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Peter Ruffatto

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U.S. ACTION IN MICRONESIA AS A NORM OF CUSTOMARY INTERNATIONAL LAW: THE EFFECTUATION OF THE RIGHT TO SELF-DETERMINATION FOR GUAM AND OTHER NON-SELF-GOVERNING TERRITORIES

Peter Ruffatto

Abstract: U.S. relations with the Federated States of Micronesia and the Republic of the Marshall Islands resulted in a status of free association for these two Micronesian nations in 1986. Meanwhile, 18 trust and non-self-governing territories still lack a status of self-determination, including U.S.-administered Guam. U.S. action in Micronesia and U.N. approval of such action creates a norm of customary international law, which mandates all administering authorities of trust and non-self-governing territories to bring to fruition these territories' right to self-determination. Although non-self-governing territories are generally categorized under a separate legal regime from that which governed U.S. action in Micronesia, the more appropriate view is that the U.N. instruments under which Micronesia achieved self-determination apply equally to non-self-governing territories such as Guam. The Guam Commonwealth Act, currently under consideration by the U.S. Congress, presents the United States with an opportunity to meet its international legal obligation to effectuate Guamanian self-determination. Passage would move Guam significantly closer to a status of self-determination.

I. INTRODUCTION

In 1986, the United States, as administering authority of the Trust Territory of the Pacific Islands,¹ effectuated that territory's right to self-determination as set forth in U.N. instruments. In November of that year,

¹ The two thousand islands which once constituted the Trust Territory of the Pacific Islands (TTPI) are scattered over an area in the Pacific Ocean which approximates the size of the continental United States. The region is bordered by the equator to the South and stretches northward to include the Northern Mariana Islands, which lie just north of Guam. This region, commonly referred to as Micronesia, has 155,000 inhabitants and covers a total land area of approximately seven hundred square miles. ARNOLD H. LEIBOWITZ, *DEFINING STATUS, A COMPREHENSIVE ANALYSIS OF UNITED STATES TERRITORIAL RELATIONS* 482 (1989).

Micronesia is one of the three major divisions of Oceania. Geographically, the region includes Guam, Kirabati, Nauru, the Republic of the Marshall Islands, the Commonwealth of the Northern Mariana Islands, The Republic of Palau, and the Federated States of Micronesia. *ACADEMIC AMERICAN ENCYCLOPEDIA* 385 (1990). In this Comment, use of the term "Micronesia" refers only to the latter four entities because these are the islands that once made up the TTPI.

The Federated States of Micronesia (FSM), the Republic of the Marshall Islands, and the Republic of Palau are commonly referred to as the Freely Associated States (FAS). In this Comment, however, the acronym "FAS" refers only to the Republic of the Marshall Islands and the Federated States of Micronesia because Palau has yet to attain the status of free association. *See infra*, note 130.

the Federated States of Micronesia and the Republic of the Marshall Islands became self-governing in accordance with an agreement with the United States which is known as the Compact of Free Association.² For these two Micronesian states, the Compact and subsequent U.N. approval of the Compact marked their first break from colonial rule in almost 500 years.³

For the international community, the effectuation of Micronesian self-determination constitutes another step towards world decolonization and a manifestation of self-determination as a rule of international law. Decolonization remains unfinished, however, because at least 18 trust and non-self-governing territories still lack self-determination.⁴ Guam's status as a non-self-governing territory under the plenary authority of the United States Congress constitutes a prime example of this residual colonialism.⁵ Guam's frustration with its current political status became apparent in February, 1993, when Guam's Governor, Joseph Ada, delivered his "The State of the Colony Address," rather than the usual "State of the Territory Address."⁶

This Comment proposes that U.S. action in Micronesia, which culminated in the Compact of Free Association, creates a new norm of customary international law. This norm requires all administering authorities of trust and non-self-governing territories to effectuate these territories' right to self-determination as set forth in U.N. instruments. It prohibits these administering authorities from holding territories in a prolonged and

² Compact of Free Association, 48 U.S.C. § 1681 (1988) [hereinafter Compact].

³ U.N. approval of the Compact came from the Trusteeship Council in 1986. T.C. Res. 2183 (LIII), 53 U.N. TCOR Supp. (No. 3) at 14-15, U.N. Doc. T/1901 (1986) [hereinafter *Trusteeship Council Resolution 2183 (LIII)*]. In 1990, the U.N. Security Council also endorsed the Compact as fulfilling the United State's obligation to promote Micronesia's self-determination. U.N. SCOR, 45th Sess., 2972nd mtg. at 29, U.N. Doc. S/INF/46 (1990).

Ferdinand Magellan's arrival in Guam in 1521 marked the point of first contact between Pacific Islanders and Europeans. FRANCIS HEZEL, *THE FIRST TAIN OF CIVILIZATION 1* (1983). From that day on, Micronesians experienced a growing dependency on foreign powers, coupled with a gradual diminishment of their autonomy. CARL HEINE, *MICRONESIA AT THE CROSSROADS* 10-17 (1974).

⁴ These territories and their administering authorities include: American Samoa, Guam, United States Virgin Islands, and the Trust Territory of the Pacific Islands (Palau) all of which are administered by the United States; Anguilla, Bermuda, British Virgin Islands, Cayman Islands, Falkland Islands, Gibraltar, Montserrat, Pitcairn, St. Helena, Turks and Caicos Islands all of which are administered by the United Kingdom; New Caledonia which is administered by France; Tokelau which is administered by New Zealand; Western Sahara which is administered by Morocco; and East Timor which is administered by Portugal. *Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples: Report of the Secretary-General*, U.N. GAOR, 47th Sess., Agenda Item 18, at 1, 5-6, U.N. Doc. A/47/649 (1992). Note that Palau is the only area which is still under the International Trusteeship System, while the rest of these areas are non-self-governing territories under Article 73 of the U.N. Charter. 1991 U.N.Y.B. 810, U.N. Sales No. E.92.I.1.

⁵ LEIBOWITZ, *supra* note 1, at 363. See *infra* part III.A-B.

⁶ Joseph F. Ada, *State of the Colony Address* at Guam Legislative Session Hall, Agana, Guam (Feb. 26, 1993) (transcript available at Office of Guam Commission on Self-Determination, Agana, Guam).

indefinite colonial status. In addition to establishing a new norm of customary international law, U.S.-Micronesian relations aid in understanding the right of self-determination by identifying its definition and means of implementation. Focusing on Guam as an example of a non-self-governing territory, this Comment concludes that the norm established by U.S. action in Micronesia reaches beyond the framework of the International Trusteeship System to include other areas lacking self-determination. The Guam Commonwealth Act, now before the U.S. Congress, presents an opportunity for the United States, as the administering authority of Guam, to satisfy its obligation to effectuate Guamanian self-determination.⁷ Current U.S. intransigence with respect to Guamanian self-determination violates international law, including the norm established by U.S.-Micronesian relations.

This Comment continues with part II which provides a brief overview of the right to self-determination. Part III focuses on Guam as an example of a non-self-governing territory which lacks a significant measure of self-determination. Part IV discusses U.S.-Micronesian relations, charting Micronesia's progression from Trust Territory to Freely Associated States. Part V demonstrates how a customary international law norm emerges from U.S. action in Micronesia. Part VI discusses the content and implementation of the right to self-determination as illustrated by the case of Micronesia. Part VII argues that the norm established by U.S. action in Micronesia reaches beyond the International Trusteeship System to include all non-self-governing territories. Finally, part VIII sets forth the reasons for viewing the Guam Commonwealth Act as a valid expression of Guamanian self-determination and evaluates the U.S. position on key provisions of the Act.

II. THE HISTORICAL⁸ RIGHT TO SELF-DETERMINATION: STATUS AND SOURCES

Repeated state practice both within and outside the U.N. has established the right of self-determination as a norm of customary international

⁷ On March 30, 1993, Congressman Underwood from Guam introduced H.R. 1521, 103rd Cong., 1st Sess., (1993) to the House Committees on Natural Resources and Ways and Means. This is a bill to establish the Commonwealth of Guam. 139 CONG. REC. H1738 (daily ed. Mar. 30, 1993). Not coincidentally, the bill number corresponds with the year that Ferdinand Magellan arrived on Guam.

⁸ The author uses the term "historical" here to describe the right of self-determination as it existed before U.S.-Micronesian relations and to distinguish this right from the new and separate norm which emerges from U.S. action in Micronesia.

law.⁹ The U.N. Charter and U.N. action subsequent to the adoption of the U.N. Charter constitute primary sources of the right to self-determination.

A. *The Principle of Self-Determination in the U.N. Charter*

The principle of self-determination constituted a key feature of the allied plan for organization of a stable international order after World War II,¹⁰ and was incorporated into several provisions of the U.N. Charter. Article 1(2) of the U.N. Charter states that a primary purpose of the U.N. is the development of friendly relations among nations "based on the respect for the principle of equal rights and self-determination of peoples."¹¹

Chapters XI and XII of the U.N. Charter, which govern the administration of non-self-governing and trust territories, are also recognized as sources of the right to self-determination.¹² Article 73, the heart of chapter XI, provides, in part, that the administering authorities take on the obligation to develop self-government, to take due account of the political aspirations of the peoples, and to assist them in the progressive development of their free political institutions, according to the particular circumstances of each territory and its peoples and their varying stages of advancement.¹³

Article 73 applies to territories which have not yet achieved a full measure of self-government, including both trust and non-self-governing territories.¹⁴ Article 76, the heart of chapter XII, applies only to territories within the International Trusteeship System. Article 76 states that one of the objectives of the Trusteeship System is to promote "progressive development towards self-government or independence as may be

⁹ Edward A. Laing, *The Norm of Self-Determination, 1941-1991*, 22 CAL. W. INT'L L.J. 209, 217 *passim* (1992); UMOZURIKE O. UMOZURIKE, SELF-DETERMINATION IN INTERNATIONAL LAW 138-76, 188-89 (1972). See also HURST HANNUM, AUTONOMY, SOVEREIGNTY, AND SELF-DETERMINATION—THE ACCOMMODATION OF CONFLICTING RIGHTS 45 (1990) ("It would seem difficult to question [the right of self-determination's] status as a right in international law."); cf. LAURI HANNIKAINEN, PEREMPTORY NORMS (JUS COGENS) IN INTERNATIONAL LAW 358-416 (1988) (indicating that there is a great deal of evidence that the obligation of states not to obstruct the right of dependent peoples to external self-determination rises to the level of a peremptory norm).

¹⁰ W. OFUATBY-KODJOE, THE PRINCIPLE OF SELF-DETERMINATION IN INTERNATIONAL LAW 104-06 (1977).

