Comment

Does International Law Govern Puerto Rico's November 1993 Plebiscite?

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The question of Puerto Rico's status came to American and world attention once again in November, 1993, when Puerto Ricans held a plebiscite to decide the status of Puerto Rico. The status options remained the same as in the 1967 non-binding plebiscite: commonwealth, independence or statehood. No status option received more than 50 percent of the vote in the November, 1993 Puerto Rico plebiscite. This was the result even though a record 80 percent of the electorate voted. As in the 1967 plebiscite, the commonwealth option received most of the votes, statehood second, and independence the least. Why did Puerto Rico have a plebiscite? What expectations did the Puerto Rican people and politicians have with respect to the outcome? The answer to these questions lie in the reality of the colonial relationship between the United States and Puerto Rico.

Prompted by the unprecedented unity among the three Puerto Rican political parties — expressed by a letter dated January 17, 1989, requesting Congress define the parameters of a binding plebiscite — Congress was forced to seriously consider an act for the “self-determination” of the Puerto Rican people.

In 1989, 1990 and 1991, the United States Congress considered legislation to authorize a plebiscite on the future political status of Puerto Rico vis-à-vis the United States. All the legislation failed passage. The legisla-


2. Enhanced commonwealth will be thoroughly explained below. For now, it suffices to say that enhance commonwealth means more self-government and less federal (United States) power.


5. See supra note 1 at 1.


tion would have allowed Puerto Ricans the opportunity to express their preference among three options: independence, statehood, or enhanced commonwealth.8 Senator Bennet Johnston introduced Senate Bill 712 late in the Congressional session and failed to have the bill considered before Congress adjourned. Likewise, Senate Bill 244 died in the Senate Energy and Resources Committee when it failed to secure a majority of the votes.9

Although legislation to provide for a status referendum had not been approved, there was evidence that similar legislation would continually surface until all obstacles were removed.10 A plebiscite was likely to eventually occur, either one controlled by United States Congress or one independently formulated by Puerto Rico’s legislature.11 Indeed, Puerto Rican politicians became increasingly pro-active on this issue. On October 2, 1991, the Puerto Rican legislature passed a bill to provide for a referendum that would allow Puerto Ricans to specify four limitations on the status negotiations with United States Congress.12 The binding proposition would


prohibit Puerto Rico from negotiating any change in status that would not respect Puerto Rican culture and language. The other three propositions were clearly symbolic: one declared that the U.S. citizenship of Puerto Ricans is non-negotiable, another claimed a right of self-determination, and yet another rejected Congressional power over Puerto Rican status determinations.

Another manifestation of the increased initiative of Puerto Rican politicians was the approval of a bill making Spanish the official language of Puerto Rico. This bill was enacted on April 5, 1991, only two months after the Senate failed to approve Senate Bill 244. Other actions included nor of Puerto Rico on June 29, 1989, set up a “Dialogue Committee on the Status of Puerto Rico” to carry out status negotiations. Congress has agreed to cooperate with the Dialogue Committee.

13. Section 955a states in part: “the following rights are guaranteed in our Constitution: ... the right that any consultation on status guarantees, under any alternative, our culture, language, and identity . . . .” 1991 P.R. LAWS tit. 16 § 955a (1991). This proposition is a result of fears that the United States would not accept Puerto Rico into the union as a new state unless it adopted English as its official language. Canute James, A troubled mañana may face the new Puerto Rico, FINANCIAL TIMES, Aug. 13, 1991, at 15 (“Legislators in Washington . . . disapprove[e] of the possibility of a new US state in which Spanish is the only official language . . . .”).


15. “We, the people of Puerto Rico, solemnly claim that the following democratic rights be guaranteed in our Constitution: the inalienable right to determine our political status, freely and democratically . . . .” P.R. LAWS tit. 16, § 955a (1991).

16. “[T]he right to choose a status of full political dignity without colonial or territorial subordination to the full powers of Congress; and the right to vote for the three status alternatives Commonwealth, Statehood, and Independence . . . based on the sovereignty of the People of Puerto Rico . . . .” P.R. LAWS tit. 16, § 955a (1991). See also Voting in Puerto Rico to Address Ties to U.S. and Ethnic Heritage, supra note 12. The referendum took place Dec. 8, 1991, as provided by section 2 of Act. No. 86, P.R. LAWS tit. 16, § 955 (1991). Puerto Ricans voted 641,687 to 544,143 against adopting any of the propositions partly because of the single slate ballot in which a voter could only say Yes or No to the whole ballot. Jorge Casuso, Puerto Rico Rejects Rule on Political Status Votes, CHI. TRIB., Dec. 9, 1991, at 10. The referendum results signaled a major defeat for the ruling Partido Popular Democratico, the party in favor of enhanced commonwealth. The defeat was so clear and resounding, the governor of Puerto Rico announced on January 2, 1992, that he resigned and would move to Spain. Puerto Rico: Governor Rafael Hernandez Colon, available in CARIBBEAN UPDATE, Feb. 1992, at ISSN: 8756-324X. See also Canute James, Puerto Ricans Ponder Future, FIN. TIMES, Jan. 7, 1992, at 6 (discussing significance of defeat).

17. “Spanish shall be the official language of Puerto Rico to be used in all its departments, municipalities or other political subdivisions, agencies, offices and government dependencies of the Executive, Legislative and Judiciary Branches of the Commonwealth of Puerto Rico.” P.R. LAWS tit. 1, § 56 (1991). See also Irene Garzon Fernandez, Spanish becomes Puerto Rico’s Official Language, available in UNITED PRESS INT’L, April 5, 1991. Sensing that this international law offended Congress and may have decreased the potential of a plebiscite, the new governor with a legislature controlled by his party, signed an “English-also” law making English an official language of Puerto Rico on equal footing with Spanish. Karl Ross, Puerto Rico Law Embraces English; Governor Who Backs Statehood Signs on to Second Official Language, WASH. POST, Jan. 30, 1993, at A4.

the continued insistence of Puerto Rican politicians to testify before the Committee on Decolonization in the United Nations. 19

The then newly elected governor of Puerto Rico, Dr. Pedro Rosello, declared his intention to hold a plebiscite in 1993 with or without Congressional approval. 20 The governor expressed his intention to take the result of the November 14, 1993 referendum “to the United States Congress for approval.” 21 Rosello was able to pass a plebiscite bill in the Puerto Rican legislature because his party swept the 1992 elections and controlled both chambers of the legislature. 22 All three political parties agreed to participate in the plebiscite.

Given the United States failure to approve a binding plebiscite for Puerto Ricans, and the decision of Puerto Rico to force a plebiscite vote and take the result to the United States for approval, an analysis of the international legal ramifications of such actions becomes necessary. This Comment ascertains whether international law governs the legal consequences of the plebiscite in Puerto Rico.

In Part I, this Comment analyzes the process by which Puerto Rico attained its current political and legal status in order to determine what law governs the plebiscite. Part II analyzes relevant international law, finds that international law governs and concludes that the principle of self-determination implies significant legal consequences for the plebiscite held in Puerto Rico. Part III concludes the Comment by discussing some of the moral implications of the plebiscite.

February 21, 1902, known as “An Act concerning the language to be used in the Departments, Courts and Offices of the Insular Government”, [sic] is hereby repealed.”


20. Canute James, Stars and Stripes for Puerto Rico?: Islanders will Vote on Whether to Join the Union, FIN. TIMES, Nov. 20, 1992, at 7.

21. Id.

I.

THE PROCESS BY WHICH PUERTO RICO ATTAINED ITS PRESENT STATUS: RELEVANT POLITICAL AND LEGAL DEVELOPMENTS

A. Early Developments

1. Treaty of Paris and The Foraker Act

The 1898 Treaty of Paris between Spain and the United States, which ended the Spanish-American War, ceded Puerto Rico to the United States. Article 9 of the treaty authorized the U.S. Congress to determine the political conditions and civil rights of the people of the ceded islands. The Treaty of Paris catapulted the United States into the ranks of countries with foreign colonies.

After a short period during which the United States military controlled all acts of government, in 1900 Congress passed the Foraker Act, which created a civil government to replace military rule. In general, the Foraker Act established limited self-government where governmental powers of Puerto Rico were ultimately subject to the will of the United States Congress. Specifically, the Act created an Executive Council, created a House of Delegates, and created the position of Resident Commissioner. The Act also provided for the President of the United States to appoint a governor for the island, gave the governor veto power over the House of Delegates, and gave Congress ultimate veto power over all insular legisla-

23. Treaty of Paris, April 11, 1899, U.S. - Spain, 30 Stat. 1754. The Treaty was signed on December 10, 1898 in Paris, Preamble, 30 Stat. 1754, and ratified on February 6, 1899. Ratifications were exchanged on April 11, 1899 and proclaimed on the same day.

24. Id. Art. 2, at 1755.

25. Id. Art. 9, at 1759 ("The civil rights and political status of the native inhabitants of the territories hereby ceded to the United States shall be determined by Congress."). The other territories include Guam, all Spanish colonies in the West Indies, Cuba, and the Philippines. Articles 1-3, at 1755.


27. Id. at 81. Members to the council were appointed by the President of the United States This chamber was responsible for making laws. Id.

28. Id. § 27, at 82. The House of Delegates functioned as the lower chamber. Puerto Ricans were allowed to elect all the members to this chamber. Id. § 29, at 82.

