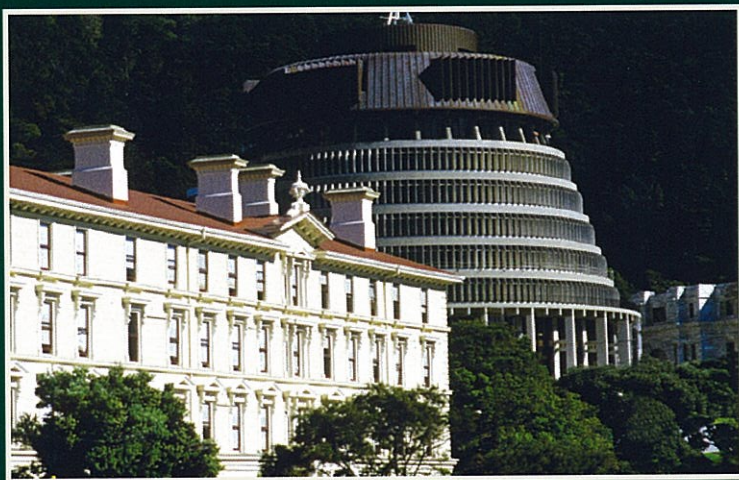


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Stephen Smith
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Victoria

UNIVERSITY OF WELLINGTON

*Te Whare Wānanga
o te Ūpoko o te Ika a Māui*



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CONTENTS

Judicial Review of the Executive – Principled Exasperation	
<i>David Mullan</i>	145
Uncharted Waters: Has the Cook Islands Become Eligible for Membership in the United Nations?	
<i>Stephen Smith</i>	169
Legal Recognition of Rights Derived from the Treaty of Waitangi	
<i>Edward Willis</i>	217
The Citizen and Administrative Justice: Reforming Complaint Management in New Zealand	
<i>Mihiata Pirini</i>	239
Locke's Democracy v Hobbes' Leviathan: Reflecting on New Zealand Constitutional Debate from an American Perspective	
<i>Kerry Hunter</i>	267
The Demise of Ultra Vires in New Zealand: To be? Not to be!	
<i>Ruiping Ye</i>	287

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UNCHARTED WATERS: HAS THE COOK ISLANDS BECOME ELIGIBLE FOR MEMBERSHIP IN THE UNITED NATIONS?

*Stephen Eliot Smith**

The paper gives in depth consideration to whether the Cook Islands could become a member of the United Nations. The author concludes that a Cook Islands application for UN membership would be successful, and undoubtedly UN membership would provide advantages for the Cook Islands and its residents. Whether it will become a reality is a political decision that is one aspect of what it means for a State and its people to exercise the treasured right to self-determination. As such, it is a decision that rests solely with the government and people of the Cook Islands.

I Introduction

Jonah, my eight-year-old son, is interested in geography. On the wall of his bedroom we have hung a large and detailed political map of the world. Recently, he had been examining the area of the South Pacific, and we had a conversation that went something like this:

Jonah: "Dad, are the Cook Islands part of New Zealand?"

Me: "No, not really ..."

Jonah: "On the map under 'Cook Islands' it says 'NZ' in tiny red letters."

Me: "Yes, New Zealand and the Cook Islands are good friends, and we share a lot of the same things ..."

Jonah: "So New Zealand *owns* the Cook Islands, right?"

Me: "No, we don't own it, but we've agreed to be partners, and ..."

Jonah: "Did we *conquer them* in battle?"

Me: "No, but ..."

And so it went, with me providing unsatisfying answers that ultimately were summed up in the classic parental escape-hatch: "it's complicated".

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And it is. In 1965, the Cook Islands and New Zealand entered into a formal relationship of "free association" with each other, but at the time there was little understanding in the international community of precisely what that meant. At a surface level, the Cook Islands seemed to occupy the ill-defined no-mans-land between colony and independent statehood – it was a "Pacific Puerto Rico" of sorts. The issue was extensively mooted at the United Nations (UN), and at the end of the day, the organisation determined that the events of 1965 meant that the Cook Islands had been "decolonised", and that this was what mattered.

The time has now come to question whether the Cook Islands should seek membership in the very organisation that judged the appropriateness of its political status nearly five decades ago. In the early days of the free association, membership in the UN may have been far from the minds of the leaders of the Cook Islands. Of much more importance in the first two decades of the free association were the efforts to establish a respectable foundation of self-governance in domestic affairs. As with any new country emerging from a colonial past, there have been struggles and setbacks, and challenges still remain.¹ But as the Cook Islands nears its fiftieth anniversary as an Associated State, applying for membership in the UN could be a natural, if somewhat surprising, next step.

This article argues that the Cook Islands should apply for membership in the United Nations and that if such an application were lodged, it would be successful. The article is divided into five parts. Part I sets out a short history of the growth in the number of UN member States, including an introduction to the organisation's membership criteria. In Part II, the history and development of the Cook Islands' status as an Associated State is described, with special attention paid to examining how the status has changed since the Cook Islands became an Associated State in 1965. The historical examination in Part II leads to Part III, in which the current status of the Cook Islands at international law is assessed. In Part IV, armed with knowledge of the current legal status of the Cook Islands, the question is whether the Cook Islands is eligible for membership in the UN. After determining that the Cook Islands currently satisfies the criteria for membership in the UN, Part V concludes by asking whether membership in the UN is something with which the Cook Islands should concern itself.

II A Short History of UN Membership

In its first sixty years, the United Nations evolved from being what one commentator has called a "Western victors' club led by the United States" to becoming a body with near-universal

1 For a pessimistic assessment of the first one-and-a-half decades of Cook Islands self-governance, see Mana Strickland "Self-Government and the New Colonialism" in Ron Crocombe (ed) *Cook Islands Politics: The Inside Story* (Polynesian Press, Auckland, 1979) at 7. For a summary of current issues and challenges, see Jon Tikivanotau M Jonassen "Cook Islands" in Stephen Levine (ed) *Pacific Ways: Government and Politics in the Pacific Islands* (Victoria University Press, Wellington, 2009) 35 at 42-44.

representation.² Although some early British and American proposals for a post-Second World War international organisation envisaged a realisation of the long-standing ideal of a grand federative assembly or "United States of the World",³ these early utopian thoughts were largely banished at the preparatory Dumbarton Oaks Conference in mid-1944. When it began to emerge that the Soviet Union would resist efforts to craft a body that went beyond the central goal of maintaining international peace and security, the proposed organisation was criticised by some observers as nothing more than a slightly enlarged "Alliance of the Great Powers".⁴

At the conclusion of the two-month United Nations founding conference in San Francisco, delegates of each of the 50 States that attended the conference signed the UN Charter on 26 June 1945. Three months later, representatives of the new government of Poland signed the Charter, and on 24 October 1945 the UN came into existence with 51 founding members.⁵ Of the original 51 members, 22 were from the Americas,⁶ 14 were from Europe,⁷ nine were from Asia,⁸ four were from Africa,⁹ and just two were from Oceania.¹⁰ At the time, no effort was made to establish the

2 Türkaya Ataöv "United Nations Reform: Some Structural Changes Related to International Democracy" in Hans Koechler (ed) *The United Nations and International Democracy* (Jamahir Society for Culture and Philosophy, Vienna, 1995) 49 at 66.

3 Philosopher Immanuel Kant first proposed the concept of a world federative government in the late 18th century: Emanuel [sic] Kant *Project for a Perpetual Peace: A Philosophical Essay* (translation Vernor and Hood, London, 1796). After the Napoleonic Wars, the major powers maintained the informal and ad hoc series of conferences known as the "Concert of Europe", and by the end of the 19th century, the eventual creation of a permanent world body representing all States was expected: see for example Benjamin F Trueblood *The Federation of the World* (BiblioLife reprint, Charleston, 2009) (1899). The devastation of the First World War prompted the creation of the League of Nations in 1919, which was in many ways the institutional forerunner of the UN.

4 Wilhelm G Grewe and Daniel-Erasmus Khan "Drafting History" in Bruno Simma (ed) *The Charter of the United Nations: A Commentary* (2nd ed, Oxford University Press, Oxford, 2002) vol 1, 1 at [36], quoting Hans Wehberg "Die Vorschläge der 200 amerikanischen Juristen und Publizisten und die Empfehlungen von Dumbarton Oaks" (1944) 44 *Die Friedens-Warte* 369. For an account of the Dumbarton Oaks Conference, see Robert C Hilderbrand *Dumbarton Oaks: The Origins of the United Nations and the Search for Postwar Security* (University of North Carolina Press, Chapel Hill, 2001).

5 For background on the establishment of the UN, see Stephen C Schlesinger *Act of Creation: The Founding of the United Nations* (Westview Press, Boulder, 2003).

6 Argentina, Bolivia, Brazil, Canada, Chile, Colombia, Costa Rica, Cuba, Dominican Republic, Ecuador, El Salvador, Guatemala, Haiti, Honduras, Mexico, Nicaragua, Panama, Paraguay, Peru, United States, Uruguay, and Venezuela.

7 Belgium, Byelorussia, Czechoslovakia, Denmark, France, Greece, Luxembourg, Netherlands, Norway, Poland, Soviet Union, Ukraine, United Kingdom, and Yugoslavia.

8 China, India, Iran, Iraq, Lebanon, Philippines, Saudi Arabia, Syria, and Turkey.

9 Egypt, Ethiopia, Liberia, and South Africa.

10 Australia and New Zealand.

UN as a universal representative body of all the independent States of the world: the Axis States and neutral States of the Second World War were not invited to participate at the conference, and in fact six of the founding UN members were not independent States at the time of the San Francisco Conference.¹¹

Nevertheless, during the negotiations in San Francisco, it was argued by some delegations – particularly those from Latin America – that in order to best fulfil the organisation's principal mission of preserving world peace, UN membership must be expandable and ideally would later become universal among the independent States of the world.¹² There was general agreement on this theoretical point, but the delegates had difficulty in settling on the criteria and procedures for admission of new member states.¹³ Ultimately, five criteria for admission were set out in article 4 of the UN Charter:¹⁴ to be admitted, the applicant must (1) be a State; (2) be peace-loving; (3) accept the obligations contained in the Charter; (4) be able to carry out those obligations; and (5) be willing to do so.¹⁵ An applicant may be admitted to the UN by a positive two-thirds majority vote of the General Assembly "upon the recommendation of the Security Council";¹⁶ this has been interpreted to mean that the General Assembly can vote to admit an applicant only after the Security Council has provided a favourable recommendation, and that the permanent members of the Security Council may use their veto power to stop any such recommendation.¹⁷ The UN does not formally invite or solicit States to apply for membership.

11 Byelorussia, India, Lebanon, Philippines, Syria, and Ukraine. Lebanon and Syria had been League of Nations Mandates and had declared their independence, but final arrangements with France, the mandatory power, were not made until after the founding of the UN. In 1934, the Philippines had entered into what had been planned to be a 10-year transition to independence from the United States. The war interrupted these plans, but at the time of the UN Conference the United States was still committed to Philippine independence, which was ultimately granted in July 1946. Byelorussia and Ukraine were constituent republics of the Soviet Union; Joseph Stalin had originally demanded UN seats for each of the 15 Soviet republics, arguing that they were analogous to the British dominions of Australia, Canada, New Zealand and South Africa. As a compromise, it was agreed that the two Soviet republics that bore the brunt of German aggression in the war would be invited to the Conference. For an explanation of why non-independent India was a founding member, see below n 245.

12 Ruth B Russell and Jeannette E Muther *A History of the United Nations Charter: The Role of the United States 1940-1945* (Brookings Institution, Washington DC, 1958) at 843-844.

13 Ibid, 844-847.

14 Charter of the United Nations, art 4(1).

15 *Conditions of Admission of a State to Membership in the United Nations (Article 4 of the Charter) (Advisory Opinion)* [1948] ICJ Rep 57 at 62.

16 Charter of the United Nations, arts 4(2) and 18(2).

17 *Competence of the General Assembly for the Admission of a State to the United Nations (Advisory Opinion)* [1950] ICJ Rep 4 at 9-10.

In the UN's first ten years, expansion of membership was slow and impeded by political considerations. In 1946, four neutral states – Afghanistan, Iceland, Sweden, and Thailand – were admitted, followed by Yemen and Pakistan in 1947.¹⁸ Burma and Israel were admitted in 1949, but after newly independent Indonesia was admitted in 1950, rising Cold War animosities in the Security Council prevented that body from making any positive recommendations for admission until late 1955.¹⁹ A 1955 "package deal" in the Council resulted in an en masse positive recommendation for 16 applicants whose previous efforts to be admitted had been blocked either by the Soviet Union or by the Western powers.²⁰ By 1959 another seven States had been admitted,²¹ and in 1960 the new UN-backed policy of decolonisation began a period of rapid expansion of UN membership that has only recently abated as membership in the organisation has approached universality. In 1960 alone, 17 new States were admitted, with another 44 being admitted in the rest of the 1960s. Twenty-six States were admitted in the 1970s, most of them also being newly independent States that emerged from decolonisation. The pace slowed in the 1980s with only seven new States being admitted, but membership growth accelerated again in the 1990s with 32 new members. Much of the growth in the 1990s was attributable to the increase in the absolute number of independent States in the world after the break-ups of the Soviet Union and Yugoslavia, but the decade also saw successful applications from a number of so-called "microstates" which had for many years opted to not apply for membership,²² including Liechtenstein (1990), San Marino (1992), Monaco (1993), Andorra (1993), Nauru (1999), and Tonga (1999). Since 2000, another four States have joined the UN, with perhaps the most notable addition being the 2002 admission of Switzerland, which despite being the host State for many UN offices and agencies, had for over fifty years consistently refused to apply for membership.²³

There are currently 192 member States in the United Nations.²⁴ Today, the organisation's membership would be best described as "near universal", with only a few remaining territories in the

18 John Dugard *Recognition and the United Nations* (Grotius Publications, Cambridge, 1987) at 57.

19 Between Indonesia's admission and December 1955, 30 States applied for admission, with Soviet-backed Albania, Bulgaria, Hungary, Mongolia, and Romania failing to receive a sufficient number of positive votes in the Council and the positive recommendations for 25 other applicants being vetoed by the Soviet Union.

20 Albania, Austria, Bulgaria, Cambodia, Ceylon [Sri Lanka], Finland, Hungary, Ireland, Italy, Jordan, Laos, Libya, Nepal, Portugal, Romania, and Spain. For a discussion of the admissions deadlock and the "package deal", see Konrad Ginther "Article 4" in Bruno Simma (ed) *The Charter of the United Nations: A Commentary* (2nd ed, Oxford University Press, Oxford, 2002) vol 1, 177 at [8]-[10].

21 Ghana, Guinea, Japan, Malaysia, Morocco, Sudan, and Tunisia.

22 For more on microstates, see Part IV-B-1 below.

23 In a March 2002 referendum, Swiss citizens voted 54.6 per cent in favour of applying for UN membership: Elizabeth Olson "Stepping Back From Isolation, Switzerland Votes to Join UN" *The New York Times* (New York, 4 March 2002) at A4.

