PALAU:
A CHALLENGE TO THE RULE OF LAW IN MICRONESIA

Report of a Mission By

William J. Butler, Esq.
The Honorable George C. Edwards and
The Honorable Michael D. Kirby, C.M.G.

to

The American Association For The
International Commission of Jurists, New York
and
The International Commission of Jurists, Geneva

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Report of a Mission on Behalf of

The International Commission of Jurists

And

The American Association for the International Commission of Jurists

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New York, April 1988

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PREFACE

The International Commission of Jurists (ICJ) and its affiliated Sections throughout the world has, since its founding in 1951, been primarily concerned with the establishment of Rule of Law coupled with an independent Judiciary, as an indispensable ingredient in the cause of Human Freedom.

Our principles on the Independence of the Judiciary and the Legal Profession have been approved by the General Assembly of the United Nations and are now forming part of the international norms and standards expected of civilized nations.

In the fall of 1987 the ICJ was informed by the American Association for the ICJ (AAICJ), of an alleged breakdown of the Rule of Law in the Republic of Palau, a part of the strategic Trust Territory of the United Nations administered by the United States of America. Because of the seriousness of the events leading to the denial of Palauan citizens access to their legal institutions, the AAICJ and the ICJ decided to co-sponsor a mission to Palau to inquire into a challenge to the Rule of Law in Micronesia which is the subject of this report.

The mission took place the week of January 17, 1988. Its terms of reference were to inquire into the status in the Rule of Law in Palau since its formation by a constitutional convention

in 1979. More particularly the Ordre de Mission (Appendix 1) was to inquire into the facts and circumstances which required the holding of six referenda on the Compact of Free Association with the United States and together with four referenda on the constitution itself and the denial, through acts of intimidation and violence, of access by Palauan citizens to their duly constituted legal institutions.

The members of the mission were: the Honorable George C. Edwards, of the United States Court of Appeals for the Sixth Circuit, Cincinnati, Ohio USA, the Honorable Michael D. Kirby, C.M.G., President of the Court of Appeals of the Supreme Court of New South Wales, Sydney, Australia and William J. Butler, Esq., a New York lawyer and Chairman of the Executive Committee of the International Commission of Jurists in Geneva.

During the course of their stay in Palau, the members of the mission were cordially welcomed by the Chief Justice and other distinguished members of the Judiciary, the President, senior members of both houses of the Palauan National Congress, high government officials, the Ibedul (Paramount Chief), officials of the Palauan Bar Association, leading lawyers, prominent citizens who acted as plaintiffs in constitutional litigation as well as the representative of the United States Department of State resident in Palau.

The mission was given full cooperation by all segments of the Palauan government and its branches. Prior to its departure the mission was briefed by several United States agencies,

including the Department of the Interior, the Department of State, the United States House Committee on Interior and Insular Affairs as well as several non-governmental organizations interested in Human Rights in the Pacific Area.

We are particularly grateful for the help and assistance given to the mission by the governments of Palau and the United States which gave such a warm welcome to the mission and to the Frederich W. Richmond Foundation of New York, and the World Division of the General Board of Global Ministries of the United Methodist Church which generously provided the resources which made the mission possible.

The report is both critical and optimistic - critical in that it complains of a denial of access by Palauan citizens to its judicial institution through threats of intimidation and acts of violence coupled with threats to the integrity of that institution - optimistic in its confidence that, if its recommendations are accepted by the United States, as the Administering Power and the Government of Palau, the fundamental rights and freedom of the Palauan citizens will be protected and the integrity of the Palauan Constitution sustained.

Hon. Andres Aguilar Mawdsley

President, International
Commission of Jurists

New York
April 1988

II

HISTORICAL PERSPECTIVE

Palau (earlier Pellew; orse. Belau) is part of the cluster of the Pacific Islands known geographically and ethnically as Micronesia. Micronesia also includes the Mariana, Marshall and Caroline Island chains. As the attached map shows (Appendix v), Palau is on the Western perimeter of this collection of islands. Although described collectively as Micronesians, the people of Palau, like those of other island groupings in the region present ethnic, cultural and linguistic variety, inhabiting more than 100 islands set amidst a three-hundred mile chain of reefs and attols, in the vast emptiness of the Pacific Ocean.

To the visitor, Palau has many of the appearances of Paradise. The surrounding water, never far distant, is blue and glistens in the almost constant sunlight. The people appear gentle and soft spoken. The vistas of bays and inlets are of great beauty. The land appears lush and green. Flora of every variety grow in abundance. The air is rich with the fragrance of plumerias.

However, Palau has had more than its fair share of constitutional challenges and legal problems in the past three years. Its first president, Haruo Remeliik, was assassinated in July 1985. Repeated constitutional referenda failed to resolve

the question of the infant republic's new relationship with the United States of America, trustee for the islands, designated as such by the United Nations. And then, on 9 September 1987, an Associate Justice of the Supreme Court of Palau (Robert A. Hefner) published a memorandum,[1] which will be described at length below stating that certain persons who had commenced proceedings in that court may have discontinued their proceedings "as a result of intimidation through the use of violence". These proceedings were designed essentially to test the legality and effect of the most recent constitutional referendum. It was that memorandum (which was promptly contested by the government of Palau) that became the occasion, although not the cause of, the interest of the International Commission of Jurists (ICJ) and resulted in this mission.

Even before the recent events the ICJ, its American Section as well as various committees of the Congress of the United States of America, the Trusteeship Council of the United Nations, as well as many Palauans, had evinced an interest in the strength and viability of the constitutional institutions of Palau and the health in Palau of the Rule of Law, the respect for Human Rights and for the independence of the Judiciary.

The relationship of Palau with the wider world community extends over about 400 years to the time in the early sixteenth century that the explorers from Europe preceded traders and later colonial conquerors and administrators into the region of modern

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[1] Also published in full at page 41, infra.

day Micronesia. By the end of the seventeenth century the Spanish had established their power in the Carolinas (named for King Carlos II of Spain) and the Marianas (named for Queen Maria Ana of Spain). It was at this time that the Spanish first began to take an interest - mainly for missionary purposes - in the Palaos Islands in the Western Carolinas. The existence of Palau was well established. But the Philippines was already a substantial drain on the Royal Treasury, so Palau was at first neglected or ignored. After a number of desultory efforts to establish a presence on Palau, Spain abandoned an idea of a permanent mission and contented itself with ruling the Philippines and the Marianas. It was not until late in the 19th Century that Spain again tried to colonise the Carolinas, including Palau.

In 1783 came the first recorded British link with Palau. A vessel Antelope was blown off course and shipwrecked on a reef near Koror, the modern capital. The crew was assisted to rebuild its vessel by the friendly inhabitants of the island. When they departed for England the crew was accompanied by Lee Boo, the son of the Ibedul' (or Great Chief). Unfortunately Lee Boo contacted small pox and died in England after spending only a few months there. Small pox and other such diseases were to wreak havoc in populations of Micronesia, decimating the population in one ravaging epidemic after another. The chiefs of Palau (then called "Pellew") were later to address a petition to Queen Victoria to be incorporated in the British Empire, but without

avail.

Spain officially reinstituted its claim on the Caroline Islands (including Palau) in 1874 and in the same year on the Marshall Islands. In 1885 Germany took the Marshalls from Spain and in the resolution of the Spanish American War, Germany purchased the rest of Micronesia (including Palau) in 1899. With German commercial interests (including copra) came Protestant Christian missionaries.

Soon after the beginning of the First World War, Japan took over control of Micronesia and entered into a League of Nations Mandate for the area. Large numbers of Japanese migrated to the Islands so that, by the 1930's the Japanese equalled in number and then outnumbered the indigines. At the time Japanese policies were integrationist. But their administration was in many ways enlightened and efficient. It laid emphasis on education and commercial activities. Far from discouraging the established Christian missions, the Japanese encouraged their role, especially in education and health services. The Japanese established plantations, and introduced mining and fishing industries. They built public works and established military facilities. At its peak, just before the Japanese surrender in 1945, the Japanese population on Palau was estimated to be upwards of 30,000 people, including military forces. At the end of hostilities in the Second World War, the policy of the victorious allies was to repatriate Japanese migrants from Micronesia to Japan, returning the islands to the indigenous

people. In 1987 the population of Palau was approximately 14,000. Interestingly, this resulted in the forced return to Japan of the family of the present Chief Justice (the Hon. Mamora Nakamura), then a child. He was later to return, and with other members of his family to make a notable contribution to the modern life of Palau.

III

THE TRUST TERRITORY

The experience of the United States of America in the administration of Micronesia dates back to the seizure of Guam from Spain, at the time of the Spanish American War. During the Second World War, Micronesia became a strategic point of great significance in the "island hopping" policy for the defeat of Japan. The Marshalls and Marianas were occupied by the Allied (principally United States) forces in 1944. Great naval battles were fought, principally at Truk Lagoon in February 1944, and land battles principally at Saipan in June 1944 and Palau. The assault on Palau began on 15 September 1944 at the beaches of Peleliu. Palau had been the base from which the attack on the Netherlands East Indies had been mounted. The seizure of Palau for its strategic importance was considered imperative. The coral formations, which are now such an attraction to tourists, and scuba divers, presented special obstacles to the invading 1st, 5th and 7th Marines. The intensity of the fighting was unexpectedly long and costly. The "neutralization" of Micronesia was a costly operation in American lives, 7353 dead (including 1864 on Peleliu, 3272 on Saipan) and 25,042 wounded. There were also costly losses of Micronesian lives and land. The newly constructed air bases in Micronesia were, however, to play a

vital part in the defeat of Japan. The United States interest in the islands was sealed by blood, sacrifice and suffering.