29. Id. § 39, at 86. The Resident Commissioner is one element of the Foraker Act that survives today. The position is similar to being a Member of the House of Representatives, except that the Resident Commissioner until recently could not vote in plenary sessions. Just recently, Congress resolved to allow the Resident Commissioners of the United States territories the power to vote on the floor, thus reversing its earlier procedures.

30. Id. § 17, at 81.

31. Id. § 31, at 83.
tion. The Act also created tariff structures and prohibited the use of foreign shipping lines in commerce between Puerto Rico and the United States. It made United States currency the only legal tender in Puerto Rico and included many other miscellaneous economic provisions. Finally, at least as it regards the political and legal dimension, the Act created the United States District Court for the District of Puerto Rico.

2. The Insular Cases

In a series of decisions known as the Insular Cases, the Supreme Court decided the fate of the people of Puerto Rico. Of the six decisions reported, the fifth, Downes v. Bidwell, is the one that determined the early, and perhaps current, legal structures of the United States-Puerto Rico relationship. The current relationship can be generally characterized as one where Puerto Rico is considered "part" of the United States for some issues and as a foreign country for others. Specifically, Downes held that the Foraker Act and the duties exacted pursuant to the Act are constitutional, notwithstanding the uniformity clause.

The issue presented in Downes was whether merchandise exported from Puerto Rico to New York was exempt from paying duties. Determining the answer to this question involved interpreting the Treaty of Paris, as well as the Foraker Act and the Constitution. The Treaty of Paris, which in part ceded Puerto Rico to the United States, provided the legal framework for determining the status of Puerto Rico. The Foraker Act, which provided for the civil government of Puerto Rico, allowed the United States to impose a 15 percent duty on items "imported from foreign coun-

32. Id. § 31, at 83 ("all laws enacted by the legislative assembly shall be reported to the Congress of the United States, which hereby reserves the power and authority, if deemed advisable, to annul the same").
33. Id. § 2, at 77.
34. Id. § 9, at 79.
35. Id. § 11, at 80.
36. See generally §§ 2-6, 38, at 77-79, 86.
37. Id. § 34, at 84-5.
39. Downes v. Bidwell, 182 U.S. at 287. It is important to note that there is no plurality opinion in Downes and that Justice Brown wrote an opinion and Justices White wrote a concurrence joined by Justice Shiras and Justice McKenna. Only Justice White's opinion will be discussed because it is the one followed by succeeding courts.
40. Id. at 247.
41. 31 Stat. 77 (1900).
Justice White believed that if Puerto Rico was part of the United States, the exaction of duties as allowed by the Foraker Act "was repugnant to the uniformity clause" of the United States Constitution. Therefore, he framed the issue whether the particular tax in question was "levied in such a form as to cause it to be repugnant to the Constitution. This is to be resolved by answering the inquiry, Had (sic) Porto Rico, at the time of the passage of the act in question [the Foraker act], been incorporated into and become an integral part of the United States?"

By the way he formulated the question, White indicated his belief that incorporation is tantamount to becoming part of the United States. At the same time, however, he believed that for a territory to become part of the United States it does not have to become a State of the Union. Indeed, Justice White elaborated that the peace treaty with Great Britain acknowledged that all territories not already states when the United States gained independence from the British Empire were part of the United States.

To answer the question whether Puerto Rico had been incorporated by the time of the Foraker Act, White examined how territories in the past became part of the United States. He found that every treaty that ceded a territory contained a provision that either stipulated that the inhabitants of the territory should enjoy all the rights, privileges, benefits and advantages as the citizens of the United States, or had the following provision: "The inhabitants of the ceded territory shall be incorporated into the Union of the United States . . . as soon as possible according to the principles of the Federal Constitution." To Justice White, these provisions refute the position taken by counsel for the plaintiff that incorporation arises at once from the mere force of a treaty. And, again, this "promise" did not amount to a promise to make the territories states because territories can be incorporated as part of the "Union of United States" and "remain part thereof" without becoming a state.

"The treaty-making power by a mere cession can[not] incorporate an alien people into the United States without the express or implied approval of Congress." Where a treaty provides for incorporation "if the treaty be not repudiated by Congress, [the conditions therein] have the force of the

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42. Id. § 3.
44. Id. (description added).
45. Id. at 319.
46. Id.
47. Id. at 321.
48. Id. at 325 (emphasis in original).
49. Id.
50. Id. at 325-26. Justice White again references the treaty of peace between the United States and Great Britain.
51. Id. at 312. See Id. at 339 ("the treaty-making power cannot incorporate territory into the United States without the express or implied assent of Congress . . . .")).
law of the land, and therefore by the fulfillment of such conditions cause incorporation to result."

On the other hand, Justice White claimed, where a treaty does not contain a provision for incorporation, "incorporation does not arise until in the wisdom of Congress it is deemed that the acquired territory has reached that state where it is proper that it should enter into and form a part of the American family." The Treaty of Paris between the United States and Spain has no incorporation language. Rather, it has the following provision: "The civil rights and political status of the native inhabitants of the territories hereby ceded to the United States shall be determined by the Congress." Justice White believed this provision prevented the treaty on its own accord from incorporating Puerto Rico into the United States. In other words, the treaty, in White's view, specifically left Puerto Rico in a state of legal limbo until Congress takes affirmative steps to incorporate it. Thus, Congress cannot assent to incorporation if incorporation is not provided for in the treaty. According to White, the Foraker Act did not amount to Congressional action on the issue of the status of the inhabitants of Puerto Rico because a provision conferring citizenship upon the people of Puerto Rico was stricken out in the Senate.

Then White made one of the most mind-baffling comments in all of the Insular Cases:

"The result of what has been said is that whilst in an international sense Porto Rico 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. Puerto Rico was foreign to the United States in a domestic sense. This is exactly how Puerto Rico has been treated since this decision: foreign in regards to some issues, domestic in regards to others.

Justice White's decision did not specify which provisions of the Constitution apply on their own force to Puerto Rico and which do not. He does make a general comment that "where there is no direct command of the Constitution which applies, there may nevertheless be restrictions of so fundamental a nature that they cannot be transgressed . . . ."

Justice White's opinion did not state unequivocally what language Congress had to include in an act to incorporate Puerto Rico. Although the Foraker Act provided for a civil government, it was not sufficient. Indeed, the Insular Cases could have been decided the other way very easily. Even
after 52 pages of analysis of incorporation, the Court could have simply
said that the Foraker Act amounted to incorporation. The Foraker Act es-
established a United States District Court in Puerto Rico, with appeals to the
United States Supreme Court; it made United States legislation applicable
to the island; it provided for the circulation of United States currency. All
of these, in addition to creating a civil government, were ample evidence of
Congress' "assent" or intent to incorporating Puerto Rico.

If the Court needed more evidence regarding Congress' intent, it could
have analyzed a resolution by the United States Senate approved only eight
days after the ratification of the Treaty of Paris. The resolution provided:

[B]y the ratification of the treaty of peace with Spain it is not intended to
incorporate the inhabitants of the Philippine Islands into citizenship of the
United States, nor is it intended to permanently annex said islands as an
integral part of the territory of the United States; but it is the intention of the
United States to establish on said islands a government . . . and in due time
to make such disposition of said inhabitants as will best promote the interest
of the United States and the inhabitants of said islands. 58

The presence of a special clause in the Treaty of Paris excluding the
Philippine Islands from incorporation, suggests by the failure to mention
Puerto Rico, that the Senate did not have similar reservations about the
incorporation of Puerto Rico. The Senate could have included the words
Puerto Rico and the word Guam after or before the words "Philippine Is-
lands" or "said islands" if it intended to exclude Puerto Rico and Guam
from incorporation. It is reasonable to assume that if the Senate felt so
compelled to pass this exclusionary resolution regarding the Philippines, it
would have done the same regarding Puerto Rico and Guam if it so felt, but
it did not. Although this does not necessarily mean that Congress intended
to incorporate Puerto Rico, it is at least evidence that suggests that the Sen-
ate did not intend to keep Puerto Rico "unincorporated" and should have
been considered by the court in Downes.

3. The Jones Act of 1917

In response to Puerto Rican complaints that the Foraker Act conferred
less self-government to Puerto Rico than it had under the Spanish regime, 59

58. 33 CONG. REC. S1847 (Apr. 1899).
59. A reading of the "Charter of Autonomy" granted to Puerto Rico by Spain on November 25,
1897, immediately obviates the truth of this assertion. See the United States, War Department's transla-
tion entitled Constitution Establishing Self-Government in the Islands of Cuba and Porto Rico [Rare
Documents Call No: KC 1482.1899] (1899). The Charter created a legislature with two chambers of
equal power. Id. tit. II art. 4, at 11. One Chamber, the Council of Administration, had 51 percent of its
members elected, the rest appointed by the Crown. Id. tit. III, art. 5, at 12. Puerto Rico elected all
members to the other, the Chamber of Representatives. Id. tit. IV, art 11, at 15. The Charter also gave
Puerto Rico full voting representation in the Spanish Parliament, Id. tit. VI, Art. 32, at 15, guaranteed
Puerto Rican participation in the negotiation of commercial treaties which affected Puerto Rico, Id. tit.
Congress passed and the President signed the Jones Act of 1917. The Act allowed Puerto Ricans to elect both the House and a Senate; stripped the Executive Council of all legislative powers, thereby rendering it an advisory cabinet to the Governor, who was still appointed by the President of the United States. The governor retained the power to veto legislation, but was subject to an override veto by two-thirds of both chambers of the legislature. The Jones Act kept the President's absolute veto power over all laws enacted by the Puerto Rican legislature, and gave Congress veto power over any and all acts signed into law by the governor, even if the legislature had overridden a veto. The President also retained the power to appoint the Supreme Court justices.

