TO THE EDITOR IN CHIEF:

June 5, 1987

I was startled to read in the April issue of the *Journal* (81 AJIL 438 (1987)) that the Panel on the Law of Ocean Uses had recommended U.S. utilization of the dispute-settlement procedures of the 1982 UN Convention on the Law of the Sea for the resolution of customary international law issues arising between the United States or its nationals and states parties to the 1982 Convention or their nationals with respect to matters as to which the provisions of the 1982 Convention are regarded as reflecting emerging norms of customary international law.

In my view, a nation should think long and hard before subjecting itself to the jurisdiction of a tribunal established under a convention to which it is not a party, and this is especially so as regards the 1982 UN Convention on the Law of the Sea. Because of their heavy preponderance of numbers, the developing countries can be expected to have a large majority of the judges on the International Tribunal on the Law of the Sea established under that Convention, and it would be unreasonable to expect that the President of the Tribunal, with power to select the "neutral" arbitrators in arbitral proceedings, will be anyone other than a developing-country national. The politicization of the International Court of Justice that led to the U.S. rejection of its jurisdiction in the *Nicaragua-U.S.* dispute could prove trivial by comparison with what may come to pass under the 1982 Convention.

While the Panel stated rather blithely that use of the International Tribunal on the Law of the Sea is an option open even to nonparties to the Convention, that is true under Annex VI, Article 20(2) of the Convention only with the consent of all parties to the dispute. A cautious analyst must anticipate that in the majority of cases, such consent will be forthcoming only when our adversaries deem it to their advantage to utilize the dispute settlement procedures of the 1982 Convention.

In my view, the United States should await the entry into force of the 1982 Convention and observe the composition of the International Tribunal on the Law of the Sea and its performance in conflicts between developed and developing nations before making any blanket commitment to submit itself and its nationals to the jurisdiction of this Tribunal. In arriving at a final conclusion, the possibility of an even greater bias against the United States by reason of its refusal to adhere to the Convention cannot be ignored. I am wholeheartedly in favor of the peaceful settlement of disputes but feel that, in the meantime, means must be found outside the 1982 Convention for the accomplishment of that objective.

LUKE W. FINLAY

TO THE EDITOR IN CHIEF:

June 10, 1987

Your April 1987 issue (at p. 405) carried an item in Contemporary Practice of the United States concerning the Trust Territory of the Pacific Islands. It referred to a proclamation of November 3, 1986 by President Reagan purporting to terminate the United Nations Trusteeship in respect of three of the four present entities of the trust, the Northern Marianas, the

Federated States of Micronesia and the Marshall Islands.[1] The presidential proclamation also records the coming into effect of the Compact of Free Association, governing the relationship between the United States on the one hand, and the Federated States of Micronesia and the Marshall Islands on the other, together with the commonwealth arrangement for the Northern Marianas. The practice note simply presents the presidential action as fact, completely ignoring the highly controversial nature of the action taken.

The administration took its action without bothering to obtain the approval of the Security Council, as required by the United Nations Charter. On other occasions the United States has complained bitterly about failure to follow proper procedures within international organizations. I believe that it should have complied with the Charter here. This letter is an effort to set the record straight.

On May 28, 1986, the Trusteeship Council adopted, by a majority vote, Resolution 2183 (LIII) on the future of the Trust Territory of the Pacific Islands.[2] In the last preambular paragraph of that resolution, the Trusteeship Council noted that it was "[*c*]*onscious* of the responsibility of the Security Council in respect of strategic areas as set out in Article 83, paragraph 1, of the Charter." In the operative paragraphs, the Council noted the statuses chosen by the Marshall Islands, the Federated States of Micronesia, Palau and the Northern Mariana Islands and asked the Government of the United States, in consultation with the Governments of those entities, to agree on a date, not later than September 30, 1986, for the "full entry into force" of the relevant arrangements and to "inform the Secretary-General of the United Nations of that date." The resolution further expressed the opinion that the Government of the United States had satisfactorily discharged its obligations under the terms of the Trusteeship Agreement and that it was appropriate for that Agreement to be terminated with effect from the date referred to above. It concluded by requesting that the present resolution and all material received from the Administering Authority pursuant to it be circulated as official documents of the Security Council by the Secretary-General.

