

New Zealand Journal of Public and International Law



VOLUME 5 • NUMBER 1 • JUNE 2007 • ISSN 1776-3930

SPECIAL CONFERENCE ISSUE
14th ANNUAL ANZSIL CONFERENCE:
PACIFIC PERSPECTIVES ON INTERNATIONAL LAW

THIS ISSUE INCLUDES CONTRIBUTIONS BY:

Campbell McLachlan

Rt Hon Helen Clark

José E Alvarez

Transform Aqorau

Andrew T F Lang

Shirley V Scott

Andrew Townend

Stephen Tully

Steven Freeland

VICTORIA UNIVERSITY OF WELLINGTON

Te Whare Wānanga o te Ūpoko o te Ika a Māui



FACULTY OF LAW
Te Kauhanganui Tatai Ture

© New Zealand Centre for Public Law and contributors

Faculty of Law
Victoria University of Wellington
PO Box 600
Wellington
New Zealand

June 2007

The mode of citation of this journal is: (2007) 5 NZJPIL (page)

The previous issue of this journal is volume 4 number 2, November 2006

ISSN 1176-3930

Printed by Stylex Print, Palmerston North

Cover photo: Robert Cross, VUW ITS Image Services

CONTENTS

14TH ANNUAL AUSTRALIA AND NEW ZEALAND SOCIETY OF INTERNATIONAL LAW CONFERENCE: PACIFIC PERSPECTIVES ON INTERNATIONAL LAW

Pacific Perspectives on International Law <i>Campbell McLachlan</i>	1
Address at the Opening of the Australian and New Zealand Society of International Law 14 th Annual Conference <i>Rt Hon Helen Clark</i>	7
<i>Articles</i>	
Instituted Legalisation and the Asia–Pacific "Region" <i>José E Alvarez</i>	15
Challenges and Prospects for Effective Tuna Management in the Western and Central Pacific <i>Transform Aqorau</i>	35
Towards Universal Justice — Why Countries in the Asia–Pacific Region Should Embrace the International Criminal Court <i>Steven Freeland</i>	55
The Role of the Human Rights Movement in Trade Policy-Making: Human Rights as a Trigger for Policy Learning <i>Andrew T F Lang</i>	83
The Political Interpretation of Multilateral Treaties: Reconciling Text with Political Reality <i>Shirley V Scott</i>	109
Tokelau's 2006 Referendum on Self-Government <i>Andrew Townsend</i>	127
The Contribution of Human Rights as an Additional Perspective on Climate Change Impacts within the Pacific <i>Stephen Tully</i>	175

The **New Zealand Journal of Public and International Law** is a fully refereed journal published by the New Zealand Centre for Public Law at the Faculty of Law, Victoria University of Wellington. The Journal was established in 2003 as a forum for public and international legal scholarship.

The NZJPIL welcomes the submission of articles, short essays and comments on current issues, and book reviews. Manuscripts and books for review should be sent to the address below. Manuscripts must be typed and accompanied by an electronic version in Microsoft Word or rich text format, and should include an abstract and a short statement of the author's current affiliations and any other relevant personal details. Authors should see earlier issues of the NZJPIL for indications as to style; for specific guidance, see the Victoria University of Wellington Law Review Style Guide, copies of which are available on request. Submissions whose content has been or will be published elsewhere will not be considered for publication. The Journal cannot return manuscripts.

Contributions to the NZJPIL express the views of their authors and not the views of the Editorial Committee or the New Zealand Centre for Public Law. All enquiries concerning reproduction of the Journal or its contents should be sent to the Student Editor.

Annual subscription rates are NZ\$95 (New Zealand) and NZ\$120 (overseas). Back issues are available on request. To order in North America contact:

Gaunt Inc
Gaunt Building
3011 Gulf Drive
Holmes Beach
Florida 34217-2199
United States of America
e-mail info@gaunt.com
ph +1 941 778 5211
fax +1 941 778 5252

Address for all other communications:

The Student Editor
New Zealand Journal of Public and International Law
Faculty of Law
Victoria University of Wellington
PO Box 600
Wellington
New Zealand
e-mail nzjpil-editor@vuw.ac.nz
fax +64 4 463 6365

TOKELAU'S 2006 REFERENDUM ON SELF-GOVERNMENT

*Andrew Townend**

In February 2006, the people of Tokelau voted in a United Nations-monitored referendum on whether to become a self-governing state in free association with New Zealand. In the event the proposition narrowly failed to attract the necessary two-thirds support. For the time being, Tokelau remains a dependent territory of New Zealand, but with a substantial degree of self-government in practice. This paper traces the most recent phase of constitutional development in Tokelau, and examines the draft Constitution of Tokelau and draft Treaty of Free Association between New Zealand and Tokelau that were the basis of the referendum.

I INTRODUCTION

The three atolls of Tokelau — Atafu, Nukunonu and Fakaofu — lie 500 kilometres and 30 hours by boat to the north of Samoa. On these low-lying atolls, which are separated from one another by several hours' sea travel, live 1500 people.¹

* Legal Adviser, Legal Division, Ministry of Foreign Affairs and Trade. The author is grateful for the assistance and support of Tony Angelo, Rebecca Kitteridge, Bill Mansfield, Jen McDonald, Alison Quentin-Baxter, Gerard van Bohemen, Neil Walter, Lindsay Watt, and Alan Williams. The views expressed in this paper are the author's own.

1 The 2006 census showed a usually resident population of 1466: Statistics New Zealand and the Office of the Council for the Ongoing Government of Tokelau *2006 Tokelau Census of Population and Dwellings: 2006 Census Tabular Report* (Tokelau, 20 December 2006). General information on Tokelau may be found on the websites of Tokelau's Council for the Ongoing Government (<www.tokelau.org.nz>) and the New Zealand Ministry of Foreign Affairs and Trade (<www.mfat.govt.nz>). See also "Report of the Administrator of Tokelau for the Period Ended 30 June 2006" AJHR E 14 and previous reports of the Administrator published in the Appendix to the Journals of the House of Representatives; UNGA "Special Committee on the Situation with regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples: Tokelau Working Paper Prepared by the Secretariat" (4 April 2006) A/AC.109/2006/10 and earlier United Nations working papers and reports at <www.un.org/Depts/dpi/decolonization>.

The colonial history of Tokelau began in 1889, when the atolls were brought under British protection.² Tokelau was then annexed to the Gilbert and Ellice Islands Colony in 1916.³ Tokelau's association with New Zealand dates from 1926, when it was brought under New Zealand administration.⁴ Formal sovereignty was assumed by New Zealand under the Tokelau Act 1948, which incorporated Tokelau as "part of New Zealand".⁵ Tokelau has since then been a dependent territory of New Zealand: it is a separate jurisdiction with a separate administration, but ultimately subject to the legislative authority of a parliament for which the people of Tokelau do not vote.⁶ Tokelau has also remained on the United Nations' list of non-self-governing territories.

In recent years, Tokelau, New Zealand and the United Nations have been engaged in a process of developing self-government in Tokelau. The development of national institutions of government,

2 The protectorate was declared on 20-22 June 1889, during a visit to Tokelau (then known as the Union Islands) by HMS *Egeria*. See Order in Council annexing the Union Islands to the Gilbert and Ellice Islands Colony 1916 (Imp), sch. For the text of this Order and the others mentioned in n 4 below, see Moeimoana Atoni and AH Angelo *Tokelau: A Collection of Documents and References relating to Constitutional Development* (3 ed, Malo o Tokelau, Wellington, 1999). See generally G Marston and PDG Skegg "The Boundaries of New Zealand in Constitutional Law" (1988) 13 NZULR 1, 23-26.

3 Order in Council annexing the Union Islands to the Gilbert and Ellice Islands Colony 1916 (Imp).

4 Union Islands (No 1) Order in Council 1925 (Imp); Union Islands (No 2) Order in Council 1925 (Imp); Union Islands (No 1 of New Zealand) Order 1926. The Ross Dependency had been brought under New Zealand administration three years earlier: Order in Council providing for Government of the Ross Dependency 1923 (Imp).

5 Tokelau Act 1948, s 3; see also Union Islands (Revocation) Order in Council 1948 (Imp). It was considered necessary to effect a formal transfer of Tokelau to New Zealand in order that Tokelauans become New Zealand citizens under the British Nationality and New Zealand Citizenship Act 1948: (20 October 1948) 283 NZPD 3117-3118; (27 October 1948) 283 NZPD 3252-3254. Section 3 is also (in conjunction with the Constitution Act 1986, s 15) the source of the power of the New Zealand Parliament to legislate in respect of Tokelau. The Tokelau Act 1948 contains no express provision that it is in force in Tokelau, but must be taken to be (despite its s 6 — see n 6 below), as must regulations made pursuant to its s 4.

6 By the Tokelau Act 1948, s 6, New Zealand statute law is in force in Tokelau only where expressly provided. Under the Tokelau Amendment Act 1986, ss 3, 4, the High Court and Court of Appeal of New Zealand may sit as courts for Tokelau. (To date this has not happened. On the 1986 court reforms see AH Angelo "Tokelau: Its Legal System and Recent Legislation" (1987) 6 Otago LR 477, 484-491 ["Tokelau: Its Legal System and Recent Legislation"].) See also the Tokelau Administration Regulations 1993, made pursuant to the peace, order and good government clause in the Tokelau Act 1948, s 4. By reg 3 of the Regulations the Minister of Foreign Affairs appoints the Administrator of Tokelau, who by reg 4 is charged with the executive government of Tokelau. See also the definition of "New Zealand" in the Interpretation Act 1999, s 29:

"New Zealand" or similar words referring to New Zealand, when used as a territorial description, mean the islands and territories within the Realm of New Zealand; but do not include the self-governing state of the Cook Islands, the self-governing State of Niue, Tokelau, or the Ross Dependency.

The electoral law of New Zealand does not extend to Tokelau.

and the progressive devolution of executive and legislative authority, have brought Tokelau to the point where it is substantially self-governing in practice, with New Zealand playing a support role. In this context, self-government in free association with New Zealand has emerged as Tokelau's preferred future status. Over the last three years, Tokelau has finalised the text of its own draft Constitution of Tokelau,⁷ and Tokelau and New Zealand have negotiated a draft Treaty of Free Association.⁸ These documents were put to a United Nations-monitored referendum in Tokelau in February 2006, in which the people of Tokelau were asked whether they wished Tokelau to become a self-governing state in free association with New Zealand. In the event, the proposition failed to attract the necessary two-thirds support. For the time being, therefore, Tokelau remains a dependent territory of New Zealand and a non-self-governing territory on the United Nations' list. But the self-government package remains on the table, and indications are that another referendum will be held in late 2007.

This paper examines the constitutional developments of recent years. It begins by recalling the basic elements of the international legal framework for decolonisation, and the characteristics of self-government in free association as opposed to the independence and integration alternatives. The paper goes on to describe the steps that led up to the 2006 referendum, and in particular the developments of the years 2003–2006. There follows an examination of the self-determination package put to the referendum, with its two components: the draft Constitution and the draft Treaty of Free Association. The paper concludes with an account of the referendum and an indication of next steps.

II THE DECOLONISATION FRAMEWORK

The development of self-government in Tokelau sits against the Charter of the United Nations and the various resolutions of the General Assembly on decolonisation. By Article 1 of the Charter, one of the purposes of the United Nations is:⁹

To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace...

7 The English text, to which frequent reference will be made in this article, is attached as Appendix A. The Tokelauan text is accessible at <www.mfat.govt.nz/Foreign-Relations/Pacific/Tokelau/index.php> (accessed 7 April 2007).

8 See the English text, attached for ease of reference as Appendix B. The Tokelauan text is accessible at <www.mfat.govt.nz/Foreign-Relations/Pacific/Tokelau/index.php> (accessed 7 April 2007).

9 Charter of the United Nations (26 June 1945) 59 Stat 1031, art 1 para 2.

Article 73 further provides as follows:

Members of the United Nations which have or assume responsibilities for the administration of territories whose peoples have not yet attained a full measure of self-government recognize the principle that the interests of the inhabitants of these territories are paramount, and accept as a sacred trust the obligation to promote to the utmost, within the system of international peace and security established by the present Charter, the well-being of the inhabitants of these territories, and, to this end:

...

b. to 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;

...

e. to transmit regularly to the Secretary-General for information purposes, subject to such limitations as security and constitutional considerations may require, statistical and other information of a technical nature relating to economic, social, and educational conditions in the territories for which they are respectively responsible...

A resolution of the General Assembly of 14 December 1946 records that New Zealand had declared an intention to transmit information in respect of Tokelau under Article 73(e) of the Charter.¹⁰ Tokelau was thereby listed as a non-self-governing territory of New Zealand.

The right of self-determination expressed in the Charter was more fully developed in the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights of 1966.¹¹ Each proclaimed in its Article 1 that "[a]ll peoples have the right of self-determination", by virtue of which they "freely determine their political status and freely pursue their economic, social and cultural development". Further:

The States Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations.

10 UNGA Resolution 66 (I) (14 December 1946). The resolution records that New Zealand had already begun transmitting information in respect of the Cook Islands (including Niue).

11 International Covenant on Civil and Political Rights (16 December 1966) 999 UNTS 171; International Covenant on Economic, Social and Cultural Rights (16 December 1966) 993 UNTS 3. New Zealand ratified the Covenants on 28 December 1978, with territorial application to the Cook Islands, Niue and Tokelau: 1120 UNTS 482-483, 489-490.

For most non-self-governing territories that have been decolonised under United Nations auspices, self-government has meant independence. But it was recognised in the years following the adoption of the Charter that independence was not the only option: association with another country could also satisfy the requirements of the Charter. General Assembly Resolution 742 (VIII) of 27 November 1953 provided that:¹²

The General Assembly ... [c]onsiders that the manner in which Territories referred to in Chapter XI of the Charter can become fully self-governing is primarily through the attainment of independence, although it is recognized that self-government can also be achieved by association with another State or group of States if this is done freely and on the basis of absolute equality...