For some time after the War, Palau was administered by the United States Navy. An early administrator, Admiral Raymond Sprance in his "fourteen points" included as item 7:

> "It is desired that the inhabitants of the occupied territories be granted the highest degree of self government that they are capable of assimilating. They shall be encouraged and assisted to assume as much as possible of the management of their own affairs and the conduct of their own government." (12 December 1945)

On 18 July 1947, a Trusteeship Agreement for the Trust Territory of the Pacific Islands, entered into by the United States of America and the Security Council of the United Nations on 2 April 1947 was approved by the United States Congress. Under the terms of the agreement "full powers of administration legislation and jurisdiction" were "granted" to the United States. At first, administration was delegated by the President to the Secretary of the Navy. In 1951 it was transferred to the Department of the Interior. The Secretary of the Interior acted through a High Commission.

It is unnecessary for present purposes to record the constitutional and legal developments in Micronesia between 1950 and the present time. They are varied and complex and have changed over that time. By 1980, however, the Territory was divided into four political entities - the Commonwealth of the

Northern Mariana Islands, the Federated States of Micronesia (comprising four states: Yap, Truk, Pohnpei and Kosrae - all in the Carolinas), the Marshall Islands and Palau (also in the Carolinas). Guam is separated, having been reverted to its pre War status as a territory of the United States and is now proposing that it assume Commonwealth status with the United States. The Commonwealth of the Northern Marianas already has that status. Compacts of Free Association have been signed, appointed and implemented between the United States of America (on the one part) and the Marshall Islands and the Federated States of Micronesia (on the other). Under those compacts the United States, provides financial aid and carries the responsibility for their defense. The status of "free association" for those Territories envisages that, save in defense and other foreign affairs matters, local legislative, executive and judicial powers reside in local institutions as established and operated pursuant to local constitutions adopted by the people of the relevant Micronesian state.

The Trusteeship Agreement authorizing United States administration of that part of the Trust Territory of the Pacific Islands which includes Palau is still in force. It has not been terminated by the United States either by agreement with the Security Council or unilaterally (if the latter be lawfully possible). It is not necessary for this report to canvas the difficult questions of international law raised by the suggested power of the United States to terminate its Trust without the

concurrence of the Security Council. That step has not occurred. In any case that issue is not the focus of the Mission, as established by its Ordre de Mission. In fact, to the time of this writing, the United States has continued to acknowledge that the Trusteeship continues in respect of Palau, pending the outcome of the moves of that country to settle finally the basis of its future political status, and, notably, its relationship with the United States.

Putting it broadly, there are two factions in Palau - those who want to establish with the United Sates a compact of free association, as negotiated, and those who do not. There are of course intermediate positions concerned with the terms of any such compact. As shown by repeated referenda, large majorities of the population appear to favor a relationship, if not precisely on the present terms then upon renegotiated terms. The Mission has not been concerned directly with the desirability of such a relationship, with its strategic, economic, social and/or other implications. Such questions are for others - principally and primarily for the people of Palau, determined by their constitutional processes. It is those constitutional processes which are the concern of the Mission. The nature of the problem has already been alluded to. It is now necessary to set it out in some detail. But first it is appropriate to say something about the constitution of Palau.

IV

A "NUCLEAR FREE" CONSTITUTION

In the mid-1970s, Palau's District Legislature, was established by the Administering Power with limited legislative functions. Responding to a referendum in which Palauan voters rejected a proposal that Palau become part of the Federated States of Micronesia, the legislature established a Constitutional Convention. In April 1979 this convention adopted a proposed federal constitution for a "Republic of Palau." The constitution envisaged a separation of powers - including judicial power reposed in a Supreme Court, National Court and inferior courts established by law. The Supreme Court would be the final court of appeal. The draft constitution also included a bill of rights.

Several provisions were regarded as controversial by the Administering Power. These included the provisions for a 200 mile archipelagic zone and a specific prohibition of the use, testing, storage or disposal in Palauan territory of "harmful substances such as nuclear, chemical, gas or biological weapons" without express approval of 75% of the voters in a referendum. There were also severe restrictions on the acquisition of land for "the benefit of a foreign entity." The feature of the

Palauan constitution which was unique and which attracted the strongest opposition of the Administering Power was that which required approval at a popular referendum of nuclear and other related activity. It was not entirely surprising that such a provision emerged in view of the testing of nuclear weapons in the Marshall Islands - with adverse consequences for dislocated communities, health problems from radiation exposure, as well as unresolved legal claims. Depending on one's point of view, the "inflexibility" or the "assurance" of popular approval by 75% of those voting was what made the Palauan constitution different.

In July 1979, reportedly because of pressure by the United States, the Palau District Legislature passed a bill nullifying the proposed constitution and cancelling a referendum which had been set for July. A lawsuit was then filed in the High Court of the Trust Territory beginning a series of litigation that is critical for this Mission. In the result, the High Commissioner allowed the referendum to be held on 9 July 1979. It was conducted under the observation of a visiting mission of the United Nations. The result was that the constitution of the Republic of Palau was approved by a remarkable 92% of the population of the islands making up Palau.

In August 1979 the legislature's action in abrogating the proposed constitution was upheld by the High Court. Accordingly the High Commissioner refused to certify the results of the July referendum. Thereafter the legislature, meeting without a quorum because of boycotts by supporters of the constitution,

established a Drafting Commission. It produced a draft which was generally acceptable to the United States. That draft was submitted to the people on 23 October 1979. It was rejected by an equally remarkable 70% of the population. On 9 July 1980, a third referendum overwhelmingly approved the original constitution.

The Constitution contains two nuclear control provisions. These are Article II, Section 3:

> "Major governmental powers including but not limited to defense, security, or foreign affairs may be delegated by treaty, compact, or other agreement between the sovereign Republic of Palau and another sovereign nation or international organization, provided such treaty, compact or agreement shall be approved by not less than two-thirds (2/3) of the members of each house of the Olbiil Era Kelulau and by a majority of the votes cast in a nationwide referendum conducted for such purpose, provided that any such agreement which authorizes use, testing, storage or disposal of nuclear, toxic chemical, gas, or biological weapons intended for use in warfare shall require approval of not less than three-fourths (3/4) of the votes cast in such referendum."

And Article XIII, Section 6 which reads as follows:

> SECTION 6: "Harmful substance such as nuclear, chemical, gas or biological weapons intended for use in warfare, nuclear power plants, and waste material therefrom, shall not be used, tested, stored, or disposed of within the territorial jurisdiction of Palau <u>without the express approval of not less than three fourths (3/4) of the votes cast in a referendum submitted on this specific question.</u>" (underlining ours).

It is also pertinent to note Article XIII, Section 7 which provides as follows:

> "The national government shall have the power to take property for public use upon payment of just compensation. The state government shall have the power to take property for public use upon payment of

just compensation. No property shall be taken by the national government without the prior consultation with the government of the state in which the property is located. This power shall not be used for the benefit of a foreign entity. This power shall be sued sparingly and only as final resort after all means of good faith negotiations with the land owner have been exhausted." (undermining ours).

And so after three Constitutional Plebiscites (July 9, 1979, October 23, 1979 and July 9, 1980) the third draft constitution, containing the above quoted paragraphs became the Supreme Law of Palau on January 1, 1981.

Judicial interpretation of these provisions can be found in Gibbons et al vs. Salii, et al (1918) (appeal #8-86 - Civil Action 1 #101-86, Supreme Court of Palau, Sept. 17, 1986):

> "Too much has happened. It is now too late to go back and simply declare, as the Republic Palau and the United States have attempted to do, that the nuclear control provision which were the focus of all these events actually never did and, do not now, have any bearing on the Right of the Republic of Palau to authorize the United States to transit Palau waters with nuclear powered or nuclear capable ships or aircraft.
>
> To the contrary, these events leave no doubt that uppermost in the minds of the electorate and other key actors in this constitutional drama was the understanding that the language of the nuclear control provisions would subject the right of Transit by nuclear vessels, and any proposed introduction of harmful substances, to a vote by the people of Palau. For good or for ill, those supporting voter control for transit activities were the victors." (See opinion of Chief Justice Mamora Nakamura, and Associate Justices Loren A. Sutton and Edward C.King, dated September 17, 1986 at pg. 18).

As International Jurists we have investigated the process by which the Constitution of Palau was devised, its adoption at a constitutional convention in 1979, its approval by 92% of the

electorate voting on July 9, 1979, the attempt by those opposing the nuclear provisions in 1980 and the rejection of the electorate of such an attempt by approximately 70% of the votes and the subsequent approval of the original constitution on July 9, 1980 by an overwhelming 78% of the popular vote.

Furthermore, we have examined the opinion of the Supreme Court of Palau affirming, without exception, the validity of their constitution as the "Supreme Law of the Land".

With these observations in mind we now turn to the more recent events.

V

COMPACTS OF FREE ASSOCIATION IN MICRONESIA

Because many of the issues leading to a breakdown of the Rule of Law and fundamental institutions in Palau arose out of basic conflicts between the proposed "Compact of Free Association" and the Palau Constitution, we feel it appropriate to mention certain pertinent facts.

It is agreed, internationally at the U.N. and in other spheres, that the United States of America in 1947 as the Administering Power under the Trusteeship Agreement with the United Nations and pursuant to Article 76 of the U.N. Charter, owed a duty as Trustee to:

> " ... promote the political, economic, social and educational advancement of the inhabitants of the trust territories, and their progressive development towards self government or independence as may be appropriate to the particular circumstances of each territory and its peoples and the freely expressed wishes of the peoples concerned ..."