Article 83, paragraph 1 of the Charter, to which the Trusteeship Council's resolution refers, provides that "[a]ll functions of the United Nations relating to strategic areas, including the approval of the terms of the trusteeship agreements and of their alteration or amendment, shall be exercised by the Security Council." Resolution 2183 (LIII) evidently contemplated that in due course, in accordance with the Charter, the Security Council would receive a request from the Administering Authority, accompanied by appropriate documentation, for its approval (or disapproval) of the termination of the trusteeship. The majority of the Trusteeship Council had expressed its view that the United States had brought the Micronesian entities[3] to self-government, and the Trusteeship Council forwarded its recommendation to the Security Council for that body to take the definitive action. This would follow the precedent, for example, of the course taken by the Trusteeship Council in 1974, the last time that termination of a trusteeship

[1] The fourth entity is Palau. *See infra* note 7.

[2] TC Res. 2183 (LIII), 53 UN TCOR Supp. (No. 3) at 14, UN Doc. T/1901 (1986).

[3] As it turned out, the Council's action was a little premature in respect of Palau, since its approval of the Compact had not then, and has not yet, been given.

was contemplated, that of Papua New Guinea. On that occasion, the Trusteeship Council expressed its views for the benefit of the General Assembly,[4] which later adopted a resolution approving termination.

Subsequent events suggest that the Administering Authority has instead set out to ignore the role that the Charter accords the Security Council in this matter.

On October 24, 1986, the Secretary-General of the United Nations circulated a letter dated October 23, 1986, from the Permanent Representative of the United States.[5] That letter referred to Resolution 2183 (LIII) and informed the Secretary-General that

> as a consequence of consultations held between the United States Government and the Government of the Marshall Islands, agreement was reached that 21 October is the date upon which the Compact of Free Association with the Marshall Islands enters into force. Furthermore, I am pleased to inform you that the Compact of Free Association with the Federated States of Micronesia and the Commonwealth Covenant with the Northern Mariana Islands will enter into force on 3 November 1986.[6]

The letter further stated that the Permanent Representative would inform the Secretary-General "of arrangements for entry into force of the Compact of Free Association with Palau once accord has been reached on the effective date of that agreement."[7] It will be noted that this document merely refers to the *entry into force* of the relevant arrangements and makes no mention of terminating the trusteeship.

[4] *See* Report of the Trusteeship Council, 23 June–23 October 1974, 29 UN GAOR Supp. (No. 4) at 22–25, UN Doc. A/9604 (1974). Since the present trust is a strategic one, the Council's recommendation must, of course, go to the Security Council. Under Article 83, paragraph 3 of the Charter, the Security Council is to avail itself of the assistance of the Trusteeship Council to "perform those functions of the United Nations under the trusteeship system relating to political, economic, social, and educational matters in the strategic areas." The day-to-day supervision of the Trust Territory has been left to the Trusteeship Council since 1949, just as the General Assembly left the day-to-day supervision of the other trust territories to the Trusteeship Council, but reserved to itself the power to make determinative decisions such as those on termination.

[5] UN Doc. S/18424 (1986).

[6] The Marianas, at least, had apparently been proceeding on the basis that the Security Council needed to take action. *See* UN Doc. T/Com.10/L.366 of Oct. 21, 1986, which contains a recommendation from the Marianas House of Representatives *to the Security Council* that, subject to certain understandings, the trusteeship be terminated in respect of the Marianas. In fact, representatives of the Northern Marianas Task Force on Termination (created by the Marianas legislature) made lengthy oral petitions to the Trusteeship Council on May 13, 1987 for Security Council action leading to termination, subject to their understandings—some 6 months after the trusteeship was supposed to have been terminated as to them. *See* UN Doc. T/PV.1627 (1987). There is apparently a serious dispute raging between the Northern Marianas and the United States as to what the relationship between the parties is.