That Resolution then went on to set out a list of "factors indicative of the attainment of independence or of other separate systems of self-government". The range of decolonisation options crystallised into three a few years later, with General Assembly Resolution 1541 (XV) of 15 December 1960.¹³

A Non-Self-Governing Territory can be said to have reached a full measure of self-government by:

- (a) Emergence as a sovereign independent State;
- (b) Free association with an independent State; or
- (c) Integration with an independent State.

Two of New Zealand's Pacific dependencies subsequently achieved self-government under United Nations auspices, as self-governing states in free association with New Zealand: the Cook Islands in 1965 and Niue in 1974.¹⁴ There are still sixteen territories on the United Nations' list of

¹² UNGA Resolution 742 (VIII) (27 November 1953) para 6.

¹³ UNGA Resolution 1541 (XV) (15 December 1960), annex, principle VI. The day before, the General Assembly had adopted the landmark Declaration on the Granting of Independence to Colonial Countries and Peoples (UNGA Resolution 1514 (XV) (14 December 1960)). See also the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations (UNGA Resolution 2625 (XXV) (24 October 1970)), which hints at a fourth decolonisation option: "the emergence into any other political status freely determined by a people".

¹⁴ Cook Islands Constitution Act 1964; Niue Constitution Act 1974. (Western Samoa, administered by New Zealand under a League of Nations mandate and then as a Trust Territory under the Charter of the United Nations, above n 9, chs XII, XIII, had become independent in 1962). Compare the "Commonwealth status" of Puerto Rico and the Northern Mariana Islands, and the relatively short-lived association arrangements between the United Kingdom and certain Caribbean islands under the West Indies Act 1967 (UK). See James Crawford *The Creation of States in International Law* (2 ed, Clarendon Press, Oxford, 2006) 625-631, and generally Masahiro Igarashi *Associated Statehood in International Law* (Kluwer, The Hague, 2002).

non-self-governing territories,¹⁵ overseen by a Special Committee of the General Assembly (the "Committee of 24").¹⁶

What do the three self-government options mean in practice? Options (a) and (c) are plain enough: independence means the territory becomes an independent state in its own right; integration makes it part of an existing independent state, on the basis of "complete equality between the peoples of the erstwhile Non-Self-Governing Territory and those of the independent country with which it is integrated",¹⁷ and potentially with a special degree of local autonomy. But what about the middle one, free association (sometimes referred to as "self-government", though it is only one form thereof)?

Professor RQ Quentin-Baxter explained the difference between free association and integration in the following way, in a report to the Niue Island Assembly in 1971:¹⁸

What, then, is the distinction between integration and self-government? The United Nations holds that every man and woman has the right to a voice in the government of his own country, and that every people has the right freely to determine its own political status. Niue, as a dependent territory, is subject to the authority of the New Zealand Parliament; but the people who live in Niue have no vote in a New Zealand electorate. To bring to an end Niue's dependent status, one of two things must happen: either the inhabitants of Niue must become enfranchised as New Zealand voters, or the New Zealand Parliament must assign to the Niue Island Assembly all powers to make laws for Niue. The first alternative is integration; the second alternative is self-government.

In most cases, the basic characteristic of a "self-governing state" (or "associated state" — both terms are widely used) that distinguishes it from a territory that has become an integral part of another state is that the self-governing state has plenary and exclusive power to make its own law

15 American Samoa, Anguilla, Bermuda, British Virgin Islands, Cayman Islands, Falkland Islands, Gibraltar, Guam, Montserrat, New Caledonia, Pitcairn, St Helena, Tokelau, Turks and Caicos Islands, United States Virgin Islands, Western Sahara. The most recent non-self-governing territory to come off the list was Timor-Leste, which became independent in 2002.

16 Or, to give it its full name, the Committee on the Situation with regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples. The Committee was established by UNGA Resolution 1654 (XVI) (27 November 1961).

17 UNGA Resolution 1541 (XV), above n 13, annex, principle VIII.

18 RQ Quentin-Baxter "Report to the Niue Island Assembly on the Constitutional Development of Niue" [1971] I AJHR A 4 para 14.

(and, in turn, to administer itself in accordance with that law).¹⁹ But how is this different from independence?²⁰

The characteristic of a self-governing state that sets it apart from an independent one is its relationship of free association — an unusually close relationship with another state (usually the former administering power) by which that other state extends a special degree of assistance to the self-governing state associated with it.²¹ Beyond that, there is no easy definition of what it means to be self-governing in free association: it varies from case to case and depends on the nature of the government and support arrangements entered into. A useful way to view it is as a point on a spectrum between integration and independence.²² Where a given self-governing state sits on that spectrum will depend on the degree of autonomy it has by virtue of its constitutional arrangements

19 Including the power to amend laws originally made by the former administering power and extended to the former territory — see for example the numerous statutes on the Cook Islands and Niuean statute books that were originally made by the New Zealand Parliament (but query the substantive effect of any amendment or repeal in the Cook Islands or Niue of those statutes that straddle the relationship of free association, such as the Citizenship Act 1977 or the Seal of New Zealand Act 1977). In some cases, the former administering power may retain the ability to legislate for the former non-self-governing territory, but only at its request and with its consent: see the procedures contained in the Constitution of Niue, art 36 (in practice no longer used) and the Constitution of the Cook Islands, art 46 as originally enacted (repealed in the Cook Islands by the Constitution Amendment (No 9) Act 1980-1981 (CI), s 5). Compare, however, the Northern Mariana Islands and Puerto Rico, which have a more limited degree of legislative autonomy than the Cook Islands or Niue (but are considered at least analogous to self-governing states). See Crawford, above n 14, 626-628; Igarashi, above n 14, 214.

20 The question is at least as old as the Charter:

To us of the British Commonwealth it is very difficult to distinguish between self-government and independence, for to the self-governing sovereign States of the British Commonwealth, self-government is independence and independence is self-government.

"Statement by the Right Honourable Peter Fraser, Chairman of the Trusteeship Committee of the San Francisco Conference, June 1945" in *New Zealand Foreign Policy Statements and Documents 1943-1957* (Ministry of Foreign Affairs, Wellington, 1972) 93, 93.

21 See Alison Quentin-Baxter "The Constitutions of Niue and the Marshall Islands: Common Traits and Points of Difference" in Peter Sack (ed) *Pacific Constitutions* (Australian National University, Canberra, 1982) 97, 121-122 ["The Constitutions of Niue and the Marshall Islands"].

22 See for example Alison Quentin-Baxter "Self-government in Free Association with an Independent State: The Applicable Criteria" (Paper presented at the Pacific Regional Seminar on Advancing the Decolonisation Process in the Pacific Region, Majuro, 16-18 May 2000) PRS/2000/CRP.10 4; and the "compass" model in IG Bertram and RF Watters "New Zealand and its Small Island Neighbours: A Review of New Zealand Policy toward the Cook Islands, Niue, Tokelau Islands, Kiribati and Tuvalu" (Institute of Policy Studies, Wellington, 1984) 36-40.

and the terms of its relationship with the supporting state.²³ The following parts of this article seek to locate the proposal for a freely-associated Tokelau on that self-government spectrum.

III CONSTITUTIONAL DEVELOPMENT IN TOKELAU

A Developments Pre-2003

Decolonisation did not loom large for Tokelau for the first period of New Zealand administration. The focus, both in the villages and on New Zealand's part, was on practical matters of day-to-day government:²⁴

[New Zealand's] administration of Tokelau has traditionally been light-handed. There has never been a New Zealand representative based in Tokelau. For the first 50 years ... Tokelau effectively ran itself through each atoll's Village Council, with only occasional visits by the Administrator and minimal financial support from New Zealand.

The first talk of self-government came in the early 1960s. But Tokelau was not about to take lightly any decisions about its future status. When in 1963 it was asked by the New Zealand Government about its intentions, Tokelau chose to retain its existing relationship with New Zealand. That decision was confirmed by Tokelau at various points through the 1960s.²⁵ Ever since, Tokelau has consistently reserved its right to determine its own future in its own time.

-
- 23 For a recent discussion of the relevant factors see Alison Quentin-Baxter "Self-Government in Free Association with the Former Administering Power, Individual Work Programmes, and 'Delisting': Are These Compatible, Acceptable, and Realisable Goals?" (Paper presented at the Pacific Regional Seminar on Advancing the Decolonisation Process in the Pacific Region, Madang, 18-20 May 2004) PRS/2004/DP.4 ["Self-Government"]. The distinction in international legal terms between self-governing states and independent states is a subtle one. Two basic questions arise: if a self-governing state has plenary and exclusive power to make its own laws, how is that different from independence? And if it is not formally categorised as an independent state, can it still be a state at international law? See *The Laws of New Zealand* (Butterworths, Wellington, 2001) Pacific States and Territories: Cook Islands para 34, in which Alison Quentin-Baxter concludes that the international legal personality of the Cook Islands has developed to the extent that it is now a state at international law. See also Crawford, above n 14, 630, in which he notes that "for most purposes" the Cook Islands can now be considered independent. This is apparently to say that for most purposes the Cook Islands can be considered a state: see Crawford, above n 14, 62, 88-89, 349-373, and in particular the test of independence in a devolution context at 358. Compare, however, Crawford's categorisations of the Cook Islands elsewhere as an entity other than a state: Crawford, above n 14, 492, 625, app 1.
- 24 "Report of the Administrator of Tokelau for the Period Ended 30 June 2006", above n 1, 4. From 1926 until 1971 Tokelau was administered from Samoa, with the Administrator (later High Commissioner) of Western Samoa and (from 1962) the High Commissioner for New Zealand in Western Samoa also Administrator of Tokelau. Since 1971 the Administrator has been based in Wellington. See Union Islands (No 1 of New Zealand) Order 1926 and successive Tokelau Administration Regulations.
- 25 See CC Aikman "Constitutional Development in New Zealand's Island Territories and in Western Samoa" in Angus Ross (ed) *New Zealand's Record in the Pacific Islands in the Twentieth Century* (Longman Paul, Auckland, 1969) 308, 316-318.

For its part, New Zealand has taken the view that Tokelau (like the Cook Islands and Niue before it) should be encouraged to be as self-reliant as possible, and to have as equal as possible a relationship with New Zealand, while recognising that the direction and the pace of constitutional development are for Tokelau alone to determine.

In 1976 a United Nations Visiting Mission (the first of five to date) travelled to the atolls. There was still no great enthusiasm in Tokelau for a change in constitutional status, but the visit did mark the beginning of a period of experimentation in national government structures. An important catalyst was the Tokelau Law Project, initiated in 1981 with the aim of identifying, consolidating and reforming the law of Tokelau.²⁶ The project generated numerous law reforms, including a series of regulations under the Tokelau Act 1948 on various practical matters of general law,²⁷ and grew into a process of general constitutional development that continues today.

By the early 1990s Tokelau had its own distinctive system of national government, founded on the authority of the three Taupulega — Tokelau's traditional village councils, made up of heads of families.²⁸ The main organ of this system was, and still is, the General Fono — the national assembly, made up of delegates from the three villages, elected every three years by universal adult suffrage.²⁹ In between sessions of the General Fono, the business of government was handled by an

26 See "Tokelau: Its Legal System and Recent Legislation", above n 6 and AH Angelo "The Tokelau Law Project" in AH Angelo and others *The Law of Tokelau: A Working Collection* (Government of Tokelau, 1997) xiii [*The Law of Tokelau*].

27 See for example Tokelau Divorce Regulations 1987; Tokelau Commissions of Inquiry Regulations 1991; Tokelau Shipping (Salvage) Regulations 1992.

28 This was the institutional manifestation of the governance project known as the "Modern House of Tokelau". See "The Modern House of Tokelau Project: A Way Forward: Discussion Document" in Andrew Townend and AH Angelo *Tokelau: A Collection of Documents and References relating to Constitutional Development* (4 ed, Law Publications, Wellington, 2003) 163 [*Tokelau: A Collection of Documents*]. See also Tokelau Village Incorporation Regulations 1986; Standing Orders of the General Fono as at August 1992 in *The Law of Tokelau*, above n 26, 675; AH Angelo "Tokelau Constitutional Development" (1995) 8 Otago LR 413, 416-417 ["Tokelau Constitutional Development"].

29 On the evolution of the General Fono from the joint island meetings of the 1960s, and on constitutional developments generally up to the end of the 1990s, see Tony Angelo "Establishing a Nation: Kikilaga Nenefu" (1999) 30 VUWLR 75 ["Establishing a Nation"]. The current Standing Orders of the General Fono provide for a system of proportional representation, whereby Nukunonu sends six delegates, Fakaofu seven, and Atafu eight. See Standing Orders of the General Fono, SO 1(1) in Talei Pasikale and others *Tulafono a Tokelau 2005: A Consolidated Collection of the Legislation of Tokelau as at 1 February 2005* (Manulele Tokelau, Tokelau, 2005) vol 2, 469.

executive council consisting of the three Faipule (village leaders, also elected at three-yearly intervals), with the Faipule taking it in turns to act as Ulu o Tokelau (titular head of government) for a year at a time.³⁰

During this period Tokelau expressed an increasing desire to "taste" self-government before committing to any act of self-determination which would bring an end to its colonial status.³¹ On 27 January 1994, the Administrator of Tokelau formally delegated his administrative powers in respect of Tokelau to the General Fono (and to the Council of Faipule when the General Fono was not in session).³² This move followed successive delegations of administrative authority, starting in the early 1970s, to the Apia-based Official Secretary, the head of the Tokelau Public Service.

Tokelau was now starting to show a preference for a future self-governing status of free association with New Zealand, rather than independence or integration. This is perhaps not surprising: Tokelau's fragile practical situation meant that independence was more or less out of the question, and its traditional autonomy and desire to preserve its language and culture made

30 That body is now the Council for the Ongoing Government, consisting of the three Faipule and three Pulenuku. Tokelau has few of the trappings of national government. There is no capital, and the General Fono has no permanent seat but meets in the falefono (meeting house) of the village of the Ulu for the time being. The central office of the national public service is in Apia, Samoa. Given Tokelau's geographical situation and the traditional autonomy of the three atolls, the villages are seen as the foundation of governmental authority, and national government is essentially a coming together of the three villages where circumstances require. In constitutional terms, that authority currently flows from the New Zealand Government. But Tokelau has throughout the period of New Zealand administration been largely left to run itself, with New Zealand institutions and officers remaining more or less invisible. The traditional view of the villages as the source of all authority in Tokelau has thus remained largely intact.