In pursuance of this obligation the United States in 1965 created a territory-wide legislature, the Congress of Micronesia. The Congress of Micronesia in turn established in 1967 a Political Status Commission to examine into Micronesia's future status and its relationship with the United States.

After many years there evolved a pattern in 1975 to the effect that the Northern Marianas were moving towards

"commonwealth" status and the Marshalls, Federated States of Micronesia and Palau were tending towards "independent" republics.

The general plan was to allow these three states through processes of self determination to establish their own constitution and governmental institutions after which they would each enter into "Compacts of Free Association with the United States."

The Compacts of Free Association with the United States and the Federated States and the Marshall Islands were accepted in referendum in these States in 1983 and came into effect by a Proclamation of President Reagan on Nov. 3, 1986.

The Compacts generally allow for local independence and antonomy but delegate ultimate foreign affairs powers and some financial controls to the United States with a commitment by the United States to defend these countries against foreign intrusion. These compacts all give the United States rights to use the territory for military purposes. These new political entities would also receive substantial financial support and subsidies from the U.S. conditioned upon United States approval of development and spending plans.

THE FIRST REFERENDUM

When the compact was submitted to the people of Palau for the first time on February 10, 1983, it had incorporated with it the "Agreement between the United States and Palau Regarding

Radioactive Chemical and Biological Substances" which when read together with the compact obviously allowed certain nuclear substances to be located on Palau in violation of the Palaun constitution.

Two questions were asked of the electorate, as follows:

> THE COMPACT WILL BE APPROVED BY A MAJORITY OF THE VOTES CAST.
>
> (A) Do you approve of Free Association as set forth in the Compact of Free Association?
>
> BEFORE THE COMPACT CAN TAKE EFFECT SECTION 314 UNDER QUESTION (B) BELOW MUST ALSO BE APPROVED BY AT LEAST SEVENTY-FIVE PERCENT (75%) OF THE VOTES CAST.
>
> (B) Do you approve of the Agreement concerning radioactive, chemical and biological materials concluded pursuant to Section 314 of the Compact of Free Association?

62% voted in favor of question A. 52% voted in favor of question B.

Subsequent to the vote, a challenge was launched to its constitutionality. In August of 1983 in a case entitled Gibbons v. Remeliik, (Civil Action #67-83 Trial Division, Sup. Ct. of Palau) Judge Hefner held that because approval required a 75% vote,

> "... the Compact of Free Association, and its integral and subsidiary parts that include the Harmful Substances Agreement, were disapproved by the people of the Republic of Palau in the February 10, 1983 referendum and plebiscite."

THE SECOND REFERENDUM

A second version of the compact was submitted to the voters again in September of 1984. By this time all agreed that a 75% vote was required for ratification. Although there was a legal challenge, the Court through Judge Loren Sutton, declined to issue a temporary restraining order preventing the vote.

This time only one question was submitted, whether the compact in its entirety should be approved.

The compact was again defeated. 66% of those voting favored the agreement thus falling short of the 75% requirement.

THE THIRD REFERENDUM

Between September 1984 and January 1986, a significant change was negotiated substantially altering the earlier provision. The amended provision provided that the United States would not "use, test or store" nuclear weapons on Palau but it retained the right to "operate nuclear capable or nuclear profilled vessels or aircraft within the jurisdiction of Palau" without "confirming or denying the presence or absence of such weapons" in Palau.

The new Provision read as follows:

> "In the exercise in Palau of its authority and responsibility under this Title [Title III, the Security and Defense Relations title of the Compact], the Government of the United States shall not use, test, store, or dispose of nuclear, toxic chemical, gas or biological weapons intended for use in warfare and the Government of Palau assures the Government of the United States that in carrying out its security and defense responsibilities under this Title, the Government of the United States has the right to operate nuclear capable or nuclear propelled

vessels and aircraft within the jurisdiction of Palau without either confirming or denying the presence or absence of such weapons within the jurisdiction of Palau." [Section 324]

In February 1986, the new version of the compact which contained this provision was submitted to the people of Palau for approval.

The question was asked:

"Do you approve Free Association with the United States as set forth in the improved Compact of Free Association and its subsidiary agreements? Yes or no?"

This time 72% of the votes cast were affirmative and the question of whether the compact was constitutionally approved was submitted to the Supreme Court of Palau.

In the now well known opinion in Gibbons vs. Salii (cited supra on page 20) the Appellate Division of Supreme Court of Palau in an unanimous decision held that ratification of the Compact had failed thereby affirming a brief oral opinion of Judge Gibson to the same effect.

THE FOURTH REFERENDUM

The government of Palau encouraged by the fact that in the third referendum it had received a 72% approval, again submitted the January 1986 compact to the voters on Nov. 29, December 2 and 7, 1986.

On this occasion the percentage of eligible voters voting "yes" decreased and the percentage of those voting "no"

increased.

President Salii, in his Presidential Proclamation dated December 15, 1986, certified the results as follows:

"Total "yes" votes 5,789 (65.97%)

Total "no" votes 2,986 (34.03%)

It was apparent to the government that voter approval of the proposed Compact which had peaked in February of 1986 at 72% of those voting, was by now decreasing and that the trend toward disapproval was accelerating.

Several senior officials in the Palau government remarked to our mission that in December of 1986 it was becoming increasingly clear that a constitutionally required 75% approval percentage was not obtainable and that new ways would have to be devised if ratification of the compact, with its controversial provisions was to be accomplished.

THE FIFTH REFERENDUM:

Nonetheless, the Government of Palau decided to make one further effort and submitted the same compact to the voters in June 1987.

Once again the vote was 67% in favor.

VI

THE AUGUST 1987 REFERENDA

Because the events surrounding the most recent referenda are crucial to the gravamen of this report we have chosen to subdivide this section as follows:

A. Events leading up to the legislative process which passed the enabling legislation requiring (1) a constitutional amendment referendum, and (2) a referendum on the Compact of Free Association.

B. The facts and circumstances surrounding the Legislative sessions at which the legislation was adopted.

C. The facts and circumstances surrounding the actual holding of both referenda (one on the constitutional amendment and the other on the Compact of Free Association).

D. The legal challenges to the validity of the amendment referendum to wit; Merep et al. vs. Salii et al. and Ngirmang et al vs. Salii together with the termination and withdrawal of these legal actions, and,

E. Threats and acts of violence perpetrated against Paluan citizens who wished to test the constitutionality of certain actions of the Palaun government relating to the August 1987 referenda.

A. Palau - January 1 - July 1, 1987

Any examination of the tragic events which occurred on Palau in September of 1987 requires some comment concerning the social and economic climate leading up to the decision of the legislature to provide for the August referenda.

At the outset one must remember that Palau conducts financial activities on a fiscal year basis ending September 30th (the same fiscal year used by the United States). Because Palau has very limited economic resources of its own it relies most heavily on subsidies from the United States. Of the total workforce over 60% are employees of the government.

It is well known in Palau as well as in the United States that Palau, in recent years, has not been fiscally solvent and that it is now constantly threatened with a public bankruptcy.

Early in 1987 it became abundantly clear that appropriations for the fiscal years 1986 and 1987 would exceed the revenue of the National Government by approximately 5 million dollars.

It was also clear, as stated in President Salii's Executive Order #59 that;

> "a shortfall of approximately $2 million dollars exists for the last quarter of Fiscal Year 1987."

Faced with economic insolvency of this magnitude the government proceeded to take surgical action. Among other measures it took were:

1. In February of 1987 it reduced the weekly work hours of government employees from forty to thirty two.

2. It reduced government grants to the Palauan States; placed limitation on power usage, travel, government

hirings and other expenses.

3. When these measures failed to meet the needs of the government, it proclaimed that a furlough of 60% of government employees, in addition to the aforesaid, was necessary to equal the revenue income available for fiscal 1987.

4. The Palauan government proceeded to furlough the majority of the national government employees for lack of funds. About 900 out of 1331 employees were furloughed from July 8, 1987 - October 1, 1987.[2]

5. Furthermore, the President of Palau, by Executive Order #59 impounded over two million dollars from the 1986 and 1987 appropriation of the Palaun National Congress, the State governments and agencies, and from various state projects such as the National Development Bank, the Fourth Congress Funds, the ASAHI Baseball Field, Non-public Schools, Elementary School Cook Salaries, Scholarship and others.

These decisions were put into effect in and around July 3, 1987 by the Executive Order of President Salii.

B. The Legislative Sessions of July 1987

It is hard for one not present on Palau during these times, to imagine the climate of fear engendered as a consequence of the foregoing events. Heads of families and others were out of work. The thought of not being able to feed one's family or to make payments on a mortgage, or an auto loan or even to pay for the basic necessities of life gradually during the months of June, July and August developed into a state of hysteria which in turn resulted in violence, threats of violence, and intimidation which are about to be described.

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[2] These actions resulted in the formation of the "Furlough Committee" which later took an active role in pressing for compact ratification.

As the pressure crescendoed, leaders of the government including President Salii repeatedly assured the unemployed that the solution to all their problems was to be found in the ratification of the Compact of Free Association.

The reasoning was that, if the compact was ratified, the subsidies from the United States would increase and the solvency of the government would return.

Many workers formed a "Furlough Committee" (see note page 31) and the leadership began a concentrated effort to force the Palaun National Congress to adopt enabling legislation which would authorize two referenda:

1. To amend the constitution in order to allow the compact to be adopted by a simple majority of those voting,[3] and,

2. Submitting to the People of Palau for a sixth time, the Compact of Free Association, this time requiring only a simple majority instead of the 75% vote required by the present constitution.

