

I-21905/69

21 April 1969

MEMORANDUM FOR COMMANDER EDWIN A. KUHN
EA & PR/OSD/ISA

SUBJECT: Preliminary Observations - Legal Aspects
Concerning the Political Future of the
Trust Territory of the Pacific Islands.

Introduction.

We provide here our preliminary observations concerning legal aspects relating to the questions associated with the political future of the Trust Territory of the Pacific Islands. The TTPI are presently administered as a strategic trust area pursuant to the Trusteeship Agreement, approved by the Security Council of the United Nations April 2, 1947, and made with the United States pursuant to Articles 75 et. seq. of the United Nations Charter.

According to your undated memorandum the Department of State takes the position that in a forthcoming plebiscite the inhabitants of the Trust Territory should be given, among other options, an option which would enable them to have sovereign independence. The JCS, Department of Interior, and ISA would not offer this option at all, and instead would offer the Micronesians two options, i. e., either to become part of an organized territory of the United States or to continue under the Trusteeship Agreement. Should time permit, an analysis in depth might follow these preliminary observations, but we would like to point out that the legal aspects are interwoven with the political and policy aspects and in large measure their resolution is largely dependent upon them.

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1. The Legal Aspects Set Forth in the Trusteeship Agreement.

The Trusteeship Agreement between the United States as the "State directly concerned" (see United Nations Charter, Article 79) and the Security Council of United Nations contain several provisions that bear upon the questions raised in dealing with the political future of the TTPI.

Under Article 3 the United States as administering authority is given "full powers of administration, legislation and jurisdiction" and authority to apply "such of the laws as the United States as it may deem appropriate to local conditions and requirements". In the initial draft of this provision it had been proposed by the United States that it might administer the TTPI as an "integral part" of the United States, but following debate in the United Nations, this phrase was dropped.¹ But the United States in deleting this phrase declared "for the record" that "its authority in the Trust Territory is not to be considered in any way lessened thereby".²

1. The phrase had been used earlier in connection with the "C" Mandates, referring to administration under the laws of the Mandatory acting under the Covenant of the League of Nations, Article 22, Paragraph 6.

2. See Sayre, "Legal Problems arising from the United States Trusteeship System", 42 A.J.I.L. 263-298 (1948), at p. 286. Mr. Sayre was the United States representative in the Trusteeship Council and President of the Council.

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In its authority to administer the strategic trust area the United States secured the right to erect military and naval basis. A large majority in the Assembly voted down a Soviet resolution that would have rejected not only this right but also the Trusteeship Agreement program.

Article 4 of the Trusteeship Agreement obligates the United States, in carrying out its administration, to act in accordance with the Charter of United Nations, and in particular as set out under Chapter XXII. Article 76 which refers to the basic objectives of administration are implemented in detail in Articles 5, 6, 7, and 8 of the Trusteeship Agreement.

a. Article 76 of the United Nations Charter.

At this point it is appropriate to look more closely at Article 76 of the United Nations Charter and then to return to Articles 4 et. seq. of the Trusteeship Agreement. Article 76(a) lays down as one objective that of furthering "international peace and security". This Paragraph is broad and vague and needs no comment here. Paragraph (b) indicates that a further basic objective in administering the TTPI is as follows:

"b. To 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;"

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Unfortunately, no standards have been set forth in the United Nations Charter as to when and how it may be determined that the inhabitants of a trust territory have developed enough to be entitled to enjoy self-government or independence. Although the United Nations Charter places the power to make policy determinations of a broad sort on the Security Council of the United Nations, it is clear both from the practices of the Trusteeship Council, from a reading of the Charter itself, and even from the earlier activities of the Permanent Mandates Commission operating under the League of Nations that the United Nations Trusteeship Council has no administering powers (as opposed to policy-making powers) and must rely on its right to make periodic visits to trust territories and to receive reports from the United States to secure information on which its policies may rest.

It is an open question whether or not the Trusteeship Council in carrying out its policy-making functions can also determine whether the administering authority has adopted adequate standards or implemented them in carrying out the objectives set forth in Article 76(b) of the United Nations Charter. But there is little evidence to show so pervasive a power in the Trusteeship Council. However, I would suggest that the Trusteeship Council might be able to secure, through political means in the United Nations, a kind of "veto" should it decide that the standards adopted or implemented are not adequate. This however is a matter which might be more closely examined by the Department of State.

