The UN Committee of 24's Dogmatic Philosophy of Recognition: Toward a Sui Generis Approach to Decolonization

'What we need now are creative solutions for the remaining Non-Self-Governing Territories. If the United Nations is to fulfil its obligations in supporting the legitimate aspirations of the peoples of these Territories, a pragmatic and realistic approach- taking into account the specific circumstances of each- is most likely to lead to concrete results.'

- Ban Ki-Moon, former UN Secretary General[1]

Abstract:

The time is ripe for the United Nations Special Committee on Decolonization ('the Committee of 24') to accept sui generis categories that enable it to achieve its aim of 'finishing the job' of decolonization. This would mean a departure from the Committee of 24's rigid adherence to the three forms of decolonization currently recognised by it - independence, integration and free association. This article adopts Gilles Deleuze's critiques of the 'dogmatic philosophy of recognition' and how this can be overcome through his articulation of 'the Encounter' to interrogate the philosophical basis of the Committee of 24's inability to recognise sui generis forms of decolonization. It is through the Encounter that the rigid adherence to the categories is challenged such that sui generis categories are created in furtherance of the Committee's stated

[1] UN General Assembly, 'Secretary General Hails 2010 as Landmark Year for Special Committee on Decolonization', (25 February 2010, GA/COL/3199)
<http://www.un.org/press/en/2010/gacol3199.doc.htm> accessed 1 November 2017 [bold emphasis added]

aim. In applying this theoretical analysis, the article uses Gibraltar as a nascent example of what a sui generis category of decolonization could look like.

Key words: Colonialism, Decolonization, United Nations, Committee of 24, Deleuze, Gibraltar, Non-Self-Governing Territory

It is high time that the Committee of 24 recognises *sui generis* forms of decolonization. That the last decade has seen zero territories graduate from the UN's list of Non-Self-Governing Territories ('NSGT') has been attributed to the political, institutional but also conceptual shortcomings of the Committee.[2] This article deploys Deleuze's philosophy of recognition to critically examine the Committee's inadequate understanding of decolonization and the current stasis the seventeen listed territories on its list find themselves in.

The quote above is from Ban Ki-Moon's 2010 statement which he delivered at the end of the UN's Second International Decade for the Eradication of Colonialism and the 15th anniversary of the UN General Assembly Resolution 1514(XV),[3] *the Declaration on the Granting of Independence to Colonial Countries and Peoples*. The Committee of 24 is the progeny of the declaration and is tasked with its implementation. Several years on, and the Committee is now in the *Third International Decade for the Eradication of Colonialism* (2011-20) with seventeen territories still on the UN's List of NSGT who remain targets of decolonization efforts. Paradoxically, many of those territories have high levels of internal self-government, with some having exercised

[2] Oliver Turner, 'Finishing the Job: the UN Special Committee on Decolonization and the politics of self-governance' (2013) 34,7 Third World Quarterly 1193-1208; Peter Gold, 'Gibraltar at the United Nations: Caught between a treaty, the charter and the 'fundamentalism' of the special committee' (2009) 20, 4 Democracy and Statecraft 697-715

[3] The legality of the resolution, as with all General Assembly Resolutions, is contingent on wording of the text, the voting record, statements made during the adoption of the resolution and *post factum* state practice. Helen Quane, 'The United Nations and the Evolving Right to Self-Determination' (1998) 47 International and Comparative Law Quarterly 551

plebiscites to maintain particular constitutional arrangements under the sovereignty of independent states. Demands for delisting based on these realities have typically received neither the assent nor recognition of the Committee of 24.

Significantly however, the former UN Secretary General's address to the Committee of 24 spoke of greater overtures that, whether intended or not, problematized the three fixed categories of decolonization – integration, free association with an independent state or independence – as static and rigid. A deconstruction of the former Secretary General's statement appears to challenge the anticipatory nature of the fixed categories of decolonisation. These fixed categories intend to forestall all the possible manifestations of decolonization but those that it does not *recognise* under any of its three categories, do not satisfy the requisites of decolonization. Contrarily, the statement above posits the primacy of 'specific circumstances' that warrant 'a pragmatic and realistic approach' rather than the subsumption of 'specific circumstances' by the three fixed categories of decolonization. This effectively presages an approach not bound by *recognition* but one in which primacy of the circumstances, rather than their subsumption by the fixed categories of decolonization, enables *sui generis* forms of decolonization to emerge which is 'likely to lead to concrete results.'

The limits of the Committee of 24's work have been variously discussed and provide important contributions as to the *institutional* and *political* limitations frustrating attainment of its objectives. These pertain to i) its narrow understandings of colonialism, ii) its similarly narrow understandings of decolonisation and iii) the institutional and political constraints on the Committee.[4] On this latter point, it has been claimed that the Committee is beleaguered by the 'North-South Theatre' in which 'point-scoring' play out between the primarily Global South dominated Committee of 24 against the primarily Global North Administering Powers of the seventeen listed territories.[5]

[4] Turner, *supra* note 2
[5] Turner, *supra* note 2

This article examines the philosophical underpinnings of the Committee's limitations in its understandings of what constitutes decolonization. It begins by outlining the history and mission of the Committee of 24 before identifying some of its principal shortcomings. The article then problematizes the limits of the narrow understanding – or fixed categories – of decolonization utilised by the Committee of 24 through a philosophical interrogation. It does this by applying Deleuze's critique of the 'philosophy of recognition' as the basis on which the Committee of 24 operates and then identifies the demerits of that basis. The article then uses Gibraltar to illustrate how engaging Deleuze's *Encounter* would privilege the territory's form of self-government and use of plebiscites in the normative assessment and subsequent establishment of new categories of decolonization, by challenging the Committee's dogmatic philosophy of recognition. The case study recognises that though certain constitutional reforms need to be made – hence *toward* a *sui generis* status – Gibraltar is apt for establishing a more amenable, open-ended category of decolonization in the future which facilitates the aim of the Committee of 24 in 'finishing the job'[6] of decolonization.