24 United Nations "United Nations Member States" (2010) <www.un.org>.

world lacking UN representation. However, membership for most of the current non-member territories does not appear to be imminent:

- The Holy See, which conducts foreign relations on behalf of the Vatican City State, is a non-State entity and therefore is not eligible for UN membership; on the other hand, Vatican City itself is a State at international law and therefore in theory could be eligible for membership.²⁵ During the 1944 Dumbarton Oaks Conference, Pope Pius XII requested information on the proposed terms of admission for the Vatican and other small States.²⁶ However, since the formal organisation of the UN, the Vatican has not expressed a desire to become a member of the organisation, although the Holy See has been granted official "observer" status.²⁷
- Every year between 1993 and 2008, Taiwan submitted an application to become a member of the UN, but each time its bid failed to gain enough support to even be placed on the UN agenda. In any case, the veto power of the People's Republic of China in the Security Council all but guarantees that Taiwan will not be admitted in the near future.²⁸
- Kosovo declared its independence from Serbia in 2008 and has been recognised as an independent State by over seventy UN members. However, Russia has made it clear that it will veto any attempt by the Security Council to recommend that Kosovo be admitted to the UN.²⁹ Meanwhile, the International Court of Justice (ICJ) has issued an advisory opinion on the legality of Kosovo's declaration of independence, with the majority holding that Kosovo's actions "did not violate general international law".³⁰ At least so far, it does

25 Josef L Kunz "The Status of the Holy See in International Law" (1952) 46 AJIL 308 at 313. The distinction between the Holy See and the Vatican City State is a difficult problem and is poorly understood. Kunz has provided the most satisfactory description of the relationship between the two entities: "Th[e] state of the City of the Vatican is a state, a subject of international law, different from the Holy See. It has become a member of the Universal Postal Union. But it is not a sovereign state. ... Its constitution is not autonomous, but derived from the Holy See. It is a vassal state of the Holy See.": *ibid.*

26 Cordell Hull *The Memoirs of Cordell Hull* (Hodder & Stoughton, London, 1948) vol 2 at 1711-1712; Russell and Muther, above n 12, at 509.

27 Benedetto Conforti *The Law and Practice of the United Nations* (3rd rev ed, Martinus Nijhoff Publishers, Leiden (Neth), 2005) at 6.

28 See Deon Geldenhuys *Contested States in World Politics* (Palgrave Macmillan, New York, 2009) at 221-222. In 2009, Taiwan departed from its 17-year tradition and did not submit its annual application to become a UN member: "MOFA rules out UN membership bid for this year" *Taipei Times* (Taiwan, 5 September 2009) at 3.

29 Geldenhuys, above n 28, at 122-124; "A state is born. Or so say some" *The Economist* (London, 16-22 February 2008) at 59.

30 *Accordance of International Law of the Unilateral Declaration of Independence in Respect of Kosovo* (Advisory Opinion) (22 July 2010) ICJ General List No 141.

not appear that the ICJ judgment has persuaded Russia to change its position and thereby permit Kosovo to join the UN.

- The self-proclaimed statehood of Palestine is disputed, and although Palestine is an official observer at the UN, it is likely that full membership would be granted only after the conclusion of a final settlement with Israel that implemented the proposed "two-State solution".³⁰
- Although the right to self-determination of the former Spanish colony of Western Sahara has been consistently and widely recognised both in theory and in practice,³¹ the territory continues to be occupied and administered by Morocco, which refuses to back down from its unilateral 1975 annexation. As a result, UN membership for Western Sahara will have to await a breakthrough in the stalled negotiations between Morocco, Algeria, and the government-in-exile of Western Sahara.³²
- The lack of any substantial diplomatic recognition of the other "contested States" of the world – including Abkhazia, Nagorno-Karabakh, Northern Cyprus, Somaliland, South Ossetia, and Transnistria – makes UN membership for these quasi-States extremely unlikely for the foreseeable future.³³

As discussed in the remainder of this article, the next State admitted to membership in the United Nations could well be the Cook Islands.

III History and Development of the Cook Islands as an Associated State

A Background and Pre-Associated State History

The territory of the Cook Islands comprises 15 widely dispersed islands and atolls that until administered by Europeans were never unified into a single political unit.³⁴ The 15 islands are informally divided into northern and southern "groups"³⁵ and are located south of Kiribati, west of French Polynesia, and east of Samoa, Tonga, and Niue.³⁶ Although the total land area of the Cook

30 See Geldenhuys, above at n 28, at 147-169.

31 See for example *Western Sahara (Advisory Opinion)* [1975] ICJ Rep 12; SC Res 1871, S/Res/1871 (2009).

32 See Geldenhuys, above at n 28, at 190-207.

33 See generally *ibid*, at 69-106, 128-146 and 170-189.

34 Jonassen, above n 1, at 35-36.

35 *Ibid*, at 35.

36 Formally, the Cook Islands is defined as "all islands in the South Pacific Ocean lying between the 8th and 23rd degrees of south latitude and the 156th and 167th degrees of longitude west of Greenwich": Constitution of the Cook Islands, art 1(1).

Islands is only 236 square kilometres, its maritime exclusive economic zone is approximately 1.8 million square kilometres,³⁷ which is comparable in size to the land territory of Queensland. In the islands' most recent census, there were 19,569 residents counted, with over 70 per cent living on Rarotonga, the largest of the 15 islands and the location of Avarua, the principal settlement and the seat of government.³⁸ The indigenous Polynesian peoples of the islands are known as Cook Islands Māori and they are closely related to the Māori of New Zealand.³⁹ The islands are named after Captain James Cook; recent efforts to adopt an indigenous collective name for the islands have been unsuccessful.⁴⁰

The first known contact with Europeans experienced by the inhabitants of any of the Cook Islands was a brief encounter in 1606 between the inhabitants of Rakahanga and Pedro Fernandes de Queirós, a Portuguese explorer who sailed for Spain.⁴¹ Visits to some of the islands were made in 1777 by James Cook during his third voyage,⁴² and in 1789 by Captain William Bligh and the crew of the ill-fated HMS *Bounty*.⁴³ The first Europeans to reside on the islands were missionaries from the London Missionary Society (LMS), who began arriving in the early 1820s.⁴⁴ Gradually, political control shifted from the tribal chiefs and the LMS to British colonial authorities. In 1888, a British Protectorate was declared over some of the islands,⁴⁵ and in 1901, an Order in Council of the British

37 *Food and Agriculture Organization Fishery Country Profile: Cook Islands*, UN Doc FID/CP/CKI/Rev.3 (2002).

38 Cook Islands Statistics Office *Cook Islands 2006 Census of Population and Dwellings* (Ministry of Finance and Economic Management, Avarua, 2006).

39 Brij V Lal and Kate Fortune (eds) *The Pacific Islands: An Encyclopedia* (University of Hawai'i Press, Honolulu, 2000) at 562.

40 Jonassen, above n 1, at 36; John Henderson "Micro-states and the Politics of Association: The Future of New Zealand's Constitutional Links with the Cook Islands and Tokelau" in Werner vom Busch and others (eds) *New Politics in the South Pacific* (Institute of Pacific Studies, Rarotonga, 1994) 99 at 105. Some have suggested renaming the islands *Avaiki Raro*, but in a 1994 referendum, 69.8 per cent of voters favoured retention of the current name.

41 Andrew Sharp *The Discovery of the Pacific Islands* (Clarendon Press, Oxford, 1960) at 61-63; Howard Henry *The Coming of Tomorrow: European Exploration and "Discovery" of the Cook Islands* (Sovereign Pacific Publishing, Auckland, 2002) at 10-11.

42 Sharp, above n 41, at 138-140; Henry, above n 41, at 31-41.

43 Sharp, above n 41, at 157-162; Henry above n 41, at 47-58. Fletcher Christian, the leader of the *Bounty* mutineers, is generally recognised as the European discoverer of Rarotonga.

44 Richard Gilson *The Cook Islands 1820-1950* (Victoria University Press, Wellington, 1980) at 20.

45 *Ibid*, at 60; WP Morrell *Britain in the Pacific Islands* (Clarendon Press, Oxford, 1960) at 285. For a discussion, see G Marston and PDG Skegg "The Boundaries of New Zealand in Constitutional Law" (1988) 13 NZULR 1 at 11-16.

government incorporated the islands into the "self-governing Colony of New Zealand".⁴⁶ Shortly thereafter, the New Zealand Parliament enacted provisions that allowed Cook Islands affairs to be largely controlled by a Resident Commissioner, who was appointed by the Governor of New Zealand.⁴⁷ Later, Parliament established a comprehensive legal system for the islands, which endured until the implementation of self-government in 1965.⁴⁸

When New Zealand ratified the UN Charter in 1945, the precise status of the Cook Islands was unclear. The Cook Islands had certainly been "annexed and proclaimed part of New Zealand",⁴⁹ but because the islands lacked parliamentary representation and were not subject to New Zealand legislation unless such an application was expressly provided for,⁵⁰ it is difficult to conclude that they formed an integral part of New Zealand proper. Nevertheless, the 1945 ratification of the Charter by New Zealand undoubtedly extended to the territory of the Cook Islands, since at the time New Zealand alone was responsible for the international affairs of the components of its dominion. Shortly after its ratification of the Charter, New Zealand added the Cook Islands to the UN's official list of "Non-Self-Governing Territories"; pursuant to its obligations under articles 73 and 74 of the Charter, New Zealand therefore began to transmit information to the UN Secretary-General regarding the conditions of the islands and their inhabitants.⁵¹ Contributing to the confusion as to the status of the islands was the General Assembly's 1946 acknowledgement that the addition of the Cook Islands to the list was "without prejudice to any interpretation of the expression 'Non-Self-Governing Territories' in view of the fact that the Cook Islands are an integral part of New Zealand".⁵²

Also in 1946, New Zealand began a series of reforms that aimed to involve the residents of the Cook Islands in the governance of the territory. A Legislative Council of the Cook Islands was created and was given the power to impose taxes and advise the Resident Commissioner on the creation of laws. The members of the Council were the Resident Commissioner, members of the Cook Islands Public Service, and Cook Islanders selected by tribal "island councils" on each

46 Extension of Boundaries of the Colony of New Zealand to the Cook Group SR 1901/531, reproduced in "Appointing Date of Extension of Boundaries of Colony to include Cook Group and other Islands" (13 June 1901) *New Zealand Gazette* at 1307-1308.

47 Cook and other Islands Government Act 1901 (NZ), s 5.

48 Cook Islands Act 1915 (NZ).

49 New Zealand Census and Statistics Department *New Zealand Official Year-Book 1945* (53rd ed, EV Paul, Wellington, 1945) at 647.

50 Cook Islands Act 1915 (NZ), ss 618 and 622(2).

51 *Transmission of Information under Article 73e of the Charter* GA Res 66, UN GOAR, 1st sess, 64th plen mtg (1946).

52 *Ibid*, at preamble [2].

island.⁵³ As early as 1955, questions were being asked within the New Zealand government as to the future status of the Cook Islands: would it become a truly integral part of New Zealand, subject to New Zealand legislation and fully represented in Parliament, or would a separate and independent State of the Cook Islands develop?⁵⁴ An on-site report in 1956 by a constitutional expert advised the New Zealand government against complete integration of the islands, but also suggested that Cook Islanders were not yet prepared for complete self-governance. Instead, a middle path between absorption and independence was proposed in which the New Zealand government would gradually devolve governmental responsibilities from the Resident Commissioner to the people of the islands.⁵⁵ Acting on this advice, the New Zealand Parliament enacted the Cook Islands Amendment Act 1957, which replaced the Cook Islands Legislative Council with a Legislative Assembly that was empowered to enact legislation regulating the domestic affairs of the islands.⁵⁶ Although a minority of the Assembly would continue to be composed of appointed members, Cook Islanders were empowered to democratically elect the majority of the Assembly's members.⁵⁷ The first elections by secret ballot and universal suffrage were held on 15 October 1958,⁵⁸ and the governance of the Cook Islands entered a new phase.

On 14 December 1960, the UN General Assembly famously adopted the *Declaration on the Granting of Independence to Colonial Countries and Peoples*.⁵⁹ Announcing the desire of all peoples for "the end of colonialism in all its manifestations",⁶⁰ the General Assembly declared:⁶¹

Immediate steps shall be taken, in Trust and Non-Self-Governing Territories or all other territories which have not yet attained independence, to transfer all powers to the peoples of those territories, without any conditions or reservations, in accordance with their freely expressed will and desire, without

⁵³ Cook Islands Amendment Act 1946 (NZ), ss 2-18.

⁵⁴ H Belshaw and VD Stace *A Programme for Economic Development in the Cook Islands* (prepared for the Department of Island Territories, 1955) at 3-4.

⁵⁵ CC Aikman *First Report on Constitutional Survey of the Cook Islands* (prepared for the Department of Island Territories, 1956).

⁵⁶ The Legislative Assembly could not legislate in areas of defence, external affairs, and title to Crown lands: Cook Islands Amendment Act 1957 (NZ), s 38.

⁵⁷ *Ibid*, ss 32-33.

⁵⁸ Masahiro Igarashi *Associated Statehood in International Law* (Kluwer Law International, The Hague, 2002) at 73.

⁵⁹ *Declaration on the Granting of Independence to Colonial Countries and Peoples* GA Res 1514, UN GOAR, 15th sess, 947th plen mtg (1960).

⁶⁰ *Ibid*, at preamble [6].

⁶¹ *Ibid*, at [5].

any distinction as to race, creed or colour, in order to enable them to enjoy complete independence and freedom.

Ironically, this declaration appears to have caused more discomfort in Wellington than excitement in the Cook Islands. Both before and after the 1960 declaration, there were virtually no self-generated demands for independence or self-government emanating from Cook Islanders.⁶² Nevertheless, on 11 July 1962, the New Zealand Minister of Island Territories delivered a speech before the Cook Islands Legislative Assembly in which he announced that the islands would be asked to choose between four options: (1) complete independence from New Zealand, as Western Samoa had recently selected; (2) complete integration with New Zealand; (3) full internal self-government; or (4) eventual integration into an as-yet non-existent Polynesian or Pacific federation.⁶³ The Minister stated that the New Zealand government was recommending the third option, and advised the Assembly that if that particular course were selected:⁶⁴

... you would retain your New Zealand citizenship, and you would manage your own affairs within the Cook Islands, while New Zealand would be responsible for such matters as external affairs and the constitutional law of the Cook Islands.

Two days later, the Legislative Assembly unanimously passed a motion declaring that full independence was not its desired goal⁶⁵ and that the New Zealand government should "proceeds [sic] with its plan for giving the Cook Islands the fullest possible internal self government while at the same time preserving for the Cook Islands people their present status as New Zealand citizens".⁶⁶ Accordingly, the New Zealand government set out a timetable for constitutional changes and a proposed constitutional Bill, and the Legislative Assembly, aided by three advisers, studied the New Zealand proposals in detail in August 1963.⁶⁷ The next month, the three advisers issued a report with detailed recommendations on each aspect of the proposals,⁶⁸ which were largely accepted by the Legislative Assembly. The final draft of the New Zealand Parliament's Cook Islands Bill was written in consultation with the Cook Islands Legislative Assembly, and on 17 November

62 Igarashi, above n 58, at 74-77; Howard Henry *Rise and Rise of the Cook Islands Party: Cook Islands Politics and the Road to Self-Government: on 4 August 1965* (Sovereign Pacific Publishing, Auckland, 2002) at 1-2.

63 *Proceedings of the Legislative Assembly of the Cook Islands* (5th sess, 1962) at 104-106.

64 *Ibid.*, at 106.

65 *Ibid.*, at 119-122.

66 *Ibid.*, at 120.

67 *Proceedings of the Legislative Assembly of the Cook Islands* (6th sess, 1963) at 490-675.

68 CC Aikman, JW Davidson and JB Wright *Report to the Members of the Legislative Assembly of the Cook Islands on Constitutional Development* (prepared for the Legislative Assembly of the Cook Islands, 1963), reprinted in (1999) 30 VUWLR 519. For a summary of the report, see Igarashi, above n 58, at 74-82.

