THE MARIANAS, THE UNITED STATES, AND THE UNITED NATIONS: THE UNCERTAIN STATUS OF THE NEW AMERICAN COMMONWEALTH

> I think the strategic importance of the Marianas to the United States is sufficient that we had better get along with this whole job.[1]
>
> Senator Barry Goldwater,
> March 17, 1975.

The "job" which Senator Goldwater seeks to expedite is the creation of a commonwealth relationship between the Marianas Islands[2] and the United States by a covenant jointly proposed in February, 1975,[3] by the executives of the United States and the Marianas.[4] The "strategic importance" of these islands to the United States is clear.[5] However, the terms of the covenant and

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1. 121 CONG. REC. 4083 (daily ed. Mar. 17, 1975).

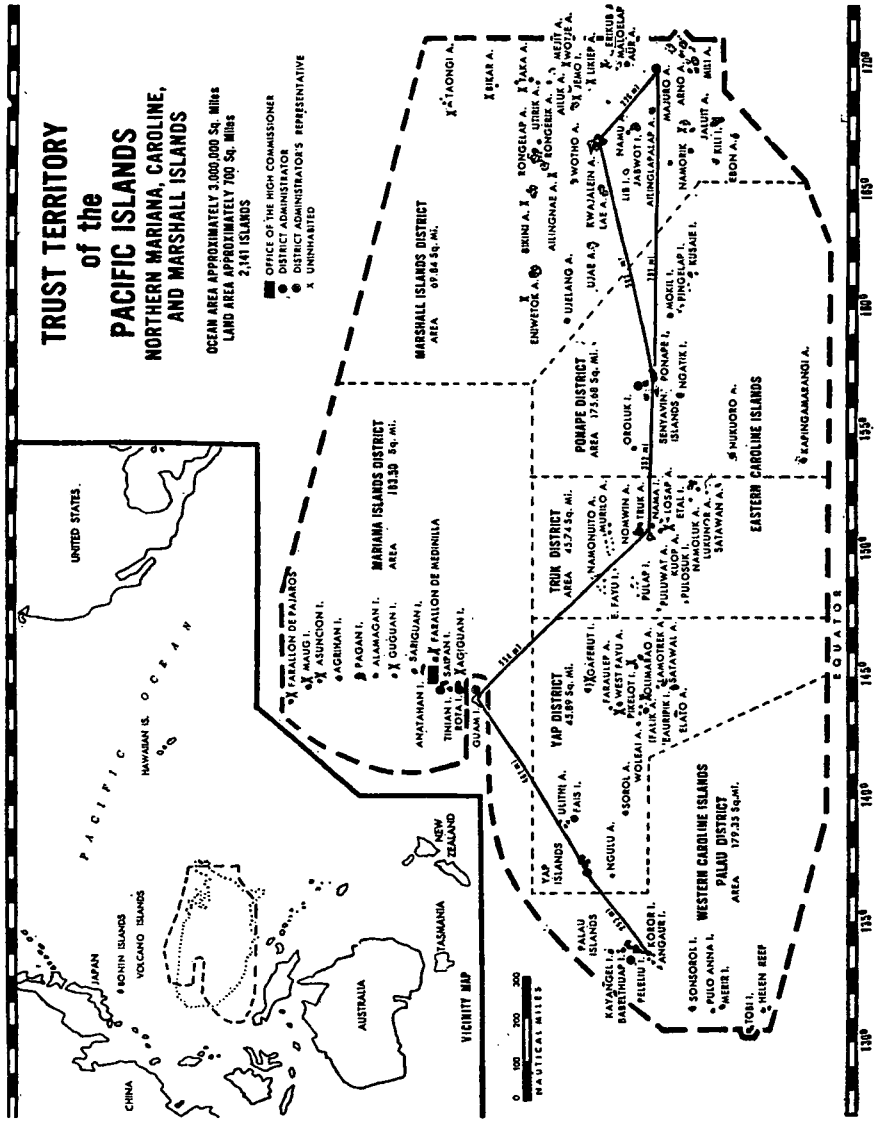
2. The Marianas are an archipelago of fourteen islands lying some 100 miles to the north of Guam. Total land mass is 183.5 square miles, supporting a population of about 15,000. 121 CONG. REC. 10796-97 (daily ed. June 17, 1975) (from Boorstin, *United States May Acquire Micronesia*, Daily Reporter Herald, (Loveland, Colorado) June 13, 1975, at 4, col. 2, and Miller, *New Progressive Outpost*, The Progressive, June, 1975).

3. Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States of America, February 15, 1975, H.J. Res. 549, 94th Cong., 1st Sess. (1975), S.J. Res. 107, 94th Cong., 1st Sess. (1975) [hereinafter cited as 1975 Covenant] [reproduced in 121 CONG. REC. 7106-11 (daily ed. July 21, 1975)].

4. As of this writing the measure has been endorsed by a Marianan plebiscite, 121 CONG. REC. 111 (daily ed. July 21, 1975) (Senator Burton reporting to the U.S. Senate), the United States House of Representatives, *id.* at 7117, and the United States Senate, 122 CONG. REC. 2256 (daily ed. Feb. 24, 1976). The bill was signed by President Ford on March 24, 1976. San Diego Union, Mar. 25, 1976, at A-7, col. 4.

5. The significant strategic commodities in the Marianas are *land* and *presence*. *See* Green, *America's Strategic Trusteeship Dilemma Its Humanitarian Obligations*, 9 TEXAS INT'L L.J. 19, 25 (1974) [hereinafter cited as Green]. The 1975 Covenant gives the United States the exclusive right to act as the Marianas' agent in all areas of foreign affairs. 1975 Covenant, *supra* note 3, § 104. This includes the exclusive right to maintain a strategic "presence" within the Marianas Island District itself. The Covenant also provides for various lands to be leased to the United States for military purposes. *Id.* art. VIII.

The need for military base locations in the Western Pacific is becoming more critical as the United States finds itself virtually evicted from the Asian



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the manner of its implementation appear to be in direct conflict with legal duties binding on the United States under international law.

United States involvement with the Marianas began with the islands' capture from the Japanese during World War II. In 1947, the United States and the United Nations entered into a treaty[6] establishing a trust relationship with the United States as trustee, the island domain of Micronesia as the trust territory, and the United Nations as the authorizing body. The Marianas and surrounding waters comprise one of six districts of Micronesia which make up this "Trust Territory of the Pacific Islands" (TTPI).

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mainland. The Marianas, with Guam a mere hundred miles away, would make an ideal location. A glance at the map demonstrates the strategically critical position of this archipelago. An arc of 1400 mile radius, centered in the Marianas, sweeps through Japan, Taiwan, the Phillipines and New Guinea. If the radius is extended to 2000 miles, the arc passes through South-Eastern Siberia, Eastern China, the Southeast-Asian peninsula, Indonesia and the northern tip of Australia.

> The strategic defensive value of this extensive territory, lying as it does along and across the lines of communication to Asia and the South Pacific, has long been recognized. The fundamental relationship of the territory to the future security of the United States became a matter of grave concern to us when the aggressive intentions of Japan became increasingly evident.

Statement by James Forrestal, Secretary of the Navy, *Hearings on S.J. Res. 143 Before the Senate Comm. on Foreign Relations*, 80th Cong., 1st Sess. at 14 (1947) [hereinafter cited as *1947 Hearings*]. Note that Secretary Forrestal's remarks encompassed all of Micronesia, of which the Marianas Islands District is the fraction most central to the Asian mainland, and for that reason probably the most strategically located of the six districts which make up Micronesia.

The privilege of exclusive strategic presence in Micronesia provides two benefits for the United States—first, the opportunity to maintain bases and forces; and second and even more important, exclusive presence for the United States and the correlative denial of military presence to others.

> We have here islands that in many instances are nothing but sandspits. They are of very little economic value. Our sole interest in them is security. But they are the spots on that great ocean surface that to-day provide a capacity and an ability for a nation that would seek to conduct aggressive operations across that ocean. They would have to use them. So long as we have them, they can't use them, and that means to me, even in their negative denial to someone else, a tremendous step forward in the security of this country.

Statement of General of the Army, Dwight D. Eisenhower, Chief of Staff, *id.* at 18. Here again the reference is to all of Micronesia. There is indication that the People's Republic of China is favorably disposed towards the stabilizing effect of a continued United States presence in the Western Pacific. *See* Green, *supra*, at 24.

6. Trusteeship Agreement for the Former Japanese Mandated Islands, July 18, 1947, 61 Stat. 3301, T.I.A.S. No. 1665, 8 U.N.T.S. 189 [hereinafter cited as 1947 Agreement].

The 1975 Covenant is an attempt by the United States to terminate the trust relationship which exists between itself and the Marianas. This comment will examine the legal sufficiency of the Covenant to accomplish that end.