1. The History and Mission of the Committee of 24

The end of the Second World War was transformative for both Europe and the World. It appeared to mark the beginning of international co-operation after centuries of warring empires and signified a new humanism, crafted under the auspices of the United Nations Charter which centred international peace, security, fundamental human rights and dignity as part of its project.[7] It was also a period of rapid decolonization from the great Imperial powers of Europe. However, certain territories remained in the throes of colonial governance. Chapter XI, Article 73 of the 1945 UN Charter[8] contained the 'Declaration Regarding Non-Self-Governing Territories' which placed obligations on the administering powers of those territories 'to promote to the utmost…the well-being of the inhabitants of these territories' as well as 'to

[6] 'The United Nations and Decolonization' <http://www.un.org/en/decolonization/specialcommittee.shtml> accessed 02 November 2017

[7] Charter of the United Nations, Preamble (adopted signed on 26 June 1945, entered into force 24 October 1945)

[8] Charter of the United Nations (adopted signed on 26 June 1945, entered into force 24 October 1945)

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

From around the 1960's, the number of territories that had become decolonized (and therefore de-listed), began to drop for the first time.[9] The 14th and 15th of December 1960 however, were to prove particularly important dates in the history of decolonization. On the 14th, the General Assembly adopted Resolution 1514(XV) entitled *the Declaration on the Granting of Independence to Colonial Countries and Peoples*[10] which recognised the previously vague principle of self-determination,[11] that 'the peoples of the world ardently desire the end of colonialism in all its manifestations' demanding 'immediate steps shall be taken, in Trust and Non-Self-Governing Territories or all other territories which have not yet attained independence, to transfer all powers to the peoples of those territories, without any conditions or reservations.' A day later, Resolution 1541(XV) entitled *the Principles which should guide members in determining whether or not an obligation exists to transfer the information called for under Article 73e of the Charter*[12] was passed by the General Assembly. A major impetus for these developments was the fact that a number of former colonial territories had by then joined the United Nations. The interest of these new member states in decolonization made a significant difference to the hitherto declared but lamely pursued commitment of the United Nations to the cause.[13]

[9] Turner, *supra* note 2, at 1198
[10] UNGA Res 1514 (1960) U.N. GAOR, 15th Sess., Supp. No. 16
[11] Self-determination is also recognised in Articles 1 and 55 of the UN Charter, Article 1 of the International Covenant on Civil and Political Rights 1966, Article 1 of the International Covenant on Economic, Social and Cultural Rights 1966 and considered a part of customary international law by the *Namibia Advisory Opinion* I.C.J., Advisory Opinion, 1971, I.C.J. Rep 16; Quane, *supra* note 3.
[12] UNGA Res 1541 (1960) GAOR, 15th Sess., Supp. No. 16. This entails the requirement on the Administering power of the territory to issue annual reports to the Committee Secretariat
[13] Bardo Fassbender 'The Better Peoples of the United Nations? Europe's Practice and the United Nations' (2004) 15, 5 European Journal of International Law 857, 868-869.

Importantly, Resolution 1541(XV) set out three ways in which a NSGT is said to have reached full self-government ('decolonization') and achieve subsequent de-listing. These are independence, free association with an independent state, or integration with an independent state. In 1961, the UN set up the Committee of 24[14] through Resolution 1654(XVI),[15] to monitor the implementation of Resolution 1514(XV). It was further tasked to make recommendations as to its implementation, conduct annual reviews of NSGTs, hear statements from NSGTs representatives, dispatch visiting missions, organize seminars on the political, social and economic situation in the Territories, make annual recommendations concerning the dissemination of information to mobilize public opinion in support of the decolonization process, and observe the 'Week of Solidarity with the Peoples of Non-Self-Governing Territories'.[16]

The success of the Committee of 24 cannot be understated. In 1945, a third of the world's population were considered to be living under a colonial power. That has now been reduced to 0.02%.[17] However, the rate at which NSGTs have achieved decolonized status in the ways circumscribed by Resolution 1541(XV) have all but plateaued since the 1990s. The Democratic Republic of Timor-Leste is the most recent success of the Committee, having gained independence from Indonesia back in 2002. In 2010, the Fourth Committee; a separate though related body focussing on specific cases of decolonization, peacekeeping, and reviewing special political missions, had described the decolonization process as having arrived at a 'virtual halt'.[18] It argued that it was necessary to evolve 'a new dynamic' between collecting objective information about the situations in the remaining NSGTs, and to pursue a stronger dialogue between them and their administering powers. In the Committee's most recent annual report

[14] Its full name is the 'Special Committee on the Situation with Regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples'. The '24' refers to the number of members it had at one point though this was originally 17 and now stands at 29.
[15] UN GA Res 1654 (1961) GOAR, 16 Sess., Supp. No. 17
[16] 'The United Nations and Decolonization' <http://www.un.org/en/decolonization/specialcommittee.shtml> accessed 02 November 2017
[17] Turner, *supra* note 2, at 1197
[18] UN General Assembly, 'Decolonization Process at 'Virtual Halt'', (8 October 2012) <https://www.un.org/press/en/2012/gaspd504.doc.htm> accessed 02 November 2017

submitted to the General Assembly, it stated that it would similarly 'emphasize the value of holding, during the intersessional period, informal consultations with the administering Powers and other stakeholders regarding the status of the Non-Self-Governing Territories on the Committee's agenda.'[19]

2. The Committee of 24's Principal Shortcomings

The inability of the Committee of 24 to finish the job of eradicating colonialism has been attributed primarily to its political and institutional failures. Oliver Turner frames the tension between the primarily 'Global-South'[20] countries of the Committee of 24 and the primarily 'Global-North'[21] countries of the administrating powers as actors in the 'North-South Theatre'.[22] Rather than acting in furtherance of eradicating colonialism, Turner states that the Committee has been used as a proxy forum for point-scoring. States belonging to the Non-Aligned Movement or other Southern or so-called 'third-world' groupings have been more interested in one-up-man-ship over states belonging to variations of Euro-American alliances, rather than creating productive groupings in pursuit of the Committee's aims.[23] Turner is however quick to acknowledge the indeterminacy of the Global –North/-South[24] nomenclature, particularly with reference to where certain countries, such as Russia and China, would be situated.[25] Nonetheless, the Global North and South divide means that the Committee oscillates between being ignorant to cases of colonialism among countries of the Global South[26] and being overly sensitive to what it sees as aberrations in the territories under the administration of Global

[19] UN Special Committee on Decolonization (71st Session) 'Report of the Special Committee on the Situation with regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples for 2016' (14 July 2016) UN DOC A/71/23, 21
[20] Including Syria, Iran, India and Cuba
[21] The UK, US, France and New Zealand
[22] Thomas G. Weiss, 'ECOSOC and the MDGs: what can be done?' in R Wilkinson & D Hume (eds), *The Millennium Development Goals and Beyond* (Routledge 2012) 119
[23] Turner, *supra* note 2, at 1201
[24] Other 'divisions' have been attributed to theological diversions, dividing physical geographical regions, such as the *Great Schism of 1054*. However, postcolonial scholars have said that such divisions are artificial constructs, created by discourses of power with their originals in colonialism. See Edward Said, *Orientalism* (Penguin Books 1978) 52, 54-7, 155-57
[25] Turner, *supra* note 2, at 1202
[26] Ibid., at 1203

North countries. The latter attitude is apparent in its consideration of territories like Gibraltar and Bermuda both of which have 'relatively stable and effective local administrations and comparatively high levels of GDP per capita'.[27] Turner's argument is not directed at mitigating the responsibility of the primarily European perpetrators of imperial and colonial endeavours, but to illustrate the subversion of the Committee's goals under the politics of self-interest of its members.