1964, Parliament enacted the Cook Islands Constitution Act 1964. In order to ensure that Cook Islanders approved of the proposals, the Act was set to come into effect on a date requested by the Legislative Assembly after a general election was held in the islands.⁶⁹ In the 1965 UN-supervised election, the Cook Islands Party – which supported association with New Zealand and the proposed constitution – captured 14 of the 22 seats in the Assembly.⁷⁰ After the New Zealand Parliament enacted some changes that were requested by the newly elected Legislative Assembly,⁷¹ the Assembly voted 19 to 2 to approve the new Constitution.⁷² In accordance with the request of the Legislative Assembly, the Cook Islands Constitution Act 1964 was proclaimed to enter into force on 4 August 1965.⁷³

B The Cook Islands as an Associated State in 1965

With the enactment of the Constitution, the Cook Islands became the first Associated State of the decolonisation era.⁷⁴ Often referred to as "free association", there was not in 1965 – nor is there today – a universally accepted definition of "associated statehood" at international law.⁷⁵ However, a 1960 UN General Assembly resolution outlines the contours of what is meant by "free association":⁷⁶

Principle VI. 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.

Principle VII.

⁶⁹ Cook Islands Constitution Act 1964 (NZ), s 1(2).

⁷⁰ Dick Scott *Years of the Pooh-bah: A Cook Islands History* (Cook Islands Trading Co, Rarotonga, 1991) at 299-300. For the complete election results, see Henry, above n 62, at 91.

⁷¹ Cook Islands Constitution Amendment Act 1965 (NZ); Cook Islands Amendment Act 1965 (NZ).

⁷² Igarashi, above n 58, at 94-95. The 2 dissenting members of the Assembly favoured full integration with New Zealand: Scott, above n 70, at 301-302.

⁷³ Cook Islands Constitution Act Commencement Order 1965 (NZ), reg 128.

⁷⁴ Igarashi, above n 58, at 95.

⁷⁵ Ibid, at 5-6, 111-112.

⁷⁶ *Principles which Should Guide Members in Determining whether or Not an Obligation Exists to Transmit the Information Called for under Article 73e of the Charter* GA Res 1541, UN GOAR, 15th sess, 948th plen mtg, annex (1960).

(a) Free association should be the result of a free and voluntary choice by the peoples of the territory concerned expressed through informed and democratic processes. It should be one which respects the individuality and the cultural characteristics of the territory and its peoples, and retains for the peoples of the territory which is associated with an independent State the freedom to modify the status of that territory through the expression of their will by democratic means and through constitutional processes.

(b) The associated territory should have the right to determine its internal constitution without outside interference, in accordance with due constitutional processes and the freely expressed wishes of the people. This does not preclude consultations as appropriate or necessary under the terms of the free association agreed upon.

In other words, at a minimum, free association requires that the status be (1) selected voluntarily and democratically by an electorate that is informed of its three options, and (2) open to unilateral termination by the Associated State.

Although there was initially some question in the General Assembly whether the creation of the Constitution would be sufficient to remove the Cook Islands from the UN's list of Non-Self-Governing Territories,⁷⁷ ultimately the Assembly voted 78 to 0 to declare that by force of the Constitution of 4 August 1965, "the Cook Islands have attained full internal self-government".⁷⁸ In 1965, what was the nature of the Cook Islands' self-government, and how was it "associated" with New Zealand?

1 Aspects of self-governance in 1965

The statute that created the Constitution of the Cook Islands declares that "[t]he Cook Islands shall be self-governing".⁷⁹ The Legislative Assembly of the Cook Islands was given the exclusive power to unilaterally make laws and to amend or repeal any law then in force in the Cook Islands, including the Constitution.⁸⁰ Significantly, the power of the Parliament of New Zealand to legislate for the Cook Islands without its consent was explicitly abolished.⁸¹ The Legislative Assembly of the Cook Islands was converted into an entirely elected body, and an appointed House of Arikis for

77 For a complete discussion of the Cook Islands debate in the General Assembly and its committees, see Igarashi, above n 58, at 95-110.

78 *Question of the Cook Islands* GA Res 2064, UN GOAR, 20th sess, 1398th plen mtg (1965) at [5]. Twenty-nine States abstained from voting on the resolution: Dusan J Djonovich (ed) *United Nations Resolutions, Series I: Resolutions Adopted by the General Assembly* (Oceana Publications, Dobbs Ferry (NY), 1974) vol 10 at 37.

79 Cook Islands Constitution Act 1964 (NZ), s 3.

80 Cook Islands Constitution Amendment Act 1965 (NZ), sch 2, Constitution of the Cook Islands, arts 39, 41. For a limited number of constitutional provisions, amendment or repeal required a positive two-thirds majority vote in a popular referendum.

81 *Ibid*, art 46.

traditional island leaders was created, which was given advisory powers only.⁸² A member of the Legislative Assembly who commanded the confidence of the Assembly would be the Premier, and the Premier and his Cabinet would have the "general direction and control of the executive government".⁸³ However, an appointed High Commissioner of the Cook Islands, who would represent the Head of State and would appoint the Premier, would formally exercise the executive authority of the government.⁸⁴ The High Commissioner would act on the advice of the Premier and the Cabinet in assenting to Bills after passage by the Legislative Assembly; in calling, proroguing, and dissolving the Legislative Assembly; and in appointing judges, judicial commissioners, and justices of the peace.⁸⁵ A High Court of the Cook Islands would have full jurisdiction over both civil and criminal matters, and a Land Court and a Land Appellate Court were established.⁸⁶ In these aspects, on 4 August 1965 the Cook Islands largely resembled any other self-governing member of the British Commonwealth that had adopted the Statute of Westminster 1931.⁸⁷

2 *Aspects of association with New Zealand in 1965*

However, the Cook Islands in 1965 differed from other self-governing Commonwealth realms in significant ways: it retained a number of associations with New Zealand, and these associations are what made the Cook Islands an "Associated State". At the same time, because the Cook Islands was given the power to amend its Constitution, the relationship was one that could be unilaterally terminated by the Cook Islands.

Just as there was no accepted international definition of what constituted an "Associated State" in 1965, so too were the Cook Islands Constitution and the New Zealand statute that enacted it silent on the matter; in fact, neither document explicitly declared that the Cook Islands was to be in association with New Zealand. Rather, the existence and meaning of the association could be deduced from the provisions of the Constitution and the New Zealand statute by which it was enacted,⁸⁸ and it is these original constitutional provisions that made the Cook Islands "the pioneer in associated state thinking".⁸⁹

82 Ibid, arts 8-9.

83 Ibid, art 13.

84 Ibid, arts 3, 12(2) and 13(2).

85 Ibid, arts 5, 8(3), 29, 37, 44, 57 and 64.

86 Ibid, arts 47, 52 and 55.

87 Statute of Westminster 1931 (UK) 22 & 23 Geo V c 4, adopted in New Zealand by the Statute of Westminster Adoption Act 1947 (NZ) (the latter was repealed by the Constitution Act 1986 (NZ), s 28(1)).

88 *Laws of New Zealand* Pacific States and Territories: Cook Islands at [8].

89 Arnold H Leibowitz *Colonial Emancipation in the Pacific and the Caribbean: A Legal and Political Analysis* (Praeger Publishers, New York, 1976) at 132.

First, the 1965 Constitution set out that the Cook Islands would continue to share a Head of State with New Zealand: it provided that "Her Majesty the Queen in right of New Zealand shall be the Head of State of the Cook Islands".⁹⁰ Although there is only one individual who is the Queen, it has been widely recognised since the 1950s that the Crown – meaning the Sovereign – is a legal entity that is distinct from the personage of the Queen and is therefore divisible among separate jurisdictions.⁹¹ Thus, each of the 16 Commonwealth realms that have retained the Queen as Sovereign has a separate legal entity as Head of State, even if all 16 legal entities are currently embodied within the personage of Queen Elizabeth II.⁹² Rather than adopting a separate and legally unique Head of State, which would be one of the sure signs of full independence, the Cook Islands chose to continue to associate itself with New Zealand by maintaining with that country a common Head of State.

Second, the High Commissioner of the Cook Islands, who was established by the 1965 Constitution as the representative of the Queen in the Cook Islands, was also designated as the representative of the Government of New Zealand in the Cook Islands.⁹³ A further indication of the link between the two countries was that the High Commissioner was to be appointed by the Governor-General of New Zealand⁹⁴ (who, as later Letters Patent clarified, represents the Queen throughout the entity formally known as the Realm of New Zealand, which comprises New Zealand, the Cook Islands, Niue, Tokelau, and the Ross Dependency).⁹⁵ As a result, the Cook Islands was formally given two representatives of the Queen – one "for the Cook Islands as Cook Islands; the other (the Governor-General) for the Cook Islands as part of the Realm of New Zealand".⁹⁶ The recommendation to the Governor-General as to who would be appointed High Commissioner was to be made by the Minister of the Government of New Zealand responsible for matters relating to the

90 Cook Islands Constitution Amendment Act 1965 (NZ), sch 2, Constitution of the Cook Islands, art 2.

91 See below Part IV-D-1.

92 The 16 Commonwealth realms that have retained Elizabeth II as Head of State are Antigua and Barbuda, Australia, Bahamas, Barbados, Belize, Canada, Grenada, Jamaica, New Zealand, Papua New Guinea, Saint Kitts and Nevis, Saint Lucia, Saint Vincent and the Grenadines, Solomon Islands, Tuvalu, and the United Kingdom. There are 38 States that are members of the Commonwealth for which the Queen is not the Head of State.

93 Cook Islands Constitution Amendment Act 1965 (NZ), sch 2, Constitution of the Cook Islands, art 3(1).

94 Ibid, art 3(2).

95 Letters Patent Constituting the Office of Governor-General of New Zealand 1983 (NZ), reg 225.

96 Andrew Townend "The Strange Death of the Realm of New Zealand: The Implications of a New Zealand Republic for the Cook Islands and Niue" (2003) 34 VUWLR 571 at 583. As noted by Townend, from a formalistic standpoint this situation of "double representation" in a jurisdiction is not particularly unusual: although Australia and Canada each has a Governor-General who represents the Queen in the whole of Australia or Canada, each state of Australia also has a State-Governor or Administrator and each province of Canada has a Lieutenant-Governor, who represents the Queen within the sub-national jurisdiction.

Cook Islands, and such a recommendation was to be made after consultation with the Cook Islands Premier.⁹⁷

Third, fundamental ties were kept between the Cook Islands and New Zealand in the administration of justice in the Cook Islands and in ensuring the financial accountability of its government. Outside the jurisdiction of the Land Court system, in 1965 the Constitution provided for no Cook Islands-based appellate court. Rather, appeals from the High Court of the Cook Islands were to be heard by the High Court of New Zealand.⁹⁸ Any decision of the High Court of New Zealand in a case that was appealed from the Cook Islands would be final: a case could not be pursued further to the Court of Appeal of New Zealand.⁹⁹ The 1965 Constitution also established that all public funds and accounts of the Government of the Cook Islands were to be audited annually by the Audit Office of New Zealand.¹⁰⁰

Fourth, the New Zealand statute that enacted the 1965 Constitution contained section 5, a provision that would cause considerable confusion in the coming years:¹⁰¹

5. External affairs and defence — 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.

At the time, s 5 – also known as the "Riddiford Clause" after the member of Parliament who chaired the Island Territories Committee – was perhaps not surprisingly understood by members of both the New Zealand Parliament and the Cook Islands Legislative Assembly to reserve exclusive power over external affairs and defence to the Government of New Zealand.¹⁰² However, over time the dominant interpretation of the Riddiford Clause has shifted considerably.

97 Cook Islands Constitution Amendment Act 1965 (NZ), sch 2, Constitution of the Cook Islands, art 3(2).

98 Ibid, art 61. The 1965 text of the Constitution states that "an appeal shall lie to the Supreme Court of New Zealand from a final judgment of the High Court". At the time, the Supreme Court of New Zealand was a superior trial-level court for New Zealand. In 1980, the Supreme Court of New Zealand was continued under the name of the High Court of New Zealand: Judicature Amendment Act 1979 (NZ), ss 2, 12. In 2004, a newly created Supreme Court of New Zealand replaced the Judicial Committee of the Privy Council as the final court of appeal for New Zealand: Supreme Court Act 2003 (NZ).

99 Cook Islands Constitution Amendment Act 1965 (NZ), sch 2, Constitution of the Cook Islands, art 63.

100 Ibid, art 71.

101 Cook Islands Constitution Act 1964 (NZ), s 5.

102 Alex Frame "The External Affairs and Defence of the Cook Islands – The 'Riddiford Clause' Considered" (1987) 17 VUWLR 141 at 143.

Finally, as had been promised to the Cook Islands in New Zealand's 1962 offer of self-governance, section 6 of the Cook Islands Constitution Act 1964 preserved the common citizenship between New Zealanders and Cook Islanders:¹⁰³

6. British nationality and New Zealand citizenship — Nothing in this Act or in the Constitution shall affect the status of any person as a British subject or New Zealand citizen by virtue of the British Nationality and New Zealand Citizenship Act 1948.

Retention of the common citizenship between the people of the Cook Islands and the people of New Zealand was one of the principal considerations – if not the deciding factor – that led the 1962 Government of the Cook Islands to select free association over complete independence. The initial response of the Cook Islands Legislative Assembly to the offer of self-government is telling. It requested:¹⁰⁴

... that the New Zealand Government proceeds [sic] with its plan for giving the Cook Islands the fullest possible internal self-government *while at the same time preserving for the Cook Islands people their present status as New Zealand citizens.*

The reason that New Zealand citizenship was (and continues to be) so highly valued by Cook Islanders is entirely pragmatic: a common citizenship allows Cook Islanders to freely enter and reside in New Zealand. As a result, it is common for Cook Islanders to migrate to New Zealand to work, attend university or polytech, or receive medical treatment; in fact, in 2006, the number of Cook Islands Māori living in New Zealand was nearly three times greater than the entire population of the Cook Islands.¹⁰⁵ A New Zealand passport also provides advantages to Cook Islanders seeking to visit or reside in other Commonwealth countries, including the freedom to work in Australia

¹⁰³ Cook Islands Constitution Act 1964 (NZ), s 6.

¹⁰⁴ *Proceedings of the Legislative Assembly of the Cook Islands* (5th sess, 1962) at 120 (emphasis added).

¹⁰⁵ The 2006 New Zealand census counted 58,008 Cook Islands Māori people in New Zealand: Statistics New Zealand *New Zealand Official Yearbook 2008* (106th ed, David Bateman Ltd, North Shore City, 2008) at 106.

without a visa.¹⁰⁶ Although high levels of emigration from the islands has long been a source of concern to the Government of the Cook Islands,¹⁰⁷ the common citizenship remains popular among Cook Islanders and there has been no political movement in favour of creating a Cook Islands citizenship. A New Zealand Prime Minister has described the shared citizenship as "the strongest proof" of New Zealand's regard for and confidence in the Cook Islands and its people.¹⁰⁸

C Changes to the Cook Islands' Associated Statehood since 1965

The 1965 Constitution bestowed upon the Legislative Assembly of the Cook Islands the exclusive power to make laws for the Cook Islands and to amend or repeal the Constitution by a two-thirds majority vote; in certain instances, a proposed constitutional amendment must also be ratified by a two-thirds majority vote in a popular referendum.¹⁰⁹ The bestowal of this power upon the Cook Islands thus satisfies the UN General Assembly's requirement that an associated territory have "the right to determine its internal constitution without outside interference", including the right to unilateral termination of the relationship.¹¹⁰

The Cook Islands has amended its Constitution 29 times since it came into effect, including most recently in 2009. Although many of the individual amendments have been minor "cosmetic" changes to the Cook Islands' constitutional system and the terminology that it employs, the cumulative effect of these amendments leaves no doubt that the Cook Islands has chosen to substantially alter the scope of its association with New Zealand. The most significant of the constitutional amendments were enacted in the early 1980s. Additionally, since 1965 the Cook Islands and New Zealand have chosen to apply particular constitutional conventions that have cumulatively de-emphasised New Zealand's role in controlling Cook Islands affairs. As a result of these two developments, there can be little doubt that today the Cook Islands should be treated as having the attributes of an independent and sovereign State at international law.