31 On this process of building self-government from within see AH Angelo "The Case of Tokelau: Developments in the Constitutional Review Process in Tokelau" (Paper presented by Andrew Townend at the Pacific Regional Seminar on Advancing the Decolonisation Process in the Pacific Region, Madang, 18-20 May 2004) PRS/2004/DP.3 ["The Case of Tokelau"]. See also Lindsay Watt "Decolonisation" in Malcolm Templeton (ed) *New Zealand as an International Citizen: Fifty Years of United Nations Membership* (Ministry of Foreign Affairs and Trade, Wellington, 1995) 110, 119-120; "Report of the Administrator of Tokelau for the Period Ended 30 June 2002" AJHR E 14 (the final report of Lindsay Watt, Administrator of Tokelau 1993-2003); Tony Angelo "To Be or Not To Be... Integrated: That is the Problem of Islands" (2002) numéro hors série vol 2 Revue Juridique Polynésienne 87, 104-105 ["To Be or Not To Be"]. See also Alison Quentin-Baxter's "working model" for decolonisation in the remaining non-self-governing territories, grounded in the territory's existing or likely future constitutional arrangements (including an ongoing relationship with the administering power) rather than continued discussion of a variety of abstract possibilities. "Self-Government", above n 23.

32 The delegation was effected under the Tokelau Administration Regulations 1993, reg 5. See the instrument of delegation and accompanying letter of understanding, reproduced in *The Law of Tokelau*, above n 26, 692, 694. See also "Tokelau Constitutional Development", above n 28, 418-419. The Administrator retained overall responsibility to the Minister of Foreign Affairs for the administration of Tokelau: Tokelau Administration Regulations 1993, reg 4.

integration too an unattractive proposition. In a statement to a 1994 United Nations Visiting Mission, the Ulu explained that:³³

The Constitution of a self-governing Tokelau is now under active consideration by the people of Tokelau both as a matter of importance in itself and also as an aspect of self-determination in terms of the Charter of the United Nations.

The act of self-determination of Tokelau is now also under active consideration by the people of Tokelau. The present indication is a strong preference for:

- a future status of free association
- free association with New Zealand.

The delegation of the Administrator's powers was followed in 1996 by an amendment to the Tokelau Act 1948, conferring on the General Fono a legislative power.³⁴ The General Fono has since taken over virtually all lawmaking in respect of Tokelau.³⁵ Also in 1996, the General Fono's Special Committee on the Constitution produced a draft Constitution of Tokelau, known as the "First Glimpse".³⁶ A single constitutional document would eventually replace the various provisions

33 "New Wind, New Waters, New Sail: The Emerging Nation of Tokelau" (30 July 1994) A/AC 109/2009/SR7 in *Tokelau: A Collection of Documents*, above n 28, 93, 98.

34 See the Tokelau Amendment Act 1996 and in particular its preamble, which records the course of Tokelau's constitutional development up to that time. The preamble is in English and Tokelauan — a first for the New Zealand Parliament (compare the Niue Constitution Act 1974, sch 1). By the Tokelau Act 1948, s 3A the General Fono has the power to make Rules for the peace, order and good government of Tokelau. That power includes (by s 3A(2)(d)) control over regulations made for Tokelau by New Zealand before 1 August 1996 (but not New Zealand Acts in force in Tokelau). Rules are by s 3B subject to New Zealand Acts and post-1 August 1996 regulations, as well as "any international obligation of Tokelau or applying in respect of Tokelau", and by s 3F may be disallowed by the Administrator (which has never been done). See "Tokelau Constitutional Development", above n 28, 421-423.

35 For the current written law of Tokelau in consolidated form, including the Rules and Standing Orders of the General Fono, see Pasikale and others, above n 29. Before 1996 lawmaking for Tokelau was typically done by regulation under the Tokelau Act 1948, s 4, and by extending general New Zealand statutes (and, by the Tokelau Act 1948, s 7, all regulations under them) to Tokelau by way of a regulation or an extending provision in the particular Act itself (see the lists contained in *The Law of Tokelau*, above n 26, xxi-xxxv). Apart from the Tokelau (Employer for Tokelau Public Service) Order 2001 and the Tokelau (Territorial Sea and Exclusive Economic Zone) Act Commencement Order 2001, the regulation-making power under the Tokelau Act 1948 has been exercised on only four occasions since 1996, all in relation to commemorative coins.

36 "Tokelau: Elements of the Constitution" (1997). This report, subsequent reports of the Special Committee on the Constitution, and other documents associated with constitutional development in Tokelau, many of which are referred to in this article, are held by the Legal Division of the Ministry of Foreign Affairs and Trade. The First Glimpse grew out of constitutional workshops through 1995 (designated by the General Fono the "Year of the Constitution") and 1996. On the general state of play as at 1997 see AH Angelo "The Legal System of Tokelau: An Overview" in *The Law of Tokelau*, above n 26, xviii.

of constitutional significance contained in the Acts, Rules and other laws in force in Tokelau. Subsequent constitutional and legislative developments were greatly informed by the First Glimpse; indeed many aspects of it, including the preamble, were carried over into the draft Constitution put to the 2006 referendum.

B 2003–2006

The years 2003–2006 were a particularly fertile period of constitutional development in Tokelau, culminating in the February 2006 referendum.³⁷ The process began in mid-2003, with a round of village consultations in Tokelau, led by Tokelau's two government lawyers with support from Tokelau's Constitutional Adviser, Professor Tony Angelo of Victoria University of Wellington.³⁸ The Special Committee on the Constitution carried matters forward in October 2003.³⁹ In November the Governments of New Zealand and Tokelau concluded the Joint Statement on the Principles of Partnership between New Zealand and Tokelau.⁴⁰ The Statement, signed in Tokelau in November 2003 in the presence of the Governor-General of New Zealand, Dame Silvia Cartwright,⁴¹ was a major step forward. For the first time, the nature of the relationship was captured in a single formal document. Of particular note is clause 2.2, by which New Zealand and Tokelau "affirm their commitment to work in partnership with the United Nations to achieve a self-determination outcome that fits the local Tokelauan context and has the support of the Tokelauan people".

The General Fono presented to the Governor-General a "second glimpse" of the Constitution, in a specially-woven pandanus cover.⁴² And on 19 November 2003, nine years after Tokelau first

37 See generally "Report of the Administrator of Tokelau for the Period Ended 30 June 2006", above n 1 — the valedictory report of Neil Walter, Administrator of Tokelau from 2003 to 2006. The report covers the four-year period from 1 July 2002 to 30 June 2006.

38 See the report, entitled "Constitutional Consultations May-July 2003: In Preparation to the Workshop of the Special Committee on the Constitution: October 2003".

39 "Tokelau: Meeting of the Special Committee on the Constitution: October 2003".

40 The text of the Principles of Partnership (in English and Tokelauan) is available at <www.tokelau.org.nz>. In agreeing on 27 August 2003 that New Zealand sign the Principles of Partnership, the New Zealand Cabinet also instructed government departments to discharge New Zealand's obligations to provide administrative assistance to Tokelau (and Niue) on a coordinated, "whole-of-government" basis.

41 Governors-General traditionally visit Tokelau once per term. For photographs and commentary see *Tapu* magazine issue 4 (December 2003/January 2004) 38-46. See also issue 5 (March/April 2004) 40-46; issue 6 (May 2004) 22-31.

42 See "Vainuiga o Kalelega: Report on the Constitution and Lawmaking Sessions of the General Fono: Fakaofu, 17-21 November 2003" 13-20 ["Vainuiga o Kalelega"]. The title of the report, inspired by John 21:1-14, refers to a fisherman looking ahead for the best place to cast his nets. The "second glimpse" is an amalgam of the provisions of constitutional significance contained in the Acts, regulations and Rules in force in Tokelau, as well as the Letters Patent constituting the Office of Governor-General of New Zealand (28 October 1983) SR 1983/225 ["Letters Patent"] and the Standing Orders of the General Fono.

indicated a decolonisation preference, the General Fono adopted by unanimous vote a resolution endorsing self-government in free association with New Zealand as "the choice now to be actively explored with the New Zealand Government".⁴³ The decision encapsulated both a prediction as to Tokelau's future status in terms of Resolution 1541 (XV)⁴⁴ and a commitment to working out with New Zealand what that status would mean in practice — before making any act of self-determination.⁴⁵ Work on a Treaty of Free Association that would form the basis of such a relationship began soon after.

In May 2004, representatives of Tokelau and New Zealand attended a United Nations Pacific Regional Seminar on Advancing the Decolonisation Process in the Pacific Region in Madang, Papua New Guinea. Tokelau received special attention as a case study of decolonisation in a small island territory.⁴⁶ In June 2004, in fulfilment of the reporting obligation contained in Article 73(e) of the Charter, the Administrator and the Ulu made their annual appearance before the Committee of 24 as part of its ongoing consideration of "the Question of Tokelau". Not for the first time, Tokelau and New Zealand were warmly praised as a model for other non-self-governing territories and administering powers.⁴⁷

On 1 July 2004 the powers of the Administrator were formally re-delegated to the three villages of Tokelau.⁴⁸ The villages in turn delegated their authority in respect of national matters to the General Fono and the Council for the Ongoing Government of Tokelau (the successor to the Council of Faipule, now including the three Pulenuku (village mayors)),⁴⁹ with specified subject-area competencies including relations with New Zealand and the United Nations.⁵⁰ The re-

43 "Vainiuga o Kalelega", above n 42, 10.

44 UNGA Resolution 1541, above n 13.

45 On the need for such a "sense of direction" see "Self-Government", above n 23, 4. See also "To Be or Not To Be", above n 31, 89-90 on the palette approach versus a single option.

46 See the report in United Nations Special Political and Decolonization Committee "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 2004" (2 July 2004) A/59/23, annex.

47 See for example UNGA Resolution 59/133 (10 December 2004) A/Res/59/133, preamble: "*Noting with appreciation* the continuing exemplary cooperation of New Zealand as the administering Power with regard to the work of the Special Committee relating to Tokelau and its readiness to permit access by United Nations visiting missions to the Territory" ... "*Noting* that, as a small island Territory, Tokelau exemplifies the situation of most remaining Non-Self-Governing Territories and that, as a case study pointing to successful cooperation for decolonization, Tokelau has wider significance for the United Nations as it seeks to complete its work in decolonization".

48 See the three instruments of delegation and accompanying letters of understanding in Pasikale and others, above n 29, 511-516.

49 Standing Orders of the General Fono, SO 11(4).

50 See the instrument of delegation in Pasikale and others, above n 29, 517.

delegation brought the pattern of formal executive authority in Tokelau into line with the traditional "coral-up" approach to government founded on the villages, and was consistent with a contemporaneous public service reform involving the transfer of authority to the villages in respect of village matters.⁵¹ Both developments were seen in Tokelau as a return to the villages of the "pule", or traditional authority.⁵²

Meanwhile, Rules were being made by the General Fono to equip this increasingly self-governing territory with a comprehensive legal system suited to local conditions.⁵³ Where laws had been made for Tokelau or extended to it by New Zealand, they were patriated through a process of re-enactment as Rules of the General Fono.⁵⁴ The aim of this exercise was to make clearer the distinction between the two legal systems and to reduce the risk of confusion as to what the local law was (as opposed to what the New Zealand statute book might suggest it was).⁵⁵

51 See the Public Service Rules 2004 and the Government Superannuation Fund (Recognition of Public Sector Employers for Tokelau) Order 2004.

52 See Falani Aukuso "Return of the 'Pule'" (Paper presented at the Pacific Regional Seminar on Advancing the Decolonisation Process in the Pacific Region, Madang, 18-20 May 2004) PRS/2004/DP.2.

53 See the chronological table in Pasikale and others, above n 29, xiv, and, for example, Crimes, Procedure and Evidence Rules 2003 (replacing the Tokelau Crimes Regulations 1975, an inadequately-adapted version of the criminal provisions of the Niue Act 1966); Contract Rules 2004; Custom as a Source of Law Rules 2004; Interpretation Rules 2003.

54 See for example Census Rules 1961 (replacing the Tokelau Census Regulations 1961); Land Rules 2003 (not in force, pending the repeal by New Zealand of the Tokelau Amendment Act 1967); Visiting Forces Rules 2004 (taking the place of the Visiting Forces Act 1939 (extended to Tokelau by its s 7) upon its repeal and replacement by the Visiting Forces Act 2004 (s 24 of which provides that the Act is not in force in Tokelau, to avoid the "Acts in substitution" rule in the Tokelau Act 1948, s 7)). See also Change of Name Rules 2004 (spent). In other cases, the content of general New Zealand statutes in force in Tokelau was picked up by reference rather than re-enactment in full. See Application of New Zealand Law Rules 2004 (bills of exchange, marine insurance, partnership, trusts, intellectual property).

55 Amendments made by the General Fono (by rule under the Tokelau Act 1948, s 3A(2)(d)) to New Zealand regulations made for Tokelau do not appear in those regulations in their original form on the New Zealand statute book. A similarly confusing situation arises in respect of the Cook Islands and Niue where the legislatures of those self-governing states have amended their Constitutions and the New Zealand Acts and regulations in force there.