2. Articles 4 through 8 of the Trusteeship Agreement.

With Article 76 of the United Nations Charter in view, Articles 4 through 8 of the Trusteeship Agreement can be considered in greater detail. Article 5, it will be noted, states that the United States, as administering authority, "in the maintenance of international peace and security" is entitled to establish military, naval and air bases, to erect fortifications, and to deploy armed forces in the trust territory.

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If the United States seeks to maintain these bases and deploy armed forces in the future, the United States would be in a much stronger position if the inhabitants of the Trust Territory agree to continue the Arrangement or, in the alternative, provide by separate agreement that the United States may continue to use such bases and maintain the deployment of armed forces (and augment them if need be) after the inhabitants have adopted independence and a self-governing status. This option would, it appears to me, satisfy United States security considerations as set forth in your memorandum.

Article 6 of the Trusteeship Agreement is more closely concerned with the United States obligations to provide greater participation among the inhabitants in the government of their territory. It must therefore be a question of fact whether the inhabitants have reached such a stage that they can then proceed toward independence and autonomy. As noted earlier, there are no standards so far formulated against which this development in political maturity can be measured. Moreover, there seems to be no obligation to submit the standards, or even the decision to afford the inhabitants a plebiscite, to the United Nations.

On the other hand, there is strong support in Article 15 which would enable the United States as administering authority to maintain the present Trusteeship Agreement in force because that article requires the "consent of the United States" before the Trusteeship Agreement can be altered, amended, or terminated. Presumably, therefore the United States is in a strong position to shape the decisions of the inhabitants of the Trust Territory in such a way that strategic interests of the United States can be protected while the inhabitants of the Trust Territory can benefit from adequate compensation for the use of their land.

Mr. Sayre in the American Journal of International Law points out (at pp. 268 ff) that the sovereignty of the Trust Territories - a question which raises both legal and political

implications - has by no means been settled and remains controversial. However, since sovereignty is in part a political question, the United States must be prepared to face attitudes developing within the United Nations suggesting that non-self-governing peoples must be given an opportunity to choose independence and self-government as soon as possible. Although this aspect of "colonialism" is a political issue which might best be weighed by the Department of State and its political officers, strong arguments reinforcing the JCS/ISA position can be made, as we will now indicate.

4. Federation with Other United States Territories.

The headnote of Article 9 in the Trusteeship Agreement is "Federation with Other United States Territories." Under Article 9, the United States is entitled to create a customs, fiscal, or administrative union or federation with other territories under United States jurisdiction. Article 9 further declares that such a union or federation must not be inconsistent with the basic objectives of the International Trusteeship System (set forth in Article 76 of the United Nations Charter). Hence, Article 9, though somewhat vague, would suggest that the United States can take steps to shape the political process in the trust territory toward establishing a federation or customs union. As such, the federation or customs union becomes an acceptable arrangement and does not appear to require a plebiscite. Moreover, it can become the relationship linking the United States and the TTPI even after the Trusteeship Agreement has been terminated.

Using such arguments as the limited amount of natural resources (other than land and fish), the lack of appeal that the trust territories might hold for industry, and at this stage, the relatively limited skills of the inhabitants in providing themselves with financial support, the United States might be able to make a strong case for promoting federation as a transitional stage between the trusteeship arrangement and the plebiscite for self-government. During this stage - as in Puerto Rico - the United States can take steps to shape the attitudes of the Micronesians to secure their consent and desires to be assimilated as part of United States territory. Such an argument as this would

therefore gain weight under Article 9 and 15 and it would assimilate the United Nations Charter's basic objectives set out in Article 76, particularly if the federation to be established would have as one of its objectives the promotion of the economic security of the inhabitants of the Trust Territory with a view that this would enable them to continue their progressive development toward self-government (i. e., by linking effective self-government with a sound economy).

Conclusion.

These preliminary observations do not exhaust the considerations which these questions deserve. On the other hand, we recommend that an in depth analysis be made following a discussion with those who are more aware of the political factors than are to be found in the documents and references upon which we are compelled to rely.

