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1998 AND BEYOND IN NEW CALEDONIA: AT FREEDOM'S GATE?

Alan Berman[†]

Abstract: This article examines the upcoming 1998 referendum on self-determination in New Caledonia through the larger contextual lens of French historical involvement in the territory. The article addresses the impact French colonization has had on Kanak culture, legal institutions, social organization and economic livelihood. The historical policies of the French government are canvassed by exploring the manner in which France manipulated the legal process and political institutions it created in New Caledonia to entrench colonial control. The article concludes that the process of decolonization is unlikely to be completed in the near future. Finally, the article discusses the potential consequences for France and the international community of French non-compliance with its international legal obligations.

I. INTRODUCTION

Indigenous peoples have throughout the world been subjected to mass genocide.¹ They have suffered from economic exploitation, racial discrimination and abuse of their human rights.² They have had much of their landholdings taken away. Their cultural traditions have been destroyed in many instances, substantially diluted in others, and in all instances subjugated to the onslaught of values and customs of the dominant society.³ European

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² Hurst Hannum, *New Developments in Indigenous Rights*, 28 VA. J. INT'L L. 649 (1988).

³ Douglas Sanders, *The Re-Emergence of Indigenous Questions in International Law*, CANADIAN HUMAN RIGHTS YEARBOOK 4 (1984).

³ Hannum states:

Most indigenous peoples have been not only attacked militarily but have seen their way of life systematically assaulted. Colonial powers and 19th century states in the Americas attempted to conquer and exterminate hostile tribes, force the assimilation of more acculturated indigenous groups, erode traditional culture and landholdings, and expand private property at the expense of the collective or communal holdings of indigenous peoples.

Hannum, *supra* note 1, at 650-51. Notwithstanding these actions, indigenous peoples have consistently denounced the idea of integration into the dominant culture, insisting on their right to determine their own course of development and preserve their cultural traditions.

states and their successors have denied indigenous peoples their rightful place in the international community: "They have consigned indigenous issues to domestic contexts, using racist, paternalistic doctrines and rationales for political advantage in drives to acquire indigenous lands and resources."⁴ This experience is vividly illustrated in New Caledonia, where French colonial domination over the indigenous Melanesian population (the "Kanak") continues unabated.⁵

Since the end of the Second World War, international human rights law has recognized the right of all peoples to self-determination. For example, the Charter of the United Nations and the International Covenants on Civil and Political Rights and Economic, Social and Cultural rights recognize a right of all peoples to self-determination.⁶ While the scope, content, and application of the right of self-determination to indigenous peoples is not delineated in any of these instruments, the United Nations has consistently recognized the right of external self-determination in instances involving geographically separated territories governed by distant colonial powers.⁷

⁴ Excerpts of Maureen Davis reprinted in *Are Indigenous Populations Entitled to International Judicial Personality*, 79 AM. SOC. INT'L. L. PROC. 189, 200 (1987).

⁵ New Caledonia was "discovered" in 1774 by Captain James Cook, and it was annexed by France in 1853. William Branigin, *New Caledonians Warn U.S. of "New Cuba" in Pacific French Envoy Arrives for Talks*, WASH. POST, Dec. 5, 1984, available in 1984 WL 2004035. Located in the Pacific about 1000 miles east of Australia, New Caledonia consists of a main island ("the Grand Terre") and a series of smaller islands which include the Isle of Pines, Loyalty Islands, and Belep and Huon Islands. Bill Begalke, *Postcard from Noumea*, DENV. POST, Oct. 17, 1993, available in 1993 WL 6317435. Captain Cook named the Grand Terre "New Caledonia" because it reminded him of his homeland, Scotland, which was at one time known as Caledonia. *Presence*, 5 INFO. BULL. FRENCH EMBASSY 1, 3 (1987). The Grand Terre is a narrow island, 400 kilometers long by 50 kilometers wide with a total surface of 16,890 square miles. *Id.* at 11. Ingrid A. Kircher, *The Kanaks of New Caledonia*, 71 MINORITY RTS. GROUP REP. 5 (1986).

⁶ Article 1(2) and Article 55 of the U.N. Charter recognize equal rights and self-determination as principal purposes of the United Nations. U.N. CHARTER art. 1, para. 2, art. 55. Article 1 of both the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social, and Cultural Rights provide: "All peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development." International Covenant on Civil and Political Rights, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316, art. 1 (1966); International Covenant on Economic, Social, and Cultural Rights, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316, art. 1 (1966).

Some commentators view the right of self-determination as having achieved the status of *jus cogens*, a non-derogable peremptory norm of customary international law. Sarah Pritchard, *The Right of Indigenous Peoples to Self-Determination Under International Law*, ABORIGINAL L. BULL., Apr. 1992, at 5.

⁷ Marija Batistich, *The Right of Indigenous Peoples to Self-Determination Under International Law*, 7 AUCKLAND L. REV. 1013, 1019-23 (1995); Sam Blay, *Self-Determination: A Reassessment In the Post-Communist Era*, 22 DENV. J. INT'L L. & POL'Y 275 (1994); Daniel Orlow, *Of Nations Small: The Small State in International Law*, 1995 TEMP. INT'L & COMP. L.J. 506; John T. Paxman, *Minority*

Chapters XI and XII of the Charter outline the process by which colonized peoples should free themselves from the shackles of colonial domination.⁸ Colonial powers administering non-self-governing territories are obligated under Article 73 of Chapter XI of the Charter to “develop self-government, to take due account of the political aspirations of the people, and to assist them in the progressive development of their free political institutions.”⁹ In addition, in 1960, the U.N. General Assembly passed Resolution 1514, recognizing colonial domination of peoples by a foreign power as an impediment to the promotion of international peace and a violation of the U.N. Charter.¹⁰

Since World War II, the international community has witnessed a relatively smooth transition from colonial domination to independent statehood for many former colonies.¹¹ Conspicuous exceptions to this trend have been the cases of former French and Portuguese colonies.¹² Franck and Hoffman explain:

Indigenous Populations and Their Claims for Self-Determination, 21 CASE W. RES. J. INT’L L. 185, 193 (1989).

⁸ Batistich, *supra* note 7, at 1021-23.

⁹ U.N. CHARTER art. 73, ch. XI.

¹⁰ Resolution 1514 provides in relevant part:

- 1.) The subjection of peoples to alien subjugation, domination and exploitation constitutes a denial of fundamental human rights, is contrary to the Charter of the United Nations and is an impediment to the promotion of world peace and cooperation;
- 2.) All peoples have the right to self-determination; by virtue of that right they freely determine their economic, social and cultural development.
- 3.) Inadequacy of political, economic, social or educational preparedness should never serve as a pretext for delaying independence.

Declaration on the Granting of Independence by Colonial Countries and Peoples, G.A. res. 1514, U.N. GAOR, 15th Sess., Supp. No. 16, at 66-67, U.N. Doc. A/4684 (1961).

Non-self-governing territories may choose independence, free association, integration with another state, including the colonizing state, or any other political status. While self-determination can denote a range of outcomes, the exercise of this right must be free of external interference and genuinely exercised by the colonized peoples. As Pritchard explains:

The basic requirement is a procedure—a genuinely and freely made choice and the possibility of reconsidering present arrangements after a suitable interval. Interpretations of self-determination deferring . . . [to] territorial integrity and national unity are being rejected in favor of a more differentiated view which regards secession as a remedy for continued abuse of human rights and denial of political freedoms.

Pritchard, *supra* note 6, at 6.

¹¹ Thomas M. Franck and Paul Hoffman, *The Right of Self-Determination in Very Small Places*, 8 N.Y.U. J. INT’L L. & POLITICS 331, 332 (1976).

¹² *Id.* at 331-32.

The U.N. has significantly accelerated the momentum for peaceful decolonisation . . . both instrumentally and conceptually [A] billion people have undergone the transition from subjects of a foreign imperium to citizens of independent states.

For the most part, this transition has been smooth enough, considering the extraordinary depth of the legal, ideological and psychological changes occurring in its wake. To be sure, there were exceptions. France and Portugal were too sentimentally tenacious in Algeria, Mozambique and Angola, seeking to hold on to what they regarded as "overseas provinces" tied by long histories of association to the metropole and settled by substantial European populations. They waged hopeless, protracted battles in those territories not only against national liberation forces, but also against an irresistible tide of historical inevitability In the [case] . . . of Vietnam . . . France . . . tried, by force of arms, to reassert . . . [her] colonial control over [a country] that had seen the myth of Western invincibility destroyed by the Japanese, and which, released from foreign occupation by the collapse of Japan, refused to don again the old colonial harness.¹³

New Caledonia stands out as one of the few remaining vestiges of continued blatant colonial domination in the world. Only eighteen of the one hundred and five territories previously designated by the U.N. General Assembly as "non-self-governing" remain in that classification.¹⁴ New Caledonia represents one of the eighteen non-self-governing territories in which the process of decolonisation remains to be completed.¹⁵ The U.N. General Assembly has proclaimed the 1990s as the global decade for eliminating colonialism.¹⁶

¹³ *Id.*

¹⁴ Peter Ruffato, *U.S. Action in Micronesia As a Norm of Customary International Law: The Effectuation of the Right to Self-Determination for Guam and Other Non-Self-Governing Territories*, 2 PAC. RIM. L. & POL'Y J. 377 (1993).

¹⁵ New Caledonia was reinscribed on the list of Non-Self-Governing territories in 1986. G.A. Res. 41/41A, U.N. GAOR, 41st Sess., Supp. No. 53, at 49, U.N. Doc. A/RES/41/41A (Dec. 2, 1986).

¹⁶ *International Decade for the Eradication of Colonialism, Report of the Secretary-General*, UNGAOR, 45 SESS., AGENDA ITEM 18, U.N. DOC. A/45/625 (1990).

Kanak demands for the independence of New Caledonia escalated dramatically in the late 1970s.¹⁷ Violent confrontations ensued in the mid-1980s by and between the Kanaks demanding independence and French settlers and other migrants supporting continued French presence in the territory.¹⁸ To suppress the rising tide of violence and avert potential civil war in the territory, France agreed to hold a referendum on self-determination in 1998.¹⁹ Eligible voters will decide "whether the territory remains within the French Republic or whether it accedes to independence."²⁰

Resolving to hold a referendum in 1998 was part of a wider agreement ("The Matignon Accords")²¹ reached on June 16, 1988, after a period of intensive negotiations between the two rival factions and the French government. The Matignon Accords call for a rebalancing of economic and social conditions between the Kanak and non-Kanak populations in New Caledonia as well as greater internal autonomy and Kanak participation in the political institutions of the territory.²²

The Matignon Accords, and the 1998 referendum raise a series of issues: Do the Accords inspire genuine confidence in a French contribution toward achieving the U.N. goal of eradicating colonialism in this decade? Or are the Accords merely a shrewd facade designed to sustain French colonial domination? Has France complied with U.N. principles and practices relating to decolonisation and self-determination? What are the prospects for achieving independence through the 1998 referendum? Has the democratic principle of majority rule been perverted to deny Kanaks the internationally recognized legal right of self-determination? What is the likelihood of continued French presence in New Caledonia if the eligible voters choose independence? Would independence signal a return to Kanak customary

¹⁷ *South Pacific: Increasingly Volatile S. Pacific Troubled by Nationalism and Unfulfilled Hopes*, CHRISTIAN SCI. MONITOR, Aug. 2, 1988, at 7.

¹⁸ Kircher, *supra* note 5, at 7-9.

¹⁹ M. Rafigul Islam, *The 1998 Paris Agreement on the Future Status of New Caledonia*, 4 QUEENSLAND U. TECH. L.J. 229, 233 (1988).

²⁰ Section 2 of the 1988 Referendum Act quoted in *New Caledonia The Matignon Accords 1991 Progress Report* (July 1992) (HIGH COMMISSION OF THE REPUBLIC OF NEW CALEDONIA), at 5.

²¹ The Matignon Accords were endorsed by a national referendum in France, and a territorial referendum in New Caledonia. Voter turnout on the national referendum was a record low. Only 38% of all eligible voters cast a ballot, of which 80% supported the Accords. In New Caledonia, 63% of the eligible voters cast a ballot and 57% of those voting endorsed the agreements. The largely non-Melanesian loyalist population rejected the plan while the Melanesian population voted overwhelmingly in support of it. PAC. ISLANDS MONTHLY, June 1989, at 2; Rone Tempest, *Low Turnout Called Slap in the Face to Premier French Back New Caledonia Peace Plan*, L.A. TIMES, Nov. 7, 1988, at 4.

²² See generally Islam, *supra* note 19.

legal traditions and traditional schemes of land tenure? Or, is such a change unlikely to be realized?

These issues can be more fully assessed by examining them through the wider lens of French historical involvement in New Caledonia. This article will examine the impact French colonisation has had on the Kanak culture, legal institutions, and socio-economic structures. The traumatizing effect of missionary establishments espousing the virtues of capitalism and private property ownership on the communal existence of traditional Kanak society will be chronicled. The historical policies of the French government vis-à-vis the Kanaks will be canvassed. The manner in which France manipulated the legal process and political institutions it created in New Caledonia to entrench French colonial control will be explored. The effect of French actions in exploiting clan rivalries and sowing divisions within the Kanak community through land eviction, land reallocation and the creation of a system of reserves will be demonstrated.

This article exposes the strong influence of ethnocentrism, land alienation and gross economic disparity between the Kanak and non-Kanak populations which ultimately fostered an atmosphere conducive to Kanak demands for independence. The article also shows the extent to which vacillating French policies pursued in New Caledonia also fueled Kanak demands. Finally, the pattern of Kanak reaction to unfulfilled expectations and demands from acquiescence and accommodation to rejection and militant refusal to accede to the legal regimes established by the French government will be discussed.

After examining the historical legacy of French presence in New Caledonia, this article will then assess the significance of the Matignon Accords, the 1998 referendum and French resistance to international attempts to supervise the process by which the right of self-determination should be exercised. This article argues that the process of decolonisation is unlikely to be completed in New Caledonia in the foreseeable future. The ten year transitional period leading to the 1998 referendum merely represents an additional orchestrated ploy designed to weaken Kanak demands for, and strengthen public resistance to, independence. This article concludes that even the unlikely prospect of an independent New Caledonia would not significantly change the colonial dynamics of subjugation and domination. Finally, the potential consequences for France and the international community of French non-compliance with its international legal obligations will be discussed.

II. TRADITIONAL KANAK SOCIETY

Native Melanesians ("Kanak")²³ are believed to have settled in New Caledonia between three and four thousand years ago.²⁴ The Kanak population is estimated to have been approximately sixty thousand prior to colonization.²⁵ Early Kanak society was based on a complex system of tribes and clans.²⁶ Each tribe consisted of a number of related clans usually sharing the same language and body of beliefs concerning ancestral spirits.²⁷ Reigning supreme in Kanak society, the clan in turn was comprised of a group of individuals belonging to different families but sharing a common ancestry and attachment to a specific territorial area. There existed in each clan a hierarchy based on patrilineal descent.²⁸

Leadership was varied. Tribal chiefs exercised political power in consultation with a council of advisors. Clan chiefs retained responsibility for managing the property rights of the clan.²⁹ The master of the land, defined as the eldest son of the first clan to settle the land, maintained the sacrosanct link between the land and ancestral forces and could grant usufructuary rights to

²³ Kanak means roughly man of the country, signifying the bond between the indigenous peoples and their land and natural environment. M. LYONS, *THE TOTEM AND THE TRICOLOUR: A SHORT HISTORY OF NEW CALEDONIA SINCE 1774* 16 (1986). DAVID ROBIE, *BLOOD ON THEIR BANNER: NATIONALIST STRUGGLES IN THE SOUTH PACIFIC* 82 (1989).

²⁴ It has been estimated that the Kanaks arrived in New Caledonia as early as 2000 B.C. and no later than 1000 B.C. Groups of Polynesians are believed to have subsequently settled in the main island and in what is today known as the Loyalty Islands to the East of the main island. Dorothy Shineberg, *French Colonization in the Pacific I* (Unpublished paper delivered at the Australia and the Pacific Conference, Sydney, October 19, 1986); See also Michael Ntumy, *New Caledonia*, in *SOUTH PACIFIC ISLANDS LEGAL SYSTEMS* 595 (Michael Ntumy, ed., 1993).

²⁵ Kircher, *supra* note 5, at 5.

²⁶ Bronwen Douglas, *Conflict and Alliance in a Colonial Context: Case Studies in New Caledonia 1853-1870*, 15 *J. PAC. HIST.* 21, 26 (1980).

²⁷ Kircher, *supra* note 5, at 5.

²⁸ Douglas, *supra* note 26, at 25-26; MYRIAM DORNOY, *POLITICS IN NEW CALEDONIA*, 120 (1984).

²⁹ Alain Saussol, *New Caledonia: Colonization and Reaction*, in *LAND TENURE IN THE PACIFIC* 240, 242 (3rd ed. 1987); See also Douglas, *supra* note 26, at 26-27. Summarizing the rights and responsibilities of the tribal and clan chief, C. S. Hopman states that:

The clan head manages the clan's lands, but does not own them. He is empowered to decide how clan lands are to be allocated to different families—and under what conditions they may be attributed to foreigners. Homage (in the form of yams) is given to him and through him to the clan's founders.

The tribal chief's power, in contrast was above all a political power, quite different from the subordinate powers to decide on resource allocation. He had no particular prerogatives to decide over tribal lands, but protected the tribe's heritage, formed alliances and, with clan notables, resolved disputes.

land. Complete alienation of land was generally forbidden, however, because the complex customary ties to ancestral spirits could never be severed.³⁰ Membership in the clan not only determined rights to land but also served as the principal basis for identifying and distinguishing social groups.³¹ As Ward explains:

Cultural identity . . . is a geographical identity that flows from the memories and values attached to places. Membership in a clan or social group, individual or collective identity, is inherited through a network of places, the sum total of which constitutes a territory. It is common for communities and people to take as their name, or as a symbol of unity and identity, the name of the land and place they occupy, or in some cases from whence they came.³²

Land use and rights were also affected by matrimonial relationships:

Land-rights, then, were obtained through transfers which invariably involved political or matrimonial alliances Alliances through marriage was extremely important, as the two individuals or the two kinship groups concerned were bound to provide mutual help This fluidity of social norms and organization rested with the segmentary character of pre-colonial New Caledonian societies and the relative autonomy they granted lineage groups within the local territorial and political unit, both in terms of land-rights and political power. Land rights, then did not constitute a closed and carefully guarded asset, but were only one aspect of the links that existed between

³⁰ As the representative of a clan asserting the rights of the earliest inhabitants of a particular area, the master of the land possessed authority through his control of the land and link with the spirits with which it was associated. The inseparable bond between the land and the master of the land was signified by the fact that the defeat of a clan in an interclan war would rarely dispossess the defeated master of the land of control over his territory because of his links with the ancestral spirits associated with the land. Douglas, *supra* note 26, at 29; Kircher, *supra* note 5, at 5; See also ALAN WARD, LAND AND POLITICS IN NEW CALEDONIA 3 (1982) (discussion of the duties of the chief and tribal leadership and the role of the original clan inhabitants of a particular parcel of land) [hereinafter WARD I].

³¹ Douglas, *supra* note 26, at 25-26; Patrick Pillon & Francois Sodter, *The Impact of Colonial Administrative Policies on Indigenous Social Customs in Tahiti and New Caledonia*, 26 J. PAC. HIST. 151, 159-62 (1991).

³² R. Gerard Ward & Elizabeth Kingdon, *Land Tenure in the Pacific Islands*, in LAND, CUSTOM AND PRACTICE IN THE SOUTH PACIFIC 46 (R. Gerard Ward & Elizabeth Kingdom eds., 1995).

individuals and between kinship groups. Therefore, the limits on land-use were determined by the social relationships from which the land rights derived. The use of land obtained from maternal uncles was limited to the growing of annual food crops. On the other hand, fruit-bearing trees could be planted on land obtained from patrilineal descent. Two patrilineal relatives, or two individuals related through matrimonial alliance, would grant each other temporary land-use privileges, or cultivate their gardens either together or side by side . . . as an expression of the relationship which bound them."³³

Clans varied in size from two hundred to five thousand members. The Kanaks were able to produce agricultural crops in the fertile foothills coastal areas, and the less fertile high terrain areas. They subsisted primarily on yams and taro and fishing.³⁴ The cultivation of yams and taro was shrouded in cultural symbolism and associated with a variety of cultural practices aimed at pacifying ancestral spirits.³⁵ Clans led a communal existence and food was shared on a communal basis.³⁶ Cooperation and reciprocity were necessitated by environmental, economic and technological considerations:

In the absence of money, labour could not be purchased, but farming operations which had to be performed within a short time span because seasonal climatic or other conditions might require labour inputs greater than an individual's immediate family could provide alone. For example, dependence on . . .

³³ Pillon & Sodter, *supra* note 31, at 159-61.

³⁴ The Kanaks were able to irrigate dry slopes on the interior of the island by hauling in water from off the coast of the island. Jean Guiart, *One of the Last Colonies: New Caledonia*, J. INT'L AFF. 105, 106 (1982). Evidence of these advanced agricultural methods can be traced back as far as 500 A.D. Ntuny, *supra* note 24, at 595.

³⁵ Lyons explains:

The yam . . . was held sacred, for it grew in the ancestral soil, and its cultivation and harvesting were surrounded by various rituals designed to placate the spirits, and ensure a plentiful crop. The yam was invested with a predominantly male symbolism. It was held to give the male his virility, and to contain the ancestral spirit which enabled the male to continue the line of the tribe or family . . . the taro, by contrast, was a female crop, grown not in dry ground but in water . . . this series of dichotomies between yam/taro, male/female, dry/wet, was central in Kanak life and culture.

LYONS, *supra* note 23, at 15.

³⁶ Crops were generally presented to the chief by individual families to demonstrate their loyalty to him and the clan as well as to confirm the land was cultivated in accordance with the wishes of the clan. The crops were then redistributed to the entire community. Kircher, *supra* note 5, at 5.

wooden tools meant forest clearance was a slow . . . task, but cooperation with others in a work group mobilised on the basis of reciprocity made the task feasible within the required time. It was also safer from enemies and evil spirits, as well as more congenial, to be in a group when working on the margins of the community's agricultural land. [There was also] the social need to be a member of a community, and the need to have physical protection against enemies.³⁷

Not much commercial interaction existed between various clans and tribes because the terrain dividing the island was difficult to traverse.³⁸ Many distinct dialects existed on the main island and the various groups shared no common identity.³⁹ Some violent conflicts occurred among tribes when disagreements over land could not be resolved amicably.⁴⁰ It is not surprising that violent conflicts erupted over the issue of land encroachment, given the inexorable psychological link between particular terrain and Kanak identity.⁴¹ Yet, French colonial rule would serve to minimize these differences and earlier conflicts. Kanaks would later unite and form a common identity in response to the systematic assault on their customary traditions.⁴²

III. FRENCH COLONIZATION

French and British Protestant and Catholic missionaries arrived in New Caledonia in the 1840s.⁴³ New Caledonia was annexed by France in 1853 in part to preempt a British takeover. To entrench colonial control, the French government encouraged European settlement. French settlers began arriving

³⁷ Ward & Kingdon, *supra* note 32, at 45.

³⁸ Saussol, *supra* note 29, at 240. Clans did however exchange women on occasion in what would be considered a marriage in Kanak society. Though the bride in a marriage lived with the husband's clan, the children of the marriage belonged to the mother's clan. To marry, the consent of the chief and all male relatives had to be secured. These marriages were sealed by the exchange of gifts (or pearl money) between clans. LYONS, *supra* note 23, at 19.

³⁹ Douglas, *supra* note 26, at 25-26; Saussol, *supra* note 29, at 240.

⁴⁰ Kircher, *supra* note 5, at 5; *See also* Saussol, *supra* note 29, at 243.

⁴¹ Ward & Kingdon, *supra* note 32, at 46-47.

⁴² John Connell, *Melanesian Nationalism: A Comparative Perspective on Decolonisation in New Caledonia*, in *NEW CALEDONIA: ESSAYS IN NATIONALISM AND DEPENDENCY* 231, 234 (Michael Spencer et al. eds., 1988).

⁴³ Kircher, *supra* note 5, at 5; Branigan, *supra* note 5; Ntumu, *supra* note 24, at 595.

on the island in the early 1860s. By the late 1870s, the European population in New Caledonia was over seven thousand.⁴⁴

The French government hoped the colony would prove commercially beneficial while also serving as a penal colony for political prisoners and ordinary criminals.⁴⁵ Waves of convicts began arriving in the colony in 1864. By 1897, there were over twenty thousand convicts on the island.⁴⁶

French missionaries converted almost all Kanaks to the Protestant and Catholic religions. Both churches viewed their mission as one of enlightening the uncivilized peoples and teaching them the virtues of Western ideas and Christian values, such as private property ownership,⁴⁷ individualism,

⁴⁴ J.L. Rallu, *Population of the French Overseas Territories in the Pacific, Past, Present and Projected*, 26 J. PAC. HIST. 169, 178 (1991).