[7] The Compact was again defeated in a referendum held in Palau in December 1986. The author of this letter was one of a group of international nongovernmental observers at that referendum. *See* Report of the International Observer Mission, Palau referendum, December 1986 (International League for Human Rights and Minority Rights Group, New York, May 1987). A referendum on June 30, 1987 also failed. A later effort to amend the nuclear control provisions of the Constitution so that the Compact could be approved by a 50% majority was being litigated in Palau early in September.

A few days later, on November 3, 1986, President Reagan issued his proclamation "[p]lacing into Full Force and Effect the Covenant with the Commonwealth of the Northern Mariana Islands, and the Compacts of Free Association with the Federated States of Micronesia and the Republic of the Marshall Islands."[8] This document, which was not sent to the United Nations until the delivery of the Administering Authority's annual report on April 14, 1987,[9] goes further than the letter of the Permanent Representative. The President asserts that "the United States has fulfilled its obligations under the Trusteeship with respect to the Commonwealth of the Northern Mariana Islands, the Republic of the Marshall Islands and the Federated States of Micronesia." He goes on to "determine that the Trusteeship Agreement is no longer in effect as of October 21, 1986, with respect to the Republic of the Marshall Islands, as of November 3, 1986, with respect to the Federated States of Micronesia, and as of November 3, 1986, with respect to the Northern Mariana Islands." In a postscript added to the inside of the cover page of its 1986 report to the United Nations on the Trust Territory, the United States declared:

> In compliance with the Presidential proclamation (found on page 273 of this report) this is the final report of the United States of America to the Trusteeship Council of the United Nations with respect to the Federated States of Micronesia, the Republic of the Marshall Islands and the Commonwealth of the Northern Mariana Islands.

On November 3, 1986, a proclamation was also issued by President Nakayama of the Federated States of Micronesia,[10] whose relevant part states that "[t]he United Nations Trusteeship Agreement no longer applies to the Federated States of Micronesia and from this day forward, the people of the Federated States of Micronesia shall no longer be the wards of any nation or organization of nations."

I would suggest that the appropriate body to make a determination that the trusteeship is terminated (or its synonyms in the proclamations, "no longer in effect" and "no longer applies") is the Security Council of the United Nations, not the Presidents of the United States and the Federated States of Micronesia.

True, Article 83, in referring to the role of the Security Council, does not make specific reference to termination—it speaks of "alteration or amendment." In context, however, those words must include termination. It strains credulity to believe that the founders[11] of the Organization would

[8] Presidential Proclamation No. 5564, Nov. 3, 1986, 51 Fed. Reg. 40,399 (1986), *excerpted in* 81 AJIL 405 (1987).

[9] *See* UN Doc. T/1909 (1987).

[10] This proclamation appears in the 1986 report of the Administering Authority, *id.* at 276–77. I am not aware of any similar documents on the Marshalls or the Marianas.

[11] An examination of the original materials of the relevant proceedings in San Francisco in 1945, 10 UNCIO Docs., failed to shed any light on the intent of the founders. However, a leading secondary source on the Charter, apparently written with the aid of American State Department material not generally available, says this about the discussion of amendment and termination:

> The United States explained that the states originally concerned would have to agree to any subsequent changes, which would then be submitted for approval by the Organization

have given the United Nations the functions to approve an agreement and to approve changes in that agreement, short of its complete abolition, but no role in its abolition. Moreover, it is hard to argue that a change in the nature of the Trusteeship Agreement, effectively removing three out of the four entities to which it applies, is not an alteration or amendment as those terms are normally understood.[12]