¹⁰⁶ The long-standing but informal Trans-Tasman Travel Agreement between Australia and New Zealand allows Australian and New Zealand citizens to "travel to and live and work in one another's country without restriction": New Zealand Ministry of Foreign Affairs and Trade "Trans-Tasman Travel Arrangement (TTTA)" (2010) <www.mfat.govt.nz>.

¹⁰⁷ See for example Strickland, above n 1, at 9 and 13; Jonassen, above n 1, at 43.

¹⁰⁸ Exchange of Letters between the Government of New Zealand and the Government of Cook Islands on the Constitutional Relationship between the Cook Islands and New Zealand (1973), printed in [1973] I AJHR A10 and *Proceedings of the Legislative Assembly of the Cook Islands* (17th sess, 1973) at 428.

¹⁰⁹ Cook Islands Constitution Amendment Act 1965 (NZ), sch 2, Constitution of the Cook Islands, arts 39, 41. Amendments that require a popular referendum include any change in the identity of the Head of State, changes to the Cook Islands' self-governing status, changes to the Riddiford Clause, and amendment of the provision that maintained the common citizenship.

¹¹⁰ GA Res 1541, above n 76, annex.

1 *Constitutional amendments since 1965*

First, although the identity of the Head of State of the Cook Islands remains the Queen in right of New Zealand, the office of High Commissioner has been abolished and replaced with that of the Queen's Representative in the Cook Islands.¹¹¹ Unlike the High Commissioner, the Queen's Representative does not have the additional role of representing the Government of New Zealand in the Cook Islands. While under the 1965 Constitution the High Commissioner was appointed by the Governor-General of New Zealand upon the recommendation of a New Zealand Minister, the amended Constitution simply states that the Queen's Representative "shall be appointed by Her Majesty the Queen".¹¹² Since the Constitution lacks a provision that establishes who should advise the Queen in this matter, the Cook Islands and New Zealand have agreed that the Government of the Cook Islands will tender the advice and that such recommendations will be routed through the Governor-General of New Zealand, who remains the representative of the Queen throughout the Realm of New Zealand.¹¹³ In any case, in practical terms it is clear that the representative of the Head of State in the Cook Islands is now selected by the Government of the Cook Islands as opposed to a Minister of the Government of New Zealand.

Second, the Constitution has been amended to alter the names and titles of a number of institutions and positions within the Government of the Cook Islands. Most notably, the Legislative Assembly has been renamed the Parliament of the Cook Islands, and the Premier has become the Prime Minister of the Cook Islands.¹¹⁴ Although these amendments did nothing to substantively change the manner in which the Constitution and law of the Cook Islands are applied, they are significant for symbolic reasons. In 1963, when the two governments were planning the details of the association arrangement between New Zealand and the Cook Islands, the Legislative Assembly was explicitly advised by its experts to name the head of the Cabinet the "Premier" or the "Chief Minister", because those titles were ones that were in use in Australia, India, and Malaysia for the heads of government of the sub-national constituent states of those countries.¹¹⁵ "Prime Minister", on the other hand, was reserved for heads of truly independent national governments. Similar logic no doubt applied at the time in favouring the retention of a "Legislative Assembly" rather than the

111 Constitution of the Cook Islands, art 2; Constitution Amendment (No. 10) Act 1981-82 (CI), ss 2-5.

112 Constitution of the Cook Islands, art 3(2).

113 The role of the Governor-General in this regard has been described as essentially that of a "postman" who delivers messages from the Queen's Representative to Buckingham Palace: Iaveta Short "The Cook Islands: Autonomy, Self-Government and Independence" in Antony Hooper and others (ed) *Class and Culture in the South Pacific* (Centre for Pacific Studies, Auckland, 1987) 176 at 182.

114 Constitution of the Cook Islands, arts 13(1) and 27; Constitution Amendment (No. 9) Act 1980-81 (CI), ss 3 and 5.

115 Aikman, Davidson and Wright, above n 68, at [13]. It was also noted that the head of the Government of Tonga was a "Premier" (Tonga did not gain independence until 1970).

creation of a "Parliament".¹¹⁶ In adopting terminology that is typically reserved for use by the governments of independent Commonwealth realms, the Cook Islands has demonstrated that it wishes to be recognised as a truly self-governing state that is no longer a colony, dependency, or sub-national entity of New Zealand.

Third, a subtle change to the Constitution has been made that clarifies the locus of the power to legislate for the Cook Islands. The 1965 Constitution contained a provision that allowed for subsequent legislation of the New Zealand Parliament to apply to the Cook Islands if such an action "has been requested and consented to by the Government of the Cook Islands".¹¹⁷ This provision has been amended to state that in the future, New Zealand legislation will not extend to the Cook Islands "[e]xcept as provided by Act of the Parliament of the Cook Islands",¹¹⁸ and "for the avoidance of doubt", the following clarification has been added:¹¹⁹

The power conferred on the Legislative Assembly of the Cook Islands by Article 39 of this Constitution (as originally enacted) to make laws for the peace, order, and good government of the Cook Islands always conferred on that Assembly power to make laws notwithstanding anything in Article 46 of this Constitution (as originally enacted), declaring that any specified Act of the Parliament of New Zealand ... should extend to the Cook Islands as part of the law of the Cook Islands.

In other words, the 1965 Constitution bestowed upon the Cook Islands a plenary power to legislate on its own behalf, and it continues to hold this power today. The only change these provisions effected was that while previously, the New Zealand Parliament could legislate for the Cook Islands upon an official request of the Government of the Cook Islands, now incorporation of New Zealand law can only be completed pursuant to an Act of the Parliament of the Cook Islands. Due to the relatively minor and largely clarifying nature of these changes:¹²⁰

It is understood that [these] amendments were prompted by a desire to convince the international community that the Cook Islands was indeed a self-governing State with full legislative autonomy and that it should therefore be recognised as having the attributes of a State at international law.

Fourth, the Constitution of the Cook Islands has been amended to sever many of the pre-existing ties with New Zealand in the administration of justice in the Cook Islands and in ensuring the financial accountability of its government. Appeals from the High Court of the Cook Islands to the

¹¹⁶ Although a "Parliament" legislates for each of the sub-national states of Australia, sub-national legislative bodies in most other Commonwealth federations – including those in Canada, India, and Malaysia – are referred to as "Assemblies".

¹¹⁷ Cook Islands Constitution Amendment Act 1965 (NZ), sch 2; Constitution of the Cook Islands, art 46.

¹¹⁸ Constitution of the Cook Islands, art 46; Constitution Amendment (No. 9) Act 1980-81 (CI), s 5.

¹¹⁹ Constitution of the Cook Islands, art 46(5); Constitution Amendment (No. 9) Act 1980-81 (CI), s 5.

¹²⁰ *Laws of New Zealand* Pacific States and Territories: Cook Islands at [15].

High Court of New Zealand have been abolished, and a Court of Appeal of the Cook Islands has been created.¹²¹ Although New Zealand judges may sit on the High Court of the Cook Islands¹²² and at least one New Zealand superior court judge must be a member of the Court of Appeal of the Cook Islands,¹²³ the court of final appeal for the Cook Islands has shifted from the High Court of New Zealand to the Judicial Committee of the Privy Council in London.¹²⁴ Echoing the adoption of the terms Parliament and Prime Minister, the Chief Judge of the High Court first became the Chief Justice of the High Court in 1975,¹²⁵ and is now the Chief Justice of the Cook Islands.¹²⁶ The Audit Office of the Cook Islands has been created, and it has assumed the government financial auditing responsibilities that had previously been fulfilled in the Cook Islands by the Audit Office of New Zealand.¹²⁷ While some significant ties remain between the legal systems of the two countries,¹²⁸ there is no doubt that today the Cook Islands' judicial system bears close resemblance to the systems that currently exist in some of the smaller independent states of the Pacific and the Caribbean.¹²⁹

Finally, a number of miscellaneous amendments have been made to the Constitution, all of which serve to further emphasise the strengthened self-governing nature of the Cook Islands. For example, the flag and national anthem of the Cook Islands have been entrenched in the Constitution,

121 Constitution of the Cook Islands, arts 56 and 59(1); Constitution Amendment (No. 9) Act 1980-81 (CI), s 7. Additionally, the separate Land Court and the Land Appellate Court were abolished, with the High Court now being divided into civil, criminal, and land divisions.

122 Constitution of the Cook Islands, art 49(3).

123 Ibid, art 56(2).

124 Ibid, art 59(2). The Privy Council was New Zealand's "supreme court" until 2004, and it remains the final court of appeal for 14 independent Commonwealth countries: Antigua and Barbuda, Bahamas, Belize, Brunei, Dominica, Grenada, Jamaica, Kiribati, Mauritius, Saint Kitts and Nevis, Saint Lucia, Saint Vincent and the Grenadines, Trinidad and Tobago, and Tuvalu.

125 Constitution Amendment (No. 7) Act 1975 (CI), s 2.

126 Constitution of the Cook Islands, art 49(2); Constitution Amendment (No. 9) Act 1980-81 (CI), s 7.

127 Constitution of the Cook Islands, art 71; Constitution Amendment (No. 14) Act 1991 (CI), s 4.

128 For instance, New Zealand courts retain jurisdiction over property in the Cook Islands for purposes of adjudicating divorce and bankruptcy proceedings: Cook Islands Act 1915 (NZ), ss 540 and 655. Additionally, prisoners convicted under Cook Islands criminal law may be transferred to New Zealand for imprisonment, and New Zealand's statute of limitations and its laws regarding intellectual property still apply in the Cook Islands: Cook Islands Act 1915 (NZ), ss 275, 627, 635 and 641.

129 To cite but one example, just as the courts of the Cook Islands may be staffed by New Zealand judges, it is common for non-nationals to serve as judges on the courts of small independent States. Non-nationals are constitutionally permitted to sit as judges in the Courts of Fiji, Kiribati, Marshall Islands, Palau, Samoa, Solomon Islands, Tonga, and Tuvalu; in the Caribbean, the Eastern Caribbean Supreme Court has jurisdiction over and is staffed by judges from Antigua and Barbuda, Dominica, Grenada, Saint Kitts and Nevis, Saint Lucia, Saint Vincent and the Grenadines, and the non-independent British territories of Anguilla, British Virgin Islands, and Montserrat.

and the prerogative of mercy and pardon has been reserved to the Queen's Representative, who may act pursuant to a resolution of Parliament passed by a two-thirds majority vote.¹³⁰ The Constitution has also been amended to include guarantees of fundamental human rights and freedoms that must inform the interpretation of every enactment of the Cook Islands Parliament;¹³¹ significantly, this entrenchment of rights took place almost a decade prior to passage of the comparable New Zealand Bill of Rights Act 1990 by the New Zealand Parliament.

2 *Adoption of constitutional conventions since 1965*

As mentioned above in Part II-B-2, many observers assumed that section 5 of the Cook Islands Constitution Act 1964 reserved to the Government of New Zealand the exclusive power to act in pursuit of the external affairs and defence of the Cook Islands. This view seems to have been generally held by those members of the New Zealand Parliament who spoke on the issue when the Constitution was enacted,¹³² but outside Parliament there was not universal agreement on the meaning of the Riddiford Clause. For instance, just months after the Constitution had entered into force, New Zealand's permanent representative to the UN informed the international community that the limitations placed on New Zealand by the Cook Islands Constitution extended even to foreign affairs and defence.¹³³ The situation did not become clear until some time after 1969, when Professor RQ Quentin-Baxter argued in a government memorandum that since the intent of the Constitution was to establish the Cook Islands as a self-governing entity, the Riddiford Clause should be interpreted as having held back "no reserve legislative power. ... The better course by far – and one which greatly influenced New Zealand's own constitutional development – is to recognise the growth of constitutional conventions, which refine the use to be made of legal powers."¹³⁴ In the

130 Constitution of the Cook Islands, arts 76B-76D; Constitution Amendment (No. 9) Act 1980-81 (CI), s 13.

131 Constitution of the Cook Islands, arts 64-66; Constitution Amendment (No. 9) Act 1980-81 (CI), s 8.

132 See for example (21 October 1964) 340 NZPD 2832 (JR Hanan), 2838 (DJ Riddiford), 2848 (L Munro), 2851 (AH Nordmeyer); (3 December 1964) 341 NZPD 4055 (DJ Riddiford); (2 August 1966) 347 NZPD 1649 (L Munro).

133 "[O]n 4 August 1965, New Zealand's jurisdiction over the Cook Islands came to an end [External affairs and defence] are not subjects which New Zealand has 'reserved' for itself and withheld from the Cook Islanders. The legislative autonomy of the Cook Islands Assembly means what it says. New Zealand has no unilateral power within the Cook Islands to pass laws or make regulations on external affairs or defence or anything else; therefore nothing New Zealand does on behalf of the Cook Islands in these fields can have practical effect there unless the Cook Islands takes whatever legislative, executive or administrative action is required": Frank Corner, Permanent Representative of New Zealand to the United Nations "Remarks by the Permanent Representative of New Zealand in the Fourth Committee of the General Assembly" (17 November 1965). A summary of Corner's remarks is contained in UN GAOR, 4th Comm, 1560th mtg at 225, A/C.4/SR.1560 (1965).

134 RQ Quentin-Baxter "Aspects of the Constitutional Relationship between New Zealand and the Cook Islands" (memorandum to the Secretary of the Department of Maori and Island Affairs, January 1969), quoted in Frame, above n 102, at 146.

1970s, Quentin-Baxter's view came to be widely accepted in both New Zealand and the Cook Islands, and a convention began to develop whereby New Zealand would take no action regarding the external affairs or defence of the Cook Islands without an explicit request of the Government of Cook Islands. In the early 1980s, the Government of the Cook Islands converted its informal External Affairs Division into a formal Ministry of Foreign Affairs,¹³⁵ and at least by 1987, a constitutional convention respecting the Riddiford Clause had been clearly established:¹³⁶

Section 5 does not, linguistically, decide between New Zealand Ministers and Cook Islands Ministers as the source of advice to Her Majesty the Queen in Right of New Zealand. It favours neither and eliminates neither. Accordingly, the gap must be filled by convention, and there is nothing odd or surprising about the proposition that the convention has shifted, over time, from one favouring New Zealand Ministers to one favouring Cook Islands Ministers.

Today, this approach is broadly accepted, and the view that the 1965 Constitution conferred merely internal self-government on the Cook Islands has been bluntly dismissed as "persistent but wrong".¹³⁷ In 2001, the Prime Ministers of New Zealand and the Cook Islands jointly confirmed that the self-governing nature of the Cook Islands is – insofar as the parties to the free association relationship are concerned – complete and unambiguous:¹³⁸

Her Majesty the Queen as Head of State of the Cook Islands is advised exclusively by Her Cook Islands Ministers in matters relating to the Cook Islands. ... In the conduct of its foreign relations, the Cook Islands interacts with the international community as a sovereign and independent state. ... 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, and 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.*

IV Current Status of the Cook Islands at International Law

As mentioned above, although the concept of an Associated State is recognised at international law, there is no one-size-fits-all approach to how such an entity is regarded in international relations. Just a few years after the establishment of self-governance for the Cook Islands, it was asserted that Associated States "are not yet entities in international law", and it was questioned whether they could ever become such given the uncertainties that existed regarding their competence to conduct

¹³⁵ Ron Crocombe *Pacific Neighbours: New Zealand's Relations with Other Pacific Islands* (Centre for Pacific Studies, Christchurch, 1992) at 171.

¹³⁶ Frame, above n 102, at 151.

¹³⁷ *Laws of New Zealand* Pacific States and Territories: Cook Islands at [29].