⁴⁵ Shineberg, *supra* note 24, at 7.

⁴⁶ J. Houbert, *Settlers and Natives in Decolonisation*, THE ROUND TABLE 217, 220 (1985); John Connell, *Politics and Tradition in Melanesia*, in ISLANDS AND ENCLAVES: NATIONALISMS AND SEPARATIST PRESSURES IN ISLAND AND LITTORAL CONTEXTS, 225 (Garry Trompf ed., 1993); ROBBIE, *supra* note 23, at 85. Five thousand of the exiles to New Caledonia were deported for supporting the Paris Commune in 1871 in a losing battle against the French army for the control of Paris. Almost 25,000 died in the clashes. Ironically, most of the Commune followers deported to New Caledonia subsequently supported the French government during periods of violent Kanak resistance to French authorities. Stanley Meisler, *New Caledonia: A Crisis Full of Irony*, L.A. TIMES, Feb. 6, 1985, at 4; Michael Dobbs, *French Propose Vote by New Caledonia on Independence "In Association"*, WASH. POST, Jan. 8, 1985, at A9.

⁴⁷ See Ward & Kingdon, *supra* note 32, at 57. French missionaries failed to comprehend or tolerate Kanak customary laws concerning communal land rights; which such legal traditions could not easily be reconciled with French laws recognizing individual private property ownership and freehold land title. This lack of understanding or tolerance manifested itself as early as 1858 when the Catholic Priest, Father Poupinel, expressed frustration with the Communism of Oceania which he viewed as a significant impediment to integration into European society. As Lyons explains:

The fundamental problem was that a society based on gift exchange could not easily grasp the notion of buying and selling. A tribal communalism could not be reconciled with modern capitalist concepts of private property.

This was the origin of one very early misunderstanding. Soon after their arrival, the missionaries believed that they had "bought" a field of yams. Such a definitive property contract was not comprehensible to the natives who later insisted in taking back the fruits of the harvest. Yams, in any case, were sacred. They were the flesh of the ancestors. How could they therefore be "sold" in a western sense? The consequence of these errors was that the French saw the natives as thieves or bandits

It was therefore the missionaries who first introduced the Kanaks to the notion of individual private ownership. It was a painful introduction. The Kanaks always expected a division of the spoils. When the whites did not cooperate, they became enemies who would not observe the conventions of gift exchange. For the whites, on the other hand, the Kanaks were thieving barbarians, who refused to recognize that certain things did not belong to them: Father Poupinel saw it as his task to eradicate "The communism of Oceania . . . this scourge of society, with its ugly and depressing consequences, [which] oppresses the tribes of these islands. Here one must share everything Communism must surely be one of the greatest obstacles standing in the way of the mission's attempts to improve the physical and moral condition of these tribes"

monogamous marriage and reliance on the nuclear family rather than the general community.⁴⁸ Indoctrinating Kanaks with Western values assisted in paving the way for colonial domination. As Kohler explains:

Although the churches gave indisputable priority to their religious objectives and constantly defended certain essential rights of the native people against the abuse of the settlers and the administration (especially in land matters and compulsory work) they furthered the process of colonisation very effectively More than any other institution, the churches contributed to the establishment in the indigenous culture of the social and material structures of western civilization, and to the inculcation in the natives of perceptions and values inherent in colonial domination.⁴⁹

While the missionaries successfully infiltrated Kanak culture, the French government and settler population undertook a series of steps, all of which encroached on Kanak land and had a devastating impact on the very soul of Kanak existence.⁵⁰ During the early settlement years, the French government encouraged the cultivation of coffee estates. After this proved economically unviable, early settlers, encouraged by the French government, focussed their energies on cattle ranching. By 1878, there were some eighty thousand cattle in New Caledonia.⁵¹

The movement towards individual initiative in agriculture necessitated changes in the land tenure system.⁵² In pre-contact times, land was held ultimately by clans even though individuals were granted usufructuary rights of cultivation.⁵³ Land under cultivation changed every couple of years due to widespread presence of insects and relatively quick percolation of ground

LYONS, *supra* note 23, at 32-33.

⁴⁸ Jean-Marie Kohler, *The Churches in New Caledonia and the Colonial Order*, in NEW CALEDONIA: ESSAYS IN NATIONALISM AND DEPENDENCY, *supra* note 42, at 145, 145-46; ALAN WARD, PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA, LEGISLATIVE RESEARCH SERVICE DISCUSSION PAPER NO. 4, NEW CALEDONIA-THE IMMEDIATE PROSPECTS 7 (1983)[hereinafter WARD II]; Ward & Kingdon, *supra* note 32, at 57; ROBIE, *supra* note 23, at 83.

⁴⁹ Kohler, *supra* note 48, at 146.

⁵⁰ Alain Saussol, *The Colonial Chimera: From Annexation to the Re-emergence of Kanak Identity*, in NEW CALEDONIA: ESSAYS IN NATIONALISM AND DEPENDENCY, *supra* note 42, at 38, 53-54.

⁵¹ ROBIE, *supra* note 23, at 85.

⁵² Ward & Kingdon, *supra* note 32, at 62.

⁵³ Ron Crocombe, *Land Reform: Prospects for Prosperity*, in LAND TENURE IN THE PACIFIC 368, 377-78 (University of the South Pacific, 3d ed. 1987).

water to the surface.⁵⁴ The introduction of coffee crops increased the time period during which the land could be held by individuals because the cultivation cycle was longer. The subsequent use of land for cattle raising did not require any turnover in land.⁵⁵ Capital improvements made to land used for pastoral purposes and coffee crops provided farmers with a longer-lasting attachment to the land. The ability to maintain control over the land for a considerably longer period of time was more consistent with the introduction of private property ownership. The establishment of a land tenure system based on private property ownership was dramatically at variance with the traditional system in which communal ownership based on kinship and ancestral ties predominated.⁵⁶

Because the early European settlers allowed their cattle to graze freely, many taro and yam harvests were destroyed.⁵⁷ In a move which began the process of land dispossession, the first Governor of New Caledonia proclaimed two years after annexation that Kanaks could only occupy land under cultivation. Vacant land was to remain in the domain of the state and be available for settlement.⁵⁸ It became virtually impossible to differentiate between vacant and occupied land since essentially all land in New Caledonia had a claim by at least one clan. If a land was not subject to actual cultivation, it likely formed part of their hunting and gathering zone.⁵⁹

The myth of vacant land provided a convenient guise for the French government to justify seizure. Token attempts were made to compensate the previous Kanak occupants of the land. These attempts failed to appreciate Melanesian concepts of land rights. Europeans understood that exchanging goods for property gave them a right to permanent ownership and possession of land. Offering goods in Melanesian society did not have the effect of alienating land. Rather, such goods were viewed as an offer for the transfer

⁵⁴ *Id.*; See also Saussol, *supra* note 29, at 241; Ward & Kingdon, *supra* note 32, at 62.

⁵⁵ Structural improvements undertaken by farmers strengthened settler convictions concerning rights to claim permanent ownership of land. Ward & Kingdon, *supra* note 32, at 55, 59.

⁵⁶ *Id.* at 55, 57.

⁵⁷ Kircher, *supra* note 5, at 5-6.

⁵⁸ In 1855, Governor Du Bouzet recognized the right of Kanaks over occupied land and proclaimed that one-tenth of the rural lands open for sale could not be sold to settlers. Such lands were to be reserved for Kanaks. Saussol, *supra* note 29, at 244; WARD I, *supra* note 30, at 1-2.

⁵⁹ WARD I, *supra* note 30, at 2. As one commentator points out: "The French . . . had a very elastic notion of what constituted . . . 'vacant' land. Unoccupied land might include taro fields, for instance, which were simply lying fallow for a few years. The Kanaks would not have regarded this land as 'unoccupied' or abandoned . . ." LYONS, *supra* note 23, at 51.

of permission to occupy and use the land for a short time period.⁶⁰ Saussol explains:

The conceding of land rights being reciprocated by the transfer of gifts may have appeared as sale to European observers, but in Melanesian society, where service took precedence over economic gain, the gift of yams merely signified the obligation and gratitude of the recipient. It was a symbol of a new and complex relationship between the parties, and an appropriate gift at this ceremonial transaction was very different from payment for permanent and exclusive rights to land.⁶¹

Complete alienation of clan land through this process destroyed the intricate web of social and psychological bonds as well as customary rites and relationships springing from ties to particular terrain.⁶²

Another frontal assault on traditional Kanak political and social structure was launched in 1868 when the French government refused to acknowledge the clan as the legal owner of occupied land and instead created a legal fiction by recognizing the tribe as the legal owner of such land.⁶³ The Governor of New Caledonia retained the authority to reshape the makeup of tribes at his discretion.⁶⁴

The traditional authority structure and communal system of land rights was further eroded by the forcible confinement of Kanaks onto reserves created by the government.⁶⁵ Initially, only those villages viewed as having

⁶⁰ Saussol, *supra* note 29, at 243.

⁶¹ *Id.* Misunderstandings of Western concepts of property ownership by indigenous peoples was a theme common in many of the Pacific islands. As Ward and Kingdon explain:

Some early European residents received permissive residence rights similar to those enjoyed by indigenous community members. Others sought more exclusive and long-lasting arrangements which amounted to freehold or fee simple in the view of purchasers. The donors or sellers may not have always interpreted the arrangements in the same way [T]he indigenous people, lacking the concept of land as a commodity which could be sold in perpetuity, thought that they were bestowing some form of permissive occupancy which would lapse when the Europeans involved departed.

Ward & Kingdon, *supra* note 32, at 48-49

⁶² LYONS, *supra* note 23, at 53-54; Crocombe, *supra* note 53, at 373-74.

⁶³ LYONS, *supra* note 23, at 51; Ntumu, *supra* note 24, at 597; Saussol, *supra* note 29, at 245.

⁶⁴ LYONS, *supra* note 23, at 92.

⁶⁵ The practice of relocating Kanaks onto reserves actually began in 1859 though the French government did not publicly acknowledge the policy until 1868. The colonial government issued decrees in 1868, 1876 and 1897, all of which provided the legal authority for Kanak land dispossession and entrenched the French policy of confining Kanaks to reserves. Kircher, *supra* note 5, at 5; Ntumu, *supra*

resisted colonial authority had their land confiscated. The individuals inhabiting the villages were forcibly transferred to the reserves. As the need for land increased to accommodate the growing penal and settler populations, French authorities acted without pretext in moving Kanaks away from their ancestral homes.⁶⁶ Kanak activities within and outside the reservations were regulated by the *indigenat*, an oppressive code of conduct promulgated in 1887.⁶⁷

The creation of tribal reserves was another legal fiction to justify the process of land encroachment and dispossession. Resisting territorial expropriation of their land, the Kanaks launched a series of revolts in an attempt to rescue their history, culture, identity and indeed their very existence from annihilation. The most notable revolt was led by Chief Atai in 1878. This rebellion constituted the most violent reaction to European colonization in the Pacific.⁶⁸ However, the odds of prevailing in any conflict with the French authorities was virtually nil. Consistent with their characteristically realistic and restrained nature, the Kanaks eventually made efforts to negotiate with the colonizers⁶⁹:

In virtually every engagement in 1878 . . . Melanesian warriors
were markedly inferior in number to French troops and their

note 24, at 595. The policy of containment was prompted in part by a perceived need to secure more land for European settlement while at the same time provide for the subsistence needs of Kanaks until their population eventually became extinct. Kircher, *supra* note 5, at 5; Saussol, *supra* note 50, at 41; Dorothy Shineberg, *supra* note 24, at 3. As detestable as the French government's action may have been, it did have at least one positive aspect. The segregation of the Kanak population allowed a greater modicum of their cultural heritage to be maintained. The policy of segregation was a unique one in French colonial history. In other colonies, such as French Polynesia, an effort was made to assimilate the indigenous peoples into the settler community. WARD II, *supra* note 48, at 7.

⁶⁶ Saussol, *supra* note 50, at 41; Saussol, *supra* note 29, at 246.

⁶⁷ Under the *indigenat*, leaving the reserve necessitated proof of employment and/or police permission (e.g., to attend a marriage or funeral). Less than ten years later, the colonial authorities required the payment of a head tax, a proportion of which was paid to the appointed chiefs, as an additional condition for moving outside the reservation. The receipt of a proportion of the head tax provided an incentive for the French appointed tribal chiefs to participate in the cycle of oppression. The work requirement and head tax provided an effective avenue through which the colonial government could ensure a cheap labor force for the settler population. Under the *indigenat*, Kanaks were forbidden from entering public bars or carrying traditional weapons and were subject to arrest for violating an 8:00 p.m. curfew, engaging in charlatanism, witchcraft, showing a lack of respect for the authorities, or walking around naked. Kanaks were often fined or sentenced to prison based on the arbitrary actions of colonial authorities. Shineberg, *supra* note 24, at 5; ROBIE, *supra* note 23, at 88.

⁶⁸ John Connell, *New Caledonia: A Crisis of De-Colonisation In the South Pacific*, 305 ROUND TABLE 53, 54 (1988). Two hundred Europeans and more than one thousand Kanaks lost their lives before French authorities successfully neutralized the uprising. Kircher, *supra* note 5, at 6.

⁶⁹ Bronwen Douglas, "Almost Constantly at War"? *An Ethnographic Perspective on Fighting in New Caledonia*, 25 J. PAC. HIST. 22, 43-45 (1990).

allies Melanesian tactical preferences in fighting Europeans . . . represented not only the prudent pragmatism of the outnumbered, outgunned, part-time warriors, but also an enduring emphasis on restraint, coupled with the belief in the psychological value of short, sharp explosions of extreme violence.

Though ultimately Melanesians opposed to the French lost every colonial war, they were usually not defeated militarily, but chose or were forced to negotiate when the costs of continued fighting became unacceptable. A subsistence economy could not sustain armed mobilization indefinitely, especially in the face of an effectively implemented strategy of attrition; furthermore these people scorned political martyrdom and saw no virtue in fighting to the bitter end against daunting odds.⁷⁰

Though the colonial government prevailed in the conflict, Chief Atai achieved legendary status and has become a focal point in the current struggle for independence. The 1878 revolt is today cited by many Kanak nationalists as a significant development in the emergence of Kanak consciousness. As one scholar explains:

In death more than in life, Atai has achieved fame and renown, increasingly becoming a symbol of struggle, a man now more myth than reality. In the manner of Atai's death symbolism was ensured, an inevitable symbolism in a society where ancestors were revered as the links between land and life. Although Atai and other Melanesians of that era were primarily traditionalists seeking to re-establish intact a disrupted order and recapture the past, their considerable unity in defense of Melanesian identity and territorial integrity has ensured strong connections between these "primary resistance" movements and modern nationalism. Contemporary Kanak nationalism has succeeded in achieving mass commitment partly by using similar methods (appealing to Melanesian consciousness, stressing land losses and so on) and partly by appealing to memories of this historic revolt against

⁷⁰ *Id.*

colonialism, where Melanesians were far from passive spectators in their colonisation.⁷¹

Following the successful suppression of the rebellion, the French government accelerated the rate at which Kanak land was confiscated.⁷² From 1895 to 1903, New Caledonia's Governor Feillet appropriated two hundred and fifty thousand hectares of land to new settlers.⁷³ During this same period over three hundred artificially constituted tribes were confined to seven percent of the main island. This area was less than either that land allocated for settlement or held under public domain by the state.⁷⁴

Most of the reserve land was located in dry and inaccessible areas.⁷⁵ This often made it difficult for Kanaks to meet their subsistence needs on these lands. The settler population was able to employ Kanak labor at exploitative wages.⁷⁶ The introduction and exchange of money for labor lessened economic dependence on communal ties and further attenuated the relationship between individual Kanaks and obligations to the community.⁷⁷ Clans having no relation to each other, or often to the land to which they were confined, were forced onto the same reserves.⁷⁸ This led to confusion and

⁷¹ Connell, *supra* note 46, at 235-36. The circumstances of the revolt suggest resistance to French colonization was not as widespread as previously reported partly because the authorities successfully divided Kanaks by exploiting clan rivalries and rewarding with land those clans sympathetic to French actions. Kanak cooperation was critical in the pacification of New Caledonia. In devising methods for their conquest, French authorities drew upon Kanak knowledge of the terrain of the country and local methods of strategy and warfare. As Lyons has written:

Not all Kanaks . . . were inspired, mobilized or awakened. Many were receptive to French blandishments. Many tribes stayed neutral The extent of Melanesian collaboration with the French demands a slightly more nuanced interpretation than that usually advanced by committed nationalists.

That does not mean that the events of 1878 can be brushed off simply as a series of uncoordinated intertribal wars, in which the French occasionally intervened. This was also an anti-French rising It was provoked by territorial expropriation of the Kanaks, and the continued harassment they received at the hands of the graziers and their livestock. The roots of the revolt lay in the cold logic of imperial conquest and colonial annexation.

LYONS, *supra* note 23, at 64-65.

⁷² Shineberg, *supra* note 24, at 5.

⁷³ Saussol, *supra* note 50, at 47.

⁷⁴ Kircher, *supra* note 5, at 6.

⁷⁵ LYONS, *supra* note 23, at 134; Saussol, *supra* note 29, at 250.

⁷⁶ Jean Guiart, *Progress and Regress in New Caledonia*, 27 J. PAC. HIST. 3 (1992), 26-27; Shineberg, *supra* note 24, at 3-5.

⁷⁷ Ward & Kingdon, *supra* note 32, at 255-57.

⁷⁸ *Id.* at 3; Saussol, *supra* note 29, at 246-48; Pillon & Sodter, *supra* note 31, at 162-63; Kircher, *supra* note 5, at 5-6. Further, as Lyons explains:

friction amongst Kanaks. Limited agricultural land resources on many of the reserves only served to further heighten tension.⁷⁹

The reserve lands were designated as the community property of the tribe.⁸⁰ Disregarding customary lineage, France appointed tribal chiefs who were sympathetic to continued French settlement.⁸¹ The tribal chiefs acted under the supervision of the French police and served at the pleasure of the governor of the colony.⁸² Kanak chiefs who sought to promote the interests of their people were often removed and replaced with individuals more easily manipulated by French authorities.⁸³

Under the system of reserves, the proprietary rights of individual clans and the authority of the master of the land were subordinated to the whims of the artificially created chiefs. These chiefs were given formal authority to determine how land was to be allocated within the reserves, and were empowered to sell occupied land to settlers.⁸⁴ Giving tribal chiefs these powers underscored a blatant disregard of Kanak customary methods of land allocation in which property was shared on a collective basis, with the chief constrained from unilaterally disposing of clan land. Even when land was rarely allocated, it was never completely alienated.⁸⁵

There were other situations in which purported deference to customary methods were in reality concocted legal fictions camouflaging underlying supremacy of colonially imposed legal regimes. For example, France did offer protection to Kanak customary laws regarding marriage and succession to property unless the particular individual chose to have the matter governed by French law. This meant French law enjoyed primacy over customary law. In addition to allocating land, French-appointed chiefs settled disputes among

The French administrators grouped different clans together in the same reserve with little discrimination, so that clans who were hereditary enemies might find themselves labeled as members of the same tribe. Such niceties were ignored in the interests of bureaucratic convenience, and speedy white land appropriation . . . the tribal reserves gathered together "an arbitrary grouping of uprooted people on strange territory". The French might use the reserved land as a kind of reward for clans who supported them, but they had no compunction about making resisters rub shoulders with collaborators in the same newly constituted tribe . . .

Lyons, *supra* note 23, at 52.

⁷⁹ WARD I, *supra* note 30, at 4-5.

⁸⁰ Pillon & Sodter, *supra* note 31, at 163.

⁸¹ *Id.* at 165. Those tribal chiefs acting in complicity with the confinement process were given lifetime annuities. Saussol, *supra* note 29, at 247.

⁸² Pillon & Sodter, *supra* note 31, at 163; LYONS, *supra* note 23, at 92.

⁸³ Saussol, *supra* note 29, at 247; ROBIE, *supra* note 23, at 86.

⁸⁴ Douglas, *supra* note 26, at 29; Saussol, *supra* note 29, at 245; Pillon & Sodter, *supra* note 31, at 163-65.

⁸⁵ Saussol, *supra* note 29, at 245; Kircher, *supra* note 5, at 5; Crocombe, *supra* note 53, at 378; Douglas, *supra* note 26, at 29.

Melanesians on the reserve. However, if a Kanak was dissatisfied with the chief's resolution of a tribal conflict, an appeal could be lodged with a French court. If a Kanak was involved in a dispute with a European, either could choose to have the matter adjudicated by a French court.⁸⁶ The right of appeal to a French court in these situations, along with the option of having marriage and property distribution upon death governed by French laws of succession, ultimately weakened the authority and effectiveness of customary authorities.⁸⁷

To make Kanak matters worse, their population was nearly halved by the introduction of European diseases. Their population plummeted from 42,500 to just 22,000 between the late 1880s to 1896.⁸⁸ Ironically, the French government used the declining population as an excuse to justify

⁸⁶ Since 1866, the French "statut particulier" has exempted Kanaks from the French Civil Code provisions which relate to personal status. Ntuny, *supra* note 24, at 619. They are regulated by customary law in matters concerning marriage and succession unless they specifically opt to be governed by the French civil law. Once such an intention is declared, the application of French civil law becomes irrevocable. In 1962, the government passed a resolution reaffirming the application of customary law to the distribution of property of deceased Kanaks choosing to be governed by customary law. Succession under Kanak customary law is matrilineal and is based on the maternal uncle. *Id.* at 620 (citing Resolution No. 11 (Fr.) of June 20, 1962).

⁸⁷ LYONS, *supra* note 23, at 94. Melanesians did not experience equal treatment in practice in the French judicial system during this time period. A 1909 incident involving the unprovoked assault of a Kanak by a white settler has been cited as one notable example of the miscarriage of French justice with respect to the Kanaks:

The Leconte affair of 1909 . . . serves to illustrate the subordinate status of the Kanak in the judicial arena. Leon Leconte was a violent bully in his late twenties . . . His violent attacks against Melanesians were protected by the fact that his father, a rich colonist, was a local notable . . .

On New Year's Eve, Chief Tieou of Paola, near Kone, was bringing in the capitation tax returns he had collected from his tribe. On the way he was hoping to find a popinee, Nina Paega, and entered Leconte's courtyard to see if she was there. She wasn't and he left. Leconte followed him, and attacked him on the road without reason. A little later, Leconte came after him again in his car, beat Tieou so savagely that he lost an eye, and threw him into the nearby river. This appalling brutality was not all, for Leconte also seized the money from the capitation tax, and this loss could have had dire consequences for Tieou and his whole tribe.

Eventually, the Assize Court awarded Tieou 3000 francs damages, but acquitted Leconte. It is clear that the jury and Tieou were under immense pressure to dismiss the charges. Leconte had presented Tieou with a document agreeing to withdraw all charges, offered him 30 francs to sign it, and then threatened him with prison if he refused. Such was white justice. Tieou was perhaps exceptional in resisting this intimidation, for presumably many others did not dare to defy prominent colonists . . .

Id.

⁸⁸ Stanley Meiser, *New Caledonia: a Crisis Full of Irony*, L.A. TIMES, Feb. 6, 1985. The population increased to over 28,000 in 1901, but grew to just 29,000 by 1920. Shineberg, *supra* note 24, at 2; *American Society of International Law Proceedings of the 82nd Annual Meeting, D.C.* Apr. 20-23 (1988), at 436.

further land deprivation. For example, in 1896, the government proclaimed the designated reserve areas as too large for the declining population.⁸⁹

The emergence of a nickel industry in the late nineteenth century and the subsequent spread of nickel mines in New Caledonia in the early 1900s resulted in further land confiscation and the contraction of reserve areas.⁹⁰ Land and rivers in those areas which continued to be designated as reserves were polluted by mining activities.⁹¹ The dwindling Kanak population and the growing nickel mining industry were relied upon by colonial authorities to justify the importation of migrant labor from Indonesia, Tahiti, Wallis-Futuna, New Hebrides (Vanuatu), the Solomon Islands, the Gilberts (Kiribati) and Vietnam.⁹² By 1930, approximately 14,000 indentured laborers had migrated to New Caledonia.⁹³ The policy of isolating and segregating Kanaks precluded their involvement in mining activities.⁹⁴ As Guiart has observed: "[The European settlers] . . . destroyed or neutralized any attempt by Melanesians to be economically proficient and autonomous."⁹⁵ The disparity in living standards between the Kanaks living in remote rural areas and the urban settlers increasingly widened.⁹⁶

⁸⁹ Shineberg, *supra* note 24, at 3. As Saussol comments: "[The] trauma hit at the social and agrarian foundations of the society and largely explains the despondency which afflicted the Melanesians until the 1930s. Their demographic decline, being perhaps an expression of it, served as a pretext for the resumption of confinement." Saussol, *supra* note 29, at 248.