Significantly, the act also conferred United States citizenship on Puerto Ricans, but the granting of citizenship did not amount to incorporation. There is evidence that conferring citizenship on Puerto Ricans was a

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VI, Art. 38, at 17, and of most significance, provided that the Charter could not be modified without the prior consent of the Puerto Rican legislature, Id. Art. 2, at 17, "Transitory Provisions."

61. Id. § 27, at 959.
62. Id. § 26, at 959.
63. Id. § 13, at 955-56.
64. Id. § 12, at 955.
65. Id.
66. Id. § 34, at 960-61.
67. Id. § 34, at 961.
68. Id.
69. Id. § 40, at 965.
70. Id. § 5, at 953. For a thorough analysis on the process by which Puerto Ricans received U.S. citizenship, see José Julián Alvarez-González, The Empire Strikes Out: Congressional Ruminations on the Citizenship Status of Puerto Ricans, 27 HARV. J. ON LEGIS. 309 (1990) (also tracing the difficulties that resulted as a failure to specify in the original grant of citizenship that all persons born in Puerto Rico after 1917 were deemed citizens of the U.S.), and Alvarez-González, The Protection of Civil Rights in Puerto Rico, 6 ARIZ. J. INT'L & COMP. L. 88 (1989).
71. Justice White's reasoning in Downes, strongly suggested that a grant of citizenship would amount to incorporation. He said, "Can it be denied that such a right [to acquire territories] could not be practically exercised if the result would be to endow the inhabitants with citizenship of the United States...?" 182 U.S. at 306. Thus, White suggests that citizenship entails equality between the citizens, at least as it regards taxes.

In talking about the entire territory of the U.S. when Virginia ceded the Northwest Territory, White says, "all the native white inhabitants were citizens of the United States and endowed with the rights and privileges arising from that relation." Id. at 319. That is, being a citizen endows you with the rights of all American citizens. And should anyone try to construe this to mean only some rights and not all rights, White elaborates:

"[the U.S.] consisted not only of States, but also of territories, all the native white inhabitants being endowed with citizenship, protected by pledges of a common union, and, except as to political advantages, all enjoying equal rights and freedom, and safeguarded by substantially similar guarantees..."

Id. at 320.

Talking about the Territory of Orleans, Justice White says, "citizenship was conferred, and the Territory of Orleans was incorporated into the United States..." Id. at 332. Finally, in regards to the Territory of Missouri, White states: "Citizenship was in effect recognized...[and] the rights [of citizenship
unilateral act, opposed by significant sections of Puerto Rican society.\(^7\) For example, the House of Delegates existing under the Foraker Act passed a resolution opposing the “imposition” of American citizenship. Dated March 12, 1914, it read as follows:

We maintain firmly and loyally our opposition that we be declared against our expressed will or our expressed approval citizens of any other country that is not our own and beloved land which God granted us as an inalienable gift and as an irrevocable right. We affirm that the conferral of American citizenship to the Puerto Rican people does not respond to any objective that will satisfy any public need or a general livelihood. We already have a self and sufficient citizenship of Puerto Rico, ostensible and undisputable before the World, given that our citizenship derives from the natural right of its birth and in the right written by a law approved by the Congress of the United States.\(^7\)

were] secured to the people of the territory.” Id. at 333. Clearly then, Justice White believed a grant of citizenship amounted either to incorporation or at least an obligation to treat the inhabitants of a territory granted citizenship equally with all other citizens.

Justice White crystallized this view in Rassmussen v. United States, 197 U.S. 516 (1905). That opinion held that the treaty ceding Alaska to the U.S. incorporated Alaska to the United States even though it did not provide for incorporation! Why? Because Article 3 of the treaty extended “all the rights, advantages and immunities of citizens of the United States” to the inhabitants of the territory of Alaska. Id. at 522. This language, the Court held, “is the equivalent, as pointed out in Downes v. Bidwell, of the formula employed from the beginning to express the purpose to incorporate” territories. Id. Thus, a grant of citizenship is the equivalent of incorporation.

The main issue in Balzac v. Porto Rico, 258 U.S. 298 (1922) (Chief Justice Taft writing for the Court), was what was the effect of the 1917 grant of citizenship to Puerto Rico? One would expect that this grant amounted to incorporation after reading Justice White’s opinions. However, Balzac held that the grant of citizenship to Puerto Ricans did not amount to incorporation.

Recognizing that Justice White had held differently in Rassmussen, Justice Taft endeavored to distinguish that case: Alaska was a very different case from that of Porto Rico. It was an enormous territory, very sparsely settled and offering opportunity for immigration and settlement by American citizens. It was on the American continent and within easy reach of the then United States. It involved none of the difficulties which incorporation of the Philippines and Porto Rico presents . . . Id. at 309. This reasoning seems unacceptable. Practical considerations like these are not properly entered into the calculus of whether the Constitution is applicable to the citizens of the United States, regardless of where they live.

The discussion of how exactly Puerto Rico fits into the United States has shifted away from incorporation doctrine since Puerto Rico approved its constitution. Many Puerto Ricans believed that Puerto Rico ceased being a territory within the meaning of the territorial clause of the United States Constitution with the adoption of the Puerto Rico Constitution. The language in Public Law 600 referring to a compact between Puerto Rico and the United States and the statement by Mason Sears to the United Nations on August 28, 1953 led Puerto Ricans to believe this. Indeed, some Puerto Ricans believed that the ELA was something unique, not a state, but also not a territory. The distinction is important because being a territory is the equivalent of being a colony because Congress has plenary powers over a territory. The powers vested in Congress by the Territorial Clause, U.S. Const. Art. IV, § 3, cl. 2, are broad. See District of Columbia v. Carter, 409 U.S. 418, 430-31 (1973); National Bank v. County of Yankton, 101 U.S. 129, 133 (1880); American Insurance Co. v. Canter, 1 Pet. 511, 542 (1828). How the courts have interpreted the Constitution is important because it reflects the legal realities as opposed to the political rhetoric, of the United States-Puerto Rico relationship.

72. See Avérrez-Gonzáles, The Empire Strikes Out, supra note 71, at 324.
73. Status of Puerto Rico: Hearings before the United States-Puerto Rico Commission on the Status of Puerto Rico 89th Cong., 2d Sess. 103 (1965) (Statement of Dr. Concepción de Gracia) (transla-
As Puerto Rico did not have the power to pass any laws without the concurrence of the United States-appointed governor at that time, this resolution had no effect. The Resident Commissioner to the United States Congress, Luis Muñoz Rivera, also opposed citizenship because he thought it would confer only “second class” citizenship.

4. The Elective Governor’s Act of 1947 and Public Law 600

In response to continued demands for increased autonomy, Congress passed the Elective Governor’s Act in 1947, allowing Puerto Ricans to elect their own governor for the first time. The Puerto-Rican-elected governor had the power to appoint his own cabinet but still could not appoint the auditor or the justices of the Supreme Court of Puerto Rico. Public Law 362 required the governor to furnish to a “Coordinator of Federal Affairs” all “such reports pertaining to the affairs, conditions and government of Puerto Rico” as the Coordinator may demand. Congress still retained the power to annul Puerto Rican legislation, as did the President. Furthermore, Congress could legislate for Puerto Rico without consulting insular leaders or elected officials.

Puerto Ricans were still not satisfied with the political arrangements and continued to demand more self-government. Approximately three years later, the Resident Commissioner introduced H.R. 7674 to allow Puerto Ricans to write their own constitution. H.R. 7674 became Senate...
bill 3336 after several amendments. Senate Bill 3336 was approved as Public Law 600. 84 Public Law 600 permitted the adoption of a constitution subject to several conditions. First, the constitution had to "provide a republican form of government." 85 Second, the constitution had to include a bill of rights. 86 Third, the constitution had to conform "with the applicable provisions of this Act and of the Constitution of the United States." 87 Finally, the constitution had to be approved by the United States Congress. 88

Public Law 600 was approved by Puerto Ricans in a referendum. 89 A Constitutional Convention was formed 90 to draw up the constitution. 91 This document was approved by Puerto Ricans in a second referendum. 92 Congress then approved the Constitution of the Commonwealth of Puerto Rico, subject to certain changes. 93 The Constitutional Convention accepted the changes, 94 and then Governor Luis Muñoz Marín, on July 25, 1952, proclaimed the Constitution as accepted, 95 pursuant to Public Law 447's own provisions. 96 The amended constitution, which created the Estado Libre Asociado, was not put to the people of Puerto Rico for approval before it was officially adopted. Rather, at the next general election, held on November 4, 1952, the legislature put the amendments to sections 3 and 5 on the ballot for approval. Section 20 was not even mentioned on the ballot. 97

Immediately after the Estado Libre Asociado de Puerto Rico was approved in 1952, the Partido Popular Democrático set out to "perfect" it. In 1959, Antonio Fernós Isern, then Resident Commissioner in Washington