We interviewed several of the important and leading legislators from both the Senate and the House of Delegates of Palau. We questioned them in detail about the events which had occurred during the Eleventh Regular Session of the OEK (Palauan National Congress) in July of 1987 and which resulted in the adoption of RPPL 2-30 allowing the aforesaid amendment and

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[3] We will avoid commenting on the legality of this decision, since the competence to decide these legal issues lies with the Palauan Judiciary. We do say, however, that they involve substantial and arguable questions of law, yet to be decided by the Palaun courts.

ratification procedures to go forward.

In brief we discovered the following:

1. The Furlough Committee had surrounded the Legislative buildings and had pitched tents. It informed the Congress that they intended to remain there until the appropriate legislation was adopted.

2. Many of the workers wore red bands on their heads which in Palau society is a well accepted symbol constituting a threat to those opposed to the committee.

3. There was evidence that many were under the influence of alcohol and/or drugs.

4. At times there was evidence of a mob hysteria and a corresponding failure or inability of Palau's law enforcement agencies to curb the intimidation of the legislators.

Without violating any confidences by attribution, we quote from our notes certain comments by some leading Senators and Delegates.

One said;

> "We were forced to do things against our will. Government employees camped out at the Legislature demanding that the Compact be ratified and that the legislation be adopted to allow the vote on the Compact to proceed."

Another said;

> "Strong efforts were made to keep the law from being complied with."

Another said;

> "The strikers had guns, although the constitution precludes the use of arms."

Perhaps the most telling evidence about these events can be found in sworn testimony given to the U.S. Congress, House Interior and Insular Affairs Committee - Insular and International Affairs Committee on July 23, 1987 by the Speaker of the House of Delegates, the Honorable Santos Olikong. He said;

> "An angry mob camps outside our legislature building threatening physical violence and, in some instances carrying through with the threats. Who can honestly legislate in such circumstances? Under great duress, the House of Delegates voted for two new plebiscites, one to amend the constitution, and one on the compact. I voted for the enabling legislation on these two plebescites only because I feared for my life." (Underlining his.)

We interviewed Delegate Olikong while we were in Palau who confirmed the above and more. In Palau he reiterated:

> "I cannot exercise my own responsibility and obligations as a legislator because literally, not figuratively, a gun is being held to my head. My life is and was threatened continually since the last compact vote."

> "For even approval of the compact in the midst of such coercion would not, could not represent the true will of the Palaun Electorate. Such a result could only represent the death of Democracy in Palau and the severe strain, possibly to the breaking point, in the friendship between our two countries."

C. The Amendment Referendum and the Compact Vote of August 4,1987 and August 21, 1987.

In the foregoing climate and circumstances Republic of Palau Public Law #2-30 was passed by the legislature was signed into law by President Salii on July 19, 1987. Pursuant to its provisions the referendum on the Amendment to the Constitution, which purported to amend the constitution so as to allow the

Compact to be adopted by a 50% vote of those voting (thereby altering the constitutional requirement of 75%) was to be held on August 4, 1987.

The sixth vote on the Compact was to be held on August 21, 1987 in the event the proposed amendment was adopted on August 4th by a majority vote in three-quarters of the States.

These two events took place as scheduled. On August 12, 1987 President Salii issued Proclamation #40-87 announcing the results of the constitutional amendment:

"yes"	5,645	73.33%
"no"	2,053	26.67%

The proposed amendment to the constitution had passed. On the 21st of August the Palauan People voted for the sixth time on the Compact. The President on August 29, 1987 by Proclamation #40-87 announced the results:

"yes"	5,964	73.04%
"no"	2,201	26.96%

The Compact had been approved since it received a "majority", (more than 50%) vote in favor. President Salii certified the results to President Reagan who later gave his affirmative sanction and sent the Compact to the United States Congress for approval.

D. Legal Challenges to the Validity of the Legislation Authorizing the Amendment Referendum and the 5th Compact Referendum.

Prior to the August 4th referendum and on July 29, 1987, in

a case known as Merep et al. vs. Salii, et al. (Civil Action 139-87) a complaint was filed in the Supreme Court of Palau requesting:

1. A Declaratory Judgment that RPPL-2-30 authorizing the amendment referendum was null and void and unconstitutional; and

2. For a preliminary and permanent injunction enjoining the government from carrying out its August 4th votes and August.

A hearing was held on August 18, 1987 on the plaintiff's motion for a temporary injunction to restrain the carrying out of the referendum of August 21, 1987. The hearing was heard before Chief Justice Nakamura who refused to enjoin the plebescite itself. However, he enjoined the tabulation of the voting until the Full Court could consider the constitutional issues involved in the plaintiffs challenge.

This decision angered, not only the Palauan administration, but also some of the legislators, representatives of a number of States, and more importantly the Furloughed Workers Committee which immediately launched an organized attack against the Chief Justice.

1. On August 19, 1987, the next day at noon a letter signed by members of the Legislature was hand-delivered at his residence accusing him of being:

a. "politically whitewashed",

b. "involved in conflicts of interest",

c. "biased",

d. the letter also called into question the Chief

Justice's integrity, and demanded his disqualification.

On the same day, August 19, 1987 the Furloughed Government Employees Committee presented a petition signed by its members urging the Chief Justice;

a. to reverse himself,

b. threatened him with removal, and

c. accusing him of unethical conduct, etc.

Also on the same day, August 19, 1987, prominent members of the Palau National Congress sent another letter to Lazarus E. Salii, President of the Republic, urging him to become actively involved in reversing a decision rendered by the Supreme Court enjoining the tabulation of votes.

This letter, among other things, accused the Chief Justice of being "highly politically motivated"; it accused the Chief Justice of a conflict of interest, stating that the "Chief Justice's brothers are over-zealous opponents of the Compact of Free Association"; and accused the Chief Justice of impropriety because a relationship "exists between the Chief Justice's spouse and her uncle the Ibedul, who has continuously stood in the way of a Compact of Free Association." The letter goes on to state that the Chief Justice should divorce himself from the case and allow his associates to hear the same. Furthermore, it accused the Chief Justice of having "knowingly and willingly plunged the judiciary branch into the political arena."

Because we consider these actions a gross interference with the independence of the Judiciary, we have chose to reprint the

letters in full. (See Appendix ii, iii, iv)

Moreover, two subsequent events disturb us markedly:

a. On August, 1988 the Chief Justice reversed himself and denied the motion for a preliminary injunction in full, and

b. On August 25, 1987 the Chief Justice recused himself from the case and appointed Judge Hefner, an Associate Judge of the Supreme Court of Palau, a resident of Saipan, to sit in his place.

A hearing of this suit never took place for on August 28, 1987 the case was "settled" and, at that time, all constitutional objections to the August Referendum were, for a moment, put to rest.

On August 29, 1987, the Ibedul (Paramount Chief) addressed the nation that he had made a satisfactory arrangement with President Salii whereby President Salii agreed to designate the Council of Chiefs of Palau, headed by the Ibedul, to be charged with "the responsibility of considering all requests by the United States government for land use rights within the Republic of Palau pursuant to the Compact of Free Association."

In return for this arrangement the Ibedul agreed to cause the Merep case to be dismissed (although he was not a formal party in the lawsuit) thereby agreeing to withdraw all pending constitutional challenges to the August referendums.

E. Palaun Citizens Are Denied Access To Their Legal Institutions

Although all was seemingly quiet, all did not end. When the news broke that the Ibedul had settled his action, an important segment of Palaun Society took great exception. The women of Palau regarded the settlement as a "sell out." Palau traditionally is a matrilineal society. The women elders elect the chiefs and their processes have worked for the Palauans for centuries. The women, through their leaders, notably Gabriela Ngirmang, Tosie Keldermans, Rafaela Sumang and others immediately filed a similar challenge to the constitutionality of the August referenda.

Their case, known as Ngirmang, et al. vs. Salii (Civil Action #161-87) was filed on August 31, 1988, just two days after the settlement of Merep.

The pleadings in the action essentially repeated, almost word for word, the allegations of Merep.

All of the plaintiffs signed the complaint in person and because of their inability to retain counsel they acted "pro se" i.e.: on their own behalf.

On September 1st at 5:00 p.m., the government filed a Motion to Dismiss the suit alleging res judicata (citing Merep and other points). A hearing was set for September 8th at 2:00 p.m. before Judge Hefner.

The events which occurred between August 1, 1987 and September 8, 1987 spell out a series of threats, acts of violence, crimes and intimidations of the utmost gravity for a civilized country.

1. On September 3, 1987 Mr. Joel Toribiong issued a statement on behalf of the Government of Palau warning the plaintiffs that the Government would take every action to support the Compact.

2. On September 4, 1987, a Government employee named Nazario Tellames, driving a government vehicle arrived at the home of Roman Bedor, a prominent lawyer who had represented the Plaintiffs in Merep and proceeded to cut his power lines. When intercepted, Tellames said that he had been given a list of homes to cut lines.

3. One hour later, on September 4, 1987, the same Tellames went to the home of Tosie Keldermans, a plaintiff in the last mentioned case (Ngirmang et al vs. Salii), and cut her power lines while she was cooking dinner.

4. On September 5, 1987, the Speaker of the House of Delegates returned from Guam where he had fled for a month as a result of threats to himself and his family. At 11:00 p.m. that evening a "red sedan" passed his house in which was a person indiscriminately firing shots in the air. One hour later, the same car returned and more shots were fired in a passby.

5. On September 6, 1987, a "red sedan", apparently the same, passed by the house of plaintiff Rafaela Sumang and several shots were fired in the air over her house.

6. On September 7, 1987, the day before the scheduled hearing before Judge Hefner, Rafaela Sumang and Gabriela Ngirmang requested police protection from Thomas O. Remengesau, Minister

of Justice and Vice President of Palau. The request was refused.

Later that night the electric power on Koror was cut off and a fire bomb was exploded outside the home of plaintiff Gabriela Noirmang and the Abai Ra Metal night club was bombed.

7. The murder of the father of plaintiff Tosie Keldermans occurred on the same evening. The father had gone to the law office of his son, Roman Bedor, for a flashlight. When he came to the door he was shot twice by a man described as having a white mask over his head. Roman Bedor told us he saw a "red sedan" leaving and that his father told him there were two people involved in the shooting. The elder Bedor died later at the local hospital.

8. We interviewed eighteen of the women plaintiffs who graphically described the events leading to the hearing before Judge Hefner on September 8, 1987. Some of the points made to us were as follows:

a. Threats began immediately after the suit was filed on August 30, 1988.

b. All plaintiffs were approached by people who asked them to withdraw the suit, threatening them with "bombings", "shootings", "bloodshed" to those who go to the court on September 8, 1987.

c. The government controlled radio station referred constantly to those who were destroying the country by going to the courts.

d. One of the plaintiffs described a visit by a Mr. Orak who several times told her: "If you don't withdraw your name on Monday there will be shooting and bloodshed all over Koror". He continued "You will get hurt if you do not withdraw. The women in the lawsuit will be first killed. I am not lying because I am there at the Furlough Committee office and I hear them talking."

e. Gabriela Ngirmang described a visit to her home by the Ibedul himself, pleading with her to withdraw the suit "because it was dangerous."

And so the stage was set for the hearing before Judge Hefner at 2:30 p.m. on September 8, 1987. In sum:

* The father of a main plaintiff had been murdered.
* The house of a main plaintiff had been fire bombed.
* All or at least the overwhelming majority of the plaintiffs had been threatened with violence.
* The homes of one plaintiff and the speaker of the House had been fired on.
* The power lines had been cut, putting Koror Island in total darkness.
* The government radio was continually airing warnings of a national disaster.
* The Furlough Committee had surrounded the Court wearing red head bands and demanding that the Court dismiss the case.

Only Rafaela Sumang appeared in court to file a petition for an adjournment to obtain counsel. She was given a Stipulation of Dismissal to sign. She thought it was for a postponement.

Judge Hefner became concerned. He said in court that he would not allow the dismissal to be filed unless it was personally signed by all plaintiffs in person.

Several persons, including policemen in police cars were then dispatched to the homes of the plaintiffs to obtain the necessary signatures. The plaintiffs told us they were given the alternative to "sign or else".

All twenty-two plaintiffs signed the stipulation and submitted it to Judge Hefner for approval. However, Judge Hefner

refused to sign the customary "so ordered" at the foot of the stipulation.

Instead he wrote the following opinion stating that there was evidence that the case had been withdrawn as a result of threats of violence. We feel that it is important to reprint his opinion in full.

> "There has been filed with the Court a Dismissal signed by all the Plaintiffs in this action. This Dismissal is pursuant to Civ. Pro. Rule 41(a)(1). Since no answer by the Defendants has been filed, Rule 41 does not require any Order of the Court and no Order shall be signed by the Court. With the filing of the Dismissal there is nothing before the Court nor is there any further action required or possible by the Court.
>
> However, in light of the circumstances of this case, the Court would be remiss if it did not add a footnote to the matter.
>
> There are indications in the record and in the proceedings in this matter that the Dismissal signed by Plaintiffs may not be voluntary. There are indications that the Dismissal was brought about by intimidation through the use of violence. This was manifested by a document signed and filed with the Court by two of the plaintiffs and, as demonstrated yesterday in Court, the failure of any of the twenty some plaintiffs to appear.
>
> The Court can not and does not make any finding whether in fact the Plaintiffs were actually intimidated. As said before, there are no further proceedings at this time before the Court. Should any of the Plaintiffs wish to have the Dismissal vacated later and the action reinstated, they may file the appropriate proceedings.
>
> But with this back drop and with the indication of intimidation in the record, the Court ponders on just what has been accomplished today. As the Court perceives it, there are three future events which can occur. In all three instances, the

Government of Palau notifies the United States that this case is dismissed and that the Compact has been approved pursuant to the constitutional process of the Republic.

In the first case, the United States accepts that proposition and implements the Compact and all the benefits, duties and responsibilities commence. No one files any more lawsuits testing the process by which the Compact was approved. Should that event occur, it will be up to the historians and political scientists to question the validity or invalidity of the act of implementation of the Compact, purely as an academic matter.

Under the second scenario, the United States does not accept the assertion of the Government of Palau that the Compact was approved pursuant to the Constitutional process. It would require more than the state of the record at this point.

The third event, is that tomorrow, next week,next year or whenever, some citizen or taxpayer of the Republic of Palau files yet another lawsuit contesting the constitutional amendment process which is used as a basis for the approval of the Compact.

Should either of the latter two events occur, it can be seen that little has been accomplished today. There is no final adjudication on the merits in this case and everyone is back at square one.

The courts are established to allow anyone to have their case heard and decided by an impartial tribunal. Even the so called little person or the underdog is entitled to have his/her day in Court no matter how unpopular is or her cause may be.

If, in this case, any one of the Plaintiffs has been denied that right, it is tragic.

If intimidation of the Plaintiffs has prevented the utilization of the doctrine due process then the citizens, the Government, counsel and this Court have nothing to be proud of, and the justice system has failed the plaintiffs.

Entered: 9/9/87

ROBERT A. HEFNER
Associate Justice"

We should add that when Judge Hefner left for the airport to return to Saipan on September 9, 1987, he was accompanied by a cadre of twelve policemen apparently because of the government's concern for his personal safety in light of what he had felt obliged to do and say.

VII

SOME CONCLUSIONS

1. Faced with conditions tantamount to economic bankruptcy, the resultant loss of jobs in the public sector which employees 60% of its workforce, Palauan Executive, Political and Judicial Institutions, for the period beginning in July 1987 to September 1987, were under such severe strain as to cause us to conclude that there existed a virtual breakdown of the Rule of Law during that period.

2. Even six months later, when the Mission visited Palau, we felt that there was ample evidence that the right of Palaun citizens to seek redress of their constitutional rights in the courts of Palau was at the very least, inhibited and in some instances prohibited by a climate of fear and intimidation originating from certain segments of Palauan society.

3. In the last eight years the Palauan people have had four referenda relating to their constitution which in 1979 they ratified by a 92% vote and six referenda on the Compact of Free Association with the U.S. All of the referenda of the Compact and two of the amendment referenda on the Constitution were apparently a result of sustained pressure on Palau by the Administering Power designed to persuade it to alter its constitution either to allow the United States to "store" nuclear weapons or, at a later stage, to "operate" ships and aircraft

with nuclear devices within the territorial jurisdiction of Palau.

4. The August 1987 referendum purporting to authorize, by an amendment to the constitution, a 50% vote on the Compact of Free Association raises serious, substantial and arguable questions of constitutionality which can only finally be passed upon by the Supreme Court of Palau.

5. Attempts by Palauan citizens to raise these questions have been thwarted in the first instance by a behind the scenes arrangement between top government officials and the litigants and in the second instance by threats of violence and intimidation against the plaintiffs. These acts, many of which were plainly criminal in nature included fire bombing, shooting at the homes of some of the plaintiffs, direct threats of violence to many of the plaintiffs, and the murder of the father of one of the main plaintiffs.

6. There has been an illegal and improper interference with and pressure upon the independence of the judiciary in that:

A. Members of the Legislature engaged in express threats to the Chief Justice;

B. Members of the Furlough Committee have filed a petition for the removal of the Chief Justice from a case;

C. A series of oral threats were made directly and indirectly to the members of the Judiciary of Palau and their families; and

D. An organized attempt to threaten the Judiciary by

surrounding the Supreme Court building with campers who wore "red bands" and who camouflaged a government truck to appear to be a coffin with words inscribed on it "red september".

7. Specifically we conclude that the withdrawal of this case entitled Ngirmang, et al. vs. Salii, et al. was involuntary. Such withdrawal was brought about by "intimidation through the use of violence" Accordingly we conclude that because substantial constitutional issues cannot be challenged and determined in Palauan courts, because of threats to litigants, lawyers and the Judiciary, there has been a breakdown of the Rule of Law in Palau.

8. It is our duty to report our conclusion that there is evidence of government complicity in many of the matters raised in this report that concludes:

* Constant and repeated public statements by government officials on the government controlled radio attacking or denigrating the Judiciary or referring to the "tyranny of the courts".

* Police participation or acquiescence in these events, by failing to maintain law and order, and by the failure of police and the Attorney General to pursue claims.

* Constant pressure on legitimate opposition, such as the threatening loss of jobs and assignment of opponents to uncomfortable shifts.

* Threats by police officials concerning the withdrawal of legal actions.

* Threats of the denial of scholarship to members of the families of those opposing the compact

* Sadly there are also serious allegations of corruption against prominent Palauans, which we consider it proper to mention but not elaborate. There were also many allegations of incompetence and waste, the use of government property for private purposes and alleged

bribes regarding the building of a power plant.

9. We conclude that the Eleventh Legislative Session of the National Congress of Palau of July 1987 was held in a climate of near hysteria; that Legislators were coerced into voting in favor of the bill authorizing the Amendment to the Constitution and approval of the Compact referenda of August 1987 and that such legislation did not freely reflect the considered political will of the Palauan National Congress, as the Constitution of Palau envisaged that it would be expressed.

10. We conclude that the Palauan Bar Association failed in its duty to maintain the Rule of Law when it knew, or should have known, that judges, lawyers and litigants were being threatened in their professional capacity. It should be pointed out that the brother of the President, Carlos Salii, is the President of the Palauan Bar Association.

INDEPENDENCE OF THE JUDICIARY AND THE LEGAL PROFESSION

11. The constitution of the Republic of Palau establishes an independent judiciary. There is much evidence that the Supreme Court of Palau has exercised its independence and in numerous suits reversed the acts of legislative and executive branches of government when the constitution or law of Palau was held to so require.

12. The justices of the Supreme Court are sufficiently alert to the challenges to their independence and to the operation of

the Rule of Law in Palau whilst at the same time sensitive to the lack of understanding, in some quarters including in the government, of the vital importance, for the long term welfare of Palau, of adherence to constitutional processes and compliance with legal forms.

13. Proof positive of the independence of the justices of the Supreme Court can be found not only in the history of governmental litigation generally. It can be found in many decisions associated with the constitutional evolution of Palau. Most notable of these have been the judgments in Gibbons vs. Remeliik and Gibbons vs. Salii and the very observations of Judge Hefner in Ngirmang vs. Salii which contributed to the reason for this Mission.

14. The current circumstances in Palau make it more important than ever that the judicial branch of government be supported by the citizens and by all those having it in their power to lend support. The reasons include not only the fine principle of the Rule of Law as the best guarantee of freedom and the defense of human rights. They extend beyond the vital importance of constitutionality at this critical stage of transition in the evolution of Palau to full independence in the community of nations. They concern the very practical problems of everyday importance to Palau and its people: the growth of higher levels of violence, the evidence of social disruption, new problems involving narcotic drugs and the breakdown of the effectiveness of traditional authority. These problems, and the

need for a strong judicial branch of government to deal with them, is appreciated by many in responsible positions in Palau. It is certainly appreciated by the judiciary. But it is not appreciated by all.

15. Unprecedented and unacceptable pressure - and the public appearance of pressure - was placed upon the Supreme Court of Palau during the third quarter of 1987. It took the form of petitions to the Chief Justice threatening his removal if he did not decide a constitutional case before him in a designated way; letters to him by members of the legislature expressed in intimidating language designed to influence his performance of his judicial duties; and the gathering of large and violent crowds in the vicinity of his courthouse. Peaceful demonstration of a point of view is a mark of a free society. Mob rule around the courts, with threats to the judiciary, and to litigants is the very negation of freedom under law. It is vital that the government and citizens of Palau - and all others watching these events - should realize this. What is at stake is not just the wish of the people, democratically elected. It is nothing less than the right of litigants to test the compliance of that democratic expression against the requirements of the people's constitution and the entitlement of the judiciary to determine that question. If legal processes break down once, a dangerous precedent is set - and the rule of violence, intimidation and oppression replaces the Rule of Law.

16. In the sequence of events disclosed in this report there

is a possible appearance that Chief Justice Nakamura yielded to that pressure. He made an order which was unpopular. Yet within a very short time of doing so he vacated that order and revoked it and soon after disqualified himself. He did so, as is publicly known, after the receipt of intimidating letters and a petition threatening his removal. In these circumstances, the appearance of the independence of the judiciary was damaged. The blame for this fact must be placed principally at the door of those persons responsible who publicly or otherwise threatened the Chief Justice. We do not say that the Chief Justice was actually intimidated. But damage can be done by the appearances of intimidation and the appearance of yielding to pressure. The question is what reasonable observers of these events would infer from them and the conclusions they might draw concerning the independence of the Supreme Court of Palau.

17. The Mission was greatly impressed by the insight of the Justices of the Supreme Court of Palau into the important principles at stake here, vital for the well being of the people of Palau. The assignment of the litigation to Judge Hefner and his memorandum referring to possible intimidation is proof, if it be needed, of the independence and courage of the Justices. It would be a misfortune if it were considered necessary or even desirable in such sensitive situations, always to resort to off island judges of non Palauan origin. For the survival of the Rule of Law in Palau in the long term, it is essential that such independence be demonstrated, repeatedly, by indigenous judges in

Palau. The rule of Law is most important when it is most severely tested.

18. Statements were made to the Mission, which it also accepts and finds believable, that the litigants before the Supreme Court in the cases designed to test the constitutionality of the amendment for the purpose of adopting the compact, were intimidated and discontinued those proceedings out of fear. The Ibedul who was believed by many to be supporting the litigation in the Merep case was afraid of the breakdown of law and order and had himself been the subject of thinly veiled threats. The Palauan women who then brought a case in virtually identical terms were then submitted to unprecedented coercion in order to dissuade them from exercising their constitutional rights before the Supreme Court of Palau. The coercion is fully set out above. But in summary it included:

* Fire bombing of houses.
* The interruption to the power supply.
* The gathering of violent demonstrations in the vicinity of the courthouse and legislature.
* The actions of the demonstrators in assuming the wearing of read headbands and in painting a van used by them with threatening slogans.
* Murder of the father of one of the plaintiffs serious escalation of violence and the outcome of a period of mob rule.
* The executive brance of government including the police were either unable or unwilling to provide security to the litigants to defend their right to litigate a serious constitutional question in the Supreme Court.
* Individual threats were addressed to the Palauan women who brought a case in the Supreme Court as well as to

their families as recounted to the Mission and set out in this report.

19. It is not necessary for the Mission to judge - nor would it be appropriate - whether the Palauan women have a valid claim under the constitution of Palau to challenge the purported constitutional amendment preliminary to the execution of the Compact. Nor is the Mission concerned with the validity of those amendments, the application of customary law to the conduct of the women, the application of the principles of res judicata or the availability of defenses of accord and settlement. These are entirely matters for the Palauan courts. Nothing in this report should be read as expressing a view or any of these questions. It is sufficient for the purposes of the Mission to say that a serious constitutional question, which was arguable, was raised by the suit of the Palauan women. They should have been allowed to bring it and have it peacefully resolved in a court room. Instead they were coerced into seeking an adjournment or a discontinuance of it. That coercion undermines the Rule of Law in Palau and the appearance of the independence of the Palauan courts to resolve serious questions according to law.

20. In addition to the pressure applied to the judiciary, legislators and litigants, improper pressure was also applied to some members of the legal profession known to be concerned in the prosecution of the constitutional litigators. One of them, Roman Bidor, was the son of the man murdered and it was in his office that the murder occurred. Cars were damaged by the smashing of

the front windows. The response of the Bar Association to these shocking events was, it must be said, inadequate. Instead of rallying in a single voice to denounce these assaults on the Rule of Law and the intimidation of the Judiciary and colleagues it was decided instead to seek advice from the American Bar Association on what should have been obvious to any lawyer. Unless lawyers rally around and together defend the Rule of Law, the judiciary and constitutional institutions, they abandon their historical role. This includes, ultimately, putting individual interests aside and even the interests of particular clients aside when the very institutions by which those interests are safeguarded are under siege. In the unhappy event of a repetition challenge it is hoped that the Bar Association will show more resolve.

21. Individual lawyers have done things which appear to the Mission incompatible with respect for the judiciary and the Rule of Law. For example, it would seem quite wrong for the lawyer for the Furlough Committee to have participated in the writing of the August 19th Petition threatening the Chief Justice. Whatever the motives - which the Mission has no prerogative to judge - it would seem inconsistent with a lawyer's cardinal duty to be involved in such an act or thereafter to participate in steps intermeddling in private litigation, involving the women plaintiffs, designed to effect the discontinuance or adjournment of their proceedings which were lawfully before the court, and to secure their termination out of fear.

VII

RECOMMENDATIONS

1. The Administering Power (the United States) should use its power and lend the efforts of its institutions (in every constitutional and proper way) to ensure that the Rule of Law is observed in Palau so long as the Administering Power has duties as a Trustee. In the long run, leaving the people of Palau independent but without respect for their constitutional institutions will not only be a rejection of United States' own concern about the government by laws and not-of men, but it will be an abdication of the trust accepted by the United States from the United Nations after the sacrifices of the Second World War.

2. The trusteeship should not be terminated by the United States and the United Nations until the constitutional processes of Palau to review a challenge to the Compact of Free Association have been fully exhausted. This will not be shown by a certificate by the Executive Government of Palau, which is not conclusive. Nor will it be shown by a certificate of the President of the United States, no doubt based on reliance upon the former. It will only be demonstrated conclusively by an authoritative decision of the only body able to give such a decision - the Supreme Court of Palau. The United States is on notice by this report and otherwise that a serious constitutional question remains to be tested and that by force, intimidation,

violence and even murder, litigation designed to raise and determine that question have been forestalled. In discharge of its remaining duties as trustee - and in the strong tradition of constitutionality which has marked its own history -the United States of America should ensure that a test case is peacefully determined in the Court of Palau before terminating the trusteeship.

3. If the women plaintiffs - despite fears which the Mission accepts to be both sincere and well founded - decide to bring a suit or to continue their adjourned proceedings the Government of Palau should likewise provide effective protection to them to ensure that they can secure a decision in their case according to law. The Government of Palau should ensure that the judiciary, lawyers and litigants are protected fully in the discharge of their respective functions.

4. The appropriate Palauan authorities should, without delay, investigate and prosecute those responsible for the murder, acts of violence, illegal possession of firearms, and other criminal violations set forth in this report.

