Inter-American Commission on Human Rights

PEDRO ROSELLÓ ET AL
(Petitioners)

Vs.

UNITED STATES
(State)

Case No. 13.326

Written comments of

AMICUS CURIAE

Presented by

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I. Statement of Interest

The International Human Rights Clinic, of the Inter-American University of Puerto Rico, School of Law (hereafter, "Clinic"), respectfully submits this *Amicus Curiae brief* for the consideration of the Inter-American Commission of Human Rights ("IACHR or Commission") in the Case of *Pedro Roselló, et. al. vs. United States*, according to the Rules of Procedure of the IACHR.

The Clinic works in collaboration with local and regional partners, providing free legal representation to victims of human rights violations before regional and international human rights judicial systems. The Clinic has previously filed amicus briefs before the Inter-American Court of Human Rights, and engages in active legal advocacy at the United Nations human rights system. The Clinic has extensive experience addressing complex human rights issues affecting the greater Caribbean region, which shares a distinct context of colonial history, racial discrimination and limited civil and political autonomy.

Amicus files this brief to address fundamental human rights aspects that have not been properly addressed by the parties and amici in the case, and that have broader implications for the American region. The Clinic specially focused its research on the applicable international human rights norms on self-determination and decolonization procedures, which are at the core of centuries of human rights violations occurring in Puerto Rico and other island-nations in the Caribbean.

II. Summary

Residents of Puerto Rico are not allowed to vote in US Presidential or congressional elections. This is an undeniable fact. However, an isolated analysis of this reality, without proper

consideration of the applicable international norms regarding the right to self-determination, may lead to incorrect conclusions.

Petitioners argue that this is a case of minority rights, and that prohibiting participation in federal elections amounts to discriminatory treatment against a specific minority within the United States. The basic allegation is that residents of Puerto Rico are US citizens who are being denied access to the full range of rights recognized to US citizens in the states of the union. It then asks the Inter-American Commission to determine that residents in Puerto Rico should have the right to participate in federal elections. Although this conclusion may seem logical and concomitant with the American Declaration's right to political participation (Art. XX), it could also induce a forced change in the political relationship between two nations. Amicus ask the Commission to exercise caution in its analysis, giving due consideration to specific applicable international norms, particularly the people's right to self-determination as recognized under common Article I of the ICCPR and ICESCR.

The Inter-American Commission should not ignore that Puerto Rico has never been duly allowed to determine its political future and that the territory's lack of political power stems from the fact that the United States has exercised control over Puerto Rico for over 120 years. This is not the first time that this issue has been scrutinized by an international organ. In fact, the question of Puerto Rico's political status has been under review by United Nations' Special Committee on Decolonization since 1972. The Special Committee on Decolonization has repeatedly recognized Puerto Rico's status as a 'people' with the right to self-determination. As this *Amicus* brief analyzes in detail, by attempting to identify Puerto Rico as a 'minority' and not as a 'people', the petition before this Commission goes against decades of international law and doctrine on the right to decolonization.

The human rights violations being alleged by Petitioners under the American Declaration correspond to general categories of rights to which everyone is individually entitled. However, the case of Puerto Rico involves a specific category of rights that is only available to groups recognized as peoples under international law. Namely, the collective right to self-determination. This is a right that is not available to individuals or other groups, such as minorities. The Commission should apply the maxim *lex specialis,* understanding that this particular case is regulated by the international right to self-determination, which also implies multiple violations to civil and political rights. The Commission should then conclude that the violation of the right to political participation stems from a more profound and fundamental violation– the United States' refusal to decolonize Puerto Rico and allow for the exercise of its right to self-determination.

III. Contextual Background

Puerto Rico is a non-sovereign political entity that has been under the jurisdiction and control of the United States since 1898. During that time, the Puerto Rican government has acquired certain competencies but the fundamental colonial relationship between the United States and Puerto Rico has remained unchanged.

The relationship between the United States and Puerto Rico is defined by the former as being proprietary in nature. This has been the case since the beginning of the twentieth century when the US Supreme Court established that Puerto Rico 'belonged to, but was not a part of' the United States.[1] It was also established early on that pursuant to the US constitutional framework

[1] *Downes v. Bidwell*, 182 US 244, 341-342 (1901) ("The result of what has been said is that, while in an international sense Porto Rico [sic] was not a foreign country, since it was subject to the sovereignty of and was owned by the United States, it was foreign to the United States in a domestic sense, because the island had not been incorporated into the United States, but was merely appurtenant thereto as a possession.")

the United States enjoyed broad powers over Puerto Rico, exercised through the US Congress, its main legislative body.[2] The domestic legal doctrine concerning US possession and control over Puerto Rico has been consistently reaffirmed by the US Supreme Court on a number of occasions and in a variety of contexts. A recent notable example was *Commonwealth of Puerto Rico v. Sánchez Valle*, where the US Supreme Court addressed the question of whether the United States and Puerto Rico were considered separate sovereigns in the context of their power to prosecute crimes.[3] The Supreme Court concluded that Puerto Rico does not enjoy any sovereignty because the Puerto Rican government is, in its entirety, a product of US delegation of authority.[4]

Pursuant to this domestic legal doctrine, the US Congress has historically determined the structure and competencies of the Puerto Rican government. The first such instance was the Foraker Act[5] of 1900, an organic act passed by Congress in order to remake the government that existed in Puerto Rico prior to US occupation. Several important provisions contained in the Foraker Act are still in effect today. For example, the automatic extension of US federal law to

[2] The basis for congressional power over Puerto Rico stems from a provision in the US Constitution known as the 'Territorial Clause'. Article IV, Section 3, Clause 2. This provision also formalizes the possessive nature of the relationship between the United States and Puerto Rico. ("The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States[.]")

[3] *Commonwealth of Puerto Rico v. Sánchez Valle et al.*, 136 S.Ct. 1863 (2016).

[4] In reaching that conclusion, the Supreme Court reiterated that Puerto Rico's Constitution, approved in 1952, did not alter the fundamental relationship between the United States and Puerto Rico. See *Sánchez Valle* at pp. 1875-76. ("Congress […] authorized Puerto Rico's constitution-making process in the first instance; the people of a territory could not legally have initiated that process on their own. And Congress, in later legislation, both amended the draft charter and gave it the indispensable stamp of approval; popular ratification, however meaningful, could not have turned [Puerto Rico's] handiwork into law. Put simply, Congress conferred the authority to create the Puerto Rico Constitution […]. That makes Congress the original source of power […]. The island's Constitution, significant though it is, does not break the chain.").

[5] 31 Stat. 77 (1900).

Puerto Rico.[6] The second organic act, the Jones Act[7] of 1917, is best known for its imposition of US citizenship on Puerto Rican residents. In 1950, the US Congress passed Public Law 600[8] authorizing Puerto Rico to draft its own internal constitution but without recognizing the archipelago's sovereignty. Under the terms of Public Law 600, Congress reserved the right to approve the Puerto Rican Constitution prior to its entry into force.[9] It did so, albeit conditioned on the removal of a provision recognizing various human rights, including the rights to employment, food, housing, health care, social security, and the right of mothers and children to special care and assistance.[10] Congress also added a provision prohibiting certain future constitutional amendments, including any that would restore the previously-mentioned human rights.[11] These changes were incorporated and upon the adoption of Puerto Rico's Constitution in 1952, the remnants of the previous organic acts that were still in effect, such as the automatic application of US law to Puerto Rico, were renamed the Puerto Rican Federal Relations Act.

Puerto Rico's colonial status remains unchanged to this day. As a result, the archipelago continues to be subject to a substantial degree of intervention and in several cases outright control by the United States. The three branches of the US government (executive, legislative and judicial) have jurisdiction over Puerto Rico, and their institutions constitute an additional dimension of government within the archipelago. The United States exercises exclusive authority over areas,

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[6] *See* 48 USC § 734 ("The statutory laws of the United States not locally inapplicable, except as hereinbefore or hereinafter otherwise provided, shall have the same force and effect in Puerto Rico as in the United States, except the internal revenue laws[.]"). The phrase "not locally inapplicable" could be read as limiting the application of US law in principle, but it has never had any practical consequences. Efrén Rivera Ramos, 'Puerto Rico: Autonomy or colonial subordination?' in Y. Ghai and S. Woodman (eds.), *Practising Self-Government: A Comparative Study of Autonomous Regions* (Cambridge University Press, Cambridge, 2013), p. 100.

[7] 39 Stat. 951 (1917).

[8] 64 Stat. 319 (1950).

[9] *Id.* ("Upon approval by the Congress the constitution shall become effective in accordance with its terms.").