85. Id. § 2.
86. Id. § 2.
87. Id. 3.
88. Id.
89. The referendum was held on July 4, 1951 and the results were: 387,016 in favor to 119,169 against. JUAN R. TORKUELLA, THE SUPREME COURT AND PUERTO RICO: THE DOCTRINE OF SEPARATE AND UNEQUAL 153 (1988).
92. The second referendum was held on March 3, 1952. 374,648 voted to accept the Constitution as drawn and 82,923 voted against it. Pub.L. No. 447, 66 Stat. 327 (1952).
93. Id.
95. FERNOS ISERN, ESTADO LIBRE ASOCIADO DE PUERTO RICO: ANTECEDENTES CREACIÓN Y DESARROLLO HASTA LA ÉPOCA PRESENTE, at 178.
96. See Pub.L. No. 447, 66 Stat. 327, 327-28 (providing that the Constitution would be deemed accepted as soon as the Constitutional Convention approved a resolution so saying).
97. See El Projecto Campbell, in EL DESSARROLLO CONSTITUCIONAL DE PUERTO RICO: DOCUMENTOS Y CASOS, supra note 94, at 130-1. The results of the election as they pertain to the constitution were: 420,036 votes in favor of approving the amendment to § 3 of article VII and 58,484 against; for § 5 of article II, 419,515 for, 58,204 against. Id. at 131.
D.C., together with Senator James E. Murray, introduced a bill in Congress intended to perfect the Estado Libre Asociado by granting Puerto Rico increased autonomy in a new compact of association with the United States. Senator Henry Jackson opposed the concept of a “perfected” Commonwealth because the provision of a compact meant Congressional compliance with bilateral action, and that would mean that Congress would not legislate for the island without the express consent of the insular government. That would restrict Congress’ powers to a point where Puerto Rico could resist federal authority. The bill met with Congressional opposition and failed passage.

B. The 1967 Plebiscite

Soon after the proclamation of the Estado Libre Asociado, Puerto Rican politicians voiced their opposition in the Congress. They claimed that the Estado Libre Asociado constitution was a farce and cited the following facts in support of their position. The only new power granted was that the Auditor and Justices of the Supreme Court of Puerto Rico would be appointed, not by the President of the United States, but by the Governor of Puerto Rico. In effect, they argued, the Estado Libre Asociado constitution achieved far less than did the Elective Governor Act of 1947.

Confusion over what had actually been agreed upon in ratifying the Estado Libre Asociado led Puerto Rico to request that Congress address the question of the status of Puerto Rico and authorize a plebiscite. It was hoped that a plebiscite “would finally put to rest the question of the status of Puerto Rico.” Public Law 271 created the United States-Puerto Rico Commission for the Study of the Status of Puerto Rico. The Legislative Assembly of Puerto Rico pushed for enactment of Public Law 271 on December 3, 1962.

The thirteen member Commission studied three broad areas of the relationship between the United States and Puerto Rico: the legal-constitutional, social-cultural, and economic. It held hearings and established a “Legal Consultative Committee.” The Commission studied constitutional issues first in order to define the legal relationship between Puerto Rico and the United States.

98. See supra note 26.
100. See supra note 26.
101. Supra note 26.
102. Supra note 26.
103. Supra note 26.
104. Supra note 26.
Rico and the United States, and to define the three status options: a "perfected" or "culminated" Commonwealth, Statehood or Independence. 105

The Commission did not clarify any of the confusion behind the meaning of the Estado Libre Asociado. The United States agreed to a "compact" with Puerto Rico, yet the "exact nature and precise limits" of the relationship were not clear, explained the Commission. 106 The Commission in its discussion of the role of the Supreme Court in interpreting the 1952 compact, explained that "what the Supreme Court would find the precise legal consequence to be of the bilateral arrangements entered into in 1952 is a matter of conjecture." 107

The Commission's major conclusion was that all three forms of political status were valid and conferred upon the "people of Puerto Rico equal dignity with equality of status and of national citizenship." 108 The Commission specifically "recognize[d] the Commonwealth as a dignified, legal, and creative political status, which will be permanent if the people of Puerto Rico wish to retain it." 109 Given the validity of all status options, the Commission recommended that a plebiscite should be held to assess whether Puerto Rico wished to maintain itself as a Commonwealth or change to Statehood or Independence.

The conclusions and recommendations of the Commission served as a basis for the structuring of the 1967 plebiscite. Then Governor Roberto Sanchez Vilella summoned a special session of the Legislative Assembly to organize the event. Both the statehood and independence parties opposed the approval of the plebiscite legislation and later decided to boycott the voting. Being in control of the legislature and having no opposition, the Partido Popular Demócrata passed the Plebiscite Act on December 23, 1966. 110 The Act stated that "a plebiscite shall be held on July 23, 1967, through which the Puerto Rican voters will decide the final political status

105. The three options define the three major political parties in Puerto Rico. The "Partido Popular Demócrata" originated the concept of Commonwealth and has never departed from the option. The "Partido Nuevo Progresista" supports complete annexation and thus advocates Statehood. The "Partido Independentista Puertorriqueño" advocates independence for Puerto Rico. About 10-15 percent of Puerto Ricans can be considered "independentistas." The rest of the population is about evenly divided between the other two options. However, these are rough approximations, and only a plebiscite can give the best estimates.

106. See supra note at 103.

107. Id.


109. Id. at 13.

they wish for Puerto Rico, choosing between the Commonwealth, Statehood and Independence formulas.\footnote{111}

The Plebiscite Act specified the meaning of a vote in favor of each of the three political formulas. The Plebiscite Act stipulated that a vote in favor of Commonwealth would mean reaffirmation of the Commonwealth, the inviolability of Puerto Rican United States citizenship, the authorization to develop the Commonwealth to a maximum of self-government, and the permanence of the Puerto Rico-United States relationship.\footnote{112} A vote in favor of Statehood would mean "the authorization to ask the Congress of the United States of America to admit Puerto Rico as a federated state of the American Union." And finally, a vote for Independence would mean "the authorization to ask Congress for the independence of Puerto Rico from the United States of America."\footnote{113}

If voters chose a status other than Commonwealth, Congress would create ad hoc committees composed of representatives from Puerto Rico and the United States to propose the transition measures necessary for that status. If voters chose enhanced Commonwealth, then an ad hoc committee would propose measures to "perfect" or "culminate" it.

The plebiscite was held on July 23, 1967; about 703,000 (65.8 percent) of the 1,067,000 registered voters exercised their right.\footnote{114} Voter turnout was significantly lower than in the general elections; the abstention rate was approximately thirty percent.\footnote{115} Of the 65.8 percent voting, more than 60 percent voted for the Commonwealth option, 39 percent for Statehood, and only 0.39 percent for Independence.\footnote{116} Commonwealth clearly attracted a majority vote, and Muñoz Marín proclaimed the vote "a clear endorsement for commonwealth as a permanent political status for Puerto Rico."\footnote{117}

\footnote{111} Department of State of Puerto Rico, The Plebiscite on the Political Status of Puerto Rico 7 (1967).

\footnote{112} The Plebiscite Act provided the following option under the rubric of "Commonwealth": The reaffirmation of the Commonwealth established by mutual agreement under the terms of Act 600 of 1950 and Joint Resolution 447 of 1952 of the Congress of the United States as an autonomous community permanently associated with the United States of America; the inviolability of common citizenship as the primary and indispensable basis of the permanent union between Puerto Rico and the United States; the authorization to develop Commonwealth in accordance to its fundamental principles to a maximum of self-government compatible with a common market, a common currency and the indissoluble link of the citizenship of the United States; that no change in the relations between the United States and Puerto Rico shall take place unless previously approved by a majority of the electors voting in a referendum held to that effect. 1966 Plebiscite Bill, in El Desarrollo Constitucional de Puerto Rico: Documentos y casos, supra note 94, at 262.

\footnote{113} Ley De Plebiscito No. 1, in El Desarrollo Constitucional de Puerto Rico: Documentos y casos, supra note 94, at 262-64 (1979).

\footnote{114} Henry Giniger, Muñoz Claims Victory, N.Y. Times, July 24, 1967, at 1.

\footnote{115} Id. at 18.

\footnote{116} This low percentage was in part a result of the Partido Independentista Puertorriqueño boycott. Id. at 1.

\footnote{117} Henry Giniger, Muñoz Claims Victory, N.Y. Times, July 24, 1967, at 1.
However, as future political developments would show, the plebiscite only rekindled the debate, especially in the United Nations.

C. The Ad Hoc Committees and the Compact of Permanent Union

Ad Hoc Committees were created by Congress to implement a provision of the 1967 plebiscite, which had an explicit authorization to "develop Commonwealth . . . to a maximum of self-government." Partido Popular Democrático thought it could accomplish enhancement of the Commonwealth through an Ad Hoc Committee recommendation making the proposed Compact of Permanent Union between the United States and Puerto Rico modifiable only by mutual agreement. Senate Resolution 215 would have allowed Puerto Rico to achieve a "culminated" Estado Libre Asociado and a new Compact of Association with Congress.