The 1947 Agreement does not include a clear statement of the trustee's legal duties regarding trust termination. However, it does require the trustee, or "Administering Authority", to promote both international security, and the political and other humanitarian interests of the territory's inhabitants. The United States has consistently emphasized the security aspects of these obligations. Moreover, the United States has failed to distinguish between global security interests and its own. Consistent with this position, the United States has understood trusteeship to be roughly equivalent to annexation, and termination to be a matter of unilateral discretion.[7] On the other hand, the United Nations' interpretation of these duties is strongly oriented toward the humanitarian needs of the inhabitants, and its position on trust termination diverges widely from that held by the United States.

The promotion of the 1975 Covenant by the United States is an international event which clearly favors the strategic interests of the Administering Authority over the humanitarian interests of the trust territory's inhabitants. The United States has not made even a modest effort to comply with the criteria established by the United Nations for proper trust termination. Under international law, this collision of priorities must be resolved against the United States. The United Nations cannot, consistent with its expressed position, endorse the 1975 Covenant as an example of proper trust termination. Should the United States persist after disapproval by the United Nations in promoting a new Marianan status strongly advantageous to the United States, such an act could only be interpreted as an act of colonialism.[8]

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7. Senator HICKENLOOPER. Is there any authority in the United Nations to compel us to do more than we determine we should do?

Mr. GERIG. [Chief, Division of Dependent Area Affairs, Department of State] No; none whatever.

1947 Hearings, supra note 5, at 22.

8. "Colonialism" is used here in an everyday, nontechnical sense. For example, it may be defined as: "[a] policy by which a nation maintains or extends its control over foreign dependencies." THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 262 (1969).

I. THE EVOLVING DUTIES OF TRUSTEESHIP

The central question in determining whether the United States has complied with the duties set forth in the 1947 Agreement is whether that Agreement extends to the United States an absolute right to determine and pursue its security interests in the TTPI. An affirmative finding would authorize any action the United States might regard as appropriate, including implementation of the 1975 Covenant. But if it appears that development of the inhabitants' humanitarian needs was anticipated by the Agreement to be the interest of highest priority, then the 1975 Covenant must comply with those ends, or else be regarded as a violation of the 1947 Agreement. An examination of the negotiations leading to the signing of the Agreement, and both early and recent interpretations of the United Nations Charter, compels the conclusion that, in this instance, the humanitarian interests should prevail.

A. Early Compromises

The United States is in the peculiar position of having stood on both sides of this controversy at different times. In 1941, President Roosevelt and Prime Minister Churchill met to discuss the principles which should underlie any future reconstruction of the world order at the war's end. In the Atlantic Charter[9] which issued from that meeting, the United States rejected the notion of territorial expansion through annexation of conquered lands. This expression of liberal humanitarianism was the seed for a future trusteeship system geared to the best interests of dependent inhabitants in the trust territories.

A year later,[10] the United States' view of the dominant problem attending post-war non-self-governing territories had switched from a concern for the inhabitants' development toward self-determination, to a realization of how vital to world peace and American security the skillful management of a territory such as Micronesia would be.[11] This shift of policy precipitated a conflict

9. Joint Declaration of August 14th, 1941, 55 Stat. 1600 (1941), E.A.S. No. 236.

10. The United States was brought into the war by the Japanese attack on Pearl Harbor, December 7, 1941. This was half a year after publication of the Atlantic Charter, and heralded a gradual reassessment of the American championship of Wilsonian liberal humanitarianism expressed in that declaration.

11. Sacrifices exacted of the nation by the continuing global struggle displaced an evanescant liberal humanitarianism, opening a new chapter

between humanitarian considerations and strategic interests which would play a key role in deliberations when the victors of World War II convened to establish the principles by which the new world organization, the United Nations, would be guided.

At the drafting of the United Nations Charter in 1945,[12] the United States urged that provision be made for two types of trust territories. One would hold paramount the interests of the inhabitants, while the other would regard security considerations as controlling. The British, still champions of the liberal humanitarianism expressed in the Atlantic Charter, objected.[13] A compromise was struck,[14] leading to a proposal which would establish the International Trusteeship System.

The proposed chapter provided for "strategic areas" within trusts,[15] a provision which apparently satisfied the United States'

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in trusteeship policy-preparation. Sometime during the spring of 1944, the question of future Pacific military bases occupied the President's thinking.

Green, *supra* note 5, at 28. As early as July, 1942, President Roosevelt had decided that "the instrumentality of trusteeship should safeguard international peace and security, rather than the sole promotion of self-government or independence." *Id.* For a discussion of Western Pacific security issues, see note 5, *supra.*

12. The Charter was drafted at the United Nations Conference on International Organization, San Francisco, 1945.

13. Territorial Trusteeship: United Kingdom Draft of Chapter for Inclusion in United Nations Charter, U.N. Doc. 2-G/26(d), 3 U.N.C.I.O. Docs. 609 *et seq.* (1945).

14. One writer states that:

To meet British concerns for the territorial inhabitants' welfare, the United States Delegation revised its proposals to apply the system's basic objectives specifically to peoples of strategic areas.

Green, *supra* note 5, at 32 (footnote omitted).

15. The duties of trusteeship are described in chapters XI and XII of the U.N. Charter. Chapter XI applies to all "non-self-governing" territories, of which trust territories are an example, and stipulates that any member State which has or assumes administrative responsibilities for a dependent State, accepts its responsibilities as a "sacred trust", recognizing that the interests of the inhabitants are paramount. U.N. CHARTER art. 73.

Within the requirements set forth in chapter XI, chapter XII describes the additional duties of trust administration. A trusteeship is established by agreement between the United Nations and an Administering Authority, which agrees to promote the basic objectives of the International Trusteeship System, which include world peace, and the well-being of the dependent population. U.N. CHARTER arts. 76-81.

Within this general framework of trusteeship, chapter XII also provides for the designation of any area within a trust as a "strategic area". The Security Council speaks for the United Nations on all matters relating to such areas. For all other areas, the General Assembly has this authority. No further details are given concerning the distinction between strategic and non-strategic areas, this

security requirements.[16] However, if the United States understood this to be a blueprint for trust agreements under which security interests might predominate to the exclusion of the humanitarian, such a view was not supported by the initial reaction to the proposed chapter. When the drafting committee[17] for this proposal reported back to its governing commission,[18] the debate which followed included praise,[19] criticism,[20] reassurance[21] and even the

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function being relegated, apparently, to the particular trusteeship agreement. U.N. CHARTER arts. 82-85.

Of the eleven trusteeships established under the U.N. Charter, the only area designated as strategic was the entirety of the TTPI.

16. The Agreement which the United States concluded under the terms of that Chapter certainly seemed satisfactory to the U.S. military:

> In accepting the islands in strategic trusteeship under the United Nations, the United States can proceed to make permanent provision for the administration of these islands and their inhabitants more rapidly and under more favorable political conditions than would otherwise be possible.

Statement of Robert P. Patterson, Secretary of War, *1947 Hearings, supra* note 5, at 11.

17. Committee II/4 (Conference Technical Committee on Trusteeship), of the United Nations Conference on International Organization.

18. Commission II, of the United Nations Conference on International Organization.

> 19. [A]nd when in . . . this Declaration, they enlarge upon the nature of this pledge of acceptance, and in the simplest of terms promise not only to develop self-government, but also "to take due account of the political aspirations of the people," and, what is more important, "to assist them in the progressive development of their free political institutions," there is no possible way to underestimate the importance of this pledge. There can be no possible misunderstanding. The humblest, most bewildered human being must know what these words hold out to him. Here is the promise of independence; here is the pledge of his freedom.

UNITED STATES DEPARTMENT OF STATE, THE UNITED NATIONS CONFERENCE ON INTERNATIONAL ORGANIZATION 689 (1946) [hereinafter cited as Charter Debates]. (General Romulo, representative of the Philippines, commenting on the text which subsequently became article 73 of the Charter.)

> 20. I remember a word said by Commander Stassen [the U.S. Representative to the drafting committee] in the Committee, that this document is a living document and like all living beings, I wish to comment, it must evolve, it must change, and it must grow into something greater and better. This is the reason why, even though the Egyptian Delegation does not look upon this document as in any way an ideal document, nevertheless it considers that it presents a great step forward, and in the right direction, and we hope that it opens for the peoples under trusteeship a brighter and happier future than what they have experienced in the past, and that it will help in bringing many of them to the goal of complete independence at the earliest possible moment.

Comments of Mr. Awad, representative of Egypt, *id.* at 697.

> 21. But whatever difficulties are there, the rule that we will be guided by—I know I speak for my own country, but I feel I speak also for every country in a similar position—is that we have accepted a mandate as a sacred trust, not as part of our sovereign territory. The mandate does

prescient observation that no express provision had been made for trust termination.[22] However, the central concern of these comments was the proposal's adequacy in promoting the interests of a dependent territory's inhabitants. The draft text was adopted without objection[23] and subsequently became Chapter XII of the United Nations Charter.[24]

The basic objectives of the trusteeship system are set out in article 76 of the United Nations Charter. The first two of these embody conflicting views regarding the primary purpose of trusteeship. Article 76(a) favors the strategic interests:

> [T]o further international peace and security.

and article 76(b) champions the humanitarian needs of the inhabitants:

> [T]o promote the political, economic, social, and educational advancement of the inhabitants of the trust territories, and their progressive development towards self-government or independence as may be appropriate to the particular circumstances of each territory and its peoples and the freely expressed wishes of the peoples concerned, and as may be provided by the terms of each trusteeship agreement . . . .