[10] These rights were originally included as Article II, Section 20 of the Puerto Rico Constitution.

[11] *See* Public Law 447, 66 Stat. 327 (1952).

such as monetary policy, nationality and immigration, bankruptcy, etc. In contrast, there are no areas of governance over which Puerto Rico exercises exclusive authority. This means that, at a minimum, the United States exercises concurrent authority over all areas of Puerto Rican life. As a result, issues of purely local importance, such as housing, education, agriculture, labor relations, and energy, among others, have become increasingly entangled with overlapping US legislation.

Additionally, these two dimensions of government do not operate on equal terms. The laws of the United States are supreme in Puerto Rico. Local laws and regulations are valid only if they do not conflict with US laws and regulations. In the case of any conflict, Puerto Rican authority is superseded by US law and must yield to the latter.[12] Even Puerto Rico's Constitution cannot conflict with any law, present or future, passed by the United States. For example, while the Puerto Rican Constitution prohibits capital punishment, the death penalty is still sought against Puerto Rican residents in US courts operating in Puerto Rico.[13]

Aside from the automatic application of US law, Congress can also legislate specifically for Puerto Rico. This was recently demonstrated by the United States' imposition of an unelected political body with sweeping powers. The Financial Oversight and Management Board of Puerto Rico (the "Board") was created by an act of Congress in 2016.[14] The Board is defined as an instrumentality of the Puerto Rican government, even though all seven members are appointed by

[12] United States Constitution, Article VI, Section 2 ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.")
[13] *Tribunal de Apelaciones de Boston ratifica decisión del juez Gustavo Gelpí en caso de pena de muerte*, El Nuevo Día, 11 March 2021, available at: https://www.elnuevodia.com/noticias/tribunales/notas/tribunal-de-apelaciones-de-boston-ratifica-decision-del-juez-gustavo-gelpi-en-caso-de-pena-de-muerte/ (Last accessed: 7 October 2021).
[14] Puerto Rico Oversight, Management, and Economic Stability Act (PROMESA), US Public Law 114-187, 30 June 2016, 48 USC 2101 *et seq.*

the President of the United States.[15] According to the law that created it, the Board was tasked with providing a method for Puerto Rico "to achieve fiscal responsibility and access to the capital markets" in response to increasing government debt.[16] The Board was given broad powers over Puerto Rico, which include the power to review, modify and ultimately approve the budgets of the Puerto Rican government and its individual agencies.[17] The Board also has the power to block laws passed by the Puerto Rican legislature if it understands they do not comply with Puerto Rico's Board-approved fiscal plans.[18] Since its creation, the Board has advocated for and implemented stringent austerity measures that have had a severe impact on Puerto Rican society.[19]

IV. Argument

A. The United States is in violation of Puerto Rico's right to self-determination.

1. Puerto Ricans constitute a 'people' under international law, not a 'minority'.

Decades of United Nations praxis have established that Puerto Ricans constitute a people under international law with the right to self-determination. By virtue of that right, the people of Puerto Rico are entitled to freely determine their political status and freely pursue their economic, social and cultural development. Being a beneficiary of the collective right to self-determination is a privileged position to occupy within international law. However, the petition before this

[15] PROMESA Sections 101(c) and 101(e), 48 USC 2121.
[16] PROMESA Section 101(a), 48 USC 2121.
[17] PROMESA Section 202, 48 USC 2142.
[18] PROMESA Section 204, 48 USC 2144.
[19] *See* "Puerto Rico's debt crisis: UN expert warns human rights cannot be side-lined by Juan Pablo Bohoslavsky, Independent Expert on the effects of foreign debt on human rights", OHCHR, 9 January 2017. Available at: https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=21060&LangID=E (Last accessed: 7 October 2021). *See also* IACHR, 157 Period of Sessions, Thematic Hearing "Public Debt, Fiscal Policy and Poverty in Puerto Rico", 4 April 2016; IACHR, 166 Period of Sessions, Thematic Hearing "Economic, Social, Cultural and Environmental Rights in Puerto Rico", 7 December 2017.

Commission seeks to deviate from this by attempting to recast the people of Puerto Rico not as a 'people', but as a 'minority' within the United States. That is the fundamental flaw in the Petitioners' argument. This is not to say that the United States is in compliance with its international obligations regarding Puerto Rico. Rather, the reality is that all of the specific violations the Petitioners have identified stem from a more profound and fundamental violation– the United States' refusal to decolonize Puerto Rico and allow for the exercise of its right to self-determination.

In order to frame the discussion on the rights of minorities, the United Nations has recognized that there are four sets of relevant rights. These are:

(a) the general human rights to which everyone is entitled;

(b) the additional rights specific to 'persons belonging to national or ethnic, religious or linguistic minorities';

(c) the special rights of 'indigenous peoples and individuals'; and

(d) the right to self-determination of 'peoples'.[20]

In other words, the rights of persons belonging to minorities and the right of peoples to self-determination are different categories of rights. Minority rights are individual rights, even if in most cases they can only be enjoyed in community with others. Minority protection is based on four requirements: protection of the existence, non-exclusion, non-discrimination and non-assimilation of the groups concerned. On the other hand, the right of peoples to self-determination is a collective right recognized by both treaty law and customary international law, which generally

[20] Working paper on the relationship and distinction between the rights of persons belonging to minorities and those of indigenous peoples, 19 July 2000, para. 2, UN Document Number: E/CN.4/Sub.2/2000/10.

does not apply to persons belonging to minorities.[21] Self-determination is of such fundamental importance that it has been described as a precondition for the genuine exercise of all other human rights and freedoms.[22]

While the issue of which collectivities may legitimately claim to be a people with the right to self-determination has sometimes been controversial, this is not the case with Puerto Rico. There is established consensus within the international community that the right applies to the populations of colonial and non-self-governing territories, as determined by the relevant organs of the United Nations.[23] Thus, the right to self-determination has primarily been recognized as a legal entitlement to decolonization.[24] And it is through the lens of decolonization that the case of Puerto Rico has been consistently viewed at the international level. In 1946, Puerto Rico was included as one of the initial seventy-four non-self-governing territories listed by the United Nations pursuant to Article 73 of the UN Charter.[25] Furthermore, the Special Committee on Decolonization recognized long ago "the inalienable right of the people of Puerto Rico to self-determination and independence" and has kept the question of Puerto Rico under continuous review for the past fifty years.[26] In its thirty-nine resolutions and/or decisions regarding Puerto Rico, which span from 1972 to the present, the Special Committee on Decolonization has repeatedly recognized Puerto Rico's

[21] Commentary of the Working Group on Minorities to the United Nations Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, 4 April 2005, para. 15, UN Document Number: E/CN.4/Sub.2/AC.5/2005/2.
[22] Héctor Gros Espiell, The Right to Self-Determination: Implementation of United Nations Resolutions (1980), para. 59, UN Document Number: E/CN.4/Sub.2/405/Rev.1.
[23] United Nations General Assembly Resolution 1541 (XV), *Principles which should guide Members in determining whether or not an obligation exists to transmit the information called for under Article 73e of the Charter* (15 December 1960).
[24] Antonio Cassese, Self-Determination of Peoples: A Legal Standard (1995), p. 65. *See also, Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276,* Advisory Opinion, ICJ Reports 1971; *Western Sahara,* Advisory Opinion, ICJ Reports 1975.
[25] United Nations General Assembly Resolution 66(I), *Transmission of Information under Article 73e of the Charter* (14 December 1946).
[26] Special Committee resolution of 28 August 1972 concerning Puerto Rico, A/AC.109/419.

status as a people with the right to self-determination.[27] Therefore, by attempting to identify Puerto Rico as a minority group and not a people, the petition before this Commission goes against decades of international law and doctrine on the right to decolonization.

Central to the Petitioners' claim that Puerto Rico constitutes an ethnic and linguistic minority, is the argument that it is a group that exists "within the United States".[28] Again, this statement lies in opposition to decades of established UN practice on self-determination and decolonization. The petitioners argue that Puerto Rico "belongs to and is part of the United States".[29] Viewing it from the perspective of individual rights, they claim that there are "no legitimate factual differences" between persons living in the United States and persons living in Puerto Rico.[30] However, having already established that Puerto Ricans are entitled to the collective right to self-determination, there is one glaring difference– the United States constitutes a sovereign people that have exercised their right to self-determination, while Puerto Rico constitutes a people that have not.