¹¹ Likewise, Article 55 states that its directives are "based on respect for the principle of equal rights and self-determination of peoples."

¹² MICHLA POMERANCE, SELF-DETERMINATION IN LAW AND PRACTICE 9 (1982) (noting that chapters XI and XII are principle bases of the right of self-determination although the term "self-determination" does not appear therein). See also Laing, *supra* note 9, at 212.

¹³ U.N. CHARTER.

¹⁴ Harry G. Prince, *The United States, the United Nations, and Micronesia: Questions of Procedure, Substance, and Faith*, 11 MICH. J. INT'L L. 11, 20 (1989). The U.N. criteria for when a territory has achieved a "full measure of self-government" are set out *infra* in note 187.

appropriate to the particular circumstances of each territory and its peoples and the freely expressed wishes of the peoples concerned."¹⁵

Although Chapters XI and XII are generally thought of as separate legal regimes,¹⁶ the more appropriate view is that territories which became part of the trusteeship system under Articles 75-85 (Chapter XII) are a subset of the broader category of non-self-governing territories governed by articles 73-74 (Chapter XI).¹⁷ By definition, trust territories lack a full measure of self-government, and thus constitute non-self-governing territories. U.S. governance of Micronesia, for example, fell under both Article 73 and Article 76,¹⁸ though commentators generally speak of U.S.-Micronesian relations in the context of the Trusteeship System only.¹⁹ Article 73, therefore, explicitly applies to both trust and non-self-governing territories.

Moreover, the right of self-determination which is embodied in Article 76 is essentially the same as that embodied in Article 73.²⁰ The right in both Articles derives from Article 1(2).²¹ A comparison of the language demonstrates that the obligation is equivalent in both Articles.²² In both provisions, the overriding obligation is for administering authorities to promote the development of self-government in accordance with the will of the peoples they govern.

The primary difference between Chapter XI and Chapters XII and XIII is that the latter two chapters provide for extensive U.N. supervision. Article 73, contained in Chapter XI, requires only that an annual report be submitted.²³ By contrast, the Trusteeship System in Chapters XII and XIII provides for the U.N. examination of petitions, U.N. visiting missions, and

¹⁵ U.N. CHARTER.

¹⁶ *E.g.*, USHA SUD, UNITED NATIONS AND THE NON-SELF-GOVERNING TERRITORIES 2 (1965).

¹⁷ Prince, *supra* note 14, at 20. Although Articles 75-85 go on to set forth specific requirements with respect to trust territories, Professor Prince notes that the language and organization of Chapters XI and XII support the conclusion that Chapter XI explicitly applies to trust territories. *Id.* See also HANNUM, *supra* note 9, at 18.

¹⁸ See *Trusteeship Council Resolution 2183 (LIII)*, *supra* note 3 (noting that both Articles 73 and 76 applied to the TTP).

¹⁹ *E.g.*, Naomi Hirayasu, *The Process of Self-Determination and Micronesia's Future Political Status Under International Law*, 9 U. HAW. L. REV. 487, 493-95, 514 (1987).

²⁰ See Laing, *supra* note 9, at 212; see UMOZURIKE, *supra* note 9, at 76; see POMERANCE, *supra* note 12, at 9.

²¹ See Laing, *supra* note 9, at 212.

²² For the language of Articles 73 and 76 relating to self-determination see *supra* text accompanying notes 13 and 15.

²³ U.N. CHARTER art. 73(e).

U.N. participation in overseeing plebiscites.²⁴ These are procedural provisions, however, and do not impose additional substantive obligations on the administering country.

B. Further U.N. Action and the Emergence of the Principle of Self-Determination as a Customary International Law Norm

Despite its incorporation into the U.N. Charter, the principle had not yet become a rule of international law when the U.N. Charter entered into force in 1945.²⁵ The principle of self-determination became increasingly prominent, however, as the world experienced widespread decolonization in the four decades following World War II.²⁶ U.N. action taken subsequent to the adoption of the U.N. Charter reaffirmed this norm. U.N. Resolution 1514, entitled the Declaration on the Granting of Independence to Colonial Countries and Peoples,²⁷ is a landmark in the emergence of the customary norm of self-determination.²⁸ The right of self-determination is also included in the two International Covenants on human rights which were signed in 1966.²⁹ Finally, in 1970, members of the U.N. unanimously adopted General Assembly Resolution 2625 which states:

[B]y virtue of the principle of equal rights and self-determination of peoples enshrined in the Charter of the United Nations, all peoples have the right freely to determine, without external interference, their political status and to pursue their

²⁴ *Id.* art. 87. A plebiscite is a vote by which the people of a region express an opinion for or against a proposal.

²⁵ HANNUM, *supra* note 9, at 33.

²⁶ UMOZURIKE, *supra* note 9, at 138-76; GORONWY J. JONES, *THE UNITED NATIONS AND THE DOMESTIC JURISDICTION OF STATES* 95-97, 115 (1979).

²⁷ *Declaration on the Granting of Independence to Colonial Countries and Peoples*, G.A. Res. 1514, U.N. GAOR, 15th sess., Supp. No. 16, at 66, U.N. Doc. A/4684 (1960) [hereinafter Resolution 1514].

²⁸ POMERANCE, *supra* note 12, at 11. Adopted in December, 1960, Resolution 1514 is considered an authoritative interpretation of the U.N. Charter, *id.* at 10-11, and states that:

"2. All peoples have the right to self-determination; by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

"3. Inadequacy of political, economic, social or educational preparedness should never serve as a pretext for delaying independence

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

²⁹ International Covenant on Economic, Social, and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3; International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171. Article 1 of both covenants states that "[a]ll peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development."

economic, social and cultural development, and every State has the duty to respect this right in accordance with the provisions of the Charter.³⁰

Resolution 2625 stands out as unanimous U.N. approval of extending the right of self-determination beyond the regime of trust and non-self-governing territories to include all peoples. In addition to affirming the principle of self-determination through the Covenants and Resolutions 1514 and 2625, the international community implemented the principle in the form of widespread decolonization.³¹ By the early 1960s, the principle of self-determination existed as an international legal right.³²

C. *Shortcomings of the Historical Right of Self-Determination*

The right of self-determination lacks a clear definition in international law.³³ Even as the right to self-determination emerged as a customary norm, development of its content awaited further state practice.³⁴ Countries which govern groups of people who demand self-determination tend to view the right as a right to full independence, and, therefore, these countries resist such demands.³⁵ This view ignores the full range of means to achieving self-determination.³⁶ Even though Resolution 2625 set forth a flexible approach for implementing the right, such an approach has not been fully followed.³⁷

Notwithstanding the emergence of the right to self-determination as a customary norm and a substantial body of U.N. action reaffirming the right, the process of decolonization remains incomplete. In 1990, 14 members of the U.N. specifically recognized this shortcoming and affirmed the need for

³⁰ *Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations*, G.A. Res. 2625, U.N. GAOR, 25th sess., Supp. No. 28 at 121, U.N. Doc A/8028 (1970) [hereinafter Resolution 2625].

³¹ In the four decades following World War II, over 750 million people in over 100 territories achieved a status of self-determination. HANNIKAINEN, *supra* note 9, at 357. For an examination of the practice of decolonization by specific states, see OFUATEY-KODJOE, *supra* note 10, at 129-47.

³² ROSALYN HIGGINS, *THE DEVELOPMENT OF INTERNATIONAL LAW THROUGH THE POLITICAL ORGANS OF THE UNITED NATIONS* 103-04 (1963); JONES, *supra* note 26 at 95-96.

³³ HANNUM, *supra* note 9, at 27; JONES, *supra* note 26, at 69.

³⁴ Laing, *supra* note 9, at 219.

³⁵ HANNUM, *supra* note 9, at 39-40, 473.

³⁶ Allen E. Buchanan, *The Right to Self-Determination: Analytical and Moral Foundations*, 8 ARIZ. J. INT'L COMP. L. 41, 46-47 (1991).

³⁷ HANNUM, *supra* note 9, at 41. For the relevant text of Resolution 2625, see *infra* note 193. This topic is taken up again *infra* part VI.

further decolonization throughout the world, especially in the remaining 18 non-self-governing territories.³⁸ In 1988, and again in 1991, the U.N. General Assembly declared the 1990's as the "International Decade for the Eradication of Colonialism."³⁹ The relationship between the United States as an administering authority and the island of Guam as a non-self-governing territory provides an example of an unfulfilled obligation to promote self-determination.

III. THE CASE OF GUAM

A. *Background*

Guam has been a U.S. territory for ninety-five years, beginning in 1898 when the United States took control of the island from Spain.⁴⁰ For the first 52 years of U.S. control, the United States Department of the Navy governed Guam through a series of naval governors.⁴¹ In 1946, the U.N. placed Guam on the original list of non-self-governing territories.⁴² The United States became the official administering authority of Guam and assumed an obligation to promote Guamanian self-determination under Article 73 of the U.N. Charter.⁴³ In recent years, the U.N. reaffirmed the United States' obligation to promote self-determination for Guam through General Assembly resolutions.⁴⁴

In order to achieve self-determination for Guamanians, the United States and Guam are working to change Guam's political status. From 1990, until the end of 1992, the Guam Commission on Self-Determination (CSD) negotiated with a U.S. task force to attain greater political autonomy for

³⁸ *International Decade for the Eradication of Colonialism, Report of the Secretary-General*, U.N. GAOR, 45th Sess., Agenda item 18, U.N. Doc. A/45/624 (1990).

³⁹ G.A. Res. 43/47, U.N. GAOR, 43rd Sess., Supp. No. 49, at 48, U.N. Doc. A/43/49 (1989); G.A. Res. 46/181, U.N. GAOR, 46th Sess., Supp. No. 49, at 49, U.N. Doc. A/46/49 (1992).

⁴⁰ LEIBOWITZ, *supra* note 1, at 313, 316-18.

⁴¹ *Id.* at 313, 319; Lizabeth A. McKibben, *The Political Relationship Between the United States and Pacific Islands Entities: The Path to Self-Government in the Northern Mariana Islands, Palau, and Guam*, 31 HARV. INT'L L.J. 257, 287 (1990).

⁴² SUD, *supra* note 16, at 144, 191-93.

⁴³ For the relevant text of Article 73, see *supra* text accompanying note 13.

⁴⁴ *E.g.*, G.A. Res. 43/42, U.N. GAOR, 43rd Sess., Supp. No. 49, at 244-45, U.N. Doc. A/43/49(1989) [hereinafter G.A. Res. 43/42]; G.A. Res. 46/68, U.N. GAOR, 46th Sess., Supp. No. 49, at 231, U.N. Doc. A/46/49 (1992) [hereinafter G.A. Res. 46/68]. See *infra* text accompanying notes 77-79.