¹³⁸ Joint Centenary Declaration of the Principles of the Relationship between New Zealand and the Cook Islands (Rarotonga, 11 June 2001), cls 3(1) and 4(1)-(2) (emphasis added).

foreign relations.¹³⁹ More recently, however, it has been suggested that "it is untenable to suggest that Associated States lack all international status", and that if a country obtains a true measure of self-government, it thereby "acquires substantial international personality, which may in some cases approximate to statehood".¹⁴⁰ Obviously, the assessment of an Associated State's status will depend on the association arrangements specific to it, and these will vary from case to case.¹⁴¹ As a result, few generalities can be formulated by examining and comparing the statuses of the various Associated States of the world.¹⁴²

Thus, in order to establish the nature of the Cook Islands status at international law, it is necessary to examine how the Cook Islands acts on the world stage in practice. New Zealand and the Cook Islands both claim that the Cook Islands "interacts with the international community as a sovereign and independent state".¹⁴³ What are the facts that would justify this claim?

The Cook Islands was not a member of any regional or international organisations until 1978, when it became an associate member of the South Pacific Commission (now the Pacific Community); it became a full member in 1980 after the organisation changed its admission criteria to allow Associated States to join as full members.¹⁴⁴ Cook Islands membership in this organisation was unsurprising and had been anticipated as early as 1963 as one that was "likely to develop".¹⁴⁵ In the late 1970s, the Cook Islands also became a party to a number of regional treaties negotiated by

139 Margaret Broderick "Associated Statehood – A New Form of Decolonisation" (1968) 17 ICLQ 368 at 402-403.

140 James Crawford *The Creation of States in International Law* (2nd ed, Clarendon Press, Oxford, 2006) at 633.

141 *Ibid*, at 632.

142 In addition to the Cook Islands, the following territories are sometimes described as being current Associated States: Niue (associated with New Zealand); Marshall Islands, Federated States of Micronesia, Northern Mariana Islands, Palau, Puerto Rico (associated with the United States); Aruba, Curaçao, Sint Maarten (associated with the Netherlands); Faroe Islands, Greenland (associated with Denmark). While some of these territories are also widely regarded to be independent States at international law, others are not. Historical Associated States may include the Philippines (associated with the United States); Antigua, Dominica, Grenada, Saint Christopher-Nevis-Anguilla, Saint Lucia, and Saint Vincent (associated with the United Kingdom). The three British Crown dependencies (Guernsey, Jersey, and the Isle of Man) and some of the larger of the 14 British overseas territories (such as Bermuda) are also sometimes referred to as being akin to Associated States.

143 Joint Centenary Declaration, above n 138, cl 4(1).

144 *Laws of New Zealand Pacific States and Territories: Cook Islands* at [36].

145 Aikman, Davidson and Wright, above n 68, at [76].

the informal South Pacific Forum organisation,¹⁴⁶ and in 1976, it joined the Asian Development Bank by acceding to the ADB Treaty.¹⁴⁷

The first bilateral treaty entered into by the Cook Islands was a 1980 treaty with the United States that delimited the maritime boundary between the Cook Islands and American Samoa.¹⁴⁸ This treaty recognised the sovereignty of the Cook Islands over four sparsely populated atolls in the islands' northern group.¹⁴⁹ The negotiation of this treaty proved to be something of a watershed in the development of an autonomous foreign policy for the Cook Islands. As described by Iaveta Short, who was a member of the Cabinet of the Cook Islands at the time:¹⁵⁰

... America informed New Zealand they wished to negotiate with New Zealand for the return to the Cook Islands of several small islands. The Cook Islands cabinet said, "No, New Zealand does not own them. New Zealand is not even going to sit in the meeting, they belong to us." In fact, that is how the negotiations took place. And when the agreement was reached, the New Zealand Ministry of Foreign Affairs helped us to prepare the documents, because we had never made such an agreement before. I don't think that New Zealand Foreign Affairs liked being left out, but they were prepared to accept that if the Cook Islands say "You don't come in", they don't come in.

The text of the resultant treaty does not mention New Zealand in any context.

The successful conclusion of the treaty with the Americans increased the confidence of the Cook Islands that it could manage its own external affairs: just months later, the Cook Islands concluded a fishing rights treaty with South Korea.¹⁵¹ However, in early 1981, the Cook Islands encountered a set-back when it was prevented from acceding to the Lomé Convention¹⁵² on the grounds that the other parties to the treaty were not convinced that the Cook Islands was

¹⁴⁶ Agreement establishing the South Pacific Bureau for Economic Co-operation (opened for signature 17 April 1973, entered into force 17 May 1973); Memorandum of Understanding on the Establishment of the Pacific Forum Line Limited (16 June 1977); South Pacific Forum Fisheries Agency Convention (opened for signature 10 July 1979, entered into force 9 August 1979).

¹⁴⁷ Agreement Establishing the Asian Development Bank (opened for signature 4 December 1965, entered into force 22 August 1966).

¹⁴⁸ Treaty between the United States of America and the Cook Islands on Friendship and Delimitation of the Maritime Boundary between the United States of America and the Cook Islands (11 June 1980, entered into force 8 September 1983).

¹⁴⁹ The atolls are Pukapuka, Hanihiki, Rakahanga, and Penrhyn. The United States had claimed these islands under the 1856 Guano Islands Act 48 USC §§ 1411-1419 (2006).

¹⁵⁰ Short, above n 113, at 181.

¹⁵¹ Agreement on Fisheries between the Government of the Republic of Korea and the Government of the Cook Islands (25 August 1980, entered into force 25 August 1980).

¹⁵² Second ACP-EEC Convention of Lomé (31 October 1979).

constitutionally distinct from New Zealand.¹⁵³ More than any other factor, this failure provided the impetus for the constitutional amendments of the early 1980s that were designed to emphasise that the Cook Islands was by then self-governing in all internal and external affairs.¹⁵⁴

Since the constitutional amendments of the early 1980s were enacted, the Cook Islands has entered into bilateral treaties with a number of independent States, including Australia,¹⁵⁵ Chile,¹⁵⁶ the People's Republic of China,¹⁵⁷ Fiji,¹⁵⁸ France,¹⁵⁹ Papua New Guinea,¹⁶⁰ and Samoa.¹⁶¹ (The Cook Islands has also entered into bilateral treaties with two other constituent parts of the Realm of New Zealand – Niue and New Zealand.)¹⁶² Since 1992, the Cook Islands has otherwise entered into formal bilateral diplomatic relations with 24 States, the Holy See, and the European Union.¹⁶³

¹⁵³ Igarashi, above n 58, at 263-265.

¹⁵⁴ Ibid, at 237; Short, above n 113, at 181-182.

¹⁵⁵ Agreement between the Government of Australia and the Government of the Cook Islands relating to the Equity and Merit Scholarship Scheme (10 August 1989, entered into force 10 August 1989); Agreement between the Government of Australia and the Government of the Cook Islands relating to Air Services (18 September 2001, entered into force 11 December 2002).

¹⁵⁶ Air Transport Agreement between the Government of the Cook Islands and the Government of Chile (16 June 1992).

¹⁵⁷ Trade Agreement between the Government of the Cook Islands and the Government of the People's Republic of China (16 November 1998, entered into force 16 November 1998).

¹⁵⁸ Trade Agreement between the Government of the Cook Islands and the Government of the Republic of the Fiji Islands (23 October 1998).

¹⁵⁹ Agreement on Maritime Delimitation between the Government of the Cook Islands and the Government of the French Republic (3 August 1990, entered into force 3 August 1990).

¹⁶⁰ Agreement concerning Technical Cooperation between the Government of the Cook Islands and the Government of Papua New Guinea (15 September 1995).

¹⁶¹ Agreement between the Government of the Independent State of Western Samoa and the Government of the Cook Islands for Air Services between and beyond their Respective Territories (23 June 1993, entered into force 23 June 1993).

¹⁶² Agreement between the Government of the Cook Islands and the Government of Niue concerning Air Services (30 July 1991, entered into force 30 July 1991); Agreement on Civil Aviation between the Government of New Zealand and the Government of the Cook Islands (6 August 1985, entered into force 1 April 1986).

¹⁶³ The entities that have established diplomatic relations with the Cook Islands are Malaysia (1992); New Zealand (1993); Australia, Nauru (1994); Papua New Guinea, Portugal (1995); Bosnia and Herzegovina, Iran, South Africa (1996); People's Republic of China (1997); Fiji, India, Norway, Spain (1998); Holy See (1999); France (2000); European Union, Germany (2001); Cuba, East Timor, Italy (2002); Jamaica (2003); Belgium, Thailand (2005); Czech Republic, Turkey (2008). Entities and dates available at the website of the Cook Islands Ministry of Foreign Affairs and Immigration <www.mfai.gov.ck>.

Since the 1970s, the Cook Islands has signed or acceded to well over 100 multilateral conventions, including the UN Convention on the Law of the Sea, the Framework Convention on Climate Change and its Kyoto Protocol, the Chemical Weapons Convention, the Convention on the Rights of the Child, the Geneva Conventions, and the Terrorism Financing Convention.¹⁶⁴ The Cook Islands has become a full member of a number of international organisations for states, including seven of the 17 specialised agencies of the UN: the World Health Organization (WHO) (1984), the Food and Agriculture Organization (FAO) (1985), the International Civil Aviation Organization (ICAO) (1986), the Educational, Scientific and Cultural Organization (UNESCO) (1989), the International Fund for Agricultural Development (IFAD) (1993), the World Meteorological Organization (WMO) (1995), and the International Maritime Organization (IMO) (2008). In 2008, the Cook Islands also became a member State of the International Criminal Court (ICC),¹⁶⁵ an independent body that has a formal co-operative relationship with the UN.¹⁶⁶ When it applied to join the WHO in 1984, questions were initially raised as to whether the Cook Islands was eligible to join an organisation that was "open to all States",¹⁶⁷ but after the nature of the Cook Islands' relationship with New Zealand was explained and debated, its application was unanimously approved.¹⁶⁸ The UN Secretary-General has commented on the significance of this decision:¹⁶⁹

... a number of treaties adopted by the General Assembly were open to participation by "all States" without further specifications In reply to questions raised in connection with the interpretation to be given to all States formula, the Secretary-General has on a number of occasions stated that there are certain areas in the world whose status is not clear. If he were to receive an instrument of accession from any such area, he would be in a position of considerable difficulty unless the Assembly gave him explicit directives on the areas coming within the "any State" or "all States" formula. He would not wish to determine, on his own initiative, the highly political and controversial question of whether or not the areas whose status was unclear were States. Such a determination, he believed, would fall outside his competence. He therefore stated that when the "any State" or "all States" formula was adopted, he would

¹⁶⁴ For a list of multilateral treaties that the Cook Islands has entered into, see Cook Islands Ministry of Foreign Affairs and Immigration "Cook Islands Treaty List" <www.mfai.gov.ck>.

¹⁶⁵ United Nations Department of Public Information "Presidents of International Court of Justice, International Criminal Court Present Annual Reports to General Assembly" (press release, 30 October 2008) GA/10774.

¹⁶⁶ *Negotiated Relationship Agreement between the International Criminal Court and the United Nations* ICC Doc ICC-ASP/3/Res.1 (2004).

¹⁶⁷ Constitution of the World Health Organization (opened for signature 22 July 1946, entered into force 7 April 1948), art 3.

¹⁶⁸ *Laws of New Zealand* Pacific States and Territories: Cook Islands at [36].

¹⁶⁹ *Summary of Practice of the Secretary-General as Depositary of Multilateral Treaties* at [81] and [86], ST/LEG/7/Rev.1 (1999).

be able to implement it only if the General Assembly provided him with the complete list of the States coming within the formula ...

...

However, in 1984, an application by the Cook Islands for membership in the World Health Organization was approved by the World Health Assembly In the circumstances, the Secretary-General felt that the question of the status, as a State, of the Cook Islands, had been duly decided in the affirmative by the World Health Assembly, whose membership was fully representative of the international community. The guidance the Secretary-General might have obtained from the General Assembly, had he requested it, would evidently have been substantially identical to the decision of the World Health Assembly. ... Moreover, on the basis of the Cook Islands membership in the World Health Organization, and of its subsequent admittance to other specialized agencies ... as a full member without any specifications or limitations, the Secretary-General considered that the Cook Islands could henceforth be included in the "all States" formula, were it to wish to participate in treaties deposited with the Secretary-General.

In 2001, New Zealand and the Cook Islands confirmed in a joint statement that "[t]he 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".¹⁷⁰ Treaty practice of the past two decades therefore confirms that other States now regard the Cook Islands as a State at international law.

V Is the Cook Islands Eligible for Membership in the UN?

Given that the Cook Islands is now treated as a State at international law and that it considers itself to be a State, is the Cook Islands currently eligible to join the United Nations? The Cook Islands certainly has never applied for UN membership, and it is possible that its government has assumed that membership is only open to States that have formally declared independence, or that Associated States "need not apply". In 1974, large manganese deposits were discovered in Cook Islands waters, and the Premier of the Cook Islands, Sir Albert Henry – perhaps with his eye on UN membership – suggested that he would hold a referendum on dissolving the Cook Islands' association with New Zealand.¹⁷¹ However, the idea was dropped a few months later, probably because of the popularity among Cook Islanders of retaining New Zealand citizenship.¹⁷² Henry's successor, Thomas Davis, also expressed a desire to terminate the association, but was similarly dissuaded from pursuing it due to a lack of public support.¹⁷³

¹⁷⁰ Joint Centenary Declaration, above n 138, cl 5.

¹⁷¹ Kathleen Hancock *Sir Albert Henry: His Life and Times* (Methuen, Auckland, 1979) at 130.

¹⁷² *Ibid*, at 132; Crocombe, above n 135, at 171-172.

¹⁷³ Crocombe, above n 135, at 171-172.

If a formal declaration of independence is the ticket to UN membership, ending the relationship of free association would lead to few other tangible benefits for the Cook Islands. Presumably, if such a course were pursued, the shared citizenship would come to an end, and a majority of Cook Islanders would almost surely be averse to trading New Zealand citizenship for UN membership.¹⁷⁴ But what if this is a false dilemma, and in fact the Cook Islands is currently eligible for UN membership?

A Legal Requirements for UN Membership

When the UN was established, its Charter set out two separate categories of members: founding members and those subsequently admitted to membership. The 51 founding members were States that (1) had signed and ratified the UN Charter, and (2) had either (a) signed the 1942 Declaration or (b) participated in the San Francisco Conference.¹⁷⁵ Article 4 of the Charter sets out the criteria for a non-founding State to be admitted to UN membership:¹⁷⁶

Membership in the United Nations is open to all other peace-loving States which accept the obligations contained in the present Charter and, in the judgment of the Organization, are able and willing to carry out these obligations.

Thus, the requirements for UN membership can conveniently be broken down into five constituent criteria: to be admitted, the applicant must (1) be a State; (2) be peace-loving; (3) accept the obligations contained in the Charter; (4) be able to carry out those obligations; and (5) be willing to do so.¹⁷⁷

New Zealand was a founding member of the UN and, as indicated in Part II-A above, its ratification of the Charter extends to the territory of the Cook Islands.¹⁷⁸ If we hypothetically

¹⁷⁴ In fact, New Zealand would probably benefit more from a termination of the relationship, since it would "free New Zealand from both cost and criticism for being in a quasi-colonial relationship": *ibid.*, at 172.

¹⁷⁵ Charter of the United Nations, art 3. The somewhat awkward provision that offered two possible routes to original membership was necessitated by the chaotic circumstances in Europe in 1945. Poland did not participate in the San Francisco Conference due to its lacking a government that was unanimously recognized by the Allied major powers. Poland had, however, signed the 1942 Declaration, so this route to original membership was included in the Charter. Later in 1945, after the major powers had agreed to recognise a Soviet-backed Polish government, Poland was permitted to sign the UN Charter as an original member: see Russell and Muther, above n 12, at 928-929.

¹⁷⁶ Charter of the United Nations, art 4(1).