Because of the inherent abuses of colonialism, the international community has generally been weary of any attempts to blur the lines between a colony and a controlling state. In 1970, the United Nations General Assembly unanimously approved the 'Declaration on principles of international law concerning friendly relations and cooperation among states in accordance with

[27] *See* Special Committee decisions and resolutions concerning Puerto Rico: A/AC.109/419, A/AC.109/438, A/AC.109/574, A/AC.109/589, A/AC.109/628, A/AC.109/677, A/AC.109/707, A/AC.109/751, A/AC.109/798, A/AC.109/844, A/AC.109/883, A/AC.109/925, A/AC.109/973, A/AC.109/1013, A/AC.109/1051, A/AC.109/1088, A/AC.109/2131, A/AC.109/1999/28, A/AC.109/2000/24, A/AC.109/2001/22, A/AC.109/2002/22, A/AC.109/2003/22, A/AC.109/2004/L.7, A/AC.109/2005/L.7, A/AC.109/2006/L.7, A/AC.109/2007/L.7, A/AC.109/2008/L.7, A/AC.109/2009/L.7, A/AC.109/2010/L.8, A/AC.109/2011/L.6, A/AC.109/2012/L.7, A/AC.109/2013/L.6, A/AC.109/2014/L.6, A/AC.109/2015/L.6, A/AC.109/2016/L.6, A/AC.109/2017/L.12, A/AC.109/2018/L.7, A/AC.109/2019/L.7., and A/AC.109/2021/L.7.
[28] Petition, 17 October 2006, paras. 1 and 57.
[29] Petitioners' Observations Regarding the Merits of Their Case, 3 October 2017, p. 116.
[30] Petitioners' Observations Regarding the Merits of Their Case, 3 October 2017, p. 124.

the Charter of the United Nations'.[31] In the fifth principle of the Declaration, entitled 'The principle of equal rights and self-determination of peoples', the General Assembly reaffirmed the right of all peoples to freely determine their political status without external interference, and expressed the following with regard to the distinction between colonial peoples and the states that control them:

> The territory of a colony or other Non-Self-Governing Territory has, under the Charter, a status separate and distinct from the territory of the State administering it; and such separate and distinct status under the Charter shall exist until the people of the colony of Non-Self-Governing Territory have exercised their right of self-determination in accordance with the Charter, and particularly its purposes and principles.[32]

Thus, according to international law[33], Puerto Rico cannot be considered an integral part of the United States. Although international law is decisive on this point, it is also worth mentioning that even under the US domestic legal framework, Puerto Rico has never been considered an integral part of the United States. Since 1901, Puerto Rico has been defined by the US Supreme Court, not as part of the United States, but as an unincorporated possession.[34] It is for this reason that the Petitioners' reliance on this Commission's decision in *Statehood Solidarity Committee v. United States*[35] is inapposite. While the residents of Washington DC could

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[31] United Nations General Assembly Resolution 2625 (XXV), 24 October 1970.
[32] *Id*.
[33] General Assembly pronouncements do not automatically constitute binding law, but as will be discussed in the following section, several resolutions, most notably Resolution 1514 (XV) and Resolution 2625 (XXV), are considered cornerstones of the customary right to external self-determination. Customary international law confers a substantive legal right to external self-determination that is similar in scope and context to the right provided in the two International Covenants of 1966. *On this point, see* Antonio Cassese, Self-Determination of Peoples: A Legal Standard (1995), Chapters 4 and 7.
[34] *Downes v. Bidwell*, 182 US 244, 341-342 (1901). Much has been written on the United States' self-serving efforts to define its colonial relationship to Puerto Rico in a way that would affirm the distinction between the two entities while also allowing the US to maintain sovereignty over the archipelago. *See for example,* Christina Duffy Burnett and Burke Marshall (eds.), *Foreign in a Domestic Sense: Puerto Rico, American Expansion, and the Constitution* (2001).
[35] Report No. 98/03, Case 11.204, 29 December 2003.

reasonably be considered a geographically distinct group residing within the United States, the same cannot be said for Puerto Rico, a people under international law that live an ocean away.

2. The right to self-determination of peoples.

a) Self-determination is a fundamental human right.

Self-determination has evolved within international human rights law from a general principle into a positive legal right of peoples. Developments at both the regional and international levels have gradually broadened the scope of this right and have legitimized its application in different contexts.[36] As a result, there has always been some uncertainty on the fringes of the right regarding which groups may be its potential beneficiaries. However, as this section will establish, self-determination's original and most unequivocal legal expression is as an entitlement to decolonization. The right to self-determination of peoples was the engine of the post-war decolonization movement that flourished under the auspices of the United Nations.[37] During that time, the work of international bodies such as the United Nations General Assembly and the International Court of Justice continued to expound on the scope and content of the right. Today, self-determination constitutes a legal norm present in both treaty law and customary international law. It is considered an essential precondition for the genuine existence of all other rights and freedoms.[38] As an anti-colonial standard, self-determination has become firmly rooted among the

[36] For example, a distinction has been recognized with regard to external and internal self-determination. While *external* self-determination refers to the international status of a people and their territory, *internal* self-determination refers generally to the relationship between the inhabitants of a state and their government.
[37] Since the adoption of the UN Charter, around 70 former non-self-governing territories have achieved joint or separate independence. James R. Crawford, *The Creation of States in International Law* (2007), n. 82, p. 648.
[38] Gros Espiell, para. 59.

fundamental principles of international human rights law and, as many prominent scholars suggest, has risen to the level of *jus cogens*.[39]

The first mention of self-determination in a conventional international instrument occurred in the United Nations Charter of 1945.[40] It was not yet expressed as a legal right but rather as one of the guiding principles of the newfound organization. The most crucial provision in the Charter with regard to the eventual development of the right to self-determination was Article 73, located in Chapter XI: 'Declaration Regarding Non-Self-Governing Territories'. Without being expressly mentioned, the concept of self-determination was the basis for Article 73:

> Members of the United Nations which have or assume responsibilities for the administration of territories whose peoples have not yet attained a full measure of self-government recognize the principle that the interests of the inhabitants of these territories are paramount, and accept as a sacred trust the obligation to promote to the utmost, within the system of international peace and security established by the present Charter, the well-being of the inhabitants of these territories, and, to this end:
>
> a. to ensure, with due respect for the culture of the peoples concerned, their political, economic, social, and educational advancement, their just treatment, and their protection against abuses;
>
> b. 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;
>
> c. to further international peace and security;
>
> d. to promote constructive measures of development, to encourage research, and to cooperate with one another and, when and where appropriate, with

[39] Manfred Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary* (2005), pp. 13-14; Antonio Cassese, *Self-Determination of Peoples: A Legal Standard* (1995), pp. 319-320; Héctor Gros Espiell, The Right to Self-determination: Implementation of United Nations Resolutions, E/CN.4/Sub.2/405/Rev.1 (1980), para. 70. *See also* Jörg Fisch, *The Right to Self-Determination of Peoples: The Domestication of an Illusion* (2015), p. 10; Stefan Oeter, 'The Role of Recognition and Non-Recognition with Regard to Secession' in Christian Walter, von Ungern-Sternberg and Abushov (eds.), *Self-Determination and Secession in International Law* (2014), p. 52; David Raič, *Statehood and the Law of Self-Determination* (2002), p. 218.

[40] Charter of the United Nations, 24 October 1945, 1 UNTS XVI, Articles 1(2) and 55.

specialized international bodies with a view to the practical achievement of the social, economic, and scientific purposes set forth in this Article; and

e. to transmit regularly to the Secretary-General for information purposes, subject to such limitation as security and constitutional considerations may require, statistical and other information of a technical nature relating to economic, social, and educational conditions in the territories for which they are respectively responsible other than those territories to which Chapters XII and XIII apply.