Guam through the newly proposed Guam Commonwealth Act (GCA).⁴⁵ Joseph Ada, Guam's governor, expressed Guam's general position in 1991:

We want to preserve our relationship with the United States within a new and constitutional framework. Under our proposal, Guam would have complete internal self-government, with the United States continuing its jurisdiction over appropriate defense and foreign affairs matters.⁴⁶

Guamanians support the GCA as a step toward achieving self-determination, which, up to this point, has been denied by the United States.⁴⁷

B. The United States has Failed to Effectuate Guam's Right to Self-Determination

Guamanians have achieved little in the way of self-government or self-determination. From 1950 to 1972, the United States Congress enacted the Organic Act legislation⁴⁸ which defined the political status of Guam. The Organic Act and its amendments designated Guam as an unincorporated territory, conferred U.S. citizenship upon the populace, provided for an elected governor, and provided for an elected legislature to enact laws of "local application."⁴⁹ The Organic Act failed to achieve self-determination for Guam because Guam's status as an unincorporated territory affords it no promise of attaining Statehood.⁵⁰ Rather, Guam is considered "appurtenant to the United States and belongs to the United States but is not a part of the United States."⁵¹ Guam remains in limbo, a possession of the United States

⁴⁵ Floyd Whaley, *Autonomy Bid By Pacific Island of Guam Gets Boost*, The Reuter Library Report, Jan. 6, 1993, available in LEXIS, Nexis Library, LBYRPT File; see *infra* note 66.

⁴⁶ Joseph F. Ada, *Guam Wants to Govern Itself*, S.F. CHRON., Dec. 7, 1991, at A18. It appears that Guam's recent frustration with the United States' intransigence may lead to more aggressive action, such as demands for independence. William Claiborne, *Guam Seeks Upgrade in Status, Residents Threaten Independence Action*, WASH. POST, Feb. 10, 1993, at A14.

⁴⁷ See *infra* text accompanying note 66.

⁴⁸ McKibben, *supra* note 41, at 288. For the current version of this legislation, see 48 U.S.C. §§ 1421-28 (1988).

⁴⁹ *Id.*

⁵⁰ By comparison, Hawaii was also a non-self-governing territory under the administration of the United States from 1945 until 1959 when it was admitted as a State. Yet for 60 years prior to its admission into the Union, Hawaii was an incorporated territory, and, as such, it was destined for Statehood. S. Rep. No. 80, 86th Cong., 1st Sess. 5 (1959), reprinted in 1959 U.S.C.C.A.N. 1346.

⁵¹ H.R. Rep. No. 1365, 81st Cong., 1st Sess. 8 (1949) quoted in LEIBOWITZ *supra* note 1, at 335.

without many important privileges of Statehood such as the right to full representation in Congress and the right to vote for the President.⁵²

The Organic Act itself is an expression of unfettered U.S. authority over Guam. Unlike a state constitution which derives its authority from the people governed, the Organic Act derives its power from the United States Congress.⁵³ While the Act grants plenary powers to the United States Congress, it denies Guam the power to act in the absence of a specific authorization from Congress.⁵⁴ Even as the U.S. Congress authorized a constitutional convention in Guam, it articulated Guam's lack of real self-government: "in the territories, Congress has the entire dominion and sovereignty, national and local, and has full legislative power over all subjects upon which a state legislature might act."⁵⁵

The grant of U.S. citizenship has been the most significant change in Guam's political status since U.S. governance began.⁵⁶ Citizenship, however, has had little effect on the powers or rights of Guamanians. Though Guamanians initially viewed citizenship as a means to empowerment, this change in status failed to bring meaningful political participation or control over local affairs.⁵⁷ The United States exercises its power over Guam without affording Guam a significant measure of self-government.

C. *Steps Toward Greater Self-Determination for Guam*

Guamanians have long recognized the need for greater political autonomy. A subcommittee to the Guam legislature noted in 1974 that

⁵² Guam's delegate to the United States Congress has recently been given greater voting power in the House of Representatives. Previously, delegates from Guam, American Samoa, Puerto Rico, and the Virgin Islands were allowed to vote only in House committees. A change in House Rule XII authorized these delegates to vote in the House's Committee of the Whole. Clifford Krauss, *House Delegates Get New Powers*, N.Y. TIMES, Dec. 10, 1992, at A22. This change, however, is symbolic only and does not afford Guam's delegate any real increase in democratic representation. *Michel v. Anderson*, 817 F. Supp. 126, 147-48 (D.D.C. 1993) (upholding the constitutionality of the rule change because of its lack of effect on the power of the delegates).

⁵³ LEIBOWITZ, *supra* note 1, at 363.

⁵⁴ See *Snow v. United States*, 85 U.S. (18 Wall.) 317, 320 (1873) (setting forth the traditional doctrine that decisions made by the territory government are subject to modification by the United States Congress). In *Sakamoto v. Duty Free Shoppers, Ltd.*, the court stated that "since Guam is an unincorporated Territory enjoying only such powers as may be delegated to it by the Congress, the government of Guam is in essence an instrumentality of the Federal Government." 764 F.2d 1285, 1286 (1985). See also Gary Lawson, *Territorial Governments and the Limits of Formalism*, 78 CAL. L. REV. 853, 864 (1990).

⁵⁵ S. Rep. 94-1034, 94th Cong., 2d Sess. 3 (1976).

⁵⁶ Robert F. Rogers, *Guam's Quest for Political Identity*, 12 PAC. STUD. 49, 49 (1988); LEIBOWITZ, *supra* note 1, at 329.

⁵⁷ LEIBOWITZ, *supra* note 1, at 335.

1. Guam has a viable culture which deserves preservation and protection . . . [and]
2. If political autonomy is not obtained by the people Guam, the death of Guam's culture is inevitable.⁵⁸

In 1979, the Guam electorate rejected a proposed constitution because it lacked a local expression of self-determination.⁵⁹ Moreover, it failed to resolve the political status question, which Guamanians felt was necessary to answer before they would ratify a constitution.⁶⁰

After the voters rejected the proposed constitution, self-determination became a critical issue in Guam's relationship with the United States.⁶¹ In 1980, the Guam legislature established the Guam Commission on Self-Determination (CSD).⁶² The CSD held a referendum in 1982 to determine what political status Guam should have, resulting in about three-fourths of the voters favoring commonwealth status, and the remaining quarter favoring Statehood.⁶³ By the end of 1984, the CSD had produced a working draft of the proposed terms of commonwealth status.⁶⁴ In response to concerns about self-determination and indigenous rights, the draft was revised in 1985.⁶⁵ Finally, in November 1987, Guam voters approved a comprehensive proposal to change Guam's political status.⁶⁶

Although the United States appears open to the general concept of commonwealth status for Guam,⁶⁷ negotiations between the CSD and the U.S. task force failed to resolve a number of specific issues concerning the future relationship between Guam and the United States. These issues in-

⁵⁸ Gayle, *An Analysis of Social, Cultural and Historical Factors Bearing on the Political Status of Guam*, Report submitted to the Political Status Commission of the 12th Guam Legislature (n.d.), at 76-77, quoted in LEIBOWITZ, *supra* note 1, at 328.

⁵⁹ Rogers, *supra* note 56, at 56.

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² LEIBOWITZ, *supra* note 1, at 338.

⁶³ *Id.*

⁶⁴ Rogers, *supra* note 56, at 57.

⁶⁵ *Id.* at 57-59.

⁶⁶ Telephone Interview with Leland Bettis, Executive Director of the Guam Commission on Self-Determination (Apr. 7, 1993) [hereinafter Interview with Leland Bettis]. The text of the final draft of the commonwealth proposal is now in the form of H.R. 98, 101st Cong., 1st Sess. (1989) [hereinafter Guam Commonwealth Act] and is commonly referred to as the Guam Commonwealth Act.

⁶⁷ Second Federal Inter-Agency Task Force Report on H.R. 98, the Guam Commonwealth Bill, (Jan. 1993) (on file with the *Pacific Rim Law & Policy Journal*).

clude: 1) Chamorro rights to self-determination;⁶⁸ 2) Guam's demand for mutual consent over the applicability of federal laws on the island; 3) Guam's demand for a 200-mile Exclusive Economic Zone around the island; 4) U.S. power of eminent domain on Guam; and 5) Guam's capacity to participate in regional and international organizations.⁶⁹ The United States has refused to concede any of these issues.⁷⁰ The first two of these issues constitute the core of the Guamanian right to self-determination⁷¹ and both are included in the GCA.⁷² These issues will eventually be addressed by the United States Congress when it considers the proposal in the form of the Guam Commonwealth Act.

D. The United States Remains Obligated to Promote Guamanian Self-Determination Under International Law

Because Guam remains a non-self-governing territory, international law obligates the United States, as Guam's administering authority, to expedite Guam's movement towards self-determination.⁷³ This obligation stems primarily from its trust responsibility under U.N. Article 73 and U.N. Resolution 1514.⁷⁴ Aside from submitting annual reports to the U.N.'s Decolonization Committee and to the U.N. General Assembly regarding

⁶⁸ Of Guam's 133,152 people, approximately 47 per cent are Chamorro. Guam: Working Paper Prepared by the Secretariat, U.N. GAOR Special Comm. on Decolonization, 47th Sess. at 3, U.N. Doc. A/AC.109/1111 (1992). Chamorros are the indigenous people of Guam, and their status is an integral aspect of self-determination for Guam. It is the Chamorro people who have led the quest for commonwealth status. McKibben, *supra* note 41, at 289. For a more pointed discussion of indigenous people's rights in Guam, see U.N. GAOR Special Comm. on Decolonization, 47th Sess., 1407 mtg. at 18-30, U.N. Doc. A/AC.109/PV.1407 (1992) (statement of Ronald F. Rivera, Organization of People for Indigenous Rights); *Guam Commonwealth: Hearing on H.R. 98 Before the Subcomm. on Insular and International Affairs of the House Comm. on Interior and Insular Affairs*, 101st Cong., 1st Sess., pt. 1, at 278 (1989) (statement of Attorney David Lujan, Public Member, Guam Commission on Self-Determination).

⁶⁹ Interview with Leland Bettis, *supra* note 66.

⁷⁰ *Id.*

⁷¹ Governor Joseph F. Ada, Opening Remarks at "A Time of Change" National Conference, The George Washington University, Washington, D.C. (Feb. 10, 1993) (transcript available at Office of Guam Commission on Self-Determination, Agana, Guam).