The Compact would change Puerto Rico's international involvement and trade practices by allowing Puerto Rico to make "educational, cultural, health, sporting, professional, industrial, agricultural, financial, commercial, scientific, or technical agreements with foreign countries." Specifically, the Compact would allow Puerto Rico to "participate in specialized agencies of international organizations" and create a common market explicitly forbidding the United States from imposing tariffs, customs, or duties of any kind on articles imported into the United States from Puerto Rico. However, the Compact would allow Puerto Rico to "levy, increase, reduce, or eliminate tariffs and quotas on articles imported directly from foreign countries."

Perhaps the second most important recommendation of the Ad Hoc Committee from Puerto Rico's point of view — the most important being the modification provision — was Section 11 of Senate Bill 215. Existing law creates a presumption that all laws passed by Congress are effective in Puerto Rico. Section 11 of the Compact of Permanent Union proposed reversing this presumption by requiring United States statutes to specifi-

119. "[T]he U.S. agrees that the provisions of this Compact may be modified only by mutual agreement . . . ." S. Res. 215, 94th Cong., 2d Sess. (1976) § 19, at 31788.
120. Compact of Permanent Union between Puerto Rico and the United States, id. at 31785.
121. For a thorough analysis of the Ad Hoc committee significance and work, See IDSA E. ALEGRIA ORTEGA, LA COMISIÓN DEL STATUS DE PUERTO RICO: SU HISTORIA Y SIGNIFICACIÓN (1982). Most of the following information derives from her analysis.
122. Supra note 119, § 2(c), at 31786.
123. Id.
124. See Id. § 6(a).
125. See Id. § 6(d). The section included a proviso that would ensure U.S. agreement before Puerto Rico acted. See § 6(d)(1)-(3).
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cally refer to Puerto Rico and furthermore required these statutes to be compatible with the Compact.127

José Cabranes, special counsel to the governor of Puerto Rico, general counsel of Yale University and now a federal judge, remarked that the Ad Hoc committees represented the last chance for the Estado Libre Asociado: if nothing came of them then Puerto Rico "will drift along in a state of limbo." The Ad Hoc committee’s recommendations were not legally binding, so Congress in its discretion chose not to follow the Committee’s recommendations.

In his 1981 work, New Thesis, Partido Popular Democrático Governor Rafael Hernandez Colón argued that the Estado Libre Asociado politically had not merely been static but regressive. The steady expansion of federal powers and federal legislation had left Puerto Rico with less, not more, autonomy than it possessed in 1952. The Partido Popular Democrático leaders early denounced United States powers in the 1970 Pronouncement of Aguas Buenas on the Political Status of Puerto Rico. The Pronouncement, inter alia, opposed exclusion of Puerto Rico from the Treaty for the Prohibition of Nuclear Arms in Latin America128 and demanded jurisdiction over the entry of foreigners into Puerto Rico.129 In addition, the Pronouncement demanded a thorough study of the compact between Puerto Rico and the United States to establish more precision with respect to compulsory military service, maritime commerce, customs, communications, internal revenue, labor-management relations, and air and maritime transportation.130

Governor Hernandez Colón demanded new powers, as embodied in Puerto Rico’s Legislature House Joint Resolution 22.131 H.R. 22 demanded power to impose tariffs and other controls on goods entering Puerto Rico; the power to make commercial agreements with other countries; the power to control imports from the United States in order to protect local agricultural production; modification of United States maritime law to permit the use of foreign vessels in commerce between the United States and Puerto Rico; elimination of the 24-hour restriction on the length of stay of cruise ship passengers in Puerto Rican ports; eliminating the use of foreign cruise ships between Puerto Rican and United States ports; eliminating United States taxes on items purchased by tourists in Puerto Rico; and, permission

127. S. Res. 215, supra note 119, § 11(b).
129. Id. at 692-96.
130. Id.
to expand air routes between San Juan and foreign countries, inter alia.\textsuperscript{132} However, these demands led nowhere.\textsuperscript{133}

Not able to get Congress to act on their proposals, the Partido Popular Democrático became even bolder. President of the Senate and long-time high official of the Partido Popular Democrático, Severo Colberg, called for a constitutional assembly to draw up a new constitution and a revised version of the Federal Relations Act. The Partido Popular Democrático wished to negotiate as one sovereign to another. It desired a new relationship based on a treaty which could be terminated. Congress ignored Severo Colberg and the Partido Popular Democrático. On this whole process Carr muses, "Despite twenty years of effort [the Partido Popular Democrático] had made no substantial progress in obtaining from Congress the increase in autonomy that it repeatedly demanded."\textsuperscript{134}

In sum, the Partido Popular Democrático created the Commonwealth of Puerto Rico and attacked anyone who criticized it. It soon became dissatisfied with the lack of real power and set an agenda to enhance self-government. The 1967 plebiscite created the expectation that an enhanced commonwealth would follow as a result of the Ad Hoc committees. The Partido Popular Democrático enthusiastically embraced the Ad Hoc committee work because the committee recommended several changes that met the Partido Popular Democrático's desires of increased self-government. The Partido Popular Democrático became increasingly radical when these recommendations were ignored. The Partido Popular Democrático, through Hernandez Colón's New Thesis and House Joint Resolution 22, demanded more insular powers. Congress reacted by becoming increasingly recalcitrant.

The Partido Popular Democrático had made a 180 degree turn in its dealings with Congress and the United States. From very amicable dealings, the climate had become hostile and radicalized. In the end, the Partido Popular Democrático — and Puerto Rico — had to live with the 1952 Constitution. The Partido Popular Democrático decided to take its grievances to the United Nations, a place it had successfully avoided since 1953 because of the political ramifications of such an action.

\textbf{II. PUERTO RICO'S NEXT PLEBISCITE SHOULD BE A MATTER FOR INTERNATIONAL LAW}

International public law is an amorphous field that eludes simplistic explanations. Some critics maintain that international law does not exist for

\textsuperscript{132} \textit{Id.} \\
\textsuperscript{133} The U.S. has continued to encroach on the Puerto Rican powers to this day. \textit{See} 130 Cong. Rec. S2246, 1324-25 (Feb. 1, 1984), 689-90. \\
\textsuperscript{134} \textit{Carr, supra} note 102, at 126.
the simple reason that there is no sovereign power to enforce the law. Others maintain that while there may not be a sovereign in terms of a supra-national organization with the power to force compliance to the law, there is nevertheless a system of international law that imposes rights and obligations upon participating nations. Notwithstanding the above enforcement problem, there are some norms that most nations in the world consider to have the binding power of law. One such normative value or international legal rule is the right to self-determination.

Part II of this comment will consider the question of the status of Puerto Rico within the context of international law. Puerto Rico’s current constitutional-legal structure, as discussed in part I, impedes her exercise of self-determination. Because Puerto Rico has not been able to fully exercise its right to self-determination, any issue that addresses the status of Puerto Rico, should be a matter of international law. Therefore, the November 1993 Plebiscite should be governed by international law. The next section explains the sources of international law, specifically the right to self-determination, Puerto Rico’s inability to exercise that right, and the history of United Nations involvement in Puerto Rico and the Partido Popular Democrático’s initial reluctance and hostility to United Nations oversight of the Puerto Rico-United States relationship.

A. The Right to Self-determination

Public international law concerns the conduct of states and of international organizations and with their relations inter se. The sources of international law include treaties, international custom, “the general principles of law recognized by civilized nations,” and judicial decisions and the teachings of the most qualified publicists.

1. Customary Law

Customary international law results from “a generalized and consistent practice of states followed by them from a sense of legal obligation,” or opinio juris. The United States Supreme Court early accepted the position that customary international law is binding in appropriate circumstances.

137. Statute of the International Court of Justice, Art. 38(1)(c).
139. See The Paquette Habana, 175 U.S. 677, 700 (1900) (“International law is part of our law, and must be ascertained and administered by [our] courts . . . . [W]here there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations . . . .”).
2. **Self-determination is a Norm of Customary International Law**

The right to self-determination is a principle of customary international law which rapidly developed in the 20th century. The process by which self-determination became customary law began with the French Revolution of 1789 and the Russian October Revolution of 1917. The Latin American independence movements also contributed to recognition of the norm.

The African and Asian independence movements in this century cemented the consensus that self-determination is a right of all peoples. Indeed, the nations convened to create the United Nations in San Francisco in 1946 found this principle so compelling that they included it in the first article of the first chapter of the new Charter of the Organization of United Nations. Article 1 states the purposes of the United Nations. Included as a purpose is “to develop friendly relations among nations based on respect for the principle of equal rights and self-determination . . . .” Article 55 repeats the principle.

These nations also agreed to include a “Declaration Regarding Non-self-governing Territories.” Articles 73 and 74 make up the Declaration and Article 73 (b) specifically requires member nations to develop the self-government of their territories. Although this article does not specifically mention the principle of self-determination, the United Nations subsequently made it abundantly clear that self-determination is a principle of international law.

In December, 1960, the United Nations General Assembly adopted Resolution 1514 (XV) which was entitled “Declaration on the Granting of Independence to Colonial Countries and Peoples.” The resolution passed without opposition; a final vote tallied 89 nations in favor and only nine abstaining.

The first sentence of the International Covenant on Economic and Social and Cultural Rights [GAR#2200(xxi)] and the first sentence of the International Covenant on Civil and Political Rights say “[a]ll peoples have the right to self-determination.” The positioning of the principle as the first sentence is significant. The nations agreeing to the Covenants must have taken immediate notice of the prominent display of the principle.