⁹⁰ Over 124,000 hectares of land was designated as reserve land in 1929. There was virtually no change in the areas designated as reserve areas through the early 1950s. Saussol, *supra* note 29, at 249. By 1873, the mining of nickel became the major source of income for the colony. The Societe le Nickel ("SLN") was formed in the 1880's. By the end of the nineteenth century, New Caledonia had become the world's largest nickel ore supplier. ROBIE, *supra* note 23, at 89; HELEN FRASER, *NEW CALEDONIA ANTI-COLONIALISM IN PACIFIC TERRITORY*, LEGISLATIVE RESEARCH SERVICE 6 (1987-88). Estimates of New Caledonia's current nickel deposits range from 20% to nearly half of the world's nickel reserves. New Caledonia is now the third largest nickel producer globally after Canada and the United States. In recent years, the nickel industry has accounted for over 90% of export receipts. Philip Shenon, *Testing Colonial Patience: French Leader Jacques Chirac Has Won No Friends Over Nuclear Issues in Restless South Pacific Possessions*. VANCOUVER SUN, Sept. 16, 1995, at B3; *New Caledonian Nickel Firm Doubles Exports*, Agence France Presse, Jan. 3, 1996, available in 1996 WL 3782410; *Working Paper Presented to the [U.N.] Special Committee on the Situation With Regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples*, G.A. DOC A/AC109/1041 (3AUG. 1990), at 9; Kanaky: *A Step in the Decolonisation Process*, PAC. NEWS BULL., May 1990, at 1.

⁹¹ Shineberg, *supra* note 24, at 5.

⁹² Houbert, *supra* note 46, at 220; Shineberg, *supra* note 24, at 3.

⁹³ Working conditions for these migrant workers were generally poor, alcoholism was high and the death rate for this group was several times that of the European population. Many of the migrant workers were children indentured until reaching the age of majority. Dorothy Shineberg, *The New Hebridean is Everywhere: The Oceanian Labor Trade to New Caledonia, 1865-1930*, 18:2 PAC. STUD. 1, 12 (1995).

⁹⁴ A. Thompson, *The Uses and Misuses of Capital: New Caledonia's Mining Industry, 1870-1901*, 19 J. PAC. HIST. 81, (1984).

⁹⁵ Guiart, *supra* note 34, at 106.

⁹⁶ *Id.*

Though satisfied with isolating Kanaks internally, the French government was eager to enlist Kanak men in the war effort during the First World War.⁹⁷ Heavy-handed tactics were often used to secure the service of Kanak men in the military.⁹⁸ Resisting this pressure as well as continued land encroachment, destruction and outright dispossession, the Kanaks rebelled against the colonial government in 1917.⁹⁹ French authorities successfully quelled the revolt after just two months.¹⁰⁰ In the aftermath, the government predictably escalated the rate of land confiscation.¹⁰¹

New Caledonia was not spared the effects of the global depression in the 1930s. As demand for nickel collapsed so too did the need for migrant workers, many of whom were returned to their native land.¹⁰² During this period, in line with its actions in other overseas territories, the French government abandoned the vigorously pursued policy of segregation and isolation in favor of assimilation.¹⁰³ Yet, it was not until the advent of the Second World War that substantive legal changes in French treatment of Kanaks actually materialized.

IV. EMANCIPATION OR FURTHERANCE OF COLONIAL ABUSE?

World War II marked a turning point in French treatment of Kanaks. During the war, the islands were occupied by allied troops from the U.S., Australia, and New Zealand. The allied presence was designed to guard against a Japanese military move toward Australia and/or New Caledonia. New Caledonia served as both a naval and air base for military operations directed against Japan.¹⁰⁴ The American presence in particular undermined the ability of the French to continue depriving Kanaks of civil liberties. As Cheseneaux discusses: "American pragmatism, combined with Rooseveltian democratic values, were manifest in U.S. attitudes and behavior Americans paid local labourers, who had hitherto been forced to perform

⁹⁷ About 30% of the more than one thousand Kanaks serving French military efforts lost their lives. Kircher, *supra* note 5, at 6.

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ A few hundred Kanaks and almost a dozen Europeans lost their lives during the clashes. *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ The allies were especially concerned that Japan might invade New Caledonia to gain access to nickel deposits for use in making armaments to support the war effort. *Id.*; Andrew Nelson, *New Caledonia: France in the Pacific Islands Combine Gallic Refinements, Tropical Scenery*, SAN FRANCISCO EXAMINER, Apr. 4, 1993, at T10.

unpaid corvees, in cash. Black and white G.I.'s were seen behaving ostensibly as equals, at ease with each other."¹⁰⁵

A resurgent demand for nickel prompted by the war quickly transformed New Caledonia from an agriculturally based economy to an urban one.¹⁰⁶ Some Kanaks were employed in the increasingly urban economy as wage laborers.¹⁰⁷ The principal beneficiaries of the urban sector, however, were non-Kanak migrants. New waves of migrants arrived during and after the war to support the mining activities in the territory.¹⁰⁸

As one of the founders of the United Nations and as a principal architect of the post-war international legal order, France was forced to acknowledge the emerging international trend toward decolonization. France abolished the oppressive code of native regulations in 1946 and listed New Caledonia as a non-self-governing territory with the U.N. Decolonization Committee.¹⁰⁹ Most civil liberties accorded to the settler population were extended to the Kanaks, except the right to vote, which was not granted until 1951.¹¹⁰

The abolition of the indigenat and the granting of many civil liberties to Kanaks was commendable. However, other French legal maneuvers served to further erode customary legal traditions and undermine the efficacy of customary traditions in maintaining order on the reserves. France issued a decree in 1946 abolishing the application of customary laws in penal matters involving two Melanesians and extending French penal laws to cover crimes committed by Melanesians.¹¹¹ France also eliminated the artificially

¹⁰⁵ Jean Chesneaux, *Kanak Political Culture and French Political Practice: Some Background Reflections on the New Caledonian Crisis*, in *NEW CALEDONIA: ESSAYS IN NATIONALISM AND DEPENDENCY*, *supra* note 42, at 61.

¹⁰⁶ JOHN CONNELL, *RESEARCH INSTITUTE FOR ASIA AND THE PACIFIC, NEW CALEDONIA: THE MATIGNON ACCORD AND THE COLONIAL FUTURE 2* (1988).

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* By 1946, the non-Melanesian population was roughly the same as the Kanak population, each approximately numbering over 31,000. Rallu, *supra* note 44, at 178.

¹⁰⁹ M. Rafiqul Islam, *The Recent Self-Determination Referendum in New Caledonia: Terms Militating Against Its Validity*, 15 *MELANESIAN L.J.* 136, 136-37 (1987).

¹¹⁰ Kanaks were able to vote in the territorial elections in 1951. Maurice Lenormand, the only candidate evincing an interest in Kanak concerns, was elected territorial representative to the French National Assembly in 1951. The ruling elite in the territory were outraged over the election results and sought unsuccessfully to change the electoral process by replacing one electoral college and five electoral districts with a bi-cameral legislature and two-level electoral college. *WARD I, supra* note 30, at 8-9; Kircher, *supra* note 5, at 7; Ntummy, *supra* note 24, at 597.

¹¹¹ DORNOY, *supra* note 28, at 102 n.61. Fote Trolue, a Kanak judge, explains how the application of French penal law has eroded and transformed customary traditions:

Under customary law, blood is paid for by blood, but there can also be repentance and mediation. If a Kanak commits a robbery, for example, traditionally all of the elders of the clan

appointed tribal chiefs and replaced them with a Council of Elders, a body maintaining representation from each clan of a tribe. The Council of Elders was empowered to handle land allocation within reserve areas. Even this body failed to mirror the pre-contact structure. Moreover, it lacked the enforcement powers previously conferred on the French appointed tribal chiefs, resulting in a weakened ability to maintain social control.¹¹² According to Kanak tradition, the *petits chefs* (small chiefs) were responsible for maintaining order and dealing with the internal problems of the clan:

In the past, the more serious conflicts culminated in wars initiated from within the kinship or political group, or failing that, in voluntary or forced departures. The possibility of recourse to armed force having been eliminated, and the departures—although still occasionally seen—being discouraged by the reservation system and the general shift to sedentary life, the conflicts acquired a tendency to drag on [T]he pre-colonial power structure had been eradicated . . . and the decision making process put in the hands of Councils of Elders which lacked any power of enforcement and never matched the integrative function of the older chiefdoms¹¹³

French overtures toward the U.N. were short lived. France disregarded its obligations under the Charter to move toward self-government, protect Kanaks against abuses, and otherwise ensure just treatment and respect for their culture. New Caledonia was declared a French overseas territory and withdrawn from the U.N. list of non-self-governing territories in 1947.¹¹⁴

would punish the offender by hitting him with a stick. They would also discuss why the offence was committed. As a show of solidarity, the offender's friends would also suffer punishment with him. Afterwards, the offender's friends would, outside the presence of the clan, also punish the offender. Today, when a robbery is committed, it is reported to the police. The elders of a clan view this as a sign of weakness since the matter is not being resolved by the customary authorities. However, the show of solidarity by the offender's friends is still manifested. Rather than submitting to physical punishment, the friends of the offender will now do something which benefits the community such as cleaning a cemetery or working on a road or communal building.

Pourquoi Pas?, De La Coutume Au Droit Officiel: Un Enfant De la Coutume M. Fote Trolue, 19 (1990) (rough translation by author).

¹¹² Pillon & Sodter, *supra* note 31, at 163, 166.

¹¹³ *Id.* at 166.

¹¹⁴ *American Society of International Law Proceedings of the 82nd Annual Meeting, D.C.*, *supra* note 88, at 434.

This allowed France to disclaim any obligation to quickly and unconditionally end colonialism in all its forms and manifestations in New Caledonia. France has since refused to submit information to the U.N. Secretary-General concerning economic, social and educational conditions in New Caledonia¹¹⁵ as required under Article 73 (e) of the U.N. Charter. France has no desire to relinquish control over the territory. To this day, France has flouted its international legal obligations, resisting all U.N. attempts to scrutinize the situation in New Caledonia and/or supervise the process by which the right of self-determination should be exercised.

As a major world power prior to the Second World War, France had the second largest colonial empire. Remaining in New Caledonia, as in other parts of the Pacific, after the war preserved links essential in projecting status as a world power. It also nurtured a national set of beliefs in which French greatness and historical global destiny were inextricably intertwined with continued presence in the Pacific territories.¹¹⁶ As one commentator explains:

[The French strategy] has been perfectly summed up by former Prime Minister Barre . . . "Whatever the costs, the overseas territories provide us with *a world dimension that is fundamental to us.*"

. . . France's grandeur . . . [has a] strong moral, emotional, virtually mythical aura . . . [in which] the policies [of the government] identify France's "Manifest Destiny" with its world-wide stature. This nearly cosmic approach, so strange to non-French observers, is so obvious to most French minds that it does not need any further explanation or justification, it is an ideological entity *per se* The "manifestness" of France's global destiny is so deeply rooted in the national *esprit public* that it does not need detailed analytical and systematic review. It stands by itself, as a kind of Freudian *non-dit*.

. . . [T]he Pacific Basin and its southern archipelagos represent for France an important technological priority, military as well as civilian . . . [and] is also expected to contribute to French global ambitions from a historical and ideological point of view. In the case of the great French navigators of the 18th

¹¹⁵ Islam, *supra* note 19, at 235-36 (1988).

¹¹⁶ Jean Chesneaux, *The Function of the Pacific in the French Fifth Republic's "Grand Design"*, 26 J. PAC. HIST. 256, 257, 262, 269 (1991). See also Jean Christophe Victor, *France in the Pacific*, 3 PAC. REV. 343, 345 (1990).

century, Bougainville, La Pérouse, and others, the connection was obvious, and still is, between their round-the-world naval performances and their explorations of the Pacific as such. This much celebrated and centuries-old legacy is seen as establishing the historicity of the system, the relation of reciprocity between the French position in the Pacific and the French ambition to remain a global power.

. . . [I]f it does not hold on, France runs the risk of losing its place in a possible Yalta of the Pacific and even in the Security Council at the U.N. France's Grand Design in the Pacific is emphatically described as a vital necessity [T]he Pacific's main function in France's world-wide Grand Design is to complete, to fulfill, philosophically as well as politically, the global nature of France's mission "Maintaining the TOMs [Overseas territories] of the Pacific within the framework of the French Republic" said . . . Colonel Pierre-Charles Gonnot, "goes far beyond the mere state of relations between any single TOM and metropolitan France. What matters is the capacity of the whole system to maintain its world-wide status."¹¹⁷

Thus, maintaining France's position as a status-quo power overwhelmed any perceived international obligation of moving toward self-government and submitting the situation in New Caledonia to international scrutiny. To maintain at least some international credibility and assist in dodging international pressure to move toward self-government in New Caledonia, France realized Kanak opposition to French presence in the territory would need to be neutralized. Integrating at least some Kanaks into the colonial structure would help lessen opposition to this continued presence.

Since the end of the Second World War, governing authorities of all parties in metropolitan France have adopted a common ethnocentric assumption about the indigenous peoples. They have assumed that Kanaks would not hesitate to embrace French culture and legal institutions if given the chance.¹¹⁸ As Karis Muller states: "The prevailing view on the Right . . . and in sections of the Left too, . . . is that, once introduced to the benefits of

¹¹⁷ *Id.* at 263, 267-68.

¹¹⁸ Alan Ward, Comment, *The Crisis of our Times: Ethnic Resurgence and the Liberal Ideal*, 27 J. PAC. HIST. 83, 85 (1992) [hereinafter Ward III].

urbanisation [sic] and modern technology, a primitive people will happily lose their identity and become French."¹¹⁹

Kanaks reaping the benefits generated by an emerging urban economy did succumb to the conditioning of colonial authorities. They embraced French culture, legal institutions and capital profit system. Nonetheless, the vast majority of Kanaks continued to live on the reserves, remaining on the margins of French society, and eventually opposing efforts of integration. Ironically, once the Kanaks were no longer forcibly confined to the reserves, there emerged a growing consensus among much of the indigenous population of the need to protect the reserves against further encroachment so as to preserve a greater modicum of Kanak culture.¹²⁰ As Ntumy has concluded: "On the whole, the reaction of the Kanaks to the French policy of integration was a reawakening of the consciousness of Kanak culture and identity."¹²¹

The stated French policy of assimilation was successful in the short-term in convincing many Kanaks that integration into the economic and political infrastructure of the territory was a worthwhile policy for them to pursue.¹²² In 1953, two years after Kanaks were granted the right to vote, they formed their first political party, the Union Caledonie ("U.C."). The U.C. enjoyed the support of most Kanaks. It also was supported by less economically-advantaged urban settlers who resisted French hegemony in the territory. This group particularly resented that they were unable to share in the fruits of economic expansion prompted by the growing nickel industry.¹²³

Accepting the prevailing international consensus concerning policies toward indigenous peoples at the time, the U.C. implicitly embraced an integrationist dogma. Kanaks were willing to accept assurances of gradual progressive movement toward economic and political integration into the territory. The multi-racial party campaigned under the slogan "two colours, one people."¹²⁴ It endorsed: (1) greater Kanak involvement in political affairs; (2) a cessation of territorial infringement on reserves; (3) re-allocation of large under-utilized estates to Kanaks and other smallholders; (4) respect for Kanak culture and recognition of customary justice on reservations; (5) greater access to health care, education and employment opportunities; and

¹¹⁹ Karis Muller, *New Caledonia, Another Corsica? French Conceptual Obstacles to Considering Independence as an Option*, 26 J. PAC. HIST. 288, 293 (1991).

¹²⁰ WARD I, *supra* note 30, at 8.

¹²¹ Ntumy, *supra* note 24, at 598.

¹²² WARD I, *supra* note 30, at 8.

¹²³ *Id.*; Kircher, *supra* note 5, at 7.

¹²⁴ Kircher, *supra* note 5, at 7; Shineberg, *supra* note 24, at 11.

(6) wage equity.¹²⁵ Charting out a moderate course, the U.C. endorsed a gradual move toward self-government while supporting continued close links with France.¹²⁶

French government policy in New Caledonia during the post-war period has always been subject to the whims of the particular governing body in metropolitan France. There has been a vacillating pattern of granting greater powers to the territorial government followed by restrictions on local authority. In some instances, greater autonomy has been conferred to diffuse tension by providing greater expression to Kanak interests and demands. In other cases, powers of the local governing authorities have been diluted or withdrawn to thwart emerging Kanak political influence and power.

This pattern initially surfaced in 1956 when the French government introduced the framework law ("loi cadre") under which New Caledonia was granted greater internal autonomy.¹²⁷ Subsequent U.C. control of the Territorial Assembly in 1956¹²⁸ provided a prime opportunity for Kanaks to exert political influence and pursue their aims.¹²⁹ Pursuing an assimilationist policy, the Socialist government in France attempted to integrate Kanaks into the economy by encouraging them to cultivate coffee plantations. This was accomplished by extending the existing reserve areas.¹³⁰ As previously mentioned, cultivation of land for coffee involved a considerably slower changeover in land use as distinguished from yam and taro cultivation which necessitated a more rapid changeover in pre-contact times.¹³¹ The extension of reserves for the growing of coffee crops only served to further weaken the

¹²⁵ WARD I, *supra* note 30, at 9; Kircher, *supra* note 5, at 7; Shineberg, *supra* note 24, at 11.

¹²⁶ Stephen Henningham, *A Dialogue of the Deaf: Attitudes and Issues in New Caledonian Politics*, 61 J. PAC. AFF. 633, 637-38 (1988-89).

¹²⁷ The framework law promulgated by the French Socialist government actually decentralized power to all of the overseas territories. Under the law, a Territorial Assembly and a Governing Council consisting of five ministers selected by a majority vote of the Assembly was established in New Caledonia. The territorial government was given control over some economic matters, primary, secondary and technical education as well as postal and telegraphic communications. The French government retained responsibility for finance, defense, foreign affairs and tertiary education. LYONS, *supra* note 23, at 107; ROBIE, *supra* note 23, at 92; Shineberg, *supra* note 24, at 11; Kircher, *supra* note 5, at 7.

¹²⁸ Kanaks comprised a bare numerical majority of the population in 1956. Less than nine thousand of the almost twenty thousand Kanaks eligible actually registered to vote in 1959. Nevertheless, the U.C. was successful in gaining control of the Territorial Assembly because it enjoyed support from European moderates. SAUSSOL, *supra* note 29, at 250; Kircher, *supra* note 5, at 7.

¹²⁹ Kircher, *supra* note 5, at 7.

¹³⁰ Just after World War II, Kanak reserves on the Grande Terre amounted to over 126,000 hectares as contrasted with over 318,000 hectares held by Europeans. By 1956, the reserve areas expanded to cover over 143,000 hectares. SAUSSOL, *supra* note 29, at 251; WARD I, *supra* note 30, at 7, 10.

¹³¹ Ward & Kingdon, *supra* note 32, at 55, 59.

customary system of land tenure by encouraging long-term individual, rather than communal, attachment to particular terrain.¹³²

The growing influence of Kanaks in the political affairs of the territory, and the trend toward granting greater local autonomy to the governing institutions came to a screeching halt just two years later. In 1958, after DeGaulle ascended to power in France, New Caledonians voted to remain an Overseas Territory. The U.C. supported this outcome, believing continued decentralization of power would be forthcoming.¹³³ The French government and wealthy white conservative settlers ("Caldoches") became alarmed over the growing influence of the U.C., the potential for self-government under Kanak rule, and the extent of compulsory land distribution which would eventuate under a U.C. dominated Territorial Assembly.¹³⁴

After consolidating its hold in New Caledonia, the French government undertook a series of moves to stifle emerging U.C. political influence, culminating in the dissolution of the Territorial Assembly in 1958 and 1962 and the holding of new elections in those years. However, these gambits failed: both elections produced U.C. dominated majorities in the Assembly.¹³⁵

¹³² *Id.* at 55, 57.

¹³³ Kircher, *supra* note 5, at 7; Victor, *supra* note 116, at 344. The 1958 Constitution of the French Republic provides the French government with ultimate authority over matters relating to the external affairs of New Caledonia. New Caledonia has no international personality and French sovereignty over the territory is considered a fundamental principle of law. Overseas Territories are granted autonomy and the ability to organize the local administration of the territory. However, this autonomy is subordinated to the French state and the territories possess no power to make laws. The representative of the French state (the High Commissioner and his predecessor the Governor of New Caledonia) is responsible for ensuring respect for French laws, maintaining control over the budgets and upholding public order. Laws passed by the French Parliament are applied in the territories if provided for in the applicable law. These laws cannot be challenged on constitutional grounds because judicial review does not exist in French constitutional law. Equally significant, the highest public law court in France, the Conseil d'Etat, retains the power to issue a decree vetoing any territorial decision for a variety of reasons, including, but not limited to, national defense, public order, security and excess of power. Though the territories possess no powers to enact laws, they are represented in the French Parliament. Moreover, any laws enacted by Parliament dealing with the internal organization of the territory may not be applied in the absence of consultation with the territorial assembly. This is designed to provide the Overseas Territory with an organization which reflects its particular political and social needs while at the same time ensure the primacy of the "French Parliament [as] . . . the only body competent to define and modify the statutes of the Overseas Territories." Excerpt from Yves-Louis Sage, *The Application of Legislation in the French Overseas Territories of the Pacific*, 23 VICTORIA U. WELLINGTON L. REV. 15, 18-19 (1993). This consultative requirement has usually not served as a hindrance to the will of the metropolitan government in France. Ntumu, *supra* note 24, at 601, 612.

¹³⁴ Kircher, *supra* note 5, at 7; ROBIE, *supra* note 23, at 92.

¹³⁵ ROBIE, *supra* note 23, at 92; Kircher, *supra* note 5, at 7. Armed settlers, with the acquiescence of the French army, caused disturbances in Noumea in an effort to undermine the U.C. On June 10, 1958, 10 U.C. representatives were kidnapped from the Territorial Assembly and 1000 settlers demonstrated in

Laurent Pechoux, governor of New Caledonia, embarked on a course of taking away powers previously conferred on the Territorial Assembly to mitigate the growing Kanak influence. The framework law was revised: the powers of the Governing Council became mostly advisory, and the real power was centralized in the governor of New Caledonia.¹³⁶ With the support of the caldoche community, the French government was able to foil emerging Kanak power and influence:

1958 and 1963 inaugurated a renewed centralizing process based on a coalition of interests of conservatives in New Caledonia and France. A democratic evolution towards self-government, considered normal in British colonies, was frustrated in New Caledonia. Instead, the Paris Government took control of more and more areas of administration as it took over the responsibility of financing them. New Caledonia was ruled as a colony with powers concentrated in the Governor.¹³⁷

The right of self-determination and democratic development guaranteed all Overseas Territories in the preamble of the 1958 French Constitution rang hollow in New Caledonia.¹³⁸ There existed a dramatic discrepancy between the words of civil equality and the deeds of the French government.¹³⁹ Moreover, the retrenchment of the Assembly's powers solidified Kanak opposition to French tactics in the territory. In turn, this only served to

Noumea demanding the removal of U.C. leader Lénormand from the Governing Council. In October 1958, De Gaulle dissolved the Territorial Assembly until elections in December of that year which yielded a U.C. dominated Assembly. In 1962, after the new Governing Council refused to grant the Societe le Nickel a tax exemption, a bomb exploded in the Assembly. De Gaulle once again dissolved the Assembly. Another election witnessed the return of the U.C. to majority control of the Assembly. ROBIE, *supra* note 23, at 92-93.

¹³⁶ The process of curtailing the powers of the Assembly began with the loi Billotte which withdrew territorial control over mining and the economy generally. In 1963 the French National Assembly passed the loi Jacquinot which further winnowed away the powers and authority of the Territorial government. Under the 1963 law the Council of Government was reorganized and answerable to the Governor, the representative of the French state in New Caledonia. The Governor presided over the reconstituted Council of Government and exercised control over state services and territorial public services. The Government Council was effectively diminished to an advisory capacity. DORNOY, *supra* note 28, at 95; Kircher, *supra* note 5, at 7.

¹³⁷ WARD II, *supra* note 48, at 13.

¹³⁸ The preamble of the Constitution guarantees all peoples in the Overseas Territories the right of self-determination and democratic development based on the principles of liberty, equality and fraternity. Ntummy, *supra* note 24, at 609.

¹³⁹ *Id.*

radicalize Kanak demands and accelerate the likelihood of conflict between the Kanak and European community.