According to Article 73, non-self-governing territories were identified as those "whose peoples have not yet attained a full measure of self-government". The provision then set out five specific undertakings that correspond to member states of the UN which are responsible for non-self-governing territories, among them the obligation to develop self-government. The first four undertakings, subsections (a) – (d), are obligations that states assume vis-à-vis the inhabitants of the colonial territories they control. The fifth undertaking, the reporting requirement of subsection (e), is an obligation assumed vis-à-vis the United Nations directly. The procedural roadmap for the eventual decolonization of all non-self-governing territories established by Article 73 became the foundation for the evolution of self-determination into a legal right.[41]

Following the adoption of the UN Charter, state practice began to coalesce around the recognition of a customary right of peoples to self-determination. It was manifested primarily through resolutions of the United Nations General Assembly which expressly mentioned the right and began to shed light on its content.[42] The watershed moment came in 1960 with the adoption in the General Assembly of Resolution 1514 (XV), the 'Declaration on the granting of

[41] Raič, p. 201.
[42] *See for example,* GA Resolution 545 (VI), *Inclusion in the International Covenant or Covenants on Human Rights of an article relating to the right of peoples to self-determination* (5 February 1952); Resolution 637 (VII), *The right of peoples and nations to self-determination* (16 December 1952); Resolution 837 (IX), *Recommendations concerning international respect for the right of peoples and nations to self-determination* (14 December 1954).

independence to colonial countries and peoples'.[43] Resolution 1514 (XV), or the '1960 Declaration', was significant in many respects. First and foremost, it was adopted without opposition, by 89 votes to 0 with 9 abstentions. This meant that by 1960 no state contested the existence of the right to self-determination of peoples. With the adoption of Resolution 1514 (XV) the international community expressed, in no uncertain terms, its rebuke of colonialism and the urgent need to bring about its end. In its preamble, Resolution 1514 (XV) affirmed that "all peoples have an inalienable right to complete freedom [and] the exercise of their sovereignty". It also proclaimed "the necessity of bringing to a speedy and unconditional end colonialism in all its forms and manifestations". Resolution 1514 (XV) incorporated the draft wording of the right to self-determination that was being discussed at the time and which, six years later, would be adopted as common Article 1(1) of the two International Covenants of Human Rights:

> 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.[44]

Resolution 1514 (XV) linked self-determination with independence, as the main objective of decolonization, by establishing that the right applied not only to non-self-governing territories recognized by the United Nations but to all peoples who had not yet attained independence. Lastly, Resolution 1514 (XV) accelerated the theoretical timeline of decolonization by asserting that sovereignty should be transferred immediately to all subject and dependent peoples. With regard to these last two points, it stated:

> *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, without any distinction as to

[43] Resolution 1514 (XV), 14 December 1960.
[44] Resolution 1514 (XV), para. 2.

> race, creed or colour, in order to enable them to enjoy complete independence and freedom.[45]

In 2019, the International Court of Justice affirmed in the *Chagos Archipelago* case that by the mid-1960s the right to self-determination had already crystallized into a rule of customary international law.[46] It based this conclusion on Resolution 1514 (XV). In the Court's view, Resolution 1514 (XV) had "declaratory character with regard to self-determination as a customary norm, in view of its content and the conditions of its adoption".[47] Furthermore, the Court stated that the wording of the resolution was "normative" in affirming that "all peoples have the right to self-determination" and that "the subjection of peoples to alien subjugation, domination and exploitation constitutes a denial of fundamental human rights and is contrary to the Charter of the United Nations".[48]

The crystallization of the customary human right to self-determination of peoples was followed soon after by its codification in an international treaty. In 1966, the United Nations adopted the two International Covenants on Human Rights.[49] The right to self-determination of peoples was established in both Covenants by their common Article 1:

> (1) All 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.
>
> (2) All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.

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[45] Resolution 1514 (XV), para. 5 (emphasis added).
[46] *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, Advisory Opinion, ICJ Reports 2019, para. 152.
[47] *Id.*
[48] *Id.*, para. 153.
[49] International Covenant on Economic, Social and Cultural Rights, 16 December 1966, 993 UNTS 3; International Covenant on Civil and Political Rights, 16 December 1966, 999 UNTS 171.

> (3) The States Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations.[50]

The fundamental nature of self-determination is evidenced by the fact that it is the only article that the two Covenants share in common, and the only right that is recognized and guaranteed by both treaties. Article 1(1) expressly recognizes the right to self-determination. However, Article 1(3) is the key provision in terms of decolonization, dealing specifically with the administration of non-self-governing and trust territories. With the adoption of the two International Covenants on Human Rights, Article 73 of the UN Charter was transformed into a set of binding obligations for states under treaty law. In stating that the right of self-determination was to be realized "in conformity with the provisions of the Charter", the two International Covenants wrote the obligations of Article 73 into common Article 1 and "gave teeth to the Charter's general principle of self-determination".[51] However, as previously stated, the crystallization of customary law simultaneously had a hand in turning Article 73 of the Charter into binding law.[52] With regard to the interplay between treaty and customary law on self-determination, at least in the specific context of decolonization, both confer a substantive human right to external self-determination which is similar in scope and content.[53]

There were two other General Assembly pronouncements during this period that were important for the development of the right to self-determination. They are Resolution 1541 (XV) of 15 December 1960 and Resolution 2625 (XXV) of 24 October 1970.

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[50] *Id.*, common Article 1.
[51] Cassese, p. 58.
[52] *Id.*, n.57, pp. 58-59.
[53] *See* Cassese, Chapter 7.

Resolution 1541 (XV), passed the day after Resolution 1514 (XV), enumerated a series of principles to be used in order to determine whether a state had a continuing obligation under the reporting requirement of Article 73(e) of the Charter.[54] Since Article 73 applied to "peoples [that] have not yet attained a full measure of self-government", Resolution 1541 (XV) provided a method for determining whether a non-self-governing territory had genuinely exercised its right to self-determination by identifying and describing three results that could constitute a full measure of self-government. Prior to doing so however, it established that Article 73 applied to territories that were of the "colonial type".[55] This meant any territory that was (i) geographically separate, (ii) distinct ethnically and/or culturally, and (iii) politically subordinate, to the country controlling it.[56] With regard to what may constitute a full measure of self-government, Principle VI mentioned three results by which it could be understood that a non-self-governing territory had achieved such status:

(a) emergence as a sovereign independent State;

(b) free association with an independent State; or

(c) integration with an independent State.

For two of the three possibilities, association and integration, Resolution 1541 (XV) placed additional qualifications on what these arrangements should entail and how they should be arrived at in order to be considered a genuine exercise of self-determination.[57] The additional guarantees required in the cases of association and integration stemmed from the fact that independence was viewed as the natural result of decolonization, as had been previously confirmed by Resolution

[54] Resolution 1541 (XV), *Principles which should guide Members in determining whether or not an obligation exists to transmit information called for under Article 73e of the Charter* (15 December 1960).
[55] Resolution 1541 (XV), Principle I.
[56] Resolution 1541 (XV), Principles IV and V. This is what is often referred to as the salt-water theory of colonization. *See* Crawford, p. 611; Raič, pp. 206-207.
[57] Resolution 1541 (XV), Principles VII, VIII and IX.

1514 (XV). Therefore, any instance of decolonization where the result was a territory's union or association with its former colonial power, was inherently viewed with suspicion by the international community.[58]

The other notable General Assembly pronouncement was Resolution 2625 (XXV) of 24 October 1970, entitled the 'Declaration on principles of international law concerning friendly relations and cooperation among states in accordance with the Charter of the United Nations'. As mentioned in the previous section, Resolution 2625 (XXV) affirmed the distinct legal and political personality of colonial peoples within international law by stating that under the Charter colonies have "a status separate and distinct from the territory of the State administering it". Resolution 2625 (XXV) also recognized that decolonization was a duty of all states, not just those that had colonial territories:

> Every State has the duty to promote, through joint and separate action, realization of the principle of equal rights and self-determination of peoples, in accordance with the provisions of the Charter, and to render assistance to the United Nations in carrying out the responsibilities entrusted to it by the Charter regarding the implementation of the principle, in order:
> […]
>
> (b) To bring a speedy end to colonialism, having due regard to the freely expressed will of the peoples concerned[.][59]

As a result of all these developments, the human right to self-determination of peoples constitutes a legal entitlement to external self-determination and decolonization. It is an obligation *erga omnes*, which imposes a legal duty on all states to promote decolonization.[60] However, with specific regard to states that are still in possession of colonial territories, it creates far-reaching and

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[58] M. Pomerance, *Self-Determination in Law and Practice: The New Doctrine in the United Nations* (1982), p. 25, *as mentioned in* Raič, p. 212. *See also* Crawford, pp. 623-624; Fisch, p. 204.
[59] Resolution 2625 (XXV), The principle of equal rights and self-determination of peoples.
[60] Resolution 2625 (XXV); *Case Concerning East Timor (Portugal v. Australia)*, Judgment, ICJ Reports 1995, para. 29.

substantial obligations. These obligations are of a dual nature, entailing both a required process and a required outcome. As such, the obligation to decolonize is one of both conduct and of result. The required result is that decolonization must in fact be achieved. However, states are not entirely free to determine how best to do so. The international community has determined what actions are most appropriate to bring about decolonization and, as a result, has imposed upon states a basic standard of conduct that they must employ to that end.

b) Decolonization in practice: A dual obligation of conduct and result.