⁷² Guam Commonwealth Act, *supra* note 66, §§ 102, 103-202.

⁷³ G.A. Res. 46/68, *supra* note 44; *Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples*, U.N. GAOR Rep. of the 4th Comm., 47th Sess., at 24-25, 35-36, U.N. Doc. A/47/648 (1992); *Guam: Working Paper Prepared by the Secretariat*, U.N. GAOR Special Decolonization Comm., 47th Sess., at 3, U.N. Doc. A/AC.109/1111 (1992).

⁷⁴ G.A. Res. 46/68, *supra* note 44.

Guam's non-self-governing status,⁷⁵ the United States rarely acknowledges this international legal obligation.⁷⁶

In recent years, the U.N. has reaffirmed the United States' duty to assist in Guam's self-determination.⁷⁷ In 1988, for example, the U.N. General Assembly directed the United States to bring to fruition the "inalienable right of the people of Guam to self-determination and independence in conformity with [Resolution 1514]."⁷⁸ Moreover, the U.N. called upon the United States to "expedite the process of decolonization strictly in accordance with the expressed wishes of the people of [Guam]."⁷⁹

While Guam continues to struggle to achieve self-determination, its neighboring territory of Micronesia has achieved self-determination through a negotiated agreement with the United States. Indeed, leaders from Guam stood by as the United States implemented the Compact of Free Association in Micronesia.⁸⁰

IV. THE CASE OF MICRONESIA

U.S. action in Micronesia provides the starting point for showing that such action establishes a norm of international customary law. U.S. involvement in Micronesia began when the United States acquired control of Micronesia in 1945.⁸¹ Self-determination for Micronesia followed more slowly. Growing impatience in the international community, the adoption of U.N. instruments in support of self-determination, and the emergence of self-determination as an international legal right influenced the United States to reevaluate and alter its policy toward Micronesian self-determination. Shifting its policies in the early 1960's, the United States became committed to implementing Micronesian self-determination.⁸²

⁷⁵ See, e.g., *Guam: Working Paper Prepared by the Secretariat*, U.N. GAOR Special Decolonization Comm., 47th Sess. at 8, U.N. Doc. A/JAC.109/1111 (1992).

⁷⁶ *Guam Commonwealth: Hearing on H.R. 98 Before the Subcomm. on Insular and International Affairs of the House Comm. on Interior and Insular Affairs*, 101st Cong., 1st Sess., pt. 1, at 278 (1989) (statement of Attorney David Lujan, Public Member, Guam Commission on Self-Determination). In recent years, the U.S. Mission to the U.N. has attempted to downplay the United States' international legal obligation to decolonize Guam. The United States views its policy towards Guam as a domestic matter, rather than an international one. Interview with Leland Bettis, *supra* note 66. If such view prevails, the United States would be shielded from U.N. intrusions into the matter of Guamanian self-determination. U.N. CHARTER art. 2(7).

⁷⁷ E.g., G.A. Res. 46/68, *supra* note 44; G.A. Res. 43/42, *supra* note 44.

⁷⁸ G.A. Res. 43/42, *supra* note 44.

⁷⁹ *Id.*

⁸⁰ See *infra* text accompanying notes 167-69.

⁸¹ LEIBOWITZ, *supra* note 1, at 481.

⁸² See D. MCHENRY, *MICRONESIA: TRUST BETRAYED* 14 (1975).

Negotiations between the United States and Micronesia culminated in an agreement which conforms with international law⁸³ and embodies self-government and self-determination as defined by Micronesians.⁸⁴ The U.S. continues to be involved in Micronesia, however, as both the United States and the Freely Associated States (FAS) attempt to give effect to the expression of self-determination which is embodied in the Compact.

A. *The United States Takes on the Administration of Micronesia*

After Japan was defeated in World War II, it was deprived of control over its colonies.⁸⁵ The United States assumed administration of Micronesia under authority granted by the U.N. Charter and the International Trusteeship System.⁸⁶ U.S. policy-makers had two competing interests as they debated the nature and extent of their administration of the islands.⁸⁷ Those who were primarily concerned with U.S. security in the Pacific wanted to annex Micronesia outright.⁸⁸ Those who favored self-government and self-determination, and supported the international non-annexation movement, opposed U.S. annexation of the Island.⁸⁹

The competing interests of military security and respect for self-determination initially led to a compromise when Micronesia became a "strategic trust" in accordance with an agreement between the U.N. Security Council and the United States.⁹⁰ The strategic trust relationship was unique to the Trusteeship System,⁹¹ and gave the United States almost complete control over the islands, especially for defense purposes.⁹² At the same time, the

⁸³ See *supra* note 3.

⁸⁴ LEIBOWITZ, *supra* note 1, at 657-59; John R. Haglelgam, *Problems of National Unity and Economic Development in the Federated States of Micronesia*, 1 J. MICRONESIAN STUD. 5, 7 (1992).

⁸⁵ UMOZURIKE, *supra* note 9, at 60. See also H.R. REP. No. 889, 80th Cong., 1st Sess. (1947), reprinted in 1947 U.S.C.C.A.N. 1317, 1318.

⁸⁶ The International Trusteeship System placed trustee states in a guardian relationship with territories detached from countries after World War II. The overall purpose of the system was to foster the well-being and development of the territories into self-governing states in accordance with U.N. Charter objectives. Prince, *supra* note 14, at 20; *Special Issue on Non-Self-Governing Territories*, 19 OBJECTIVE: JUSTICE 1, 1 (1987).

⁸⁷ MCHENRY, *supra* note 82, at 2. See generally *Trusteeship Agreement for the Territory of the Pacific Islands: Hearing on S.J. Res. 143 before the Senate Comm. on Foreign Relations*, 80th Cong., 1st Sess. (1947) [hereinafter 1947 Hearing].

⁸⁸ E.g., 93 CONG. REC. 8733 (1947). See also, Prince, *supra* note 14, at 22.

⁸⁹ Prince, *supra* note 14, at 22.

⁹⁰ *Trusteeship Agreement for the Former Japanese Mandated Islands*, Apr. 2-July 18, 1947, 61 Stat. 3301, T.I.A.S. No. 1665, 8 U.N.T.S. 189 [hereinafter Trusteeship Agreement]. See also MCHENRY, *supra* note 82, at 2; Prince, *supra* note 14, at 22.

⁹¹ LEIBOWITZ, *supra* note 1, at 487-88.

⁹² Trusteeship Agreement, *supra* note 90, arts. 5, 13. See also McHenry, *supra* note 82, at 2, 9.

United States assumed responsibilities under the U.N. Charter, the Trusteeship System, and the Trusteeship Agreement to promote self-government and self-determination.⁹³ The provisions of the U.N. Charter which guided the United States in its administration of the TTPI include Chapters XI, XII, and XIII.⁹⁴ These provisions were supplemented by the agreement between the United States and the U.N. Security Council.⁹⁵ Article 73 of Chapter XI and Article 76 of Chapter XII both directed the United States, as the administering authority, to develop self-government and to promote self-determination in Micronesia.⁹⁶ Article 6 of the Trusteeship Agreement for the TTPI provides that the United States will

foster the development of such political institutions as are suited to the trust territory and shall promote the development of the inhabitants of the trust territory toward 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 . . .⁹⁷

Despite the apparent compromises of the Trusteeship Agreement, the interest in military security dominated early U.S. policy in Micronesia.⁹⁸ Congressman Mike Mansfield expressed the overriding purpose of the United States in 1947: "We need these islands for our future defense We have no concealed motives because we want these islands for one purpose only and that is national security."⁹⁹ Commentators characterize the degree of control which the United States has actually exercised over the islands as *de facto* annexation.¹⁰⁰

B. *The U.S. Policy Shift During the 1960s*

Initially, both the United States and the U.N. failed to focus their attention on Micronesia's political, economic, or social development.¹⁰¹ U.S. attempts at developing Micronesia's internal political system were directed

⁹³ See *supra* notes 13 and 15 and accompanying text. See *infra* text accompanying note 97.

⁹⁴ For the relevant text of these chapters, see *supra* text accompanying notes 13 and 15.

⁹⁵ Trusteeship Agreement, *supra* note 90. See also U.N. CHARTER art. 83.

⁹⁶ See *supra* notes 13 and 15 and accompanying text.

⁹⁷ Trusteeship Agreement, *supra* note 90, art. 6.

⁹⁸ See 1947 Hearing, *supra* note 87, at 5-8.

⁹⁹ 93 CONG. REC. 8733 (1947).

¹⁰⁰ S. DESMITH, MICRONESIA AND MICROSTATES 128 (1970); Prince, *supra* note 14, at 22.

¹⁰¹ MCHENRY, *supra* note 82, at 12-13; Prince, *supra* note 14, at 77.

only at the municipal level.¹⁰² Because of its failure to promote economic development, education, health care, and transportation, the U.S. administration of Micronesia came under increasing criticism from the world community.¹⁰³ Micronesia's lack of self-government became an anomaly as decades of decolonization followed World War II.¹⁰⁴ Resolution 1514, for example, had a substantial impact on colonialism throughout the world.¹⁰⁵ In the Pacific areas south of Micronesia, numerous nations became independent following the adoption of Resolution 1514, including Western Samoa, Fiji, Papua New Guinea, the Solomon Islands, Tonga, and Tuvalu.¹⁰⁶

Partly in response to growing obligations under international law and partly due to criticism by the U.N. Trusteeship Council, the United States reoriented its position with respect to Micronesia in the mid-1960's.¹⁰⁷ The United States began to implement programs in Micronesia addressing the problems in education, health care, and transportation. It also renewed its commitment to decolonization and the development of political institutions in Micronesia.¹⁰⁸ Financial assistance for the islands was substantially increased.

As early as 1964, a U.N. visiting mission noted substantial improvements in Micronesia's education, health care, transportation, and political development.¹⁰⁹ In that same year, the U.S. Secretary of the Interior established the Congress of Micronesia, the first territory-wide legislature in the islands.¹¹⁰ This constituted the first major advancement toward self-government in Micronesia.¹¹¹ By institutionalizing territory-wide self-government and encouraging political participation throughout the islands, the establishment of the Congress of Micronesia set the stage for

¹⁰² LEIBOWITZ, *supra* note 1, at 495; Note, *A Macrostudy of Micronesia: The Ending of a Trusteeship*, 18 N.Y.L.F. 139, 165 (1972).

¹⁰³ LEIBOWITZ, *supra* note 1, at 496; MCHENRY, *supra* note 82, at 13.

¹⁰⁴ By 1969, the TTPI was the last territory under the International Trusteeship System. LEIBOWITZ, *supra* note 1, at 641.