There is specific language binding the Administering Authority of strategic areas to observe both of these principles.[25] However, there is no provision in the Charter which explains how conflicts between their applications should be resolved.

Within the context of these Charter provisions, the TPPI was established in 1947 as a strategic area trusteeship by agreement between the United Nations Security Council and the United States government.[26] This Agreement commands that the Administering Authority shall "act in accordance with the Charter of

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not belong to my country or any other country. It is held in trust for the world.

Comments of Mr. Frazer, representative of New Zealand, *id.* at 701.

22. [T]here is no specific regulation in the Charter as to how to terminate a trusteeship. A territory under trusteeship has no specific way of applying for independence and being granted that independence. It is at the mercy of the trustee power. Had provision been made for that, the Charter would have been better.

Comments of Mr. Al-Jamali, representative of Iraq, *id.* at 685.

23. *Id.* at 702.

24. U.N. CHARTER chap. XII.

25. "The basic objectives set forth in Article 76 shall be applicable to the people of each strategic area." U.N. CHARTER art. 83, para. 2.

26. 1947 Agreement, *supra* note 6.

the United Nations."[27] Concern for the welfare of the inhabitants persists in the 1947 Agreement in language substantially similar to that of Article 76(b).[28] The significance of the *strategic* designation of the area is reflected in the right of the Administering Authority to "establish naval, military and air bases"[29] and to close parts of the territory from time to time "for security reasons."[30]

The debates in the Security Council over the terms of the 1947 Agreement opened with token United States acknowledgement of the Atlantic Charter.[31] However, this did not diminish United States determination that, in this instance, "these islands [consituted] an integrated strategic physical complex vital to the security of the United States,"[32] and that "in such an area the security objective must be an overriding consideration."[33] While there was general agreement that *international* security favored the trust,[34] the rigid demand by the United States for virtually

27. *Id.*, art. 4. Since the U.N. Charter is incorporated by reference into the 1947 Agreement, the United States' obligation to observe the Charter stems in this instance not only from membership in the world body, but also from treaty obligation.

28. [The Administering Authority] shall promote the development of the inhabitants of the Trust Territory towards self-government or independence as may be appropriate to the particular circumstances of the Trust Territory and its peoples and the freely expressed wishes of the peoples concerned . . . .

Id., art. 6, para. 1.

29. *Id.*, art. 5, para. 1.

30. *Id.*, art. 13.

31. The United States, like other nations adhering to the United Nations Declaration of 1 January 1942, subscribed to the Atlantic Charter Principle that they would "seek no aggrandizement, territorial or otherwise."

U.N. SCOR 407 (1947) [hereinafter cited as Trusteeship Debates] (remarks of Mr. Austin, U.S. representative to the Security Council, upon the presentation of the U.S. draft proposal).

32. *Id.* at 409.

33. *Id.* at 664.

34. For example, in the words of Mr. Quo Tai-chi, representative of China: "I am confident that those strategic islands under United States' administration will constitute a great bulwark of peace and security in the Pacific." *Id.* at 467.

Mr. Gromyko, speaking for the Soviet Union, also endorsed the Trusteeship, but for the almost sinister reason that "the United States made incomparably greater sacrifices than other Allied Powers [in the conquest of Micronesia]. . . ." *Id.* at 415. Such a reason for post-war occupation would be in plain conflict with the spirit of the Atlantic Charter. Perhaps this was an expression of indirect justification for then-current Soviet expansion plans, or perhaps an expression of skepticism of the expressed altruism of American motives for occupation. The U.S. representative *had* brought up the trust-context irrelevant truth that "[t]ens

autonomous control was met with uneasiness. Minor amendment[35] to the United States' proposed draft which sharpened the distinction between trusteeship and annexation was grudgingly accepted,[36] and one delegate reminded the Council that all trusts anticipate eventual termination.[37]

Fiery debate followed a Soviet suggestion that the unilateral power to terminate trusteeship be vested in the Security Council.[38] The United States demanded that its consent be required for any alteration of the terms of the trusteeship agreement.[39] When the United States ambassador threatened to scuttle the agreement rather than permit even modest alteration of the American provision,[40] the United States proposal was adopted virtually

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of thousands of American lives, vast expenditure and years and bitter fighting were needed to drive the Japanese aggressors from these islands." *Id.* at 409.

35. One Soviet amendment deleted words which would characterize the trust territory "as an integral part of the United States" from a sentence explaining how U.S. law would apply to the trust territory. Another amendment included "independence" as an express political possibility for the islanders. *Id.* at 415.

36. In regard to the "independence" amendment, Mr. Austin said: "[T]he United States feels that it must record its opposition . . . to the idea that in this case independence could possibly be achieved in the foreseeable future." *Id.* at 474.

> 37. [T]he Charter does include provisions for the termination of a Mandate [i.e. "trusteeship"; the Ambassador is using the old League of Nations terminology. "Mandates" are unknown to the U.N. Charter]. The Charter does not provide for Trusteeships being eternal. It says that Trusteeships will be ended by self-government or independence.

Id. at 678 (comments of Mr. El-Khouri, representative of Syria, in response to the question "What does the Charter say about termination?" asked by Mr. Cadogan, representative of the United Kingdom. *Id.* at 676).

38. The U.S. wording of article 15 of the proposed draft was: "[t]he terms of the present Agreement shall not be altered, amended or terminated without the consent of the Administering Authority." 1947 Agreement, *supra* note 6, art. 15. The Soviet proposed version read: "[t]he terms of the present Agreement may be altered, supplemented or terminated by decision of the Security Council." Trusteeship Debates, *supra* note 31, at 415.

39. Mr. Austin explained:

> As a matter of principle, therefore, [this amendment] ought not to be accepted since the whole theory of the Trusteeship System is based on the fact that there must be, in any case, at least two parties to any trusteeship agreement.

Id. at 670.

40. At one point in the debate Mr. Quo Tai-chi, representative of China, proposed the following wording as a possible compromise to resolve the dispute: *"The terms of the present Agreement may be altered or amended in accordance with the provisions of the Charter."* Mr. Quo then inquired as to whether this language might meet with U.S. approval. "No; definitely not." snapped Mr. Austin. *Id.* at 675.

In response to the original Soviet proposal, the American representative had warned: "[the] . . . amendment . . . proposed by the representative of the Soviet

intact.[41]

Any restraint which the United States had exercised during the Security Council debates, in promoting the position that this trusteeship was not distinguishable from annexation because it had been classified as "strategic", had disappeared by the time the 1947 Agreement was submitted to the United States Congress for approval. The principles of the Atlantic Charter abandoned,[42] effusive representatives of the executive[43] and the military[44] explained to an eager Senate[45] that United States' rights in the TTPI would

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Union would probably be unacceptable to the United States as a party to the agreement." *Id.* at 670.

41. The debate drew to a close with Mr. El-Khouri indicating surprise at the United States' inability to accept wording which bound them to an observance of the Charter, but then joining his colleagues in the defeat of the Soviet amendment, and immediately thereafter, the unanimous approval of the agreement as a whole. *Id.* at 679.

42. Even at this early stage, there was a firm appreciation that this trusteeship was likely to be a long-term one, with the length of the term determined by the interests of the Administering Authority.

> The fundamental relationship of the territory to the future security of the United States became a matter of grave concern to us when the aggressive intentions of Japan became increasingly evident. . . .
>
> We believe that the relationship of the Territory of the Pacific Islands to our own security will assume a far more vital character in the future.

Statement of J. Forrestal, Secretary of the Navy, *1947 Hearings, supra* note 5, at 14. Robert Patterson, Secretary of War commented: "In accepting the islands in strategic trusteeship under the United Nations, the United States can proceed to make permanent provision for the administration of these islands . . . ." *Id.* at 11.

43. Secretary Patterson left little question as to the position of the American Government:

> There has been no doubt within these executive agencies of the Government having primary responsibility for the national security that these islands must be held under an arrangement which assures their exclusive control by the United States.

Id. at 11.

44. Chief of Staff Dwight D. Eisenhower pointed out that:

> It seems . . . there are only two questions to be considered. First, Is this area necessary to the security of the United States? Secondly, Does the agreement under which we obtained it from the United Nations give us all the national security rights and, you might say, permissive functions that we need? In both cases I think the answer is, "Yes."

Id. at 18.

45. The exclusive concern of the senators at this hearing was that the 1947 Agreement not abridge the rights of conquest, currently enjoyed by the U.S. At one point the committee chairman, seeking reassurance of this, asked the Secretary of State:

> So that you would say, as I understand you, that under the terms of the trusteeship agreement we have the same freedom of action on behalf of national security as we would have if we were continuing the administration of the islands under our present exclusive control?