In terms of the required result of decolonization, the normative content of the obligation is straightforward. Common Article 1 of the two International Covenants on Human Rights states that self-determination is the right to freely determine one's political status and freely pursue one's economic, social and cultural development. Under Article 73 of the Charter, colonial peoples must attain a full measure of self-government in order to achieve decolonization and extinguish their status as non-self-governing territories. What may constitute a full measure of self-government was defined by General Assembly Resolutions 1514 (XV) and 1541 (XV). Among the three recognized alternatives, independence is seen as the primary form of self-government.[61] It is the only option a people may unilaterally and unconditionally demand because, unlike the other alternatives, it is an outcome that does not require the consent of the controlling state. The other alternatives, association and integration, may also constitute a full measure of self-government subject to additional requirements. Association may be considered a valid exercise of decolonization if: (i) it is the result of a "free and voluntary choice"; (ii) in which the people retain "the freedom to modify the status of [the] territory"; and (iii) have "the right to determine [their] internal constitution without outside interference".[62] In the case of integration, Resolution 1541

[61] Crawford, p. 621.
[62] Resolution 1541 (XV), Principle VII.

(XV) imposes the prerequisite that (i) the people must have attained "an advanced stage of self-government with free political institutions". Then, in order for integration to constitute a valid exercise of decolonization, it must also (ii) be the result of the "freely expressed wishes of the territory's peoples acting with full knowledge of the change in their status" and it must be "on the basis of complete equality between the peoples of the [...] territory and those of the independent country with which it is integrated."[63] United Nations practice has generally supported the view that all three alternatives can be legitimate forms of decolonization.

With regard to the obligation of conduct, international law substantially limits a state's exercise of its sovereignty over colonial territories. States are no longer free to preside over these territories as they see fit. Instead, they must set aside their own interests and work to foster the conditions that would be most conducive in each territory to the emergence of a viable, self-governing polity. As Cassese eloquently explains, the right to self-determination imposes a far-reaching legal standard of conduct:

> the gradual emergence of legal rules on self-determination, has led to the emergence of a set of legal obligations for those countries still enjoying sovereignty over colonial territories. These obligations [...] do not produce the immediate legal effect of rendering the legal title over colonial territories null and void. Rather, besides setting out a series of limitations and qualifications intended greatly to restrict sovereignty, they envisage a temporary legal regime that must of necessity lead to the eventual extinction of legal title. In a way, these obligations act as a sort of time-bomb: the holder of sovereign title has to fulfil them knowing that by this action it will eventually have to relinquish its title.[64]

[63] Resolution 1541 (XV), Principles VIII and IX.
[64] Cassese, pp. 186-187. *See also* Crawford, pp. 613-615 ("The view that sovereignty over a non-self-governing territory remains with the administering State can be accepted only with reservations. That State has accepted far-reaching obligations with respect to such territories[...] [T]o the extent that sovereignty implies the unfettered right to control or to dispose of the territory in question, the obligation in Article 73b, and the associated principle of self-determination, substantially limit the sovereignty of the Administering State.")

The operative legal text regarding this standard of conduct is Article 73 of the UN Charter. It recognizes that the "interests of the inhabitants of these territories are paramount" and, in conjunction with common Article 1 of the International Covenants, establishes that the well-being of all peoples is contingent upon them being able to freely determine their international status. As previously mentioned, under Article 73, states are legally obliged:

> to ensure, with due respect for the culture of the peoples concerned, their political, economic, social, and educational advancement, their just treatment, and their protection against abuses;
>
> 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;
>
> to further international peace and security;
>
> to promote constructive measures of development, to encourage research, and to cooperate with one another and, when and where appropriate, with specialized international bodies with a view to the practical achievement of the social, economic, and scientific purposes set forth in this Article[.]

The content of this obligation evinces a clear fiduciary character, reminiscent of general institutions of trusteeship whereby one party has a duty to forego its own personal interests and act solely in the interests of another. It was recognized as such by J. Weeramantry in *Case Concerning East Timor* (1995), where the fiduciary character of Article 73 was explicitly affirmed and the responsibility conferred upon states was viewed as being of equal nature to that of a trustee.[65]

At the level of specifics, compliance with the obligation of conduct may take different forms depending on the circumstances of each case. However it must always be oriented toward self-determination and decolonization. In support of this, the General Assembly has made numerous recommendations to states regarding what constitutes appropriate conduct under Article

[65] *Case Concerning East Timor (Portugal v. Australia)*, ICJ Reports 1995, pp. 188-189 (dissenting opinion of Judge Weeramantry).

73. For example, it has recognized that a colonial territory's increased participation in its own governance, through the attainment of effective decision-making authority, is an appropriate manifestation of the required development mentioned in Article 73.[66]

Moving away from the strictly political, under Article 73 the General Assembly has also recommended increased diversification in colonial economies that it considered were too narrowly focused[67] or were based primarily on highly-fluctuating economic activities such as tourism, tax haven arrangements and land sales.[68] When discussing the aims of economic development in colonial territories, the General Assembly has employed phrases such as "viable and stable"[69], "sustainability"[70], "strengthening and diversification"[71], "economic stability"[72] and "economic self-reliance"[73]. It should not be lost on this Commission that the above-referenced General Assembly resolutions were all made, at least in part, with regard to non-self-governing territories for which the United States is responsible. In any case, these development aims lead to two important conclusions. First, that the obligation of conduct corresponds not only to the need to

[66] General Assembly Resolution 1468 (XIV), *Voluntary transmissions of information on political developments in Non-Self-Governing Territories* (12 December 1959) and General Assembly Resolution 1535 (XV), *Progress achieved in Non-Self-Governing territories* (15 December 1960).
[67] General Assembly Resolution 3156 (XXVIII), *Question of American Samoa, Gilbert and Ellice Islands, Guam, New Hebrides, Pitcairn, St. Helena, Seychelles and Solomon Islands* (14 December 1973) and General Assembly Resolution 3290 (XXIX), *Question of American Samoa, Guam, New Hebrides, Pitcairn, St. Helena and Solomon Islands* (13 December 1974).
[68] General Assembly Resolution 3157 (XXVIII), *Question of Bermuda, British Virgin Islands, Cayman Islands, Montserrat, Turks and Caicos Islands and United States Virgin Islands* (14 December 1973) and General Assembly Resolution 3289 (XXIX), *Question of Bermuda, British Virgin Islands, Cayman Islands, Montserrat, Turks and Caicos Islands and United States Virgin Islands* (13 December 1974).
[69] General Assembly Resolution 32/31, *Question of the United States Virgin Islands* (28 November 1977).
[70] General Assembly Resolution 70/102 A-B, *Questions of American Samoa, Anguilla, Bermuda, the British Virgin Islands, the Cayman Islands, Guam, Montserrat, Pitcairn, Saint Helena, the Turks and Caicos Islands and the United States Virgin Islands* (9 December 2015).
[71] General Assembly Resolution 55/144, *Questions of American Samoa, Anguilla, Bermuda, the British Virgin Islands, the Cayman Islands, Guam, Montserrat, Pitcairn, St. Helena, the Turks and Caicos Islands and the United States Virgin Islands* (8 December 2000).
[72] General Assembly Resolution 44/99, *Question of the United States Virgin Islands* (11 December 1989).
[73] General Assembly Resolution 40/56, *25th anniversary of the Declaration on the Granting of Independence to Colonial Countries and Peoples* (2 December 1985).

secure the required outcome of decolonization, but also the need to ensure the long-term viability of that outcome to the fullest extent possible. Second, that colonial dependence is multifaceted and therefore, a general atmosphere of economic, social and cultural freedom must be part and parcel of political decolonization.

In sum, the right to self-determination of peoples has created a transitional framework in which states are prohibited from enjoying sovereign title over colonial possessions in perpetuity. They must achieve the required result of decolonization by providing the peoples of those territories with a "peaceful and orderly, but nevertheless certain" transition out of colonial status.[74] Until they do so, state sovereignty over those territories is greatly restricted by the obligation to act in the best interests of the peoples concerned and to foster the optimal conditions for self-determination and decolonization.

3. Violation of Puerto Rico's right to self-determination.

As has already been established, the question of Puerto Rico is one of self-determination, not minority rights. Puerto Rico was included in the initial group of seventy-four non-self-governing territories listed by the United Nations pursuant to Article 73 of the UN Charter in 1946.[75] Beginning in the 1960s, after the adoption of Resolution 1514 (XV), the Special

[74] E.M. FitzGerald, '*Nauru v. Australia*: A sacred trust betrayed?', 6 Connecticut Journal of International Law (1991), p. 236.