¹⁰⁵ JONES, *supra* note 26, at 115; Laing, *supra* note 9, at 215.

¹⁰⁶ Neal S. Solomon, *The Guam Constitutional Convention of 1977*, 19 VA. J. INT'L L. 725, 742 (1979).

¹⁰⁷ MCHENRY, *supra* note 82, at 14; LEIBOWITZ, *supra* note 1, at 496, 501; see N. MELLER, *THE CONGRESS OF MICRONESIA* 195 (1969).

¹⁰⁸ MELLER, *supra* note 107, at 195; MCHENRY, *supra* note 82, at 14. A combination of U.N. pressure and Micronesian initiative caused President Johnson to attempt to establish a Presidential Commission to address the political status of the Trust Territory. This attempt stalled, however, and was quickly superseded by Micronesia's own political status commission. LEIBOWITZ, *supra* note 1, at 501.

¹⁰⁹ MCHENRY, *supra* note 82, at 15.

¹¹⁰ Dept. of the Interior Order 2882, 29 F.R. 13613 (Sept. 28, 1964).

¹¹¹ Prince, *supra* note 14, at 81.

Micronesia's movement towards greater autonomy and self-determination.¹¹²

C. *Negotiations Toward the Compact*

Formal negotiations between the United States and Micronesia on the future political status of Micronesia began in 1969.¹¹³ Initial negotiations focused on several issues, including control over Micronesian land, control over laws, and control over any further change in political status.¹¹⁴ During the Third Round of negotiations in 1971 it became clear that the negotiations were leading toward free association for Micronesia.¹¹⁵

Throughout the negotiations, Micronesia asserted the right to adopt its own constitution.¹¹⁶ By 1975, a constitution became an immediate necessity to formally establish Micronesian sovereignty and to ensure that a national government would be established on the basis of Micronesian decisions.¹¹⁷ As the various districts within Micronesia showed signs of dividing from the whole, the Constitution also became necessary to curb the tendency toward fragmentation.¹¹⁸ In this respect, the constitutional convention was only partly successful.¹¹⁹ The Micronesian Constitution was written to promote the principles that Micronesians considered essential

¹¹² MELLER, *supra* note 107, at 372-77. See also Patsy T. Mink, *Micronesia: Our Bungled Trust*, 6 TEX. INT'L L. J. 181, 198 (1970) (stressing the importance of the Congress of Micronesia in the islands' overall political development).

¹¹³ LEIBOWITZ, *supra* note 1, at 501.

¹¹⁴ *Id.* at 642-46.

¹¹⁵ *Id.* at 644-45. While most of the districts of the TTPI sought greater autonomy through free association with the United States, a number of issues were beginning to divide the Northern Mariana District from the rest of Micronesia. *Id.* at 528-29. The Northern Mariana Islands wanted a closer relationship with the United States and did not espouse independence or free association. MCHENRY, *supra* note 82, at 141. The Mariana Islands and the United States began separate negotiations in December of 1972. *Id.* These negotiations were completed in 1975 when they agreed that the Northern Mariana Islands would have commonwealth status. Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States of America, Pub. L. No. 94-241, 90 Stat. 263 (1976). For an analysis of the separate path taken by the Mariana Islands, see LEIBOWITZ, *supra* note 1, at 519-93; MCHENRY, *supra* note 82, at 130-69; Hirayasu, *supra* note 19, at 522-36. The status of the Northern Mariana Islands is more akin to integration than free association. *Id.* at 526: Section 101 of the Covenant, for example, provides that the Northern Mariana Islands will be under the sovereignty of the United States.

¹¹⁶ See MCHENRY *supra* note 82, at 99-100.

¹¹⁷ Alan B. Burdick, *The Constitution of the Federated States of Micronesia*, 8 U. HAW. L. REV. 419, 425 (1986).

¹¹⁸ *Id.* at 424-25.

¹¹⁹ In addition to the Mariana Islands break away, both the Marshall Islands and Palau signed compacts which are separate though equivalent to the one between the FSM and the United States. Prince, *supra* note 14, at 53.

to their future status.¹²⁰ Most significantly, the Constitution asserted full Micronesian sovereignty and the supremacy of their own constitutional government.¹²¹

In 1978, the Constitution was ratified by plebiscite in the island groups of Yap, Pohnpei, Truk, and Kosrae.¹²² The Constitution was defeated in Palau and the Marshall Islands.¹²³ The four island groups that ratified the Constitution joined together to become the Federated States of Micronesia (FSM), while Palau and the Marshall Islands adopted their own constitutions and continued to negotiate separately with the United States.¹²⁴ The United States recognized the three new constitutional governments in 1979 through a U.S. Department of Interior Secretarial Order.¹²⁵ For all three governments, the Constitutions, their ratification by Micronesians, and their recognition by the United States represented a profound step toward self-determination: for the first time since they became a colonized people, Micronesians asserted their sovereignty.¹²⁶

Despite an occasional impasse, negotiations between the United States and the three states seeking free association continued during the 1970's.¹²⁷ In April 1978, in Hilo, Hawaii, representatives of the United States, Palau, the FSM, and the Marshall Islands signed a statement of agreed upon principles which furnished the foundation for the future relationships between the United States and these islands.¹²⁸

In 1982, negotiators from the FSM and Palau, and in 1983 negotiators from the Marshall Islands, signed the final version of the Compact.¹²⁹ This was followed by U.N.-observed plebiscites in each of the three states. The Compact of Free Association was approved by popular vote in the FSM and

120 Burdick, *supra* note 117, at 432-33. In 1969, the Congress of Micronesia endorsed the status of free association, including four basic principles: 1) the sovereignty of the Micronesian people, 2) the right to self-determination and self-government, 3) the right to adopt a constitution, and 4) the right to unilaterally terminate or alter their future relationship with the United States. LEIBOWITZ, *supra* note 1, at 641-42.

121 Burdick, *supra* note 117, at 435.

122 *Id.* at 429.

123 *Id.*

124 Hirayasu, *supra* note 19, at 507.

125 Dept. of the Interior Order 3039, 44 Fed. Reg. 28, 116 (1979). See also Burdick, *supra* note 117, at 430.

126 Burdick, *supra* note 117, at 433.

127 See LEIBOWITZ, *supra* note 1, at 642-50.

128 LEIBOWITZ, *supra* note 1, at 648; For the text of the Hilo Principles, see LEIBOWITZ, *supra* note 1, at 648 n.48.

129 Prince, *supra* note 14, at 40 n.145.

the Marshall Islands, but failed in Palau.¹³⁰ After U.S. Congressional approval, President Reagan signed the Compact in 1986.¹³¹

D. The Compact of Free Association

The Compact of Free Association which governs current U.S.-FAS relations is divided into a preamble and four titles: Governmental Relations, Economic Relations, Security and Defense Relations, and General Provisions.¹³² The preamble embodies many of the principles that Micronesians considered fundamental to their self-determination.¹³³ The preamble provides that the agreement is concluded on a government-to-government basis.¹³⁴ Moreover, it states that the peoples of Micronesia have and retain their sovereignty and their sovereign right to self-determination.¹³⁵ It also states that the FAS are self-governing under their own constitutions.¹³⁶

Title One of the Compact, dealing with Governmental Relations, formally establishes self-government in the FAS.¹³⁷ The Compact also recognizes that the FAS can conduct foreign affairs and make treaties "in their own name and right."¹³⁸ These foreign affairs powers also include the right to join regional and international organizations.¹³⁹ In addition, the United States agrees to support FAS applications for such memberships.¹⁴⁰ The areas of security and defense are excluded from the FAS's foreign affairs powers and retained by the United States.¹⁴¹ U.S. law no longer

¹³⁰ Hirayasu, *supra* note 19, at 508. Palau remains a trust territory because the United States and Palau have failed to reach a complete agreement on their future relationship. Until only recently, Palau's Constitution required 75% approval by popular vote in order to grant the United States the right to transport nuclear vessels through the country. This right is currently afforded to the United States under the Compact, which is not yet effective. The United States refuses to cede any ground on this issue. After seven plebiscites, the Palauan people still have not approved the Compact by the necessary margin. Jon Hinck, *The Republic of Palau and the United States: Self-Determination Becomes the Price of Free Association*, 78 CAL. L. REV. 915, 915-17 (1990). Palau, however, has recently amended its constitution to allow the Compact to be approved by a simple majority vote. It is likely that this will expedite the termination of the Trusteeship for Palau and bring Palau into the status of free association. *Palau's [sic] Vote to Ease Repeal of Anti-nuclear Provisions*, The British Broadcasting Corporation; Summary of World Broadcasts, Nov. 19, 1992, available in LEXIS, Nexis Library, BBCSWB File.

¹³¹ Hirayasu, *supra* note 19, at 511.

¹³² Compact, *supra* note 2.

¹³³ *Id.*, pmb1. See *supra* note 111.

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ *Id.* tit. I, art. I, § 111.

¹³⁸ *Id.* tit. I, art. II, § 121.

¹³⁹ *Id.*

¹⁴⁰ *Id.* tit. I, art. II, § 122.

¹⁴¹ *Id.* tit. III, art. I, §§ 311-16.

applies to the FAS except where specifically provided.¹⁴² The sovereignty of the FAS, therefore, is limited only by the security and defense authority allocated to the United States by the Compact.¹⁴³

Title Two of the Compact governs economic relations.¹⁴⁴ Article I, entitled "Grant Assistance," delineates the assistance the United States must allocate to the FAS for developing economic self-sufficiency in the islands.¹⁴⁵ For the first year following the Compact, the Marshall Islands and the FSM received \$97.6 million in grant assistance.¹⁴⁶ The amount of financial assistance is scheduled to gradually decrease through the life of the Compact.¹⁴⁷ Additionally, specific federal programs such as aid in building infrastructure projects, and money for communications, health care, and scholarships are included under Article II, "Program Assistance."¹⁴⁸

The economic value of these specific federal programs is relatively small in comparison to the grant assistance.¹⁴⁹ Most of the special programs were phased out over a period of three years.¹⁵⁰ The front-end loading of the grant assistance, the three year phase out of the program assistance, and the relatively small number of specific federal programs were intended to diminish the FAS' dependency and allow them to fashion their plans for development according to their own priorities.¹⁵¹

Title Three covers security and defense relations between the United States and the FAS.¹⁵² The United States retains full authority and responsibility for security and defense matters in the islands.¹⁵³ This authority includes: 1) the obligation to defend the islands from attack; 2) the option to foreclose access to the islands for the military purposes of any third country; and 3) the option to establish and use military areas in the islands.¹⁵⁴ These

¹⁴² *Id.* tit. I, art. VII, § 171.