Interestingly however, Turner also identifies the theoretical inadequacies of the Committee of 24, both in its conceptualisations of colonialism and decolonization which inform its work. He discusses how the Committee's understanding of colonialism is 'fundamentally limited and broadly unsuited to the 21st century' in that 'forms of colonial domination are widespread, myriad and complex and often persist in alternative guises long after official independence.'[28] Drawing from International Relations and Critical Geography literature, he describes how colonialism can be defined beyond the typical notions of transplantations of settler populations from the imperial metropole into different territories. Colonial power is more than mere physical occupation or 'conquer and rule'[29] but 'operates as an impersonal force through a multiplicity of sites and channels, through which the impersonal forces may still linger in the absence of a discernible colonizer'.[30]

What could be described as the 'reformulations of colonial power' or colonialism as 'trans-historical'[31] have also been engaged by lawyers. Nathaniel Berman illustrates how the imperial imagination has the ability to reinvent itself under changing conditions[32] and how the failure to notice structural continuities may hasten us to overestimate the extent to which modern

[27] Ibid., at 1203
[28] Ibid., at 1194
[29] Ibid., at 1199
[30] Law Wing Sang, *Collaborative Colonial Power: The Making of Hong Kong Chinese, Hong Kong,* (Hong Kong University Press 2009) 3
[31] Aijaz Ahmed, 'The Politics of Literary Postcoloniality' (1995) 36, 3 Race and Class 9
[32] Nathaniel Berman, 'In the Wake of Empire' (1999) 14 American University International Law Review 1531

international law has broken away from its imperial past.[33] For example, some scholars contend that the UN Charter's exceptions to the general proscription of the use of force against the political or territorial integrity of a state, or the contemporary international trusteeship system are merely reformulations of colonial endeavours which have been 'reimagined'. [34]

Particularly relevant here is what Turner recognises as the conceptual limitations in the Committee of 24's understanding of decolonization, which accepts 'only one of three predetermined outcomes' as satisfying its criteria delisting. This approach, Turner points out, is the product of the North-South ensemble which has meant the Committee of 24 has

> established a singular ideology as authoritative fact before granting an opportunity for debate…the Committee therefore imposes upon people of a certain legitimate persuasion the task of proving themselves worthy of their opinion…Just as colonial powers have traditionally spoken for the people they control, so the Special Committee renders the inhabitants of NSGTs voiceless to the extent that it dictates what their futures should entail.[35]

This article picks up from Turner's theoretical observations as to the insufficiencies of the three categories of decolonisation. The main issue here with the Committee's approach to its work is its rigid adherence to the three fixed categories as parameters for recognising a territory as being decolonized. The conventional *modus operandi* of free association, integration or independence, affirmed in Resolution 1541(XV), stymie the Committee's attainment of its objectives because of its philosophical underpinnings. The philosophical underpinnings of the Committee are characterised by a dogmatic philosophy of recognition which produces conceptual cul-de-sacs that prevent further decolonisation.

---

[33] Ibid., at 1542

[34] Ibid., at 1521- 1561; See also Anne Orford, *Reading Humanitarian Intervention: Human Rights and the Use of Force in International* Law (CUP 2009) 18-37; Gustavo Gozzi, 'The "Discourse" of International Law and Humanitarian Intervention' (2017) 30, 2 Ratio Juris 186-204

[35] Turner, *supra* note 2, at 1204

3. Deleuze, the Philosophy of Recognition and the Encounter

A philosophy of recognition is 'an approach that seeks only to *recognize*…because it *a priori* assigns a representational form to the outside; it presumes that the encountered thing is only another identifiable instance of an existing concept'.[36] It 'has based its supposed principle upon extrapolation from certain facts, particularly insignificant facts such as Recognition, everyday banality in person'.[37] Implicit in such an approach therefore, is the suppression of concrete reality.[38] Philosophy as recognition is 'concept/category centric'. It states that conventional epistemologies are typically based on pre-ordained categories which only cognize phenomena (or 'the thing thought about') as instances of those pre-ordained categories. In effect, the thing exists only for the purposes of the concept. Thinking in this way takes place on the basis of 'that which is being thought about' and its appropriateness within the broader category or concept. Anything thought about *outside* the general concept is not recognised, or its unique differences are extinguished.

If philosophy is about resisting and disposing of *doxa*, then a philosophy of recognition, according to Deleuze, is wholly inadequate, and thinking along these parameters is less about cognition and more about *re*cognition. This is precisely the nature of the approach of the Committee of 24; one which is predicated on a dogmatic philosophy of recognition. Its works to exclude specific circumstances of territories that have asserted self-determination (even with the concurrence of their former colonisers) as they are not recognised- as identifiable instances- as such by the Committee of 24 under its fixed categories. Its current criteria can be considered a 'top-down' or subsumptive approach to decolonization therefore in that 'specific circumstances' are ignored to fit NSGTs, if possible, into the three fixed categories. Decolonized status only exists as identifiable examples of these fixed categories and thus through

[36] Alexandre Lefebvre, *The Image of Law: Deleuze, Bergson, Spinoza* (Stanford University Press, 2008) 60
[37] Gilles Deleuze, *Difference and Repetition* (Paul Patton tr, Columbia University Press 1968) 135
[38] This is later discussed in this section

recognition. Though this may have been appropriate seventy years ago, it has become ill-suited to the multifarious and evolving experiences and understandings of self-determination.

It is no coincidence that Turner describes the process of delisting of NSGTs as only being granted through 'one of three predetermined outcomes' or the Committee of 24's paramount problem as 'dictating what their [NSGT] futures should entail.' Both points speak to the anticipatory nature of the philosophy of recognition that permeates the Committee's decolonization approach. In other words, the concepts or more accurately here, categories of decolonization from Resolution 1541(XV) attempt to anticipate all different instantiations of decolonization. There may be variations within each of the three categories, but those differences are still contained within the broader genus of the *recognised* categories; independence, free association or integration. An example of self-government among the NSGTs therefore, which doesn't fit into these broad categories or their finer gradations as an 'identifiable instance' of the broader categories, simply does not get 'recognised' as a decolonized territory. This dogmatic philosophy of recognition, which prefigures the three categories of decolonization, is a predicament because many of the territories on the UN List of NSGTs have particularly high-levels of government and some have often utilised plebiscites to maintain their current constitutional arrangements.

Deleuze claims that modern philosophy is similarly marred by the banality of 'recognition' in which unique differences- those not contained within a broader category or concept- are elided. On this account, 'the elementary concepts of representation are the categories defined as the conditions of possible experience. These, however, are too general, too large for the real'.[39] In the Committee of 24's current approach to decolonization, it has, on the Deleuzian frame of analysis, reified its recognised categories as the only possible circumstances for self-determination in international law, a problematic position, as Ban Ki Moon's statement above emphasised.