Id. at 5.

be virtually absolute[46] and certainly unhampered by the humanitarian duties of trusteeship.[47]

The United States' commitment to the primacy of promoting peace and security had been made clear. The United Nations' had set forth its position more gently, but with sufficient conviction to establish a basic conflict between the principles expressed by articles 76(a) and 76(b) of the Charter. This controversy lay dormant for a decade and a half before being propelled into visibility by a confrontation which did not directly involve the United States.

B. A Firm United Nations Position: The Priority of Proper Termination

Nikita S. Khrushchev, in an address to the General Assembly in September, 1960, proposed adoption of a declaration which called for the "final elimination of the colonial regime in all its forms and manifestations, . . . immediately and unconditionally!"[48] Sponsorship of the resolution was assumed by a group of forty-three African and Asian States[49] and on December 14, 1960, the celebrated[50] Declaration on the Granting of Independ-

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46. Secretary of State Marshall understood that the 1947 Agreement would in no way impede the security interests of the United States:

> Mr. Chairman, I think the terms of the agreement have been so carefully drafted from the security point of view that there is no doubt in my mind that our security and our responsibility for general security are fully provided for. . . . I believe all our interests are fully conserved.

Id. at 5.

47. The question of the inhabitants' interests came up occasionally, only to be dismissed as irrelevant. For example:

> Senator CONALLY. . . . [I]s there anything in here about the rights of the inhabitants, the natives, that would in any wise hamper us in our defense control?
>
> Secretary MARSHALL. I do not think there is, sir.

Id. at 6. Or again:

> The CHAIRMAN. Is there anything in any of these obligations which you have recited which impinges in any way upon our autonomy with respect to national security?
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> Mr. GERIG. [Chief, Division of Dependent Area Affairs, Department of State]. Not in the slightest degree.

Id. at 21.

48. U.N. Doc. A/4502 at 13 (1960).

49. U.N. Doc. A/L.323 Add. 1-6 (1960). For a list of the forty-three states, see Y.B. OF THE U.N. 49 (1960). This sponsorship was so rigidly partisan that even the U.S.S.R. was barred from participation.

50. [This declaration] is the most frequently cited resolution in the United Nations. Most of the African and Asian nations regard it as a document only slightly less sacred than the charter and as stating the law in relation to all colonial situations.

ence to Colonial Countries and Peoples was passed by the overwhelming vote of 89-0, with nine abstentions.[51] This declaration is, by its simplest interpretation, a statement that colonialism, in any form, is illegal *per se*;[52] trusteeship is listed as one of the forms.[53]

If this Declaration commanded that trusteeship *must* terminate, the question of *how* was answered the very next day with the passage of Resolution 1541,[54] a statement of criteria for

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Rosenstock, *The Declaration of Principles of International Law Concerning Friendly Relations: A Survey*, 65 AM. J. INT'L L. 713, 730 (1971) (footnote omitted) [hereinafter cited as Rosenstock].

51. G.A. Res. 1514, 15 U.N. GAOR Supp. 16, at 66, Annexes, Agenda Item No. 87, at 7, U.N. Doc. A/4684 (1960) [hereinafter cited as 1960 Declaration].

52. Several writers conclude that this is the overriding message of the 1960 Declaration. For a discussion, and a thorough gathering of authority, see Green, *supra* note 5, at 43-49.

53. "Immediate steps shall be taken, in Trust . . . Territories . . . to enable [the inhabitants] to enjoy complete independence and freedom." 1960 Declaration, *supra* note 51, para. 5.

54. G.A. Res. 1541, 15 U.N. GAOR Supp. 16, at 29, Annexes, Agenda Item No. 38, at 9, U.N. Doc. A/4684 (1960) [hereinafter cited as Resolution 1541]. Ironically, the two resolutions originated quite independently of one another, and the simultaneity of their passage appears entirely coincidental.

Under chapter XI of the U.N. Charter, all administering nations are required to account to the U.N. with respect to the evolution of their dependencies. If the dependent territory is a trusteeship, the nature of the administrator's duty will be set forth in the trust agreement. If the dependency is not a trust territory (a colony, for example) the duty of the administering nation is set forth in article 73(e) of chapter XI: "to transmit regularly to the Secretary-General [statistical information]. . . ."

A committee was established in 1959, G.A. Res. 1467, 14 U.N. GAOR Supp. 36, at 36, Annexes, Agenda Item No. 36 at 126, U.N. Doc. A/4354 (1959), to determine those principles which should guide the world body in deciding when the obligation to transmit information under article 73(e) ceases. Resolution 1541, the committee's work product, is the statement of those principles. The immediate incentive had been the recent failure of Portugal to transmit information concerning its colonies. Resolution 1541 was put to immediate work in G.A. Res. 1542, 15 U.N. GAOR Supp. 16, at 30, Annexes, Agenda Item No. 38, at 9, U.N. Doc. A/4684 (1960), requiring such transmission.

Article 73 defines a dependent territory as one whose peoples have not yet attained a "full measure of self-government." The committee understood its task to be the construction of this phrase, for when a territory achieved a full measure of self-government, the duty of its one-time administrator to transmit information would end. In its larger sense, then, Resolution 1541 may be regarded as establishing the procedure which must be followed if a territory is to pass from a dependent to a self-governing status. As a side-effect of defining the appropriate procedure, the Resolution also provides definitions of the intended initial and final conditions of the subject matter on which that procedure operates. Regarding the subject matter of the Resolution as a territory's political status, the initial condi-

determining when an administering nation's obligations to account to the United Nations regarding a dependent territory ceases. This Resolution indicates that the processes of dependency termination and correct territorial administration cannot be separated. It states that the administering nation has the duty to promote:

> [A] dynamic state of evolution and progress towards a "full measure of self-government". As soon as a territory and its peoples attain a full measure of self-government, the obligation [of the administering nation to account to the United Nations with regard to the territory] ceases.[55]

The Resolution explains that:

> [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.[56]

Neither the 1960 Declaration nor Resolution 1541 provides for any exception based on security interests. Both are understood to be constructions of the United Nations Charter,[57] an instrument which the United States is bound to observe under the terms of the 1947 Agreement.[58] Together, these resolutions establish the firm United Nations position that the TTPI must be terminated, and terminated properly.[59]

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tion is "dependence" (or *technical colonialism* perhaps) and the final condition "self-governance". While the Administering Authorities of trusteeships are not held to the terms of article 73(e), they *are* bound to promote self-government, and success in this regard would terminate the trust. *See* note 37, *supra*. The criteria established by Resolution 1541, for determining how and when a "full-measure of self-government" is achieved, are thus entirely relevant to a discussion of the criteria for correct trusteeship termination.

55. Resolution 1541, *supra* note 54, Prin. II.

56. *Id.*, Prin. VI.

57. The very purpose of Resolution 1541 was the construction of parts of chapter XI of the Charter. *See* note 54, *supra*. The 1960 Declaration opens:

> 1. The subjection of peoples to alien subjugation, domination and exploitation constitutes a denial of fundamental human rights, [and] is contrary to the Charter of the United Nations . . . .

1960 Declaration, *supra* note 51.

58. *See* note 27, *supra*, and accompanying text.

59. The debate on the status of General Assembly resolutions as statements of international law has persisted without abatement since the founding of the U.N. The Charter's terse treatment of the subject is not dispositive. Article 13 simply authorizes the General Assembly to "initiate studies and make recommendations for the purpose of . . . encouraging the progressive development of inter-

II. THE 1975 COVENANT

Scrutiny of the 1975 Covenant,[60] the way in which it evolved, and the manner in which it is intended to be implemented reveals two major discrepancies between the actions of the United States and the obligations of trust termination. First, the United Nations has been excluded from participation in this termination process, in direct contradiction to the requirements of the United Nations

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national law and its codification." The bulk of current legal opinion regarding the weight which should attach to General Assembly resolutions lies between the extremes of "recommendatory only" and "law-making *per se*." Emerson explains:

> No one is likely to deny that principles laid down by the United Nations may under appropriate conditions set in motion forces which ultimately have the effect of bringing law into being, nor, on the other side, does anyone assert that Assembly resolutions laying down general principles automatically create international law.

Emerson, *Self-Determination*, 65 AM. J. INT'L L. 459, 460 (1971) [hereinafter cited as Emerson].

The prevailing legal approach avoids simple rules, and seeks to take into account the particular circumstances of each resolution. Certain factors enjoy wide acceptance as contributing to the legal force of a particular resolution: (1) the degree to which the resolution purports to be declaratory of existing law, especially the U.N. Charter, rather than prescriptive of new law; (2) the degree of consensus at the time of the resolution's acceptance; (3) its longevity, measured for example, by the frequency of recitation and general support *as law* in the international community; (4) the voting position taken by the member sought to be bound. In this regard, "[a]bstention by a state is treated without injustice as acquiescence in obligations specified on the basis that any real demurrer could have been equally expressed." Green, *supra* note 5, at 47.

