has even sought, to varying degrees, in having the Committee abolished. These efforts continue today, and as the Second IDEC comes to close, these efforts are expected to intensify.

To this end, a fundamental strategy is to target the basis of "absolute political equality" as defined in the three options contained in Resolution 1541 (XV) of 1960, which has been reaffirmed by the General Assembly each year. The idea is to creatively interpret Resolution 2625 (XXV) of 1970 as justification for dependency status.

Resolution 2625 properly reaffirmed that the three options of independence, integration or free association constituted the achievement of implementing the right to self-determination, but it also referred to "the emergence of any other political status freely determined by the people" as a mode of implementing the right to self-determination.

This has sometimes been mis-represented as grounds for legitimisation of a form of 'colonialism by consent,' even if the internal governance arrangements would fall short of the achievement of a full measure of self-government with political equality. The fact is that the intent of Resolution 2625 (XXV) was to recognise the emergence of differing and flexible self-governing political models, with the clear understanding that the minimum level of political equality, and the attainment of a full measure of self-government, remained an essential prerequisite.

Thus, "colonialism by consent" is a colonial status, nevertheless. It is more a function of the lack of a political education programme in the territories on the legitimate political options, rather than an interest in dependency status in perpetuity. Resolution 2625 was never intended to be utilised to legitimise present day dependency status, nor to facilitate the de-listing of territories before they have achieved full self-government.

International Assessment of Self-Governance

All of these issues could be clarified if the present dependency arrangements were submitted to the United Nations for proper international assessment. But such a review would clearly show the weakness of the argument that these territories are self-governing.

This contrasts with the cooperation in these review processes by New Zealand in relation to the Cook Islands and Niue in 1965 and 1974, respectively [8] and Tokelau over the last several years. In fact, such an assessment process has been in place since 1948 with the adoption of a resolution on the *"cessation of transmission of information under Article 73(e) of the Charter,"* which requested the administering powers to "communicate to the Secretary-General, within a maximum period of six months," relevant information on the (dependency) political relationship."

Under this process, a detailed review of the elements of any political status modifications would be conducted by the U.N. to determine whether the established threshold for a full measure of self-government had been met. This process was used in assessing the sufficiency of self-government with respect to *Puerto Rico, Greenland* and the *Netherlands Antilles* between 1953 and 1955 when the U.S., Denmark, and The Netherlands, respectively, submitted constitutional changes in the territories for U.N. review.

In these cases, subsequent U.N. resolutions were adopted, following U.N. debate, removing Puerto Rico, Greenland and the Netherlands Antilles from the UN non self-governing list, but only after it was determined that a sufficient level of political equality had been achieved based on the criteria in effect at that time. There is nothing wrong with the prevailing criteria for self-government. It is the process of examination which is deficient.

If there was a process for periodic re-assessment, a number of the former territories earlier removed from the list,, as Puerto Rico, could be re-listed. The status of the self-determination process of the individual islands like Curacao in the Netherlands Antilles following the planned dismantling of that free associated state would also be worthy of re-examination, along with the unilateral reversal by the administering power of the autonomous model in Northern Mariana Islands.

The need for a process of international review and assessment of changes in dependency arrangements has been continually refined, and was included in the plans of action (POA) of the first and second IDEC's, in the mandate for periodic analyses to be done on the progress and extent of the implementation of the (Decolonization Declaration), and the case-by-case analysis of each territory. So far, these initiatives have not been carried out, and in the absence of this required in-depth political analysis of the situation in each territories, a political vacuum is created which provides political space for the colonial accommodation arguments to be put taken seriously. The Plan of Implementation (POI), endorsed by the General by resolution in 2006, organised these proposed actions, but remains unfulfilled.

But if these territories can be successfully shown as having achieved full self-government, then there should be no reluctance to bring the evidence to the table for review of the international community, in particular the Decolonisation Committee. It is hopeful that the new government in Washington would take a more enlightened approach to this matter than the last several administrations.

Otherwise, it is unlikely that these dependency arrangements will be submitted for review. Nothing, however, prevents the UN as a whole from initiating the exercise. I therefore conclude with some recommendations for the "way forward" on how the decolonisation process can be accelerated for the remaining small island territories, in particular those issues which the UN itself can do. These ideas have been put forward by the CARICOM member states at the UN in the general debate of the UN Fourth Committee, as recent as last October. These include:

- The establishment of an expert group to examine the conditions in the territories.

- The conduct of the analytical studies and analyses on political and constitutional developments on the ground on the territories themselves as mandated in the plan of action of the first and second International Decade(s) for the eradication of Colonialism.

- The implementation of the Plan of Implementation of the Decolonisation Mandate (A/60/853) which organised the actions called for by the General Assembly to be undertaken by the Un system, including the establishment of Special Mechanisms designed to monitor UN system and UN member state compliance wit the decolonisation mandate.

- The implementation of the case-by-case analysis of each territory and the re-ordering of the sequence of actions to eliminate the prerequisite that the administering powers must cooperate at the outset in order that the process begin.

- The expansion of the scope of the regional information centres to service the non self-governing territories.

One final point.

The adoption of resolutions and the de-listing of territories from UN review does not constitute success in and of itself. It is the achievement of full self-government by the peoples of the territories which is the real barometre of success. De-listing should not be considered the goal, but rather a result of the achievement of full self-government, and only after certification by the international community that full self-government with political equality has been realized.

NOTES

[1] Partnership for Progress and Prosperity: Britain and the Overseas Territories, Foreword by Foreign and Commonwealth Secretary Robin Cook, 1999.

[3] The full US constitution applies only to integrated states of the United States. In territories, only the fundamental parts apply *(a 1991 US General Accounting Office study on the applicability of the US Constitution to US territories provides an article-by-article of which provisions apply, and which do not).*

[4] See Turks and Caicos Islands Constitutional Order 2006, Article 25, Sections 1-5).

[5] Ibid, Article 33, Section 1-5.

[6] Statement of Jeremy Corbyn (Islington, North)(Labour)

[7] Report of the Decolonisation Committee 2008; General Assembly Official Records, Sixty-Third Session, Supplement No. 23, U.N. Document A/63/23, 2008.

[8] Igarashi, Masahiro. 2002. *Associated Statehood in International Law*. The Hague, London, New York: Kluwer Law International