Further constitutional meetings took place in mid-2004,⁵⁶ and in August the New Zealand Prime Minister, Rt Hon Helen Clark, visited Tokelau and met with all three village councils.⁵⁷ Her trip followed a meeting of the Pacific Islands Forum in Apia, attended for the first time by a Tokelau leader (Acting Ulu o Tokelau, Faipule Pio Tuia), as a member of the New Zealand delegation. The Acting Ulu's speech, in which he described Tokelau as "a little bird among eagles", received widespread and positive media coverage.⁵⁸ In October 2004 Robert Aisi, Permanent Representative of Papua New Guinea to the United Nations and Chair of the Committee of 24, visited Tokelau and witnessed a meeting of the Special Committee on the Constitution.⁵⁹

The Council for the Ongoing Government visited Wellington in November 2004 for high-level discussions about self-determination and consultations with the main Tokelauan communities. In a meeting with the Minister of Foreign Affairs and Trade, Hon Phil Goff, agreement was reached on the key elements of the draft Treaty of Free Association on which work had begun a year earlier. A further development was the signing of a Deed formally establishing the Tokelau International Trust Fund.⁶⁰

Negotiations were held in Tokelau, Wellington and Apia through 2005, with the draft Treaty going through numerous iterations. By now an act of self-determination was firmly in Tokelau's sights. In July the New Zealand Cabinet formally agreed to the approach being taken to prepare for a change in Tokelau's status, with a referendum on the option of self-government in free association with New Zealand. Cabinet noted drafts of the Constitution and Treaty, and approved the content of

56 See "Tokelau: Constitutional Consultations Report 2: A Proposed Guide for the Workshop of Tokelau's Special Committee on the Constitution: October 2004".

57 This was the third visit by a New Zealand Prime Minister to Tokelau. David Lange had been in January 1985, and Peter Fraser had visited Atafu by flying boat on 24-25 December 1944, during a South Pacific tour that also took in Samoa and the Cook Islands. (27 June 1945) 268 NZPD 3.

58 See for example Helen Tunnah "Tokelau's little bird braves the eagles" (9 August 2004) *New Zealand Herald*.

59 See "Report of the Special Committee on the Constitution: 18-20 October 2004" (Atafu, 2004). Note in particular Mr Aisi's statement at the opening of the meeting (23-26) and a third glimpse of the Constitution, with existing law in Roman type and proposals in italics (27-36).

60 Deed concerning the Tokelau International Trust Fund (10 November 2004) in Pasikale and others, above n 29, 496. By cl 2 the purpose of the trust is "to contribute to the long-term financial viability of Tokelau and to improve the quality of life of the people living in the villages of Tokelau, by providing the Government of Tokelau with an additional source of revenue for recurrent budgetary and development expenditure". Compare Agreement concerning an International Trust Fund for Tuvalu (16 June 1987) 1536 UNTS 47 and note cl 18 of the Tokelau Deed, which provides for its conversion into a treaty at such time as Tokelau has the capacity to enter into treaties on its own behalf. See also the draft Treaty, art 8.

a Tokelau Bill to effect the necessary changes in New Zealand law following a move to self-government in Tokelau.⁶¹

The General Fono at its August 2005 meeting resolved to proceed to a referendum on the basis of the draft Constitution and draft Treaty. It authorised the Council for the Ongoing Government to negotiate with New Zealand the remaining details of the draft Treaty, and on 23 August enacted a set of rules for the referendum. It was decided that the vote be limited to residents of Tokelau (including those temporarily overseas, such as public servants working in Apia and scholarship students and referred patients in New Zealand),⁶² rather than taking in the approximately 12,000 people of Tokelauan descent who live outside Tokelau. The voice of Tokelauans in Tokelau would have been swamped, yet it was they who would have to live with the result.⁶³ The General Fono also decided, in recognition of the seriousness of the choice, to set a threshold of two-thirds of valid votes for a change in status.⁶⁴

In the meantime Tokelau was lifting its international profile. The Administrator of Tokelau and the Secretary to the Council for the Ongoing Government visited a number of foreign capitals in September 2005, seeking financial and technical support for Tokelau, and contributions to the Trust Fund.⁶⁵ Offers of various forms of financial and practical assistance followed. In October, Tokelau

61 In addition to the self-determination "package" of the draft Constitution and draft Treaty, it was necessary to prepare a Bill to bring New Zealand law into line with Tokelau's new constitutional status. Work on a Tokelau Bill began in late 2004, and an advanced draft had been completed by the time of the referendum. The draft Bill is a technical document, directed more at New Zealand than at Tokelau, and was therefore not put before voters in the referendum. It contains a preamble recording the key steps in Tokelau's constitutional history, and would among other things have repealed the Tokelau Act 1948 and put in place the necessary arrangements for Tokelau's continued access to New Zealand courts. It would also have amended and repealed obsolete references to Tokelau in New Zealand law, leaving a minimum of legislative overlap between the two jurisdictions. The Citizenship Act 1977, the Royal Titles Act 1974 and the Seal of New Zealand Act 1977 would have been left as the only New Zealand statutes in force in Tokelau. (See ss 7(3), 3(1) and 7(3) respectively, and cl 4(1) of the schedule to the draft Constitution). Compare the Western Samoa Act 1961, which by its long title is "An Act to make provision in connection with the attainment of independence by the people of Western Samoa".

62 Referendum Rules 2005, r 22(1)(i).

63 This caused some controversy among the expatriate communities, who expressed a feeling of exclusion. Their frustration was assuaged to some degree by successive rounds of consultation. The decision was consistent with the pattern in previous such referenda (Niue's, for example) and with UNGA Resolution 1541, above n 13, annex, principle VII(a) which speaks of a "free and voluntary choice by the peoples of the territory concerned".

64 Referendum Rules 2005, r 22(1)(i). Compare Niue's simple majority: Referendum Ordinance 1974, s 14.

65 See the promotional booklet *Tokelau* (Ministry of Foreign Affairs and Trade, Wellington, 2005).

was admitted as an observer to the Pacific Islands Forum, at its 36th meeting in Madang.⁶⁶ At that meeting Pacific members of the African, Caribbean and Pacific (ACP) development group endorsed in principle an application by a self-governing Tokelau for accession to the Cotonou Agreement.⁶⁷ Also in that month an invitation was issued to the United Nations to monitor the referendum.

Final approvals for the self-government package were issued in November. The General Fono and the New Zealand Cabinet each approved the draft Treaty, and the General Fono approved the draft Constitution (which was noted by Cabinet). In the ensuing three months final preparations were made for the referendum, with the dissemination of voter packages and pamphlets,⁶⁸ briefing sessions in the villages, posting of material on websites, and various press releases.⁶⁹ Competitions were held to select a national flag and anthem.⁷⁰

C Tokelau Pre-Referendum

By the time of the referendum Tokelau was substantially self-governing in practice, but in form still a dependent territory. On the one hand, it was running its own affairs under delegated authority, with New Zealand playing a support role. It was in practice making its own law, and administering itself through its own institutions of government. It was an observer at the Pacific Islands Forum and a member or associate member of regional and international organisations such as the Forum Fisheries Agency and the World Health Organisation. It had its own direct relationships with a number of Pacific neighbours.⁷¹ Tokelau was test-driving self-government in free association. On

66 In 1999 Forum Leaders adopted the following policy on observer status: "A Pacific Island territory on a clear path to achieving self-government or independence may be eligible for observer status at the Forum, subject to the approval of Forum Leaders".

67 Partnership Agreement between the Members of the African, Caribbean and Pacific Group of States and the European Community and its Member States (8 September 2000) 2000/483/EC. The Cook Islands and Niue ratified the Agreement in 2000. Article 94 provides for accession by "an independent State whose structural characteristics and economic and social situation are comparable to those of the ACP States". Although not legally applicable to states wishing to become party by signature and ratification, the accession provision was considered applicable to the Cook Islands and Niue by analogy. See *The Laws of New Zealand*, above n 23, para 36.

68 See in particular the "Self-Determination Package", a bound volume containing the draft Constitution and draft Treaty (plus its Supporting Documents), in both languages, delivered to each household in Tokelau.

69 See the full report of the United Nations Election Monitoring Team "The Referendum in Tokelau 11-15 February 2006" (February 2006) 4-6.

70 Three out of the six finalists in the 2005 competition for a flag for a self-governing Tokelau contained the New Zealand Flag in the upper left-hand corner, mirroring the design of the New Zealand Flag itself.

71 See Memorandum of Understanding between the Government of Tokelau and the Government of Tuvalu (22 April 1996) in Pasikale and others, above n 29, 480; Cooperation Arrangement between the Government of Tokelau and the Government of Samoa (March 2003) in Pasikale and others, above n 29, 482.

the other hand, it was still ultimately subject to the authority of the Administrator and of the New Zealand Parliament.

IV THE SELF-GOVERNMENT PROPOSAL

The proposed legal framework for self-government in free association with New Zealand has two main elements: the draft Constitution of Tokelau,⁷² and the draft Treaty of Free Association.⁷³ The two documents perform different but related functions. The draft Constitution is concerned with the rules for Tokelau's self-government (including its capacity to conduct its own international relations); the draft Treaty provides for Tokelau's relationship with New Zealand. The guiding principles in the development of the draft Constitution and the draft Treaty were to keep the documents as simple and practical as possible, and to capture existing arrangements rather than reinvent anything unnecessarily — for the greatest degree of certainty and clarity of expectation on both sides, and the maximum ease of transition to self-government.⁷⁴

A The Draft Constitution

The development of the draft Constitution began in 1995, with the First Glimpse. It has been a Tokelauan effort throughout, undertaken by the General Fono with advice from Tokelau's Constitutional Adviser and in consultation with the Ministry of Foreign Affairs and Trade.

Like the various reports that preceded it, and the Standing Orders of the General Fono on which it is based, the draft Constitution is bilingual. A special translation committee was convened for the task in 2005. An innovative feature of the Tokelauan text is its glossary, which defines various technical terms (many of which have been created as part of the constitutional development project) and records their English equivalents, for the benefit of the lay reader. As much as possible the draft is expressed in plain language — and the whole document is only 19 articles long.⁷⁵ Much of it is existing law or General Fono practice.⁷⁶ And it contains a relatively simple amendment procedure,

72 See Appendix A.

73 See Appendix B.

74 The self-government package developed by and for Tokelau strongly resembles the concept of "sustained autonomy" elaborated by Alison Quentin-Baxter in "Sustained Autonomy: An Alternative Political Status for Small Islands?" (1994) 24 VUWLR 1. The concept remains a touchstone in considering the future of the remaining non-self-governing territories for which independence or a form of free association close to independence may not be desired or appropriate. Note in particular the principles of the sustained autonomy approach at 7-9: many are features of Tokelau's current situation and of the self-government proposal put to the referendum.

75 By contrast the Constitution of the Cook Islands as originally enacted had 88 articles, and Niue's 82 — but the structures for self-government are more elaborate in each case than those of Tokelau.

76 See for example arts 3-7, relating to the General Fono, which are taken from the Standing Orders of that body, and arts 15 and 16, drawn from the Land Rules 2003 and the Human Rights Rules 2003 respectively. The Human Rights Rules 2003 implement in Tokelau law the rights expressed in the Universal Declaration

the only special requirement being that proposed amendments receive the written support of all three villages (in addition to the ordinary requirement that the villages be given the opportunity to "consider" legislative proposals).⁷⁷

The draft Constitution differs in several respects from those of New Zealand's other associated states, the Cook Islands and Niue.

1 Bottom-up, not top-down

The draft Constitution provides for the "coral-up" approach to government based on the traditional authority of the three villages, rather than the Westminster principles adopted in the Cook Islands and Niue. One Faipule has put it this way:⁷⁸

We have crafted a nation from the logs of the kanava, the tree from which we carve our canoes, and not from logs found in the dockyards of London.

Thus, it begins with the villages,⁷⁹ which are described in the Preamble as "the source of all

of Human Rights (UNGA Resolution 217A (III) (10 December 1948)) and "reflected" in the International Covenant on Civil and Political Rights (above n 11) (r 1), with an administrative remedy for breach (r 3). The importance in the Tokelauan context of the rights of others and of the community is recognised in r 2.

77 See draft Constitution, arts 7 and 18; compare the relatively onerous amendment procedures contained in the Constitutions of the Cook Islands and Niue, requiring two-thirds majority support in the legislature and, for the most important provisions, two-thirds support in a referendum: Constitution of the Cook Islands, art 41; Constitution of Niue, art 35.

78 Pio Tuia, Ulu o Tokelau (Statement to the Special Committee on the Situation with regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples, New York, 24 June 2005). See also "The Case of Tokelau", above n 31.

79 Draft Constitution, art 2. Article 1 defines Tokelau as "all the islands, internal waters, territorial seas, and other areas to which Tokelau is entitled at international law" (compare the Tokelau Act 1948, s 2(1)). A challenging aspect of the development of the draft Constitution was the question of Swain's Island, known to the people of Tokelau as Olohega. Olohega is an atoll lying to the southeast of Fakaofu. It is considered by Tokelauans to be culturally part of Tokelau, but was not part of the original British protectorate and has since 1925 been part of American Samoa. A situation of overlapping territorial claims was resolved in 1980 with the conclusion of a boundary treaty between New Zealand and the United States, following a unanimous decision of the General Fono to waive Tokelau's claim (see Treaty on the Delimitation of the Maritime Boundary between Tokelau and the United States of America (2 December 1980) [1983] NZTS no 17). Tokelau signed the treaty on behalf of New Zealand. See AH Angelo and Hosea Kirifi "The Treaty of Tokehega: An Exercise in Law Translation" (1987) 17 VUWLR 125. The "loss" of Olohega has remained a matter of deep unhappiness in Tokelau ever since. (Several entries in the pre-referendum flag competition featured four stars.) When it came to the draft Constitution, it was decided after much soul-searching in the General Fono to recognise the historical link to Olohega in the Preamble.

authority in Tokelau". It then moves up to the national level: the General Fono,⁸⁰ the Council for the Ongoing Government,⁸¹ and the courts.⁸²

At the High Court and Court of Appeal levels, the courts are borrowed from New Zealand.⁸³ But aside from this and certain prerogative matters,⁸⁴ the draft Constitution is self-contained, with constitutional functions performed by Tokelau officers and institutions, rather than by the Head of State, the Governor-General or New Zealand officers or institutions acting at Tokelau's request. At present, the New Zealand Parliament and the Governor-General in Council have power to make law for Tokelau.⁸⁵ The Governor-General also appoints and removes Law Commissioners (lay

80 Draft Constitution, arts 3-5, 7. Note the specified duties of the General Fono in art 5(1) and the treaty-making process at art 5(2)-(3).