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before voting. Agreements freely entered into for international law purposes are binding.\textsuperscript{143}

The principle of self-determination was reaffirmed in the Declaration on Principles of International Law Concerning Friendly Relations and Co-operation or Resolution 2625.\textsuperscript{144} The Declaration resolved that by virtue "of the principle of equal rights and self-determination of peoples enshrined in the Charter of the United Nations, all people have the right freely to determine, without external interference, their political status . . . and every State has the duty to respect this right in accordance with the provisions of the Charter."\textsuperscript{145}

Finally, states have found the principle and the true meaning — the achievement of independence of subjugated peoples — so universally accepted that they have declared the 1990s the "International Decade for the Eradication of Colonialism."\textsuperscript{146} The instrument agreed upon—General Assembly Resolution 43/47 (1989)—received only one negative vote: the United States.\textsuperscript{147}

The International Court of Justice has held that self-determination is a right of peoples. In Western Sahara,\textsuperscript{148} the International Court examined the legal effect of the resolutions of the General Assembly on decolonization and self-determination. After extensive analysis, the court held that it was evident that the right of self-determination for non-self-governing territories "has become a norm of international law."\textsuperscript{149} In Legal Consequence for state of continued presence of South Africa in Namibia,\textsuperscript{150} the ICJ stated "the subsequent development of international law in regard to non-self-governing territories, as enshrined in the Charter of the United Nations, made the principle of self-determination applicable to all of them."\textsuperscript{151}

The Final Act of the Conference on Security and Cooperation in Europe agreed that self-determination is a norm of customary law. Specifically they resolved "[b]y virtue of the principle of . . . self-determination of peoples, all peoples always have the right, in full freedom, to determine,\footnote{See Vienna Convention, art. 26 (1966). The principle that agreements entered into are binding is known as \textit{pacta sunt servanda}, appearing in Rosenne, Law of Treaties, Guide to Legislative History of Vienna Convention 300.}


\footnote{Id. at 123.}

\footnote{G.A. Res. 43/47, U.N. GAOR, 43rd Sess., (1988).}

\footnote{Id.}

\footnote{1975 I.C.J. 12.}

\footnote{See 1975 I.C.J. ¶¶ 54-59.}

\footnote{1971 ICJ 16.}

\footnote{Id. at 31, ¶ 52. See also Id. at 73-75, ¶ 5 (the separate opinion by Ammoun tracing the development of the right to self-determination).}
when and as they wish, their internal and external political status, without external interference..."\(^{152}\)

Finally, the United States has accepted the right to self-determination and shown the requisite opinio juris. The United States Representative to the UNGA endorsed Resolution 2625 stating that "the United States is pleased now to observe that it considers the declaration... to be an objective statement of relevant charter principles rather than a partisan document."\(^{153}\) Furthermore, officially, the "United States [was] glad that the declaration [UNGA 2625] recognizes the right of self-determination..."\(^{154}\)

Some argue that the right to self-determination has reached the level of a peremptory norm from which no state may derogate.\(^{155}\) In other words, not only is the norm a customary rule of international law, but no state may derogate from it. In international law jargon, a peremptory norm is called jus cogens.\(^{156}\) It has been defined as "a peremptory norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character."\(^{157}\) It confers the belief that the norm has become "so fundamental that it invalidates rules consented to by states in treaties or custom."\(^{158}\) Professor M. Janis suggests that the least controversial jus cogens is pacta sunt servanda, meaning that international agreements are binding.\(^{159}\) Professor Janis also suggests that Articles 1 and 2 of the United Nations Charter reach the level of jus cogens in so far as they propound that states are sovereign.\(^{160}\)

All states believe in their right to self-determination.\(^{161}\) Because all states believe in their inalienable right to self-determination, several commentators find that the principle of self-determination reaches the level of jus cogens.\(^{162}\) One of the more forceful expositions and arguments that the


\(^{153}\) Id. at 623.

\(^{154}\) See Case Concerning Military and Paramilitary Activities in and Against Nicaragua, 1986 ICJ 14, 351, para. 180 (dissenting opinion of Schwebel); Namibia, 1971 ICJ at 73-75 (separate opinion by Ammoun); Alexidze, Legal Nature of Jus Cogens in Contemporary International Law, 172 Rec. des Cours 227, 262-63 (1981); Ian Bownlie, infra, Cristiceau, infra, inter alia.

\(^{155}\) Vienna Convention, art. 53, supra note 143, at 300.

\(^{156}\) Id. at 625.

\(^{157}\) Id. at 54.

\(^{158}\) Id. at 135, at 62.

\(^{159}\) Id. at 54.

\(^{160}\) Id.

\(^{161}\) Nicaragua, 1986 ICJ at 351, para. 180 (Dissenting opinion of Schwebel) (self-determination is universally recognized).

\(^{162}\) See supra notes 155, 158.
right to self-determination is a rule of jus cogens is by Special Rapporteur Gros Espiell. The Special Rapporteur found that:

In present-day legal theory the idea that self-determination is a case of jus cogens is widely supported, whether because it is held that the character of jus cogens is an attribute of the principle of self-determination of peoples or because it is considered that this right, being a condition or prerequisite for the exercise and effective realization of human rights, possesses that character as a consequence thereof."

For a right to reach jus cogens, then, the belief in the right must be universal. That is, all states must believe in the right, and that is the case with the right to self-determination.

The Instituto Hispano-Luso-Americano de Derecho Internacional has stated "[t]he principle of the self-determination of peoples is an intrinsic element of human consciousness and an integral part of the rules of jus cogens of positive international law." Ian Brownlie has found that self-determination is a basic human right. Moreover, he believes that it is also a peremptory norm.

A working group of the International Law Commission considered drawing up a list of fundamental principles of international law (i.e., a list of norms that they believed reached the level of jus cogens). In their draft list of peremptory norms, self-determination was included. The working group ultimately decided against the list, not because they didn't believe these rights reached the level of jus cogens, but for practical reasons.

3. What is the Proper Exercise of Self-determination?

Thus, self-determination has become at a minimum a principle of international law by virtue of the custom of states, and at a maximum, jus cogens, a peremptory norm of international law from which no derogation is permitted. The process of establishing the norm has entailed determining its meaning and ramifications. Resolution 2625 found that "all peoples have the right freely to determine, without external interference, their political status and to pursue their economic, social and cultural development . . . ." It also found that every state has "the duty to promote . . . [the] realization of the principle of equal rights and self-determination of peoples,

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164. Id. at 34.
165. Translates to Hispanic-Portuguese-American Institute of International Law.
166. See Espiell, supra note 163, at 53 (citing the Eleventh Congress (Madrid, 19), Instituto Hispano-Luso-Americano de Derecho Internacional).
167. IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 82-83 (3d ed. 1979).
168. Id.
... in order... [t]o bring a speedy end to colonialism, having due regard to the freely expressed will of the peoples concerned.  

Customary and conventional international law has recognized several ways by which a colonized territory may effectively exercise its right to self-determination. A non-self-governing territory may exercise its right to self-determination by becoming independent, freely associating itself to a sovereign state, or by integrating itself to a sovereign state. For the exercise of the right to be effective for any of these methods, the non-self-governing territory must have reached a full measure of self-government.

a. Independence

The right to independence is two-fold. On the one hand, non-self-governing territories have a right not to be ceded or exchanged against their will. On the other hand, the non-self-governing territories have the right to complete and total separation from the colonizing countries. The ultimate test of independence is whether a former non-self-governing territory has acceded to the benefits of sovereign equality.

A decision to become independent is not necessarily a permanent decision. A territory may, after experiencing independence, through another exercise of self-determination, decide to become freely associated or integrated to another sovereign State.

b. Integration with an Independent State

Integration with an independent state does not mean the forced annexation and assimilation of the non-self-governing territory — the classic imperialist and colonial method of expansion. Rather, integration must be the

169. G.A. Res. 2625, supra note 144.
171. See Id.
172. See Cristescu, The Right to Self-determination, supra note 140, at 47.
173. Complete independence means political, economic, social, and cultural independence. See G.A. Res. 1514, supra note 141.
174. The Declaration on Principles of International Law concerning Friendly Nations and Co-operation among States in Accordance with the Charter of the United Nations list several factors of sovereignty:

(a) States are juridically equal;
(b) Each State enjoys the rights inherent in full sovereignty;
(c) Each State has the duty to respect the personality of other States;
(d) The territorial integrity and political independence of the State are inviolable;
(e) Each State has the right freely to choose and develop its political, social, economic and cultural systems;
(f) Each State has the duty to comply fully and in good faith with its international obligations and to live in peace with other States. G.A. Res. 2625, supra note 144, at 122.
exercise of self-determination of a people based on equality and certainly through democratic processes. Resolution 1541 also outlines this option.\footnote{175}

c. \textit{Free Association}

A non-self-governing territory may decide to freely associate itself with an independent sovereign State. Like independence, this option is not permanent either, as its definition suggests.\footnote{176}

The Free Association option seems to envision a situation where the non-self-governing territory exercises its self-determination as if it were a completely independent sovereign state. In that sense, the non-self-governing territory has achieved a full measure of self-government by freely adopting a constitution and having the ability to modify the arrangement between it and the other State. Indeed, the latter is perhaps the essential element to free association.\footnote{177} Either of the two States must be able to withdraw from the relationship at any point in time—albeit, through "the expression of their will by democratic means and through constitutional processes."
d. Freely Associated States

The West Indies Associated States are an example of properly associated states. The West Indian territories associated themselves with the United Kingdom. In that relationship, the West Indies delegated the power to determine defense and external affairs matters to England. Significantly, either party to the relationship could walk away from the association.

Another example of free association is provided by the 1965 arrangements between the Cook Islands and New Zealand. These arrangements are similar to that just discussed to the extent that the territory has delegated the power over foreign affairs and defense to the metropolitan power. The relationship was characterized by a sense of partnership, where the people of the Cook Islands reserved their right to move to a status of complete independence.

The examples above show that a fundamental criterion for a valid free association relationship is the ability to terminate the relationship and have complete self-government. In other words, the compact must be revocable. As the following discussion shows, Puerto Rico is not free to revoke its “compact.”

B. Has Puerto Rico Exercised its Right to Self-determination?

1. The United Nations and Puerto Rico

When the Partido Popular Democrático proclaimed the new constitution in 1952, many believed Puerto Rico had exercised its right to self-determination. Chapter XI of the United Nations’ Charter is a “Declaration Regarding Non-self-governing Territories” which describes the responsibilities of member nations to ensure that their territorial possessions attain “a full measure of self-government.”


179. West Indies Act 1967, c.4 at § 11(2). The U.K. acknowledged that “the association is a voluntary one terminable by either country, every endeavor should be made to resolve any difference of view between the Governments by means of free negotiation and to maintain the spirit of co-operation and mutual confidence that now exists and that makes a voluntary association possible.” Windward Islands Constitutional Conference Report, 1966 Cmd. 3021, at 8.


181. Id.

182. Id.

183. See G.A. Res. 742, U.N. GAOR, 8th Sess., (1953) (establishing as a factor indicative of free association, the freedom “to modify at any time this status through the expression of their will by democratic means”).

184. Id.

Nations on their territories' conditions. The United States, one of the leading countries behind the post-World War II decolonization movement, rapidly complied. It submitted reports on Puerto Rico, Alaska, Guam, Hawaii, the Virgin Islands and American Samoa. But, with the proclamation of the Commonwealth of Puerto Rico on July 25, 1952, the United States requested that Puerto Rico be dropped from the list of non-self-governing territories. On November 27, 1953, as mentioned above, the United Nations acquiesced by passing Resolution 748.

Resolution 748 provided that "in the framework of their Constitution and of the compact agreed upon with the United States of America, the people of the Commonwealth of Puerto Rico have been invested with attributes of political sovereignty which clearly identify the status of self-government attained by the Puerto Rican people as that of an autonomous political entity." However, the resolution also provided that "due regard will be paid to the will of both the Puerto Rican and American peoples . . . in the eventuality that either of the parties to the mutually agreed association may desire any change in the terms of this association." Ever since the resolution was passed, the United States has argued that Puerto Rico is a domestic issue and that any United Nation involvement is interference in the internal affairs of the United States and Puerto Rico.

However, with the tide of newly independent Asian and African states entering the United Nations, the issue of Puerto Rico has re-emerged as one of international import. The African and Asian Countries wrote Resolution 1514 which passed by a vote of 89 to 0 with 9 abstentions. The United States delegation abstained at the request of the United Kingdom. General Assembly Resolution 1514, entitled "Declaration on the Granting of Independence to Colonial Countries and Peoples," reads: "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 distinction as to race, creed or color, in order to enable them to enjoy complete independence and freedom."

Shortly after, the General Assembly passed Resolution 1541 which indicated three ways by which:

A Non-Self-Governing Territory can attain a full measure of self-government by:

a) Emerging as a sovereign independent State;
b) Free association with an independent State; or

186. Id.
188. Id.
189. Id.
190. U.N. Res. 1514, supra note 141, at art. 5.
To bring an end to colonialism the General Assembly set up the Committee of Twenty-Four, or as it is more popularly known, the Special Committee on Decolonization.

On August 28, 1972, the Committee of Twenty-four passed a resolution which linked Puerto Rico for the first time explicitly to Resolution 1514, recognizing "the inalienable right of the people of Puerto Rico to self-determination and independence in accordance with General Assembly Resolution 1514." The resolution also created a Working Party that was to submit a report in 1973 describing the procedure by which Resolution 1514 would be implemented for Puerto Rico. On August 30, 1973, the Decolonization Committee adopted another resolution adopting its 1972 decision and reaffirming "the inalienable right of the people of Puerto Rico to self-determination . . . .", asked the United States to refrain from obstructing Puerto Rico's right to self-determination, and decided to keep the case under continuous review.

These resolutions were of little effect because the United States position that the United Nations had no jurisdiction over Puerto Rico was supported by the major Puerto Rican political parties. "Both parties (Partido Nuevo Progresista and Partido Popular Demócratico) passed a joint resolution (No. 452) condemning the committee's action . . . as 'flagrant interference.'"

The Committee of Twenty-four did keep the Puerto Rico question under review. Meetings were held in 1974 and from 1975 onward. The 1975 meetings became heated after Australia moved to have the debate suspended and the meeting adjourned. The discussion was suspended, and the meeting was adjourned only after intense lobbying. The United States warned that "a vote supporting the resolution concerning Puerto Rico, would be considered a 'hostile act' toward the United States."

The Partido Popular Demócratico argued that Puerto Rico had democratically chosen its present status in 1952. It rejected "any outside intervention designed to impose on Puerto Rico terms which violate the free self-determination already expressed by the Puerto Rican people with re-

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191. Supra note 170.
193. Id.
194. Id.
The Partido Nuevo Progresista, in agreement, claimed that the United Nations had no right to interfere in the domestic concerns of United States citizens. Such support of the United States position by the two major political parties of the territory under scrutiny gave legitimacy to the United States’ claim that Puerto Rico was a domestic issue and temporarily served to quell international opinion.

Yet, in what amounts to a major turn in policy, all three Puerto Rican political parties have testified before the Committee of Twenty-four since 1978. The two political parties which had refused to acknowledge the legitimacy of United Nations’ involvement came forward clamoring for the Decolonization Committee to hear their new positions. The position of the Partido Popular Democrático now became strident against the United States position. It now held that the refusal of the United States to develop Commonwealth constituted “immorality.” The Partido Popular Democrático stated at the Committee meeting that “[i]t is precisely the absence of development and growth [of the Commonwealth] despite the persistent claims of the Puerto Rican people, that casts doubt on the validity of that status as a formula for the decolonization of Puerto Rico.”

The Partido Nuevo Progresista also sent its representatives to the Committee. Then Governor Carlos Romero Barceló, a staunch supporter of statehood, criticized the Commonwealth as quasi-colonial, and stated that Puerto Rico is free to opt for “the vestiges of colonialism which characterize our relations with the United States.” Partido Nuevo Progresista delegate to the United Nations, and a pro-American conservative Senator, Oreste Ramos explained that “the political inferiority inherent in Puerto Rico’s present status is an insult to the national decorum of the United States and to the dignity of the people of Puerto Rico.” Maurice Ferre, the Puerto Rican-born mayor of Miami, also testified before the Committee “dramatizing the widespread dissatisfaction with the status quo.” Since then, the official Partido Nuevo Progresista position before the Committee is that Commonwealth is a “humiliating colonial problem” and “that the United Nations may have a monitoring role to play” because Commonwealth “maintains Puerto Rico subject to the territorial clause of the United

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201. See Carr, supra note 101, at 354.
202. Id. at 354.
203. Id. at 355.
204. Id. at 358-59.
206. Id. at 69.
States Constitution and hence prevents the colonial problem of our people from being solved.”

What became evident in these proceedings was that all the leaders of the Puerto Rican political parties were dissatisfied with the status quo (i.e., Commonwealth). Evidently, Puerto Ricans felt that their prior exercise of self-determination was not complete or had not come to fruition. They wanted to exercise that right again.

The whole scenario has led status analyst Juan Manuel García-Passalacqua to conclude that the trip to New York “legitimized” the issue of colonialism in the debate on Puerto Rico in the United Nations. José Cabranes concluded that the 1978 debate was significant because first, Puerto Rican leaders of “every political stripe” for the first time “recognized the existence of an alternative forum for efforts to resolve the prolonged Puerto Rican identity crisis,” and secondly, the debate “shattered the delusion of a generation of United States policy-makers that the question of Puerto Rico’s political future is strictly an American domestic issue.”

Eric Swendsen, in the State Department’s Open Forum, explained that “the 1978 Committee hearings were important in demonstrating to the world more clearly than ever before that, whatever Puerto Ricans may think about the United States, they are clearly dissatisfied with the current status relationship. . . . This mass of negative testimony materially undercut the support for our position in the committee to defer the issue.” No party in Puerto Rico accepted the existing status.

The debate on Puerto Rico’s political status unfolded from the domestic to the international scene. The only party claiming that the status of Puerto Rico was an internal matter was the United States and more and more States were convinced that Puerto Rico had not effectively exercised its right to self-determination. On August 20, 1980, for instance, the Decolonization Committee adopted a resolution which included condemnation of the United States on a number of new issues, including United States Naval activities on the island of Vieques.