[39] Deleuze, *supra* note 37, at 68-9

The Deleuzian *Encounter* however, unsettles the dogmatic philosophy of recognition of the sort the Committee of 24 has adopted in its work so far. The Encounter is an anathema to it – a metaphysical violence.[40] It is not about making concepts or categories quantitatively (more numerous) or qualitatively (more flexible) different[41]. Rather, it is about the *primacy* of that which is thought about – or to borrow from Ban-Ki Moon's statement, 'specific circumstances' of a territory. Encounters exist *outside of thought* in that they are unrecognizable by the concepts or categories. Real thought, according to Deleuze, lies in the primacy of the Encounter. By 'primacy' therefore, we understand this to be the rejection of recognition, resisting the privileging of the concept or category, and the elevation of the thing being thought about- the 'specific circumstances'. The thing thought about ceases to be an 'identifiable instance' of the concept or category, but is unique in and of itself. Whereas 'concepts only ever designate possibilities', Deleuze describes the Encounter as 'that which forces thought to raise up and educate the absolute necessity of an act of thought or a passion to think.' [42] This is precisely the approach the Committee of 24 needs to embrace in order to progress its work in pursuit of the eradication of colonialism in light of changing global socio-political dynamics. Gibraltar stands out as a prime territory among those on the UN's list of NSGTs which is particularly apt for applying the Deleuzian 'metaphysical violence' in establishing a *sui generis* decolonised status.

4. Gibraltar and the 'Fourth Option'

So long as the philosophy of recognition informs the Committee of 24's decolonization strategy, the seventeen territories are likely to remain on the UN's list. To be clear however, this article is not articulating a conceptualisation of decolonization so broad that it captures territories that are clearly under colonial power but recognises that the current concepts of decolonization are in need of revision through the establishment of a category which is open and sensitive to the

[40] Lefebvre, *supra* note 36, at 73
[41] Deleuze, *supra* 37, at 303
[42] Ibid., at 139

particularities of the NSGTs. Gibraltar is one such example which has sought to use the 'fourth option' of self-determination.

A. Broadening Self-Determination: The 'Fourth Option' of decolonization

A partial confusion exists in the decolonial vocabulary of International Law. This stems from the fact that terms such as 'decolonization', 'self-determination', 'independence', 'self-government' and so on, were either not initially defined, defined in reference to one another or defined tautologically.[43] Self-Determination however, is the preeminent term in understanding the process toward decolonization. It was first mentioned in the UN Charter, Article 1(2), which proclaims the 'respect for the principle of equal rights and self-determination of peoples' and is mentioned again in Article 55 where it promotes international economic and social co-operation on the basis of 'equal rights and self-determination of peoples'. Further, it is also recognised in common Article 1 of the International Covenant on Civil and Political Rights 1966 and the International Covenant on Economic, Social and Cultural Rights 1966. Importantly, Resolution 1514(XV) focussed self-determination as part of the international law applicable to colonized territories (NSGT). Thus, it can be understood that decolonization is effected through self-determination. Indeed, in the *Namibia Advisory Opinion,*[44] the International Court of Justice held that self-determination applied to all peoples in colonial territories and this was recognised as part of customary international law in the *Western Sahara Case*.[45] Consistent state practice from colonial powers[46] and the absence of denial or contrary practice have confirmed, to some commentators[47], that self-determination is *jus cogens.*

The key scholastic discussions around self-determination have tended to focus on its scope (particularly as to whether it extends beyond non-colonial situations);[48] what constitutes

[43] Turner, *supra* note 2, at 1199
[44] I.C.J., Advisory Opinion, 1971, I.C.J. Rep 16
[45] [1975] ICJ Rep 12
[46] Statement by the UK's representative in the Security Council on 25 May 1982 (1983) 54 BYBIL 371-371
[47] Antonio Cassese, *Self-Determination of Peoples: A Legal Perspective* (CUP 1995) 140
[48] Quane, *supra* note 3, at 558-571; Robert McCorquodale, 'Group Rights' in Daniel Moeckli, Sangeeta Shah & Sandesh Sivakumaran (eds), *International Human Rights* Law (OUP 2014) 340-341

'peoples';[49] the internal versus external dimensions of self-determination[50] and whether it is a moral or legal principle- though this question has largely been settled by the *Namibia Opinion* and *Western Sahara Case*.[51] Another key point of contention pertains to the limits on self-determination particularly that of 'territorial integrity' and competing claims over a territory.[52]

Though self-determination and decolonization may be considered as coterminous, self-determination can more accurately be described as the umbrella term that captures the different *modus operandi* of decolonization. Resolution 1541(XV) therefore, recognised the different 3 *modus operandi* of decolonization which are each examples of self-determination- free association, integration and independence. However, a broadening of the principle of self-determination, through the addition of another *modus operandi* of decolonization, was to occur in October 1970.

The General Assembly adopted Resolution 2625(XXV)[53] entitled *the Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations'*. The Resolution reaffirmed the three conventional categories for decolonization but importantly, added the possibility that 'the emergence into any other political status freely determined by a people constitute modes of implementing the right of self-determination by that people.' This 'fourth option'[54] has opened up the possibilities of decolonization (so as to make the options available open-ended) including provision for a

[49] Quane, *supra* note 3, at 541, 548-558; Robert McCorquodale, 'Group Rights' in Daniel Moeckli, Sangeeta Shah & Sandesh Sivakumaran (eds), *International Human Rights* Law (OUP 2014) 337-338

[50] Robert McCorquodale, 'Group Rights' in Daniel Moeckli, Sangeeta Shah & Sandesh Sivakumaran (eds), *International Human Rights* Law (OUP 2014) 341-343; this is dealt with later when discussing the status of Gibraltar.

[51] See also Malcolm Shaw, *International Law-6 edition* (CUP 2008) 251-257

[52] This conflict, between self-determination and territorial integrity, emerged in Resolution 1514(XV). This is dealt with later when discussing the status of Gibraltar. See also McCorquodale, *supra* note 50, at 346-348

[53] UNGA Res 2625 (1970), U.N. GAOR, 25th Sess., Supp. No. 28

[54] Javier J. Rua Jovet, 'The Fourth Option: Modern Self-Determination of Peoples and the Possibilities of U.S. Federalism' (2010) 49 Revista de Derecho Puertoriqueno 218

closer relationship with the metropolitan power,[55] presenting 'more flexible options set out in Resolution 1541(XV)'.[56]

Resolution 2625(XXV) and the fourth option, it is argued, appeared to develop the principle of self-determination and prefigured a pragmatic approach to decolonization that Ban Ki-Moon would later articulate to the Fourth Committee. This pragmatism, which is facilitated by the Resolution, can be explained through Deleuze's notion of the Encounter. Far from being another 'fixed category' predicated on a dogmatic philosophy of recognition, Resolution 2625(XXV) provides for the possibility of the primacy of the Encounter- or the opportunity for the 'specific circumstances' of the NSGTs to determine what constitutes decolonization. It expands the three fixed categories of decolonisation to enable a determination of decolonized status based on 'other political status freely determined'. This suggests that the 'special circumstances' are privileged over and above the three fixed categories. The word 'other' is especially prescient. It suggests that the possibilities of what constitutes colonialism are non-exhaustive. The Resolution does not try to specifically define- or anticipate as the other categories do- what 'other' forms of decolonized statuses may look like. In other words, it elevates the 'specific circumstances' of the NSGT, providing it the opportunity to articulate what is meant by a decolonised status. In effect, the Resolution *recognises the unrecognised*.