Whatever view one might take of the words "alteration or amendment" were the question now suddenly appearing for the first time, past practice shows overwhelmingly that they encompass "termination." That Article 83 envisages action by the Security Council on termination, even of the whole of a trust agreement, was stated firmly by Ambassador Warren Austin, the U.S. representative in the Security Council when the Trusteeship Agreement was being approved by that body in 1947. The Soviet Union had proposed an amendment to the draft Agreement that would have made it possible for the Security Council to terminate the Agreement unilaterally. Ambassador Austin successfully opposed this amendment, arguing that the Trusteeship Agreement "is in the nature of a bilateral agreement between the United States, on the one hand, and the Security Council on the other," and that "no amendment or termination can take place without the approval of the Security Council." [13] The Agreement itself provides that the consent of the United States is required before the Agreement may be "altered, amended or terminated."[14] The Charter requires the consent of the Security Council to termination.

The same view was expressed more recently by the representative of the United Kingdom, who chaired the UN Mission to Observe the Plebiscite in Palau in February 1986. In response to the allegation by the USSR that the Security Council was being bypassed, Mr. Gore-Booth stated on the record: "It simply is not true that there is any attempt to bypass the Security Council. The United Nations Mission has made it clear both to political leaders and at public meetings that the termination of the trusteeship will have to be decided by the Security Council."[15]

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as in the case of the earlier agreement. Termination of a trust or a change in the administrator would constitute "alterations" in this respect.

R. RUSSELL & J. MUTHER, A HISTORY OF THE UNITED NATIONS CHARTER: THE ROLE OF THE UNITED STATES 1940–1945, at 837 (1958).

[12] This is true even if one takes a narrow dictionary definition of the terms. *Black's Law Dictionary* defines "alteration" as "[v]ariation; changing; making different. A change of a thing from one form or state to another; making a thing different from what it was without destroying its identity." It defines "amendment" as "[a] change, ordinarily for the better . . . . An amelioration of the thing without involving the idea of any change in substance or essence." Whether the removal of the three entities from the trusteeship would be a change "for the better" is perhaps debatable; that it is a change of the Agreement is not disputable.

[13] 2 UN SCOR (23d mtg.) at 476 (1947). And see the further discussion at 2 UN SCOR (31st mtg.) at 669–80 (1947). The ambassador's statement may be regarded either as a solemn unilateral promise, which is binding under the doctrine of the *Nuclear Tests Cases*, or as subsequent practice by the parties within the meaning of the Vienna Convention on the Law of Treaties. Either way, it is strongly supportive of the U.S. obligation to submit the question to the Security Council.

[14] Trusteeship Agreement for the Former Japanese Mandated Islands, Art. 15, 8 UNTS 189.

[15] Report of the United Nations Visiting Mission to Observe the Plebiscite in Palau, Trust Territory of the Pacific Islands, UN Doc. T/1886, at 39 (1986).

United States officials have indeed conceded many times in the past decade that it would be necessary to take up termination of the Pacific Trust with the Security Council.[16]

A diametrically opposed position has recently been asserted by the U.S. Justice Department in *Nitol v. United States*,[17] a case in the United States Court of Claims arising out of the nuclear testing in the Marshall Islands, and in related cases. The Justice Department takes the position that approval by the Security Council is not required for termination. It says that "[i]t is not clear whether Ambassador Austin misspoke himself, or whether he erroneously assumed at that time that Article 83 specifically requires Security Council approval for termination."[18] The Department goes on to assert that the ambassador "successfully opposed all amendments to the Trusteeship Agreement that would have required Security Council approval of termination of the Trusteeship."

This is a complete distortion. The ambassador was endeavoring (successfully) to prevent the inclusion in the Agreement of a unilateral power for the Security Council to terminate or otherwise amend or alter. He conceded that the Security Council must approve of any termination but defeated the effort to give the Council a unilateral power. Action by both the Security Council and the Administering Power was made necessary.