81 Draft Constitution, art 6. Note the specified duties of the Council in art 6(5).

82 Draft Constitution, arts 8-11, sch. See also the Supporting Document under art 5 of the draft Treaty, above n 60 which records in para 11 that "New Zealand will continue to make available to Tokelau the facilities and judicial services of the High Court and Court of Appeal of New Zealand as courts for Tokelau, as provided for in the law of Tokelau and New Zealand".

83 The Tokelau Bill would have provided the necessary authority in New Zealand law: see above n 61; compare Tokelau Amendment Act 1986, ss 3, 4. The borrowing of New Zealand higher courts for appellate purposes was also a feature of the Constitutions of the Cook Islands and Niue as originally enacted: Cook Islands Constitution Act 1964, s 2(2), Constitution of the Cook Islands, arts 61-63; Niue Constitution Act 1974, s 4(2), Constitution of Niue, arts 51, 52. The Constitution Amendment (No 9) Act 1980-1981 (CI) and the Constitution Amendment (No 1) Act 1992 (Niue) saw local appellate courts (typically made up of current or retired New Zealand judges) created in their place. The final court of appeal for the Cook Islands and Niue is in certain cases still the Judicial Committee of the Privy Council (which New Zealand itself borrowed until 2003): Constitution of the Cook Islands, art 59(2), Privy Council (Judicial Committee) Act 1984 (CI); Constitution of Niue, art 55(2). Such appeals were abolished in Tokelau's case in 1986: Tokelau Amendment Act 1986, s 4(2). When asked, none of the Cook Islands, Niue or Tokelau wished to have access to the Supreme Court of New Zealand, established in 2003 to replace the Privy Council as New Zealand's court of final appeal.

84 The prerogative of mercy (exercisable by the Governor-General) extends to Tokelau under the Letters Patent, above n 42, cl XI, though it has probably never been used in relation to Tokelau, and it is not clear whether a self-governing Tokelau would wish to retain it in its current form. The New Zealand Royal Honours system also extends to Tokelau. None of the Statutes of the New Zealand orders are in force in Tokelau, but ordinary membership is open to New Zealand citizens: see for example the Statutes of the New Zealand Order of Merit 1996, cl 6. Three Tokelauans were appointed to New Zealand Orders in the 2006 Queen's Birthday Honours: Faipule Pio Tuia of Nukunonu and Faipule Kolouei O'Brien of Fakaofu (Officers of the New Zealand Order of Merit for services to Tokelau), and Falani Aukuso, former Secretary to the Council for the Ongoing Government and General Manager of the Tokelau Public Service (Companion of the Queen's Service Order for public services). Another quasi-constitutional function, which in Niue's case is provided for in the Constitution of Niue, art 60 and the Niue Constitution Act 1974, s 4(2), is auditing of government accounts. Tokelau's Finance Rules 1998, r 11 provide that the New Zealand Controller and Auditor-General is to audit Tokelau's national accounts, and this would have remained the case after self-government. See Public Audit Act 2001, s 5(1)(d).

85 Tokelau Act 1948, s 3, Constitution Act 1986, s 15; Tokelau Act 1948, s 4.

magistrates, one in each village).⁸⁶ The draft Constitution allocates these functions to the General Fono.⁸⁷

2 *The macroconstitutional dimension*

Starting as it does at the bottom and working up, the draft Constitution deals with macroconstitutional matters in an unusual way. Tokelau is part of the Realm of New Zealand, with the Queen in right of New Zealand as its Head of State and the Governor-General as Her Majesty's representative in respect of Tokelau. These matters are provided for in the Letters Patent of 28 October 1983 constituting the Office of Governor-General of New Zealand.⁸⁸

We do hereby constitute, order, and declare that there shall be, in and over Our Realm of New Zealand, which comprises—

- (a) New Zealand; and
- (b) The self-governing state of the Cook Islands; and
- (c) The self-governing state of Niue; and
- (d) Tokelau; and
- (e) The Ross Dependency,—

a Governor-General and Commander-in-Chief who shall be Our representative in Our Realm of New Zealand...

86 Tokelau Amendment Act 1986, s 5. Appointments are made on the recommendation of the Minister of Foreign Affairs following consultation with the elders of the village concerned: s 5(1).

87 Draft Constitution, arts 7, 9. Unlike the Constitutions of the Cook Islands (in its original form) and Niue, with their request and consent procedures, the draft Constitution of Tokelau does not provide for lawmaking by New Zealand on request.

88 Letters Patent, above n 42, cl I. The Letters Patent are law throughout the Realm of New Zealand: cl IX. There is no express provision to the effect that Tokelau's Head of State is the Queen in right of New Zealand, but that is a necessary inference from Tokelau's place within the Realm (and, currently, its status as a dependent territory of New Zealand). See also Tokelau Act 1948, s 3; Constitution Act 1986, s 2. The composition of the Realm was evident at the swearing-in of Hon Anand Satyanand as Governor-General of New Zealand (and Governor of the Ross Dependency *ex officio*) at Parliament on 23 August 2006. Present were the Queen's Representative in the Cook Islands, Sir Frederick Goodwin, the Premier of Niue, Hon Young Vivian, and a former Ulu o Tokelau, Patuki Isaako. In several speeches since he took office, the Governor-General has greeted his audience in the six languages of the Realm: Maori, Cook Islands Maori, Niuean, Tokelauan, English and New Zealand Sign Language. As between New Zealand and the Cook Islands, and New Zealand and Niue, the Realm may be seen as a constitutional link signifying the relationship of free association (*The Laws of New Zealand*, above n 23, para 27). The relationship is often described as "constitutional", but is really an international legal relationship with constitutional aspects (*The Laws of New Zealand*, above n 23, para 26). Professor Angelo recalls that Professor Quentin-Baxter used the analogy of a coin (specifically, a New Zealand 50 cent coin, legal tender throughout the Realm), with the international legal relationship (and a globe-trotting HM Bark *Endeavour*) on one side, and the constitutional relationship (and the effigy of the Queen) on the other.

As with the Cook Islands and Niue, these arrangements would not be any different if Tokelau were self-governing. But the draft Constitution contains no explicit reference to the Head of State or the Governor-General, or to Tokelau's place within the Realm of New Zealand.⁸⁹ It reflects a village-based view of national authority, and is focussed on the internal structure and governance of Tokelau. So the retention of the Queen in right of New Zealand as Tokelau's Head of State and the Governor-General as Her Majesty's representative in respect of Tokelau is left to be inferred from the Letters Patent, which are expressly preserved as part of the law of Tokelau.⁹⁰

This is somewhat different from the situation in the Cook Islands and Niue. The Constitution of the Cook Islands states at the outset that the Queen in right of New Zealand is Head of State of the Cook Islands.⁹¹ It then provides for a Queen's Representative,⁹² who fulfils essentially the same role in the government of the Cook Islands as the Governor-General does in New Zealand.⁹³ In Niue's case, the Queen's role of Head of State is implicit in a provision in the Constitution vesting the executive authority of Niue in the Queen in right of New Zealand.⁹⁴ There is no separate Queen's Representative: the Governor-General represents the Queen in respect of Niue.⁹⁵

3 *Autochthony*

The development of Tokelau's draft Constitution is an example of autochthony. Constitutional development in Tokelau has mostly been a process of building local institutions, to which the New Zealand Government has delegated legislative and executive authority in respect of national matters. The General Fono, as the central organ of government, is not the creation of New Zealand, but

89 Compare the First Glimpse, above n 36, art 4.2: "The Head of State is the same as that for New Zealand".

90 Draft Constitution, sch, cl 4(2). See also art 6(3), which enables the Ulu o Tokelau to represent "the nation" (that is, Tokelau as Tokelau, rather than Tokelau as part of the Realm of New Zealand), in accordance with the directions of the Council for the Ongoing Government. This role is akin to that played by the Premier of Niue.

91 Constitution of the Cook Islands, art 2. See also art 12, which vests the executive authority of the Cook Islands in Her Majesty the Queen in right of New Zealand and provides for the exercise of that authority by the Queen's Representative, either directly or through subordinate officers.

92 Constitution of the Cook Islands, art 3.

93 This mirroring of the New Zealand system dates from 1982. Constitution Amendment (No 9) Act 1980-1981 (CI), ss 17, 18. The Governor-General now has no role in relation to the Cook Islands beyond that of representing the Queen in respect of the Cook Islands as part of the Realm.

94 Constitution of Niue, art 1, mirroring Constitution of the Cook Islands, art 12.

95 Constitution of Niue, art 1. The role is almost entirely ceremonial: the only powers conferred on the Governor-General by the Constitution relate to the appointment and removal of judges: Constitution of Niue, Part III.

rather began life as the traditional ad hoc gatherings of village representatives.⁹⁶ By the 1980s it had become a regular event; it later came to be recognised as an institution in its own right to which powers could be delegated.

Autochthony can also manifest itself in the way in which the new constitution comes into force. In a decolonisation context, an autochthonous approach means that there is no grant of self-government; rather it springs forth on the withdrawal of the administering power.⁹⁷ Tokelau's draft Constitution contains a trigger provision in its schedule, that would bring the Constitution into force upon the repeal, by the New Zealand Parliament, of the Tokelau Act 1948.⁹⁸ In this respect it resembles the Constitution of Samoa.⁹⁹ The Constitutions of the Cook Islands and Niue, on the

96 See "The Case of Tokelau", above n 31, 5-6; "Establishing a Nation", above n 29, 88 ("[T]he definition, composition and role of the local central agency has been left to the people of the territory ... [C]ontrol of the [General Fono] has always been local and the composition, whether by appointment or through the electoral system, was the choice of the people of the territory").

97 The paradox of such an approach is that in making their new constitution the people have stepped outside the existing (colonial) constitutional order: the new constitution is the product of a revolution. Yet that instrument is intended to establish basic legal parameters for the future that are not subject to extra-legal change. See Sir Kenneth Roberts-Wray *Commonwealth and Colonial Law* (Stevens, London, 1966) 293 ("The greatest objection to autochthony") and the discussion of Samoa 295-301. But as Alison Quentin-Baxter observes, "the reality is that constitutions, whether they are made in the exercise of powers conferred by the existing legal system or by processes involving a break with legal continuity, derive their real strength from the perception that they ought to be obeyed": Alison Quentin-Baxter "The Independence of Western Samoa: Some Conceptual Issues" (1987) 17 VUWLR 345, 359 ["The Independence of Western Samoa"]. This is perhaps particularly the case where the new constitution for the most part captures existing arrangements that are seen as having legitimacy by virtue of their continued operation over time, as with the draft Constitution of Tokelau.

98 Draft Constitution, sch, cl 1.

99 See Constitution of the Independent State of Samoa, art 113: "This Constitution shall come into force on the day approved by the General Assembly of the United Nations as the date of the termination of the Trusteeship Agreement for the Territory of Western Samoa approved by the General Assembly on 13 December 1946." The Western Samoa Act 1961, s 3 provides that "on and after Independence Day Her Majesty in right of New Zealand shall have no jurisdiction over the Independent State of Western Samoa." It was decided not to include such a provision in the Tokelau Bill. It was considered sufficient to let the repeal of the Tokelau Act 1948 speak for itself, and to recognise Tokelau's self-government in the preambles to the Tokelau Bill and the draft Treaty and by amending the Letters Patent, cl 1 and the definition of "New Zealand" in the Interpretation Act 1999, s 29 so as to refer to "the self-governing state of Tokelau" rather than simply "Tokelau". Note also the Constitution of the Independent State of Samoa, art 1(1): "The Independent State of Samoa shall be free and sovereign." There is no equivalent provision in the draft Constitution of Tokelau.

other hand, are "allochthonous" constitutions, made for those self-governing states by Act of the New Zealand Parliament.¹⁰⁰

B The Draft Treaty of Free Association

The development of the draft Treaty of Free Association was a collaborative effort between Tokelau and New Zealand. The purpose of the draft Treaty was to bring together in a single comprehensive package the terms of the proposed free association, with the detail contained in a set of Supporting Documents.¹⁰¹ This approach, which drew on the 2003 Principles of Partnership, was considered to be the most straightforward and secure way of recording the proposed relationship.

1 The terms of free association

At the outset the draft Treaty binds New Zealand and Tokelau to a relationship of partnership and adherence to shared values.¹⁰² This is the basic commitment, essential to the ongoing health of the relationship, from which the more detailed substantive provisions flow. It is supported by a commitment to regular consultation, including meetings between the political leadership of New

100 Cook Islands Constitution Act 1964; Niue Constitution Act 1974. See s 3 of each ("The Cook Islands shall be self-governing"; "Niue shall be self-governing") and the schedules. The draft Tokelau Bill contains no equivalent provision to s 3 of the Cook Islands and Niue Constitution Acts; nor is the draft Constitution of Tokelau appended. (Note however that since the people of the Cook Islands and Niue shaped the content of their constitutions, those instruments too are autochthonous in substance). An incidental benefit of the autochthonous approach is that it produces a single text of the Constitution. The allochthonous approach instead yields two: the Constitution as originally enacted (which in the case of the Cook Islands and Niue remains unchanged on the New Zealand statute book) and the living Constitution as amended from time to time in the jurisdiction for which it was made (once in Niue; 27 times in the Cook Islands: see Constitution Amendment (No 1) Act 1992 (Niue) and the various Constitution Amendment Acts (CI)).