¹⁷⁷ *Conditions of Admission of a State to Membership in the United Nations (Article 4 of the Charter) (Advisory Opinion)* [1948] ICJ Rep 57 at 62.

¹⁷⁸ The New Zealand statute which allows for the creation of regulations that would give effect to sanctions regimes imposed by the Security Council is also law of the Cook Islands: United Nations Act 1946 (NZ), s 4.

assume that the Cook Islands chose to lodge an application for UN membership, would it be eligible for membership? First, the fact that the territory of the Cook Islands is currently subject to the Charter is a comparatively unimportant point: the general practice has been that entities whose territory has previously been subject to the Charter are expected to lodge an application for admission if they emerge as an independent State and wish to remain within the UN.¹⁷⁹ Second, it is obvious that if the Cook Islands were to lodge an application for UN membership, a number of the membership criteria would be self-evidently fulfilled. By its very nature, making an application for UN membership demonstrates an acceptance of the obligations contained in the UN Charter (criterion 3) as well as a willingness to carry out those obligations (criterion 5).¹⁸⁰ The Cook Islands has never participated in any international behaviour that would suggest it is not "peace-loving" (criterion 2).¹⁸¹ Thus, the only questions that remain are: Is the Cook Islands able to carry out the obligations contained in the UN Charter (criterion 4), and is the Cook Islands a "State" (criterion 1)?

B Criterion 4: Is the Cook Islands Able to Carry out the Charter Obligations of a UN Member State?

There are two circumstances that would theoretically render an applicant unable to carry out the obligations contained in the UN Charter. The first is a constitutional restriction that prevents the applicant from exercising full control over its external or internal affairs. As discussed above in Part II-C, no such constitutional restriction exists for the Cook Islands. The Cook Islands certainly retains the option of requesting assistance from New Zealand in managing any of its affairs; in fact, if such a request were lodged, the Queen in right of New Zealand would have a statutory duty to act on behalf of the Cook Islands in matters of external affairs or defence. However, as a matter of practice this option lies dormant, and the Cook Islands now acts independently in managing all its affairs.

179 For instance, Czechoslovakia was a founding member of the UN, but after it was dissolved in 1993, the Czech Republic and Slovakia were both required to apply for membership. Montenegro, the most recent State to join the UN, has undergone this process more than once. Its territory was subject to the Charter beginning in 1945, when the Socialist Federal Republic of Yugoslavia became a founding member of the organisation. After the break-up of the country, the Federal Republic of Yugoslavia (later known as Serbia and Montenegro) was admitted in 2000. Finally, in 2006, Montenegro declared its independence from Serbia and was admitted to the UN as a separate state.

180 An application for UN membership requires that the applicant attach a formal declaration of acceptance of the UN Charter obligations: *Provisional Rules of Procedure of the Security Council*, r 58, S/96/Rev.7 (1983).

181 Acts that could be interpreted as being indicative of a non-peace-loving state include recourse to non-peaceful means in the settlement of territorial or other disputes, non-compliance with UN resolutions, and interference with innocent passage of ships in territorial or international waters: Ginther, above n 20, at [21].

The second theoretical impediment is that a lack of resources on the part of the applicant would make fulfilment of its UN obligations impossible. In short, if the applicant is "too small", it may not be able to do what is expected of a UN member State.

An applicant State can be small in territory or small in population; with a population of around 20,000 living in just 236 square kilometres, the Cook Islands is both. However, the size of an applicant's territory has never been an impediment to UN membership: as long as the applicant has exclusive control over a defined territory, the size of that territory is irrelevant. The territory of the Cook Islands is over 120 times larger than that of Monaco, the UN member State with the smallest territory, and is larger than the territory of five other current UN member States.¹⁸²

The issue of whether an applicant's population can be too small to qualify for UN membership has been a more live issue. During the last half of the 1960s, the so-called "microstate" or "ministate" problem was occasionally raised at the UN.¹⁸³ This problem had existed previously at the League of Nations, at a time when the few microstates in the world were referred to as "Lilliputian States". For instance, in 1920, the League refused to admit Liechtenstein on the grounds that its small population would result in its inability to carry out the duties of membership.¹⁸⁴ At the 1944 Dumbarton Oaks Conference, the United States advanced the position that although no size requirement should be formally enshrined in the organisation's Charter, the planned UN should not encourage membership for States "too small to be able to undertake the responsibilities [of membership], such as participation in measures of force to preserve or restore peace".¹⁸⁵

During a 1965 Security Council debate on the membership application of the Maldives, France first broached the issue of whether a country with an estimated population of around 90,000 should be admitted to full UN membership. Although the Council ultimately recommended that the Maldives be admitted,¹⁸⁶ at various times in next few years, members of the Security Council, as

182 The six smallest UN members by territory are Monaco (1.95 km²), Nauru (21 km²), Tuvalu (26 km²), San Marino (61 km²), Liechtenstein (160 km²), and the Marshall Islands (181 km²). The territory of the next smallest, Saint Kitts and Nevis (261 km²), is slightly larger than that of the Cook Islands.

183 There never has been a consensus position on how small a state's population must be for it to be classified as a microstate. Proposals for cut-offs have ranged between less than 300,000 to less than one million: Patricia Blair *The Ministate Dilemma* (Carnegie Endowment, New York, 1968) at 2-3 (less than 300,000); William L Harris "Microstates in the United Nations: A Broader Purpose" (1970) 9 Colum J Transnat'l L 23 at 23 (less than one million); Elmer Plischke *Microstates in World Affairs: Policy Problems and Options* (American Enterprise Institute, Washington DC, 1977) at 18-19 (less than 300,000, with less than 100,000 being "submicrostates"). However, regardless of which cut-off is selected, it is clear that the Cook Islands qualifies as a microstate.

184 Jorri Duursma *Fragmentation and the International Relations of Microstates: Self-determination and Statehood* (Cambridge University Press, Cambridge, 1996) at 171-172.

185 Hull, above n 26, vol 2 at 1712.

186 SC Res 212, UN SCOR, 20th sess, 1243rd mtg (1965).

well as the Secretary-General, suggested that some form of intermediate or associate membership be developed that would allow microstates to participate in the UN without requiring them to accept the full responsibilities of membership.¹⁸⁷ In 1969, the Security Council convened a Committee of Experts to consider the matter, but it quickly lost momentum when the committee's legal counsel advised that the creation of a special membership category for microstates would require amendment of the UN Charter because doing so would implicitly violate the sovereign equality of States, which is a foundational principle of the Charter.¹⁸⁸ There were also concerns that because most microstates were developing countries, the opposition of the Security Council to full membership for microstates could be criticised as a form of neo-colonialism.¹⁸⁹ Although the Committee of Experts still theoretically exists, it has not met since 1971, and in the meantime UN membership has approached universality. In the past 40 years, no country's application to the UN has been questioned based on population size. Currently, there are 12 UN member States with a population below 100,000, and the population of the Cook Islands exceeds that of Tuvalu and Nauru, the two least populous UN member States.¹⁹⁰ The Cook Islands is indeed a small microstate, but the move to universality at the UN emphasises that size will not be an obstacle to UN membership.

C Criterion 1: Is the Cook Islands a "State"?

1 Self-identification and recognition of statehood by other States

Having thus concluded that the Cook Islands would meet the requirement of being able to carry out the obligations of UN membership, the only remaining requirement for UN membership to be examined is criterion 1: Is the Cook Islands a "State"? At first blush, this criterion would appear to present no barrier: although it is associated with New Zealand, as discussed above in Part III, the Cook Islands may be fairly described as a State at international law and it self-identifies as such. As far as New Zealand law is concerned, the Cook Islands is a State. Since the early 1980s, New Zealand legislation has made reference to "the self-governing state of the Cook Islands".¹⁹¹ In 1996, a five-judge panel of the New Zealand Court of Appeal was unanimous in accepting the proposition

¹⁸⁷ Crawford, above n 140, at 182-184.

¹⁸⁸ Michael M Gunter "What Happened to the United Nations Ministate Problem?" (1974) 71 AJIL 110.

¹⁸⁹ Henry G Schermers and Niels M Blokker *International Institutional Law: Unity within Diversity* (4th ed, Martinus Nijhoff Publishers, Leiden (Neth), 2003) at [73].

¹⁹⁰ From smallest to largest, these 12 "true" microstates are Tuvalu (12,000), Nauru (14,000), Palau (20,000), Monaco (33,000), Liechtenstein (36,000), Saint Kitts and Nevis (43,000), Marshall Islands (62,000), Dominica (73,000), Seychelles (84,000), Antigua and Barbuda (86,000), Andorra (89,000), and Kiribati (98,000).

¹⁹¹ Official Information Act 1982 (NZ), s 7; Privacy Act 1993 (NZ), s 27(2); Interpretation Act 1999 (NZ), s 29.

that "the Cook Islands is a fully sovereign independent state",¹⁹² and this finding was accepted and repeated when the Court of Appeal's judgment was appealed to the Judicial Committee of the Privy Council.¹⁹³ The High Court of the Cook Islands has similarly accepted that "the Cook Islands is a sovereign State".¹⁹⁴

The statehood of the Cook Islands has also been implicitly acknowledged by most other UN members through their permitting the Cook Islands to become a member of international organisations that are open only to States. As discussed above in Part III, in 1984 the Cook Islands was unanimously admitted to the WHO under a provision that declared the organisation "open to all States";¹⁹⁵ it has also been admitted to other organisations with similarly-worded requirements, including the ICC, where the treaty is "open to accession by all States",¹⁹⁶ and UNESCO, where it was admitted under the provision that allows full membership for "states not members of the United Nations Organization".¹⁹⁷ As mentioned, for purposes of treaty practice, the UN Secretary-General now regards the Cook Islands to be a State.

2 *Formal and actual independence as statehood*

An analysis from a theoretical standpoint is less helpful, primarily because "there has long been no generally accepted and satisfactory legal definition of statehood".¹⁹⁸ However, the Cook Islands clearly satisfies the four classical criteria for statehood, in that it has (1) a permanent population; (2) a defined territory; (3) government; and (4) capacity to enter into relations with other States.¹⁹⁹ Of course, the word "State" may mean different things in different contexts, and in the context of the UN Charter's membership requirement:²⁰⁰

¹⁹² *Controller and Auditor-General v Davison* [1996] 2 NZLR 278 (CA) at 288.

¹⁹³ *Brannigan v Davison* [1997] 1 NZLR 140 (PC) at 144; [1997] AC 238 at 247.

¹⁹⁴ *European Pacific Group Ltd v KPMG Peat Marwick* (1997) 104 ILR 501 (CIHC) at 504.

¹⁹⁵ Constitution of the World Health Organization (opened for signature 22 July 1946, entered into force 7 April 1948), art 3.

¹⁹⁶ Rome Statute of the International Criminal Court (opened for signature 17 July 1998, entered into force 1 July 2002), art 125(3).

¹⁹⁷ Constitution of the United Nations Educational, Scientific and Cultural Organization (opened for signature 16 November 1945, entered into force 4 November 1946), art 2(2).

¹⁹⁸ Crawford, above n 140, at 37.

¹⁹⁹ Convention on the Rights and Duties of States (26 December 1933, entered into force 26 December 1934), art 1.

²⁰⁰ Ginther, above n 20, at [14].

It was clear from the very beginning that "State" meant a formally independent State, and that an applicant would have to meet the formal requirements of the notion of statehood under international law

....

Ultimately, independence is the "central criterion for statehood",²⁰¹ and in most contexts the two terms may be used interchangeably without doing violence to the meaning of either. Therefore, the question is not so much what the Cook Islands considers itself to be, what New Zealand considers it to be, or whether the Cook Islands qualifies as a "State" under other treaties, but rather whether the Cook Islands is indeed an "independent State" at international law. The Cook Islands has not constitutionally declared its independence or otherwise completely severed its association with New Zealand, but at the same time, it is clear that it has "crossed, many times, the conventional line separating Self-Government from Independence".²⁰² We may therefore consider the status of the Cook Islands in terms of formal versus actual independence.

A State is said to be "formally independent" when the powers to govern its territory in both internal and external affairs are vested in the government of the State.²⁰³ If any other State claims the discretionary right to unilaterally exercise governmental authority over the putative State, particularly in matters of internal affairs, the formal independence of the putative State is drawn into question.²⁰⁴ The Constitution of the Cook Islands now prohibits New Zealand from exercising unilateral authority in the internal affairs of the Cook Islands, but in theory New Zealand could violate the established conventions by choosing to unilaterally manage the external affairs of the Cook Islands.²⁰⁵ This may suggest to the theoretician that the Cook Islands is not fully independent in a formal sense.

However, any conclusion regarding a State's "formal independence" is of necessity tempered by considerations of the State's "actual independence". Even if a State exhibits the characteristics of formal independence, its statehood may be brought into question if it lacks the features of independence on a practical level. On the other hand, a State that appears theoretically deficient in formal independence may nevertheless be independent in practice if it is able to demonstrate that it exercises "real governmental power" that is not externally controlled by another State.²⁰⁶ Actual

201 Crawford, above n 140, at 62.

202 Short, above n 113, at 182.

203 Crawford, above n 140, at 67.

204 Ibid, at 71-72.

205 The likelihood of this actually occurring is slight, and may perhaps be compared with the likelihood of Queen Elizabeth II personally intervening in the operation of the executive powers of the Government of New Zealand: while such an occurrence is legally possible, its actual occurrence would violate conventions and would almost certainly result in a domestic constitutional crisis.

206 Crawford, above n 140, at 72.

independence is a relative concept and is measured by assessing the degree to which a State has actual control over its own affairs.²⁰⁷ If an outside State in fact exerts a substantial amount of control over the government of the putative State, the State may not be actually independent even if it satisfies the criteria of formal independence. (This situation has arisen in the past with the creation of so-called "puppet States", whereby a foreign State imbues a territory with formal independence but retains effective control over the new entity.)²⁰⁸ However, a State that chooses to form alliances or associations with other States or even delegate some of its governmental responsibilities to other States does not derogate from its actual independence so long as such choices are freely made without coercion.²⁰⁹

Thus, to categorise a State as an Associated State is not ipso facto to deny its actual independence. A number of States that may be described as being in free association with another State are also regarded as independent and have become members of the UN. For example, the Marshall Islands, the Federated States of Micronesia, and Palau (the three "Micronesian States") have all entered into long-term Compacts of Free Association with the United States, whereby the Micronesian States have delegated to the United States exclusive and full authority and responsibility for their security and defence. The compacts define the Micronesian States as self-governing in both internal and external affairs (excluding matters of security and defence), and the parties are required to consult with one another when either party takes action in foreign affairs that may affect the security arrangements.²¹⁰ Beginning in 1947, the islands of the Micronesian States and the Northern Mariana Islands were formally administered by the United States as the UN Trust Territory of the Pacific Islands.²¹¹ By the late 1970s, the United States and Micronesian representatives had agreed to terminate the trusteeship and replace it with compacts of association between the United States and the islands, which would be divided into four separate entities.²¹² In 1978, it was formally agreed that during the life of the compacts between the United States and the Micronesian States, the political status of the new entities "shall remain that of free association as

207 Ibid.

208 Ibid, at 76-83. Relatively unambiguous examples of "puppet States" include the 1932 Japanese creation of Manchukuo in Manchuria, Nazi Germany's creation of Slovakia and Croatia during the Second World War, and Turkey's 1983 creation of the Turkish Republic of Northern Cyprus.

209 Ibid, at 73.

210 Compact of Free Association, Federated States of Micronesia-United States (1 October 1982, entered into force 3 November 1986, amended 1993); Compact of Free Association, Marshall Islands-United States (25 June 1983, entered into force 3 November 1986); Compact of Free Association, Palau-United States (10 January 1986, entered into force 1 October 1994).