[75] United Nations General Assembly Resolution 66(I), *Transmission of Information under Article 73e of the Charter* (14 December 1946). Puerto Rico's removal from the list of non-self-governing territories in 1953 by General Assembly Resolution 748 (VIII) did not reflect the reality at the time nor since. Instead of an examination on the merits of Puerto Rico's case, the General Assembly's decision was the product of misrepresentation and considerable diplomatic efforts by the United States to secure a majority of votes. *See* H. García Muñiz, 'Puerto Rico and the United States: The United Nations Role 1953-1975', 53 Revista Jurídica de la Universidad de Puerto Rico (1984), p. 59. Petitioners agree that the General Assembly's decision in 1953 to allow the United States to cease reporting on the colonial status of Puerto Rico was "mistaken" because the adoption of Puerto Rico's Constitution "did not change the territorial arrangement". Petitioners' Observations Regarding the Merits of Their Case, 3 October 2017, p. 37 & 41.

Committee on Decolonization began discussing the case of Puerto Rico.[76] Since then, the Special Committee on Decolonization has issued a total of thirty-nine resolutions reaffirming Puerto Rico's inalienable right to self-determination and keeping the issue of Puerto Rico under continuous review. The Special Committee's efforts constitute an integral part of the broad body of work at the international level affirming the people of Puerto Rico's continuing colonial status and their right to decolonization. Thus, for the past seventy-five years, the international community has expressly and consistently maintained that Puerto Ricans constitute a people with the right to self-determination.

a) Obligation of result: The US has not decolonized Puerto Rico.

International law recognizes three possible alternatives for achieving a full measure of self-government: independence, association or integration. Puerto Rico's current status does not comply with any of them.

In the events leading up to its removal from the list of non-self-governing territories in 1953, Puerto Rico was advertised before the UN as an arrangement of free association on the basis of having adopted its own constitution. Indeed, it was the first formal instance of free association presented to the UN General Assembly.[77] Resolution 1541 (XV) established three basic elements that a political arrangement of free association must have in order to constitute a full measure of self-government and therefore be considered a genuine exercise of self-determination.[78] First, it must be the result of a "free and voluntary choice" of the people. Second, the people must retain "the freedom to modify" their status. Third, the population should have "the right to determine its

[76] The 'Special Committee on the Situation with regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples' was created via General Assembly Resolution 1654 (XVI) of 27 November 1961 to ensure states' compliance with Resolution 1514 (XV).
[77] Crawford, p. 626.
[78] Resolution 1541 (XV), Principle VII.

internal constitution without outside interference". A cursory look at the events of the 1950s and Puerto Rico's unchanged colonial status reveal that it does not comply with any of these factors.

1) 'Free and voluntary choice'

The events in Puerto Rico during the early 1950s were not a referendum on the nature of its political relationship with the United States. The people of Puerto Rico were never presented with the differing status options recognized under international law. Instead, what transpired was a process to adopt an "internal" constitution that would ultimately also require the approval of the United States government. The events of the 1950s did not signify any real possibility of change. They were merely an attempt to legitimize the colonial relationship by rebranding it and presenting it to the United Nations as an agreement between equals. Therefore, it could never be interpreted as a validation of the existing political relationship. Not to mention the fact that the required approval of the Puerto Rico constitution by the United States kept the political relationship well within the bounds of colonialism.

2) 'Freedom to modify status'

Under the terms of its relationship with the United States, Puerto Rico is powerless to alter its colonial status. In *Commonwealth of Puerto Rico* v. *Luis Sánchez Valle*, the US Supreme Court established in 2016 that the United States has never transferred any sovereignty to the people of Puerto Rico. According to the Supreme Court, sovereignty over Puerto Rico has always resided exclusively with the US Congress and, as a result, the authority to adopt the Puerto Rico constitution did not emanate from the people of Puerto Rico but rather from a grant of Congress that was never intended to be an irrevocable cession of sovereignty.[79] The logical conclusion of this position is that, under the current political relationship, Puerto Rico's constitution could be

[79] *Commonwealth of Puerto Rico v. Sánchez Valle et al.*, 136 S.Ct. 1863, 1875-1876 (2016).

revoked or modified unilaterally by the United States at any point in time. Thus, contrary to international law, under the US legal framework Puerto Rico cannot even guarantee the continuation of its existing (limited) authority, much less modify the unrestricted exercise of sovereignty the United States enjoys over it. Different to other cases of association, the political relationship between Puerto Rico and the United States is not governed by a bilateral association agreement. For example, both the Federated States of Micronesia and the Republic of the Marshall Islands are countries that have since entered into free association with the United States through separate agreements. These agreements constitute bilateral treaties that set out the terms of the association in binding form. They were negotiated by the parties involved and they include formal mechanisms for the unilateral termination of the agreement by any of the parties.[80] Contrary to this, the parameters of the political relationship between Puerto Rico and the United States are determined exclusively by the latter, and Puerto Rico has no power under the US domestic framework to change that.

3) 'Internal self-government without outside interference'

The events of the 1950s did not create an exclusive internal space of self-government in Puerto Rico. The United States reserved the right to confer final approval of the Puerto Rico Constitution and in doing so made significant changes to that document, including the elimination of several recognized human rights. The significance of the United States' reservation to confer its approval of the Puerto Rico Constitution rendered that document as much a creation of Congress as it is of Puerto Rico.[81]

[80] *See* 48 USC § 1901, art. IV; 48 USC § 1931, art. IV.
[81] Markku Suksi, *Sub-State Governance through Territorial Autonomy: A Comparative Study in Constitutional Law of Powers, Procedures and Institutions* (2011), p. 178.

With regard to this necessary aspect of free association, Crawford has specified that it requires not only "substantial powers of internal self-government" for the associated state, but also the relinquishment of any "substantial discretions to intervene" by the former colonial power.[82] However, the United States retains, and in fact exercises, broad authority to intervene in the internal affairs of Puerto Rico. To this day, US federal law applies automatically to Puerto Rico and supersedes local law in the case of conflict. Within Puerto Rico, there are no exclusive areas of local governmental authority. The United States' discretion to intervene in Puerto Rico, which is substantial, was put in practice once again in 2016 with the creation of the Fiscal Oversight and Management Board, an unelected entity with significant powers over the local government.[83] The imposition of an undemocratic political body within the governmental structure of Puerto Rico is nothing other than the continuation of a colonial policy that has been in place since the United States passed its first organic act over the archipelago in 1900. As a result, Puerto Rico has never enjoyed internal self-government under the United States. Today, it continues to be subject to significant US intervention in its local affairs and has no capacity to determine what degree of US intervention is acceptable to it. The relationship between Puerto Rico and the United States continues to be colonial in nature and, as Petitioners have also recognized, does not comply with the requirements of a free association arrangement under international law.[84]

b) Obligation of conduct: The US has not created conditions for decolonization.

Contrary to the standard of conduct imposed by the right to self-determination, the United States has not fostered the conditions for self-government and decolonization in Puerto Rico. The

[82] Crawford, p. 632-633.
[83] Puerto Rico Oversight, Management, and Economic Stability Act (PROMESA), US Public Law 114-187, 30 June 2016, 48 USC 2101 *et seq.*
[84] Petitioners' Observations Regarding the Merits of Their Case, 3 October 2017, p. 36. ("Puerto Rico [...] does not have the status of 'free association' with the United States as that status is defined under United States law or international practice.")

United States has not recognized any of the limitations imposed on its sovereignty by international law, and has instead continued to protect its own interests in Puerto Rico. The political relationship between Puerto Rico and the United States has remained fundamentally unchanged for over a century. In 1901, the US Supreme Court ruled that under the US domestic legal framework, Puerto Rico constituted a territorial possession of the United States.[85] In 2016, over a century later, the US Supreme Court reiterated that this continues to be the case.[86] The United States' insistence on the colonial power structure has not allowed Puerto Rico to develop politically in any significant way. Following the creation of the United Nations, cosmetic changes to the relationship were made in order to appease the international community, as was the adoption of Puerto Rico's Constitution in 1952. However, by and large, the United States has disregarded calls for political advancement and decolonization coming from in and out of Puerto Rico.

While there are different opinions within Puerto Rico as to what the ultimate result of decolonization should be, there is a clear consensus that the present situation is unacceptable. Notwithstanding, the United States has ignored these calls and, in the specific case of the adherents of independence, it has actively repressed this movement through violence and intimidation.[87] As part of its desire to keep Puerto Rico under its political control, the United States has made the costs of achieving independence, or even greater self-government, extremely high. In the

[85] *Downes v. Bidwell*, 182 US 244, 341-342 (1901).
[86] *Commonwealth of Puerto Rico v. Sánchez Valle et al.*, 136 S.Ct. 1863 (2016).
[87] 'FBI Killing of Puerto Rican Fugitive Sparks Rage', NBC News, 28 September 2005, available at: https://www.nbcnews.com/id/wbna9522205 (Last Accessed: 7 October 2021); *'Informe Final sobre la investigación de los sucesos ocurridos en el Municipio de Hormigueros el 23 de septiembre de 2005 donde resultó muerto el ciudadano Filiberto Ojeda Ríos'*, Comisión de Derechos Civiles de Puerto Rico, 13 October 2011, available at: https://periodismoinvestigativo.com/wp-content/uploads/2012/02/Informe-CDC-Filiberto-Ojeda.pdf (Last accessed: 7 October 2021); M. Navarro, 'New Light on Old FBI Fight; Decades of Surveillance of Puerto Rican Groups', New York Times, 28 November 2003, available at: www.nytimes.com/2003/11/28/nyregion/new-light-on-old-fbi-fight-decades-of-surveillance-of-puerto-rican-groups.html?pagewanted=all (Last accessed: 7 October 2021).

meantime, it has continued to weave Puerto Rico into the US governmental structure. The substantial presence of US laws and government agencies in Puerto Rico, apart from further destroying the myth of Puerto Rican self-government, implies that any move to extricate itself from under US sovereignty will be unnecessarily complicated. In other words, far from creating conditions for self-determination and decolonization, the conduct of the United States has worked in the opposite direction, to strengthen US control and to distort the political picture in Puerto Rico.

The imposition of the Financial Oversight and Management Board, which has already been discussed, is also an example of the United States' refusal to restrict the exercise of its sovereignty and foster conditions for decolonization within Puerto Rico. Seen largely as a collection agency for Puerto Rico's creditors[88], the Board has committed Puerto Rico to onerous debt repayment plans while pushing for almost zero debt cancellation. It has refused to support an audit of Puerto Rico's government debt, in contrast to what many sectors of the local population are calling for.[89] The Board has also pushed for significant privatization of the Puerto Rican government as a means to fund short-term debt repayment. All of these profoundly impactful decisions are being made behind closed doors by an unelected body imposed by the United States, instead of putting these and other important decisions in the hands of Puerto Ricans where they belong.

A crucial part of the international obligation to decolonize entails implementing developmental policies that will foster viable and stable economies in non-self-governing territories. This is necessary in order to strengthen the long-term prospects of self-determination

[88] Martín Guzmán and Joseph E. Stiglitz, 'Disaster Capitalism Comes to Puerto Rico', Project Syndicate, 15 November 2018, available at: https://www.project-syndicate.org/commentary/puerto-rico-fiscal-plan-cofina-deal-by-martin-guzman-and-joseph-e-stiglitz-2018-11?barrier=accesspaylog (Last accessed: 7 October 2021).

[89] Luis Valentín Ortiz, *'Retrasada la auditoría de la Junta, mientras coge impulso la negociación de la deuda'*, 11 June 2018, Centro de Periodismo Investigativo, available at: https://periodismoinvestigativo.com/2018/06/retrasada-la-auditoria-de-la-junta-mientras-coge-impulso-la-negociacion-de-la-deuda/ (Last accessed: 7 October 2021).

and decolonization. However, throughout its entire history under US control, US economic interests have dominated in Puerto Rico to the detriment of the people. Since the early twentieth century, the economic policies adopted and encouraged by the United States ensured that Puerto Rico's only available developmental path was as a tax haven and provider of low-cost labor for US corporations.[90] While these policies greatly favored US economic interests, they have impeded the development of local economic growth and have left Puerto Rico locked in a cycle of dependency.[91] Today, the Puerto Rican economy remains closely tied to US interests and has become a model of extreme capitalist wealth extraction, where US corporations reap over USD 30 billion in profits annually.[92] Meanwhile, over 43% of the population of Puerto Rico continues to live in poverty.[93]

B. The US has violated Puerto Rico's right to political participation by denying its right to self-determination.

In accordance with this Commission's mandate to identify and address human rights violations, it correctly decided that the Petitioners presented admissible claims with regard to Articles II (right to equality before the law), XVII (recognition of juridical personality and civil rights), and XX (right to vote and to participate in government) of the American Declaration of the Rights and Duties of Man.[94] However, the "main reason" behind these violations of individual rights is Puerto Rico's colonial status, as expressed by the Petitioners themselves.[95] International law affirms the importance of self-determination as a precondition for all other human rights. As

[90] Diane Lourdes Dick, 'US Tax Imperialism in Puerto Rico', 65 American University Law Review 1 (2015), pp. 64-65.
[91] Dick, pp. 85-86.
[92] Argeo T. Quiñones Pérez and Ian J. Seda Irizarry, 'Wealth Extraction, Governmental Servitude, and Social Disintegration in Colonial Puerto Rico', 15:4 New Politics (2016), p. 97.
[93] Data from 2019. Available at: https://www.census.gov/quickfacts/PR.
[94] Report on Admissibility, 27 January 2017.
[95] Petitioners' Observations Regarding the Merits of Their Case, 3 October 2017, p. 58.

a result, Resolution 1514 (XV) established that "[t]he subjection of peoples to alien subjugation, domination and exploitation constitutes a denial of fundamental human rights".[96] It has also been stated that:

> Only when self-determination has been achieved can a people take the measures necessary to ensure human dignity, the full enjoyment of all rights, and the political, economic, social and cultural progress of all human beings, without any form of discrimination. Consequently, human rights and fundamental freedoms can only exist truly and fully when self-determination also exists. Such is the fundamental importance of self-determination as a human right and a prerequisite for the enjoyment of all the other rights and freedoms.[97]

Thus, the fundamental importance of the right to self-determination with regard to the individual rights being invoked before this Commission cannot be overstated. Even a cursory reading of the filings presented in this case leaves no doubt that the people of Puerto Rico do not exercise any meaningful decision-making authority over their lives. The question then becomes, what is the appropriate relief under international law?

This Petition constitutes the first instance in which this Commission has been presented with the question of self-determination of peoples and decolonization. While it has dealt with related issues involving the rights of indigenous peoples on numerous occasions, the self-determination of colonial peoples constitutes an altogether different category of international human rights.[98] To find the answer to the question posed in the previous paragraph, this Commission must therefore look to other international human rights bodies that have previously dealt with self-determination and, more specifically, have applied the right to the people of Puerto Rico.[99]

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[96] Resolution 1514 (XV), para. 1.
[97] Gros Espiell, para. 59.
[98] Working paper on the relationship and distinction between the rights of persons belonging to minorities and those of indigenous peoples, 19 July 2000, para. 2, UN Document Number: E/CN.4/Sub.2/2000/10.
[99] As a general rule, any forum that applies international human rights law should look to other international or regional fora that have already addressed a specific controversy. While there may not

In its most recent decision regarding Puerto Rico, published in 2021, the Special Committee on Decolonization stated the following:

> [The Special Committee]
>
> 1. *Reaffirms* the inalienable right of the people of Puerto Rico to self-determination and independence in conformity with General Assembly resolution 1514 (XV) and the applicability of the fundamental principles of that resolution to the question of Puerto Rico, and that the people of Puerto Rico constitute a Latin American and Caribbean nation that has its own distinct national identity;
>
> 2. *Calls again upon* the Government of the United States of America to assume its responsibility to promote a process that will enable the Puerto Rican people to fully exercise their inalienable right to self-determination and independence, in accordance and in full compliance with General Assembly resolution 1514 (XV) and the resolutions and decisions of the Special Committee concerning Puerto Rico, and to take decisions, in a sovereign manner, to address their urgent economic and social needs, including unemployment, marginalization, insolvency and poverty, and the problems related to education and health, which have been aggravated by the ravages of Hurricanes Irma and Maria, the earthquakes affecting the south-western part of Puerto Rico and the coronavirus disease (COVID-19) pandemic;
>
> 3. *Notes with concern* that, by virtue of the decision of the United States Congress, under the Puerto Rico Oversight, Management and Economic Stability Act (PROMESA) which creates the Financial Oversight and Management Board, the already weakened area in which the prevailing regime of political and economic subordination in Puerto Rico operates is reduced any further;
>
> 4. *Notes* the broad support of eminent persons, governments and political forces in Latin America and the Caribbean for the independence of Puerto Rico;
>
> 5. *Notes once again* the debate in Puerto Rico on the implementation of a mechanism that would ensure the full participation of representatives of all sectors of Puerto Rican public opinion, including a constitutional assembly on status with a basis in the decolonization alternatives recognized in international law, and aware of the principle that any initiative seeking a solution to the political status of Puerto Rico should originate from the people of Puerto Rico;
>
> 6. *Expresses serious concern* over the actions carried out against supporters of Puerto Rican independence, and encourages the investigation of those actions with the necessary rigour and with the cooperation of the relevant authorities;

necessarily be a binding obligation, it is nonetheless important to take into consideration prior statements on an issue made by other international bodies. Absent good reason, international law must be consistent.