101 The draft Treaty is designed as an enduring document, and cast at a relatively high level. In recognition that the detail would need to change over time to take account of changing circumstances, it is accompanied by Supporting Documents of non-treaty status, to be amended from time to time (see draft Treaty, art 12, and for the Supporting Documents themselves, in both languages, <www.mfat.govt.nz/Foreign-Relations/Pacific/Tokelau/index.php> (accessed 7 May 2007)). These more flexible documents deal with such matters as the amounts of economic support and infrastructure development support for a given multi-year period. See Supporting Document under art 4 of the draft Treaty and the Arrangement between New Zealand and Tokelau on Economic Support to Tokelau 2004/05-2007/08 in Pasikale and others, above n 29, 492; compare Halavaka ke he Monuina: An Arrangement between the Government of New Zealand and the Government of Niue for a Programme of Strengthened Cooperation (30 October 2004). Also prepared in the lead-up to the referendum was a set of information papers recording the rights of Tokelauans to New Zealand citizenship and access to social services in New Zealand.

102 Draft Constitution, art 1. See also the Principles of Partnership, above n 40, cls 1, 5.

Zealand and Tokelau on matters affecting the two countries.¹⁰³ There is no compulsory dispute settlement mechanism,¹⁰⁴ instead the responsibility of making the relationship work is placed on the parties as partners committed to ongoing consultation.

The draft Treaty recognises the importance of Tokelau's language and culture as a source of strength and identity in Tokelau and among the Tokelauan communities in New Zealand.¹⁰⁵ Another central element is the continuing right of Tokelauans to New Zealand citizenship.¹⁰⁶ From the point of view of the people of Tokelau this is perhaps the key benefit of their ongoing link with New Zealand: it enables their free movement between Tokelau and New Zealand and gives them the rights to live and work in New Zealand that all New Zealand citizens enjoy. The shared citizenship is also a potent symbolic source of New Zealand's obligations to provide economic and administrative support to Tokelau,¹⁰⁷ as well as the parties' commitment to shared values.¹⁰⁸

Provision is also made in the draft Treaty for New Zealand's ongoing role on a request and consent basis in respect of defence and international relations.¹⁰⁹ The drafting of the international relations clause mirrors the layout of the draft Treaty itself, by binding the parties at the outset to a "common approach" to engagement with the international community, founded on shared values.¹¹⁰ It then acknowledges the capacity of the self-governing state of Tokelau to conduct its own international relations and to enter into treaties in its own right, and records New Zealand's

103 Draft Constitution, art 10. See also the Principles of Partnership, above n 40, cl 1.3. Compare Cook Islands Constitution Act 1964, s 5; Niue Constitution Act 1974, s 8; Joint Centenary Declaration of the Principles of the Relationship between New Zealand and the Cook Islands ["Joint Centenary Declaration"] (11 June 2001) 3 cls 1, 4. Alison Quentin-Baxter has described such consultation as the "hallmark" of a free association relationship: see "Self-Government", above n 23, 5.

104 Note however the optional mediation process provided for in the Supporting Document under art 10.

105 See also Principles of Partnership, above n 40, cls 3, 11.

106 See draft Constitution, art 3 and the Citizenship Act 1977, s 2(1): "In this Act, unless the context otherwise requires, ... New Zealand includes the Cook Islands, Niue, Tokelau, and the Ross Dependency." Compare Cook Islands Constitution Act 1964, s 6; Niue Constitution Act 1974, s 5.

107 As to which, see arts 4 and 5 and note the references to establishing and maintaining a "good and satisfactory standard of services and infrastructure" taking Tokelau's practical situation into account. See also Principles of Partnership, above n 40, cls 6-8.

108 Note in this regard the Exchange of Letters between the Prime Minister of New Zealand and the Premier of the Cook Islands concerning the Nature of the Special Relationship between the Cook Islands and New Zealand [1973] I AJHR A 10 ["Kirk-Henry Letters"].

109 Draft Treaty, arts 7, 9. Compare Principles of Partnership, cls 9, 10.

110 Draft Treaty, art 9 para 1. Note the link back to art 1.

obligations to assist.¹¹¹ International relations is specifically identified as a topic of regular and special consultations between the parties.¹¹²

The overarching safeguard for Tokelau under the draft Treaty is its change of status clause.¹¹³ This expressly acknowledges Tokelau's right to consider a status other than self-government in free association with New Zealand, including independence or integration with New Zealand, and obliges New Zealand to assist the people of Tokelau to exercise that right.¹¹⁴ Both parties undertake to negotiate in good faith the terms of any change of status.

The draft Treaty seeks to capture in writing the specific interests and needs of Tokelau and New Zealand, with a focus on practical realities. But the document also reflects aspects of precedent documents relating to Samoa, the Cook Islands and Niue, as well as the Principles of Partnership. The language of "shared values" comes via the Principles of Partnership from the 1973 Exchange of Letters between the Prime Minister of New Zealand and the Premier of the Cook Islands concerning the Nature of the Special Relationship between the Cook Islands and New Zealand,¹¹⁵ and the 2001 Joint Centenary Declaration of the Principles of the Relationship between New Zealand and the Cook Islands.¹¹⁶ The articles relating to economic and administrative support may be seen as a more elaborate version of section 7 of the Niue Constitution Act 1974.¹¹⁷ The Supporting Document relating to international relations was in part inspired by Article V of the 1962 Treaty of Friendship

111 Draft Treaty, art 9 paras 2, 3. See also the domestic treaty-making procedure in the draft Constitution, art 5(2). During the lead-up to the referendum, some thought was given to a Treaty of Friendship between Tokelau and Samoa, to provide for practical aspects of the relationship between the two countries.

112 Draft Treaty, art 9 para 4.

113 Draft Treaty, art 11.

114 See International Covenant on Civil and Political Rights, art 1; International Covenant on Economic, Social and Cultural Rights, art 1; UNGA Resolution 1541, above n 13, annex, principle VII(a).

115 See the Kirk-Henry Letters, above n 108: "The special relationship between the Cook Islands and New Zealand is on both sides a voluntary arrangement which depends upon shared interests and shared sympathies. In particular, it calls for understanding on New Zealand's part of the Cook Islands' natural desire to lead a life of their own, and for equal understanding on the Cook Islands' part of New Zealand's determination to safeguard the values on which its citizenship is based."

116 See Joint Centenary Declaration, above n 103, cl 2(1).

117 "It shall be a continuing responsibility of the Government of New Zealand to provide necessary economic and administrative assistance to Niue." This provision has no equivalent in the Cook Islands Constitution Act 1964; New Zealand's obligation to provide economic and administrative assistance to the Cook Islands is implicit. See *The Laws of New Zealand*, above n 23, para 31.

between New Zealand and Samoa.¹¹⁸ And the character of the document, as a record of the key principles of the relationship, reflects the Joint Centenary Declaration and the Principles of Partnership.

2 *The treaty approach*

As a binding instrument at international law, the draft Treaty marks a further departure from the Cook Islands and Niue precedents. The terms of New Zealand's relationships with the Cook Islands and Niue are found in the Constitutions of those countries and New Zealand statutes (which are binding in the domestic law of New Zealand and the associated state), and in various intergovernmental arrangements (which, although of great political weight, are not binding as a matter of domestic or international law).¹¹⁹

When the Cook Islands and Niue became self-governing, in 1965 and 1974 respectively, treaty-making was not something that self-governing states were generally considered able to do as a matter of international law. A treaty approach would not therefore have been feasible as a way of providing for the relationship of free association. But international law now recognises that self-governing states may have treaty-making capacity in their own right (depending on the extent of their constitutional competence and the terms of free association). The Cook Islands and Niue have entered into numerous multilateral treaties and various bilateral ones — including with New

118 Treaty of Friendship between the Government of New Zealand and the Government of Western Samoa (1 August 1962) 453 UNTS 3. Article V provides for New Zealand assistance to Samoa in the conduct of its international relations. On the other hand, art 9 of the draft Treaty was a deliberate departure from the language of s 5 of the Cook Islands Constitution Act 1964, which has been the subject of much confusion: "Nothing in this Act or in the Constitution shall affect the responsibilities of Her Majesty the Queen in right of New Zealand for the external affairs and defence of the Cook Islands, those responsibilities to be discharged after consultation by the Prime Minister of New Zealand with the Premier of the Cook Islands." See also the Joint Centenary Declaration, above n 103, cl 4 para 2: "Any action taken by New Zealand in respect of its constitutional responsibilities for the foreign affairs of the Cook Islands will be taken on the delegated authority, as an agent or facilitator at the specific request of, the Cook Islands. Section 5 of the Cook Islands Constitution Act 1964 thus records a responsibility to assist the Cook Islands and not a qualification of Cook Islands statehood." See Alex Frame "The External Affairs and Defence of the Cook Islands: The 'Riddiford Clause' Considered" (1987) 17 VUWLR 141; *The Laws of New Zealand*, above n 23, para 29.

119 Constitution of the Cook Islands; Constitution of Niue; Cook Islands Constitution Act 1964; Niue Constitution Act 1974; Kirk-Henry Letters, above n 108; Joint Centenary Declaration, above n 103.

Zealand.¹²⁰ The draft Treaty of Free Association thus follows an evolution in international law, as well as in the thinking as to the best way to record the terms of the free association relationship.

C The Effect of a "Yes"

If the result of the referendum in February 2006 had been a majority in favour of self-government, the legal arrangements for Tokelau's self-government and its new relationship with New Zealand would have come into force on a Day of Self-Government in the third quarter of 2006. The commencement of the new Tokelau Act would have triggered the entry into force of the Constitution,¹²¹ and the Treaty would have come into force upon signature on that day.¹²² The change in status would have been recognised by changing the reference to "Tokelau" in clause I of the Letters Patent with a reference to "the self-governing State of Tokelau", as part of a planned amendment of that instrument.¹²³

The effect of these changes would have been a withdrawal by New Zealand of its powers of control over Tokelau, leaving Tokelau to govern itself in accordance with its own Constitution. At the same time, Tokelau and New Zealand would have bound themselves at international law to a relationship of partnership in accordance with the Treaty of Free Association. As a practical matter, little would have been noticeably different: the main change would have been that as a self-governing state Tokelau would have been able to engage in its own right with other states and international organisations, including as a member of the Pacific Islands Forum. Other matters, including the operation of the national organs of government and the systems for support from New Zealand, would have remained more or less unchanged: self-determination would have been mostly a formalisation of the status quo.

V THE REFERENDUM

The referendum was a major national effort for Tokelau, and a major credit to the Tokelau officials responsible for the bulk of the preparation. The New Zealand Chief Electoral Office

¹²⁰ It was the Cook Islands that forged this new path, as early as 1969 on the technical, bilateral front (see for example Civil Aviation Agreement [1969] AJHR A 8, with Exchange of Letters (1 November 1968 and 7 February 1969; terminated 6 August 1985)) and from 1980 in respect of regional and general multilateral treaties, including the constituent treaties of various United Nations Specialised Agencies. See *The Laws of New Zealand*, above n 23, para 36; Joint Centenary Declaration, above n 103, cl 5: "The Government of the Cook Islands possesses the capacity to enter into treaties and other international agreements in its own right with governments and regional and international organisations."

¹²¹ Draft Constitution, above n 77, sch, cl 1.

¹²² Draft Treaty, above n 60, art 13.

¹²³ See Letters Patent (2006) Amending Letters Patent Constituting the Office of Governor-General of New Zealand SR 2006/219. The 2006 Letters Patent were, like the original 1983 instrument, approved in draft by the Governments of the Cook Islands and Niue as self-governing parts of the Realm. The Government of Tokelau was also consulted and concurred with the amendments.

provided practical assistance, both in the lead-up to the referendum and during it. Others present included Robert Aisi, representing the Committee of 24, two United Nations election monitors, and a small media contingent.¹²⁴

Voting began in Apia on 11 February 2006 — 80 years to the day after Tokelau had become a New Zealand territory and 30 years after the first United Nations visiting mission.¹²⁵ It continued in Atafu on 13 February, in Nukunonu on the 14th and in Fakaofu on the 15th. From a practical point of view the exercise went extremely smoothly: the referendum administrators were only let down by cardboard ballot boxes brought from New Zealand, which perished in a flood that struck Apia a few days before the vote began. They were replaced with two sturdy, purpose-built wooden ones.

The ballot paper was designed to be as simple as possible. It put the proposal "That Tokelau become a self-governing state in free association with New Zealand on the basis of the Constitution and the Treaty", in both Tokelauan and English, and invited voters to agree with or reject the proposal.¹²⁶ As the matter was considered to be of national rather than village significance, the referendum was conducted on a nation-wide basis, with no village-by-village count.

124 See "The Referendum in Tokelau 11-15 February 2006", above n 69, and the summary "Report of the United Nations Mission to observe a referendum on self-determination for Tokelau, February 2006" (30 May 2006) A/AC.109/2006/20. For a lively account of the referendum trip see Ian Parker "Birth of a Nation?" (1 May 2006) *The New Yorker* 66. Note however that Parker, like many commentators, conflates "self-government" and "independence". See also Angela Gregory "Pinpricks in the Pacific" (11 March 2006) *New Zealand Herald: Timeout* 26; Michael Field "Tiny bird among eagles" (4 March 2006) *Dominion Post* E5.

125 Postal voting had opened some weeks earlier.

126 See Referendum Rules 2005, sch 2. Compare the wording used in the Samoan referendum of 9 May 1961: "1. Do you agree with the Constitution adopted by the Constitutional Convention on 28 October 1960? 2. Do you agree that on 1 January 1962 Western Samoa should become an independent State on the basis of that Constitution?" (see "The Independence of Western Samoa", above n 97, 356) and the Niuean referendum of 3 September 1974: "Do you vote for self-government for Niue in free association with New Zealand on the basis of the Constitution and the Niue Constitution Act 1974?" (Referendum Ordinance 1974 (Niue), sch 4).

The votes were counted in Fakaofu early in the evening of 15 February. The final breakdown was as follows:

	Number	Proportion of valid votes
Total votes cast ¹²⁷	584	—
Invalid votes ¹²⁸	3	—
Valid votes	581	100.0 %
<i>Votes agreeing with proposal</i>	349	60.1 %
<i>Votes rejecting proposal</i>	232	39.9 %
Votes required to pass proposal	388	66.8 %
Votes short of 2/3 threshold	39	6.7 %

Thus by fewer than 40 votes the proposal for self-government in free association with New Zealand was rejected.¹²⁹ A ceremony later that evening marking the installation of the Faipule of Fakaofu as Ulu for 2006 gave some cause for celebration, but the mood in Fakaofu village the following morning was distinctly subdued.