¹⁴³ LEIBOWITZ, *supra* note 1, at 657-59.

¹⁴⁴ Compact, *supra* note 2, tit. II.

¹⁴⁵ *Id.* tit. II, art. I, §§ 211-19.

¹⁴⁶ Arthur John Armstrong, *Strategic Underpinnings of the Legal Regime of Free Association: The Negotiations for the Future Political Status of Micronesia*, 7 BROOK. J. INT'L L. 179, 215 (1982).

¹⁴⁷ Compact, *supra* note 2, tit. II, art. I, § 211. This arrangement is referred to as front-end loading.

¹⁴⁸ *Id.* tit. II, art. II, §§ 221-27.

¹⁴⁹ Armstrong, *supra* note 146, at 215.

¹⁵⁰ *Implementation of the Compact of 1985: Oversight Hearing Before the Subcomm. on Insular and International Affairs of the House Comm. on Interior and Insular Affairs*, 101st Cong., 1st Sess. 13 (1989) (statement of Larry L. Morgan, Director of Legislative and Public Affairs, Office of Territorial and International Affairs) [hereinafter *1989 Oversight Hearing*].

¹⁵¹ *1989 Oversight Hearing*, *supra* note 150; Armstrong, *supra* note 146, at 215.

¹⁵² Compact, *supra* note 2, tit. III.

¹⁵³ *Id.* tit. III, art. I, § 311.

¹⁵⁴ *Id.*

military privileges are subject to principles of international law and the Charter of the U.N.¹⁵⁵

Title Four contains a provision which allows the FAS to unilaterally terminate the relationship with the United States subject to notice requirements.¹⁵⁶ This ensures that the relationship will remain consistent with the freely expressed will of the citizens of the FAS as expressed by plebiscite.¹⁵⁷ This last provision, though controversial from the U.S. perspective, was necessary in order to meet the U.N. definition of "self-governing."¹⁵⁸ It was also a key element in attaining self-determination for the Micronesians.¹⁵⁹

E. *Post Compact Developments*

November 3, 1986, marked the effective date of the implementation of the Compact and termination of the Trusteeship with respect to the FSM and the Marshall Islands.¹⁶⁰ Since then, both the United States and the FAS have sought to effectuate the rights of self-determination and self-government embodied in the Compact.¹⁶¹ For example, the United States Department of the Interior transferred access to federal programs from the Trust Territory government directly to the FAS, rather than using the remaining Trust Territory government as a conduit.¹⁶² The U.S. also upgraded diplomatic relations with the FAS to the ambassadorial level,

¹⁵⁵ *Id.*

¹⁵⁶ *Id.* tit. IV, art. IV, § 443.

¹⁵⁷ Armstrong, *supra* note 146, at 229, 232.

¹⁵⁸ *Cf.*, Manuel Rodríguez-Orellana, *In Contemplation of Micronesia: The Prospects for the Decolonization of Puerto Rico Under International Law*, 18 U. MIAMI INTER-AM. L. R. 457, 462 (1987). See *infra* note 187.

¹⁵⁹ LEIBOWITZ, *supra* note 1, at 669.

¹⁶⁰ The Trusteeship Agreement itself did not set forth the terms of termination. Following the implementation of the Compact, the United States claimed that the Trusteeship Council Resolution, along with Presidential Proclamation 5546 (Nov. 3, 1986), constituted the necessary procedure to put the Compact into effect and terminate the Trusteeship. LEIBOWITZ, *supra* note 1, at 598. However, a number of commentators argued that termination of the Trusteeship required approval by the U.N. Security Council. Prince, *supra* note 14, at 13; LEIBOWITZ, *supra* note 1, at 598-99. This debate was silenced on December 22, 1990, when the U.N. Security Council voted to approve termination of the Trusteeship with respect to the Federated States of Micronesia, the Marshall Islands, and the Northern Mariana Islands. U.N. SCOR, 45th Sess. 2972nd mtg. at 29, U.N. Doc. S/INF/46 (1990).

¹⁶¹ See generally 1989 Oversight Hearing, *supra* note 150. See also *Implementation of the Compact of Free Association Act in the Marshall Islands and the Federated States of Micronesia: Oversight Hearing Before the Subcomm. on Insular and International Affairs of the House Comm. on Interior and Insular Affairs*, 100th Cong., 1st Sess. (1987) [hereinafter 1987 Oversight Hearing].

¹⁶² *Id.* at 9-12 (statement of Kittie Baier, Principal Deputy Assistant Secretary of the Interior for Territorial and International Affairs).

ensuring recognition by the international community for the FAS.¹⁶³ These policies demonstrate the U.S. commitment to continue promoting self-government by preventing U.S. interference.

The FAS have been successful in acquiring international recognition. For example, in September of 1991, the U.N. General Assembly accepted the FAS as full members of the General Assembly.¹⁶⁴ Greater independence has also enabled the FAS to participate as members in a number of regional organizations such as the Asian Development Bank and the South Pacific Forum.¹⁶⁵ Currently, 28 countries recognize the FSM as a nation state.¹⁶⁶

V. U.S.-MICRONESIAN RELATIONS AS AN ESTABLISHED NORM OF INTERNATIONAL CUSTOMARY LAW

As negotiations between the United States and Micronesians neared fruition, leaders of other U.S.-Pacific areas queried what the implications of the compact would be for their own people.¹⁶⁷ Leaders from Guam, American Samoa, and the State of Hawaii sought to render the Compact a precedent for establishing an improved political status for their people.¹⁶⁸ U.S. policy-makers denied the Compact's value as a precedent for granting the right of self-determination to other U.S. controlled areas, however.¹⁶⁹ Moreover, these U.S. controlled territories are not alone because, as noted above, numerous territories around the world remain non-self-governing.

This section shows how a norm emerges from U.S. action in Micronesia according to the principles of customary international law. Before the case of Micronesia can rise to the level of an international norm

¹⁶³ Marian Nash Leich, *Contemporary Practice of the United States Relating to International Law*, 84 AM. J. INT'L L. 237, 237-39 (1990).

¹⁶⁴ *Admission of the Federated States of Micronesia to Membership in the United Nations*, G.A. Res. 46/2, U.N. GAOR, 46th Sess., Supp. No. 49, at 12, U.N. Doc. A/46/49 (1992); *Admission of the Republic of the Marshall Islands to Membership in the United Nations*, G.A. Res. 46/3, U.N. GAOR, 46th Sess., Supp. No. 49, at 12, U.N. Doc. A/46/49 (1992); Robert C. Toth, *Divided Korea, Baltics, 2 Island States Join U.N.*, L.A. TIMES, Sept. 18, 1991, at A4.

¹⁶⁵ *State of the Nation Message*, NAT'L UNION, SUPP., June-July, 1992, at 1 (The NATIONAL UNION is the official newspaper of the FSM).

¹⁶⁶ *Id.* at 1. The ability to participate in the world community as a nation is expected to afford the FAS a greater opportunity to pursue balanced economic development. Haglegam, *supra* note 84, at 11-12.

¹⁶⁷ See generally *Implications of the Compact of Free Association on the United States Pacific Islands: Oversight Hearing Before the House Comm. on Interior and Insular Affairs*, 99th Cong., 1st Sess. (1985) (hereinafter *1985 Oversight Hearing*).

¹⁶⁸ *Id.* at 8-9 (statement by Ben Blaz, Congressional Delegate from Guam); *id.* at 101 (position paper on Compact by F. R. Santos, representative to the Guam Legislature); *id.* at 53 (statement by Peter T. Coleman, former Governor of American Samoa); *id.* at 66 (Testimony by Daniel K. Akaka, Senator from Hawaii).

¹⁶⁹ *Id.* at 3-4.

it must be shown that it satisfies the two elements necessary for establishing customary law. These elements are that, first, U.S. actions in Micronesia must constitute repeated state practice and, second, there must have been an articulated rule of law attached to such state practice.¹⁷⁰

A. *The State Practice Element*

Although security interests dominated the first 17 years of U.S. administration, the establishment of the Congress of Micronesia marked the beginning of policies that promoted Micronesian political development.¹⁷¹ This was followed by U.S. recognition of Micronesian sovereignty and right to self-determination in the Micronesian Constitution.¹⁷² U.S.-Micronesian negotiations eventually led to the Compact of Free Association which upheld principles of self-determination, self-government, and sovereignty.

Approval of U.S. action in the FAS by four members of the U.N. Trusteeship Council and 14 members of the U.N. Security Council also constitutes state action which in turn reinforces the strength of the norm.¹⁷³ By endorsing the Compact, members of the U.N. participated in the practice of effectuating Micronesian self-determination. The approval by the United Kingdom and France is especially significant, because, together with the United States, these countries administer 15 of the remaining 18 trust and non-self-governing territories.¹⁷⁴ Because these countries are more involved in the administration of trust and non-self-governing territories, their partici-

¹⁷⁰ The first element is quantitative, focusing on the action of a state or states. The second is qualitative, focusing on whether the state action was preceded or contemporaneous with the articulation of international legal obligation. Thus, the emergence or existence of a customary rule or norm is demonstrated by a showing that an articulation of a rule of law, an *opinio juris*, has been taken up as the basis for repeated state practice. ANTHONY A. D'AMATO, *THE CONCEPT OF CUSTOM IN INTERNATIONAL LAW* 73-88 (1971). See also D.W. GRIEG, *INTERNATIONAL LAW* 17-30 (2d ed. 1976).

¹⁷¹ See *supra* part IV.A-B.

¹⁷² See *supra* part IV.C-D.

¹⁷³ GRIEG, *supra* note 170, at 23 (noting that the voting behavior by members of international organizations constitutes state action). In 1986, three out of five members of the Trusteeship Council (France, the United Kingdom, and the United States) endorsed the Compact and voted for termination of the Trusteeship while one voted against (the Soviet Union). China did not take part in the 1986 proceedings, but in 1989, joined the majority in voting for termination of the Trusteeship. Prince, *supra* note 14, at 12 n. 4.

Approval from the U.N. Security Council came in 1990 when 14 countries endorsed the Compact. These countries included: Canada, China, Colombia, Cote d'Ivoire, Ethiopia, Finland, France, Malaysia, Romania, Soviet Union, United Kingdom, United States of America, Yemen, and Zaire. *ANNUAL REVIEW OF UNITED NATIONS AFFAIRS* 53 (Kumiko Matsuura et al. eds., 1990). Cuba was the lone dissenter in the Security Council vote. U.N. SCOR, 45th Sess., 2972d mtg. at 29, U.N. Doc. S/INF/46 (1990).