V. RECONCILING KANAK CUSTOMARY LAWS WITH ECONOMIC DEVELOPMENT AND FRENCH LAWS ON LAND TENURE

Conforming customary rules regulating land ownership to the French system of land tenure would prove to be challenging in the best of circumstances. Even within the Kanak community, land allocations within reserve areas and land redistribution generally were volatile issues. Some Kanaks with ancestral ties to particular land insisted that it be allocated to them as a matter of customary right. Others forced onto particular reserves by the French “cantonement” policy and possessing no historical link to the land to be allocated supported its redistribution on the basis of proposed economic development. The French government demonstrated little interest in genuinely accommodating the differing views within the Kanak community or for that matter reconciling the two inconsistent forms of land tenure. Indeed, the colonial administration was intent on sowing further divisions within the Kanak community and further eroding customary traditions. In 1959, the French government began awarding to the Kanaks provisional land grants on the exterior of existing reserves to encourage economic development of land.¹⁴⁰ Granting land on the periphery of reserves for development was not entirely successful in encouraging greater productive use of land, because some individual holders felt constrained by the property rights system of adjacent clans. Even though the land may have been granted pursuant to the *droit commun*, most Melanesians still regarded the bond to customary laws of property rights and succession more compelling. Unless the traditional customary authorities consented to the reallocation, many individual Kanak holders demonstrated little interest in improving the property: “[T]here is a tendency for individual holdings on the margins of reserves to be drawn into the property-rights system of the clans. This is partly a function of the customary law of succession, which favours the nearest clan claimant, not necessarily the children or widow of the

¹⁴⁰ *Id.* at 615-16. The grants were subject to conversion on definitive land grants. The concessions of *domaine* land involved grants of interim title to state land on the periphery of reserves to persons born in New Caledonia for a period of five years at which time the title was confirmed if specific improvements were made. WARD I, *supra* note 30, at 11-12; Saussol, *supra* note 29, at 255. Land allocations were also made under the *locations dominales* which enabled Kanaks to lease land for a period of years at a minimal fee with a guaranteed sale provided the land was improved. WARD I, *supra* note 30, at 11.

deceased.”¹⁴¹ While the French policy may have at least encouraged some economic development of the land, it also established a class of Kanak landowners who owed their fidelity to the concept of private property ownership.¹⁴²

Some Kanaks benefited materially by embracing the capitalist system and private property ownership. Most remained on the margins of economic life in the territory, clinging to communal rural subsistence to preserve as much Kanak custom as possible. Those Kanaks participating in the urban sector were employed in unskilled jobs at relatively low wages. The divergence in living standards between the Kanak and non-Kanak population progressively worsened.¹⁴³

Unable to shape the economic future of New Caledonia, Kanaks also became unable to shape it politically as their population was firmly relegated to minority status in the 1960's.¹⁴⁴ Demand for nickel escalated dramatically during the Vietnam War. The territory witnessed a renewed wave of migration to feed the labor hungry mining sector.¹⁴⁵ This migration was expressly encouraged by the French government to provide a labor force for the mining industry and to quell Kanak demands for greater autonomy through the ballot box.¹⁴⁶

By the late 1960s, some Kanak groups broached the idea of independence.¹⁴⁷ The early 1970s was characterized by a resurgence in

¹⁴¹ Ward I, *supra* note 30, at 13.

¹⁴² Ntamy, *supra* note 24, at 616.

¹⁴³ As Connell has noted:

[T]he economic history of postwar New Caledonia is essentially that of an externally oriented economy increasingly looking elsewhere for markets, finance and even labor, quite unlike that of other parts of Melanesia, where the production of agricultural commodities dominates economic life. It is an economy structured by European interests in which the Melanesian economy is peripheral and Melanesians largely remain bystanders in the political economy that has shaped their destiny.

Connell, *supra* note 106, at 2.

¹⁴⁴ Connell, *supra* note 46, at 226. For a brief time during the 1950s, Kanaks enjoyed majority status. *Id.* By 1969, they barely comprised 48% of the population. Rallu, *supra* note 44, at 180.

¹⁴⁵ New migrants arrived in the period 1968-1971 from Europe, Tahiti and Wallis. Rallu, *supra* note 44, at 184.

¹⁴⁶ The French government-owned Societe le Nickel (“SLN”) was anxious to secure more laborers for the booming nickel industry. The effect of the SLN recruiting drive was to deny promotional opportunities to the Kanaks. It also deferred any move toward self-government as most migrants, benefiting from the economic opportunities made available by the expansion of the nickel industry, supported French government policies. Alan Ward, *The Independence Movement and the Plan Dijoud in New Caledonia*, 15 J. PAC. HIST. 193, 193-96 (1980) [hereinafter Ward IV].

¹⁴⁷ Ward IV, *supra* note 146, at 193, 195. The most notable such group was the “Red Scarves” (Fouларds Rouges). This group was formed by young Kanaks who had been educated in France during the

Kanak pride in traditional culture. Support among the Kanak population for independence also gathered momentum.¹⁴⁸ The inability of the U.C. to advance Kanak demands for autonomy led to the emergence of several radical political parties.¹⁴⁹ To prevent further loss of support, in 1977 the U.C. abandoned its moderate agenda and demanded Kanak independence.¹⁵⁰ This alienated most European members who flocked to other political parties favoring continued French presence in the territory.¹⁵¹

In response to growing demands for independence, the French government actively encouraged new migration to the territory.¹⁵² This policy

student revolts in the 1960s. Restoring the supremacy of Kanak people and culture was the primary goal of the group. It demanded a place for Kanak culture in the educational system and the return of all ancestral lands to the clans which originally had possession of them. The Red Scarves staged a series of violent demonstrations to convey their message. The leader of the group, Nidoish Naisseline, son of High Chief Naisseline, was jailed for six months after organizing a demonstration against the yearly 24 September celebration of French annexation. His imprisonment in turn provoked demonstrations in the capital. ROBIE, *supra* note 23, at 94; Kircher, *supra* note 5, at 8; WARD II, *supra* note 48, at 15.

¹⁴⁸ By the mid-1970s demands were made for the return of "former clan mounds and rehabilitation of la coutume: a first step towards the demand for sovereignty which transcended the colonial relationship and took the form of a single transformation from clan space into national space." Saussol, *supra* note 50, at 53.

¹⁴⁹ The Union Multiraciale de Nouvelle Calédonie (later renamed the Front Uni pour la Libération Kanak "FULK"), the Union Progressiste Multiraciale (later renamed the Union Progressiste Mélanésienne "UPM"), the Union des Jeunes Caledoniens ("UJC"), and Groupe 1878 (later joined by members of the Foulard Rouges to create the Parti de Libération Kanak ("PALIKA")) were all formed in the 1970s. By the late 1970s all of these groups favored independence. Another radical group formed later was the Liberation Kanake Socialiste ("LKS"). Kircher, *supra* note 5, at 8; ROBIE, *supra* note 23, at 94.

¹⁵⁰ Other factors also contributed to the U.C.'s eventual support for independence. In 1975, Prime Minister Giscard d'Estaing's refused to meet in France with a Kanak delegation proposing autonomy. During the same year, a young Kanak was killed by a white police officer in Noumea. Several protests in the capital took place after the officer's sentence was suspended by a court accepting the officer's self-defense argument. These events intensified Kanak demands for independence. These demands were ultimately reflected in U.C. policies. Kircher, *supra* note 5, at 8-9.

¹⁵¹ The caldoche community has never been entirely enamored with French presence in the territory. French public servants were resented because of their perceived arrogance and higher educational and socio-economic background. Nevertheless, the caldoche community became more closely aligned with the French government in response to rising demands for Kanak independence. Frederic Bobin, *Caldoches, Metropolitans and the Mother Country*, 26 J. PAC. HIST. 303 (1991). Several parties were formed by caldoches unhappy with the increasingly radical platform of the U.C. By the late 1970s, all of these conservative parties eventually collapsed into three main parties—Rassemblement pour la République ("RPR"); Rassemblement pour Calédonie ("RPC"); and Rassemblement pour la Calédonie dans République ("RPCR"). Kircher, *supra* note 5, at 8.

¹⁵² In 1972, French Prime Minister of Overseas Territories, Pierre Messmer, instructed his Secretary of State to accelerate migration to the territory to squelch nationalist sentiments:

[I]t is necessary to seize this last chance to create another French-speaking country. Apart from a world war, the French presence in New Caledonia can only be threatened by nationalist claims made by the indigenous people In the short-to-medium term the massive immigration of metropolitan French or citizens from overseas departments (Reunion) should enable this danger to be averted by immediately improving the numerical balance of the races.

merely heightened the likelihood of future conflict: "The deliberate changes to the demography of New Caledonia had produced two polarized and apparently irreconcilable communities with little substantial knowledge or contact with each other, each with a vision for the future of New Caledonia, each appealing to a different historical basis for the right to political power."¹⁵³

The French government also strengthened police and military presence on the island.¹⁵⁴ The increasingly militant French government response was accompanied by the emergence of paramilitary and militia groups established by members of the caldoche community agitated by escalating Kanak demands for independence.¹⁵⁵

With the end of the Vietnam War in the mid 1970s, the nickel industry experienced a severe downturn. More than ever, New Caledonia was rendered increasingly dependent on financial support from France. The downturn reinforced sentiments among the settler population that their future economic livelihood necessitated close ties with France.¹⁵⁶ Seeking to develop other avenues for revenue, the territorial administration encouraged the development of Noumea into a tourist destination. This investment policy took precedence over Melanesian needs and strengthened Kanak resolve for independence:

In many ways, the administration of the territory seemed to reflect the interests of Paris, or of a powerful local oligarchy, rather than the interests of the indigenous Melanesian population, and the interests of white Noumea rather than those of the Kanak bush. While the white-controlled municipalities spent money on installing parking meters and swimming pools in urban centres like Noumea, more remote villages lacked even basic amenities like running water and sealed roads. The needs of tourists became a more pressing investment priority than

In the long-term the indigenous nationalist claims will only be avoided if the communities from outside the Pacific form the majority Conditions are ripe for New Caledonia in twenty years to be a small prosperous French territory comparable to Luxembourg, and clearly representing, in the emptiness of the Pacific, a lot more than Luxembourg in Europe

Excerpts quoted in FRASER, *supra* note 90, at 7; See also *American Society of International Law Proceedings of the 82nd Annual Meeting, D.C.*, *supra* note 88, at 436.

¹⁵³ FRASER, *supra* note 90, at 9.

¹⁵⁴ Kircher, *supra* note 5, at 9.

¹⁵⁵ *Id.*

¹⁵⁶ FRASER, *supra* note 90, at 9.

remedying this material neglect of distant Melanesian communities. Tourism, not Kanak agriculture, was seen as the alternative source of income, when the price of nickel slumped.¹⁵⁷

By the late 1970s, a perceptible split along economic, political, and racial lines could be identified. All Kanak parties demanded full independence while virtually the entire non-Melanesian population resisted any lessening of ties with France.¹⁵⁸ Tension between the pro-independence and anti-independence forces mounted throughout the 1970s.¹⁵⁹

Land issues continued to generate much tension. During the mid-to-late 1970s, a variety of proposals were floated concerning the relevant factors to be considered in allocating land and the method by which land should be redistributed. Significantly, French actions designed to accord more deference to Kanak customary land rights encountered Kanak opposition; such resistance reflected an unwillingness to accept land and economic reforms in lieu of independence.¹⁶⁰

In 1976, the French government encouraged individual initiative within reserve areas through transformation of communal property into individual title.¹⁶¹ Many Kanaks viewed this as inconsistent with customary methods of land allocation in which land distribution was undertaken by the master of the land in consultation with clan elders and chiefs.¹⁶²

¹⁵⁷ LYONS, *supra* note 23, at 123.

¹⁵⁸ FRASER, *supra* note 90, at 9; CONNELL, *supra* note 106, at 4-5.

¹⁵⁹ This tension culminated in periodic instances of armed hostility. Pollution from nickel mining was a precipitating factor in many of these instances. In 1978, Kanaks fired on gendarmes during a dispute over Kanak claims that waste from a nickel mine was polluting Kanak gardens and a nearby lagoon. WARD II, *supra* note 48, at 19. The mining of nickel had a particularly adverse impact on Melanesians because most of the mining activities take place in the North and Center of the island, both areas heavily populated by Kanaks. Bans on mining were imposed only near Noumea. These bans were prompted by concern over the impact of unpleasant residue on the emerging tourist industry. LYONS, *supra* note 23, at 116-17.

¹⁶⁰ CONNELL, *supra* note 106, at 5-6; WARD I, *supra* note 30, at 42.

¹⁶¹ The Commission for Rural Development was established in 1976 by the French government. The Commission favored the subdivision of reserve land into single and family holdings. DORNOY *supra* note 28, at 132-33.

¹⁶² WARD I, *supra* note 30, at 26. To this day, young Kanaks working for the French administration who wish to maintain their individual identity while retaining at least some ties to the communal society have acquired property under this scheme. *Id.* The struggle to achieve a balance between custom and tradition and individual initiative and economic development continues to provide a challenge in present day New Caledonia.

Two alternative proposals for land redistribution were introduced in the Territorial Assembly in 1977 by the U.C. and U.P.M. The alternative motions reflected a split of opinion even among Melanesians regarding the method to be used and the criteria to be employed in redistributing land. The

In an attempt to diffuse the rising tension, French Secretary for the Colonies, Paul Dijoud, introduced the ten year land reform and socio-economic development "Dijoud" plan in 1979.¹⁶³ The plan was designed to accelerate the pace of land reallocation by transferring ten thousand hectares of land annually to the Kanaks. The powers of the territorial government were expanded to allow preemption and expropriation of land.¹⁶⁴ The 1980 Territorial Ordinance implementing the plan recognized the clan instead of the "tribe" as the entity entitled to hold land. This was the first instance the French government attempted to recognize Melanesian customary methods of land allocation and communal ownership.¹⁶⁵ Since the composition of the clan is fluid and difficult to articulate, the clan's definition is purposefully open-ended:

The land of the clan is the common property of the family groups of which it is composed. These family groups are represented by the customary chiefs of the family who constitute the Clan Council.

The Clan Council regulates the use and division of land among members of the clan as well as the specification, where

U.P.M. proposed that private abandoned and uncultivated domaine land be allocated as an expansion of existing reserves or to individuals for the purpose of facilitating productive agricultural use of the land. A Commission of Land Redistribution was proposed which would act in consultation with customary authorities form the reserves adjacent to the allocated land. This proposal reflected an accommodation between Kanak rules regulating land allocation and economic development. By contrast, the U.C. proposal insisted that land allocation be based exclusively on customary ancestral claim. Both motions were taken under submission by the Commission for Agriculture and never acted upon.

In 1979, Promotion Melanesienne, a group created by a former member of the Red Scarves, proposed legal recognition of the "propriete clanique." Clan Councils constituting ancient and new family heads in a particular area would regulate land allocation matters. Any disagreements between clans and the Clan Council would be resolved preliminarily by a Council of Clan Chiefs and ultimately by a Council of Grand Chiefs. The proposal was designed to provide Kanaks with more authority to regulate land matters and thereby foster respect for the land allocation process. WARD I, *supra* note 30, at 26-27, 46-47, 59. The group was successful in securing legal recognition of the propriete clanique. However, the 1980 Territorial Ordinance under which the clan was later recognized, vested ultimate authority to resolve conflicting claims for land in the Territorial Administration. See *infra* note 166 and accompanying text.

¹⁶³ Robert Aldrich, *The French Press Responds*, PAC ISLANDS MONTHLY, Aug. 1988, at 19.

¹⁶⁴ In 1976, nine hundred European families owned more land in New Caledonia than the entire Kanak population. These nine hundred European families were involved in cultivating 432,000 hectares of land. This was in stark contrast to thirty-nine thousand Kanaks living on one hundred and sixty-five thousand hectares, less than 10% of the land surface of the main island. In 1980, Kanaks owned no more land per capita than they had in 1900. LYONS, *supra* note 23, at 131; Michael Ovington, *The Impact of the Dijoud Plan on New Caledonian Politics*, in NEW CALEDONIA: ESSAYS IN NATIONALISM AND DEPENDENCY, *supra* note 42, at 106, 115-16; CONNELL, *supra* note 106, at 5-6; Saussol, *supra* note 29, at 251.

¹⁶⁵ Ntumu, *supra* note 24, at 616-17; WARD I, *supra* note 30, at 51.

applicable, of the proprietary rights of the clan, according to customary law.¹⁶⁶

The U.C. assisted in drafting the plan. Even so, it refused to support it when Dijoud insisted that a vote for the plan would constitute a renunciation of the goal of independence for ten years.¹⁶⁷

The Dijoud plan, later implemented, failed to garner Kanak support. French authorities retained ultimate responsibility for oversight of land allocations and the resolution of conflicting claims. This effectively relegated Kanak customary methods of land allocation and resolution mechanisms to a subordinate position. Some Kanak leaders dismissed the plan as a cynical ploy designed to perpetuate the process of colonial domination.¹⁶⁸ Concessions on land allocation were insufficient to appease Kanak frustration with lack of progress in moving toward self-government in the territory.¹⁶⁹ The ten year target for land redistribution was never attained. Kanak parties refused to cooperate in carrying out its terms. Difficulty in ascertaining traditional tenure to the land also hindered the successful implementation of the plan. On much of the land, there existed conflicting Kanak claims of entitlement. Even without the previous forcible removal of Kanaks from their

¹⁶⁶ During legislative debates on the 1980 Ordinance, harsh criticism was leveled against the open-ended definition of the clan and the difficulty such definition would produce in applying the law. WARD I, *supra* note 30, at 50.

¹⁶⁷ Ovington, *supra* note 164, at 119. The highly publicized television debate which Dijoud believed would be a public relations exercise endorsing his plan turned into a focus on the drawbacks of the plan. Though a majority of the Territorial Assembly voted in favor of the plan, the U.C. actions during the debate spoiled the carefully scripted scenario Dijoud had envisaged. One commentator has sketched the drama which unfolded:

Although the U.C. members are recorded as having abstained, it would be more accurate to say that they did not respond in a roll-call vote. In a procedural wrangle (which served to explain the U.C. gesture) before the vote, the U.C. indicated that it would not respond when irrelevant issues were raised as preconditions. To avoid any misunderstanding of their position, seven of the nine U.C. councilors insisted on an explanation for their vote. Ironically, because this involved a precise statement of the U.C. attitude towards the plan per se, the explanations focussed more closely on the negative aspects of the plan than would probably have been the case if there had been no question of a moratorium on independence and U.C. members had simply been voting in favor. The bright lights of the television cameras which were supposed to record a Dijoud triumph captured instead his growing discomfiture under this barrage of hostility.

Id.

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*; Ward II, *supra* note 48, at 42.

traditional lands onto reserves, it would be difficult to ascertain the complex customary web of rights and relationships.¹⁷⁰

Consequently, the French government requested the resignation of U.C. members on the Government Council. Following their refusal, Dijoud successfully initiated an electoral reform bill in the Conservative *Rassemblement pour la Calédonie dans la République* ("RPCR") dominated Assembly increasing the percentage of votes needed to gain a seat in the Assembly from three to seven and a half percent. This was designed to prevent several of the pro-independence parties from securing a seat in the Territorial Assembly.¹⁷¹ Dijoud's stratagem failed: several of the independence parties united to form the Independence Front ("FI") and secured just one seat less than the Conservative parties in the subsequent election.¹⁷² Dijoud's scheme merely strengthened the solidarity of the independence movement.¹⁷³

Officials misjudged Kanak sentiments. Prior to World War II, the French government pursued a policy of segregation and isolation when the Kanaks would have responded favorably to integration into the economic infrastructure of the colony. By the time the French government was prepared to undertake social, economic and land reforms, Kanak attitudes had changed to encompass demands for independence.

VI. THE MITTERRAND YEARS: GREATER AUTONOMY AND DEFERENCE TO KANAK CUSTOMARY LAWS AND CULTURAL TRADITIONS BUT NO INDEPENDENCE

The newly constituted FI supported the Socialist party during the 1981 French elections. The FI was under the impression a Socialist government in

¹⁷⁰ Saussol, *supra* note 29, at 257.

¹⁷¹ Ovington, *supra* note 164, at 120; Kircher, *supra* note 5, at 9.

¹⁷² Kircher, *supra* note 5, at 9.

¹⁷³ As one commentator concludes:

Instead of fragmenting the independentist parties and keeping the smaller ones out of political office, the threshold provisions in the electoral reforms had clearly had the reverse effect of encouraging a cohesion . . . that they had not previously been inspired to demonstrate Dijoud's own political tactics after the Assembly debate were designed to reduce the political influence of the independence parties and to play down the independence question generally. In both respects, however, quite the reverse results were achieved

Ovington, *supra* note 164, at 121-22.

France would support the goal of independence.¹⁷⁴ No timetable for independence was proposed after Mitterrand assumed power in 1981. Nevertheless, a series of reforms were announced to speed up the pace of land redistribution, redress economic inequities and foster more protection for traditional Kanak culture and customary laws.¹⁷⁵ In contrast to the previous governing body in France which sought to accelerate the process of land reform by re-allocating power to the territorial government to pre-empt and expropriate land, the Mitterrand government pursued this goal by reclaiming and concentrating power in the metropolitan government in France. A law was promulgated under Article 38 of the French Constitution to override any statutes enacted by the Territorial Assembly in New Caledonia and to introduce reforms in the colony by ordinance, even if those reforms were opposed by the Territorial Assembly.¹⁷⁶

The land reform process encountered stiff resistance from the settler community as the pace of acquisition from rural landowners gathered momentum. Conservative settlers resorted to violence to express their opposition to the land reforms.¹⁷⁷ The use of violent tactics was not limited to

¹⁷⁴ In 1979, Mitterrand made some remarks which justifiably led many Kanak leaders to speculate that independence would be forthcoming under a Socialist government in metropolitan France:

We are now approaching a situation of desperation which will lead—I assure you—to a confrontation. Now no doubt you [the Giscard d'Estaing Conservative Government] will tell me that the Kanak population is today a minority, ethnically speaking. This may be so, but such an argument is not valid when one remembers how the importation of migrants from metropolitan France and from neighboring countries has been encouraged. What we must take into account is that all Pacific countries, including Australia, have after contact with Front Independantiste, backed their claim of independence.

Fraser, *supra* note 90, at 9-10 (quoting Mitterrand).

¹⁷⁵ The Mitterrand government passed four ordinances aimed at transferring land to Kanaks at a more rapid rate through a newly constituted Office for Land Distribution; promoting development of neglected rural areas to benefit Kanak inhabitants; creating a Kanak Cultural, Scientific and Technical Agency ("KCSTA") to support traditional Kanak culture and advancement in the economy; and appointing Kanak assessors in the lower courts to apply customary law in legal actions between Kanaks. WARD II, *supra* note 48, at 32; Kircher, *supra* note 5, at 9-10. Established in 1982, the KCSTA was designed to encourage writings on Kanak language and poetry and to facilitate the opening of Kanak cultural centers and museums. Muller, *supra* note 119, at 294.

¹⁷⁶ WARD II, *supra* note 48, at 32.

¹⁷⁷ The General Secretary of the U.C. was assassinated in late 1981. This provoked demonstrations throughout New Caledonia. Kircher, *supra* note 5, at 9. In 1982, the FI forged an alliance with a moderate settler party ("F.N.S.C."). The two parties collectively comprised a majority in the Territorial Assembly. The new alliance as well as the pace of land reform provoked anger among rightists who invaded the Assembly in 1982 and attacked Kanak and centrist supporters of the land reform plan. *Id.*; WARD II, *supra* note 48, at 34.

the settler community. Kanaks also engaged in violence to convey their anger over lack of progress in moving toward independence.¹⁷⁸

In an effort to conciliate the divergent positions of the Kanak and settler populations, the French government proposed and subsequently enacted the "Lemoine statute," providing greater autonomy for the territory to be followed by a referendum in 1989 on self-determination, of which independence was to be one option.¹⁷⁹ France therefore acknowledged the validity of a claim for self-determination.¹⁸⁰ However, France continued to spurn U.N. scrutiny by its insistence on maintaining strict control over the process by which the right should be exercised, including the individuals who should be entitled to vote in such a referendum.¹⁸¹ Noticeably absent from the Lemoine statute was any mention of electoral reform. Without such reform, Kanaks would be unable to prevail on a referendum for independence given their minority status.¹⁸²

Kanak leaders maintained that Kanaks should be the only inhabitants eligible to vote in such a referendum. Nevertheless, they were willing to accept a vote limited to all New Caledonians with at least one parent born in the territory.¹⁸³ Clinging to the principle of majority rule, the French government claimed such a restriction would violate both the guarantee of equality and democratic development in the French Constitution as well as Article 1 of the United Nations Charter and General Assembly Resolution 1514 which provides in relevant part for "equal rights and self-determination

¹⁷⁸ FRASER, *supra* note 90, at 10.

¹⁷⁹ The proposal made by the Secretary for Overseas Departments and Territories, Mr. Lemoine, was subsequently enacted into law. Under the Lemoine statute, the Governing Council's powers were to be greatly expanded. Members of the Council were to be chosen from among members of the party achieving a majority in the Territorial Assembly. There was also to be a second chamber (Assemblée des Pays) representing Kanak chiefs drawn from six regions of New Caledonia. Each of the six regions was to have its own Kanak custom council. The second chamber would play a consultative role in the legislative process with ultimate authority vested in the Territorial Assembly. Though more administrative responsibility was delegated to the Territory, the French government retained authority over mining activities and law and order. WARD II, *supra* note 48, at 38-41.

¹⁸⁰ David Anderson, *Sovereignty and Self-Determination Some Cases Close to Home*, PAC. SECURITY RESEARCH INSTITUTE (INSTITUTE OF PUBLIC AFFAIRS, AUSTRALIA, 1992), at 10.

¹⁸¹ *Id.*

¹⁸² *Id.* Under electoral laws, all New Caledonians with over six months residence were eligible to vote. WARD III, *supra* note 118, at 85-89; Kircher, *supra* note 5, at 10.

¹⁸³ U.C. President Jean Marie Tjibaou proposed that the vote be limited to Kanaks and non-Melanesian victims of history—those of long residence with at least one parent born in New Caledonia. Kircher, *supra* note 5, at 10.

of all peoples . . . and fundamental freedoms for all without distinction as to race, sex, language or religion."¹⁸⁴

The position of the French government distorted the concept of self-determination. Adherence to the majority principle is appealing at first blush. More careful scrutiny discloses that this principle should not apply in the context of a self-determination referendum in New Caledonia. The 1960 United Nations Decolonization Declaration provides:

Immediate steps shall be taken, in Trust and Non-Self-Governing Territories and all other territories which have not yet attained independence, to transfer all powers to the peoples of those territories, without any conditions or reservations, in accordance with their freely expressed will and desire, without any distinction as to race, creed or colour, in order to enable them to enjoy complete independence and freedom.¹⁸⁵

This provision must be considered in the context of the overarching intent of the entire General Assembly resolution. The preamble of Resolution 1514 sets forth in unequivocal terms the "necessity of bringing to a speedy and unconditional end colonialism in all its forms and manifestations" because "the process of liberation is irresistible and irreversible."¹⁸⁶ The Declaration declares that "[t]he subjection of peoples to alien subjugation, domination and exploitation . . . is contrary to the Charter of the United Nations." The Declaration bestows on the peoples of territories which have not yet attained independence the right to determine freely their political status.¹⁸⁷ The Declaration acknowledges the "yearning for freedom in all dependent peoples and the decisive role of the freedom of such peoples, which constitute a serious threat to world peace."¹⁸⁸ A cogent argument can be developed that non-Melanesians in New Caledonia have not been subjected to alien domination and enjoy independence as citizens of France. For this reason, Kanaks are arguably the only dependent peoples entitled to vote on self-determination. As one commentator convincingly asserts:

¹⁸⁴ To the present day, the French government continues to justify its positions relating to self-determination by relying on these provisions of the French Constitution and United Nations Charter. Anderson, *supra* note 180, at 10.

¹⁸⁵ Resolution 1514 (5). See *Declaration on the Granting of Independence by Colonial Countries and Peoples*, *supra* note 10 and accompanying text.

¹⁸⁶ *Id.*

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

The non-Kanak population, most of whom are nationals of France, have come to, and settled in, New Caledonia after the colonization of the territory as beneficiaries of a mass immigration policy of the colonizer. These people have “kith and kin” and voting rights in metropolitan France. These peoples lack indigenous root, geographical identity and suffer from a crisis of legitimacy in New Caledonia. As such, these peoples do not come within the purview of “dependent peoples” of “territories which have not yet attained independence” Any mode of exercising self-determination in New Caledonia must include the “colonial peoples” concerned quite independently of citizens of the coloniser and other independent states.¹⁸⁹

Allowing the settler population to vote on self-determination would render the democratic principle of majority rule a farce given the previous calculated French policy of encouraging new migrants to the territory to quell the Kanak drive for independence. Significantly, the United Nations General Assembly adopted a resolution in 1980 instructing member states to prevent migration to colonial territories because of the distorting impact such influx might have on the exercise of the right to self-determination and independence. U.N. Resolution 35/118 provides:

Member states shall adopt the necessary measures to discourage or prevent the systematic influx of outside immigrants and settlers into territories under colonial domination, which disrupts the demographic compositions of those territories and may constitute a major obstacle to the genuine exercise of the right to self-determination and independence by the people of those territories.¹⁹⁰

Legal arguments held no sway. The French government refused to yield any ground over the makeup of eligible voters on the referendum. Maintaining the colonial situation was of paramount importance. Using

¹⁸⁹ Excerpts quoted from Islam, *supra* note 19, at 238-40. See also Islam, *supra* note 109, at 150-51.

¹⁹⁰ Article 8 of the Plan of Action for the Full Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples. G.A. Res. 35/118 U.N. GAOR, 35th Sess., Supp. No. 48, at, 21, U.N. Doc. A/RES/35/118 (Dec. 11, 1980); *Id.*

democratic principles, however cynical and misguided, to advance this aim, were therefore justified.

Unable to extract concessions on electoral reform, Kanaks abandoned the existing legal and political processes in pursuing their independence. In 1984, the FI was recast as the Front de Liberation National Kanak et Socialiste ("FLNKS"). The new Kanak coalition refused to participate in the 1984 elections and actually obstructed the electoral process.¹⁹¹ This marked a watershed in Kanak tactics toward achieving independence.

Predictably, the anti-independence RPCR won a landslide victory in the territorial elections.¹⁹² Following the election, the FLNKS proclaimed independence and set up a provisional government of Kanaky. Violence subsequently erupted between the rival communities, bringing the territory to the brink of civil war.¹⁹³

¹⁹¹ The FLNKS was formed in 1984. It is the umbrella organization for five political parties, a trade union and a feminist group. They are the Union Caledonienne, Palika, FULK, Union Progressiste Melanesienne ("UPM"), Parti Socialiste Caledonien, the USTKE (Confederation of Kanak and Exploited Workers Union) and the GFKEL (the Group of Kanak and Exploited Women in Struggle). Kanaks boycotted the November 1984 elections. Rebels burnt ballot boxes and public buildings and blocked roads. Roger Ricklefs, *Turmoil in New Caledonia Represents Another Headache for French President*, WALL ST. J., Dec. 6, 1984 available in WL-WSJ 199878. In a symbolic gesture of defiance, Kanak leader, Eloi Machoro, axed open a ballot box and burned the voting papers inside. ROBIE, *supra* note 23, at 116, 125; Michael Spencer, *It's Not All Black and White: The Reporting of the 1984-1985 Crisis in New Caledonia by the French Press*, in NEW CALEDONIA: ESSAYS IN NATIONALISM AND DEPENDENCY, *supra* note 42, at 175, 182.

¹⁹² Participation in the election ranged from zero percent in some areas to less than 50% in others. The RPCR won 34 of 42 seats. To bestow an air of legitimacy on the results, the French High Commissioner altered the electoral results to reflect a participation rate of just over 50%. FRASER, *supra* note 90, at 19.

¹⁹³ The FLNKS seized the town of Thio and Eloi Machoro declared a provisional Kanak government. Headquarters of the French police were also occupied. Ten unarmed members of the FLNKS were killed by French settlers in Heinghene. Two brothers of FLNKS leader Tjibaou were among those killed. The FLNKS also alleged that seventeen of their members were attacked by French loyalists at a roadblock in Heinghene. They allegedly retaliated by burning a settler's home. Authorities disputed this account, claiming the Kanaks first burned the house and later came under fire while trying to attack the home of another settler. William Branigan, *Killing of 10 Natives Roils Caledonia Talks Kanak Front Leader Appeals for Calm*, WASH. POST, Dec. 7, 1984 available in WL WSJ 199878; Stanley Meisler, *New Caledonia Offered Sovereignty With Ties To France*, L.A. TIMES, Jan. 8, 1985, at 11. The instigators of the Heinghene ambush were eventually acquitted in what some commentators view to be yet another prime example of the experiences encountered in attempting to redress injustices committed against Kanaks in the French justice system:

The sordid judicial aftermath of the massacre of Heinghene is certain to go down as one of the greater stains on French colonial history in the South Pacific. Almost two years after the massacre the self-confessed killers were set free by examining magistrate Francois Semur who ruled non-lieu-no case to answer. They had been charged with the murder of 10 Kanaks and the attempted murder of seven others. Citing a rarely used highway robbery law dating back to Napoleonic times, Magistrate Semur said the accused had acted in self-defense. He referred to the exceptional circumstances at the end of 1984—the three week period which gripped New

President Mitterrand dispatched Mr. Pisani, a Socialist Deputy of the European Parliament, to find a solution to the crisis. Mr. Pisani proposed independence in association with France.¹⁹⁴ Within days of its announcement, the plan was rejected by both pro and anti-independence factions.¹⁹⁵ The subsequent killing of Kanak leader Eloi Machoro by French security agents strengthened Kanak resistance to the proposed solution.¹⁹⁶

Caledonia after the Kanak boycott of the elections of November 18 The Magistrate neglected to mention the fact that at the time of the ambush the Kanaks who died had been unarmed and were returning from the meeting at which it had been decided to resort to peaceful negotiations with the French authorities. Semur also did not explain why he shunned the testimony of more than 20 witnesses which showed the attack was an unprovoked slaughter of unarmed Kanaks.

ROBIE, *supra* note 23, at 111-12.

The furor caused by the Magistrate's ruling resulted in the eventual trial by jury of the accused in October 1987. After just two hours of deliberation, the jury returned a verdict of legitimate self-defense. Many, including the Vice-President of the French League of Human Rights, felt an unbiased jury could not be chosen given the antipathy toward Kanaks amongst the settler population. *Id.* at 114-15.

¹⁹⁴ Though New Caledonia would retain a seat in the United Nations, it would remain legally associated with France as allowed under the 1958 French Constitution. Under the Pisani plan, a referendum on independence was to be moved forward to July 1985. All French citizens living in New Caledonia for more than three years would be eligible to vote on the referendum. Mr. Pisani envisaged the drafting of a Treaty of Association with France as well as the consummation of cooperation agreements establishing the structure and rules pertaining to a multiracial society in New Caledonia. The new state would retain sovereignty over land and Melanesian freehold would be protected as would land currently owned by settlers. Noumea would be given a special status and residents would be able to choose between becoming a citizen in the new state or maintaining their French citizenship while enjoying privileged residence status in the state of New Caledonia. France would retain responsibility for defense and public security. Edgar Pisani, *France and New Caledonia Proposals by M. Pisani: The Lemoine Statute of 6 September 1984*, AUSTL. INT'L. L. NEWS 322 (1985); Connell, *supra* note 68, at 56-59; Meisler, *supra* note 193.

¹⁹⁵ The FLNKS was willing to accept nothing less than complete sovereignty. The loyalists feared the plan would lead to the eventual takeover of the territory by Kanaks. Disturbances surfaced throughout New Caledonia shortly after the plan was announced. After the killing of a 17 year old settler by Kanak rebels, over 1,000 people, mostly settlers, demonstrated in Noumea, hurling rocks at police and setting buildings ablaze. About 30 persons sustained injuries as police attempted to disperse the crowd with tear gas. The loyalists' actions effectively derailed the Pisani plan. As one commentator observed: "the plan was too early for most Europeans and too late for most Melanesians." Ward & Kingdon, *supra* note 32, at 301; Bobin, *supra* note 151, at 311; Meisler, *supra* note 193; *New Caledonia Pacific Violence Riots Shatter a Peace Plan*, TIME, Jan. 21, 1985, at 39.

¹⁹⁶ Just over one month after declaring a provisional government of Kanaky, Machoro was shot by French security agents. He and 50 of his followers were surrounded by French agents in an abandoned farmhouse outside Noumea. Both Machoro and an aide died during the raid. Some have suggested a conspiracy within the French government and intelligence services to kill Machoro. He was viewed as the most militant Kanak separatist in New Caledonia. He had previously traveled to Libya to enlist its support for independence. Spencer, *supra* note 191, at 182; *New Caledonia Rebel Leader Slain by Police*, L.A. TIMES, Jan. 12, 1985, at 24. The cycle of violence prompted the French government to declare on January 12, 1985 a state of emergency in New Caledonia with a dawn-to-dusk curfew. One thousand additional troop reinforcements were sent to the territory to assist in maintaining public order. Some commentators suggested the crisis in New Caledonia was reminiscent of the civil war in Algeria which

Mitterrand's personal visit to New Caledonia in January 1985 to demonstrate his support for the Pisani plan failed to convert public attitudes.¹⁹⁷

Due to a breakdown of order in New Caledonia, President Mitterrand scrapped the Pisani plan. French Prime Minister, Laurent Fabius, proposed an alternative scheme intended to accelerate the transfer of power to regional bodies as a gradual prelude to independence in association with France. A referendum on self-determination was scheduled to take place before the end of 1987. In the interim, four administrative regions were established, each with its own council responsible for handling economic development and land reform.¹⁹⁸ The Territorial Congress for the entire territory was made up of the four regional councils to be chosen in a 1985 election.¹⁹⁹ Consistent with their accommodating nature, the FLNKS agreed to take part in the regional council elections, notwithstanding widespread skepticism with the plan. Loyalists also agreed to embrace the plan.²⁰⁰ Though the pro-independence parties secured only just over thirty-five percent of the vote, the FLNKS gained control of three of the four administrative regions—Northern, Central and Loyalty Islands.²⁰¹

ended only after a mass exodus of French settlers from the colony led to the eventual grant of independence. Stanley Meisler, *French Send 1,000 Troops to Islands Racial Enmity Persists in Wake of New Caledonia Killings*, L.A. TIMES, Jan. 13, 1985, at 6; *Mitterrand Visits New Caledonia in Major Political Gamble Thousands Demonstrate Amid Tight Security*, WASH. POST, Jan. 19, 1985, at A17.

¹⁹⁷ Despite a ban on public gatherings, almost half the population of Noumea demonstrated in favor of maintaining the existing status of New Caledonia as a French overseas territory. After visiting the territory for 12 hours, Mitterrand returned to France and extended the state of emergency previously announced. He also reinforced French military presence on the island. Analysts suggested Mitterrand's announcement reflected a switch in priorities away from moving toward self-government in New Caledonia and toward maintaining security. The situation in the territory did not improve. An explosion at a nickel mine near the village of Thio caused \$3 million in damage. Michael Dobbs, *Mitterrand Says Security in New Caledonia to be Enhanced*, WASH. POST, Jan. 21, 1985 available in 1985 WL 2136967; William Branigin, *New Caledonia Foes Talk*, WASH. POST, Jan. 20, 1985, at A19; William Branigin, *New Caledonian Leaders Lash Out at Mitterrand French President's Trip Called an "Abuse"*, WASH. POST, Jan. 22, 1985, at A11; *France Surprise Trip Mitterrand Flies into Trouble*, TIME, Jan. 28, 1985, at 53.

¹⁹⁸ Isabelle Cordonnier, *The French Government and the South Pacific During "Cohabitation," 1986-1988*, 18 PAC. STUD. 79, 81-2 (1995); CONNELL, *supra* note 106, at 6. The Regional Councils also retained responsibility for primary education, local language, culture, sports, health, social services, transport and housing. Connell, *supra* note 68, at 59; Stanley Meisler, *France Postpones Referendum on New Caledonian Independence*, L.A. TIMES, Apr. 26, 1985, at 7.

¹⁹⁹ The Councils were chosen in a 1985 election by universal suffrage based on proportional representation. Connell, *supra* note 68, at 59.

²⁰⁰ *Id.*

²⁰¹ The loyalist parties received over 60% of the vote but gained administrative control over only one electoral region which includes Noumea. However, the RPCR gained control of the Territorial Congress with 25 seats. The Kanak Front won 16 seats in the Congress and the conservative National Front won three seats in the Congress. Stanley Meisler, *Vote Fails to Set New Caledonia's Course*, L.A. TIMES, Sept. 30, 1985, at 7; *Voting a Split Ticket (New Caledonia)*, TIME, Oct. 14, 1985, at 54.

The FLNKS leadership was elated by the results. Their victory provided a unique opportunity to demonstrate competence in peacefully leading New Caledonia after independence.²⁰² Attempts were made to appease loyalists and devote resources to fostering rural economic development to prepare for eventual assumption of leadership and future independence.²⁰³ Alternative elementary schools (“*écoles populaires kanakes*”) teaching vernacular languages and emphasizing Kanak culture were opened in 1985.²⁰⁴ A Kanak radio station and newspaper were created in the same year.²⁰⁵ Control over the regions enabled Kanaks to influence economic affairs. It also provided the first practical experience in struggling to achieve a balance between custom and tradition and economic development. As one commentator has stated:

The brief period between the Kanak victory in the New Caledonia regional elections (September 1985) and the return of the right to power in Paris (March 1986), saw a new political awakening in Kanak society, one which stressed grass-root initiatives, creative imagination and enthusiasm for tackling the problems of economic management. Small-scale economic projects (cattle, subsistence farming, fishing, etc.) and long term planning in such key sections as mining, forestry and imports were flourishing at the tribal, municipal and regional levels. The . . . ordinances detailed and minute in the extreme, as in the French administrative tradition, had deliberately established new forms of collective management, which permitted the Kanak tribes to borrow and to invest something hitherto impossible. Other ordinances had introduced the vernacular languages in the primary schools through the appointment of native [teachers] . . . For the first time, Kanaks were taking direct responsibility for

²⁰² FRASER, *supra* note 90, at 27.

²⁰³ The FLNKS proposed promoting small scale tourism and the production and marketing of agricultural produce. Attempts were made to set up joint enterprise projects involving Kanak communities and regional administrations and local settlers and investors. *Id.*; CONNELL, *supra* note, 106, at 7.

²⁰⁴ FRASER, *supra* note 90, at 26.

²⁰⁵ A publishing organization, Les Editions Populaires (“EPK”) was also created. Control over the media in New Caledonia has served as an effective instrument for maintaining support for the colonial relationship. Kanaks often felt their positions on issues were incorrectly depicted and that media coverage consistently favored positions advanced by the metropolitan government in France. Establishing their own media was viewed as essential in redressing perceived media bias. Alaine Chanter, *The Media and Politics in New Caledonia in the 1980s*, 26 J. PAC. HIST., 313, 314 (1991).

their own economic development, although the new regional institutions demonstrated how difficult it was for traditional Kanak culture to adjust itself to the modern economic system.²⁰⁶

VII. A RETURN TO THE PAST

Unfortunately, the nominal overtures made by the Mitterrand government in 1985 were effectively expunged less than one year later when Chirac's neo-Gaullist party won a majority in the French national legislative elections in 1986.²⁰⁷ Funding for the regional councils ceased. The powers previously conferred on the regional councils were substantially diluted and transferred to the RPCR-controlled Territorial Assembly and the French High Commissioner.²⁰⁸ These changes once again left Kanaks impotent in shaping their economic, political and cultural destiny:

[T]he FLNKS effectively lost almost all its limited power in the regions, the only places where it had legal and constitutional authority and was constitutionally reduced to an ineffective minority in the Territorial Congress. Its minor achievements had largely disappeared What the moderate leader of the FLNKS and UC, Jean-Marie Tjibaou, had termed the "green revolution"—the aim of building Kanak independence at the grassroots level while giving non-Kanaks a vision of this Kanak independence—had effectively been aborted, though the councils had briefly demonstrated their ability to provide responsible government.²⁰⁹

The Land Distribution Board set up in 1982 by the Mitterrand government to purchase settler land and redistribute it to traditional Kanak owners was replaced with ADRAF (Land and Rural Development Agency). This new administrative creature was charged with redistributing land equitably to all ethnic groups in New Caledonia and promoting development of the rural economy.²¹⁰ Reallocating land to Kanaks based on ancestral ties

²⁰⁶ Chesneaux, *supra* note 105, at 67.

²⁰⁷ CONNELL, *supra* note 106, at 9.

²⁰⁸ *Id.*; FRASER, *supra* note 90, at 28; Connell, *supra* note 68, at 60.

²⁰⁹ CONNELL, *supra* note 106, at 9.

²¹⁰ ADRAF was created in 1986 with the explicit aim of promoting rural and land development among all ethnic groups in New Caledonia. The Office of Kanak Culture was also renamed the

was virtually abandoned and land was invariably transferred on the basis of private property ownership.²¹¹ During the Chirac years, more land was allocated to the settler population than to Kanaks. These regressive actions not only aggravated tensions between Kanaks and Europeans but also served to further accentuate friction within the Kanak community.²¹²

Seeking to consolidate New Caledonia's place in the French Republic and to obliterate the pro-independence movement, the Chirac government announced a September 1987 referendum on the future status of the

"Caledonian Agency of Oceanian Cultures" and its mission was altered to include the promotion of all cultures in New Caledonia. PAC. ISLANDS MONTHLY, Dec. 1989, at 18; Muller, *supra* note 119, at 294-95.

²¹¹ Under the previous Mitterrand administration, attempts were made to accord more deference to Kanak customary methods of land ownership. Many settlers were allowed to continue using land by the granting of lifetime leasehold title. This was consistent with Kanak custom in that usufructuary rights were always recognized in traditional Kanak society provided ultimate title to land remained with the Kanaks. After Chirac assumed power, Kanaks were usually denied freehold estates and land granted to them was mostly on the basis of state leasehold title. Only two out of 420 total allocations from 1986-88 were made to Kanak clans collectively. CONNELL, *supra* note 106, at 10; PAC. ISLANDS MONTHLY, Dec. 1989 at 17-18.

²¹² A scathing report was subsequently issued by France's auditor general, Francois Assilineau, on the activities of ADRAF under the Chirac government. His report alleges that a group of RPCR members took control of ADRAF and demonstrated favoritism by distributing land to individuals with ties to the RPCR and anti-independence cause. ADRAF allegedly failed to follow its own guidelines of using economic development plans as the basis for allocating land. Generally, the agency allocated land without a verified economic development plan. The land was also not redistributed to all ethnic groups in proportion to their populations. A total of 420 allocations were made from 1986 to 1988. Of 717 Kanak applications for land, only 136 were approved. Many Kanaks received land with steep terrain distant from any roads and the sea. In contrast, 23 Europeans who received land already owned an average of 195 hectares each and were awarded an additional 171 hectares each. Thirty four other recipients were not even born in New Caledonia and at least 77 recipients had secure jobs as public servants or employees of the SLN nickel company. ADRAF also allegedly breached promises made to Kanaks by its predecessor, the Land Distribution Board. For example, a tribe at Oundjo had a verbal contract with the former Land Board for redistribution of riverside grazing land. The former owner had agreed to sell the land in exchange for the tribe leasing it back to him to raise his cattle. ADRAF refused to recognize the claim and evicted the tenant. Subsequently, ADRAF sold the land to a European. Oundjo threatened a mass land occupation unless the land was returned. Finally, ADRAF repeatedly ignored Kanak customary claims to ancestral land, and usually insisted on transferring land on the basis of private property ownership to Kanaks with no customary tie to the land. In one case, ADRAF allocated land to a Kanak at La Foa which encompassed sacred burial sites of the Chone clan to which the recipient did not belong. Even when the Board was notified of a conflicting claim, allocations to those with no ancestral ties were made anyway. For example, 47 hectares were allocated to a Kanak man despite the objections of a Kanak member of ADRAF's Board who revealed that the land had already been claimed by the Nechero clan. When ADRAF's Director visited the property to mediate the resulting dispute between the clan and the landholder, the roof of his car was attacked with an axe. The Commission headed by Francois Assilineau found that ADRAF intentionally pursued a policy of allocating land to Kanaks having dubious customary ties to create conflict within the Kanak community. PAC. ISLANDS MONTHLY, *supra* note 211, at 17-18. Within a couple of weeks of the release of the report on corruption and mismanagement in ADRAF, the New Caledonian Administrative Tribunal considered a case demonstrating misuse of public funds for impermissible electoral purposes by several leaders of the RPCR. PAC. REP., VOL. 2 No. 23, Nov. 23, 1989, at 1-2.

territory.²¹³ Kanaks demanded that voting on the referendum be limited to Kanaks and Europeans with both parents born in New Caledonia.²¹⁴ Continuing to defy both legal arguments over the legitimate composition of the electorate and international scrutiny over the referendum process, the Chirac government insisted on allowing those who lived in the territory for three years or more to vote.²¹⁵ Such an electoral composition would ensure a no vote on independence. Any hope of an evolution toward stability in the territory was substantially undercut by the contempt exhibited for Kanak aspirations and the refusal to encourage negotiations aimed at bridging divisions between the increasingly polarized communities.²¹⁶

The remarkable retreat from advances made by its predecessor helped foster regional and international recognition of Kanak demands. In 1986, the South Pacific Forum agreed to support the relisting of New Caledonia with the U.N. Decolonisation Committee.²¹⁷ That December of the same year, the United Nations General Assembly voted to reinscribe New Caledonia on the list of non-self-governing territories.²¹⁸

²¹³ Kircher, *supra* note 5, at 17.

²¹⁴ Paxman, *supra* note 7, at 187.

²¹⁵ Connell, *supra* note 68, at 60. The metropolitan government continued to rely on democratic principles as the basis for the composition of the electorate. Restricting the vote on independence to Melanesians would deny equal rights to other Caledonians of European, Polynesian, Indonesian or Vietnamese origin. PAC. ISLANDS MONTHLY, Sept. 1987, at 20; *See also* PAC. ISLANDS MONTHLY, Aug. 1987, at 35.

²¹⁶ Connell, *supra* note 68, at 60-61.

²¹⁷ Members agreed unanimously in an August 1986 meeting to seek the reinscription of New Caledonia on the U.N. Decolonization Committee. The South Pacific Forum had previously refused to support the Kanak efforts to relist New Caledonia due to the collective view that France should be afforded an opportunity to implement reforms and move gradually towards independence. FRASER, *supra* note 90, at 29.

²¹⁸ The resolution was passed 89 to 24 with 34 abstentions. G.A. Res. 41/41A, U.N. GAOR, 41st Sess., Supp. No. 53, at 49, U.N. Doc. A/RES/41/41A (Dec. 2, 1986). Australia and New Zealand lobbied in the U.N. to relist New Caledonia with the U.N. Decolonization Committee. France lobbied heavily to defeat the General Assembly resolution. France circulated a document at the United Nations attacking Australia's treatment of Aborigines and New Zealand's treatment of Maoris. During U.N. debate on the issue, France's U.N. Ambassador scolded Australia and New Zealand for giving lessons to France given their poor records in promoting harmonious multi-racial societies. France also exerted economic pressure on small member states likely to be sympathetic to claims for reinscription. Antigua was reportedly threatened with the deferral of a French loan for airport extensions, and Zimbabwe was warned the planned development of a Peugeot plant could be jeopardized. Nigeria was also allegedly warned that France would not accede to its debt rescheduling requests. Fraser, *Confrontation: The Politics of Dissent*, PAC. ISLANDS MONTHLY, Feb. 1987, at 13-14.

After the General Assembly approved the resolution, ministerial exchanges with Australia were severed because "of the unfriendly attitude of the Australian government . . . toward French policy in the South Pacific, particularly concerning New Caledonia." *France Snubs Australians*, L.A. TIMES, Jan. 6, 1987, at 2 (World Section). The Australian Consul-General was also expelled from New Caledonia

The reclassification of New Caledonia as a non-self-governing territory was greeted with scorn by the Chirac government. It insisted on proceeding with the referendum. Both the South Pacific Forum and the U.N. Decolonization Committee denounced the planned referendum, advising France to abide by U.N. principles on self-determination and independence.²¹⁹ The Chirac government repudiated the advice. Predictably, the FLNKS abandoned the political process by refusing to participate in the sham referendum despite dogged efforts by the French government to encourage Kanak voting.²²⁰ Demonstrations, even peaceful ones, were banned²²¹ and highly visible police and military presence was maintained.²²²

The referendum resulted in a overwhelming victory in favor of remaining a French territory.²²³ The results were dismissed by the South Pacific Forum. Australia's Foreign Minister Bill Hayden articulated the sentiments of Forum members:

The referendum was altogether too stark in the alternatives it offered: either to remain with France or to be cast adrift.

because of "activities unbecoming his diplomatic status." Edward Cody, *France Expelling Australia's New Caledonia Consul*, WASH. POST, Jan. 12, 1987, at A17.

²¹⁹ Excerpts quoted in FRASER, *supra* note 90, at 29-30.

²²⁰ PAC. ISLANDS MONTHLY, Sept. 1987, at 20. French Minister of Overseas Departments and Territories, Bernard Pons, visited Kanak villages, making a patronizing and impassioned plea for their participation:

Because you are children of France, because you are unqualified citizens of the country of human rights, you can benefit from an exceptional privilege, a privilege that is sadly rare in today's world-of expressing your opinion and deciding your destiny with a ballot paper. Remember well that the precious thing which is guaranteed for you by the grand democratic state that is France is a fragile thing.

Id. at 19.

²²¹ In August 1987, 300 Kanaks peacefully demonstrated in Noumea, protesting the planned September 13 referendum. French riot police fired tear gas to disperse the demonstrators. The official French TV station did not cover the episode. The event was captured on film footage taken by an Australian TV crew. Former French Foreign Minister Roland Dumas commented that "the images . . . reminded French of what is going on in South Africa and of the worst excesses from the era of colonial repression." Stanley Meisler, *Mitterrand, Chirac Clash Over Racial Conflict in Distant New Caledonia*, L.A. TIMES, Aug. 29, 1987, at 12.

²²² During the course of the campaign leading up to the referendum, there were 8,400 soldiers and police mobilized to maintain calm in the territory. This represented one soldier or policeman for every ten registered voters. Stanley Meisler, *New Caledonia Voters Say No to Independence But Most Melanesians Boycott S. Pacific Referendum; Paris Hails Outcome*, L.A. TIMES, Sept. 14, 1987, at 5; See also PAC. NEWS BULL., June 1994, at 9.

²²³ Over 48,000 voted against independence and only 842 supported such a move. Less than 20% of all eligible Kanak voters actually cast a ballot. *New Caledonia Uneasy in the Islands*, TIME, Sept. 28, 1987, at 42.

The referendum . . . was also inconsistent with the requirements of the United Nations for the processes for decolonisation . . . for three reasons: . . . co-operation with the U.N. was refused; there was no political education regarding the options; there was no dialogue among various parties; the choice was restricted . . . to two quite stark options; punitive consequences were implicitly, and occasionally explicitly, attached to the independence option; and the French Government campaigned hard for its preferred option, continued attachment to France.²²⁴

Shortly after the election results, the Minister for Overseas Departments and Territories, Bernard Pons, introduced "the Pons law" in the National Assembly in Paris, changing for a fourth time the Territorial Statute. The four regions were maintained but the boundaries of the regions were altered to enable the loyalist RPCR to gain control over the West Coast region containing the least developed but most agriculturally productive land in the territory. The Pons law provided for territorial elections to be held concurrently with the first round of Presidential elections on April 24, 1987.²²⁵

The illegitimate referendum and the subsequent enactment of the Pons law served to further alienate Kanak leaders, strengthen Kanak nationalism and heighten the likelihood of militant refusal to accede to the latest legal and political regime imposed by the metropolitan government.²²⁶ Kanak leaders viewed the Pons law in particular as another flagrant French machination undertaken to sustain the dynamics of colonial domination and subjugation. FLNKS leader Jean-Marie Tjibaou stated:

[T]oday we confront the [Pons] statute, which crowns a system that refuses to take into consideration the Kanak people and their revindication. This is controlled by a clique that ruins the land, drives the Kanaks from their own land and that occupies the mines and controls business. Their [RPCR] sort of politics . . .

²²⁴ Fraser, *supra* note 90, at 37 (quoting Hayden).

²²⁵ Barry Shineberg, *French Policy in Kanaky*, H.V. EVATT MEMORIAL FOUNDATION 2, 5 (Sydney, Nov. 1987).

²²⁶ The jury acquittal of the men charged with the Heinghene massacre which was announced just one month after the September 1987 referendum also contributed to Kanak alienation and intensified demands for abandoning the French political and legal process entirely. See note 193 *supra*; CONNELL, *supra* note 106, at 12.

is institutionalized violence. Our people have never accepted colonialism, never accepted being colonized by France: as a consequence, there has always been action and reaction. The year 1878 [when an insurrection against French rule was led by Kanak Chief Atai] was among our most important dates. There was 1917 [another insurrection], and more recently 1984 [the election boycott resulted in 32 deaths]. There have been the death of Pierre Declercq, the French-born independence leader murdered in 1981, the death of Eloi Machoro, assassinated by French police marksmen in 1985, the Heinghene Ten, the militants at Ouegoa, and those of Thio . . . we must claim our right to independence, our place in the United Nations, and our militants must win the battle RPCR leaders claimed they would harass and prevent the “manipulators and instigators of the violence” moving around, and threatened Kanak leaders who called for a boycott of the elections, but they’ve done that since they stole our country; they’ve always done that. The Indigenat code repressed Kanaks and prevented them from moving around with freedom—the RPCR statement is nothing new: colonialism continues. They just repeat what their grandfathers did in stealing our country The thieves refuse to recognize their own subversive ways. From the moment when they stole our country, they have tried to eliminate everybody who denounces their evil deeds.²²⁷

The FLNKS severed talks with Mr. Pons, called for a boycott of the territorial elections and resorted to violent tactics to impress upon both France and the international community the seriousness of their demands for independence: “[A]cute frustration and despondency had brought the FLNKS to a position where it appeared that only a violent struggle could convince France of the gravity and legitimacy of their claims and again draw the attention of the world to one of the last inconclusive struggles for independence.”²²⁸

Military presence was reinforced to ensure tranquility in the territory during the election campaign.²²⁹ Nevertheless, just two days before the

²²⁷ Excerpts quoted by David Robie, *Tjibaou, “Why We Fight?”*, PAC ISLANDS MONTHLY, June 1988, at 12.

²²⁸ CONNELL, *supra* note 106, at 13.

²²⁹ Approximately 12,000 armed and highly trained paramilitary personnel were dispatched to New Caledonia. *Tension Mounts on Poll Eve*, PAC ISLANDS MONTHLY, May 1988, at 22.

elections, several Kanak militants raided military barracks, killing several police officers and taking over twenty hostages.²³⁰ While some of the hostages were released a few days later, others, including a French Prosecuting Magistrate, were taken to a tribal area on the outlying island of Ouvéa and held in a cave. The FLNKS set down several pre-conditions for release of the hostages. These included cancellation of the territorial elections; removal of French troops from Ouvéa; and the dispatch of a French representative to negotiate a U.N. supervised referendum on independence which complied with U.N. principles and practices on self-determination.²³¹

Chirac characterized the Kanaks as terrorists supported by foreign forces. He refused to yield to any of their demands.²³² Just three days before the second round of Presidential voting in France,²³³ President Chirac ordered three hundred French paramilitary forces to attack the cave on Ouvéa where the hostages were held. A gun battle ensued which lasted for over seven hours. Two policemen and nineteen Kanak militants lost their lives during the raid.²³⁴ The belligerent response to Kanak demands further inspired a

²³⁰ Four French gendarmes were killed by the Kanak militants with machetes and 27 others were taken hostage. Frederick Painton, *France Down to a Fighting Finish Mitterrand and Chirac Duel on in the Shadow of Le Pen's Success*, TIME, May 8, 1988, at 46. During the territorial elections (which coincided with the first round of Presidential elections), the FLNKS obstructed voting in several parts of New Caledonia. The rightist party, Front National, increased its share of votes in the territorial elections and became the second largest conservative party on the island. Notably, all centrist parties enjoyed very limited support. The Melanesian and non-Melanesian communities had become increasingly polarized politically. CONNELL, *supra* note 106, at 14.

²³¹ Carson Creagh, *Days of Rage and Mourning*, PAC. ISLANDS MONTHLY, June 1988, at 8; *Riots and Hostages: French Face Test Over New Caledonia Self-Rule*, CHRISTIAN SCI. MONITOR, Apr. 26, 1988, at 10; *Rebels Seize French Judge*, L.A. TIMES, Apr. 28, 1988, at 2 (World Section).

²³² CONNELL, *supra* note 106, at 15. Libya was the foreign influence to which Chirac was referring. Weapons had allegedly been shipped to Kanaks by Libya to assist in their independence movement. One journalist suggested Libya's leader Gaddafi sent the weapons to upset the US and France, both of which he perceived as his major adversaries in the West as well as to divert attention away from his own domestic problems prompted in part by the defeat of Libyan troops in the former French colony of Chad. Howard G. Chua-Eoan, *Washing Libya Out of Their Hair Suspicion and Lloathing in the South Pacific*, TIME, June 1, 1987, at 45 (World Section). The suggestion that Kanak weaponry posed any real threat to French military presence is ludicrous. Most of their arsenal consists of hunting rifles and outdated weaponry from World War II. CONNELL, *supra* note 106, at 15.

²³³ The situation in New Caledonia received extensive attention during the second round of the Presidential election campaign. Chirac believed a tough response to the situation in New Caledonia would curry favor with French voters. Mitterrand, on the other hand, charged Chirac with pursuing a policy of brutality. CONNELL, *supra* note 106, at 15.

²³⁴ Michael S. Serrill, *Hostages By Negotiation and By the Sword Controversy Rages After Two Sets of French Captives Are Freed*, TIME, May 16, 1988, at 55; Mark Fineman, *French Storm Cave, Free 23 Hostages in New Caledonia*, L.A. TIMES, May 5, 1988, at 1; Creagh, *supra* note 231. There were indications the Kanaks intended to release the hostages after the election. Chirac presumably disregarded this information in seeking to capitalize on the hostage drama. CONNELL, *supra* note 106, at 15.

sense of alienation and nationalist sentiment.²³⁵ Kanak rebels accused the colonial government of instigating a massacre which “created a legacy of blood and fire that [increased their] resolve.”²³⁶ Chirac’s attempt to capitalize on the hostage drama failed. Mitterrand defeated Chirac in the Presidential election.²³⁷

The return to power of a socialist government in France renewed faith in a negotiated settlement to the crisis in the territory which was once again on the verge of civil war.²³⁸ Reconciling the competing interests of the French government, the Kanaks and the settler population would be difficult. The decimation of moderate sentiment in the territory and the legacy of discord bequeathed by the policies of the Chirac government made the crisis seem intractable. Kanaks insisted on independence and the return of land; the settler population demanded continued French presence in the territory; and the Mitterrand government hoped to restore calm to the territory, preserve its strategic interests in the Pacific, and ease international criticism over French actions in the territory.²³⁹

The attempt to reconcile the clashing interests in New Caledonia found expression in a series of negotiations, climaxing in the signing of the Matignon Accords one month after Mitterrand was returned to office.

VIII. THE MATIGNON ACCORDS: A BLUEPRINT FOR THE FUTURE OR A POSTPONEMENT OF REALITY?

The Accords represented a fudged political compromise designed principally to restore stability to the territory.²⁴⁰ Both patterns of reclaiming

²³⁵ Mark Fineman, *Duty to Fight for Land Seen “This is Our Time,” Rebels in New Caledonia Assert*, L.A. TIMES, May 3, 1988, at 1. Three Kanaks taken into custody were allegedly killed by colonial authorities. News of this information also angered many Kanaks. CONNELL, *supra* note 106, at 15.

²³⁶ Serrill, *supra* note 234.

²³⁷ Creagh, *supra* note 231.

²³⁸ CONNELL, *supra* note 106, at 16.

²³⁹ *Riots and Hostages: French Face Test Over New Caledonia Self-Rule*, *supra* note 231.

²⁴⁰ The personal experiences of Tjibaou and RPCR leader Jacques La Fleur were instrumental in convincing the two leaders of the need to reach a peaceful solution:

As President of the FLNKS, Tjibaou felt some personal responsibility for the bloody Ouvea killings. And with the memory of the deaths of his two brothers in the 1984 Hienghene massacre he was strongly influenced into opting for a peaceful plan to independence. For his part, La Fleur, who had suffered a heart attack 2 years earlier, was apparently determined to find a peaceful solution after the Ouvea tragedy. He certainly did not want to go down in history as the man who pushed New Caledonia into civil war

powers from, and granting powers to, provincial authorities are reflected in the Matignon Accords. Administrative authority of the territory was transferred for one year from the RPCR dominated Territorial Congress to the French High Commissioner.²⁴¹ This was intended to hasten the distribution of economic development funds toward New Caledonia's underprivileged regions²⁴² and rapidly integrate Kanaks into the public sector in an effort to lessen the social and economic inequalities in the territory.²⁴³ Following the one year period, the territorial administration was decentralized to three provinces—the North, South and Loyalty Islands. Each province has its own executive and administers its own affairs through an assembly elected for six year terms based on proportional representation.²⁴⁴ The provinces exercise primary jurisdiction over customary law, land law, local budgetary issues, primary education, health care, tourism, housing and cultural activities.²⁴⁵

ROBIE, *supra* note 23, at 279. FULK was the only political party within the FLNKS which refused to endorse the Matignon Accords. Ellen Whelen, *Turning Point for Kanak Independence*, PAC. NEWS BULL., July 1989, at 4.

²⁴¹ The New Caledonia Administration Act of July 12, 1988 transferred for one year the responsibilities of the Executive Council to the High Commissioner. *New Caledonia The Matignon Accords 1991 Progress Report*, *supra* note 20, at 8.

²⁴² The Referendum Act of November 6, 1988 requires three quarters of capital investment to be allocated for the Northern and Loyalty Islands Provinces, both Kanak inhabited rural areas. The remaining 25% of capital investment is earmarked for the Southern region of the territory controlled by the settler population. Pursuant to Sections 84 and 85 of the Referendum Act, France entered into three year development projects with each of the Provinces in 1989. The French government committed \$158 million to the Northern Province, \$56 million to the Loyalty Islands Province and \$98 million to the Southern Province. *Id.* at 8-9, 33; CONNELL, *supra* note 106, at 17; Islam, *supra* note 19, at 233.

²⁴³ David Anderson, *supra* note 180, at 10; Islam, *supra* note 19, at 233. To integrate a minority of Kanaks into the market economy, an Infrastructure and Promotion fund was established under the Referendum Act to provide support for mostly individual Melanesian projects. The French government also set up a state corporation in 1989 to provide risk capital for companies operating in rural areas. By 1991, the French company had provided over \$7 million to 48 development projects outside Noumea primarily in the mining and tourism sectors. *New Caledonia The Matignon Accords 1991 Progress Report*, *supra* note 20, at 35. The signatories also agreed to place restrictions on immigration, withdraw 4000 French public servants from New Caledonia, conform business law to address Kanak needs, and eventually relocate the capital from Noumea to the Northern province. *Did Wea Gun Down the Accord?*, PAC. ISLANDS MONTHLY, June 1989, at 13. Kanaks have charged that immigration has not been restricted as required under the terms of the Accord. Despite 4,500 new migrants between 1987-1990, mainly from France and Vietnam, France has maintained that persons possessing French passports are not migrants. *Kanaky: The Ever-Present Threat of Immigration*, PAC. NEWS BULL., Feb. 1991, at 5. There have been no moves to relocate the capital from Noumea to the Northern province.

²⁴⁴ The Northern Province and the Loyalty Islands controlled by Kanaks have fifteen and seven elected members respectively and the Southern Province controlled by the RPCR has thirty-two such members. PAC. ISLANDS MONTHLY, Dec. 1988, at 13.

²⁴⁵ *Id.* The French government retains control over external relations, defense, law enforcement, foreign policy, immigration, secondary and tertiary education, broadcasting, currency and credit. The French High Commissioner reviews the legality of actions undertaken by the Provincial Assemblies and Territorial Congress. *New Caledonia The Matignon Accords 1991 Progress Report*, *supra* note 20, at 8.

The Territorial Congress is composed of the fifty-four members of the three provincial assemblies.²⁴⁶ Elections for Provincial Assemblies were held in 1989. Kanaks gained control over the Northern Province and the Loyalty Islands while the settler population continued to exercise control over the Southern Province, including Noumea. In subsequent elections held in the 1990s, the distribution of control over provincial and territorial assemblies has remained the same.²⁴⁷

To enhance Kanak perceptions of French justice, the judicial process has been decentralized under the Matignon Accords. The application of customary law has been provided for in the French judicial system, where such matters are now dealt with first at the local level. The jurisdiction of the court can be invoked by either party to a dispute where both parties are Kanaks governed by the "statut particulier." If one of the parties is not subject to the "statut particulier," the customary court lacks subject matter jurisdiction. The court is designed to resolve matters definitively in cases in which customary legal authorities are unable to do so.²⁴⁸ Accordingly, customary law has been subordinated to French law. Implicit in the aims of the customary court system are ethnocentric assumptions that French chosen authorities are more equipped to resolve matters governed by customary law than local customary authorities and that Kanaks will lend greater credence to French application of customary law. Both assumptions are highly dubious.

A Territorial Customary Assembly was also established in 1988 and is comprised of representatives from eight customary areas, each of which maintains its own Customary Council. Each Customary Council, in turn, is composed of Customary Districts formed on the basis of the customary laws

²⁴⁶ *Id.* The law of November 9, 1988 (Law No. 88-1028 relating to the Statutory Dispositions and Preparations for the Autonomy of New Caledonia) divided New Caledonia into three provinces each of which retains authority in all areas not explicitly reserved to the French State or to the Territory. Ntumu, *supra* note 24, at 599; Yves Louis-Sage, *supra* note 133, at 28; Islam, *supra* note 19, at 233.

²⁴⁷ In 1989, the FLNKS gained control of the Northern and Loyalty Islands provincial assemblies with 19 seats while the RPCR gained control over the Southern Assembly, winning 27 of the 54 contested seats. *The World*, L.A. TIMES, June 12, 1989, at 2. Elections held in 1995 produced a similar result. The FLNKS retained control over the Northern Province and Loyalty Islands. The RPCR maintained control over the Southern Province. The territorial congress was represented by 27 RPCR members and 18 FLNKS members, with the remaining seats represented by smaller parties. Frank Madoeuf, *New Caledonia to go to Polls Ahead of Self-determination Referendum*, Agence France Presse, July 7, 1995, available in 1995 WL 7826985.

²⁴⁸ There are Courts of First Instance in each of the provinces. In customary law matters, a French magistrate and two customary assessors preside over the hearings. In all other matters, up to three magistrates preside over hearings. Appeals may be lodged against decisions of the Courts of First Instance with the Court of Appeal in Noumea. A President and two judges called Councillors of the Court of Appeal preside over such appeals. Ntumu, *supra* note 24, at 607.

of the particular district.²⁴⁹ The Territorial Consultative Council scrutinizes all draft resolutions of each Provincial Assembly relating to customary law, including customary land law.²⁵⁰

The French government agreed to redistribute equitably land at a quicker rate to all ethnic groups in New Caledonia²⁵¹ and to protect and promote Kanak culture.²⁵² Each Province is represented on ADRAF's Board of Administration and land allocations are made after consultations with provincial representatives and customary authorities. The ADRAF remains responsible for oversight of land allocations and resolution of conflicting claims. Once again, Kanak customary methods of land allocation and resolution mechanisms are subordinated to the French legal process. By arbitrating land disputes, the French government enmeshes itself in interclan divisions. Although an improvement over the past, the current allocation process reinforces the ultimate lack of Kanak control over their cultural identity.²⁵³

The greatest barrier to reaching agreement was the issue of voter eligibility and the timing of another referendum on self-determination.²⁵⁴ The parties agreed to defer the referendum for ten years. All New Caledonians with voting rights in the 1987 referendum and their descendants of voting age in 1998 are entitled to vote in the 1998 referendum.²⁵⁵

FLNKS negotiator Jean-Marie Tjibaou agreed to defer the referendum for ten years because he thought it would instill confidence among all

²⁴⁹ *New Caledonia The Matignon Accords 1991 Progress Report*, *supra* note 20, at 13.

²⁵⁰ The Customary Council issues binding opinions on whether draft resolutions of the Provincial Assembly conform to customary law. *Id.*

²⁵¹ In 1989, in excess of 100,000 hectares of land were redistributed to non-Melanesians while during the same period over 125,000 hectares were redistributed to Kanaks. In 1990, approximately 225,000 hectares were redistributed to Kanaks and approximately the same amount was allocated to Europeans. In 1991, approximately 110,000 hectares of land was reallocated to both groups. *New Caledonia The Matignon Accord 1991 Progress Report*, *supra* note 20, at 37.

²⁵² The 1988 law created the ADCK, a public institution whose mission is to promote Kanak culture by holding cultural events, establishing cultural centers, and sponsoring anthropological, archeological and linguistic research. *New Caledonia The Matignon Accords 1991 Progress Report*, *supra* note 20, at 46.

²⁵³ *Id.* The present arrangement resembles key tenets of the Dijoud plan. Vesting ultimate authority to resolve conflicting claims with customary authorities (as proposed by Promotion Melanesienne in 1979) would at least provide Kanaks with a greater sense of control over their cultural identity and encourage more respect for the allocation process. *See also* text accompanying notes 163-66 *supra*.

²⁵⁴ The FLNKS wanted a referendum on self-determination in 1993 with the vote limited to Kanaks and first generation settlers. The RPCR wanted the referendum postponed until 1998 with all residents of French nationality eligible to vote. ROBIE, *supra* note 23, at 278.

²⁵⁵ *New Caledonia The Matignon Accords 1991 Progress Report*, *supra* note 20, at 5; CONNELL, *supra* note 106, at 17, 19. The referendum is scheduled to be held sometime between March and December of 1998. *New Caledonia The Matignon Accords 1991 Progress Report*, *supra* note 20, at 5.

Caledonians in the Kanak ability to effectively manage an independent Kanaky.²⁵⁶ Economic self-sufficiency could be established in preparation for independence.²⁵⁷ He also acquiesced in the composition of the electorate due to the erroneous belief that Kanaks might constitute a slim electoral majority by 1998.²⁵⁸

French officials and RPCR negotiators believed economic development aid provided for under the terms of the Agreement would soften Kanak resistance to continued French presence in the territory.²⁵⁹ France also assumed the return of political power to provincial bodies would restore stability to the territory and soften international criticism over French actions in the territory.²⁶⁰ By all indications, these assumptions have proven reliable.

Since the signing of the Accords, the United Nations²⁶¹ and South Pacific Forum²⁶² have generally adopted a more circumspect approach

²⁵⁶ *Accord Victory*, PAC. ISLANDS MONTHLY, July 1989, at 25.

²⁵⁷ Tjibaou stated: "I don't want immediate independence for my country if that means being listed among the [twenty] poorest of the United Nations There is no point in waving your flag at the front of the door if you have to crawl through the back door and beg for money." *The Way Ahead*, PAC. ISLANDS MONTHLY, Aug., 1989, at 19.

²⁵⁸ According to the 1989 Census, the total population of New Caledonia was 164,173 inhabitants, of whom 44.8% were Melanesians, 33.6% of European origin and 21.6% of other ethnic groups, including Wallisians, Tahitians, Indonesians and Vietnamese. *New Caledonia the Matignon Accords 1991 Progress Report*, *supra* note 20, at 10. There were suggestions Melanesians would represent 53% of the electorate in 1998. These projections have not proven accurate. See note 277 *infra*. Yet, even if the projections were accurate, Kanak leader Tjibaou was under the false impression that virtually all Kanaks would ultimately choose independence. The Matignon Accords have only served to solidify the existing base of Kanak opposition. CONNELL, *supra* note 106, at 19; Islam, *supra* note 19, at 240.

²⁵⁹ After signing the Accords, French Prime Minister Rocard intimated that the 1998 referendum would fail because Kanaks would gain an appreciation for the benefits of remaining part of France. As David Small has concluded: "[Rocard] was no doubt . . . counting on the Accords dividing the Kanak people and thereby weakening the independence movement. Predictably, they have done just that" David Small, *Kanak Independence Movement Faces New Challenges After French Election*, PAC. NEWS BULL., May 1993, at 6.

²⁶⁰ *France: France Hands Power to Far-Off New Caledonia on Bastille Day*, Reuters General News, July 14, 1989, at Int-News 80. Though much of the settler population voted against the Matignon Accords, the leadership of the RPCR endorsed the accords. The RPCR voted to ratify the plan for peace. L.A. TIMES, July 24, 1988, at 2.

²⁶¹ In 1988, the United Nations Decolonization Committee passed a motion praising the measures taken to promote political, economic and social development in the territory to provide a framework for the peaceful progress of the Territory to self-determination. CONNELL *supra* note 106, at 25. In 1990, a consensus resolution proposed by Fiji was adopted by the U.N. Decolonization Committee and subsequently by the U.N. General Assembly. Affirming U.N. resolutions on the right of people to self-determination and noting the positive measures that have been pursued in New Caledonia by French authorities to provide a framework for the territory's peaceful progress to self-determination, the resolution urged all parties to maintain their dialogue and continue promoting a framework for the peaceful progress of the Territory towards an act of self-determination in which all options are open and which safeguard the rights of all New Caledonians. *New Caledonia; Working Paper Prepared by the Secretariat*, U.N. Special Committee on the Situation with Regard to the Implementation of the

concerning developments in the territory. France's relations with countries in the region have also improved dramatically.²⁶³ Nonetheless, to the present day, France rejects external scrutiny over developments in the territory and insists the referendum on self-determination is an internal matter which will be held under French, rather than, United Nations supervision. France also declines to submit information to the U.N. Secretary-General concerning conditions in the territory as required under Article 73(e) of the U.N. Charter.²⁶⁴ French unwillingness to allow U.N. scrutiny and supervision

Declaration on the Granting of Independence to Colonial Countries and Peoples, at 3, U.N. Doc. No. A/AC.109/1041 (3 Aug. 1990); *Kanaky: A Struggle With Many Parts*, PAC. NEWS BULL., Oct. 1990, at 5.

²⁶² Vanuatu Foreign Minister Donald Kapokas, in an address to the United Nations General Assembly, praised France for undertaking measures aimed at restoring calm and peaceful evolution in the territory. *United Nations: French Government Praised Over New Caledonia Policy*, Reuters Newswire, Oct. 7, 1988, Int-News 80. At its twenty-second annual meeting in July 1991, the South Pacific Forum noted the positive progress made under the Matignon Accords. The Forum also noted the importance of achieving equitable social and economic development. Helen Fraser, *Forum Low-Key and Relaxed*, ASIA-PAC. DEFENSE REP., Sept. 1991, at 18. In July 1993, a Committee of Ministers from the Solomon Islands, Fiji and Nauru visited New Caledonia and issued a report to the South Pacific Forum which was subsequently tabled. The report expresses concern that the economic rebalancing called for under the Matignon Accords has not achieved its aim, as only a small Kanak elite have benefited from the economic development aid while most Kanaks remain at the margins of the economy. *Kanaky Report*, PAC. NEWS BULL., Aug. 1993, at 5. On August 2, 1994, the Forum issued a communiqué stating that "real economic and social rebalancing was still some distance away" in New Caledonia. But the Forum also "noted . . . with pleasure" the Forum Secretariat's good relations with France and its territories. *Forum Warns France About Resumed Nuclear Testing*, Agence France Presse, Aug. 2, 1994.

²⁶³ France embarked on a charm offensive with countries in the region. This has resulted in improved relations with countries in the South Pacific, most of which have eased diplomatic pressure on France. PAC. NEWS BULL., Apr. 1992, at 8. Though members of the South Pacific Forum have sought to maintain New Caledonia on the list of non-self-governing territories, some members have become reticent in their approach to developments in the territory. *Australia Backs Keeping New Caledonia on U.N. Decolonisation List*, Agence France Presse, Feb. 2, 1992. For example, though Australia publicly supports decolonization, it has privately taken positions which encourage continued French presence in the territory. The Australian government reportedly pressured Kanak delegates not to insist that France be named as the administering power in the 1990 U.N. General Assembly resolution adopted and not to insist on a clause urging France to comply with the U.N. requirement to submit updated information on progress toward decolonization. *Kanaky: Accent on Decolonisation*, PAC. NEWS BULL., June 1990, at 5. Some have suggested Australia and other countries in the South Pacific are less interested in maintaining strong support for Kanak independence than in political stability and greater access for exports. *Kanaky: Debate on Key Issues*, PAC. NEWS BULL., Oct. 1993, at 3.

²⁶⁴ *Kanaky: FLNKS Congress in January*, PAC. NEWS BULL., Dec. 1989, at 4. France has continually refused to acknowledge the application of U.N. principles and practices to the referendum on self-determination. The South Pacific Forum set up a ministerial committee to monitor the implementation of the Matignon Accords. France resisted the efforts of this regional forum to monitor developments in the territory. France refused a request by the Forum to have the Ministerial Committee (made up of representatives from the Solomon Islands, Nauru and Fiji) visit New Caledonia on the basis that visits are not authorized by regional or international organizations of which France is not a member. Only visits by individual ministers would be allowed. France subsequently did agree to allow the three ministers to visit as a group, though they would not be presented in New Caledonia as a committee. The Forum subsequently adopted a resolution urging the application of U.N. principles and practices on the self-

demonstrates a continued disrespect for its international legal obligations. It also potentially compromises the legitimacy of the referendum process.²⁶⁵

The accords have succeeded in achieving the goal of maintaining relative calm at least during the ten year period preceding the referendum. In 1995, there were some protests demanding independence which coincided with demands for an end to nuclear testing in the South Pacific. Nevertheless, for the most part, the reform measures of the Matignon Accords have successfully neutralized Kanak activism relating to the independence issue.²⁶⁶

determination referendum, advice France continues to disregard. PAC. REP., VOL. 3, NO. 15, Aug. 16, 1990, at 1; *Kanaky Update*, PAC. NEWS BULL., Sept. 1990, at 5; *Kanaky, Monitoring Progress to Independence*, PAC. NEWS BULL., Nov. 1990, at 11.

²⁶⁵ The Matignon Accords obligate France to establish a separate electoral roll and a system for monitoring the eligibility of those listed. The electoral roll is to be periodically updated to ensure those on the roll comply with the residency requirements provided for under the agreement. According to the FLNKS, the special electoral roll was to be used for the provincial elections held in 1989 and 1995. This never occurred as a French court held that the creation of a special roll could not constitutionally be used for provincial elections. It could only be used for the 1998 referendum poll. The FLNKS has charged that it will prove difficult, if not impossible, to determine residency in accordance with the 1988 referendum by deferring the creation of the special electoral roll. *Kanaky: A Struggle With Many Parts*, PAC. NEWS BULL., Oct. 1990, at 5; Helen Fraser, *New Caledonia: Halfway Across the Ford*, ASIA-PAC. DEF. REP., Apr.-May 1993, at 16; Helen Fraser, ASIA-PAC. DEF. REP., Feb. 1991, at 28; Helen Fraser, ASIA-PAC. DEF. REP., May 1991, at 26.

²⁶⁶ *Angry Protestors March Through Island Territory*, CALGARY HERALD, Sept. 14, 1995, at A13. A co-founder of PALIKA, Gabriel Meonteapo, has acknowledged the success of the Matignon Accords in neutralizing Kanak activism: "The reform measures agreed to at Matignon were designed to corrupt, obstruct and divide the independence movement. We have to admit that they have succeeded in creating considerable confusion . . ." Excerpts quoted in *Kanaky: The Struggle Against Colonialism*, PAC. NEWS BULL., May 1991, at 4. Francois Burck, President of the U.C. has discussed the difficulty in maintaining the struggle for independence in the post-Matignon period:

In 1984 and 1985 we were in full combat but as soon as you change over to organization, to saying that rocks must now be used for construction not destruction—it's a completely new direction and it takes a lot longer to enter the consciousness of people. And on the other hand we have the phenomenon of if the French government pours out more and more money, are the people who are well fed and well satisfied going to sleep or struggle for independence?

Excerpts quoted in PAC. REP., VOL. 3 NO. 1, Jan. 1990, at 3. Though activism over independence has been mostly neutralized, Kanaks have peacefully protested about housing and working conditions in the territory. Many Kanaks in search of economic opportunity have moved to Noumea. Escalating rents and/or inability to find work, have forced many Kanaks as well as some migrants to live in dilapidated dwellings on the outskirts of Noumea. In October 1992, a Squatters Defense and Support Committee was established to protest the treatment of squatters living in these dwellings. The group has organized street protests, demanding that the housing crisis be addressed. Kanaks have also taken action in conjunction with immigrant groups to protest working conditions in certain industries. For example, on January 4, 1991, a massive general strike involving over 3,000 workers of the territory's largest printery was staged. A one week general strike was called in December 1993 by the USTKE. The strike affected the international airport, the harbor and the tourist industry. The SOENC (Trade Union of Mine Workers and Employees of New Caledonia) blocked the main road of the territory during one day in three different places to protest the lay-off of 250 miners. Four major unions in New Caledonia subsequently issued a statement condemning the lack of social progress for wage earners despite an overall improvement in the

The development process has reinforced capitalist norms among an elite group of Kanaks benefiting from French development measures. Their ties to custom and tradition have diminished²⁶⁷ and their allegiance to continued French presence in the territory has been assured.²⁶⁸

Despite general stability in the territory, the accords have sparked dissent within the Kanak community. In May 1989, FLNKS leader Tjibaou and his deputy Yeiwene Yeiwene were assassinated by Djoubelly Wea, a Kanak militant incensed over the terms of the accord. Wea viewed the agreement as a sellout of the struggle for independence.²⁶⁹ Splinter groups

business environment in the territory resulting from the Accords. While Kanaks and immigrants from Tahiti, Wallis and Futuna have united on the housing and union issues, many remain pessimistic about whether these shared interests will produce any electoral advantage for Kanak independence in the 1998 referendum. *Kanaky: reflecting on the current*, PAC. NEWS BULL., Apr. 1992, at 8-9; *Strikes and squatters in Noumea*, PAC. NEWS BULL., June 1993, at 7. *Matignon Monitor*, PAC. ISLANDS MONTHLY, Feb. 1994, at 24.

²⁶⁷ Kanak militant Charles Wea has characterized the Matignon Accords as

[R]e-colonization through a development process which doesn't benefit the Kanak people. All it means is a consolidation of the capitalist system. People are living like whites, our culture is not being respected. This is the kind of development where "development" equals 170 cars; there is no productive building and growth of the society going on from the Kanak point of view.

Excerpts quoted in *Kanaky: "How to Responsibilise Ourselves"*, PAC. NEWS BULL., Jan. 1992, at 5.

²⁶⁸ Many Kanaks perceive French development aid efforts as a mechanism for creating a Kanak bourgeoisie which will perpetuate a neo-colonial dependency similar to that which existed in the former French African colonies. They charge that France has supported large-scale development projects rather than small scale community-based schemes. PAC. NEWS BULL., Aug. 1989, at 6. The trickle down approach is viewed as increasing the likelihood of perpetuating the cycle of colonial dependence. Ulafala Aviavao, PAC. ISLANDS MONTHLY, Nov. 1990, at 15. Since 1989, hotels and supermarkets have been built in Noumea; a new hotel was constructed on the island of Lifou; another Club Med opened in Hienghene; and a highway linking the east and west coasts of the Grande Terre has been completed. PAC. NEWS BULL., Apr. 1992, at 8. Pro-independence parties allege that economic growth has been principally in the Southern province and Noumea and has benefited business entities with ties to the RPCR while Kanak inhabited rural areas have received far less aid, leaving them still marginalised in the territory's economy. Kanak families residing in rural areas earn half the income of Kanak couples living in Noumea and about one quarter of the income of European couples in the capital. Agence France-Presse, Oct. 15, 1991; PAC. ISLANDS MONTHLY, Aug. 1989, at 19; *Kanaky: The Limitations of the Matignon Accords*, PAC. NEWS BULL., Sept. 1991, at 4. In response to the construction of a casino in Le Meridien Hotel in Noumea by a group controlled by the RPCR leader Jacques Lafleur, in 1994, the FLNKS refused to attend the annual meeting of the Matignon Accord monitoring committee in Paris. PAC. NEWS BULL., Feb. 1995, at 1.

²⁶⁹ Tjibaou and Yeiwene Yeiwene were actually assassinated by both Djoubelly Wea and Andre Tangopi. Wea was a member of PALIKA, one of the parties constituting the FLNKS. Wea had been released from prison just prior to the assassinations. He was imprisoned in France after the death of four policemen during the raid of the police station at Ouvea. His release from prison coincided with the beginning of the negotiations leading to the Matignon Accords. He was bitter that he had not been included as part of the FLNKS negotiating team. Wea was killed by return fire from Tjibaou's bodyguard and Tangopi was subsequently charged with assassination and attempted assassination. PAC. REP., ISSUE NO. 17, Nov. 9, 1988, at 1; *New Caledonia Party Leader Killed*, L.A. TIMES, May 4, 1989, at 2 (World Section); *Did Wea Gun Down the Accord*, PAC. ISLANDS MONTHLY, June 1989, at 12.

within the FLNKS have denounced the accords, withdrawing their support for, and participation in, them.²⁷⁰ As one commentator explains:

In addition to the well-publicized assassinations of Jean-Marie Tjibaou, Yeiwene Yeiwene and Djoubelly Wea, many other tensions have emerged since the Accords were signed. Conservative factions within the independence movement have sided with anti-independence parties (including the neofascist National Front) to oppose the movement's more radical tendencies in local elections. People previously against independence have been given key political appointments ahead of longtime activists. [The LKS] has withdrawn from them. There have been formal and informal defections from the main independence grouping, the FLNKS. And resentment is growing, particularly amongst the youth, towards what is perceived to be a distant, unaccountable and increasingly wealthy group of Kanak bureaucrats and elected officials. Compounding these difficulties has been the FLNKS decision to abolish the "struggle committees." These groups, which included grass-roots activists from all the member parties of the FLNKS as well as some with no party affiliation, were responsible for implementing . . . initiatives such as the Kanak Popular Schools and Cooperatives. They also contributed much of the power to the Kanak uprisings of the 1980s which forced France to the negotiating table. With development rather than mass mobilization the order of the day under the Matignon Accords and many activists drifting away, a conservative

²⁷⁰ One of the signatories to the Accords, the Kanak Socialist Liberation party ("LKS"), has withdrawn its support for the accords. The USTKE (Kanak and Exploited Workers Union), one of the founding members of the FLNKS, resigned from membership in the FLNKS. FULK, which is neither a member of the FLNKS nor a party to the agreement, continues to charge that the accords consolidate French colonialism. *Kanaky: The Struggle Against Colonialism*, PAC. NEWS BULL., May 1991, at 3; PAC. REP., VOL. 2, NO. 14, July 1989; *Kanaky: " . . . Worried About Where Things Are Going."* PAC. NEWS BULL., May 1993, at 6-7. Some officials of the U.C. and FLNKS have been criticized for failing to appreciate the concerns and needs of ordinary Kanaks in the post-Matignon period: "They were seen as being elevated beyond the reach of the ordinary supporters by their new duties, the bodyguards and the chauffeured cars. For the party supporters in the bush, there was no indication of change in New Caledonia . . ." PAC. ISLANDS MONTHLY, Dec. 1989, at 17.

tendency within the FLNKS was able to successfully push for disbanding of the struggle committees.²⁷¹

The twin objectives of the French government and the RPCR to preclude Kanak independence seem likely to be realized.²⁷² Recent demographic statistics indicate Kanaks will not reach majority status in the territory until after 2005.²⁷³ Furthermore, a sizeable minority of the Kanak population has consistently opposed independence. The Matignon Accords have only served to solidify this base of Kanak opposition.²⁷⁴ Unless a significant percentage of the immigrant population supports independence, it will not be possible for the Kanaks to secure independence through the referendum process.²⁷⁵ Given the virtually certain outcome of the

²⁷¹ Excerpts of David Small quoted in PAC. NEWS BULL., May 1993, at 6-7. In the 1980s, the Kanak independence movement focussed on forging links between the FLNKS leadership and grass roots supporters and in developing independent institutions. Since the signing of the Accords, the FLNKS leadership has shifted its focus. They have concentrated on developing administrative structures in the Northern and Loyalty Island provinces; lobbying at international forums to foster awareness of the case for independence and within the French parliamentary system. *New Caledonia: Kanaks Consider ANC Model For Independence*, INTER PRESS SERV. GLOBAL INFO. NETWORK, Aug. 9, 1994.

²⁷² As one journalist has stated:

Gaullist ideology . . . is the reason why France is able to hang on to a string of overseas possessions General [de Gaulle] was proud of the French tradition of integration with its colonies When, to the General's regret, most French colonies chose independence in 1960-61, de Gaulle hastened to secure the Dom-Tom, the deal being essentially that residents of any of these territories are full French citizens, with the right to settle in France This is why independence movements in the Dom-Tom never get very far and why even revolutionaries who gain power in them (such as the Marxist poet, Aime Cesaire, in Martinique), always decide to stick with France in the end . . . independence would not only be sentimentally unacceptable to many in the Dom-Tom, it would also mean a sharp drop in their standard of living and a sudden end to their ability to enter France-and thus the EU-as full citizens.

R.W. Johnson, *De Gaulle's Offer the Territories Can't Afford to Refuse*, INDEP., Sept. 8, 1995, at 12.

²⁷³ In 1990, Kanaks constituted 45.1% of the population. As of the beginning of 1996, the population in New Caledonia was 180,000, of which 45% are Kanaks. Michael Collins, *Hunting Investors at a Tropical Pace and Thirsting for Independence Too*, BUS. WK., Jan. 15, 1996, at 5. By the year 2000, Kanaks are expected to represent 48.5% of the population. They are not projected to reach half the population until 2005. Rallu, *supra* note 44, at 185.

²⁷⁴ Somewhere between 15-20% of Kanaks voting have always supported continued French presence in the territory. CONNELL, *supra* note 106, at 19-20; Muller, *supra* note 119, at 293; *See also* Islam, *supra* note 19, at 240.

²⁷⁵ There are 15,000-16,000 Wallisians and Futunians in the territory. This represents less than 10% of the population. After signing the Accords, these migrant communities fled the RPCR because their concerns over housing, unemployment and education were not addressed by the party. They formed their own party, the Union Oceaniene ("UO"). In 1994, a majority of the UO split off and formed the Rassemblement Democratique Oceanien ("RDO"). The RDO has announced its support for restoring Kanak sovereignty in an independent, democratic and multiracial state. It is difficult to assess the extent to which the recommendation of the RDO will translate into support for independence at the ballot box.

referendum, the Matignon Accords cannot be viewed as a preliminary step in an evolutionary process toward decolonization but rather a perspicacious superficial change sustaining the colonial dynamics of subjugation and domination.²⁷⁶

Even assuming Kanaks are successful in the 1998 referendum, these colonial dynamics will not change. The territory is heavily dependent on French aid. Half of the territorial budget is supplied by direct French assistance.²⁷⁷ One quarter of the labor force is employed by the government.²⁷⁸ The heavy dependence on French subsidies would provide France with considerable leverage over activities in the territory.²⁷⁹ Substantial monetary assistance would likely be forthcoming to ensure continued French presence in the territory; such presence is considered essential to uphold France's perceived strategic and economic interests and myth of grandeur and global historical destiny.²⁸⁰ The cycle of economic dependency would thus likely continue in an independent New Caledonia.

Kanaky: "Monitoring Progress . . .", PAC. NEWS BULL., Nov. 1990, at 11. Yet, even the support of many Wallisians and Futunians would not be sufficient to counterbalance the number of Kanaks expected to support continued French presence in the territory. Support of the Asian immigrant population would also be needed to have a realistic chance of prevailing in the 1998 referendum. Enlisting such support is considered slim. Wayne McCallum, *European Loyalist and Polynesian Political Dissent in New Caledonia: The Other Challenge to RPCR Orthodoxy*, PAC. STUD., VOL. 15, No. 3, Sept. 1992, at 25, 55.

²⁷⁶ John Connell, *Melanesian Nationalism: A Comparative Perspective on Decolonisation in New Caledonia*, in NEW CALEDONIA: ESSAYS IN NATIONALISM AND DEPENDENCY, *supra* note 42, at 230, 234. Addressing the Fourth Committee of the United Nations, Donna Winslow, a Canadian anthropologist, has discussed the link between the Matignon Accords and the perpetuation of colonial domination:

Because the Matignon Accords, as they stand now, make no attempt whatsoever to dismantle the colonial structures in New Caledonia, they cannot hope to remedy the current inequalities and risk, in fact, to reinforce the patters which handicap Kanak development. The colonial dynamics . . . [include] 1. land ownership; 2. control of the mining industry; 3. the heavy dependence on imports and control of the import/export trade; and finally 4. a bureaucracy which administers the Territory from a metropolitan centre 19,000 km. away.

PAC. NEWS BULL., Feb. 1990, at 5.

²⁷⁷ New Caledonia has one of the highest per capita incomes in the Pacific. Maintaining the same standard of living requires continued dependence on French aid. Most residents know withdrawal of French aid would adversely affect their standard of living. Collins, *supra* note 273; Johnson, *supra* note 272.

²⁷⁸ CONNELL, *supra* note 106, at 3.

²⁷⁹ *Id.*

²⁸⁰ The French nuclear testing program and presence in the South Pacific helps project France as an independent world maritime and nuclear power in the Pacific:

New Caledonia is not perceived in French strategic circles as an entity but as part of an important global empire France resolutely pursues a global vision in its intentions to retain an independent nuclear strike force and to hold a global balance of power, especially in the South Pacific, which is increasingly seen, by France as much as by, other global powers, as the ocean of the future.