B. British Overseas Territories as NSGT

The BOTs are remnants of the former British Empire and there continued status as such is either due to the inhabitants' wishes to remain under the sovereignty of the UK, the non-viability of independence, or because of the territories strategic value to the UK.[57] The territories vary in their size, location and population and are constitutionally distinct from one another, having separate constitutions with specificities contingent to the circumstances and

[55] Id., at 218
[56] Patrick Thornberry, 'Minorities, Human Rights: A Review of International Instruments' (1989) 38, 4 The International and Comparative Law Quarterly 875
[57] For example, 2 BOTs are used exclusively as military bases (the British Indian Ocean Territory and the Sovereign Base Areas) though many BOTs, such as the Falklands and Gibraltar, have served dual civilian and military functions.

challenges of each territory.[58] Common to all the BOTs is that they form part of the 'Crown's undivided realm' 'in the sense of government, power, ownership and belonging'.[59] Ten out of the fourteen BOTs are considered NSGTs.

Self-determination however, appears to be at the heart of the UK's intended relationship with its overseas territories. A root and branch effort to modernise all the UK's BOTs began in 1997 under the Labour government. Despite their colonial origins, the contemporary constitutional relationships between the UK and the fourteen BOTs have been described by UK White Papers as a 'partnership' and 'forward-looking',[60] predicated on reciprocal 'rights and responsibilities'.[61] The White Paper's stated aim was to initiate and continue a modernisation process informed by the following four principles; self-determination, responsibilities and reciprocity, the encouragement of self-government and providing support for the BOTs in times of emergency. The 2012 Conservative-Lib Dem White Paper, *The Overseas Territories: Security, Success and Sustainability,* sought to reenergise Labour's work on BOT modernisation. The coalition's vision was for the BOTs to be 'vibrant and flourishing communities', reemphasising the 4 principles from the previous white paper, with particular attention paid to self-determination. The white paper also set up an annual forum for UK Ministers and BOT governments, the *Joint Ministerial Council,* as well as separate offices in each government department to ensure cross co-ordination on policy rather than input being limited to the Foreign and Commonwealth Office. The Joint Ministerial Council's recent 2016 Communique affirmed the importance of self-determination and stated that 'we agreed the need to continue our engagement on these issues to ensure that constitutional arrangements work effectively to promote the best interests of the Territories and of the UK' and that it 'will continue to support requests for the removal of the Territory from the United Nations list of non-self-governing

[58] Ian Hendry & Susan Dickson, *British Overseas Territories Law* (Hart 2011)
[59] *Tito v. Waddell (No 2)*[1977] Ch 106; This was also reaffirmed in *R v Secretary of State for Foreign and Commonwealth Affairs, ex p Bancoult (No 2)* [2008] UKHL 61
[60] Foreign and Commonwealth Office, *Partnership for Progress and Prosperity: Britain and the Overseas Territories* (White Paper, Cm 4264 1999) 6
[61] Foreign and Commonwealth Office, *The Overseas Territories: Security, Success and Sustainability* (White Paper, Cm 8374 2012) 8

territories' expressing more utterances toward a relationship of collegiality between the UK and its BOTs.[62]

The *British Overseas Territories Act 2002* was an important piece of UK legislation that sought to reflect a shift in Whitehall parlance by renaming the former *Dependent Territories* as *Overseas Territories*- a nod to many of the BOTs' increasing self-government. However, notwithstanding this nomenclatural shift, it could be argued that the BOTs continue to be colonies pursuant to *Schedule 1* of the *Interpretation Act 1978:*

> "Colony" means any part of Her Majesty's dominions outside the British Islands except…territories for whose external relations a country other than the United Kingdom is responsible…and where parts of such dominions are under both a central and a local legislature, all parts under the central legislature are deemed for the purposes of this definition to be one colony.

However, this acute binary in the determination of whether a BOT constitutes a NSGT or not, is symptomatic of the philosophy of recognition that underlies the Committee of 24 and masks a far more complex picture.[63] This is because, though they may be legally defined as a colony for the purposes of UK law, many of the BOTs have very high levels of self-government akin to independent states. Further, some are able to commence, negotiate and conclude treaties and conduct external affairs largely on their own terms - an area typically the preserve of the imperial power in colonial constitutionalism.[64] Most importantly, many BOTs have chosen to remain under UK sovereignty through various referenda. To claim that there is a colonial

[62] UK Overseas Territories Joint Ministerial Council, '2016 Communique' (Joint Ministerial Council, London, 01-02 November 2016). This was recently reaffirmed in the 2017 meeting of the Joint Ministerial Council for the Overseas Territories. See also UK Overseas Territories Joint Ministerial Council, '2017 Communique' (Joint Ministerial Council, London, 28-29 November 2017) https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/663983/Joint_Ministerial_Council_2017_-_Communique.pdf accessed 30 November 2017 <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/565228/Overseas_Territories_Joint_Ministerial_Council_2016_Communique.pdf> accessed 09 November 2017

[63] It is contended however, that if any of the BOTs were to establish a *sui generis* decolonized status following the necessary constitutional changes, an amendment would be required to the Interpretation Act 1978.

[64] Hendry & Dickson, *supra* note 58, at 234-239, 257-261. These are known as entrustment agreements. Gibraltar has as entrustment regarding the exchange of tax information.

relationship therefore, is overly reductionist. Many BOTs which are NSGTs, are on the precipice of establishing a *sui generis* decolonized status. One such example of a listed territory, and one which harnesses this complexity, is Gibraltar.

C. Gibraltar at the UN

It is particularly important to note the deliberate use of the term 'toward' in the title of this article. This is to make clear that Gibraltar's preparedness, in establishing a *sui generis* decolonized category in exercising its right of self-determination, is nascent but not currently fully formed. Whilst it has been argued[65] that Gibraltar is currently in a position to establish a *sui generis* category of decolonization, the establishment of such a category, this article argues, is largely contingent on a series of reforms that would have to take place to precipitate de-listing. Still, Gibraltar situates itself well to establish this status because of the trajectory of its reform, the numerous referenda it has exercised in furtherance of its self-determination and the inadequacies of the three fixed categories of decolonization in recognising its unique circumstances.