211 For a discussion, see Igarashi, above n 58, at 172-180.

212 Ibid, at 190-199. The representatives of the Northern Mariana Islands favoured closer integration with the United States and opted out of the free association arrangements.

distinguished from independence".²¹³ As a result, nowhere in the compacts are the Micronesian States described as being "independent". We can conclude that the Marshall Islands, the Federated States of Micronesia, and Palau are clear examples of Associated States; in fact, having transferred exclusive authority over security and defence to the United States, they each have retained less actual control over their own external affairs than has the Cook Islands. However, since the conclusion of the compacts, each of the three Micronesian States has also been recognised as an independent State at international law – notwithstanding the 1978 declaration of intent – and each has been admitted to the UN without controversy in either the Security Council or the General Assembly.²¹⁴

There are further instances of a State being admitted to the UN despite its exercising a lesser degree of control over its external affairs than currently enjoyed by the Cook Islands. For instance, for nearly 90 years Liechtenstein has been party to a customs union agreement with Switzerland that allows Switzerland to negotiate and enter into any commercial- or customs-related treaty on behalf of Liechtenstein; the agreement also renders Liechtenstein unable to negotiate such treaties for itself.²¹⁵ Since 1919, Swiss ambassadors have represented Liechtenstein in international diplomatic situations unless Liechtenstein has opted to send its own delegate,²¹⁶ and the courts of Liechtenstein are staffed in part by Swiss and Austrian judges.²¹⁷ Nevertheless, Liechtenstein was admitted as a member of the UN in 1990, and although its independence and statehood have been questioned in the past, today they are well established, primarily because it is recognised that Liechtenstein retains the sovereign right to unilaterally terminate any of these relationships with other States at any time.²¹⁸ In this respect, Liechtenstein is a self-governing and independent territorial unit – a State at international law. The parallels with the Cook Islands are immediately obvious: although the Constitution of the Cook Islands permits its government to request assistance from New Zealand in matters of external affairs, the Cook Islands also carries with it the same unilateral sovereign right as

213 For the full text of the 1978 agreement, see Marian L Nash "Contemporary Practice of the United States Relating to International Law" (1978) 72 AJIL 879 at 881-882.

214 Igarashi, above n 58, at 291-294.

215 Treaty of 29 March 1923 concerning the Union of the Principality of Liechtenstein with the Swiss Customs Territory (29 March 1923, entered into force 1 January 1924).

216 Liechtenstein currently maintains independent diplomatic presences only in Austria, Belgium, the Holy See, Germany, Switzerland, and the United States. It also has an independent presence at the European Union, the Organization for Security and Cooperation in Europe, and the UN and its related subsidiary organisations. See Ministry of Foreign Affairs of the Principality of Liechtenstein <www.liechtenstein.li>.

217 Jorri Duursma "Micro-states: The Principality of Liechtenstein" in Christine Ingebritsen and others (eds) *Small States in International Relations* (University of Washington Press, Seattle, 2006) 89 at 124.

218 Ibid, at 124-125.

Liechtenstein to initiate or terminate any agreement to co-operate with New Zealand or any other State in external affairs.

3 *Statehood in UN admissions practice*

The examples of the Micronesian States and Liechtenstein being admitted to UN membership lead to the conclusion that article 4 of UN Charter – which opens membership "to all other peace-loving states" – has not been interpreted as using the term "state" in a narrow or legal sense, despite the apparent intent of its drafters.²¹⁹ As one observer has commented:²²⁰

...it seems that the meaning that can be attributed to this requisite [of independent statehood] is one which stems from a *formal* element: that is, a State is independent when its legal system is original, it draws its power from its own Constitution, and is not derived from the legal system of Constitution of another State. The original character of the Constitution represents a minimum level below which admission of an entity to the UN would become inconsistent with the Charter due to the absence of the requirement of independence. A careful study of the discussions in the [General] Assembly and in the [Security] Council regarding certain candidates, which were then admitted, shows that they did not concern this minimum requirement or independence in a legal or formal sense, but independence in a political sense, something quite undefined and not definable. Such discussions were, in fact, of no consequence.

To illustrate what this means, it is helpful to examine briefly the instances in which the Security Council has refused to recommend that an applicant State be admitted to the UN. Throughout the history of the UN, this has happened occasionally, but almost uniformly, these refusals have been motivated by geopolitical concerns that were only nominally based on an objective assessment of the applicant State's independence. In such instances, the prerequisite of independent statehood was usually arbitrarily cited as the deficiency in the application. In short, blocking UN membership for a State was used by permanent members of the Security Council as a means of waging the Cold War. To summarise UN admissions practice, it may be said that the organisation has regarded a State as eligible for membership when (1) the State derives its authority from its own Constitution, as opposed to the Constitution of another State (a formal independence requirement that has been relatively easy to satisfy); (2) the State is self-governing in practice (an actual independence requirement); and (3) there are no geopolitical impediments to the implicit recognition of the applicant as an independent State (an unspoken but controlling requirement). In UN membership debates, despite the fact that the third requirement has been key, objecting States have always claimed that their concern was the second requirement.

219 Igarashi, above n 58, at 291.

220 Conforti, above n 27, at 25.

The examples of failed membership bids are telling. Between 1946 and 1957, Mongolia filed ten consecutive applications for membership, each of which was rejected by the Western powers in the Security Council (and the Republic of China) on the grounds that the Mongolian People's Republic lacked actual independence from the Soviet Union and was essentially a communist puppet state.²²¹ Similarly, the initial membership applications by Ceylon and Jordan were opposed by the Soviet Union on the grounds that they lacked actual independence from the United Kingdom;²²² similar reasons were also given for the Soviet Union's veto of Kuwait's initial membership application in 1961.²²³ Beginning in 1949, the Soviet Union repeatedly blocked UN membership for South Korea, arguing that it was a mere puppet state of the West, despite overwhelming majority support in the General Assembly for the State's admission.²²⁴ After the Korean War, the West responded by similarly opposing all membership applications of North Korea, and the two Koreas were not admitted until 1991, when the Cold War had all but ended.²²⁵ The applications of the divided States of North and South Vietnam and East and West Germany were often defeated by similar Cold War jockeying.²²⁶ After Bangladesh emerged victorious in its 1971 war of independence against Pakistan, the People's Republic of China vetoed Bangladesh's initial application for UN membership; Bangladesh had been aided in its secession by India, and China offered its support to Pakistan primarily as a means of opposing Indian influence in the region.²²⁷ By 1974, Chinese opposition had evaporated and Bangladesh was unanimously admitted. In 1975, the United States vetoed Angola's application for membership, arguing that the presence of Cuban troops in the country suggested that Angola lacked actual independence. However, American opposition to Angola's membership did not continue into the next year, and Angola was subsequently admitted.²²⁸ Since Angola's initial failed attempt to gain membership, no application for UN membership that

221 Crawford, above n 140, at 86 n 227. Mongolia was ultimately admitted in 1961.

222 Dugard, above n 18, at 58. Both states were admitted in the 1955 "package deal", discussed above in Part I at text corresponding to footnotes 19-21.

223 Crawford, above n 140, at 180. Kuwait was subsequently admitted in 1963.

224 Dugard, above n 18, at 59. In 1949, the General Assembly passed a resolution by a vote of 50:6 that called for the admission of Republic of Korea: *Admission of New Members* GA Res 296G, UN GAOR, 4th sess, 252nd plenary mtg (1949).

225 Crawford, above n 140, at 466-472.

226 For a discussion of the statehood of North and South Vietnam, see *ibid*, at 472-477. For a chronology of the UN membership applications of the two Vietnams, see Stephen Jacobs and Marc Poirier "The Right to Veto United Nations Membership Applications: The United States Veto of the Viet-Nams" (1976) 17 *Harv Int'l LJ* 581. For a discussion of the statehood of East and West Germany, see Crawford, above n 140, at 452-466. The two German States were ultimately admitted concurrently in 1973, and a unified Vietnam was admitted in 1977.

227 Dugard, above n 18, at 75.

228 *Ibid*, at 74.

has reached the stage of being considered by the Security Council has been unsuccessful. In the early 1990s, the former constituent republics of Yugoslavia were rapidly admitted to the UN upon their initial applications, despite the existence of plausible arguments that some of them lacked independence in the midst of the Yugoslav Wars.²²⁹

This review serves only to illustrate that it is extremely unlikely that a Cook Islands application for UN membership would result in failure. No permanent member of the Security Council has a geopolitical reason to prevent the Cook Islands from becoming a member: If the application demonstrated that the Cook Islands is in fact self-governing in internal and external affairs and that it derives its governmental authority from its own Constitution, which it alone has the power to amend, the traditional criteria for UN membership would be satisfied and the Cook Islands would be welcomed into the family of UN member States.

D A Final Problem: Constitutional Sharing

There is one final problem that confronts Cook Islands membership in the UN – one final issue that could be cited as evidence that the Cook Islands is not an independent State and therefore should be refused UN membership. Although the Cook Islands is self-governing in both internal and external affairs and derives its governmental authority from a Constitution that it alone can amend, the Constitution retains for the Cook Islands two conspicuous aspects of association with New Zealand which may call into question the sovereign independence of the Cook Islands: New Zealand and the Cook Islands continue to share a Head of State and a common citizenship. It is for these reasons that many have assumed that the Cook Islands is the type of Associated State that is not eligible for UN membership: In sharing a Head of State and citizenship with a UN member State, the Cook Islands *prima facie* appears to be more similar to Puerto Rico or Aruba than the Marshall Islands or Palau.²³⁰ In its most basic form, the question may be asked: Is it possible for an independent State that shares its Head of State and citizenship with another UN member to be admitted as a separate member of the UN?

From a theoretical standpoint, there is no reason to believe that these associations with New Zealand present a barrier to UN membership for the Cook Islands. Membership in the UN is open to "all other peace-loving States", and there is no indication in the theoretical literature that

229 Crawford, above n 140, at 186-189.

230 For example, Crawford, above n 140, at 492, asserts bluntly that "[c]ertain 'associated States' constitute fully independent States which have delegated foreign affairs, defence or other powers to another State. Examples are the Marshall Islands, Palau, and the Federated States of Micronesia. Others are not States but have some separate international status by virtue of the relevant association agreements. These include Puerto Rico, the Northern Mariana Islands, the Cook Islands and Niue." This conclusion is contradicted by other analyses, including the exhaustive examination in *Laws of New Zealand Pacific States and Territories: Cook Islands* at [34]-[41], where the author determines that the "evidence supports the conclusion that the self-governing, freely associated State of the Cook Islands is now a State in international law."

independent statehood requires the existence of a unique Head of State or a unique citizenship. Because the Cook Islands is a *sui generis* case, the practice of the UN also does not provide a definitive answer on this point, and membership debates in the UN have never included discussions of how the identity of an applicant's Head of State or the citizenship status of its residents may affect the independent statehood of the applicant. However, examining the theoretical landscape of this issue suggests that neither a unique Head of State nor a unique citizenship is required for independent statehood.

1 The shared Head of State

It is well established that the same individual can act as the Head of State of multiple independent States. As mentioned above in Part II-B-2, Queen Elizabeth II is the current Head of State of 16 UN member States. Further, these 16 States are not unique in sharing an individual as a Head of State: the Head of State of Andorra is a co-principship composed of the President of France and the Bishop of Urgell in Spain.²³¹ Since the President of France is also the Head of State of France, the individual in that position acts simultaneously as the Head of State of France and as a constituent part of the Head of State of Andorra. However, it is also clear that the legal entity of a Head of State is readily divisible from the individual who acts in that position. As previously mentioned, the Crown is divisible among multiple jurisdictions, and each of the 16 jurisdictions that recognise Queen Elizabeth II as Head of State nevertheless has a unique legal entity or Sovereign as Head of State: Elizabeth II is simultaneously the Queen of the United Kingdom, the Queen of Papua New Guinea, the Queen of the Bahamas, and so forth. Similarly, there is no question that when Nicolas Sarkozy takes action as the Co-Prince of Andorra, he is acting in a legal capacity that is distinct from his more well-understood role as Head of State of France. For example, if Sarkozy signed a treaty on behalf of Andorra, his personal signature would not also bind the French Republic to the agreement.

However, the development of these distinctions is a relatively recent legal creation, and in the past, it appears that independent States sometimes did share the same legal entity as Head of State. The concept that the Crown could be formally divisible among the various countries of the British Commonwealth did not begin to take hold until after both the 1926 Balfour Declaration – which confirmed that the countries of the Commonwealth, though "freely associated", were nevertheless "equal in status" as to their independence²³² – and the Statute of Westminster 1931, which formally

²³¹ Constitution of the Principality of Andorra (1993), art 43.

²³² *Report of the Inter-Imperial Relations Committee* (Imperial Conference, London, 1926), reproduced in Arthur Berriedale Keith (ed) *Speeches and Documents on the British Dominions, 1918-1931: From Self-government to National Sovereignty* (Oxford University Press, London, 1932) 161 at 161.

bestowed full legislative independence on the British dominions.²³³ Prior to these events, more than one court had held that the Crown was indivisible.²³⁴ Indeed, as has been pointed out, "the doctrine of the divisibility of the Crown could hardly have come into existence had it not been for the Statute of Westminster, 1931, or at any rate the Imperial Conference of 1926".²³⁵ By 1952, when the member States of the Commonwealth agreed that each of them should adopt individualised royal titles for the new Queen, it was clear that the doctrine of indivisibility had passed on.²³⁶ Determining the precise moment in which the Crown became divisible – or at least the precise moment when it became recognised that the Crown had in fact been divided among independent States – is impossible.²³⁷ But what is clear is that there was a window of time, sometime between 1926 and 1952, in which the countries of the Commonwealth were independent States that shared the same individual and the same legal entity as their Head of State. This situation is essentially analogous to the current relationship between the Cook Islands and New Zealand.

In any case, the existence of confusion over the precise identity or nature of the Head of State has never been a factor that prevents an otherwise qualified territory from being recognised as an independent State. For example, the 1936 and 1977 Constitutions of the Soviet Union did not designate a Head of State, but they assigned most of the duties typically conferred on a Head of State to the Presidium of the Supreme Soviet.²³⁸ In practice, the Chairman of the Presidium was often diplomatically treated as the *de facto* Head of State of the Soviet Union, but it was never particularly clear if this designation was correct, or if the entire Presidium was actually a collective

233 Statute of Westminster 1931 (UK) 22 Geo V c 4. The Statute applied immediately to the Dominion of Canada, the Union of South Africa, and the Irish Free State. It was ratified and thereby adopted by the Commonwealth of Australia in 1942 and by the Dominion of New Zealand in 1947. (The Statute also permitted ratification by the Dominion of Newfoundland, but this was never done and Newfoundland became a province of the Dominion of Canada in 1949.)

234 *Theodore v Duncan* [1919] AC 696 (PC) at 706; *Amalgamated Society of Engineers v Adelaide Steamship Co* (1920) 28 CLR 129 at 152.

235 Kenneth Roberts-Wray *Commonwealth and Colonial Law* (Stevens & Sons, London, 1966) at 85.

236 *Ibid.*, at 86.

237 Even the more basic question of whether the Crown in fact is divisible at all has been acknowledged as one that, on first sight, "appear[s] to be a matter of no more than metaphysical interest": *ibid.*, at 85. The more complicated question posed here, being one that could never be definitely answered, takes the analysis into metaphysical considerations that are beyond the scope of this article.

238 Constitution of the Union of Soviet Socialist Republics (1936), art 49; Constitution of the Union of Soviet Socialist Republics (1977), arts 119-123.

Head of State.²³⁹ Nevertheless, the existence of this uncertainty as to the identity of the Head of State did not bring the statehood of the Soviet Union into question. Some States have even gone without a Head of State for extended periods of time: after the 1994 death of North Korea's President and Head of State Kim Il Sung, North Korea left the position vacant for over four years until it amended its constitution to abolish the position.²⁴⁰ Considering that North Korea continued to sit as a UN member during this four-year period, an argument that North Korea ceased to be a State because it lacked a Head of State would be unconvincing and, to my knowledge, has not been advanced.