Such an analysis must probe the travaux preparatoire, the role of the United States as one of the drafting parties of the Trusteeship Agreement (i. e., this role reduces the impact of United Nations supervision in the sense that the authority of the United States does not derive directly from the United Nations acting unilaterally but rather from the negotiation between the United States and the Security Council), the relevance of Article 11 of the Trusteeship Agreement calling for the United States to provide "the status of citizenship of the Trust Territory for the inhabitants of the Trust Territory" (see in particular on this Hall, Mandates Dependency and Trusteeship, Carnegie ~~Endowment~~ Endowment for International Peace, Washington 1948 at pages ~~et~~ seq.), the extent to which Article 7 referring to the guarantee of certain human rights along with the corresponding Article 76 (c) of the United Nations Charter can be used to support an argument that these rights call for a sound political economy, the impact of Article 8 of the Trusteeship Agreement in which preferential treatment in United States trade is afforded the inhabitants of the Trust Territory as contrasted in the other United States trade commitments and the like.

cc: Capt. Valentine, JCS
Mr. Niederlehner
Master Chron
Subj: ILP-Trust Territory
Att:

R&C/ISA
Circulating

SIGNED

Harry H. Almond, Jr.
Office of Assistant General Counsel
International Affairs

Appendix (Preliminary Conclusions)

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APPENDIX

(Preliminary Conclusions)

Preliminary conclusions can be proposed at this point. Among the options available to the United States are the following:

1. A Separate Agreement with the Micronesians.

United States might consider entering into a separate agreement with the inhabitants of the Trust Territory similar to the arrangements made for the Bermuda leases, i. e., calling for long-term leases of Trust Territory land suitable for use by the United States in satisfying its security means. Such a separate agreement could of course be made whether or not the inhabitants opt to enter into a federation with the United States or should they be permitted to opt for self-government in a State of their own.

2. Federation.

Our opinion indicates that under the Trusteeship Arrangement (Article 9) the United States is entitled, during the time it administers the Trust Territories, to create a customs, fiscal, or administrative union or federation with the inhabitants of the Trust Territory and to combine it with other territories under United States jurisdiction. Such a federation, we have suggested, might be a transitional stage of indefinite duration during which the United States will be engaged in bringing the inhabitants of the Trust Territory to the level of political sophistication required for self-government. The United States would, perhaps be able, as in Puerto Rico, to shape the attitudes of the inhabitants so that they will voluntarily seek to be assimilated as a permanent part of United States territory.

3. Submission to Plebiscite.

The Department of State seeks to set in motion a plebiscite among the inhabitants of the Trust Territory in which

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one of the options shall be that of sovereign independence. The Department of State therefore starts with the proposition that the inhabitants of the Trust Territory have reached the political sophistication needed both to choose self-government as an independent State and to carry out their own self-governed affairs once Statehood is granted.

Without attempting to evaluate this assumption we can refer to Resolution 1541 (XV) of the United Nations General Assembly, dated 15 December 1960. This Resolution refers to Chapter XI of the United Nations Charter. Although Chapter XI and Chapter XII (which is relevant to our issue) have been distinguished and treated separately, Resolution 1541 contains principles which would apply to determining whether or not a non-self-governing people have reached self-government. Therefore, Resolution 1541 is helpful in applying Article 76 under Chapter XII. (A copy of Resolution 1541 is attached to this memorandum.)

Principle VI of the Resolution notes that self-government has been reached when the territory can emerge as a sovereign independent State, or enter into free association with an independent State, or integrate with an independent State. Principle VII states that free association with an independent State shall be "the result of a free and voluntary choice by the peoples of the territory concerned expressed through informed and democratic processes". Principle VIII states that integration with an independent State shall be on the basis of complete equality, which in turn reflects the achievement of political sophistication essential to self-government. And Principle IX declares that the inhabitants of the integrating territory shall have attained an advanced stage of self-government with free political institutions.

These standards remain somewhat broad but applying them as general principles to Chapter XII and assuming that the inhabitants of the Trust Territory have reached the stage described, the inhabitants are then in the position described in Principle VI to choose either to be a sovereign independent State, to enter into free association with the United States, or to integrate with the United States (e. g. to become part of the State of Hawaii). Therefore, no distinction in these principles is made as to the differing stages of self-government in choosing one or another of these three options. It is for this reason that it would be

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difficult to deny the inhabitants of the Trust Territory an option permitting them to become a sovereign independent State in a plebiscite if we were also to permit them free association with the United States or integration with the United States.

For these reasons it would appear appropriate that the Department of Defense seek in its discussions with the Department of State to delay the plebiscite at this time and instead pursue one of the other steps suggested above.

~~SIGNED~~

Harry H. Almond, Jr.
Office of Assistant General Counsel
International Affairs

Att:

a/s

References: Sady, The United Nations and Dependent Peoples -
Brookings Inst., 1956.