Since the Trust Territory of the Pacific Islands is the only strategic trust created, the precise question of the procedure to be followed has not arisen in the past practice of the Security Council. It has, however, been dealt with in completely analogous circumstances in the General Assembly. Article 85 of the Charter confers powers of approval of the terms of trusteeship agreements over nonstrategic areas, including their alteration or amendment, on the General Assembly. The invariable practice of the Assembly has been to consider a request for termination of the trust made by the administering authority—and to act on that request by adopting a resolution approving termination.[19] By the same token, in the case of other non-self-

[16] *See, e.g.*, S. REP. NO. 596, 94th Cong., 2d Sess. 5 (1976) ("According to documentation supplied to the Foreign Relations Committee, the Department of State recognizes it is obligated to seek Security Council approval of termination of the trusteeship agreement"); *Micronesian Compact of Free Association: A Review of H.J. Res. 620: Hearing Before the House Comm. on Foreign Affairs*, 98th Cong., 2d Sess. 109 (1984); Letter from Andrew Young, United States Ambassador to the United Nations, to the International League for Human Rights (May 10, 1978); Report of the Trusteeship Council to the Security Council, 33 UN SCOR Spec. Supp. (No. 1) at 81, UN Doc. S/12971 (1979).

[17] No. 543-81L (Cl. Ct. filed Aug. 8, 1983). The Department's basic position is that the nuclear claims should be terminated as a result of the coming into effect of the Compact with the Marshall Islands. It relies in particular on section 177 of the Compact and the Agreement made pursuant to it between the United States and the Marshall Islands, which provides for the termination of the suits. There are those who believe that the Administering Authority has acted the way that it has to try to speed up the process of putting an end to these troublesome suits.

[18] I am puzzled by the conceptual difference between "misspeaking" and making an erroneous assumption, but it is plain that Ambassador Austin's statement is now being disavowed.

[19] As the U.S. representative in the Trusteeship Council (and President of the Council) put it in 1948:

> The Charter of the United Nations, like the League Covenant, makes no specific provision for the termination of a trusteeship agreement. It is fair to assume, however, that an

governing territories within the scope of chapter XI of the Charter, the Assembly has repeatedly reaffirmed its position that

> in the absence of a decision of the General Assembly itself that a Non-Self-Governing Territory has attained a full measure of self-government in terms of Chapter XI of the Charter, the Administering Power concerned should continue to transmit information under Article 73e of the Charter with respect to that Territory.[20]

It is inconceivable that the Security Council should proceed differently from the General Assembly in recognizing the end of trust and other non-self-governing obligations.

The view that South Africa could unilaterally terminate the mandate over South West Africa (Namibia) was unanimously rejected by the International Court of Justice in 1950;[21] that decision represents another close analogy to the present one.

The precise form of an appropriate resolution by the Security Council approving termination of part or all of the trust is for the Security Council to decide; it is master of its own procedure. But one would certainly expect it to act by taking some formal decision. Thus, it is pertinent to draw attention to another remarkable document that has appeared on the present subject, a memorandum by the Department of External Affairs of the Federated States of Micronesia, dated February 10, 1987 and entitled "Emergence of the Federated States of Micronesia as a State within the Community of Nations." This document makes the assertion that the trusteeship terminated on November 3, 1986 in respect of the Federated States and that the termination was "accomplished through notification by the United States to the United Nations Secretary-General (Security Council Document S/18424, 24 October 1986) and subsequent acceptance by acquiescence on the part of the Security Council." The notion of the Security Council acting by means of "acquiescence" in carrying out its Charter functions such as giving its approval is a startling one, and completely unprecedented. Moreover, the alchemy by which a notification of bringing an arrangement into force, as contained in the Secretary-General's memorandum of October 24, is transformed into a termination of which the Security Council has been neither informed nor asked for its approval, but in which it has acquiesced, is difficult to fathom.

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agreement may be terminated under Article 79, which states that the terms of trusteeship, "including any alteration or amendment," shall be agreed upon by the states directly concerned and approved by either the General Assembly or the Security Council.