Several of these factors were drawn together in the following comment, made by the United States representative during the drafting of The Declaration of Principles Concerning Friendly Relations:

> The significance of this gradual accumulation of areas of agreement can best be understood in light of the nature of the operation in which we are involved. For some years the Assembly has been engaged in formulating legal texts which will be authoritative interpretations of broad principles of international law expressed in the Charter. By the very nature of General Assembly action, the juridical value of such texts is directly dependent on the general support that they command. Obviously formulations representing the general agreement of the Membership of the United Nations have important juridical value. A formulation merely setting forth various highly controversial majority views, by contrast, is totally ineffectual as a declaration of international law. It is legally significant only as evidence of the extent of divergence of opinion within the international community.

Rosenstock, *supra* note 50, at 714 n.4.

Measured in terms of these factors, the 1960 Declaration has achieved the highest degree of acceptance in the U.N.'s history. *See* note 50, *supra*. Taking into account its narrower subject matter, the less celebrated Resolution 1541 is also in a firm legal position as authoritative construction of the Charter. For a brief overview of these matters, and an excellent gathering of authority, see Green, *supra*, note 5, at 43-48.

60. 1975 Covenant, *supra* note 3.

Charter.[61] Moreover, it is not clear that the United States has the authority to negotiate termination with a part of the trust territory, to the exclusion of the rest. Second, neither of the primary criteria for proper trust termination has been met in the 1975 Covenant and the commonwealth which it seeks to establish.

A. The Evolution of the 1975 Covenant

In 1965, the United States established the Congress of Micronesia to provide the trust territory with some degree of local government,[62] and in 1966, the Congress of Micronesia petitioned the President of the United States to open talks on future political alternatives[63] for the TTPI. Negotiations finally commenced in 1969,[64] but became effectively deadlocked by the end of 1972.[65] In April, 1972, the leadership of the Marianas District had invited the United States to participate in separate talks on the possibility of determining a future political status for the Marianas as an entity *separate* from the rest of Micronesia. In December, 1972, the United States accepted, and separate negotiations began.[66] Discussions continued for two years and bore fruit in the form of the Covenant released in February, 1975.

The preamble[67] explains that the Covenant's purpose is:

> [T]o establish a self-governing Commonwealth for the Northern Marianas Islands within the American Political System and to define the future relationship between the Northern Marianas Islands and the United States. This Covenant will be mutually binding when it is approved by the United States and the Marianas District Legislature and by the people of

61. *See* note 27, *supra.*

62. Department of Interior Order No. 2882, Sept. 28, 1964.

63. Blaz & Lee, *The Cross of Micronesia*, NAVAL WAR COL. REV., June, 1971, at 59, 71 [hereinafter cited as Blaz & Lee].

64. *Id.* at 73.

65. The reason, according to U.S. Senator Pell:

> Negotiations have thus far failed to produce a compromise acceptable to both the United States and Micronesia, with American opposition to Micronesia's demand for the option of eventual independence providing the major stumbling block.

121 CONG. REC. 14863 (daily ed. Aug. 1, 1975). For a brief history of the events leading up to the deadlock see Green, *Termination of the U.S. Pacific Islands Trusteeship*, 9 TEXAS INT'L L.J. 175, 179-80 (1974) [hereinafter cited as *Termination*].

66. *Id.* at 181.

67. The text consists of a preamble, ten substantive articles, and a "technical agreement" regarding leased land use.

> the Northern Marianas Islands in a plebiscite constituting on their part a sovereign act of self-determination.[68]

The political relationship between the two peoples is defined as one in which the Marianas will be "in political union with and under the sovereignty of the United States of America."[69] This means that:

> The United States may enact legislation . . . applicable to the Northern Marianas Islands . . . [but] agrees to limit the exercise of that authority so that the fundamental provisions of this Covenant . . . may be modified only [with the mutual consent of both governments.][70]

Under the Covenant, certain financial[71] and citizenship[72] benefits are extended to the islanders, while the United States is permitted full control of Marianan foreign affairs[73] and various land-use privileges for strategic purposes.[74]

B. Choosing the Participants

The parties to the 1975 Covenant are the United States and the Northern Marianas Islands. The parties to the 1947 Agreement were the United States and the United Nations, and its subject matter was the totality of Micronesia. There is no provision within the 1975 Covenant for any participation by either Micronesia generally, or by the United Nations. Moreover, such participation seems to be expressly precluded by the language of section 1002:

> Any determination by the President [of the United States] that the Trusteeship Agreement has been terminated or will be terminated on a date certain will be final and will not be subject to review by any authority, judicial or otherwise, of the Trust Territory of the Pacific Islands, the Northern Marianas Islands, or the United States.

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68. There are no Southern Marianas. Guam is the southern-most island in the Marianan chain, and is regarded by most Marianans as an integral part of their "nation." The designation "Northern" is employed to avoid impliedly excluding Guam as one of the Marianas.

69. 1975 Covenant, *supra* note 3, § 101.

70. *Id.*, § 105.

71. *Id.*, art. VII.

72. *Id.*, art. III.

73. *Id.*, art. I.

74. *Id.*, art. VIII.

Under the terms of the 1947 Agreement, the United States must be party to any modification of that treaty.[75] But the United Nations Charter[76] provides that the world body must also approve any alteration or amendment to the terms of the trusteeship.[77] Absence of actual United Nations participation in the establishment of the Commonwealth does not condemn the new status as invalid *per se*. However, while requisite United Nations approval may be granted at *any* time, it must be granted at *some* time, and the United States is powerless to avoid this requirement by only unilateral declaration such as section 1002. The necessary conclusion is that the Covenant cannot *alone* effect legal termination of the TTPI.[78]

There is no strict requirement in either the 1947 Agreement or the United Nations Charter that the territorial leadership be included in the termination process. But it has been protested that neither the 1947 Agreement nor any other legal doctrine permits the Administering Authority, on its own initiative, to partition a trust territory by entering into termination negotiations with one of its factions.[79] Moreover, the precedent of other trust termina-

75. 1947 Agreement, *supra* note 5, art. 15.

76. *See* note 27, *supra*.

77. U.N. CHARTER art. 79. The United States accepted this principle of mutual consent at the drafting of the trust agreement. "[T]he United States would see no harm at all in saying that alterations in the terms of trusteeship can only be undertaken by agreement between the United States and the Security Council." Trusteeship Debates, *supra* note 31, at 476. The U.S. even went out of its way to stress how fundamental this principle was to the concept of trusteeship itself: "[T]he whole theory of the Trusteeship System is based on the fact that there must be, in any case, at least two parties to any trusteeship agreement." *Id.* at 670. Since this is the prevailing view of trusteeship, it is difficult to imagine what role the U.S. might have in mind for section 1002.

78. Termination is a modification of the terms of the 1947 Agreement, and any such modification requires the mutual consent of the U.S. and the Security Council. If the position of the U.S., as the sole party on one side of the bargain and a veto-wielding fraction of the party on the other, would suggest the possibility of overreaching, any such fears turn out to be groundless. Logically, the veto permits only forced *rejection* of an unfavorable agreement, a result which is available to the U.S. through the simple exercise of those powers granted by the 1947 Agreement. The veto cannot force the Security Council to *adopt* an unfavorable measure. Moreover, the U.S. assured the Security Council that it could not "admit the idea of exercising the veto in the Security Council in a case where it would appear to be acting in a dual capacity, sitting on both sides of the table. . . ." Trusteeship Debates, *supra* note 31, at 665.

79. Traditionally, the Trusteeship Council of the U.N., to whom the Security Council long ago delegated the bulk of its trusteeship-related duties, sends an annual visiting mission to each trust territory for a general inspection. The report

tions discourages this practice.[80]

C. *The Criteria for Proper Termination: Legal Deficiencies in both Method and Result*

A deficiency potentially more serious than the exclusion of both the United Nations and Micronesia generally from negotia-

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which followed the 1973 visit to Micronesia was critical of the U.S.-Marianan separatist talks which were just then getting underway. It sparked considerable comment. *See* U.N. Doc. T/1741 (1973). "The U.N. Visiting Mission of 1973 protested that the 1947 trusteeship agreement gave no authority to the Marianas to negotiate separately from the rest of the territory." 121 CONG. REC. 10798 (daily ed. June 17, 1975). (Reported in Murray, *New Outpost of Empire*, 220 THE NATION 459, 460 (1975)) [hereinafter cited as Murray].

"[A] report by the 1973 United Nations Visiting Mission to Micronesia stated:

> We wish to emphasize here, that although the Micronesians themselves must work out for themselves what kind of future links they wish to have with one another, the administration (U.S.) is still at this state obligated *to promote national unity in every way possible.*

(Emphasis added.)" 121 CONG. REC. 10799 (daily ed. June 17, 1975) (letter from Representative Rasa, Marianas Delegation, Congress of Micronesia, to Senator Hart, May 15, 1975.)