The referendum had undoubtedly been a success from an organisational point of view. A statement issued on 16 February 2006 on behalf of the United Nations Secretary-General observed that the referendum had been credible and reflective of the will of the people of Tokelau.¹³⁰ The

127 The 584 votes cast represented a 95 per cent turnout of the 615 registered voters. An estimated 70 per cent of eligible voters registered for the referendum ("The Referendum in Tokelau 11-15 February 2006", above n 69, 11); this is considered in line with the usual rate of participation in the three-yearly elections for Faipule, Puleenuku and General Fono delegates.

128 Invalid votes constituted 0.5 per cent of the total votes cast. The report of the Monitoring Team records that one ballot was not marked at all, one was marked in both boxes (for and against the self-government proposal) and one was cast with the issuing stamp removed (ibid, 15).

129 Compare Niue (with the requirement of a simple majority, rather than two-thirds): 1356 valid votes cast; 887 (65.4 per cent) in favour; 469 (34.6 per cent) against. "The Constitutions of Niue and the Marshall Islands", above n 21, 102.

130 See "The Referendum in Tokelau 11-15 February 2006", above n 69, annex 5:

The Secretary-General has taken note of the results of the referendum in Tokelau and respects the decision of its people against moving to self-government in free association with New Zealand. A United Nations team deployed to monitor the vote has concluded that the referendum was credible and reflected the will of the people.

Monitoring Team had been impressed by the "highly professional manner in which the polling was conducted, from the point of view of the polling staff and the voters."¹³¹

VI WHERE TO NOW?

On the morning after the vote count, the Council for the Ongoing Government and the Administrator met to discuss the result. The Council asked that the draft Treaty be kept on the table for the time being, to allow Tokelau to consider its position and a possible further referendum. The New Zealand Government agreed immediately. New Zealand, Tokelau and the United Nations have all since taken the view that the 2006 referendum marked "an" act of self-determination, not "the" act of self-determination.¹³² It was not a choice to remain a dependent territory in perpetuity; rather, the people of Tokelau had by a small margin not approved a move to formal self-government. Sixty per cent of valid votes had been in favour of the change.

For the time being, therefore, the status quo ante prevails: Tokelau's constitutional arrangements remain unchanged, its current relationship with New Zealand, governed by the Principles of Partnership (and reflected in the draft Treaty and Supporting Documents), continues, and it remains on the United Nations' list of non-self-governing territories. It remains an observer at the Pacific Islands Forum, and other initiatives for greater engagement with the international community are on

It is important that the people of Tokelau have had this opportunity. The Secretary-General commends the Government of New Zealand, the administering Power, and the Special Committee on Decolonization, whose commitment to the principles enshrined in the 1960 United Nations Declaration on Decolonization made possible the referendum.

131 Ibid, executive summary, para 4.

132 See statements by the Administrator of Tokelau and the Ulu o Tokelau to the Committee of 24 on 22 June 2006, during its annual consideration of the Question of Tokelau. See also UNGA Resolution 61/127 (14 December 2006) A/RES/61/127, paras 17-20:

The General Assembly, ...

17. *Commends* the professional and transparent conduct of the referendum to determine the future status of Tokelau, which was held from 11 to 15 February 2006 and monitored by the United Nations;
18. *Notes* that the referendum failed by a narrow margin to produce the two-thirds majority of the valid votes cast required by the General Fono to change Tokelau's status as a Non-Self-Governing Territory under the administration of New Zealand;
19. *Welcomes* the agreement of New Zealand to the request by the Tokelau Council of Ongoing Government to maintain the referendum package of a draft Constitution and draft Treaty of Free Association as a possible basis for a future act of self-determination by Tokelau;
20. *Requests* the Special Committee to continue to examine the question of the Non-Self-Governing Territory of Tokelau and to report thereon to the General Assembly at its sixty-second session.

hold. The ordinary business of government and administrative support continues — in much the same way as it would have if Tokelau had voted for self-government.¹³³

After a period of reflection, the General Fono resolved in May 2006 to continue on the pathway to self-government in free association with New Zealand. Three months later, at its August 2006 meeting, the General Fono resolved to hold another referendum in November 2007, on the basis of the same package of draft Constitution and draft Treaty of Free Association. The pattern of constitutional development in Tokelau to date has been one of practice before formal change. Self-government in Tokelau, as a legal reality as well as a practical one, may well be something whose time has yet to come.

¹³³ In mid-2006 a "one-stop shop" Special Relations Unit, headed by the Administrator of Tokelau, was established within the Ministry of Foreign Affairs and Trade, with the aim of better coordinating New Zealand's administrative and other support to Tokelau (and Niue). On the legislative front, some tidying-up elements of the Tokelau Bill are being taken forward by Statutes Amendment Bill.

APPENDIX A

DRAFT CONSTITUTION OF TOKELAU

Preamble

We, the people of Tokelau, declare,

Tokelau is permanently founded on God. This foundation is made manifest in the villages and when the people cooperate and live together peacefully and happily,

At the dawn of time the historic islands of Atafu, Nukunonu, Fakaofu, and Olohega were created as our home. Since the days of Maui and Tui Tokelau the land, sea, and air have nurtured our people, and God has watched over us,

It is important to us now that we be free to make our own decisions. We value the voice of all our people in all the decisions we make. We are independent in the use of our resources,

In the conduct of our daily life we place our culture and customs first and continue to value them. The wishes of our people shall be reflected in our way of life,

The family is the basis of the nation, and the positive approach we use for the raising of our families shall be the basis for making national decisions,

The villages are the source of all authority in Tokelau.

We, the people of Tokelau, believe,

In the Tokelau way, which includes a commitment to a life of interdependence where the less fortunate are cared for, the inati system of sharing resources, equal opportunity to participate in the life of the community, and the right to live happily,

That all undertakings in Tokelau will be planned to conform to the expressed wishes of the people, and will be performed to achieve the fulfilment of those wishes,

In the importance of good health, education and a good standard of living, respect for the law, acceptance of the changes that will benefit Tokelau, respect for the rights of all individuals, non-discrimination, and trustworthy leaders,

That our community groups will have clear aims and constitutions, and will have a role in the development of Tokelau,

That our education must be organised to respond to the needs and wishes of the people, and must give importance to Tokelau knowledge as well as to new knowledge that benefits Tokelau,

We, the people of Tokelau, now join together,

For the protection of our families and culture and for the protection of the independence of the villages in the issues that affect them, and for these purposes establish these principles for the Constitution of Tokelau.

1 Tokelau

Tokelau is all the islands, internal waters, territorial seas, and other areas to which Tokelau is entitled at international law.

2 Villages

- (1) The villages are organised in accordance with the law.
- (2) The villages shall elect a Faipule and a Pulemuku in accordance with the law.

3 General Fono

- (1) The General Fono consists of the following members—
 - (i) The Faipule and Pulemuku of each village, and
 - (ii) One delegate from each village for every 100 inhabitants of that village, based on the latest available census figures rounded to the nearest 100 inhabitants.
- (2) The delegates are designated by each village in accordance with the rules established by that village.
- (3) The term of office of delegates of the General Fono coincides with that of Faipule.
- (4) Where a need arises to replace a member during the term of office, the replacement shall be made by the village in accordance with the rules established by that village.

4 Meetings of the General Fono

- (1) Meetings of the General Fono shall be held where possible at least twice a year.
- (2) The Council for the Ongoing Government shall fix the date for each meeting of the General Fono.
- (3) No decision shall be taken by the General Fono unless at least two thirds of the members are present, including no fewer than four members from each village.
- (4)
 - (i) All matters coming before the General Fono for a decision shall, where a vote is to be taken, be decided by a majority of the votes cast by members of the General Fono.

- (ii) If a matter receives an equal number of votes for and against, the matter has not been approved.
- (5) Meetings of the General Fono shall be open to members of the public, subject to the Standing Orders of the General Fono.
- (6) The General Fono shall conduct its business in such manner as it thinks fit and in accordance with the law and its Standing Orders.
- (7) No court shall have jurisdiction in relation to the conduct of the business of the General Fono, or to the maintenance of order in the General Fono by any person authorised for that purpose.
- (8) The validity of any proceedings in the General Fono and the validity of any certificate given by the Chairperson of the General Fono in the exercise of the functions of the Chairperson shall not be questioned in any court.

5 Executive powers of the General Fono

- (1) It is the duty of the General Fono to manage the following matters in the interests of the nation—
 - (i) National budget appropriation and national financial management;
 - (ii) National public service;
 - (iii) The relationship of Tokelau with New Zealand;
 - (iv) International relations;
 - (v) National integrity;
 - (vi) National resources;
 - (vii) National transport;
 - (viii) Telecommunications;
 - (ix) Postal services;
 - (x) Policy and structures for national health and education;
 - (xi) Tokelau currency for coin collectors; and
 - (xii) Any matters related to any of these items and any matter referred by the Taupulega of each village to the General Fono for its consideration, decision, or legislative action.

- (2) (i) The capacity of Tokelau to enter into treaties and other international arrangements shall be exercised by the Council for the Ongoing Government.
- (ii) Any treaty or other international arrangement may be entered into by Tokelau only following a resolution of the General Fono to that effect.
- (3) No provision of a treaty or other international arrangement shall have the effect of law unless approved by the General Fono by Rule.
- (4) Every document that must be signed by Tokelau may be signed on behalf of Tokelau by the three Faipule, or the Ulu, as they decide.

6 Council for the Ongoing Government

- (1) When the General Fono is not in session, the executive business of the General Fono shall be conducted by the Council for the Ongoing Government, which shall, after such consultation as it thinks fit, take the decisions necessary for the effective administration of Tokelau.
- (2) The Council shall include the three Faipule and the three Pulenuku, and portfolios shall be allocated to each member of the Council.
- (3) The Ulu o Tokelau is the Chair of the Council and represents the Council, the General Fono, and the nation, as determined by the Council.
- (4) The Ulu shall be chosen by the Council from among its members.
- (5) It is the duty of the Council to—
 - (i) Conduct the ongoing government of Tokelau in accordance with General Fono decisions;
 - (ii) Implement General Fono decisions;
 - (iii) Monitor expenditure by villages of project money granted by the General Fono;
 - (iv) Respond to national emergencies;
 - (v) Follow General Fono decisions unless there is a necessity to do otherwise, and then only after consultation with the members of the General Fono.
- (6) The Council has no power to make law.
- (7) The Council shall report to the General Fono at its next meeting on its conduct of the executive business of the General Fono.

7 Lawmaking

- (1) Draft Rules may be introduced to the General Fono by any member of the Council for the Ongoing Government at any time.
- (2) The General Fono shall refer draft Rules to the Taupulega for consideration if the Taupulega had not previously been consulted.
- (3) Where draft Rules have been referred to the Taupulega for consideration the Taupulega shall submit any comments before the next session of the General Fono.
- (4) The General Fono shall consider any comment or notice received from the Taupulega and may approve, amend, or reject the draft Rules as it sees fit.
- (5) In case of urgency, or where the General Fono considers it necessary, the General Fono may approve Rules that have not been considered in draft by the Taupulega.
- (6) Rules made without prior consideration by the Taupulega shall expire on the last day of the next General Fono session if one or more Taupulega disapproves of the Rules and gives written notice of that disapproval to the Council for the Ongoing Government within one month from the date of approval by the General Fono.
- (7) The expiry of Rules under paragraph (6) shall be publicly notified in each village by the Council for the Ongoing Government.

8 Courts of Tokelau

- (1) The courts of Tokelau are—
 - (i) The Commissioner's Court and Appeal Committee of each village;
 - (ii) The High Court;
 - (iii) The Court of Appeal.
- (2) Unless expressly provided in this Constitution, all matters relating to the courts and their operation shall be as provided by Rules of the General Fono.
- (3) The High Court has original and final authority to determine all matters of interpretation and application of this Constitution.
- (4) The power of the High Court under paragraph (3) is subject to articles 4 and 16 and to any right of appeal to the Court of Appeal.

9 Appointment of Commissioners

- (1) Each Taupulega shall designate a person, who is appropriately qualified by virtue of knowledge, experience, and standing in the community and who is not a member of the General Fono, for appointment by the General Fono as the judicial Commissioner for that village.
- (2) The General Fono shall appoint as judicial Commissioner the person designated by each village for a period not exceeding 3 years on such conditions as the General Fono thinks fit.

10 Jurisdiction of the High Court

- (1) The High Court shall have all the jurisdiction necessary to administer the laws of Tokelau.
- (2) The High Court alone shall have jurisdiction to try a case—
 - (i) Which is outside the jurisdiction of a Commissioner;
 - (ii) In which a Commissioner is a party;
 - (iii) Where there has been a valid challenge to the exercise of jurisdiction by the Commissioner.
- (3) Any judge of the High Court may exercise all the powers of the High Court, at any time in Tokelau or beyond Tokelau.

11 Court of Appeal

- (1) The role of the Court of Appeal is to decide appeals from the High Court.
- (2) Appeals from decisions of the High Court shall only be on matters of law and be a matter of right.
- (3) The decision of the Court of Appeal on any matter is final.
- (4) The Court of Appeal may exercise its powers in Tokelau or beyond Tokelau.

12 Sources of Law

- (1) This Constitution is the supreme law of Tokelau and all other laws shall be interpreted so that they are consistent with the Constitution.
- (2) Laws inconsistent with the Constitution are invalid.
- (3) The principles set out in the Preamble shall be applied in the interpretation of this Constitution and other laws.

- (4) The sources of law are, in descending order of priority, this Constitution, General Fono Rules, Village Rules, the custom of Tokelau, and the general principles of international law.
- (5) Where no source is available, the court shall decide according to the rule which it would make if it had to act as the General Fono.