Hall, Mandates, Dependencies and Trusteeships
Carnegie Endowment for International Peace
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1. Takes note of the report of the Secretary-General on offers of study and training facilities under General Assembly resolutions 845 (IX);

2. Reaffirms its resolution 1471 (XIV) of 12 December 1959;

3. Invites once again the Administering Members concerned to take all necessary measures to ensure that scholarships and training facilities offered by Member States are utilized by the inhabitants of the Non-Self-Governing Territories, and to render every assistance to those persons who have applied for, or have been granted, scholarships or fellowships, particularly with regard to facilitating their travel formalities;

4. Requests all Administering Members which have not already done so to give the fullest publicity in the Territories under their administration to all offers of study and training facilities made by Member States;

5. Urges Member States to increase the number of scholarships offered;

6. Requests the Member States offering scholarships to take into account the necessity of furnishing complete information about the scholarships offered, and, whenever possible, the need to provide travel funds to prospective students;

7. Requests the Secretary-General and the specialized agencies to give such assistance as is possible and as may be sought by the Member States concerned and by the applicants;

8. Further requests the Secretary-General to prepare for the sixteenth session of the General Assembly a report on the actual use of scholarships and training facilities offered by Member States to students from the Non-Self-Governing Territories.

948th plenary meeting,
15 December 1960.

1541 (XV). Principles which should guide Members in determining whether or not an obligation exists to transmit the information called for under Article 73 e of the Charter

The General Assembly,

Considering the objectives set forth in Chapter XI of the Charter of the United Nations,

Bearing in mind the list of factors annexed to General Assembly resolution 742 (VIII)¹² of 27 November 1953,

Having examined the report of the Special Committee of Six on the Transmission of Information under Article 73 e of the Charter,¹² appointed under General Assembly resolution 1467 (XIV) of 12 December 1959 to study the principles which should guide Members in determining whether or not an obligation exists to transmit the information called for in Article 73 e of the Charter and to report on the results of its study to the Assembly at its fifteenth session,

1. Expresses its appreciation of the work of the Special Committee of Six on the Transmission of Information under Article 73 e of the Charter;

2. Approves the principles set out in section V, part B, of the report of the Committee, as amended and as they appear in the annex to the present resolution;

3. Decides that these principles should be applied in the light of the facts and the circumstances of each

¹² *Ibid.*, agenda item 38, document A/4526.

case to determine whether or not an obligation exists to transmit information under Article 73 e of the Charter.

948th plenary meeting,
15 December 1960.

ANNEX

PRINCIPLES WHICH SHOULD GUIDE MEMBERS IN DETERMINING WHETHER OR NOT AN OBLIGATION EXISTS TO TRANSMIT THE INFORMATION CALLED FOR IN ARTICLE 73 e OF THE CHARTER OF THE UNITED NATIONS.

Principle I

The authors of the Charter of the United Nations had in mind that Chapter XI should be applicable to territories which were then known to be of the colonial type. An obligation exists to transmit information under Article 73 e of the Charter in respect of such territories whose peoples have not yet attained a full measure of self-government.

Principle II

Chapter XI of the Charter embodies the concept of Non-Self-Governing Territories in 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 ceases. Until this comes about, the obligation to transmit information under Article 73 e continues.

Principle III

The obligation to transmit information under Article 73 e of the Charter constitutes an international obligation and should be carried out with due regard to the fulfilment of international law.

Principle IV

Prima facie there is an obligation to transmit information in respect of a territory which is geographically separate and is distinct ethnically and/or culturally from the country administering it.

Principle V

Once it has been established that such a *prima facie* case of geographical and ethnical or cultural distinctness of a territory exists, other elements may then be brought into consideration. These additional elements may be, *inter alia*, of an administrative, political, juridical, economic or historical nature. If they affect the relationship between the metropolitan State and the territory concerned in a manner which arbitrarily places the latter in a position or status of subordination, they support the presumption that there is an obligation to transmit information under Article 73 e of the Charter.

Principle VI

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

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

Principle VII

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

(b) The associated territory should have the right to determine its internal constitution without outside interference, in accordance with due constitutional processes and the freely

expressed wishes of the people. This does not preclude consultations as appropriate or necessary under the terms of the free association agreed upon.