In a recent statement, Senator Gary Hart documented the views of several Micronesian officials, indicating firm opposition to the U.S.-encouraged dismemberment of their fragile oceanic domain. One of the more telling views follows:

> On September 24 the two elected *Marianas* delegates to the Micronesian Constitutional Convention now in session telegraphed their views. These men said, "We recognize the Congress of Micronesia as the sole negotiator for all six districts, Marianas included, and strongly believe intentions to separate any district from the Micronesian majority is legally and morally wrong."

Statement of Senator Gary W. Hart, *Hearings on S.J. Res. 107 Before the Senate Comm. on Foreign Relations*, 94th Cong., 1st Sess. at — (1975).

This view would seem to be supported by the words of the 1960 Declaration:

> Any attempt aimed at the partial or total disruption of the national unity and the territorial integrity of a country is incompatible with the purposes and principles of the Charter of the United Nations.

1960 Declaration, *supra* note 51, para. 6.

For a discussion of the international legal issues attending separation, see *Termination, supra* note 65, at 192-204; Note, *A Macrostudy of Micronesia: The Ending of a Trusteeship*, 18 N.Y.L.F. 139, 176-77 (1972) [hereinafter cited as *Macrostudy*].

80. Separation issues were raised in conjunction with the termination of two other trust territories. In the case of Togoland, it was pointed out that article 76(b) of the U.N. Charter speaks of the "freely expressed wishes of the *peoples*," but the General Assembly refused to construe this as granting the right of self-determination to sub-groups. U.N. Trusteeship C. Res. 1496, 18 U.N. Trusteeship, Supp. 1, at 2, Annex 12 U.N. Doc. T/1276 at 2 (1956) (emphasis added).

The Cameroons on the other hand were permitted to separate, but only after the issue had been dealt with in a territory-wide referendum. G.A. Res. 1350, 13 U.N. GAOR, U.N. Doc. A/4090, Add. 1 at 1 (1959).

tions leading to the 1975 Covenant is the failure of the Covenant to meet the criteria for proper termination mandated by United Nations resolution.

The Charter of the United Nations, the 1947 Agreement, the 1960 Declaration and Resolution 1541 all proclaim, in effect, that one of the duties of the administering nation is to:

> [P]romote the development of the inhabitants of the Trust Territory towards self-government or independence as may be appropriate to the . . . freely expressed wishes of the people . . . .[81]

These two conditions, "self-government" and "free-expression", are the recurring criteria which identify a dependent status such as trusteeship as having been terminated. However, it is not immediately apparent whether *both* conditions must be met, or whether the satisfaction of *either* would be adequate. The question is important because the two conditions are mutually independent. For example, a people emerging from trusteeship might express their wishes for a political status which the contracting parties would refuse to accept as either self-governing or independent. On the other hand, the contracting parties might endorse a status as satisfactory to them, but which turns out to be in conflict with the wishes of the people.

Resolution 1541, in positive and direct language, construes both these conditions as necessary.[82] Firstly, "self-government"

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81. 1947 Agreement, *supra* note 6, art. 6, para. 1. *See also*, U.N. CHARTER art. 76, para. b; 1960 Declaration, *supra* note 51, para. 5; Resolution 1541, *supra* note 54, Prin. II.

82. This was the expressed intent of the Resolution's authors. The final draft had been proposed by committee chairman Jha, of India. In explaining his subsequently accepted notion of "free-expression" he said:

> [Any arrangement whereby a dependency selects a status other than complete independence] should take place between countries which have attained a relatively advanced stage of self-government, which presupposes capacity to make a responsible and intelligent choice . . . .

U.N. Doc. A/AC.100/L.1, at 6, para. 24(a) (1960) [hereinafter cited as Resolution Debates].

Mr. Jha's understanding of "free-association" was also narrowly drawn:

> [The strong presumption that dependent territories should accede to independence] did not preclude a territory from seeking a free association, as a distinct entity, with an independent State, and from voluntarily surrendering certain aspects of sovereignty in accordance with the wishes of its people, *while retaining the right at any time to reconsider its decision* and to choose independence.

U.N. Doc. A/AC.100/SR.3 at 5 (1960) (emphasis added).

On the subject of absorption, Mr. Cuevas Cancino, of Mexico said: "The union of a territory with an independent country to form an inter-continental State

must occur in one of only three possible forms:[83] independence,[84] free-association or integration.[85] Secondly, any such status may only be achieved through a process characterized by "free-expression." The resolution does not address the role of "free-expression" in relation to attaining independence,[86] but regarding the other two permissible statuses it commands:

> Free association should be the result of a free and voluntary choice by the peoples of the territory concerned.
>
> . . .
>
> The integration should be the result of the freely expressed wishes of the territory's peoples acting with full knowledge of the change in their status. . . .[87]

Clearly, a "satisfactory" status cannot be forced upon an unwilling people, nor may an eager population freely adopt a non-complying political environment.[88]

1. *The June plebiscite and free-expression.* A general plebiscite was held in the Marianas in June, 1975, which endorsed the 1975 Covenant by a remarkable seventy-eight percent vote.

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had to be based on the principle of self-determination and full equality." Resolution Debates, *supra* at 5, para. 20. Mr. Jha expressed the same principle even more forcefully by emphasizing that:

> [I]n the case of integration—a decision which was irrevocable by the territory concerned—the principle should be laid down that absolute equality of fundamental rights between the peoples of both countries was a *sine qua non.*

U.N. Doc. A/AC.100/SR.5 at 11 (1960).

From these discussions it becomes apparent that only a small number of narrowly drawn statuses were considered as meeting the criteria for "full measure of self-government":

(1) Independence (however achieved).
(2) Absorption, acquired through "free-expression", and occurring within a context of absolute equality of right between the two peoples.
(3) Free-association, acquired through "free-expression", and requiring the retention, by the dependent State, of the unilateral right to withdraw.

83. Resolution 1541, *supra* note 54, Prin. VI.

84. This status is expressed in Resolution 1541 as, "Emergence as a sovereign independent State." *Id.*

85. Integration with an independent State should be on the basis of complete equality between the peoples of the erstwhile Non-Self-Governing Territory and those of the independent country with which it is integrated.

Id. Prin. VIII.

86. The possibility of being coerced into freedom is apparently not regarded as a critical threat to international fair play. There was no discussion of this in the debates. *See* note 82, *supra.*

87. Resolution 1541, *supra* note 54, Prin. VII, para. a; Prin. IX, para. b.

88. Happily, the same conclusion arises from what was written, here, as from what was said, during debate. *See* note 82, *supra.*

Ninety-three percent of the eligible voters turned out.[89] Such statistics might be regarded as speaking for themselves, rendering any discussion of the election's validity academic. Indeed, President Ford declared:

> This historic act of self-determination was the capstone of more than twenty years of continuous effort on the part of the people of the Marianas District to enter into close union with the United States.[90]

But Senator Gary Hart, reporting to the Senate on the results of the June plebiscite, saw the stone as capping an effort of a different sort:

> The vote is the capstone of an administration effort extending over several years and designed to make those islands a part of the United States and the islanders citizens.[91]

The form of the plebiscite was straightforward. The question appeared on the ballot as a simple "yes/no" alternative.[92] A "yes" vote endorsed the 1975 Covenant, but a "no" vote did more than register disagreement. The Covenant's failure would mean the continuation of trusteeship; hence, a "no" vote was actually an endorsement of the trust status.

> In essence, the people of the Marianas were being asked to choose between commonwealth status, with some of the benefits of U.S. citizenship, and continued trusteeship, with none of the rights of free citizens.[93]

Continued trusteeship was not considered a political possibility by any of the parties involved. The focus of the meetings which the United States held with both Micronesia[94] and the

89. 121 CONG. REC. 11427 (daily ed. June 24, 1975) (Senator Fong reporting on the results of the plebiscite).

90. Letter from President Gerald R. Ford to the Speaker of the House, and the President of the Senate, July 1, 1975, 11 PRESIDENTIAL DOCUMENTS: GERALD R. FORD 695 (1975) [hereinafter cited as Presidential Letter].

91. 121 CONG. REC. 10796 (daily ed. June 17, 1975).

92. As local authorities across Micronesia began to agitate for eventual independence, the United States singled out the more docile Marianas for special treatment . . . and presented the islands' 15,000 residents with a take-it-or-leave-it-choice.

121 CONG. REC. 14864 (daily ed. Aug. 1, 1975) (from N.Y. Times, June 29, 1975, § 4, at 14, col. 1.).

93. 121 CONG. REC. 10797 (daily ed. June 17, 1975) (from Miller, *New Pacific Outpost*, PROGRESSIVE, June, 1975).

94. The first agenda proposed by the Congress of Micronesia for talks with the U.S. on future political alternatives consisted of the three familiar alternatives embodied in Resolution 1541: independence, free-association, and integration. By

Marianas[95] was the territory's political status *after* trusteeship. Since the 1975 Covenant offered some political benefits beyond trusteeship, its victory over the *status quo* should not be surprising. However, the form of the plebiscite was essentially that of a "one candidate election," and competitive proposals were not encouraged, nor even permitted. If the "free-expression" mandated by Resolution 1541 is meant to guarantee more than a hollow right, it must be construed to require not only popular selection of the winning alternative, but also the guarantee that the alternatives presented, fairly represent the range of local political disposition.[96] The June plebiscite failed to provide such a practical array of alternatives.[97] One result of this is that the *apparent* success of the 1975 Covenant yields no information as to its *probable* success if pitted against one or more reasonable alternatives.

American refusal to consider any post-trust status except one proposed by the United States, and tailored to its own interests,

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the time talks actually began, this had been narrowed to free-association. For a discussion of these developments see Metelski, *Micronesia and Free Association: Can Federalism Save Them?*, 5 CALIF. W. INT'L L.J. 162, 166-72 (1974) [hereinafter cited as Metelski]. *See also* Blaz & Lee, *supra* note 63, at 69-77.

95. The Commonwealth was the only political alternative to be considered by the U.S.-Marianan negotiators. For a brief history of the discussions see *Termination, supra* note 65, at 180-83.

96. In fact, the dominant political concern in the Marianas for the last two decades has been reunification with Guam, an island historically and geographically "part" of the Marianas. A concise history of Marianan efforts directed towards reunification with Guam appears in a statement by Vincente N. Santos, President of the Marianas Islands District Legislature, printed in 121 CONG. REC. 12954 (daily ed. July 17, 1975). While absorption of the Marianas by Guam, a voiceless United States possession, would undoubtedly run counter to the United Nations understanding of acceptable post-trust status, nothing would block the inclusion of Guam in a future Marianan political status acceptable to all parties.

97. The plebiscite could have qualified as providing a practical selection had it, for example, presented the islanders with a choice among the three U.N.-approved non-colonial statuses set forth in Resolution 1541. *See* note 82, *supra.*

One writer, commenting on the absence of the independence option noted:

> The United States position would look a lot better if the alternatives offered to the people of the Marianas were those put forth in Article VI [of the 1947 Agreement, note 6 *supra*] and insisted on in that article. [*See* note 81, *supra*, and accompanying text] . . . .
>
> Plebiscites are almost always rigged in the way the question is stated. Permitting only yes or no answers to the covenant makes the manipulation clearer. It's not defensible, however, to do this when the legal background so clearly requires something more.

Leibowitz, *The Independence Option*, The San Juan Star, Aug. 26, 1975, at 13, col. 2. Mr. Liebowitz is the former general counsel of the U.S.-Puerto Rico Status Commission and is currently president of the Institute of International Law and Economic Development.

had caused the collapse of negotiations with the Congress of Micronesia. During the United States-Micronesian negotiations the American representative was reported to have remarked to the Micronesians, upon the United States' refusal to discuss the independence option:

> I should say again . . . that the circumstances which led to the trust territory's designation as a strategic trust will continue to exist whatever your future status might be. I cannot imagine, for instance, that my government would agree to termination of the trusteeship on terms which would in any way threaten the stability in the area and which in the opinion of the United States [would] endanger international peace and security.[98]

Two and half years later, this same recalcitrance embodied in the June plebiscite's abbreviated field of choice resulted in a proposed future Marianan status which fell far short of the standard for "free-expression" established by Resolution 1541—a standard specifically designed to prevent such attempts at international overreaching.

Over ninety percent of Micronesia's public revenues are derived from United States' assistance,[99] a circumstance which led one writer to cast doubt on whether *any* plebiscite could qualify as permitting "free-expression" if one of the options offers a continuation of large-scale United States aid.[100] Another suggests that the indirect strategic advantage of this dependent condition did not come about in an entirely accidental way.[101]

The "free-expression" anticipated by Resolution 1541 is the freedom of a majority of a people to choose that status which best

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98. Liebowitz, *The Independence Option*, San Juan Star, Aug. 26, 1975, at 13, col. 2. *See* note 65, *supra.*

99. Metelski, *supra* note 94, at 171.

100. "That's nice;" quips the author, "the people of the Marianas, who have become totally dependent on the U.S. defense establishment already, show good taste in their selection of a patron country." Safire, *A Destiny Not so Manifest*, N.Y. Times, Feb. 13, 1975, at 33, col. 1.

101. A secret study done under the Kennedy administration and following the military's line of thought recommended that the United States assure itself of future control of Micronesia by increasing Congressional grants to the territory, educating the people in American ways and then conducting a plebiscite while Micronesian appreciation of this generosity was at a maximum.

Murray, *supra* note 79, at 459. "A Chamorran [the predominant ethnic group in the Marianas] student observed . . . '[t]he Americans use dollars instead of bullets, but the results are the same.' " *Id.* at 460.

satisfies their political aspirations. This freedom is destroyed where the field of choice is arbitrarily limited by some outside agency, or where the *non-political* benefits of one alternative are sufficiently overpowering to eclipse any differences in the *political* value between the selections. The United Nations Charter commands that the United States should promote in these islands "progressive development towards self-government,"[102] and that "free-expression" should be an element of that process.[103] This limited plebiscite cannot qualify as fulfilling the requirement that any new status for a trust territory be arrived at through a process of "free-expression." Adherence to this requirement would seem all the more compelling where the international event in question is the political coalescence of two peoples whose populations differ by a ratio of more than ten-thousand to one,[104] and which will result in at least some measure of domination of the smaller by the larger.

2. *The new status and self-government.* The manner and context in which the June plebiscite was conducted strongly suggests that the United States has failed in its obligations under international law.[105] The same judgment must fall on the nature of the political relationship which the 1975 Covenant seeks to establish between the two peoples.[106]

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102. U.N. CHARTER art. 76, para. b.

103. As construed by Resolution 1541. *See* note 54, *supra.*

104. There are somewhat fewer than 15,000 islanders. The current population of the U.S. is approximately 220,000,000.

105. *See* note 27, *supra.*

106. The Covenant's defenders have claimed that the Marianan status will be "like" the Puerto Rican Commonwealth. It is argued that U.N. acquiescence in Puerto Rico's status should portend similar treatment for the Marianan Commonwealth. Canham, *Micronesia's Future,* Chris. Sci. Monitor, July 14, 1975, at 27, col. 1. While recognizing a similarity in *political* status, such an argument fails to distinguish between the fundamentally different *legal* relationships enjoyed by the United States with these two territories.

Article 2(7) of the United Nations Charter provides substantial protection to the *status quo* of a territory within the *domestic* jurisdiction of a nation. While Puerto Rico falls within the domestic jurisdiction of the U.S., the Marianas do not. Rather, the United States is in the position of a fiduciary to whom the Marianas have been entrusted by the U.N. *See* 121 CONG. REC. 10796 (daily ed. June 17, 1975) (Senator Gary Hart refers to the United Nations as the body which "owns" Micronesia). The "colonies" referred to by the 1960 Declaration are another example of territories falling outside the domestic jurisdiction of an administering nation. United Nations disinterest in a Puerto Rican status which does not comply with Resolution 1541 cannot provide a convincing precedent for similar mistreatment of the Marianas. *See generally Termination, supra* note 65, at 187-92.

Resolution 1541 provides for termination by independence[107] or absorption,[108] neither of which are represented in this transaction, or by a third alternative, "free-association."

> Free-association should be the result of a free and voluntary choice by the peoples . . . . [I]t should be one which . . . 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 . . . .[109]

The key phrase is "freedom to modify the status." In the place of such unilateral power to alter the relationship, the 1975 Covenant requires *mutual consent* to change any of its fundamental provisions.[110] Should the Covenant be given international effect, the result will be to lock the Marianas into the American political system with no means of withdrawal in the absence of United States approval. Such a relationship propagates the very sort of dependence which Resolution 1541 seeks to eliminate.[111] Moreover, as a safeguard to prevent establishment of such a relationship, the rule is laid down that a territory is not free to self-determine its way into bondage.[112] The commonwealth status has been attacked for this deficiency[113] and for its similarities to colonialism.[114]

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107. *See* note 84, *supra.*

108. *See* note 85, *supra.*

109. Resolution 1541, *supra* note 54, Prin. VII. The Cook Islands have been in "free-association" with New Zealand since 1964 and retain the right to terminate the relationship at will. Cook Islands Constitution Act of 1964, 13 Eliz. 2, No. 69 § 41 (N.Z.) [reproduced in 2 A. PEASLEE, CONSTITUTIONS OF NATIONS 944, 962 (3d rev. ed. 1966)].

110. 1975 Covenant, *supra* note 3, § 105.

111. Resolution 1541, *supra* note 54, Prin. II. The Resolution is quite clear in its requirement that any non-independent status, to be classifiable as non-colonial, must offer either complete equality or the opportunity to withdraw from the relationship. *See* note 82, *supra.*

112. *See* note 82, *supra,* and accompanying text.

113. The proposed "commonwealth" charter could be modified only with mutual consent of the United States and the Marianas, contrary to a 1960 U.N. resolution requiring that an associated state be free to modify its status.

San Juan Star, July 10, 1975, at 8, col. 1 (comments of Jose Cabranes, former Administrator of the Washington Office of the Commonwealth of Puerto Rico).

114. "It seems to me that this is not the time for the United States to acquire a new colony, even if the people of the Marianas [choose] colonialism over all other status alternatives." Wash. Post, July 22, 1975, § A. at 18, col. 5 (from a statement by Jose Cabranes).

"The extension of the American flag to additional areas in Asia inevitably raises charges of colonialism and imperialism throughout the international com-

While the presence or absence of a "freedom to modify" clause in the 1975 Covenant would have a radical impact on the political status which results, the probability seems small that its presence would have a material adverse effect on the interests of the United States. Had the islanders been given the choice between complete independence, and "free-association" in the form of the existing Covenant but including the all-important unilateral modification provision, it is hardly conceivable that the Marianas would have chosen independence. A free-association "bail-out" clause would insure that potential independence would be permanently retained. However, the predominant message of the last twenty years has been the Marianan desire for closer ties between their island domain and Guam, and hence, the United States.[115] When this disposition is coupled with the islands' current financial position of complete dependence on the United States, and the absolute vulnerability of a mid-ocean nation of 15,000 souls, the possibility of escape from the federal fold seems remote indeed.

Nevertheless, such a clause would raise the possibility of the Marianas, at some point in the future, becoming fully independent from the United States. Indeed, the United States has been resolute in making it clear that there is no circumstance under which it is prepared to relinquish ultimate control of any part of Micronesia.[116] Negotiations between the United States and the Congress of Micronesia failed when it became apparent that the Micronesians were not prepared to accept a post-trust status, demanded by the United States, which would maintain irrevocable United States control over the territory's political future.[117] It is not surprising to find that collapse of the Micronesian discussions, which threatened to lead to a result unfavorable to the United States, should coincide with the opening of the Marianan talks, which promise a new political status providing for rather direct United States control.

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munity." 121 CONG. REC. 14864 (daily ed. Aug. 1, 1975) (comments of Senator Pell). *See also* 121 CONG. REC. 10796 (daily ed. June 17, 1975) (comments of Senator Gary Hart).

115. *See* note 96, *supra*. *But see Termination, supra* note 65, at 180-82.

116. *See* note 65, *supra*; note 98, *supra*, and accompanying text.

117. In the wake of Micronesian charges that the United States has refused to consider the possibility of independence as a post-trust alternative, (U.N. Doc. T/PV. 1413, at 36, 37 (1973)), the U.S.-Micronesian discussions ground to a halt in November, 1973. *See also* note 65, *supra*.

That the success of the 1975 Covenant would further United States strategic policy is not in doubt. But the only permitted strategic purpose of trusteeship is to "further international peace and security."[118] The United States would be hard put to justify to the rest of the world that international peace is served by American domination of the political future of this fourteen-island archipelago off the coast of Asia. Even if the United States could show such hegemony to be internationally relevant, current interpretations of the United Nations Charter suggest that where strategic concerns and humanitarian interests such as political rights collide, the welfare of the inhabitants must prevail.

III. CONCLUSION

The current international legal position of the United States in this controversy is at best precarious. The promotion of the 1975 Covenant cannot be squared with the United States' humanitarian obligations under the terms of the 1947 Agreement. Nor is it persuasive to argue that these abridgements of the islanders' rights are a necessary cost of fulfilling United States' strategic duties. The more reasonable explanation is that the United States' determination to maintain political control of the Marianas is without legal foundation, and rests instead on the inertia of twenty years of misunderstanding the nature of this trusteeship, a misunderstanding plainly demonstrated in Secretary of State Marshall's reassurance to the chairman of the Senate Foreign Relations Committee during the 1947 hearings, when the chairman asked whether:

> [U]nder the terms of the trusteeship agreement we have the same freedom of action on behalf of national security as we would have if we were continuing the administration of the islands under our present exclusive control.[119]

But Marshall was wrong. When all the relevant international law is evaluated, it is impossible to conclude that the 1947 Agreement granted such unlimited freedom of action to the United States. Moreover, the 1960 Declaration puts to rest any possibility of a "prescriptive right" arising in one people to limit the sovereignty of another.[120]

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118. This is the first of the basic objectives of trusteeship. U.N. CHARTER art. 76, para. a.

119. *See* note 45, *supra.*

120. The Declaration proclaims the General Assembly to be: "[c]*onvinced* that all peoples have an inalienable right to complete freedom, the exercise of

Under these circumstances, the gulf between duty and performance is so wide that the United States should not expect, and the United Nations should not extend, approval of the 1975 Covenant.

Should the United States continue in defiance of the United Nations' position[121] and persist in advocating the validity of this new commonwealth,[122] the possible legal ramifications are varied. The United Nations could choose to remain silent,[123] or to regard the 1975 Covenant as a void attempt at termination effecting neither the trusteeship nor the duties of the Administering Authority.[124] A third alternative is that the United Nations could find the trusteeship terminated by violation of the "sacred trust"[125] to which the United States bound itself in accepting the TTPI. This raises the question of whether the United Nations' interest in a trust territory is sufficient to permit such action, and whether

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their sovereignty and the integrity of their national territory. . . ." 1960 Declaration, *supra* note 51, preamble.

121. Such defiance is expressed in the 1975 Covenant itself: "Any determination by the President [of the United States] that the Trusteeship Agreement has been terminated . . . will be final and will not be subject to review. . . ." 1975 Covenant, *supra* note 3, § 1002.

122. Such a position is expressed, for example, in Presidential Letter, *supra* note 90, wherein President Ford greets the June plebiscite as an "historic act of self-determination. . . ."

123. This is an unlikely possibility, in light of world interest being shown in these events. For example, on November 30, 1975, the International League for the Rights of Man, "an organization of Americans and Europeans dedicated to to the protection of human rights . . . [with] United Nations consultative status," formally complained to the U.N. that the U.S. was violating its trusteeship by seeking to "annex" the Marianas. The League contends:

(1) "[T]he trusteeship agreement requires self-determination by all people in the territory."

(2) "[S]eparation would make it 'difficult, if not impossible for the other island groups to survive as a unit.'"

(3) The Covenant's "mutual consent" provision is in violation of "a General Assembly resolution that an associated state should be free by itself to modify its status."

(4) The I.C.J. has rejected the notion of unilateral termination. (Advisory Opinion on International Status of South-West Africa, [1950] I.C.J. 128).

N.Y. Times, Dec. 1, 1975, at 3, col. 1.

124. One commentator has noted:

> At the minimum . . . [a plebiscite would have to offer] Micronesian independence as one of the choices. Only if the people of Micronesia approve a new arrangement with the United States in "a sovereign act of self-determination" is there hope of approval by the United Nations.

Macrostudy, supra note 79, at 175 (footnotes omitted).

125. *See* note 15, *supra.*

any United States interest in the territory would persist in the absence of an internationally recognized trust relationship.

The question of title to a trust territory is not well settled, but the weight of opinion,[126] even in the United States,[127] is that title remains with the United Nations during the life of the trusteeship. In 1966, the United Nations found that its interest in South-West Africa, which had been mandated to South Africa by the League of Nations in 1920, was sufficient to support the demand that South Africa vacate forthwith, "[for having] failed to fulfill its obligations in respect of the administration of the Mandated Territory. . . ."[128] It is not unthinkable that the same treatment could befall the United States if it were to fail in some important duty, as perhaps the duty to promote the political development of the inhabitants toward one of the three permitted statuses.

In the eyes of international law, America's only interest in Micronesia is that of trustee. Termination of the trust extinguishes all rights enjoyed by the United States which flow from the 1947 Agreement. Should the United Nations find the trust vacated by the United States' failure to meet its obligations, any continued American political presence would be an international tresspass, subject to condemnation as simple colonialism.

The TTPI is the lone remaining international orphan of World War II.[129] The United States must terminate this trust, but only within the rules established by the international community—rules by which it is bound under treaty and international law.

Peter Bergsman

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126. [W]e have accepted a mandate as a sacred trust, not as part of our sovereign territory. The mandate does not belong to my country or any other country. It is held in trust for the world.

Statement of Committee Chairman Frazer, representative of New Zealand, during Charter Debates, *supra* note 19, at 701.

127. Senator SMITH. [F]rom the standpoint of title . . . the title to these islands would be in the United Nations as successor to the League of Nations; as, being appointed the trustee, the United States takes over the responsibility of the old conception of mandatory power that the Japs had after the German war, which they so badly abused.

Secretary MARSHALL. Yes, sir.

1947 Hearings, supra note 5, at 8.

128. G.A. Res. 2145, 21 U.N. GAOR Supp. 16, at 2, Annexes, Agenda Item No. 65, at 6, U.N. Doc. A/6316 (1966).

129. Papua, New Guinea became fully independent from its Administering Authority, Australia, in September, 1975. TIME, Sept. 29, 1975, at 45.