13 Public Service

- (1) Appointments to the National Public Service and to a Village Public Service shall be made on the basis of merit.
- (2) Employment in the service of the National Public Service or in a Village Public Service shall be in accordance with Rules of the General Fono.

14 Finance

- (1) All revenue received for the purposes of the Government of Tokelau is public money and shall be paid into the Tokelau government account.
- (2) No taxes shall be imposed except by a Rule of the General Fono.
- (3) No money shall be withdrawn from the Tokelau government account except—
 - (i) To meet expenditure authorised by the current budget approved by the General Fono; or
 - (ii) In accordance with a Rule of the General Fono.

15 Land

- (1) Subject to this Constitution or any Rule of the General Fono, all land is under the control of the Taupulega.
- (2) Customary land is land held in accordance with the custom of the village.
- (3) Special land is land that is not customary land.
- (4) All matters relating to the ownership of special land shall be determined by the High Court in accordance with the common law of England.
- (5) No land or any interest in land shall be transferred to a person who is not a Tokelauan.
- (6) If land is required for a national purpose then there must be agreement between the Government of Tokelau and the village in respect of the land.

- (7) If land is required for a national or village purpose, the village shall enter into negotiations with the landowners for the purchase or use of the land for the national or village purpose.
- (8) If the village is unable to get the consent of the landowners, the land may be used for the national or village purpose on the condition that the landowners have first received appropriate compensation from the village.

16 Human Rights

- (1) Individual human rights for all people in Tokelau are those stated in the Universal Declaration of Human Rights, and reflected in the International Covenant on Civil and Political Rights.
- (2) The rights of individuals in Tokelau shall be exercised having proper regard to the rights of other individuals and to the community to which the individual belongs.
- (3) If a person thinks that one of their human rights as provided in this Constitution has been denied or may be denied, that person may apply to the Council for the Ongoing Government for protection of that right.
- (4) If the Council for the Ongoing Government agrees with the complaint, it may make any order it thinks appropriate for the protection of that right.
- (5) An order made under paragraph (4) may be enforced in the same manner as a judgment of the High Court.
- (6) The Council for the Ongoing Government has original and final authority to determine all matters of human rights.

17 Citizenship

The citizenship law of Tokelau is as provided for by Treaty of Free Association between Tokelau and New Zealand.

18 Amendments to the Constitution

- (1) This Constitution may be amended only by resolution of the General Fono following the procedure specified in this article.
- (2) A proposal to amend this Constitution shall be presented to the General Fono and then referred by the General Fono to each village for its consideration.
- (3) A proposal under paragraph (2) shall not be approved unless each village has, before the vote in the General Fono, advised the General Fono in writing that it supports the proposal.

19 Commencement, savings, transitional matters and existing laws

- (1) Provisions for the coming into force of this Constitution, savings, transitional matters, continuation of existing law, and amendments to existing laws are set out in the Schedule.
- (2) Article 5(2)(ii) does not apply to any treaty made with New Zealand at the commencement of this Constitution, and any such treaty will bind Tokelau from the time of its signature.

SCHEDULE

1 Commencement

This Constitution becomes effective at the time of the repeal of the Tokelau Act 1948.

2 Savings

All holders of public office and public officers of Tokelau immediately before the commencement of this Constitution shall continue in office after the commencement of this Constitution in accordance with the terms and conditions of their appointment and as if appointed under this Constitution.

3 High Court and Court of Appeal

- (1) Until the General Fono by Rule provides otherwise, the High Court and the Court of Appeal of New Zealand shall respectively act as the High Court and the Court of Appeal of Tokelau and shall in the exercise of their Tokelau jurisdiction apply the law of Tokelau.
- (2) All references in the law of Tokelau to the High Court and Court of Appeal of New Zealand are amended to be references respectively to the High Court and Court of Appeal of Tokelau.

4 Existing laws

- (1) Unless otherwise expressly provided in this Schedule, laws in force in Tokelau immediately before the commencement of this Constitution shall, with all the changes necessary for their operation under this Constitution, continue in force.
- (2) For the avoidance of doubt it is declared that the Letters Patent constituting the Office of Governor-General of New Zealand shall continue to have effect as part of the law of Tokelau.

- (3) The following laws, being laws to which paragraph (1) applies, shall be deemed to be Rules of the General Fono and shall continue in force accordingly—
- (i) Anti-Personnel Mines Prohibition Act 1998;
 - (ii) Civil Aviation Act 1990 (except Part 8A);
 - (iii) Consular Privileges and Immunities Act 1971;
 - (iv) Diplomatic Privileges and Immunities Act 1968;
 - (v) Geneva Conventions Act 1958;
 - (vi) Subsidiary legislation, made under any of the above Acts, which is in force in Tokelau immediately before the commencement of this Constitution;
 - (vii) Tokelau Coinage (Commemorative Coins) Regulations (No 2) 1996;
 - (viii) Tokelau Coinage (Commemorative Coin) Regulations 1997;
 - (ix) Tokelau Coinage (Commemorative Coins) Regulations 1999;
 - (x) Tokelau Coinage (Commemorative Coins) Regulations 2003.
- (4) All references in laws referred to in paragraph (3)—
- (i) To New Zealand are amended to be references to Tokelau, unless the context otherwise requires;
 - (ii) To the Administrator of Tokelau are amended to be references to the Council for the Ongoing Government;
 - (iii) To the Governor-General and Orders-in-Council are amended to be references to the General Fono and to Rules of the General Fono respectively, unless the context otherwise requires;
 - (iv) To the Gazette of New Zealand are amended to be references to "public notification".
- (5) The Tokelau Act 1948 and the Tokelau (Territorial Sea and Exclusive Economic Zone) Act 1977 shall not continue in force in Tokelau after the commencement of this Constitution.
- (6) The Administration Rules 1993 are repealed.

5 Consequential amendments

- (1) On the commencement of this Constitution, provisions of an existing law which are incorporated in this Constitution are superseded by this Constitution.
- (2) As a consequence of paragraph (1) the following are repealed—

- (i) Standing Orders of the General Fono 1(1), 1(3), 1(4), 1(5), 3(1), 3(2), 4, 5(3), 5(5), 9, 11, 12 and 13;
 - (ii) Human Rights Rules 2003;
 - (iii) Public Service Rules 2004, rule 3(3);
 - (iv) Crimes Procedure and Evidence Rules 2003, rule 112(1).
- (3) All references in existing laws to the Government of Tokelau, however expressed, are amended to be references to the Government of Tokelau.

APPENDIX B
DRAFT TREATY OF FREE ASSOCIATION
BETWEEN NEW ZEALAND AND TOKELAU

The Government of New Zealand and the Government of Tokelau,

Acknowledging the long history of friendship and cooperation between New Zealand and Tokelau and the many historical, social and cultural links between their peoples,

Recalling that New Zealand has encouraged and supported Tokelau as it has moved along the path to political self-reliance while leaving it to the people of Tokelau themselves to determine both the direction and the pace of their political evolution,

Recalling further that New Zealand and Tokelau have regularly provided information to the United Nations relating to the situation in Tokelau, including the development of its political institutions, and that the United Nations has been directly informed of developments in Tokelau and the views of its people through visiting missions to Tokelau,

Recalling also the Joint Statement of the Principles of Partnership between New Zealand and Tokelau, signed on 21 November 2003, *and affirming* their commitment to the continuous development of a relationship based on principles of partnership and shared values,

Honouring the cultural heritage and values of the people of Tokelau *and committed* to ensuring an ongoing thriving community living in Tokelau,

Noting that in the exercise of their sovereign right to self-determination the people of Tokelau, under the supervision of the United Nations, have freely chosen to be a self-governing state in free association with New Zealand in accordance with this Treaty,

Desiring to establish their relationship of free association and to record its nature, including their commitments to each other,

Have agreed as follows,

Article 1

Relationship of Free Association

- 1 The relationship between New Zealand and Tokelau is one of free association characterised by close cooperation and consultation in a spirit of partnership, with a commitment on both sides to clear and open communication.

- 2 The relationship shall continue to be founded upon the following principles and shared values:
- (i) Recognition and respect for each other's interests and concerns;
 - (ii) Recognition of Tokelau's unique language and culture as a source of strength and identity for people of Tokelau both in Tokelau and in New Zealand;
 - (iii) Respect for the principles of the Charter of the United Nations, including human rights and the rule of law.

Article 2

Culture and Heritage

New Zealand and Tokelau recognise that Tokelau's unique language and culture are a source of strength and identity both in Tokelau and among Tokelauan communities in New Zealand, and New Zealand undertakes to work with Tokelau and to support an agreed programme to ensure their retention and development.

Article 3

Citizenship

- 1 New Zealand undertakes that the right to New Zealand citizenship, including the associated right to live, work and study in New Zealand, shall continue to be accorded to all persons born in Tokelau, at least one of whose parents is a New Zealand citizen or entitled to reside indefinitely in Tokelau, New Zealand, Niue or the Cook Islands, and to Tokelauans born outside those countries, at least one of whose parents is a New Zealand citizen by birth or grant. New Zealand further undertakes to consult Tokelau on any proposed changes to the law of New Zealand concerning citizenship, passports, immigration or any related matter that might affect Tokelauans.
- 2 Tokelau undertakes not to make any changes to its laws governing the right to residence in Tokelau that might increase the category of persons entitled to New Zealand citizenship under paragraph 1 of this Article without consultation with New Zealand, and to take all appropriate steps to protect the integrity of New Zealand passports.

Article 4

Economic Support and Infrastructure Development Support

- 1 New Zealand undertakes to provide ongoing economic support and infrastructure development support to Tokelau to maintain and improve the quality of life of the people of Tokelau, and Tokelau undertakes to uphold principles of good political and economic

governance, including mutually agreed accounting for the expenditure of the monies involved. The economic support and infrastructure development support to be provided by New Zealand shall be sufficient to establish and maintain a good and satisfactory standard of services and infrastructure in Tokelau, taking into account the remoteness of Tokelau, the physical separation of the three villages and the size of Tokelau's population.

- 2 The level of economic support and infrastructure development support shall be determined by agreement on a multi-year basis as specified from time to time.
- 3 The economic support and infrastructure development support referred to in this Article shall be separate from the support and assistance to be provided by New Zealand under other Articles of this Treaty, New Zealand's contributions to regional development assistance programmes that may include Tokelau and any special purpose assistance by New Zealand that may be agreed from time to time.

Article 5

Administrative, Technical and Specialist Support

- 1 Tokelau is responsible for the delivery of services in Tokelau.
- 2 New Zealand undertakes to provide, at Tokelau's request, administrative assistance and access to technical or specialist advice, support and training in all areas of government activity, including justice, health, education, finance, transport, communications, public sector management, environmental protection, economic development and law enforcement.
- 3 The objective of administrative, technical and specialist support shall be to establish and maintain a good and satisfactory standard of services and infrastructure in Tokelau, taking into account the remoteness of Tokelau, the physical separation of the three villages and the size of Tokelau's population.

Article 6

Emergency and Disaster Relief

New Zealand undertakes to continue to assist Tokelau in coping with emergencies and natural disasters and shall include Tokelau in its disaster relief and mitigation schemes in the Pacific.

Article 7

Defence, Security and Maritime Surveillance

- 1 New Zealand accepts continued responsibility for the defence and security of Tokelau and shall discharge this responsibility at Tokelau's request and with its consent.

- 2 New Zealand also undertakes to continue to assist Tokelau in maritime surveillance, fisheries protection and search and rescue operations.

Article 8

Tokelau International Trust Fund

- 1 New Zealand and Tokelau undertake to continue to support the Tokelau International Trust Fund.
- 2 New Zealand undertakes to assist Tokelau to seek contributions to the Fund from other states and international organisations.

Article 9

International Relations

- 1 New Zealand and Tokelau recognise that a common approach to relations with the international community based on respect for the principles of the Charter of the United Nations including human rights and the rule of law is one of the shared values upon which their relationship of free association is founded and depends.
- 2 Tokelau has the right and the legal capacity to conduct its own international relations and to enter into treaties in its own right.
- 3 New Zealand and Tokelau recognise that Tokelau's practical capacity to undertake its own international relations is limited. New Zealand accordingly undertakes to continue to assist Tokelau in the conduct of its international relations at Tokelau's request and with its consent.
- 4 New Zealand and Tokelau agree that in conducting their international relations they shall respect the shared values referred to in paragraph 1 of this Article and each other's interests. To that end they agree that international relations shall be one of the matters covered in the regular meetings provided for in Article 10. They further agree that if any such matter that might affect the interests of the other requires action before it can be discussed in these regular meetings they shall provide relevant information and an appropriate opportunity for consultation before action is taken.

Article 10

Consultation

- 1 In recognition of the importance of close consultation, as provided in paragraph 1 of Article 1, there shall be regular meetings between New Zealand and Tokelau.
- 2 The frequency, timing and level of these regular meetings shall be determined by agreement from time to time but they shall include meetings as appropriate between the

political leadership of New Zealand and Tokelau on matters which affect the relationship between the two countries.

- 3 If either party requests a special meeting the other party shall make every effort in the spirit of partnership to accommodate that request.

Article 11

Change of Status

- 1 New Zealand acknowledges that the people of Tokelau may at some time in the future wish to consider a status different from that of self-government in free association with New Zealand, including independence or integration with New Zealand.
- 2 New Zealand undertakes that, at Tokelau's request, it shall assist the people of Tokelau to exercise this right with appropriate international supervision.
- 3 New Zealand and Tokelau shall negotiate in good faith the terms of any change of status.

Article 12

Supporting Documents

The means of giving effect to this Treaty shall be recorded in documents agreed from time to time between New Zealand and Tokelau.

Article 13

Entry into Force

This Treaty shall enter into force on the date of signature.

IN WITNESS WHEREOF the undersigned, being duly authorised for the purpose, have signed this Treaty.

DONE at ... this ... day of in four originals, two in the English language and two in the Tokelauan language, the texts of both languages being equally authentic.

FOR THE GOVERNMENT OF NEW ZEALAND:

FOR THE GOVERNMENT OF TOKELAU: