



The Case of Puerto Rico Under the United Nations Charter¹

DINORAH LA LUZ FELICIANO

This essay brings forth the political status of Puerto Rico (“Commonwealth” or Estado Libre Asociado), how it was manipulated by the United States to mean “self-determination”; and, how the U. S. avoided its duty to inform under Art. 73 (e) of the United Nations Charter, by claiming the colonial status of the Island was resolved. Through this claim, the U. S. also avoided other obligations under the U. N. Covenants of 1966,⁶ and U. N. Resolution 1514 (XV) of 1960.

Puerto Rico’s Commonwealth³ has been presented internationally as an option to decolonization and self-government since its creation in 1952. In 1953, the United States argued before the United Nations that it would cease to inform the status of the Trustee territory, as Art. 73(e) of the U. N. Charter imposes,⁴ since the Island had achieved self-government. If the Commonwealth was truly an act of self-determination, it is still being discussed at the United Nations Decolonization Committee,⁵ and it is certainly an ongoing unresolved issue in the Island.⁶

Self-determination in the U. N. Charter divides the “principle”⁷ of self-determination in two: under Art. 1(2)⁸ and under Art. 55.⁹ When the Charter was being drafted, self-determination was a term used to protect sovereignty of States. At the present time, self-determination is only mentioned twice in the context of “friendly relations among nations” and of “equal rights”. Moreover, self-determination was not recognized as a “right” of peoples¹⁰ when the U.N. Charter was drafted,¹¹ until the approval of G. A. Resolution 1514 (XV) in 1960.¹² Some commentators have argued that self-determination has evolved as *jus cogens*, based on an interpretation by the International Law Commission (1966) of the Draft Convention on the Law of Treaties, although few States at that time, wanted to include it as part of *jus cogens*.¹³ Still others, based on the International Court of Justice cases, held that the right of peoples to self-determination “as it evolved from the Charter and from the United Nations practice [of States], has an *erga omnes* character.”¹⁴

Chapters XI, XII, and XIII of the U. N. Charter have to be examined, as well, concerning “dependent territories”.¹⁵ There has been some debate on the application of Chapter XI (which includes Arts. 73 and 74)¹⁶ regarding the demand for decolonization on the one hand, versus Chapters XII and XIII (which deal with the Trusteeship system) on the other. Chapters XII and XIII provide expressly for accountability and supervision of the “trust territories” (Trusteeship system).¹⁷ Nevertheless, for territories not under the Trusteeship system only Chapter XI would apply. Article 73 of Chapter XI is intended for U. N. Members which are also Administrators of “territories whose peoples have not yet attained a full measure of self-government.” The wording of Art. 73 classifies the mandate as a “sacred trust” to promote the well-being of the inhabitants. Subsequent paragraphs specify the respect and ensure respect principle, as referred to the culture, the political, economic,¹⁸ social, and educational advancement, “just treatment, and protection against abuses” (Para. (a)). Paragraph (b) of that same Art. 73 imposes the obligation to develop self-government, assist in the progressive development of free political institutions, and to promote development (Para. (d)). Article 74 deals with the “good-neighbor” principle and stresses the friendly relations among the rest of the Members in social, economic and commercial matters.¹⁹ By the same token, Art. 76 (b) also imposes the duty to promote development towards self-government or independence. The Charter language evolved into a broader interpretation of the duties under Art. 73(e) in terms of the information to be provided (duty to provide) to the U. N. regarding the political progress made.²⁰ That same article imposes the duty to inform on the “economic, social, and educational conditions of the territory.” Its precedent was Art. 22 of the League of Nations, which laid down the “principle of a trusteeship administration” (or mandate).

In January 19 and in March 20, 1953, the United States sent communications to the United Nations indicating



that it would cease to send information under Art. 73(e) of the Charter due to the constitutional change in Puerto Rico. Arguing that the Commonwealth status alternative had been “chosen” by the Puerto Ricans in 1952, implied that the U. S. did not have to inform on the progress of Puerto Rico and the United Nations so recognized it, based on the principles of Chapter XI of the U. N. Charter. Paragraph 4 of G. A. Res. 748 (VIII) confirmed that the People of Puerto Rico had chosen the Commonwealth status “as part of its self-determination”. The then Governor Luis Muñoz Marín proposed the new political status: from a non-self-governing territory to a self-governing territory, or so he said. One can find in Puerto Rico’s archives the letters that Muñoz Marín wrote to the President of Costa Rica, José Figueres, asking him to make a petition to the United Nations so that Puerto Rico would no longer be under trusteeship. In spite of such claim of self-determination, after the Puerto Ricans voted to adopt the Constitution in 1952, U. S. Congress reserved the right to change it by federal statute. In fact, as a condition for approval Congress unilaterally deleted Section 20 of the Constitution of Puerto Rico which included economic, social, and cultural rights.