Sayre, *Legal Problems Arising from the United Nations Trusteeship System*, 42 AJIL 263, 289 (1948). This is precisely what the General Assembly has done in each case. *See* Opinion of the Legal Counsel on the Question of the Termination of the Trusteeship Agreement for the Territory of New Guinea, 1974 UN JURIDICAL Y.B. 181; and *see* Marston, *Termination of Trusteeship*, 18 INT'L & COMP. L.Q. 1 (1969); D. MCHENRY, MICRONESIA: TRUST BETRAYED 45–51 (1975); Macdonald, *Termination of the Strategic Trusteeship: Free Association, the United Nations and International Law*, 7 BROOKLYN J. INT'L L. 235, 258 (1981).

[20] See, most recently, GA Res. 41/13 (Oct. 31, 1986). And note the application of this principle in the case of New Caledonia, GA Res. 41/41 (Dec. 2, 1986).

[21] International Status of South West Africa, 1950 ICJ REP. 128, 141–43 (Advisory Opinion of July 11).

These events can only leave the impression that something is being swept under the carpet. There are serious issues at stake as to whether the UN norms for the proper exercise of self-determination have been met—most dramatically in the case of the Northern Mariana Islands, which appear to be consigned to permanent colonial status.[22] Whatever view one takes on the substantive issue, however, the international community has a stake in having the proper procedures of the Organization followed.

In the meantime, I submit that the powers of the Security Council and the Trusteeship Council under the trusteeship provisions of the Charter continue, not only as to Palau, but in respect of the other entities as well. In particular, the Council continues to have the power and duty to hear petitioners pursuant to Article 87 of the Charter and, as the Secretariat has pointed out in its proposed Programme Budget for the Biennium 1988–1989,[23] to engage in visiting missions. Article 76 of the Charter speaks of progressive development towards self-government. The present statuses in the various parts of the territory do represent development;[24] they do not represent sufficient development to constitute grounds for terminating the trust—and the definitive steps to do so have not yet been taken in spite of the President's proclamation.

ROGER S. CLARK*

ASIL AWARD TO THEODOR MERON

The American Society of International Law has awarded its Certificate of Merit for 1986 to Professor Theodor Meron for his book *Human Rights Law-Making in the United Nations: A Critique of Instruments and Process.* The certificate is awarded annually for a "preeminent contribution to creative scholarship." Professor Meron, a member of the AJIL Board of Editors, singled out three United Nations instruments for intensive scrutiny: the International Convention on the Elimination of All Forms of Racial Discrimination, the Convention on the Elimination of All Forms of Discrimination Against Women, and the International Covenant on Civil and Political Rights. The book also subjects to critical analysis the normative and jurisdictional relations between human rights instruments and organs and discusses reforms of UN human rights lawmaking.

[22] *See* Clark, *Self determination and Free Association—Should the United Nations Terminate the Pacific Islands Trust?*, 21 HARV. INT'L L.J. 1 (1980); Rodriguez Orellana, *In Contemplation of Micronesia: The Prospects for the Decolonization of Puerto Rico under International Law*, 18 U. MIAMI INTER-AM. L. REV. 458 (1987). *But see* Hills, *Compact of Free Association and Micronesia: Constitutional and International Law Issues*, 18 INT'L LAW. 583, 602–06 (1984). And note the dispute between the Marianas and the United States over what their deal is. *See* note 6 *supra*. Marianas officials obviously see an active, continuing role for the United Nations in this matter.

[23] UN Doc. A/42/6, sec. 3, at 14 (1987).

[24] Thus, at their May 1987 meeting, the states of the South Pacific Forum decided to admit the Federated States and the Marshall Islands as full members of the Forum. Some members of the Forum that agreed with this decision nonetheless expressed the view that the trusteeship is still in force. The Forum has always regarded itself as flexible on membership matters, being able to accommodate the Cook Islands and Niue, states in free association with New Zealand, albeit a different form of free association from that involving the new Micronesian entities. It is likewise able to accommodate the less than completely sovereign Federated States and Marshalls.

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