5. Because the successful implementation of the Rule of Law and the Constitutional Process requires an informed citizenry, we urge Palauan political leaders to take all steps necessary to educate and inform the Palauan society on the need for an independent Judiciary and on the rights of citizens guaranteed them by their constitution.

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MEMORANDUM

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Australian Law Commission

Appendix 1

Judge George C. Edwards, Senior Judge on the United States Court of Appeals for the 6th Circuit. Judge Edwards has served on this court since 1963 and was Chief Judge from 1979 to 1985. In addition, he has served as a Justice of the Supreme Court of Michigan, as Commissioner of the Police Department of Detroit, Michigan, and as Chairman of the Committee on the Administration of Criminal Laws of the U.S. Judicial Conference.

3. Dates of Mission:

Jan. 17th to Jan. 23rd, 1988.

4. Ordre de Mission:

To inquire into the functioning of the Rule of Law in Palau with particular reference to:

A. The Independence of the Judiciary and the Legal Profession

B. The Rights of Palauan citizens to commence and maintain legal process in the courts of Palau, and

C. The rights of Palauan citizens to raise and have adjudicated alleged violations of constitutional rights guaranteed them by the law of Palau

and to report the findings and recommendations of the Mission to the International Commission of Jurists in Geneva.

5. It is hoped that the usual courtesies will be extended to the distinguished members of the mission by:

i. The Government of Palau and its executive officers, including the Minister of Justice.

ii. The Chief Justice and other members of The Supreme Court of Palau and other courts or record.

iii. The Local Palauan Bar Association

iv. Representations of U.S. entities, such as
- The Department of the Interior
- The Department of State
- The committees of Congress interested in this matter, including the House Foreign Affairs Committee, and
- The Committee on Interior and Insular Affairs

v. The Trusteeship Council of the United Nations and its "U.N. Special Committee on Decolonialization; Subcommittee on Small Territories."

vi. Interested citizens of Palau who may wish to give testimony pertaining to the facts and circumstances relative to this Inquiry.

Second Olbiil Era Kelulau

(PALAU NATIONAL CONGRESS)

P.O. BOX 8, KOROR
REPUBLIC OF PALAU
96940

PHONE: 587/488

Received
8/19/87 CT
noon - Delivered
to residence

August 19, 1987
SP: 1268

The Honorable Mamoru Nakamura
Chief Justice of the Supreme Court
The Judiciary
Koror, Republic of Palau 96940

Dear Chief Justice Nakamura:

We, the undersigned members of the Second Olbiil Era Kelulau, are writing to express our intense disappointment and strong disagreement over the decision you rendered yesterday on Civil Action No. 139-87. We are specifically displeased with the second part of that decision which delays indefinitely the tabulation of the results of the upcoming August 21 referendum on the Compact of Free Association.

First of all, RPPL 2-30, Section 3(13) requires the Election Commissioner to certify the results of the referendum "no longer than ten (10) days after the day of the Compact Referendum." The Chief Justice, nor anyone else for that matter, cannot circumvent the clearly stated law. In the foregoing paragraph, we mentioned that the counting and tabulation of the referendum results will be delayed indefinitely, because there is no way of telling beforehand how long the pending lawsuit will take when it has run through its normal course of appeal and counter-appeals.

Second, we find the court ruling on the motion for temporary restraining order to be highly politically motivated, and accomplishes nothing to resolve existing economic and political problems that the people of Palau are suffering at the moment. It is no secret that all of your family, especially your brother Tosiwo Nakamura who is Assistant Administrative Officer for Koror State Government and a close ally of High

[redacted]

Chief Ibedul, and Senator Kuniwo Nakamura who is in politics, are overzealous opponents of the Compact of Free Association, not to mention the relationship that exists between your wife, Lillian Ruth Gibbons Nakamura, and her uncle Ibedul Yutaka M. Gibbons who has continuously stood in the way of the Compact of Free Association. Such relations should have constituted sufficient grounds for you to have disqualified yourself from hearing the case and allowing your associates to hear the same. Instead, however, you went ahead despite your better judgment and consequently have not only called into question your integrity as Chief Justice of the Supreme Court of this Republic, but also placed into political jeopardy the Judiciary Branch of our government.

Third, the court ruling will have a tremendous negative psychological effect on the people of Palau. As you know very well, politics in Palau has progressed to a fragile state where any small thing, however minor, can influence the people's attitude and affect the outcome of any vote. Thus, we believe that the people, knowing that the results of the upcoming referendum will not be counted for an uncertain period of time after the election day, might decide not to cast their votes in the false belief that the vote will not count after all. In this way, your decision has preempted some people from casting their votes and, in effect, has denied these people their right to exercise their freedom of choice by casting their votes without undue influence or coercion.

Based on the foregoing and other compelling reasons, notably our firm belief that as Chief Justice, you have knowingly and willingly plunged the Judiciary Branch beyond its judicial jurisdiction into the political arena, we strongly demand that you disqualify yourself and divorce yourself from this case any further. We normally demand your involvement in similar cases where questions on the Constitution arise, but where your familial sense of duty and obligations may create potential conflicts of interest, you should allow your better judgment to prevail.

Sincerely yours,

Joshua Koshiba
Senate President

Hideo Termeteet
Delegate

Itelbang Luii
Senator

J. Schwartz Tudong
Delegate

August 19, 1987

The Honorable Mamoru Nakamura
Chief Justice
Palau's Supreme Court
Koror, Republic of Palau

Dear Mr. Chief Justice:

The combined leadership of the several States of Palau, and the undersigned Governors on behalf of themselves and their state citizenry urge you to reconsider your decision relating to the injunction on the Compact Referendum vote tabulation. To allow the people to speak by way of their vote and not be heard by way of tabulation strikes us as a singularly inappropriate judicial act. The process the people of Palau are aware of and used to is that the court allows a vote and vote count, then if the court should determine an invalidity it voids the election. This process is understandable. The recent action has caused confusion, consternation and animosity. Nothing is lost to any of the parties nor are any issues in jeopardy by the court following its previous methodology. We urge you then to reconsider your actions and permit the Compact vote to be tabulated.

Sincerely yours,

Sebastiak Oikang, Governor
Kayangel State

Remoket Tarimel, Governor
Ngarchelong State

Martin Sokau, Speaker
Ngaraard State

Elia Tulop, Governor
Ngiwal State

Thomas Temel, Governor
Melekeok State

Moses Y. Uludong, Governor
Ngchesar State

Ersip Marino
Administrative Officer
Airai State

Esteban Augustine, Governor
Angaur State

John K. Yehaher, Governor
Ngardmau State

Takeo Towai, Speaker
Ngardmau State

Maidesil Rechuld, Governor
Ngeremlengui State

Ngiratkel Etpison, Governor
Ngatpang State

Simer Erlich, Governor
Aimeliik State

Louis O. Ngomaes, Speaker
Aimeliik State

Imarong Sysior, Governor
Peleliu State

Johnny Gibbons, Administrator
Koror State

Hakkons Baules
Senator

Lucius Malsol
Senator.

F. Kazuo Asanuma
Delegate.

AUG 19 BTD

Second Olbiil Era Kelulau

(PALAU NATIONAL CONGRESS)

PHONE: 587/455

P.O. BOX 8, KOROR
REPUBLIC OF PALAU
96940

THE SENATE
JOSHUA KOSHIBA
President
HARUO H. ESANG
Vice President
SEIT ANDRES
Floor Leader
GEORGE NGIRARSAOL
TOMMY E. REMENGESAU, JR.
SAM "YOYO" MASANG
NICHOLAS "NIKO" RECHEBEI
ISIDORO RUDIMCH
ITELBANG LUII
JOHN T. SUGIYAMA
HOKKONS BAULES
KUNIWO NAKAMURA
PETER E. SAOANG
LUCIUS "LAKIUS" MALSOL

HOUSE OF DELEGATES
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FLORENCIO YAMADA
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HIDEO TERMETEET
IGNACIO ANASTACIO
JOHNNY REKLAI
F. KAZUO ASANUMA
LAURENTINO ULECHONG
MINAMI UEKI
J. SCHWARTZ TUDONG
SURANGEL WHIPPS
TAKESHI KINTOL
THOMAS PATRIS

August 19, 1987
SP: 1269

The Honorable Lazarus E. Salii
President, Republic of Palau
Office of the President
Koror, Republic of Palau 96940

Dear Mr. President:

We are writing you to strongly urge that your office immediately appeal the court decision rendered yesterday on Civil Action No. 139-87. We are specifically interested in the second part of that decision which delays indefinitely the tabulation of the results of the upcoming August 21 referendum on the Compact of Free Association.

First of all, RPPL 2-30, Section 3(13) requires the Election Commissioner to certify the results of the referendum "no longer than ten (10) days after the day of the Compact Referendum." The Chief Justice, nor anyone else for that matter, cannot circumvent the clearly stated law. In the foregoing paragraph, we mentioned that the counting and tabulation of the referendum results will be delayed indefinitely, because there is no way of telling beforehand how long the pending lawsuit will take when it has run through its normal course of appeal and counter-appeals.

Secondly, we find the court ruling on the motion for temporary restraining order to be highly politically motivated, and accomplishes nothing to resolve existing economic and political problems that the people of Palau are suffering at the moment. It is no secret that all of the Chief Justice's brothers are overzealous opponents of the Compact of Free Association, not to mention the relationship that exists between the Chief Justice's spouse and her uncle Ibedul who has continuously stood in the way of the Compact

[redacted]

of Free Association. Such relations should have been sufficient grounds for the Chief Justice to divorce himself from the case and allow his associates to hear the same.