2 *The shared citizenship*

The past practice of the Commonwealth also supports the proposition that formally independent States can share a common citizenship. Until 1945, when Canada informed the United Kingdom that it wished to create and define a unique Canadian citizenship, it was widely understood that a common citizenship was a fundamental aspect of the Commonwealth association.²⁴¹ The resulting 1946 Canadian legislation created Canadian citizenship and declared all such citizens to be "British subjects";²⁴² in 1948, the United Kingdom adopted legislation that mirrored this system of coupling local citizenship ("citizenship of the United Kingdom and Colonies") within a broader subjection to the Crown enjoyed by citizens in other Commonwealth States ("British nationality", sometimes referred to as "Commonwealth citizenship" for reasons of clarity).²⁴³ Since there is a consensus that at least some of the Commonwealth States became formally independent well before these statutes

239 FJM Feldbrugge *Russian Law: The End of the Soviet System and the Role of Law* (Martinus Nijhoff Publishers, Dordrecht (Neth), 1993) at 152. The point was debateable, but irrelevant in practice: "For many years the Presidium of the Supreme Soviet of the USSR was on paper one of the most important agencies of the Soviet state, although it was in fact, like the Supreme Soviet itself, politically meaningless": *ibid.* The matter was rendered moot in March 1990 when, in an attempt to shift the locus of power from the Communist Party to State organs, the office of President of the USSR was created: *ibid.*, at 153-154.

240 Roger East and Richard J Thomas *Profiles of People in Power: The World's Government Leaders* (Europa Publications, London, 2003) at 276. As with the Soviet constitutions, the 1998 North Korean Constitution designates no clear Head of State, with the powers formerly exercised by the President being divided between the Premier, the Chairman of the National Defence Commission, and the President of the Supreme People's Assembly. Adding to the confusion, the deceased Kim Il Sung is referred to in the preamble of the Constitution as "the eternal President of the Republic". The President of the Supreme People's Assembly is probably the position that could be described as the Head of State most accurately, although it is understood that Kim Jong Il, who is Chairman of the National Defence Commission, has been the *de facto* Head of State of North Korea since his father's death.

241 Nicholas Mansergh *The Commonwealth Experience: From British to Multiracial Commonwealth* (2nd ed, Macmillan, London, 1982) vol 2 at 136.

242 Canadian Citizenship Act SC 1946 c 15.

243 British Nationality Act 1948 (UK) 11 & 12 Geo VI c 56.

were enacted, we therefore can conclude that prior to 1948 there were independent States that shared a common citizenship.

3 *The sharing problem in UN admissions practice*

These matters have been of little concern to the UN as it has admitted new member States. Despite the lack of attention the issues have received, there is nevertheless an apparent precedent for an applicant State being admitted to the UN when it shared a Head of State and citizenship with an existing member of the UN. In 1947, the Parliament of the United Kingdom enacted the Indian Independence Act, which partitioned British India into the independent States of India and Pakistan.²⁴⁴ India had been permitted to join the UN as a founding member, despite its lack of independence in 1945, and after the partition, it was – mistakenly, some would say – not required to reapply for membership.²⁴⁵ Just over a month after the partition took effect, Pakistan applied for UN membership and was admitted on 30 September 1947.²⁴⁶ However, the Act that effected the partition did not establish separate Heads of State for the two new countries: both were simply said to be "under the sovereignty of His Majesty".²⁴⁷ (The Act also stated that although His Majesty could appoint a separate Governor-General for both of the countries, at least temporarily, "the same person may be the Governor-General of both the new Dominions".)²⁴⁸ As discussed above, by 1947 the doctrine of the divisibility of the Crown had not yet crystallised, and Pakistan was therefore admitted to UN membership despite the formal fact that it shared a Head of State with India, the United Kingdom, Australia, Canada, and South Africa, all of which were founding members of the UN. There also can be no doubt that at the time of its UN admission, Pakistan shared a common citizenship with all of these countries except Canada, which by the time of the partition had created its separate citizenship.

²⁴⁴ Indian Independence Act 1947 (UK) 10 & 11 Geo VI c 30.

²⁴⁵ Allowing non-independent India to be a founding member of the UN had never been controversial, since India had been a founding member of the League of Nations, had signed the 1942 Declaration of the United Nations, and had made substantial contributions to the Allied war effort: see Dugard, above n 18, at 53. In any case, recall that the UN Charter set out separate qualifications for founding members and countries that would subsequently apply for membership. While statehood was a prerequisite for an applicant to be admitted, it was not included as a formal prerequisite for founding membership. For background on why it may have been appropriate for a post-partition India to reapply for membership, see above n 179 and accompanying text.

²⁴⁶ *Admission of Yemen and Pakistan to Membership in the United Nations* GA Res 108, UN GAOR, 2nd sess, 92nd plen mtg (1947).

²⁴⁷ Indian Independence Act 1947 (UK) 10 & 11 Geo VI c 30, s 2.

²⁴⁸ *Ibid.*, s 5. Not surprisingly, given the hostility between the two new States, Pakistan opted to advise His Majesty that a resident of Pakistan be appointed as the Governor-General of Pakistan.

This example illustrates that sharing a Head of State or a common citizenship with a sitting member of the UN does not prohibit an applicant from being admitted as a member State under article 4 of the UN Charter. Sharing citizenship or a legal entity as Head of State is quite uncommon among sovereign independent States, but it is not without precedent, and the fact that the Cook Islands and New Zealand have chosen to associate with each other in these ways presents no theoretical or practical barrier to the admission of the Cook Islands to the UN.

VI Conclusion: Why Bother?

This article has demonstrated that the Cook Islands is a sovereign and independent State at international law, and that should it choose to apply, the Cook Islands would be eligible to be admitted to membership in the United Nations under article 4 of the UN Charter. Any concluding remarks must concentrate attention on the proviso contained in the preceding sentence: should it choose to apply. The Cook Islands has existed as an Associated State without UN membership for 45 years: why should it concern itself now with joining the UN? What benefits, if any, would result from obtaining UN membership? Why not simply continue to rely on New Zealand to represent its interests in the General Assembly and the various UN committees and agencies? In short – why bother?

Many States have sought to join the UN because UN membership is often regarded as "the definitive acknowledgement of their independence and statehood by the international community".²⁴⁹ This desire for international recognition is understandable, particularly when it emanates from States that gained independence as a result of decolonisation. The Cook Islands has not been completely immune from such sentiments. As has been noted, the constitutional reforms of the early 1980s were motivated in part by a desire to dispel the misconceptions that other States held regarding the Cook Islands' true status.²⁵⁰ However, the general lack of a nationalist movement and the popularity in the Cook Islands of the ongoing association with New Zealand renders this factor considerably less important in the context of a potential membership application by the Cook Islands.

A consideration of much more significance is the reality that the geopolitical interests of New Zealand and those of the Cook Islands do not always coincide, and when the Cook Islands delegates to New Zealand the responsibility of representing it on the ultimate international stage, New Zealand can potentially be placed in situations where conflicts of interest will arise. The potential for disagreement between the two countries was vividly illustrated in 1980, just months after the Cook Islands had concluded its historic maritime boundary treaty with the United States. Around the time the Cook Islands was negotiating a fishing rights treaty with South Korea, it also opened

²⁴⁹ Dugard, above n 18, at 73.

²⁵⁰ Henderson, above n 40, at 103; Short, above n 113, at 181-182; *Laws of New Zealand* Pacific States and Territories: Cook Islands at [15]; Townend, above n 96, at 598.

similar negotiations with the government of the Republic of China in Taiwan. This revelation caused consternation in Wellington, since New Zealand formally recognises the People's Republic of China and not the Chinese government based in Taiwan. After New Zealand "expressed its strong disapproval" of these negotiations,²⁵¹ the Cook Islands opted to formally conclude the fishing agreement with the Taiwan Deep Sea Tuna Boat Owners and Exporters Association as opposed to the government in Taiwan.²⁵²

A more recent example – and one with more widespread geopolitical implications – relates to the controversy over the Cook Islands' involvement in offshore banking. In an attempt to attract foreign investment, the Cook Islands enacted the Offshore Banking Act 1981, which provided a light regulatory regime for foreign banks established in the Cook Islands under the Act and exempted them from paying taxes on income earned from international financial transactions.²⁵³ The offshore banking industry in the islands rapidly grew to the point where by the early 2000s it accounted for approximately 10 per cent of the Cook Islands' gross domestic product.²⁵⁴ These arrangements became controversial in New Zealand in the early 1990s, and allegations of fraud involving the New Zealand and Cook Islands tax departments culminated in the 1994-1997 "Winebox Inquiry".²⁵⁵ However, serious international disagreement between New Zealand and the Cook Islands on these matters did not emerge until 2000, when the intergovernmental Financial Action Task Force on Money Laundering (FATF) placed the Cook Islands on its initial "blacklist" of Non-Cooperative Countries and Territories (NCCT) that were not taking sufficient steps to stop money laundering by offshore banking entities.²⁵⁶ In response, the Cook Islands immediately

251 Igarashi, above n 58, at 274, quoting Tere Mataio "Relationship between the Cook Islands and New Zealand and the Problems of an Associated State" (paper presented to the Workshop on Constitution of the Pacific Islands, Pohnpei, November 1981) at 7.

252 Agreement between the Government of the Cook Islands and the Taiwan Deep Sea Tuna Boat Owners and Exporters Association concerning the licensing of Fishing Vessels of the Association to Fish within the Exclusive Economic Zone of the Cook Islands (7 October 1980). This agreement has been renewed a number of times. In 1997, the Cook Islands entered into formal diplomatic relations with the People's Republic of China and has not done so with the Republic of China.

253 Isaacus Adzoxornu "The Cook Islands" in Michael A. Ntuny (ed) *South Pacific Islands Legal Systems* (University of Hawai'i Press, Honolulu, 1993) 3 at 13.

254 Lynn Daniel (ed) *The Far East and Australasia 2003* (34th ed, Routledge, London, 2002) at 1051.

255 RK Davison *Report of the Wine-box Inquiry* (Commission of Inquiry into Certain Matters Relating to Taxation 1997).

256 Financial Action Task Force on Money Laundering *Review to Identify Non-Cooperative Countries: Increasing the Worldwide Effectiveness of Anti-Money Laundering Measures* (FATF Secretariat, Paris, 2000) at 4. Also appearing on the initial NCCT list were the Bahamas, Cayman Islands, Dominica, Israel, Lebanon, Liechtenstein, Marshall Islands, Nauru, Niue, Panama, Philippines, Russia, Saint Kitts and Nevis, and Saint Vincent and the Grenadines. For a history of the FATF blacklist, see Hilton McCann *Offshore Finance* (Cambridge University Press, Cambridge, 2006) at 288-294.

enacted an anti-money laundering statute,²⁵⁷ but its initial effort was insufficient to remove it from the blacklist. The Cook Islands remained on the blacklist until February 2005, by which time the FATF had assessed the effectiveness of a flurry of Cook Islands statutes and regulations enacted in 2003 and 2004.²⁵⁸ What made this incident awkward for the two countries was the fact that the Cook Islands was being internationally shamed into legislative action by the FATF, and New Zealand was a member of the FATF. When these matters were raised at the UN (or at its specialised agencies, the International Monetary Fund and the World Bank), New Zealand was therefore unable to adequately represent the interests of the Cook Islands because of its conflicting roles. Requiring that such situations of diplomatic dissonance be tolerated does a disservice to both the Cook Islands and New Zealand, and problems such as these would be resolved by the Cook Islands filing a successful application for UN membership.

On a more positive note, membership in the UN has benefited other microstates in that "belonging to a universal forum allows them to maintain contacts to many States at a small fraction of what it would cost to maintain a worldwide diplomatic apparatus".²⁵⁹ By obtaining UN membership, the Cook Islands could thus vastly increase its diplomatic reach while at the same time maintaining a modest level of spending in funding its diplomatic ventures.

As with any undertaking in foreign affairs, the foreseeable benefits of a Cook Islands membership application must be balanced against the possible negative consequences of the action. Some may fear that an application for UN membership by the Cook Islands would be interpreted by New Zealand as a sign that it is no longer needed by its former "colony", and that New Zealand therefore would use the event as a justification for unilaterally terminating the relationship of free association with the Cook Islands. If this were to occur, it would indeed be an unfortunate result, but it may be fair to assume that New Zealand understands and accepts that free association is not necessarily a temporary way station on a longer journey: as with the Micronesian States, free association can be comfortably incorporated into the international system as a permanent and stable form of governance.²⁶⁰ While New Zealand does retain sovereign power to terminate the relationship, if such a course were ever taken it would almost surely be done pursuant to a consensus agreement between the two countries as opposed to a unilateral act of either. The two governments have explicitly agreed that they will continue to "advise each other when a proposed

257 Money Laundering Prevention Act 2000 (CI) (repealed by Proceeds of Crime Act 2003 (CI), s 108).

258 Including the Banking Act 2003 (CI); Financial Supervisory Commission Act 2003 (CI); Proceeds of Crime Act 2003 (CI); Crimes Amendment Act 2004 (CI); International Companies Amendment Act 2004 (CI); and Terrorism Suppression Act 2004 (CI).

259 Thomas D Grant *Admission to the United Nations: Charter Article 4 and the Rise of Universal Organization* (Martinus Nijhoff Publishers, Leiden (Neth), 2009) at 238.

260 See Crawford, above n 140, at 631-632.

foreign policy initiative may affect the rights, obligations and interests of the other".²⁶¹ It is therefore far more likely that prior to any application being lodged, the Cook Islands would inform New Zealand of its desire for UN membership, and New Zealand may even choose to endorse or "sponsor" a Cook Islands application. At the same time, New Zealand support of a Cook Islands application may not be automatic if some of the trappings of free association are retained: In 2001, New Zealand Prime Minister Helen Clark "made it clear" to the Cook Islands Prime Minister that in her view, the Cook Islands "would have to become independent from New Zealand if it wanted to join the United Nations", and that this would mean that the Cook Islands "must have [its] own citizenship".²⁶³

There is no doubt, therefore, that a Cook Islands application for UN membership could be viewed by some New Zealanders and Cook Islanders as a turning point in the relationship. The fact that a Cook Islands application is now a credible possibility should cause the governments of both countries to consider whether the Cook Islands joining the UN would ultimately enhance or endanger the relationship of free association. Either result is possible, depending on how the two countries independently decide to regard one another once both are UN member States. In international affairs, friends and allies do not always agree, and when they do not, a positive relationship endures only when there is the political will on both sides to consciously tolerate the disagreement. While it is likely that in most instances there would be little difference between the positions of New Zealand and the Cook Islands at the UN, would the parties be comfortable with an occasional disagreement being played out at the international level? Is there any potential for outright confrontation, and what would the parties hope would be the consequences of such an occurrence? Are the parties prepared to treat one another as true sovereign equals on the international stage, or will the Cook Islands consciously or subconsciously defer to New Zealand out of fear of angering it and thereby threatening the maintenance of the common citizenship?

A Cook Islands application for UN membership would be successful, and undoubtedly UN membership would provide advantages for the Cook Islands and its residents. Whether it will become a reality is a political decision that is one aspect of what it means for a State and its people to exercise the treasured right to self-determination. As such, it is a decision that rests solely with the government and people of the Cook Islands.

261 Joint Centenary Declaration, above n 138, cl 4(3)(c).

263 Elinore Wellwood "Clark warns Cooks about NZ passports" *The Dominion Post* (Wellington, 13 June 2001) at 2. As outlined in this article, I disagree with Prime Minister Clark that Cook Islands membership in the UN would necessarily require the existence of a separate Cook Islands citizenship.