Since antiquity, Gibraltar has passed through Moorish, Spanish and now British hands though Spanish claims to the territory continue and remain relevant in the legal (particularly constitutional), political and economic arrangements and governance of the territory.[66] Despite Roman and Phoenician settlement in the surrounding Bay of Gibraltar, Muslim Moors from the Maghreb (North Africa, now principally Morocco, Algeria, Tunisia and Libya) were the first architects of the territory in 711CE. The area formerly known as Mons Calpe was thus renamed 'Mountain of Tarik' or Djebel Tarik in Arabic- the corrupted portmanteau of which forms the contemporary name of the territory- after the Muslims emerged victorious in what is known as

[65] Peter Gold, 'Gibraltar at the United Nations: Caught between a treaty, the charter and the 'fundamentalism' of the special committee' (2009) 20, 4 Democracy and Statecraft 697-715

[66] Keith Azopardi, Sovereignty and the Stateless Nation: Gibraltar in the Modern Legal Context (Bloomsbury Publishing 2009) 52-53; Joseph Garcia, *Gibraltar: The Making of People* (MedSun 1994) 71

the Battle of the Guadalete.[67] Apart from a brief interruption in Muslim rule by King Ferdinand IV in 1309, it was not until 1462 that the Christian Reconquista recaptured Gibraltar. A comparatively short period of 240 years of rule under the Spanish- the shortest period of sovereignty over Gibraltar among the Muslims, Spain and the British, came to an end when the territory was ceded to Britain in 1713 through the Treaty of Utrecht[68], following the Spanish War of Session.[69] Today, Gibraltar is one of fourteen British Overseas Territory (BOT). [70] As a BOT, Gibraltar would appear to fall under the definition of a colony so-defined under UK Law. Indeed, the European Court of Justice, though recognising the separate constitutional status of Gibraltar, has referred to it as a British Crown Colony.[71] However, this only reveals part of a complex and multifaceted picture.

From as early as 1946, Gibraltar has been considered a NSGT and its continued listing by the Committee of 24 continues to make it a target of decolonisation by the UN. This compels the UK, as the administering power, to submit annual reports to the UN Secretariat under Article 73(e) of the UN Charter. Meanwhile, subsequent to the Treaty of Utrecht, Spain has continued to make sovereignty claims over Gibraltar. Spanish sovereignty claims vary; from contending that the Treaty of Utrecht was signed under duress[72] to the claim that the Treaty was largely silent on the issue of sovereignty over certain parts of the territory. Perhaps most forcefully – and this is the position that has had most purchase at the UN and the Committee of 24 – is the claim that the alleged right (in the eye of the Spanish) of the Gibraltarians to self-determination constitutes an 'attempt at the partial or total disruption of the national unity and the territorial integrity of a country' which 'is incompatible with the purposes and principles of the Charter of the United Nations.'[73] Put plainly, Spain claims the Gibraltarians do not constitute a 'people'. The

[67] George Hills, *Rock of Contention: A History of Gibraltar* (Robert Hale ltd. 1974) 59; William Jackson, *The Rock of the Gibraltarians; A History of Gibraltar* (Gibraltar Books 1987) 25-26
[68] Id.
[69] Id. at 89-115
[70] The other 4 of the UK's overseas territories are not listed as they do not have permanent populations
[71] *Commission v. UK* (2003) C- 30/01*;* See also *Gibraltar Betting and Gaming Association Limited v Commissioners for Her Majesty's Revenue and Customs and Her Majesty's Treasury* C-591/15
[72] Alistair Ward, *España Britannia* (Shepheard-Walwyn 2004) 123
[73] UNGA Res 1514 (1960) U.N. GAOR, 15th Sess., Supp. No. 16, para 6

'territorial integrity' argument has been largely accepted by the UN, who have repeatedly called for the decolonization of Gibraltar and a negotiated settlement between the British and Spain [74] while largely ignoring the wishes of the Gibraltarians.[75] Indeed, the most recent General Assembly Decision, taken on the recommendation of the Committee of 24, has continued to deny the Gibraltarian's right to self-determination.[76]

The 'trump' of territorial integrity is a misnomer, however. Such a limitation is only justifiable if 'external self-determination' vis-à-vis independence is being sought after and in the absence of full 'internal self-determination', where a government represents the whole people of a territory without discrimination. Such a claim falls at the first hurdle as Gibraltar was acquired by the British through cession rather than conquest[77] and therefore both the question of whether or not there is internal self-determination vis-à-vis Spain is redundant- as is the desire for independence (which Gibraltar has never raised).

A more reasonable limitation on the Gibraltarian right to self-determination that the Spanish could have advanced was evidenced in the *East Timor Case*,[78] in which there were competing claims over the territory which was colonised by the Portuguese and occupied by Indonesia. The court however, recognised that the East Timorese had a right to self-determination. Further, the 'consultation of the people of a territory awaiting decolonization' was recognised by the International Court of Justice (ICJ) in the *Western Sahara Case*[79] and competing claims, even though they maybe lawful, would not undermine the exercise of the right of self-determination of the peoples. However, though some of the similarities may seem striking, Gibraltar has maintained time and time again its loyalty to Britain with no appetite for

[74] Gold, *supra* note 65, at 697-715
[75] Countless UN resolutions refer to 'interests' rather than 'wishes' of the Gibraltarians as it is claimed that the latter would be admission of the Gibraltarians right to self-determination under International law. See below.
[76]UNGA Decision 69/523 (2015)
[77] Azopardi, *supra* note 66 at 20
[78] *East Timor (Portugal v. Australia)* [1995] ICJ Rep 6
[79] [1975] ICJ Rep 12

independence. Indeed whereas the contestation with East Timor seemed less clear cut, there can be no doubt that Gibraltar was ceded to the British in 1713.

All of the current fixed categories of decolonization have proved inappropriate for Gibraltar. For example, independence has never been an option for the territory. It has for long considered itself as British and, even in times of British ambivalence, has always maintained a desire to sustain its constitutional links with the UK. [80] There is also a legal difficulty presented by the Treaty of Utrecht which appears to give Spain the right of first refusal should Britain ever wish to transfer sovereignty of the territory.[81] More pressingly, as a population of about 30,000 with its key markets in the EU and the UK, these links have been essential.[82] Integration, at one point a popular resolution to the question of Gibraltar, particularly with the ascendency of the *Integration with Britain Party,* was refused by the British and put to bed in the Government's 1997 White Paper.[83]

Elected representatives of Gibraltar have contended for some time that they are not governed through a colonial arrangement by the UK. As early as Resolution 1514(XV), then Chief Minister of Gibraltar, Joshua Hassan, made representations to the UN to this effect while arguing for its self-determination.[84] In the 1990s, the Chief Minister and Opposition leaders from Gibraltar made critical interventions to both the Committee of 24 and the Fourth Committee attempting to persuade them of Gibraltar's right to self-determination. Ministers from Gibraltar also levelled criticism at the rigidity of the UN's delisting criteria for NSGT under the three

[80] Garcia, *supra* note 66, at 24.
[81] The preamble of the 2006 Constitution states that the UK will not transfer sovereignty of the territory against the freely expressed wishes of the Gibraltarians. See Gibraltar Constitution Order 2006 (adopted on 28 December 2006, entered into force 02 January 2007); Legal arguments have been advanced that the 'right of first refusal clause' in the Treaty of Utrecht, is voided by Gibraltar's right to self-determination of the Gibraltarians. This operates on the presumption that Gibraltar has a right to self-determination under international law and that self-determination is considered a principle *jus cogens*- which many have claimed, If these presumptions are accepted, according to Article 53 of the Vienna Convention on the Law of Treaties 1969, 'a treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law.' Other arguments have been advanced to the effect that the Treaty of Utrecht is no longer valid more generally because of the UN Charter. See also Azopardi, *supra* note 66, at 2013-28
[82] House of Lords EU Committee, *Brexit: Gibraltar* (2017, HL 116) 7-13
[83] Foreign and Commonwealth Office, *Partnership, supra* note 60, at 13
[84] Garcia, *supra* note 66, at 133

conventional modus operandi for decolonization.[85] During the Anglo-Spanish intergovernmental Brussels talks over the question of Gibraltar, the territory was largely side-lined. The then Chief Minister, Joe Bossano, boycotted the talks as they discussed sovereignty issues. However, Bossano continued to make representations to the UN of a 'fourth option' for Gibraltar, ensuring maximum self-government with the UK retaining formal sovereignty.[86]