Finally, the court ruling will have a tremendous negative psychological effect on the people of Palau. As you know very well, politics in Palau has progressed to a fragile state where any small thing, however minor, can influence the people's attitude and affect the outcome of any vote. Thus, we believe that the people, knowing that the results of the upcoming referendum will not be counted for an uncertain period of time after the election day, might decide not to cast their votes in the false belief that the vote will not count after all. In this way, the decision has preempted some people from casting their votes and, in effect, has denied these people their right to exercise their freedom of choice by casting their votes without undue influence or coercion.

Based on the foregoing and other compelling reasons, notably our firm belief that the Chief Justice has knowingly and willingly plunged the Judiciary Branch into the political arena, we again strongly recommend and urge that your office take immediate action to appeal the above mentioned case.

Sincerely yours,

Joshua Koshiba
Senate President

Itelbang Luii
Senator

Hokkons Baules
Senator

Lucius Marsol
Senator

Hideo Termeteet
Delegate

J. Schwartz Tudong
Delegate

Fr. Kazuo Asanuma
Delegate

Nicholas Rechebei
Senator

PETITION

We, the undersigned members of the "Furloughed Government Employees, in exercise of our constitutional rights, do hereby plead with you, Mamoru Nakamura, Chief Justice of the Republic of Palau Supreme Court, as follows:

1. You must consciously overturn and reverse your recently-rendered decision in Civil Action No. 139-87 which , although denied Plaintiffs' Motion for Preliminary Injunction, it in effect impounded tabulation of the forthcoming August 21, 1987 Compact Referendum pending the outcome of the trial on the merits of said case.

2. As a Palauan citizen holding the only key available to the resolution of our plight and in support of our cause at this time, you must look into your Belauan conscience and heart and direct your humane reactions toward the will of the majority.

3. As an attorney-at-law and holding the highest judicial position in our court system at this time, you have the ethical duty to set aside your personal philosophies, political temptations and other non-ethical course of actions and render your decision based on applicable and pertinent laws.

4. Having reviewed, analyzed and consulted appropriate authorities on your referenced court decision, we are left with no other reasons but to arrive at an inescapable conclusion that your herein-referenced decision is without legal basis; without legal authorities; without legal justification; unconscionable and is politically-tained.

Accordingly, we hereby demand from you the following:

(a) You must consciously reconsider your referenced decision and do all you can to lift the impounding of the forthcoming Referendum's tabulation of ballots prior to August 21, 1987.

(b) Should you fail to comply with this Petition, you will leave us with no other alternative but to immediately take the necessary steps and actions to remove you from your judicial position.

SO PLEADED ON THIS 19th DAY OF AUGUST, 1987.

UMETARU, Steve

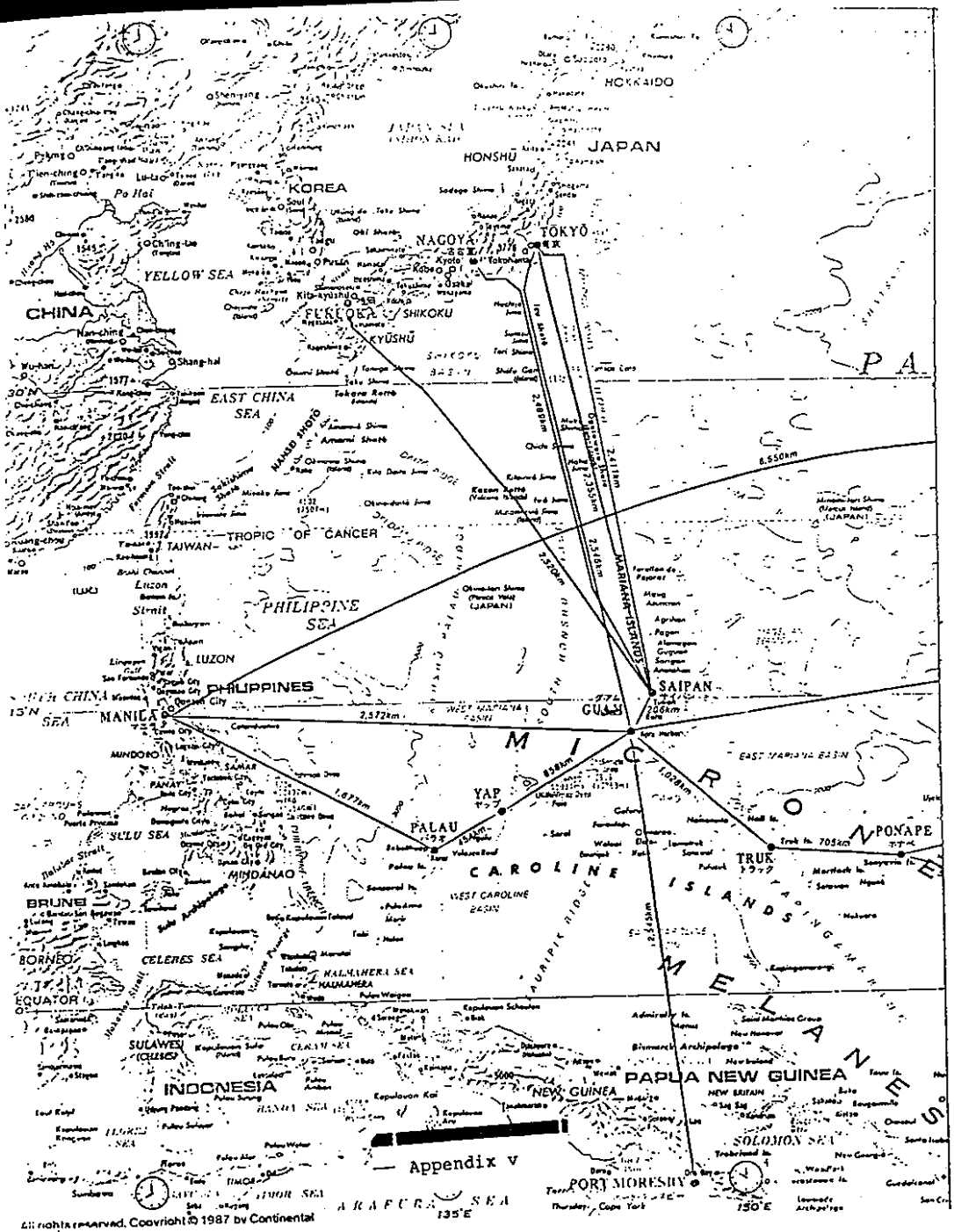
Paul W. Ueki

Raymond K

ALEXANDER Ngirmesik

[redacted]

— Appendix iv



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RAJSOOMER LALLAH — Judge of the Supreme Court, Mauritius
J.R.W.S. MAWALLA — Advocate of the High Court, Tanzania
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NGO BA THANH — Member of National Assembly, Vietnam
TORKEL OPSAHL — Professor of Law, Oslo; former Member of European Commission and UN Human Rights Committee
DORAB PATEL — Former Supreme Court Judge, Pakistan
SIR GUY ROWLES — Former Ombudsman, New Zealand
NICOLE QUESTIAUX — Member, Council of State of France; former Minister of State
ADELA.RETA SOSA DIAZ — Pres., Criminal Law Institute; Minister, Uruguay Gov't
MARY ROBINSON — Advocate; Member of Irish Senate
LORD SCARMAN — Former Lord of Appeal in Ordinary and Chairman, Law Commission
TUN MOHAMED SUFFIAN — Former Lord President, Federal Court of Malaysia
SIR MOTI TIKARAM — Former Judge and Ombudsman, Fiji
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J. THIAM HIEN YAP, Indonesia

SECRETARY-GENERAL

NIALL MACDERMOT

ABOUT THE AUTHORS:

WILLIAM J. BUTLER, ESQ. is Chairman of the Executive Committee of the International Commission of Jurists in Geneva and President of its American section. He has led human rights missions to South Korea, the Philippines, Iran, Uruguay, Nicaragua, and Guatemala. He is the author of "The Decline of Democracy in the Philippines", "Human Rights in Iran", "Human Rights, United Kingdom Foreign Policy" and "Guatemala: A New Beginning" and numerous articles on the implementation of human rights. Mr. Butler is a practicing lawyer in New York and a member of the Council on Foreign Relations.

THE HONORABLE GEORGE C. EDWARDS is a Senior Judge on the United States Court of Appeals for the 6th Circuit. He has served on the Court since 1963, and was Chief Judge from 1979 to 1985. In addition, he has served as a Justice of the Supreme Court of Michigan, The Commissioner of Police of Detroit, and the Chairman of the Committee on the Administration of Criminal Laws of the U.S. Judicial Conference. He is the author of "The Police on the Urban Frontier", "The Law of Criminal Correction" (with others), and "Pioneer-at-Law."

THE HONORABLE MICHAEL D. KIRBY, C.M.G., a Commissioner of the International Commission of Jurists, is President of the Court of Appeal of the Supreme Court of New South Wales, Australia. He was between 1975 and 1983 the foundation Chairman of the Australia Law Reform Commission. He has held Federal Judicial Office in Australia between 1975 and 1984, being a Deputy President of the Australian Coalition and Arbitration Commission between 1975 and 1983 and a Judge of the Federal Work Australia from 1983 to 1984. In 1984 he was appointed to his present judicial post. He is the author of a number of texts, including "The Judges", 1985 (the ABC Boyer Lectures). He is also Chancellor of Macquane University in Sydney, Australia.

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