Independence is not a panacea for resolving issues thrust upon Kanaks by French colonial rule. Kanak nationalism and appeals to custom and tradition are the product of resistance to colonial rule. Invoking custom and tradition serve a useful doctrinal function in unifying Kanaks in the struggle against colonial domination. But such unity will likely crumble in a post-independence era.²⁸¹ There are tremendous linguistic differences within the Kanak community. Differences in clan loyalties also create divisions.²⁸² Custom and customary law are nebulous evolving concepts which exist in large measure as a reaction to "Western law, Western anthropology and Western evangelism."²⁸³ Ascertaining the composition of tradition and custom, including customary land law would be difficult to achieve because "[t]he custom of the 1990's is not that of the 1960's, let alone that of the 1860's."²⁸⁴ As one scholar has commented:

In the South Pacific, many indigenous nationalist movements have asserted that the colonial legal systems have suppressed custom The exaggerated mystique of custom is in fact quickly being exposed. The notion of shared norms agreed by all and accepted because of the need for reciprocity is in disarray. Custom was far from uniform and tidy. Even when norms were widely shared they legitimated complex competing claims of right, and dispute was inherent in the system Custom has been manipulated to legitimize the aspirations of ruling groups. Many Pacific peoples know this full well and are

Id at 26. France also has other technological, cultural and ideological interests in the South Pacific region. *Id* at 25. The South Pacific is also viewed by France as a region of growing importance and opportunity in the world economy. New Caledonia retains between one quarter and one half of the world's nickel deposits. Philip Shenon, *Testing Colonial Patience: French Leader Jacques Chirac Has Won No Friends Over Nuclear Issues in Restless South Pacific Possessions*, VANCOUVER SUN, Sept. 16, 1995, at B3. It is also the world's third largest nickel producer. Collins, *supra* note 273. While France currently reaps no net economic gains, world nickel demand is expected to be greater than the supply in the future. This provides an additional explanation for French reluctance to withdraw from the island. On the other hand, French overseas territories cost France approximately \$10 billion per year. *French Twist: As Nuclear Tests End, Pacific Outposts Fear Losing Aid From Paris: The Costs of an Empire, in Money and Otherwise, Are Being Considered; "Grandeur" for \$10 Billion*, WALL ST. J., Jan. 25, 1996, at A1. The need to slash its budget deficit to comply with the requirements for a European currency may force France to at least reassess the feasibility of maintaining its colonial presence in New Caledonia. Such a reassessment will not be likely to induce a change in French policy toward the territory. The need to maintain a sense of grandeur will probably overwhelm any financial pressure to withdraw.

²⁸¹ Connell, *supra* note 46, at 236, 252-58.

²⁸² *Id.*

²⁸³ Ward III, *supra* note 118, at 90.

²⁸⁴ Ward & Kingdon, *supra* note 32, at 64.

not generally blinded by their own symbolism and rhetoric [Customary law] is by no means regular and of time immemorial, but is even now in the act of being created [T]here is no automatic validity about [any indigenous values]. They must be weighed and their relevance assessed in the complex process of nation building.²⁸⁵

Restoring pre-contact custom and tradition and communal agricultural subsistence is simply unrealistic. Reviving pre-contact schemes of land tenure is equally unrealistic:

It is an illusion to pretend that Melanesian cultures could ever regain the integrity and self-reliance that they once had Many Melanesians say nothing of *coutume*, are distrustful of a past history of social inequalities, and [are] anxious to progress forward not backwards. There can be no wholesale reversion to tradition, more a transformation through tradition: "our identity is in front of us."

What such a transformation would entail is necessarily unclear; Melanesian societies are now different from pre-contact times, a result of modernization, education, Christianity and migration

Christianity has influenced the lives of all Melanesians and the course and structure of the independence movement Linguistically Kanaky could only remain Francophone. Two major colonial institutions, language and religion would be unchanged [I]t is argued by most Kanaks that it would be necessary to construct a new order where elements of tradition might co-exist with the best of the modern world. The principal indication of the different organizational structures . . . is in the schools and cooperatives that now exist in parts of the countryside The establishment of a Melanesian education system throughout New Caledonia, divided between many Melanesian language groups and with a majority of the population knowing no Melanesian language, poses massive problems

²⁸⁵ Ward III, *supra* note 118, at 90.

Cooperatives . . . have grown in recent years throughout New Caledonia Chosen rural development strategies are often orientated to maintaining social ties, especially communal ownership of land, to oppose tendencies toward individualism. In attempting to resolve these problems, . . . Kanak independence parties have run into . . . organizational problems Throughout Melanesian cooperatives have gone through phases of growth and decline and many have been replaced by a more individual form of production and entrepreneurial activity The movement towards a more capitalistic organization is seemingly inevitable. Both Kanak schools and cooperatives combine idealistic and real responses to the problems of colonialism and capitalism, . . . but in an independent Kanaky their role might quickly disappear. The practice of development may well turn idealism into irrelevance.

. . . Though some rural land would revert to Melanesian use, as most regained land is currently doing, and minor migration movements would restore some Melanesians to their traditional lands, establishment of title would probably be followed by most land being hired out to its present users: *caldoches* who chose to remain as tenants of Melanesian Landlords, a wholly capitalist outcome. If land is crucial to the struggle for independence, it is less crucial to its outcome

The future economy of Kanaky . . . would be virtually unchanged Effectively the FLNKS has called only for greater Melanesian participation in the economy without any structural transformation.²⁸⁶

It is naive to assume custom, including customary land tenure practices can simply be conformed with contemporary economic realities. There is an obvious tension between modernity and technology and custom and tradition: "coutume is defined with reference to a distant past, and invokes the notion of the past itself as more or less an inversion of the present, where what existed is now felt to be lacking" ²⁸⁷ Merely striking a comfortable balance between the two would be an arduous challenge. Many Kanaks would continue to resist any loss of material goods generated by the capitalist

²⁸⁶ Connell, *supra* note 46, at 236-40.

²⁸⁷ *Id.* at 252.

system while some others would endorse a return to an agriculturally based system of communal subsistence.²⁸⁸ The capitalist colonial system is likely to prevail in the long run. As one commentator has surmised: "indigenous leaders must confront the difficulty that good business practice is sometimes in conflict with the ethics of custom. When pressed most indigenous peoples opt for a larger share of the economic action in preference to being very traditional and very poor"²⁸⁹

The political system would also unlikely differ dramatically in a post-independent New Caledonia. Control over provincial and territorial governing institutions would likely remain unchanged. The United Nations has always maintained that both the settler and indigenous populations possess a right of internal self-determination. This includes the right to

²⁸⁸ Those Kanaks living in Noumea who have benefited from economic development are likely to resist rejection of the capitalist colonial system to which they have become accustomed. The infusion of capital by France securely fastens the territory into a cycle of economic dependency. As Connell has observed:

[T]he economic and social future of [some] . . . Melanesians lies outside the reserve. In a territory dominated by capitalist enterprises, in a region dominated by capitalism . . . where French institutions dominate a part of social life, it would be surprising if some Melanesians had not found a substantial and apparently permanent stake in the capitalist system, either in commerce or the bureaucracy. [Many of these Kanaks would be] . . . unwilling to reject the colonial system through which their advancement has been secured.

Connell, *supra* note 42, at 240. Though many Kanaks would ultimately embrace capitalist development, others would undoubtedly resist such moves, causing conflict within the indigenous community. As one Kanak activist has written:

Those who, for almost a century and a half, have insatiably but unsuccessfully fought our ancestor's spirit with arms of fire, arms of exile and arms of the cross, today are striking back. Against our people they use new weapons that make wounds we do not know how to heal yet: an omnipresent foreign administration . . . that considers Melanesian solidarity as begging, and culture as something from the past; tricky mirrors that hide real faces They have brought in more of their people . . . that have never been in communion with their own land and that have decided that our country has become theirs because they constitute the democratic majority. And they say happiness will come from turning Mother Land to its real value: paper money But don't think that our people have turned blind from these shining golden jail bars. The reaction is coming from deep, from the people that have their force from the Land others have died for. And they are the people that still carry our ancestors thoughts: A people that respect Land that gives Life, Wind that carries wise words and the Ocean that allows peoples to meet and share

J. Sarimin Boengkih, PAC. NEWS BULL., VOL. 9, NO. 10, Oct. 1994, at 1. The gulf between those Kanaks wishing to take advantage of the benefits generated by participation in an industrial economy and those seeking to maintain traditional ties to Kanak custom would be hard to bridge.

²⁸⁹ Ward III, *supra* note 118, at 93.

choose a post-colonial administration. Assuming political trends hold steady, the RPCR would continue to enjoy control over the territorial institutions.²⁹⁰

Thus, the colonial dynamics of subjugation and domination would persist even in an independent New Caledonia. Economic dependence and French presence in the territory would linger and the allocation of political power would remain unchanged. Independence would not signal a comprehensive (or even a partial) return to pre-contact Kanak customary legal traditions and schemes of land tenure. The capitalist system and individual freehold title would probably predominate.

IX. CONCLUSION

Missionary establishments championing the virtues of Western values, such as private property ownership, individualism and reliance on the nuclear family rather than the general community assisted in paving the way for colonial domination of the Kanaks. French colonization methodically sabotaged the political, economic, social and legal structure of traditional Kanak society. Land dispossession, the establishment of reserves and the creation of the legally fictitious tribe undermined the ability to subsist on traditional agricultural produce, severed the spiritual links with the ancestral past and irreversibly altered the traditional system of land rights as well as the intricate web of customary rites and political, social and psychological relationships reflected in that system.

The regulation of Kanak activity within and outside the reserves through the oppressive indigenat subjugated Kanaks to French colonial control. Moreover, conferring power on artificially created tribal chiefs to allocate and sell reserve land underscored a flagrant disregard of Kanak traditions. These traditions were based on localized patterns of allegiance to particular chieftaincies and involved collective sharing and consensual allocation of land. Granting Melanesians a right of appeal to French courts to resolve tribal disputes undercut the influence and effectiveness of customary authorities in regulating affairs on the reserves. It also relegated Kanak customary laws and resolution mechanisms to a subordinate position, a predicament which continues to the present time.

The abolition of the indigenat and the granting of civil liberties and voting rights to Kanaks after World War II represented a giant leap forward

²⁹⁰ Islam, *supra* note 109, at 148. Such control would reinforce the likelihood of continued French involvement in the territory.

in the French treatment of the indigenous population. The listing of New Caledonia with the U.N. Decolonization Committee in 1946 represented an acknowledgement of an international legal obligation to decolonize the territory. This progress was short-lived. Just one year later, French penal laws were extended to all Melanesians. This undermined further the efficacy of customary legal methods in maintaining order on the reserves. New Caledonia was also declared a French overseas territory and withdrawn from the U.N. list of non-self-governing territories, a move allowing France to disclaim any obligation to quickly and unconditionally end colonialism in all its forms and manifestations. To the present time, France has ignored its international legal obligations, refusing all U.N. attempts to scrutinize the situation in New Caledonia and/or supervise the process by which the right of self-determination should be exercised. Clenching onto New Caledonia cultivated the French myth of historical global destiny and preserved links needed to project its status as a world power. Perpetuating the French myth of grandeur overpowered any perceived international legal obligation to decolonize the territory.

In the post-war period, France has continued to manipulate the legal process and political institutions it created in New Caledonia to fortify colonial control. During this time, French government policy has consistently been subject to the proclivities of the governing body in metropolitan France. There has been a vacillating pattern of granting greater powers to the territorial government followed by restrictions on local authority. In some cases, colonial domination has been maintained by conferring greater autonomy to pacify Kanak demands. In other instances, where colonial control has been discerned to be under direct threat, powers of the local governing authorities have been diluted or withdrawn to stifle emerging Kanak political power. This pattern initially surfaced in 1956 when the French government introduced the framework law granting greater internal autonomy to the territory. Two years later, the powers of the Territorial Assembly were severely curtailed to hinder growing Kanak political power in the territory. The retrenchment of the Territorial Assembly's powers solidified Kanak opposition to French tactics in the territory.

Land, the hallmark of Kanak personality and existence, continued to be a source of great tension. The French government was intent on further eroding customary traditions by encouraging Kanaks to embrace the capitalist system of private property ownership. Though some Kanaks were integrated into the economic infrastructure of the territory and embraced the capitalist system of private property ownership, most remained on the margins of

economic life in the territory. Unable to fashion their economic future, Kanaks could no longer shape it politically. The 1960s witnessed a renewed wave of migration encouraged by the French government to provide a labor force for the mining industry and to squelch Kanak demands for greater autonomy through the ballot box. Kanaks were confined to minority status in their own land, a development serving to radicalize their demands. By the 1970s, demands for Kanak independence were widespread. The French government responded to the growing demands by encouraging even more migration to the territory, a policy merely accelerating the likelihood of conflict between the Melanesian and non-Melanesian communities. By the late 1970s, a schism along economic, political and racial lines could be identified. All Kanak parties demanded full independence while virtually the entire non-Melanesian population resisted any lessening of ties with France. Tension between the pro-independence and anti-independence forces mounted throughout the 1970s.

The pattern of granting and reclaiming powers of the territorial government emerged again in the late 1970s. In an attempt to mollify Kanaks, the French government in 1979 instituted the Dijoud plan to speed up the process of land reform by granting greater powers to the territorial government. The government finally recognized the clan rather than the artificially created tribe as the legal owner of land. Yet, the plan continued to provide French authorities with ultimate responsibility for oversight of land allocations and resolution of conflicting claims, once again committing Kanak customary methods of land allocation and resolution mechanisms to an inferior position. Not surprisingly, the plan did not satisfy Kanak leaders, some of whom dismissed it as a cynical ploy designed to maintain the process of colonial domination. Angered over the response to the plan, the French government succeeded in introducing an electoral reform bill in the settler dominated Territorial Assembly to deny future representation to several pro-independence parties. This tactic served to unite the pro-independence parties and strengthen the solidarity of the independence movement.

After a change in government in France in 1981, Kanak demands for independence remained unsatisfied. The Mitterrand government hoped to appease Kanaks by restoring economic equality and speeding up the pace of land redistribution. In contrast to the previous governing body in France which sought to accelerate the process of land reform by re-allocating power to the territorial government to pre-empt and expropriate land, the Mitterrand government pursued this goal by reclaiming and concentrating power in the metropolitan government in France. In 1984, the same French government

granted greater internal autonomy to the territory and for the first time acknowledged the legal validity of a claim for self-determination. Yet, France continued to repudiate U.N. involvement, ignoring U.N. practices and principles concerning the process by which the right should be exercised. France twisted the concept of self-determination by insisting that all New Caledonians vote on the referendum under the principle of equality and democratic rule guaranteed in the United Nations Charter. The French government was well aware Kanaks would have no chance of prevailing in any such referendum given their minority status. France has continually refused to concede that Kanaks, as the dependent peoples subject to alien domination, are the only inhabitants entitled to vote on the referendum. Maintaining the status quo has always been more important than yielding to legal arguments over the composition of the electorate.

The nominal allowances included in the Dijoud plan led to its failure. The goal of accelerated land redistribution was never realized. Kanak parties refused to cooperate in implementing the plan. In addition, it was difficult to ascertain traditional tenure to the land due to conflicting Kanak claims and complex web of customary rites and relationships springing from ties to particular terrain.

The breakdown of order in New Caledonia, associated with dissatisfaction over progress toward independence, led to the Fabius plan in 1985. Under this plan, even greater autonomy was conferred on regional councils as a gradual prelude to independence in association with France. A referendum date was set for 1987. Just one year later, Chirac stripped the regional councils of many of their powers and insisted on holding a sham referendum on self-determination which failed to comply with U.N. principles. The Chirac government exacerbated tension between the already polarized Melanesian and non-Melanesian communities by allocating more land to the settler community than to Kanaks. The rightist government in France also purposefully redistributed land to Kanaks on the basis of individual title, even in instances where there was a documented conflicting customary claim.

With the return of Mitterrand in 1988, both patterns of reclaiming and granting powers to provincial authorities were reflected in the Matignon Accords. Under this agreement, the French government first reclaimed powers of the territorial government for one year to hasten the integration of Kanaks into the public sector and the distribution of economic assistance to Kanak regions. Subsequently, the government granted a greater measure of autonomy to the provincial administrations in the three provinces. The

customary law jurisdiction established under the agreement continues to consign customary law to a secondary position and reflects the consistent ethnocentric assumption that French chosen authorities are more equipped to apply customary law than local customary authorities. The same assumptions are implicit in the way land allocation and resolution of conflicting land claims are now handled. The French government continues to retain oversight of land allocations and is the ultimate arbiter of conflicting land claims.

The ten year period leading up to the 1998 referendum on self-determination, provided for under the terms of the agreement, has been characterized by relative calm in the territory. The return of political power to provincial bodies has helped promote stability and softened international criticism over developments in the territory. The infusion of French capital benefiting some (but certainly not most) Kanaks has largely neutralized Kanak activism and weakened Kanak resistance to continued French presence in the territory.

Yet, as 1998 draws closer, France continues to reject external scrutiny over developments in the territory and insists the referendum on self-determination is an internal matter which will be held under French, rather than United Nations supervision. France's refusal to allow U.N. scrutiny and supervision demonstrates a continued disrespect for its international legal obligations and potentially compromises the legitimacy of the referendum process.

The ten year period preceding the referendum on self-determination has not been a preparatory phase leading to decolonization as Kanak leaders had hoped. Rather, the Matignon Accords represent astute tinkering on the fringes which seems likely to sustain the colonial dynamics of subjugation and domination. Independence is a highly improbable outcome of the 1998 referendum. Even if by slight chance Kanaks are successful in securing independence through the ballot box, the colonial dynamics will remain. Heavy dependence on French subsidies ensures continued French presence and influence over developments in the territory. Such presence is considered essential to uphold France's perceived strategic and economic interests and the myth of French greatness. The allocation of political power will also likely experience minor change.

Moreover, pre-contact custom and tradition and communal agricultural subsistence are unlikely to be fully or even partially restored. The same is true for pre-contact schemes of land tenure. Even striking a comfortable balance between economic development and custom and tradition would be

tough to achieve. The progressive trend toward the capitalist colonial heritage of profit and private property ownership would prove irresistible in the long-run.

The Kanak response to French policy has varied from acquiescence and accommodation with French authorities and political institutions established in the territory to rejection and militant refusal to accede to these political and legal regimes. Writing about the relationship between law, politics, power, justice and order, one commentator insightfully points out that:

Those who would rule effectively need a reputation for justice. Where rules depend on force, or to the extent that they do so, the political system will be subject to constant upheavals from below unless they have at their disposal the techniques of complete terror and thought control But even these political systems attempt to win authority; which is a concession by the ruled of obedience to the rulers, and of their right to rule. One good reason is that willing obedience is cheaper than enforced obedience. Where people believe that the relationship is not to some degree reciprocal, that is, one from which they receive some benefit for obedience, they will attempt to change or modify it. The regime will be thought unjust; and therefore illegitimate Where a government is denied authority (that is not considered legitimate) the rulers must depend on the threat of physical violence, or of confiscation of assets²⁹¹

Throughout the period of French colonization in New Caledonia, a sense of injustice has been prevalent amongst the Kanak population. French authorities were able to maintain order during much of this period because of superior weaponry. Rebellion against colonial rule was launched only when the sense of injustice became so profound and the assault on identity so traumatic that the downcast Kanaks willingly risked their lives. Conquered and isolated, the Kanaks launched a series of revolts from 1878 to 1917 in an attempt to rescue their history, culture, identity and even their very existence from annihilation. In the post-war period, Kanaks have exhibited a tremendous amount of patience in pursuing their goals through the ever

²⁹¹ C.D. Rowley, 20:2 *A MATTER OF JUSTICE* (Australian National University Press 1978) (excerpts used in class materials in Law in Society, taught by the author) (on file with author).

changing legal and political regimes imposed by the French government. Only when progress in moving toward independence was completely frustrated by French actions did Kanaks abandon the pursuit of their goals through the existing legal and political process. So, in 1984, Kanaks disrupted the electoral process and resorted to periodic armed clashes. Just one year later, the French government succeeded in securing willing obedience and participation in the political process after the Fabius plan was introduced. In 1987, the Kanaks refused to submit to the regressive policies of the Chirac government and to take part in the sham referendum on self-determination. Again, in 1988 to the present, the plethora of token concessions has procured willing obedience. Kanaks have participated in the political process and exercised patience in deferring independence. The pattern of Kanak response to French colonization attests to the Kanak character:

Kanak . . . where possible avoid open confrontation with opponents who possess an overwhelming monopoly of force; they emphasize negotiation and withdrawal, while ambush and surprise are their chosen offensive modes in the event that direct action is seen to be unavoidable. Culturally, they prefer compromise to martyrdom and emphasize selective, controlled, intensely psychological violence, often verbal rather than physical Melanesians in New Caledonia . . . are generally slow to anger, passionate and sometimes extremely violent in its expression, but quick to seek negotiation and restoration of equivalences in its aftermath.²⁹²

Without independence, the pattern of Kanak reaction is likely to be repeated in the future. There are compelling reasons to believe cooperation between the pro and anti-independence forces will be difficult to sustain in 1998 and beyond. An outcome favoring continued French presence in the territory will likely produce the same reaction the 1987 referendum aroused. The FLNKS may well once again abandon the French legal and political process to press their demand for independence.²⁹³

²⁹² Douglas, *supra* note 69, at 46.

²⁹³ Perhaps in recognition of such a possibility, all three factions in New Caledonia agreed in late 1995 to begin discussions on reaching a consensus on the territory's political future. The parties remain as far apart as ever. The FLNKS has stressed that long-term development and stability can best be achieved through accession to sovereignty and eventual independence. The RPCR has taken the position that continued incorporation in the French Republic is necessary for stability. PAC. NEWS BULL., Nov. 1995, at 10-11. Both the U.C. and RPCR have suggested foregoing the referendum. The U.C. has

Remarkably, the deep sense of injustice experienced by colonized peoples globally led to the disintegration of the colonial system in this century.²⁹⁴ As one commentator has observed:

One of the most common requirements for a proper balance between human groups is that each should recognize the special claim to a particular area of land of those who were the first to discover, to humanize, and to use it. When the Europeans "discovered" new lands in the period of industrial expansion, their views about the superior importance of their own interests, supported by pure greed and the view that in Christianity they were bringing the supreme gift to the heathens which would restore the balance, commonly led to their ignoring the prior claim of the "natives"—whom they often dehumanized, first in the use or perversion of laws to deprive them of their lives and property, and later in the law itself That the colonized peoples' sense of injustice endured was indicated by the collapse of the colonial system in the mid-twentieth century, and by the fact that "colonialism" has probably become the dirtiest word in international exchanges of threats or information.²⁹⁵

It is astonishing that colonialism exists today in all its forms and manifestations in New Caledonia. This Pacific island territory continues to stand out as relic of a discredited colonial era.

The rules of international law strongly favor those countries that shaped the post-war international order to peacefully safeguard their political, economic and strategic interests.²⁹⁶ As one of the founders of the United Nations and as a principal architect of the post-war international legal order,

suggested a negotiated plan for gradual independence. As part of this plan, the U.C. has suggested giving voters a choice to approve an agreement reached by the main political groups. As a testament to the success of the Matignon Accords in achieving the twin objectives of the settler population and the French government, the RPCR has suggested canceling the referendum and entering into a thirty year agreement similar to the Matignon Accords. PAC. NEWS BULL., Jan. 1995, at 3; PAC. NEWS BULL., Oct. 1993, at 3; PAC. NEWS BULL., Nov. 1993, at 3.

²⁹⁴ Henningham accurately warns that: "the legacy of violence, and the gap between the nationalist and loyalist interests, perceptions and attitudes, remain as major obstacles to an enduring consensus and . . . [it will be] hard to maintain discipline within [the] respective blocks." Henningham, *supra* note 126, at 652.

²⁹⁵ Rowley, *supra* note 291.

²⁹⁶ Francis A. Boyle, *International Law as a Basis for Conducting American Foreign Policy: 1979-1982*, 8 YALE J. WORLD PUB. ORD. 103, 107-9 (1981).

France has a strong interest in complying with its international legal obligations. This includes decolonizing New Caledonia. Flouting its international legal obligations reduces the ability of France to influence international affairs in the future. It also undermines the stability of the post-war international legal regime that France assisted in fashioning to promote human rights and save succeeding generations from the scourge of war.²⁹⁷ Decolonizing New Caledonia may do more to maintain France's status as a world power and ability to influence international events than illegally clutching onto an artifact of a disgraced era. As one scholar has recommended:

[T]here must come a time, if genuine community across ethnic lines is to be created in New Caledonia . . . [for the French government to withdraw]. . . . The test of statecraft for the government in Paris is to know when to leave the stage The proposed solution in 1998 in New Caledonia might not . . . fundamentally assist . . . [in creating a community across ethnic lines] . . . for it risks intensifying the confrontation between communities Dialogue across communities would be much better assisted by France expressing a clear determination to withdraw, in due time, and obliging the communities to concentrate on negotiating the terms of the future relationship.²⁹⁸

France is likely to frustrate, rather than contribute to, the United Nations goal of eradicating colonialism in this decade. In 1998 and beyond, Freedom's Gate will probably remain closed to the Kanaks of New Caledonia. But their passionate yearning for freedom will endure.

²⁹⁷ *Id.* at 109; Alan Berman, *In Mitigation of Illegality: The U.S. Invasion of Panama*, 79 KY. L.J. 735, 795-800 (1991).

²⁹⁸ Ward III, *supra* note 118, at 94.