D. Contemporary Constitutionalism in Gibraltar: Toward a sui generis decolonised status

High-levels of internal self-government which are 'freely determined'– to borrow from Resolution 2625(XXV)[87]– has formed the basis of Gibraltar's pursuit of the fourth option of decolonization. The framing of the resolution embraces the Deleuzian *encounter* given its potential for breaking down the dogmatic approach to decolonization currently stalling the work of the Committee of 24. Constitutional development in Gibraltar has been particularly buoyant from around the mid-1940s.[88]

In 1999, the Gibraltar House of Assembly set up a Select Committee on Constitutional Reform 'to review all aspects of its old constitution, the Gibraltar Constitution Order 1969, and to report back to the House with its view on any desirable reform thereof'.[89] The 'approach and objective' of the consultation sought to maximise self-government under the umbrella of British sovereignty as well as facilitate reforms that would result in the delisting of the territory from the UN List of NSGT. This was to be pursued through the 'fourth option' of self-determination.[90] The committee submitted a draft *Gibraltar Constitution Order 2001* as a series of amendments to the 1969 constitution which was then approved by the House of Assembly on 27 February 2002. Negotiations with the British Government took place between 2004 and 2006, concluding

[85] House of Commons Library Research Paper, *Gibraltar's Constitutional Future*, 02/37 of 22 May 2002, 52-53; House of Commons Library Research Paper, *Gibraltar: diplomatic and Constitutional Developments,* 06/48 of 11 October 2006, 18-21
[86] House of Commons Library Research Paper, *Gibraltar's Constitutional Future*, 02/37 of 22 May 2002, 15
[87] UNGA Res 2625 (1970), U.N. GAOR, 25th Sess., Supp. No. 28
[88] Garcia, *supra* note 66.
[89] Select Committee on Constitutional Reform (HA 2002) 1
[90] Ibid., at 2

successfully in March of that year. As part of the process, then UK Foreign Secretary, Jack Straw, informed the House of Commons that the approved constitution would be put to a referendum in Gibraltar.[91] However, opposition parties in Gibraltar were not satisfied by the UK Government's silence regarding the plebiscite on the nascent constitution being observed as an act of decolonisation.

Further, there was significant diplomatic wrangling between the leader and opposition party in Gibraltar and the Foreign and Commonwealth Office over the preamble which, in the draft, omitted any reference to self-determination. This was particularly unusual, given that the Labour government had previously committed to this principle in its 1999 white paper. The Gibraltar Constitution Committee proposed an amendment to the Foreign Secretary in April 2006 to the effect that the referendum would be deemed an act of self-determination but this was rejected by the British government. However, despite its absence from the draft constitution, the then Secretary of State for Defence, Geoff Hoon, made clear that the referendum would be regarded as an act of self-determination.[92] 60% of the Gibraltar electorate voted in favour of the new constitution 'in exercise of [their] right to self-determination.'

Deleuze's Encounter enables us to postulate a process in which the Committee could, through elevating the 'specific circumstances' of each territory, establish an open, *sui generis* category of decolonization which acknowledges these issues among the currently listed territories. Gibraltar, as one example, is primed for such establishment of a fourth option or category, being resistant to categorisation under the current three fixed categories, while it embarks on a trajectory toward greater self-government, combined with its history of plebiscites.

Advances in Gibraltar's constitution toward self-government, and thus decolonization vis-à-vis the fourth option are tangible. The Gibraltar Constitution Order 1969 had many of the hallmarks

[91] HC Deb 2007, c557
[92] HC Dec 2006, c932

of a colonial constitution.[93] For example, the Governor, as the UK Monarch's representative, formed part of the legislature[94] and elected ministers' legislative competence had to lie within 'defined domestic responsibilities'.[95] If the determination of what constituted a 'defined domestic matter' was contested, it was the Governor who would make the determination and an ouster clause meant that such decisions were precluded from review by the courts.[96] Further, bills which were unlikely to be passed within these defined domestic responsibilities could be enacted by the Governor in the interests of the 'financial and economic stability' of the territory.[97] The phraseology 'financial and economic stability', a nebulous term, was not constitutionally defined, effectively giving the Governor broad legislative powers. In addition, the Crown had a power to disallow bills,[98] again, as was typical of colonial constitutionalism.

Under the Gibraltar Constitution Order 2006, advances have been made to the effect of affording greater self-government for the territory. The Governor, as the representative of the UK monarch, is no longer constitutionally a part of the newly named legislature, 'the Gibraltar Parliament'.[99] Further, unlike in previous constitutions in Gibraltar, the responsibility of the Governor is now circumscribed,[100] thus allotting the residual (and therefore broader) powers to the elected Ministers. Further, the British monarch no longer has the power to disallow legislation. The powers of disallowance and the non-circumscription of Governor's powers are emblematic of colonial constitutionalism and so their removal, set against the backdrop of self-determination, is significant.

At this juncture two key points need to be established. The first is to express a reservation that Gibraltar has not yet reached the point at which it could be considered a decolonized territory

[93] This was despite the addition of a new preamble which stated that the territory would not pass into the sovereignty of another country without the wishes of the people
[94] Gibraltar Constitution Order 1969 (adopted on 23 May 1969, entered into force 30 May 1969) s. 24
[95] Ibid., at s. 55
[96] Ibid., at s. 55(2)
[97] Ibid., at s. 34(2)
[98] Ibid., at s. 37
[99] Gibraltar Constitution Order 2006 (adopted on 28 December 2006, entered into force 02 January 2007) s. 24
[100] Ibid., at s.47(1)

under an open, *sui generis* fourth option. The second is that in spite of this however, Gibraltar is a clear contender to establish such a status in the prospect of further constitutional reforms. These both coalesce to underpin Gibraltar as gearing *toward* establishing a *sui generis* decolonized status. Gibraltar is yet to reach a point at which it could be said to have attained such level of self-government that it ought to be considered a decolonized territory under a newly established fourth option. Indeed, this would necessitate further constitutional review and reform.[101] For example,[102] as a constitution that is a product of the UK's Royal Prerogative, its laws are considered 'colonial laws' for the purposes of the *Colonial Laws Validity Act 1856*[103] and thus it is susceptible to the 'doctrine of repugnancy'. The doctrine holds that colonial law which is contrary to provisions of a UK Act of Parliament extending to the 'colonies', or orders or regulations made under an Act, will result in the invalidation and inoperability of the colonial law.[104]