Even though, Arts. 73 and 74 of the U. N. Charter included political, economic, social, educational advancement and rights to development, among others, few would argue today that Puerto Rico needs to return to the Trusteeship Council (as trustee or “territorios en fideicomiso”) before the Council becomes completely inoperative, or that Puerto Rico should return to the list of non-self-governing territories (“territorios no autónomos”) under Chapter XI of the U.N. Charter, where there are still approximately 16 territories waiting for self-determination. In different statements before the Decolonization Committee, Non-Governmental Organizations (NGOs) have stated that neither Resolution 748 (VIII) nor Chapter XI (non-self-governing territories) should be applied because Puerto Rico is still under the plenary powers of Congress in spite of what Resolution 748(VIII) affirms. With respect to plebiscites- and since the 1967 plebiscite to confirm the ELA status- the U. S. has not made any compromise to accept the results. Most NGOs that have petitioned the Decolonization Committee have argued that Resolution 1514(XV) should apply, and that the General Assembly should keep the case of Puerto Rico under review as has done during

more than 40 years, and after more than 30 Committee resolutions.²¹

In what has been called the second phase of *self-determination and human rights*, it also became important the approval of Resolution 1514(XV) in 1960, the entry into force the International Covenants of 1966 (International Covenant on Civil and Political Rights, and the International Covenant on Economic, Social and Cultural Rights), and the Helsinki Final Act,²² as basic instruments of human rights. Art. I of the International Covenant on Civil and Political Rights (ICCPR) reaffirms that self-determination is a “right,”²³ and even a pre-requisite to other human rights.²⁴

In addition to the U. N. Charter and the Covenants, one should examine the U. N. Resolutions, particularly Resolution 1514(XV). Since the 1970’s there was some doubt in the international community regarding the 1953 petition to take Puerto Rico out of the list of territories. The Decolonization Committee kept the Case of Puerto Rico under review based, precisely, on the Resolution 1514(XV) mandate. Meanwhile, the U. S. has never recognized the U. N. Committee’s competence. Actually, the U. S. generic reservation regarding human rights instruments, and in particular regarding the ICCPR, has always been that none of the international obligations are self-executing.²⁵

With respect to other U. N. Resolutions, some pro-annexation groups in Puerto Rico, tend to favor Resolution 1541(XV) of 1960, which proposes three procedural guidelines on how to determine whether the non-self-governing territory has attained full self-government, to wit, by independence, free association, or integration to another independent State.²⁶ Nevertheless, integration to the United States entails the inclusion of a different culture, which is far from the so-called U. S. “melting pot.” Notwithstanding the cultural point of view, the Island faces a bankruptcy created by this colonial situation. When the political representatives have asked for some assistance, at least by amending the “Cabotage Laws,”²⁷ the U. S. Congress and the Executive Branch have simply ignored or blamed the Islanders for the economic insolvency.

CONCLUSION

As an Administrative power the U. S. has to comply with Part I, Art. 1, Para. 3, and with “the responsibility for the administration of Non-Self-Governing and Trust-Territo-



ries" under the ICCPR. The U. S., as a Member State of the U. N., cannot claim that Puerto Rico's status is a domestic matter because it pledged to adhere to the U. N. Charter; neither can it claim that the Decolonization Committee has no competence because it abstained when the G. A. Resolution 1514 (XV) was approved. Even though, the U. S. made a reservation when ratifying the ICCPR (by trying to undermine its obligations when saying that none of the international instruments are self-executing,) such reservation might be in conflict with the object and purpose of the treaty, as required in the Vienna Convention on the Law of Treaties. Moreover, the Supremacy Clause in the U. S. Constitution and the Paquete Habana Case are the Law of the Land and are probably in conflict with such reservations.

The People of Puerto Rico voted in 2014 in a plebiscite where 54% opposed the current status (Estado Libre Asociado). Even though, the U. S. Congress has yet to recognize these results, the U. S. Department of State has sub-

mitted an Amicus Curiae in December 2015 to the U. S. Supreme Court admitting to Puerto Rico's colonial status.

Clearly, the political status has to be freely determined by the People of Puerto Rico without coercion or outside intervention. The phrase "freely determined" is problematic when considering colonial peoples and/or alien domination, besides the colonial power has never been eager to let people determine their political destiny. In Puerto Rico's case, freedom to choose is also problematic, taking into account the history of political persecution and political prisoners still incarcerated in U. S. jails, solely for believing in the independence of their country.

Dinorah la Luz Feliciano has a Master of Laws (LL. M.) in Comparative Law. She is a member of the American Association of Jurists (AAJ) Advisory Council and a co-editor of the AAJ Journal. She also collaborates with the Editorial Board of the IADL Review.

BIBLIOGRAPHY:

A. Primary Sources:

1. Archives

Letters of Luis Muñoz Marín to Figueres, August 13 & Sept. 3, 1953; Figueres to Muñoz, Sept. 10, 1953. Archivo Fundación Luis Muñoz Marín, Secc. V, Gobernador P. R., Serie 2, Correspondencia Particular, Fernós Insern-Figueres, José. 1949- 1964. Cartapacio 173, Doc. 1.

2. U. N. Documents

a. Chapters XI, XII, XIII of the Charter of the United Nations. Charter of the United Nations and Statute of the International Court of Justice. NY: U.N. Pub. 1994.

b. Resolutions

G. A. Res. 1514 (XV), 15 U. N. G.A.O.R., Supp. (No. 16), U.N. Doc. A/4684 (1960).

G. A. Res. 1541 (XV) (Annex) of 15 Dec. 1960, 15 U.N. G.A.O.R., Supp. (No. 14), U.N. Doc. A/4684 (1960).

G. A. Res. 742 (VIII), Nov. 27, 1953.

G.A. Res. 748 (VIII), 459th Plenary Meeting, Nov. 27, 1953.

G.A. Res. 1654 (XVI), Nov. 27, 1961.

G. A. Res. 2625 (XXV, Annex, 25 U. N. G.A.O.R., Supp. (No. 28), U. N. Doc. A/5217 (1970).

c. Statute of the International Court of Justice

Art. 38, Statute of the International Court of Justice. *Charter of the United Nations and Statute of the International Court of Justice*. NY: U.N. Pub. 1994.

d. Reports

Gros Espiell, Héctor. "El derecho a la libre determinación de los pueblos. Aplicación de las Resoluciones de las Naciones Unidas" (N.Y., 1979). Doc. E-CN.4-Sub.2-405-Rev.1. In Bohdan T. Halajczuk & María Teresa del R. Moya Dominguez. *Derecho internacional público*. Tercera Edición Actualizada. Buenos Aires: Sociedad Anónima Editora, Comercial, Industrial y Financiera, 1999.



_____. (Special Rapporteur). "Implementation of the United Nations Resolutions Relating to the Right of Peoples under Colonial and Alien Domination to Self-Determination." E/CN.4/Sub.2/405 (vol. I), June 20, 1978.

e. Conferences & Travaux Préparatoires

Conference on Security and Co-operation in Europe, Final Act, 14 International Legal Materials 1292 (1975). In Janis, Mark W. & John E. Noyes. *Cases and Commentary on International Law*. St. Paul, Minn.: West 1997.

Debate, 4th Committee of the 1947 General Assembly, Chapter XI Working Paper, U.N.C.I.O. Doc. 323, II/4/12.

3. Cases

Case Concerning East Timor (*Portugal v. Australia*), 1995, ICJ 90, 102, 1995 WL 688255.

"Insular Cases" (1901- 1922). In Serrano Geys, Raúl. *Derecho constitucional de Estados Unidos y Puerto Rico*. Vol. I. San Juan: Colegio de Abogados de Puerto Rico, 1986.

The Paquete Habana, 175 U. S. 677, 20 S. Ct. 290, 44 L. Ed. 320 (1900). In Covey T. Oliver, et al., *The International Legal System. Cases and Materials*. Fourth Edition. Westbury, N. Y.: The Foundation Press, 1995.

4. Unreported Cases

The Commonwealth of Puerto Rico, Petitioner v. Luis M. Sánchez Valle & Jaime Gómez Vázquez, Respondents, in the United States Supreme Court, Case No. 15-108.

The Commonwealth of Puerto Rico v. The California Tax-Free Trust, et al., cert. granted, Dec. 4, 2015 (No. 15-233).

B. Secondary Sources:

1. Amicus Curiae

Brief for the United States Solicitor General, Donald B. Verrilli, Jr., as *Amicus Curiae* supporting Respondents, in *The Commonwealth of Puerto Rico, Petitioner v. Luis M. Sánchez Valle & Jaime Gómez Vázquez, Respondents*, in the United States Supreme Court, Case No. 15-108.

2. Articles

Gómez, Antonio R. "Senado acoge informe que recomienda combatir leyes de cabotaje." *Periódico El Nuevo Día*, 13 de abril de 2015 - 8:13 PM. <http://www.elnuevodia.com> (visited July 15, 2015).

Meron, Theodor. "The Continuous Role of Custom in the Formation of International Humanitarian Law." 90 A.J.I.L. 238, No. 2 (April 1996).

[Editorial], "Justicia reitera ante Supremo federal necesidad de quiebra criolla (documento)," *Noticel*, August 24, 2015, 9:37 a.m., <<http://www.noticel.com/noticia/180052/justicia-reitera-ante-supremo-federal-necesidad-de-quiebra-criolla-documento.html>>

Reverón, Wilma. "Enfoques de política práctica que deben aplicarse por la ONU en el proceso de descolonización bajo el Derecho Internacional vigente: una mirada al Caso de Puerto Rico." Ponencia ante el Seminario Regional del Pacífico del Comité de Descolonización de la ONU, May 21-23, 2014, Nadi, Fiji.

Rivera Ramos, Efrén. "Self-determination and Decolonisation in the Society of the Modern Colonial Welfare State." In William Twining. *Issues of Self-Determination*. Proceedings of the 14th World Congress in Philosophy of Law and Social Philosophy. University of Edinburgh. August 17- 23, 1989.

_____. "The Legal Construction of American Colonialism: The Insular Cases (1901-1922)." 65 Rev. Jur. UPR 225 (1996).

Santos Santos, Héctor I. "Cabotage Laws: a Colonial Anachronism." 36 RDPU 451, No. 2 [<http://www.microris.com>] (visited 8/13/15.)

3. Books:

Bentwich, Norman & Andrew Martin. *A Commentary on the Charter of the United Nations*. London: Routledge & Kegan Paul, Ltd., 1950.

Bosque Pérez, Ramón & José Javier Colón Morera. *Las Carpetas. Persecución política y derechos civiles en Puerto Rico. Ensayos y Documentos*. Río Piedras: CIPDC, Inc., 1997.

Brownlie, Ian. *Principles of Public International Law*. Fifth Ed. Oxford: Clarendon Press, 1998.



Cassese, Antonio. *Self-Determination of Peoples. A Legal Reappraisal*. Hersch Lauterpacht Memorial Lectures. Cambridge: Cambridge University Press, 1995, 1996.

Filvaroff, David, Hurst Hannum, Virginia Leary, and Dinah Shelton. "The Substantive Rights and United States Law." In Hurst Hannum & Dana D. Fisher, eds. *U.S. Ratification of the International Covenants on Human Rights*. American Society of International Law Series. NY: Transnational Publishers, Inc., 1993.

Gautier Mayoral, Carmen & María del Pilar Argüelles. *Puerto Rico y la ONU*. Río Piedras, PR: Editorial Edil, 1978.

Géigel Polanco, Vicente. *La farsa del Estado Libre Asociado*. Río Piedras: Editorial Edil, Inc., 1981.

Goodrich, Leland M. & Edvard Hambro. *Charter of the United Nations. Commentary and Documents*. Second Revised Ed. Boston: World Peace Foundation, 1949.

Halajczuk, Bohdan & María Teresa del R. Moya Domínguez. *Derecho Internacional Público*. Tercera Edición Actualizada. Buenos Aires: Sociedad Anónima Editora, Comercial, Industrial y Financiera, 1999.

Hall, H. Duncan. *Mandates, Dependencies and Trusteeship*. Wash.: Carnegie Endowment for International Peace, 1948.

Hannum, Hurst. *Autonomy, Sovereignty, and Self-Determination. The Accommodation of Conflicting Rights*. Philadelphia: University of Pennsylvania Press 1990, 1992.

Hannum, Hurst & Dana D. Fisher, eds. *United States Ratification of the International Covenants on Human Rights*. American Society of International Law Series. N.Y.: Transnational Pub., Inc., 1993.

Higgins, Rosalyn. *Problems and Process. International Law and How We Use It*. Oxford: Clarendon Press, 1994, 1998.

Igarashi, Masahiro. *Associated Statehood in International Law*. International Law in Japanese Perspective. Vol. 7 The Hague; London; N.Y.: Kluwer Law International, 2002.

Janis, Mark W. & John E. Noyes. *Cases and Commentary on International Law*. St. Paul, Minn.: West 1997.

Kelsen, Hans. *The Law of the United Nations. A Critical Analysis of Its Fundamental Problems*. Fourth Edition. N.Y.: Frederick A. Praeger Publisher, 1964.

Kontou, Nancy. *The Termination and Revision of Treaties in the Light of New Customary International Law*. Oxford, NY: Clarendon Press, 1994.

Ku, Charlotte & Paul F. Diehl, eds. *International Law. Classic and Contemporary Readings*. Boulder & London: Lynne Rienner Pub., 1998.

Serrano Geys, Raúl. *Derecho constitucional de Estados Unidos y Puerto Rico*. Vol. I. San Juan: Colegio de Abogados de Puerto Rico, 1986.

Shelton, Dinah. "The Applicable Law." In Hurst Hannum & Dana D. Fisher, eds. *United States Ratification of the International Covenants on Human Rights*. American Society of International Law Series. N.Y.: Transnational Pub., Inc., 1993.

Simma, Bruno, ed. *The Charter of the United Nations. A Commentary*. Second Edition. Vols. I & II. Oxford: Oxford University Press, 2002.

Torruella, Juan R. *The Supreme Court and Puerto Rico: The Doctrine of Separate and Unequal*. Río Piedras: Editorial de la Universidad de Puerto Rico, 1985.

Trías Monge, José. *Historia Constitucional de Puerto Rico*. Vol. IV. San Juan: Editorial Universidad de Puerto Rico, 1983.

Van Walt van Praag, Michael C. *The Status of the Tibet*. Boulder, CO: Westview Press, 1987. In Hurst Hannum. *Autonomy, Sovereignty, and Self-Determination. The Accommodation of Conflicting Rights*. Philadelphia: University of Pennsylvania Press 1990, 1992.

Vélez Rodríguez, Evelyn. *Puerto Rico: Política exterior sin estado soberano, 1946- 1964*. San Juan: Ediciones Callejón, 2014.

Zapata Oliveras, Carlos R. "La preparación del caso de Puerto Rico ante las Naciones Unidas, agosto 1952 a febrero 1953." In Fernando Picó, ed. *Luis Muñoz Marín, Imágenes de la memoria*. San Juan, PR: Fundación Luis Muñoz Marín, 2008.



NOTES:

- ¹ The author wants to thank Vanessa Ramos, Esq., and Marjorie Cohn, Esq. for taking the time to review this essay. Also, my appreciation to Evelyn Dürmayer and the Editorial Board of the IADL's *International Review of Contemporary Law* for its publication.
- ² The U. S. ratified the International Covenants on Civil and Political Rights (ICCPR), and signed- but has yet to ratify- the International Covenant on Economic, Social and Cultural Rights. Both International Covenants of 1966 include an Art. 1 that mentions self-determination. This discussion will be, mostly, about the ICCPR, and its Art. 1.
- ³ "Estado Libre Asociado" (ELA), which literally means "Free Associated State" is not free nor a state of the United States. It has been traditionally translated as "Commonwealth", and has some resemblance to the "commonwealth" under the U. S. federal system. For a more detailed view of the political system, see, Efrén Rivera Ramos. "Self-determination and Decolonisation in the Society of the Modern Colonial Welfare State," in William Twining. *Issues of Self-Determination*. Proceedings of the 14th World Congress in Philosophy of Law and Social Philosophy. University of Edinburgh 17- 23 August 1989. ELA is strikingly similar to a "vassal state," which is "subject to the suzerainty of another state [...]. [A] distinctive element of the feudal suzerainty relationship is that the suzerain holds the source of the governmental authority of the vassal State." Michael C. van Walt van Praag. *The Status of the Tibet* (Boulder, CO: Westview Press, 1987), 105-6, in Hurst Hannum. *Autonomy, Sovereignty, and Self-Determination. The Accommodation of Conflicting Rights* (Philadelphia: University of Pennsylvania Press 1990, 1992), 18- 19. See, Raúl Serrano Geyls. *Derecho constitucional de Estados Unidos y Puerto Rico*. Vol. I. (San Juan: Colegio de Abogados de Puerto Rico, 1986), pp. 449, et seq. The "Insular Cases," resolved by the U. S. Supreme Court from 1901 to 1922 (De Lima v. Bidwell, 182 U.S. 1, among others), made the distinction between the incorporated versus the un-incorporated territory, meaning that the constitutional protections of the U. S. would not fully apply to the un-incorporated territories, and that the Island belonged to the U. S. but it was not part of the U. S. These cases were affirmed in *U. S. v. Sánchez*, 992 F.2d 1143 (June 4, 1992). In *Sánchez*, the Eleventh Circuit reiterated that Puerto Rico is an un-incorporated territory and that Congress could unilaterally revoke Puerto Rico's Constitution or change the U. S.-Puerto Rico federal relations. For a detailed discussion of the Insular Cases and post-insular cases (Balzac, and others), see, Juan R. Torruella. *The Supreme Court and Puerto Rico: The Doctrine of Separate and Unequal* (Río Piedras: Editorial de la Universidad de Puerto Rico, 1985).
- ⁴ The criteria for self-government within the meaning of Art. 73(e) is included in G.A. Res. 742(VIII) of Nov. 27, 1953 para. 3: [self-government applies] "(1) when independence is achieved; (2) by means of a voluntary decision which is capable of revision, and which is arrived at by an adequately informed population in an open and democratic process, in favour of an autonomous political system under the sovereignty of the metropolitan power, but with its own legislative, executive, and judiciary organs, as well as its own autonomous organization of its economic, social, and cultural affairs; (3) by means of a voluntary decision arrived at in an open and democratic process in favour of integration on an equal basis into the metropolitan or other country, involving the loss of an independent international status. [Some citations omitted.] See, Bruno Simma, ed. *The Charter of the United Nations. A Commentary*. Second Edition. Vol. I. (Oxford: Oxford University Press, 2002), p. 1093.
- A non-self governing territory is presumed *prima facie* that it is if "the territory is geographically separate and is distinct ethnically and/or culturally from the country administering it." Principle IV, to G. A. Res. 1541(XV) concerning duties of colonial powers to provide information. Simma, ed., *id.*
- ⁵ For the history of this process, see, Carmen Gautier Mayoral. "Treinta y tres años del caso de Puerto Rico en la ONU," in Carmen Gautier Mayoral, Angel I. Rivera Ortiz & Ilsa E. Alegría Ortega, comps. *Puerto Rico en las relaciones internacionales del Caribe*. (Río Piedras: Eds. Huracán, 1990), pp. 36- 69.
- ⁶ In the 1950's, Géigel Polanco, former Attorney General, advised of all the misgivings he had with the Commonwealth status and the Puerto Rican Constitution, which he called an "insignificant constitution." He also advised against the monopoly that the maritime transport were implementing in the Island with the complicity of the government. Vicente Géigel Polanco. *La farsa del Estado Libre Asociado* (Río Piedras: Editorial Edil, Inc., 1981), 61- 63. See, also, José Trías Monge. *Historia Constitucional de Puerto Rico*. Tomo IV. (San Juan: Editorial Universidad de Puerto Rico, 1983), 236. For today's version of the maritime monopoly and the laws passed by the Puerto Rican Senate, see, Antonio R. Gómez. "Senado acoge informe que recomienda combatir leyes de cabotaje." *Periódico El Nuevo Día*. 13 de abril de 2015 - 8:13 PM. [<http://www.elnuevodia.com>], (visited July 15, 2015).
- ⁷ Rosalyn Higgins. *Problems and Process. International Law and How We Use It*. (Oxford: Clarendon Press, 1994, 1998), Chapter 7.
- ⁸ Article 1(2) mentions as purposes of the United Nations the development of "friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples." Self-determination is present in this Art. 1(2) of the Charter, but its implementation has been more through the *practice of States at the U. N.*, by implementing the decolonization process and making it a legal right. (Emphasis supplied.) Today, it has been included (crystallized) into international instruments, for example, in the International Covenants on human rights of 1966. These Covenants created treaty obligations and are of "great importance for the interpretation of the Charter." Some commentators consider that Chapter XI of the U. N. Charter has less importance today, since its inclusion in mandatory instruments. See, Higgins, *id.* See, also, Simma, ed. *The Charter of the United Nations. A Commentary*. vol. II.
- ⁹ Art. 55 mentions in Para. 1 that peaceful and friendly relations among nations is based "on respect for the principle of equal rights and self-determination of peoples," and promotion of (a) "higher standards of living" [...], "economic, social, health, and related problems; and international cultural and educational cooperation;" and, (c) "universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race sex, language, or religion." Art. 56 reflects the compromise of Members ("All Members pledge themselves") [...] "for the achievement of the purposes set forth in Article 55." Both Articles are considered today as part of the basic instruments in international human rights.
- ¹⁰ Higgins, *id.*, 112.
- ¹¹ Hanna Bokor-Szegö. *New States and International Law* (Budapest: Akadémiai Kiadó, 1970) [...] Karl Joseph Partsch. "Fundamental Principles of Human Rights: Self-Determination, Equality and Non-Discrimination," Karel Vasak and Philip Aston. 1 *The International Dimension of Human Rights*. 2 vols. (Paris: UNESCO and Westport, CT: Greenwood Press, 1982), n. 95, pp. 62- 63; Sarah Wambaugh. *A Monograph on Plebiscites* (NY: Oxford University Press, 1920), p. 490, in Hannum, *Autonomy, Sovereignty, and Self-Determination*, p. 33. See, also, Higgins, pp. 113- 115.



¹² G. A. Res. 1514 (XV), 15 UN GAOR, Supp. (No. 16), U. N. Doc. A/4684 (1960).

¹³ Antonio Cassese. *Self-Determination of Peoples. A Legal Reappraisal*. Hersch Lauterpacht Memorial Lectures. (Cambridge: Cambridge University Press, 1995, 1996), pp. 170- 171. Other commentators include Ian Brownlie and Gros Espiell. See, Ian Brownlie. *Principles of Public International Law*. Fifth Ed. (Oxford: Clarendon Press, 1998), p. 515; and, Héctor Gros Espiell (Special Rapporteur). "Implementation of the United Nations Resolutions Relating to the Right of Peoples under Colonial and Alien Domination to Self-Determination." E/CN.4/Sub.2/405 (vol. I), 20 June 1978.

¹⁴ Case Concerning East Timor (Portugal v. Australia, 1995, ICJ 90, 102, 1995 WL 688255,) in Mark W. Janis & John E. Noyes. *Cases and Commentary on International Law* (St. Paul, Minn.: West 1997), p. 409.

¹⁵ See, also, Simma, ed., vol. I, p. 52.

¹⁶ Simma clarifies that those territories "whose peoples have not yet attained a full measure of self-government," (Arts. 73 and 74) include colonies, protectorates mandate territories and all the other forms by which one territory is subjected to or integrated into another State, without the status of equal rights, or without its free decision." Simma, ed., vol. II, at pp. 1089- 1090.

¹⁷ Ralph J. Bunche. "Trusteeship and Non-Self-Governing Territories in the Charter of the United Nations," U. S. Department of State, Bulletin XIII, at 1040, in Leland M. Goodrich & Edvard Hambro. *Charter of the United Nations. Commentary and Documents*. Second Revised Edition (Boston: World Peace Foundation, 1949), p. 407. According to Goodrich and Hambro, the obligations imposed by Art. 73 to Members are, as follows: (a) obligation to ensure the 'political, economic, social, and educational advancement,' and show "due respect for the cultures of the peoples"...; (b) to ensure the "just treatment," (c) "to ensure... their protection against abuses" (referring to abuses such as slave trade, etc.). The Netherlands Delegate added other (unfulfilled) obligations: (1) [the] 'failure to protect their land, particularly arable land; (2) forced labor; and, (3) the humiliation caused by the assertion of racial superiority. This Delegate asked the U. S. Delegate to "give an assurance that the provisions of this Article implied an obligation to deal with these abuses". Goodrich & Hambro, *id.*, pp. 407- 409.

¹⁸ Not only the political aspect of self-determination is important but the economic, social and cultural, according to the expert Gros Espiell. The economic principle means that all peoples can determine its economic regime, and choose their social system, respecting their particular traditions and characteristics. In the cultural sense, peoples have a right to maintain and enrich their cultural legacy, and the right to have the access and to have an education. See, Héctor Gros Espiell. "El derecho a la libre determinación de los pueblos. Aplicación de las Resoluciones de las Naciones Unidas" (N.Y., 1979). Doc. E-CN.4-Sub.2-405-Rev.1, in Bohdan T. Halajczuk & María Teresa del R. Moya Dominguez. *Derecho internacional público*. Tercera Edición Actualizada (Buenos Aires: Sociedad Anónima Editora, Comercial, Industrial y Financiera, 1999), p. 213.

¹⁹ Under Art. 10 the General Assembly "is authorized to discuss any matter within the scope of the Charter and to make recommendations on such matters to the Members," and has competence to discuss matters in arts. 73 and 74, without being considered an intervention on issues concerning international obligations when administering trust or mandates. Nevertheless, Members have been known to rebut these arguments based on domestic intervention arguments. Some other interpretations have prevailed in the sense that not only General Assembly can make recommendations if a Member has not fulfilled its obligations under Art. 10, but together with the Security Council it can "apply the sanction provided for in article 6 in case a Member violates its obligations under Arts. 73 and 74. If this is 'supervision', the Charter indeed does provide organs for the supervision of application of Chapter XI." In other words, General Assembly has competence "with respect to non-self-governing territories not under trusteeship in accordance with art 10 and (together with the Security Council) under art. 6, it is hardly possible to maintain that the UN has no jurisdiction over these territories," as the delegate of the U.S. has traditionally maintained since 1947. The United States delegation made a sharp distinction for non-self-governing territories under trusteeship (where the supervision of these trust territories lie in the U.N., and where it should hold the administering power to strict accountability, under Chapter XI), and those not under trusteeship (Chapter XII and XIII). For those not under trusteeship the U. S. has maintained that the U. N. has "no right at all to interfere". (Debate in the 4th Committee of the 1947 General Assembly). Actually, this author cites the discussion at the San Francisco Conference which led to the adoption of Chapter XI Working Paper (U.N.C.I.O. Doc. 323, II/4/12). It was clear from that Working Paper that it was not necessary for Member States to adhere to any special declaration but there was a contractual nature in Art. 73 (where Members "have or assume responsibilities") and "agree" (arts. 74 and 25) to "undertake" (arts. 43 and 94) and "pledge themselves" (art. 56). See, Hans Kelsen. *The Law of the United Nations. A Critical Analysis of Its Fundamental Problems*. Fourth Edition (N.Y.: Frederick A. Praeger Publisher, 1964), pp. 550- 555, n. 1 and 2.

U. S., France and U. K. did not recognize the competence of the G. A. and its Committees (Committee of 24) relating to the trust territories (U.N.Y.B. 1976, at 677), although, in practice the Committee of 24 did review both situations with trust territories and the implementation of the Declaration of the Granting of Independence to Colonial Countries and Peoples. See, also, G. A. Res. 1654(XVI), Nov. 27, 1961, in Simma, p. 1138.

²⁰ Higgins, *id.*, p. 113.

²¹ Some of the NGOs that have repeated this petition include the Puerto Rico Bar Association, the American Association of Jurists, the Puerto Rican Independence Party (PIP), and Movimiento Nacional Hostosiano through their co-president, Wilma Reverón. See, Wilma Reverón, "Enfoques de política práctica que deben aplicarse por la ONU en el proceso de descolonización bajo el Derecho Internacional vigente: una mirada al Caso de Puerto Rico." Ponencia ante el Seminario Regional del Pacífico del Comité de Descolonización de la ONU, Mayo 21-23, 2014, Nadi, Fiji. Reverón claims that the legal base lies in the number of years and the repetition in the resolutions issued by the Decolonization Committee, as a way to establish custom (as a peremptory norm.) I disagree with the argument on custom since, first of all, the elements in international custom are applied to States and not to international organs, agencies or committees. Moreover, the criteria of custom, as applied by the International Court of Justice cases are, as follows: (1) substantial uniformity; (2) consistency of the practice; (3) generality of the practice; (4) *opinio juris et necessitatis* (general practice accepted as law). No particular duration is required since this would have to be an evidence submitted on a case by case basis to the court (North Sea Continental Shelf cases, etc., in Ian Brownlie. *Principles of Public International Law*, pp. 5- 7. Meron specifies that *opinio juris* has also other elements, that is, it is composed of (a) bilateral treaties, diplomatic statements of the Executive branch, the practice of the State that also includes: military manuals, treaties and its voting records, declarations and resolutions, legislation and national jurisprudence if they are not contrary to the objects and purposes of the treaties; (b) ratified multilateral instruments (*pacta sunt servanda*); (c) crystallization of general principles in international cases, advisory opinions of international courts and ad-hoc tribunals, and U. N. resolutions.



See, Theodor Meron. "The Continuous Role of Custom in the Formation of International Humanitarian Law." 90 *A.J.I.L.* 238, no. 2 (April 1996). See, also, Nancy Kontou. *The Termination and Revision of Treaties in the Light of New Customary International Law* (Oxford, NY: Clarendon Press, 1994), pp. 140, et seq. Custom is also recognized in Art. 38 of the Statute of the International Court of Justice, and in Art. 53 of the Vienna Convention on the Law of Treaties.

- ²² The U. S. has only ratified the ICCPR with Reservations. Helsinki Act is based on the Conference on Security and Co-operation in Europe, Final Act, 14 International Legal Materials 1292 (1975), in Janis, pp. 410, et seq. The U. S. and other 34 States already signed the Conference's Final Act, in Janis, *id.*, 411.
- ²³ Higgins, p. 119.
- ²⁴ David Filvaroff, Hurst Hannum, Virginia Leary, and Dinah Shelton. "The Substantive Rights and United States Law." Sec. 3.3. Hurst Hannum & Dana D. Fisher, eds. *United States Ratification of the International Covenants on Human Rights*. American Society of International Law Series (N.Y.: Transnational Publishers, Inc., 1993), p. 72. [Other citations omitted.]
- ²⁵ Dinah Shelton. "Issues Raised by the United States Reservations, Understandings, and Declarations." In Hurst Hannum & Dana D. Fisher, eds. *United States Ratification...*, *id.*, pp. 269- 277.
- ²⁶ Patrick Tornberry. "Self-Determination, Minorities, Human Rights: A Review of International Instruments." In Charlotte Ku and Paul F. Diehl, eds. *International Law. Classic and Contemporary Readings* (Boulder & London: Lynne Rienner Pub., 1998), p. 141.
- ²⁷ Cabotage laws limit the maritime transportation between Continental United States and its territories. See, Héctor I. Santos Santos, "Cabotage Laws: A Colonial Anachronism", 36 *RDPUC* 451, No. 2 [<http://www.microjuris.com>] (visited 8/13/15.)
- ²⁸ The U. S. abstained when voting along with 8 other Members, out of a total of 89 U.N. Member States present.
- ²⁹ Compatibility test of arts. 19-21 of the Vienna Convention on the Law of Treaties, adopted 22 May 1969; entered into force 27 Jan. 1980, 1155 U.N.T.S. 331. Sixty-nine States are part of it. The U. S. signed it in 1970, but did not ratify it. Dinah Shelton. "The Applicable Law." Sec. 2.1, International Law, in Hurst Hannum & Dana D. Fisher, eds., *U. S. Ratification of the International Covenants on Human Rights*, pp. 27- 49, 30.
- ³⁰ *The Paquete Habana*, 175 U. S. 677, 20 S. Ct. 290, 44 L. Ed. 320 (1900). In Oliver, Covey T., et al., *The International Legal System. Cases and Materials*. Fourth Ed. (Westbury, N.Y.: The Foundation Press, 1995.)
- ³¹ The January 13th, 2016 hearing in the case of *The Commonwealth of Puerto Rico, Petitioner v. Luis M. Sánchez Valle & Jaime Gómez Vázquez, Respondents*, in the United States Supreme Court, Case No. 15-108, the political status question was presented in a double jeopardy case. See, also, Brief for the United States Solicitor General, Donald B. Verrilli, Jr., as *Amicus Curiae* supporting Respondents, *id.*
- Another case pending before the U. S. Supreme Court is *The Commonwealth of Puerto Rico v. The California Tax-Free Trust, et al.*, Petition for Certiorari of Aug. 21, 2015, granted in Dec. 4, 2015, (Cert. Petitions Nos. 15-233, etc.), regarding the constitutionality of Law 71 of 2014 (Puerto Rican bankruptcy law) under the U. S. Constitution. The First Circuit Appellate Court (Boston), decided on July 7, 2015 that Puerto Rico's Law 71 was unconstitutional based on Section 903(1) of Chapter 9 of the federal Bankruptcy Court, and that due to the preemption doctrine, Puerto Rico cannot approve legislation to restructure its financial situation. The First Circuit Court added that the U. S. Congress reserves the right to amend Chapter 9 at its will, and to apply it to Puerto Rico. See, "Justicia reitera ante Supremo federal necesidad de quiebra criolla (documento)," Notice!, August 24, 2015, 9:37 a.m. [<http://www.noticel.com/noticia/180052/justicia-reitera-ante-supremo-federal-necesidad-de-quiebra-criolla-documento.html>] (visited, Jan. 18, 2016).
- ³² This is especially true when the colonial power has traditionally intimidated independence groups through the U. S. FBI. For example, "Carpetas" or Police files were released in the 1990's as part of a court case regarding political persecution. The Carpetas that were not claimed are being kept in the Puerto Rico's General Archives as part of the collective memory. The Federal FBI files (or rather, copies of the files) are kept in the Legislative Library (Oficina de Servicios Legislativos). See, Ramón Bosque Pérez & José Javier Colón Morera. *Las Carpetas. Persecución política y derechos civiles en Puerto Rico. Ensayos y Documentos* (Río Piedras: CIPDC, Inc., 1997).



International Association of Democratic Lawyers
is a Non-Governmental Organization
with consultative status to ECOSOC and
represented at UNESCO and UNICEF

www.iadllaw.org