¹⁷⁴ See *supra* note 4.

pation carries greater weight in establishing the norms regarding such administration.¹⁷⁵

In addition to satisfying its obligations under the U.N., the United States continues to promote self-determination for the FAS by facilitating the entry of the FAS into the international legal community. This may be seen in the amendment to the Compact that provides for an upgraded process of foreign relations between the United States and the FAS.¹⁷⁶ Thus, U.S. practice in conjunction with U.N. practice fulfills the quantitative element of international customary law, i.e. repeated state action effectuating the right of self-determination in Micronesia.¹⁷⁷

B. *The Opinio Juris Element*

Two aspects of U.S.-Micronesian relations point to an *opinio juris*, the second element of customary international law. First, the U.S. practice of effectuating Micronesian self-determination conformed to and specifically responded to international legal obligations imposed by various sources.¹⁷⁸ Obligations imposed by the U.N. Charter, U.N. instruments such as Resolution 1514, and the emergence of the general right to self-determination as a norm of customary law all reflect *opinio juris*. The U.N. Charter was in place as the United States assumed its trust responsibility in Micronesia. U.N. instruments subsequent to the Charter reaffirmed the right of self-determination while the United States carried out its policy in Micronesia. Thus, the underlying legal obligation to promote the right of self-determination had been articulated before the United States developed its policy and continued to be articulated through international legal instruments and state practice world-wide while the United States effectuated self-determination for Micronesia.

Second, the United States, on at least two occasions, explicitly stated that it had a duty to promote self-determination in Micronesia under international law. In September, 1970, Richard Gimer, a U.S. Representative to the U.N. General Assembly made a statement in support of U.N. Resolution 2625:

¹⁷⁵ See GRIEG, *supra* note 170, at 20.

¹⁷⁶ See *supra* note 163 and accompanying text.

¹⁷⁷ Cf. Hirayasu, *supra* note 19, at 500 (noting that the United States did all that it could to further the political advancement of the Micronesian people).

¹⁷⁸ See *supra* notes 103-12 and accompanying text.

[T]he United States is glad that the declaration recognizes the right of self-determination as belonging to 'all peoples.' Important as the right is to the peoples of dependent territories, the principle of self-determination is universal in scope [T]he United States [also] supports the statement of obligation 'to bring a speedy end to colonialism, having due regard to the freely expressed will of the peoples concerned' because of the importance we attach to the wishes of dependent peoples themselves. *In the context of dependent territories, United States administration of the Trust Territory of the Pacific Islands and the other non-self-governing territories for which the United States has been responsible has been based on the view that the future of these territories is not something that can be determined in New York nor in Washington alone.*¹⁷⁹

In a House and Senate joint resolution approving the Compact, the United States again evinced its sense of international legal obligation:

Whereas the United States, in accordance with the Trusteeship Agreement, the Charter of the United Nations and the objectives of the [I]nternational [T]rusteeship [S]ystem, has promoted the development of the peoples of the Trust Territory toward self-government or independence . . . and in consideration of its own obligations under the Trusteeship Agreement to promote self-determination, entered into political status negotiations with representatives of the peoples of the Federated States of Micronesia, and the Marshall Islands . . .

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It is clear, therefore, that in implementing the right of self-determination in Micronesia, the United States and the rest of the international community were aware that such action was required under international law as embodied in numerous sources.¹⁸¹

¹⁷⁹ *Declaration on Principles of Friendly Relations*, 63 DEPT ST. BULL. 623, 625-26 (1970) (statement by Richard H. Gimer, U.S. Alternative Representative to the U.N. General Assembly) (emphasis added) [hereinafter Statement by Richard Gimer].

¹⁸⁰ Joint Resolution to Approve the Compact of Free Association, Pub. L. No. 99-239, 99 Stat. 1770 (1986).

¹⁸¹ At the minimum, the *opinio juris* element requires that the acting state be put on notice of the articulation of the legal obligation. Anthony D'Amato, *What "Counts" as Law, in LAW-MAKING IN THE GLOBAL COMMUNITY* 83, 101 (Nicholas Greenwood Onuf ed., 1982).

The combination of the repeated state practice in implementing Micronesian self-determination and *opinio juris* crystallize to form a new norm of international customary law.¹⁸² At the minimum, this norm requires those countries that administer trust and non-self-governing territories to effectuate the right to self-determination as set forth in U.N. instruments.¹⁸³ It also prohibits administering authorities from taking positions which impede attempts by trust and non-self-governing territories to achieve self-determination.

VI. UNDERSTANDING THE CONTENT AND IMPLEMENTATION OF THE NORM ESTABLISHED THROUGH THE CASE OF MICRONESIA

As shown above, U.S.-Micronesian relations establish a norm for effectuating the right to self-determination. Even so, questions remain as to the content and implementation of this right. Four aspects of the U.S.-Micronesian relationship aid in understanding the definition and implementation of the right of self-determination. The first defines self-determination, the next two focus on the procedure involved in the right to self-determination, and the final aspect deals with the substance of the right to self-determination.

As demonstrated in the case of Micronesia, the definition of self-determination emphasizes free political processes rather than a specific governmental status. The United States acknowledged that self-determination is expressed through "the process by which a people determine their own sovereign status."¹⁸⁴ In accordance with this definition, the FAS conducted their plebiscites with no interference by the United States,¹⁸⁵ and retain the authority to modify their status.¹⁸⁶ Thus, the specific substantive agreement between the two political entities is not as important as is the process used in

¹⁸² Professor D'Amato describes the emergence of a norm as follows: "Once the act takes place, the previously articulated rule that is consistent with the act takes on life as a rule of customary law, while the previously articulated rules contrary to it remain in the realm of speculation. The state's act is visible, real, and significant; it crystallizes policy and demonstrates which of the many possible rules of law the acting state has decided to manifest. This conjunction of rule and action becomes a powerful precedent for future similar situations" ANTHONY A. D'AMATO, *THE CONCEPT OF CUSTOM IN INTERNATIONAL LAW* 88 (1971).

¹⁸³ The content of the norm is inferred from the conduct which constitutes the state practice. G.J.H. VAN HOOF, *RETHINKING THE SOURCES OF INTERNATIONAL LAW* 92 (1983); S. James Anaya, *Indigenous Rights Norms In Contemporary International Law*, 8 ARIZ. J. INT'L COMP. L. 1, 8-9 (1991).

¹⁸⁴ MCHENRY, *supra* note 82, at 41.

¹⁸⁵ Hirayasu, *supra* note 19, at 508. For a more detailed discussion of the use of plebiscites in the process of self-determination, see *id.* at 501-11.

¹⁸⁶ See *supra* text accompanying notes 156 and 157.

arriving at the agreement. Self-determination requires free choice by the electorate in a democratic election. Further, the election must be free of outside interference. Finally, the territory or people must retain the authority to subsequently select an alternate status. This approach to self-determination, pursued through free processes, is also in accordance with U.N. Resolution 1541, which provides the benchmark for whether a territory has attained self-government.¹⁸⁷

A second and corollary aspect of the right to self-determination demonstrated in the case of Micronesia is the need for malleability on the part of those who are negotiating the terms of political status. Such an approach is mandated by U.N. Charter Articles 76 and 73, both of which required the United States, as the administering authority, to take into account the "particular circumstances of [the] territory" as Micronesia was guided toward self-determination. The Compact of Free Association was able to reconcile three competing interests in the United States-Micronesian relationship, including: 1) the right of Micronesians to self-government and self-determination; 2) U.S. security interests; and 3) Micronesian dependence on the United States for defense and economic assistance.¹⁸⁸ These three interests were harmonized by affording complete internal and partial external self-government to the FAS, and granting military privileges to the United States.¹⁸⁹ In return for military privileges, the United States continues to provide financial assistance to the islands.¹⁹⁰ Thus, the United States has remained flexible in its negotiations with Micronesia.

The relationship embodied in the Compact is unique in U.S. territorial law and has little precedent in international law.¹⁹¹ In approaching issues of self-determination, administering authorities must be flexible in pursuing ar-

¹⁸⁷ G.A. Res. 1541, U.N. GAOR, 15th Sess., Supp. No. 16, at 29, U.N. Doc. A/4684 (1960). Resolution 1541 was adopted one day after the adoption of Resolution 1514. Resolution 1541 states 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." Resolution 1541 also sets forth factors to be considered in determining whether the chosen status is sufficient to establish self-government including the requirement that the process involve "a free and voluntary choice through informed and democratic processes." Also among the factors are that there be self-government in internal matters, and that the people have the right to modify the status of the territory through democratic means. *Id.* See also Prince, *supra* note 14, at 42-45; POMERANCE, *supra* note 12, at 24-25.

¹⁸⁸ See *supra* part IV.D.

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

¹⁹¹ LEIBOWITZ, *supra* note 1, at 595. The Cook Islands, in 1965, and Niue, in 1974, achieved a free association relationship with New Zealand which was formally approved by the U.N. HANNUM, *supra* note 9, at 384-85.

rangements which accommodate a variety of competing interests.¹⁹² Equating self-determination with independence or any other single political status ignores the fact that the principle can be effectuated through numerous arrangements, including various degrees of local autonomy, free association, various forms of self-government, merger, and other forms of participation in government.¹⁹³ Thus, the process by which self-determination comes about must be flexible.

Third, the process of self-determination in Micronesia was brought about through the development of political institutions in the islands. Both the Congress of Micronesia and the Micronesian Constitution played an essential role in the political advancement of the Micronesian people. The Congress of Micronesia, for example, brought about integration of the various island groups, information distribution, and wider political participation by Micronesians. In the area of integration, the Congress of Micronesia helped soften the political and cultural distinctions among the various Micronesian islands, and was partially successful in forming a consensus on a Micronesian identity.¹⁹⁴ Another important function of the Congress was its role as an information conduit. The Congress provided a forum through which the desires of the Micronesian people were made known to the various representatives of the United States.¹⁹⁵ Lastly, the Congress spurred political participation throughout the various communities of Micronesia. Through political institutions, Micronesians developed the political infrastructure and sophistication which allowed them to discard the plenary authority of the United States Congress and attain full internal and partial external self-government. Thus, developing internal institutions of government appears to be essential in any plan to effectuate the right of self-determination.¹⁹⁶

192 Such an approach conforms to relevant U.N. provisions. Cf. Prince, *supra* note 14, at 58 (arguing that both Article 76 and Resolution 2625 support flexibility with regard to structuring a free association relationship). Resolution 2625 states that "the establishment of a sovereign and independent State, the free association or integration with an independent State or the emergence into any other political status freely determined by a people constitute modes of implementing the right of self-determination by that people." Resolution 2625, *supra* note 30 (emphasis added).