> 7. *Requests* the General Assembly to consider the question of Puerto Rico comprehensively and in all its aspects, and to decide on this issue as soon as possible;
>
> 8. *Urges* the Government of the United States, in line with the need to guarantee the legitimate right of the Puerto Rican people to self-determination and the protection of their human rights, to complete the return of all lands occupied by its military forces in Puerto Rico territory, in particular installations on Vieques Island and in Ceiba, to the people of Puerto Rico, respect fundamental human rights, such as the right to health and economic development, and expedite and cover the costs of the process of cleaning up and decontaminating the areas previously used in military exercises through means that do not continue to worsen the serious consequences of its military activity in order to protect the health of the inhabitants of Vieques Island and the environment;
>
> 9. *Takes note with satisfaction* of the report prepared by the Rapporteur of the Special Committee, in compliance with its resolution of 5 August 2020;
>
> 10. *Requests* the Rapporteur to report in 2022 on the implementation of the present resolution; including new developments relevant to a process of decolonization of Puerto Rico, in accordance with resolution 1514 (XV);
>
> 11. *Decides* to keep the question of Puerto Rico under continuous review.[100]

Thus, under international human rights law, the remedy for Puerto Rico's historical and ongoing lack of political participation is for its people to exercise their collective right to self-determination. In order to achieve this, the United States must comply with its corresponding international obligations. It must cease its unrestricted exercise of power over Puerto Rico and conduct a genuine transfer of sovereignty, so that Puerto Ricans may at last meaningfully make their own choices. Also, the United States must aid Puerto Rico to stand on its own, by creating conditions conducive to its long-term viability as an independent nation, regardless of what future the sovereign people of Puerto Rico may decide to pursue. This is what the right to self-determination of peoples and the corresponding praxis of the United Nations demand. There is no

[100] Decision of the Special Committee of 5 August 2020 concerning Puerto Rico, 16 June 2021, UN Document Number: A/AC.109/2021/L.7.

reason why this Commission should deviate from decades of established international human rights law.

A final question that must be addressed is why the Petitioners ignored Puerto Rico's right to self-determination and instead attempted to claim individual minority rights. In light of the extensive attention that Puerto Rican self-determination has received at the international level, at first glance the Petitioners' focus on individual voting rights might seem strangely myopic.[101] However, the answer is that the claims presented by the Petitioners are specifically tailored to their particular political agenda.

The Petitioners' apparent obliviousness to decades of international doctrine regarding Puerto Rico is not a case of mistaking the forest for the trees. To the contrary, it is a calculated political effort aimed at strengthening Puerto Rico's prospects for integration into the United States. This is the Petitioners' ultimate goal.[102] What the Petitioners are seeking from this Commission, contrary to established international law, is for Puerto Rico to be recognized as a minority within the United States instead of as a people with the right to self-determination. The recasting of Puerto Rico as a minority would effectively eliminate independence as an option

[101] The Petition, a 65-page document, does not mention "self-determination" at all. A supplemental 140-page filing entitled, 'Petitioners' Observations Regarding the Merits of Their Case', glosses over Puerto Rico's history at the United Nations in a few paragraphs without mentioning the right to self-determination. *See* Petitioners' Observations Regarding the Merits of Their Case, 3 October 2017, pp. 36-37.

[102] The main petitioner, Pedro Rosselló, is a public figure and a member of the political establishment that has long been openly and ardently in favor of Puerto Rico's integration into the United States. He was governor of Puerto Rico from 1993-1996 and 1997-2000, under the political party favoring integration (*Partido Nuevo Progresista*). His son, Ricardo Rosselló Neváres, was also elected governor under the same political party in 2016, but was forced to resign in 2019 amid a scandal that led to massive popular protests. *See* Gerardo Alvarado León, *'Ricardo Rosselló renuncia como gobernador efectivo el 2 de agosto'*, 24 July 2019, El Nuevo Día. Available at: https://www.elnuevodia.com/noticias/locales/notas/ricardo-rossello-renuncia-como-gobernador-efectivo-el-2-de-agosto/ (Last accessed: 7 October 2021); Luis Valentín Ortiz and Carla Minet, *'Las 889 páginas de Telegram entre Rosselló Nevares y sus allegados'*, 13 July 2019, Centro de Periodismo Investigativo. Available at: https://periodismoinvestigativo.com/2019/07/las-889-paginas-de-telegram-entre-rossello-nevares-y-sus-allegados/ (Last accessed: 7 October 2021).

because minorities are not entitled to external self-determination.[103] Conversely, it would strengthen the arguments for those in favor of integration with the United States by also eliminating the distinction that must be maintained between a colonial peoples and a controlling state.[104] Thus, recognizing Puerto Rico as a minority would further the cause of integration by implicitly accepting that Puerto Rico is already *within* the United States.

As previously mentioned, under international human rights law, integration with a former colonial power is an outcome that is looked upon with suspicion by the international community. To that point, while Resolution 1514 (XV) places no prerequisites on independence[105], in the case of integration it requires "an advanced stage of self-government with free political institutions".[106] By trying to recast Puerto Ricans as a minority within the United States, the Petition before this Commission is attempting to bypass the important safeguards that international human rights law has placed on the integration of colonial peoples with a controlling state.

V. Conclusion

Of the seventeen remaining non-self-governing territories listed by the United Nations, eight are located in the Americas.[107] Other territories in the region are also in positions of political subordination to foreign states despite not being recognized as such by the United Nations. All of which demonstrates that the right to self-determination of peoples is an ongoing issue for this

[103] Commentary of the Working Group on Minorities to the United Nations Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, 4 April 2005, para. 15, UN Document Number: E/CN.4/Sub.2/AC.5/2005/2.
[104] United Nations General Assembly Resolution 2625 (XXV), 24 October 1970.
[105] Quite the opposite in fact, Resolution 1514 (XV) states that the "[i]nadequacy of political, economic, social or educational preparedness should never serve as a pretext for delaying independence". Resolution 1514 (XV), para. 3.
[106] Resolution 1541 (XV), Principle IX.
[107] Anguilla, Bermuda, British Virgin Islands, Cayman Islands, Falkland Islands (Malvinas), Montserrat, Turks and Caicos Islands, and United States Virgin Islands.

Commission and will be so for the foreseeable future. The decision that is now before this Commission will have future ramifications for other collectivities under its jurisdiction, especially given the current political reality in the Caribbean region.

Contrary to the Petitioners' assertions, Puerto Rico is not a case of minority rights but of self-determination and decolonization. This has been made clear by the relevant organs of the United Nations since 1946. Under that framework, the United States has an obligation of a dual nature. First, it must ultimately decolonize Puerto Rico. Until it does so, however, it must act in the best interests of Puerto Rico and ensure to the fullest extent possible that decolonization results in a sustainable political enterprise for the people of Puerto Rico. The United States has failed to comply with these obligations by refusing to allow for decolonization and also refusing to lay the groundwork that would promote that end result.

The Petitioners are correct in arguing that Puerto Rico does not enjoy meaningful political participation as guaranteed by the American Declaration. However, the solution to this problem is not, as they claim, for Puerto Rico to be integrated into the state that has unashamedly dominated and exploited it for over a century. The underlying principle of the right to self-determination is the inherent dignity of human beings and their corresponding entitlement to live in accordance with their own values and preferences.[108] In compliance with that imperative, colonialism must be overcome not by looking backward, but forward.

Therefore, the Inter-American Commission should find that the United States is in violation of its international human rights obligations guaranteed under the American Declaration, in light of the fundamental human right to self-determination as recognized under international law. By refusing to facilitate and promote a process of self-determination and decolonization, in

[108] Aureliu Cristescu, The Right to Self-determination: Historical and Current Development on the Basis of United Nations Instruments (1981), UN Document Number: E/CN.4/Sub.2/404/Rev.1, para. 221.

accordance with international standards and applicable UN procedures, the United States has failed to guarantee a panoply of collective and individual rights to the residents of Puerto Rico.

Respectfully submitted,

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