Another issue, and one recognised by the Committee of 24's Annual Working Paper,[105] is the residual - or peace, order and good government power ('POGG') - of the UK Crown to legislate for the territory. POGG powers have been judicially interpreted to afford plenary legislative powers to the appointee[106] and were controversially deployed to expel citizens from the British Indian Ocean Territory.[107] Further, the Governor effectively has a power to withhold bills for the Crown's signification if they are deemed repugnant to 'good government'[108] – again a nebulous

[101] In 2016, the Gibraltar Parliament established a new Select Committee to review its constitution; Proceedings of the Gibraltar Parliament 2nd March 2016, 12-39
[102] This paper does not attempt to provide an exhaustive list of reforms that would likely precipitate de-listing
[103] Gibraltar Constitution Order 2006, *supra* 99, at ss. 2 & 3
[104] Hendry & Dickson, *supra* note 58, at 68; W. Ivor Jennings & C M Young, *Constitutional Laws of the British Empire* (Clarendon Press 1938) 33
[105] UNGA Special Committee on the Situation with regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples 'Gibraltar: Working Paper prepared by the Secretariat' (7 March 2017) A/AC.109.2017/8, 4
[106] Hakeem Yusuf, *Colonial and Post-Colonial Constitutionalism in the Commonwealth: Peace, Order and Good Government* (Routledge 2014)
[107] *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No 2)* (*Bancoult No.2* (*HL*))
[108] Gibraltar Constitution Order 2006, *supra* 99, at s.33(2)(b)

term – in addition to acting in accordance with Royal Instructions from HM in the exercise of his duties.[109]

Notwithstanding the foregoing, the Gibraltar situation remains apt for establishing a new paradigm of decolonization which does not fit into one of the three fixed categories. Here, the Committee of 24 would benefit from adopting the Deleuze's elucidation of the encounter to depart from its self-limiting philosophy of recognition and open up to Gibraltar's *sui generis* self-determination *qua* high level self-government affirmed through plebiscites. This is for several reasons. First, despite the concurrence of constitutional advances and regressions in its 2006 constitution, Gibraltar still operates a high-level of self-government, second perhaps only to Bermuda among the BOTs. Further, the preamble to both the 1966[110] and 2006[111] constitutions assure that Gibraltar will not pass under the sovereignty of another territory against the democratically expressed wishes of its citizens. In addition, the territory has exercised plebiscites under the auspices of self-determination on several occasions. As a precursor to its 1969 Constitution, Gibraltar held a referendum as to whether it should remain British or pass into Spanish sovereignty. The result- with a 95.8% turnout- returned an overwhelming 99.1% vote to remain under British Sovereignty. In 2002, when Labour's then Foreign Secretary Jack Straw entertained the possibility of a joint sovereignty proposal between the UK and Spain, this was overwhelmingly rebuked in a 2002 referendum where 98.48% of Gibraltarians voted against it. Further, the 2006 Constitution was approved by 60% of the Gibraltar electorate 'in exercise of [their] right to self-determination.'

The weight of the various referenda on self-determination in Gibraltar cannot be ignored as this would only reinforce the dogmatic philosophy of recognition that has impeded the work of the Committee of 24 for several decades now. Though the UN condemned Gibraltar's 1967 plebiscite through UN Resolution 2353(XXII),[112] elsewhere it has accepted that they can be used

[109] Ibid., at s.20(3)
[110] Gibraltar Constitution Order 1969, *supra* 94
[111] Gibraltar Constitution Order 2006, *supra* 99
[112] UNGA Res 2353 (XXII) G.A.O.R, Sess., 22. Supp., 16

to assess people's desire as to their future. This was evidenced in the former British Togoland[113] who voted whether they would remain a Trust Territory or become integrated into the Gold Coast upon the independence of Ghana. This example is particularly illuminating as it reveals the possibility of the UN to acknowledge plebiscites as an act of self-determination and, more broadly, the *primacy of the Encounter* as advanced by Deleuze.

Relevantly too, Gibraltar combines many features which are quintessentially not categorizable under the three fixed categories. Indeed, one of the enduring themes of Gibraltar's contemporary constitutional reform has been its overarching desire to maintain its constitutional links to the UK. This makes the three fixed categories, stymied by a dogmatic philosophy of recognition, impermeable to Gibraltar's admission such that a *sui generis* open category is necessary. The suggestion therefore is not that Gibraltar has reached an empirically ascertainable point- which would warrant a review of its constitutional arrangements, far beyond the scope of this article - in which to establish this *sui generis* category, but that certain reforms of its constitution would enable it to do so in the future.

Overall, a revised understanding of decolonization in which primacy is given to the arrangements of the various NSGT ought to presage further delisting and the eventual eradication of colonialism. This approach aligns with Deleuze's epistemic offering by extricating the Committee of 24 from the current strait-jacket of a dogmatic philosophy of recognition of fixed categories of decolonization. A change in the epistemic approach of the Committee of 24, one which harnesses the primacy of the Encounter and dispenses with the dogmatic philosophy of recognition's inertia, would be able to establish *sui generis* categories of decolonization. It would do this by identifying examples of decolonization not as identifiable instances of the three fixed categories, but through elevating the 'specific circumstances'- to use Ban Ki-Moon's statement- of each NSGT. It is interesting that this form of thinking for Deleuzians[114] is referred to as creative, and that Ban-Ki Moon similarly pleads for 'creative solutions'. Further, the

[113] UNGA Res 994 (X) G.A.O.R. Sess., 10 Supp., 19, 24
[114] Lefebvre, *supra* note 36

Committee would do well to honour its 2016 annual report abovementioned, to facilitate 'consultations with the Administering Powers and other stakeholders regarding the status of the Non-Self-Governing Territories on the Committee's agenda'. Through this dialogue, those 'special circumstances' may emerge that are able to challenge the inelasticity of the categories.

5. Conclusion

The Committee of 24 can no longer afford to maintain its current approach to decolonization, otherwise it stands accused of working against the very purpose of its creation, namely to advance the United Nations commitment to affording self-determination to extant colonial territories. There are therefore also issues of legitimacy at stake. As long as the Committee of 24 continues on its current trajectory, it risks greater enmity from listed territories and their administering powers; further distancing itself and the UN at large from its operative functions and goals. Specifically on Gibraltar, the UN's predilection toward the Spanish positions over the territory requires review. The current approach of acceptance of the Spanish position which continues to deny the recognition of Gibraltar's right to self-determination also merits interrogation. The recognition of Gibraltar's right to self-determination is neither a discrete nor necessary precursor that would then enable the establishment of a new *sui generis* category. Rather, these two issues are intimately linked. Part of the Committee of 24's (and the UN generally), problem of overcoming the partiality toward Spanish claims requires unsettling the ossification of their arguments as to its territorial integrity. There is a need to look at the issue with fresh eyes, rather than regurgitating old General Assembly resolutions. Giving primacy to Gibraltar's circumstances will unsettle the hardened assumptions over its status and such an approach will facilitate the realisation of Ban Ki-Moon's vision.