193 UMOZURIKE, *supra* note 9, at 194. See also HANNUM, *supra* note 9, at 41, 333, 467; Buchanan, *supra* note 36, at 46 (arguing that self-determination is best achieved "in different circumstances by a range of more specific rights, including a number of distinct group rights to varying forms and degrees of political autonomy . . .").

194 MELLER, *supra* note 107, at 373-74.

195 *Id.* at 375.

196 See HANNUM, *supra* note 9, at 466 (noting that the "creation of representative local governmental structures is fundamental to most demands for autonomy").

Finally, the importance of local autonomy must not be overlooked in effectuating self-determination. The primary distinction between current U.S.-Micronesian relations and relations under the Trusteeship consists of the facts that the FAS are now self-governing,¹⁹⁷ and that they were able to freely choose that status.¹⁹⁸ The core of the right to self-determination, therefore, consists in a level of political autonomy sufficient to enable a group to control its own destiny.¹⁹⁹

VII. THE NORM ESTABLISHED THROUGH U.S.-MICRONESIAN RELATIONS EXTENDS BEYOND THE INTERNATIONAL TRUSTEESHIP SYSTEM

In effectuating the right of self-determination in Micronesia, the United States was acting under a broader body of law than the legal duties imposed by the Trusteeship System alone. The norm established by U.S. action in Micronesia should similarly extend beyond the Trusteeship System to affect other administering authorities in their relationship with the territories which they govern.²⁰⁰ Again, the relationship between the United States and Guam provides a prime example for analysis of how this norm applies not only to trust territories but to all non-self-governing territories.²⁰¹ The norm established through U.S.-Micronesian relations applies to Guam because the U.S. was acting under a broader framework of international law, and because the broader framework includes Guam.

¹⁹⁷ Hirayasu, *supra* note 19, at 515.

¹⁹⁸ See *Report of the United Nations Visiting Mission to Observe the Plebiscite in the Marshall Islands, September 1983*, U.N. TCOR Supp. 51st Sess. No. 2 at 14, U.N. Doc. T/1865 (1984); *Report of the United Nations Visiting Mission to Observe the Plebiscite in the Federated States of Micronesia, Trust Territory of the Pacific Islands, June 1983*, U.N. TCOR Supp. 51st No. 1 at 19, U.N. Doc. T/1860; Hirayasu, *supra* note 19, at 507-11.

¹⁹⁹ Anaya, *supra* note 183, at 30.

²⁰⁰ The norm is applicable to all countries which continue to administer trust and non-self-governing territories. See *supra* note 4. In some cases, however, the country recognized by the U.N. as the administering authority, is not the country which maintains defacto control over the territory. This is the case in East Timor, where Portugal is the official administering authority but Indonesia exercises complete control. 1991 U.N.Y.B. 798, U.N. Sales No. E.92.I.1. In such a case, the norm should also apply to the country which maintains defacto control over the territory.

²⁰¹ Because the United States, as the administering authority, was the primary actor in the case of Micronesia, the norm has particular force with respect to the duties of the United States in effectuating the right of self-determination in other U.S. territories which are non-self-governing such as the United States Virgin Islands and American Samoa. See van Hoof, *supra* note 183, at 97 (arguing that a norm of customary law primarily applies to those state actors who participated or consented to the creation of the norm). See generally LEIBOWITZ, *supra* note 1 (providing a comprehensive analysis of U.S. territorial relations); see *supra* note 71, Leland R. Bettis, *Political Context of the Relationship*, remarks at "A Time of Change," National Conference, Washington D.C., (Feb. 9, 1993) (transcript available at Office of Guam Commission on Self-Determination, Agana, Guam).

A. *Article 73 of the U.N. Charter Applies to Both Micronesia and Guam*

The U.N. maintains its jurisdiction over Guam as a non-self-governing territory under Article 73 of the U.N. Charter.²⁰² Likewise, former U.S. relations with Micronesia were governed by Article 73 because the islands of Micronesia constituted a non-self-governing territory.²⁰³ U.S.-Micronesian relations were governed by both Articles 73 and 76, and, therefore, the norm established by U.S.-Micronesian relations extends beyond the legal framework of Article 76 to include Article 73 territories such as Guam. Regardless of whether U.S.-Micronesian relations explicitly come under Article 73, the norm established at least implicitly applies to both trust and non-self-governing territories because the right of self-determination which is embodied in Article 76 is essentially the same as that embodied in Article 73.²⁰⁴

B. *U.N. Instruments Subsequent to the Adoption of the U.N. Charter Apply to Both Micronesia and Guam*

An additional basis for analyzing the FAS and Guam under the same legal framework is that both resolutions 1514 and 2625 applied to U.S. governance of Micronesia and continue to apply to U.S. governance of Guam. U.N. resolution 1514 constituted part of the international legal backdrop to the negotiations which led to the formation of the Compact in Micronesia.²⁰⁵ The policy shift toward greater political development taken by the United States in the early 1960's was in part due to the demands of Resolution 1514 and U.N. action surrounding its adoption. By its terms, Resolution 1514's mandate encompasses both trusteeships and non-self-governing territories. Further, the United States has acknowledged that this resolution continues to apply to U.S. relations with Guam.²⁰⁶

Resolution 2625 expressed that all peoples have the right of self-determination.²⁰⁷ Beginning with Resolution 2625, the United States explicitly endorsed the right of self-determination contained therein.²⁰⁸

²⁰² See *supra* part III.D.

²⁰³ See *supra* notes 17-19 and accompanying text.

²⁰⁴ See *supra* notes 20-22 and accompanying text.

²⁰⁵ MCHENRY, *supra* note 82, at 12-13.

²⁰⁶ *Guam: Working Paper Prepared by the Secretariat*, U.N. GAOR, Special Comm. on Decolonization, at 8, U.N. Doc. A/AC.109/1111 (1992); G.A. Res. 43/42, *supra* note 44, at para. 3.

²⁰⁷ See *supra* text accompanying note 30.

²⁰⁸ Statement by Richard Gimer, *supra* note 179.

Moreover, the United States recognized that the right of self-determination embodied in Resolution 2625 applies to the United States' administration of both the Trust Territory and other non-self-governing territories.²⁰⁹

Thus, the United States' obligation to promote the right of self-determination in Micronesia derived not only from Article 76 and the Trusteeship Agreement, but also from Article 76, and U.N. Resolutions 1514 and 2625. The applicability of the norm should be coextensive with the body of law under which the norm developed. For these reasons, U.S. relations with Micronesia establish a customary law norm which reaches beyond the obligation imposed by Article 76 to include all non-self-governing territories such as Guam.

VIII. THE GUAM COMMONWEALTH ACT PRESENTS AN OPPORTUNITY FOR THE UNITED STATES TO MEET ITS OBLIGATION TO EFFECTUATE GUAMANIAN SELF-DETERMINATION

As was the case in Micronesia, U.S. approval of the GCA would mark Guam's first break from a long period of colonial rule.²¹⁰ Without exploring in detail whether the GCA grants Guamanians a sufficient level of political autonomy to effectuate their right to self-determination, three general aspects of the GCA suggest that it does constitute a valid expression of self-determination. First, it embodies principles of self-government and self-determination which are consistent with the freely expressed wishes of Guamanians.²¹¹ Second, in 1988, the U.N. General Assembly specifically endorsed the GCA.²¹² Third, the GCA affords Guam a significant measure of autonomy over its current status, accomplished primarily through its provisions on mutual consent over the applicability of U.S. law to Guam. The first mutual consent provision, Section 103, states:

[T]he United States agrees to limit the exercise of its authority so that the provisions of this Act may be modified only with the mutual consent of the Government of the United States and the Government of the Commonwealth of Guam.²¹³

209 *Id.*

210 Interview with Leland Bettis, *supra* note 66.

211 See *supra* text accompanying notes 66-72.

212 G.A. Res. 43/42, *supra* note 44.

213 Guam Commonwealth Act, *supra* note 66, § 103.

The second mutual consent provision would give Guam protection from further federal legislation and regulation.²¹⁴

The mutual consent provisions are a touchstone for evaluating the U.S. stance on Guamanian self-determination. This is because, as noted before, Guamanians view these provisions as integral to their achievement of self-determination. As Guam representatives negotiated with a U.S. federal inter-agency task force in 1992, they continued to urge adoption of the mutual consent provisions.²¹⁵ The task force responded with intransigence, stating that "the Task Force believes that the [U.S.] Congress must resist accepting constraints upon its legislative authority or upon federal regulatory authority."²¹⁶ The task force further stated that it "objects to [S]ection 103 and any other type of mutual consent provision."

The U.S. can not justify denying Guam the right to self-determination that Micronesia has achieved without violating international law. The approach taken by U.S. policy-makers runs counter to the norm established by U.S.-Micronesian relations which requires administering authorities to effectuate the right of self-determination as set forth in U.N. instruments. The norm established through U.S.-Micronesian relations also militates against U.S. intransigence because implementation of the norm requires malleability in approaching the questions of political status and the means to achieving self-determination.

X. CONCLUSION

Although U.N. Resolution 1514 proclaimed the "necessity of bringing to a speedy and unconditional end colonialism in all its forms and manifestations,"²¹⁷ vestiges of colonialism continue to survive. The persistence of colonial attitudes caused the U.N. to urge the eradication of colonialism by the year 2000, with the hope of spurring on administering authorities to effectuate the right of self-determination in trust and non-self-governing territories. These colonial attitudes also cause anger in the territories: Guam's leaders and citizens, for example, grow increasingly

²¹⁴ Section 202 of the Guam Commonwealth Act reads: "Except as otherwise intended by this Act, no Federal laws, rules or regulations passed after the date of this Act shall apply to the Commonwealth of Guam unless mutually consented to by the United States and the Government of the Commonwealth of Guam."

²¹⁵ *Second Federal Inter-Agency Task Force Report on H.R. 98, the Guam Commonwealth Bill*, Jan., 1993, at 29.

²¹⁶ *Id.*

²¹⁷ Resolution 1514, *supra* note 27.

impatient with U.S. intransigence in refusing to effectuate Guamanian self-determination.

As administering authorities consider proposals to effectuate the right of self-determination in the territories they govern, they should be mindful of their obligation to promote self-determination under relevant U.N. instruments. Additionally, administering authorities should adhere to the norm which emerged from U.S. action in Micronesia which requires them to effectuate the right of self-determination as set forth in U.N. instruments. The United States, in particular, should view the Guam Commonwealth Act as an opportunity to meet its obligation to Guam to effectuate Guamanian self-determination.