Principle VIII

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. The peoples of both territories should have equal status and rights of citizenship and equal guarantees of fundamental rights and freedoms without any distinction or discrimination; both should have equal rights and opportunities for representation and effective participation at all levels in the executive, legislative and judicial organs of government.

Principle IX

Integration should have come about in the following circumstances:

(a) The integrating territory should have attained an advanced stage of self-government with free political institutions, so that its peoples would have the capacity to make a responsible choice through informed and democratic processes;

(b) 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, their wishes having been expressed through informed and democratic processes, impartially conducted and based on universal adult suffrage. The United Nations could, when it deems it necessary, supervise these processes.

Principle X

The transmission of information in respect of Non-Self-Governing Territories under Article 73 e of the Charter is subject to such limitation as security and constitutional considerations may require. This means that the extent of the information may be limited in certain circumstances, but the limitation in Article 73 e cannot relieve a Member State of the obligations of Chapter XI. The "limitation" can relate only to the quantum of information of economic, social and educational nature to be transmitted.

Principle XI

The only constitutional considerations to which Article 73 e of the Charter refers are those arising from constitutional relations of the territory with the Administering Member. They refer to a situation in which the constitution of the territory gives it self-government in economic, social and educational matters through freely elected institutions. Nevertheless, the responsibility for transmitting information under Article 73 e continues, unless these constitutional relations preclude the Government or parliament of the Administering Member from receiving statistical and other information of a technical nature relating to economic, social and educational conditions in the territory.

Principle XII

Security considerations have not been invoked in the past. Only in very exceptional circumstances can information on economic, social and educational conditions have any security aspect. In other circumstances, therefore, there should be no necessity to limit the transmission of information on security grounds.

1542 (XV): Transmission of information under Article 73 e of the Charter

The General Assembly,

Recalling that, by resolution 742 (VIII) of 27 November 1953, the General Assembly approved a list of factors to be used as a guide in determining whether a Territory is or is no longer within the scope of Chapter XI of the Charter of the United Nations,

Recalling also that differences of views arose among Member States concerning the status of certain territories under the administrations of Portugal and Spain and described by these two States as "overseas provinces" of the metropolitan State concerned, and that with a view to resolving those differences the General Assembly, by resolution 1467 (XIV) of 12 December 1959, appointed the Special Committee of Six on the Transmission of Information under Article 73 e of the Charter to study the principles which should guide Members in determining whether or not an obligation exists to transmit the information called for in Article 73 e,

Recognizing that the desire for independence is the rightful aspiration of peoples under colonial subjugation and that the denial of their right to self-determination constitutes a threat to the well-being of humanity and to international peace,

Recalling with satisfaction the statement of the representative of Spain at the 1048th meeting of the Fourth Committee that his Government agrees to transmit information to the Secretary-General in accordance with the provisions of Chapter XI of the Charter,

Mindful of its responsibilities under Article 14 of the Charter,

Being aware that the Government of Portugal has not transmitted information on the territories under its administration which are enumerated in operative paragraph 1 below and has not expressed any intention of doing so, and because such information as is otherwise available in regard to the conditions in these territories gives cause for concern,

1. Considers that, in the light of the provisions of Chapter XI of the Charter, General Assembly resolution 742 (VIII) and the principles approved by the Assembly in resolution 1541 (XV) of 15 December 1960, the territories under the administration of Portugal listed hereunder are Non-Self-Governing Territories within the meaning of Chapter XI of the Charter:

- (a) The Cape Verde Archipelago;
- (b) Guinea, called Portuguese Guinea;
- (c) São Tomé and Príncipe, and their dependencies;
- (d) São João Batista de Ajudá;
- (e) Angola, including the enclave of Cabinda;
- (f) Mozambique;
- (g) Goa and dependencies, called the State of India;
- (h) Macau and dependencies;
- (i) Timor and dependencies;

2. Declares that an obligation exists on the part of the Government of Portugal to transmit information under Chapter XI of the Charter concerning these territories and that it should be discharged without further delay;

3. Requests the Government of Portugal to transmit to the Secretary-General information in accordance with the provisions of Chapter XI of the Charter on the conditions prevailing in the territories under its administration enumerated in paragraph 1 above;

4. Requests the Secretary-General to take the necessary steps in pursuance of the declaration of the Government of Spain that it is ready to act in accordance with the provisions of Chapter XI of the Charter;

5. Invites the Governments of Portugal and Spain to participate in the work of the Committee on Information from Non-Self-Governing Territories in accordance