On December 1, 1981 the General Assembly requested that Puerto Rico be put on the agenda of the General Assembly as a separate item. On this development Robert Pastor emphasizes “for a decade, the United States had succeeded in keeping

208. Id. at 13
210. Cabranes, supra note 205 at 85.
211. CARR, supra note 101 citing Eric Swendsen 20 Open Forum 21-27 (Spring/Summer 1979).
212. Vieques is an island-municipality of Puerto Rico off the island’s Southeast coast. The United States Navy has appropriated 75 percent of the island for military maneuvers, making it impossible for Viequeños to fish in the fish-abundant Navy-occupied areas. For an excellent overview on the issue see the motion picture documentary “The Battle of Vieques,” (directed by Zydnia Nazario).
the Puerto Rican issue outside the gates of the General Assembly but that ended in September 1982."214

The United Nations voted against debating the Puerto Rican question as a separate agenda item. The vote was 70 to 30 with 43 abstentions. Although many states desired to vote for inclusion on the agenda, some voted against it and others abstained due to what the Washington Post called "an intense global lobbying campaign — unprecedented since the battles over Chinese representation in the early 1970s." Pastor succinctly summarized the reasons and evidence. In effect, the United States mounted a huge diplomatic effort. An African ambassador said that then Secretary of State George Schultz had personally phoned his President and commented that "[t]hey really pulled out all the stops."215

Because of the lobbying effort, countries which were expected to vote against the United States position voted differently. Panama, Brazil, and Costa Rica ended up voting against inclusion; Mexico, Colombia, and Perú ultimately abstained.216 The Panamanians explained that "[t]he fact that [Puerto Rico] was not included in this year's agenda is not a solution nor is it evidence that the problem does not exist. It would be naive to think that votes cast here for reasons of state are sanctioned by Latin American public opinion..."217 Finally, Mexican President José López Portillo stated to the General Assembly that "[w]e see with concern the pressures being exerted on the members of the United Nations to change their votes. The favorable results thus obtained exhibit only the vulnerability of some countries."218

Since 1978, the Venezuelan delegate to the Special Committee on Decolonization has been a fervent supporter of putting Puerto Rico on the General Assembly agenda as a separate item. The most recent Decolonization Committee resolution dealing with Puerto Rico was on August 15, 1991. The resolution, drafted by Venezuela, says the committee "trusts the United States Congress will adopt as soon as possible the legal framework to enable the Puerto Ricans to exercise their right to self-determination, through popular consultations in accordance with the principles and practice of the United Nations." It resolves that the committee "deplores the fact that the United States Congress has not yet adopted the legal framework for the holding of a referendum..."219 The vote was 10-1 with 10 abstentions. The vote has particular importance because it is the first time that all

214. Id.
215. Id. at 111.
216. Id.
217. Id. at 111-12.
218. Id. at 112
the Latin American and Caribbean countries in the Committee voted in favor of a resolution on decolonizing Puerto Rico.\footnote{220}{Id. The members include Chile, Cuba, Trinidad, Tobago, and Venezuela. Other Countries voting in favor include Iran, Iraq, Syria, the Soviet Union, and Tanzania. Norway was the sole no vote. See U.N. Committee Asks U.S. to Consider Puerto Rico's Status, REuTER's, BC Cycle, Aug. 15, 1991.}

In essence, more and more states are convinced that Puerto Rico has not exercised its right to self-determination. The developments since 1953, when Resolution 748 was passed, suggest that if a vote were to be taken today, the United Nations General Assembly would pass an in concreto resolution supporting Puerto Rico's right to exercise its right to self-determination again.\footnote{221}{The UN has previously passed in concreto resolutions supporting the self-determination of various states: including Southern Rhodesia, Namibia, Antigua, the Bahamas, the Falkland Islands, French Somaliland, Gibraltar, Papua, South Africa, Palestine, Guam, American Somoa, Timor, and several others.} Of course, this assumes that the vote would not be influenced by a massive and global United States lobbying effort.\footnote{222}{This is of course an unrealistic assumption. The U.S. holds to its position that Puerto Rico is an internal affair of the U.S., and it is not likely to miss the opportunity to keep it so.}

In sum, because resolution 748 took Puerto Rico off the list of non-self-governing territories, in the eyes of some, Puerto Rico is no longer a colony. However, as just discussed, everyone is dissatisfied with the current Puerto Rico-United States relationship except the United States, and consequentially, the relationship has been increasingly internationalized. Puerto Rico's current political status is under constant review by the Decolonization Committee. For this reason, it is premature to conclude that Puerto Rico's status is fixed.

According to the United Nations, Puerto Ricans ostensibly chose Free Association in 1953. Assuming and agreeing that the United Nations has the competence to decide whether a non-self-governing territory has exercised its right to self-determination,\footnote{223}{Rigo Sureda, The Evolution of the Right of Self-Determination: A Study of United Nations Practice 28-95 (1973) (tracing the evolution of United Nations assuming the power to decide whether a non-self-governing territory has become self-governing).} this author finds that in 1953 the United Nations erred in taking Puerto Rico off the list of non-self-governing territories for several reasons. First, Puerto Rico did not exercise its right of self-determination without interference. Second, the option chosen by Puerto Rico's politicians — Free Association — did not comply with the definition of that concept. And third, Puerto Rico had not achieved a full measure of self-government when it "chose" free association.

\textbf{2. The Principle of Non-intervention was Violated}

To be effective, any exercise of the right to self-determination must be freely done. In other words, a non-self-governing territory must be able to exercise its right without the intervention or undue influence of external parties. If there is undue influence, the exercise of self-determination is
invalid. This rule of international law has been applied to other non-self-governing territories. For example, consider the case of French Somaliland. France transmitted information from 1946 to 1957 pursuant to Article 73(e) of the United Nations Charter. In 1957, France discontinued submitting reports because French Somaliland had become self-governing via a referendum. However, the Committee of Twenty-four found that French Somaliland had not yet fully exercised its right to self-determination because France had interfered with the referendum by exiling several thousand Somalis prior to the holding of the plebiscite.

In the case of Puerto Rico, the United States did not leave the process to Puerto Ricans; instead, it intervened in a determining and dispositive manner. First, the law that authorized the Constitutional Convention — the strongest expression of a people’s will — Public Law 600, was a law of the United States Congress, not of the Puerto Rican legislature. It is true that Puerto Ricans were allowed to ratify Public Law 600, and they did, but the simple result was to institute the mechanism by which a constitution would be drafted. In other words, ratifying Public Law 600 was not an expression of self-determination; it was an expression of the desire to exercise the right to self-determination.

Second, the resulting constitution was not entirely the product of Puerto Rico’s exercise of self-determination. Congress changed the constitution at its will. Still under the colonial regime of the Jones Act of 1917, Congress retained the power to approve the Constitution. Although the House of Representatives approved the document as was, the Senate did not agree with its “socialistic” provisions and drastically changed many portions of the organic document.

The Senate eliminated section 3, which provided that if Congress failed to take action after the President had transmitted the constitution it would be considered approved. The Senate amended § 5 of the Bill of Rights to include the following phrase: “Compulsory attendance at elementary public schools to the extent permitted by the facilities of the states as herein provided, shall not be construed as applicable to those who receive elementary education in schools established under nongovernmental auspices.”

224. Id. (on the competence of the United Nations to decide these matters).
226. Indeed, Public Law 600 is the only law of the Federal government which Puerto Ricans on the island have been able to vote for in any manner. Puerto Ricans were allowed to vote yes or no to PL 600. A yes vote meant that Puerto Ricans would have a Constitutional Convention. A no vote meant, in essence, continuation of colonialism.
228. Id.
229. See Id.
The Senate eliminated section 20 of the constitution’s Bill of Rights in its entirety. Section 20 recognized the right of every person to receive free primary and secondary education, the right to obtain work, of every person to have social protection in times of unemployment, illness, during old age, and in case of becoming physically handicapped, the right of pregnant women and all children to receive care and special help, and finally, the right to attain an adequate living standard “for the health and well being of every person and his family, and especially food, clothing, housing, and medical care and necessary social services.”

Finally, an amendment was included that preserved Congress’ power to block Puerto Ricans from amending their own constitution. The amendment provides that “[a]ny amendment or revision of this constitution shall be consistent with the resolution enacted by the Congress of the United States approving this constitution, with the applicable provisions of the Constitution of the United States, with the Puerto Rican Federal Relations Act, and with Public Law 600, Eighty-first Congress, adopted in the nature of a compact.”

Thus, not only did the United States interfere with the adoption of the Constitution itself, but it also insured itself against any amendments that might attempt to change the fundamental structures that defined the United States-Puerto Rico relationship. In essence, self-determination was conditional.

3. The Structure Formed by the Constitution is not Free Association

The structures created by the Constitutional were called in Spanish “Estado Libre Asociado.” This translates into “Free Associated State.” In deciding whether to take Puerto Rico off the list of non-self-governing territories, the United Nations presumably took this label into account. The issue that arises is whether what the Partido Popular Democrático called a Free Associated State is really that. In other words, are the structures created by the Puerto Rican constitution consistent with the definition of Free Associated State under international law? Moreover, does the adoption of these structures result in the exercise of the right to self-determination?

Recall that for Free Association to be valid “[t]he associated territory should have the right to determine its internal constitution without outside interference. . . .” As explained in the previous section, Puerto Rico adopted its constitution only with considerable United States interference. The Senate changed sections 3 and 5 and eliminated section 20. It also changed and added several other provisions. Because Puerto Ricans did not

230. Id.
231. Id.
adopt Free Association without interference, it follows that its adoption was not an effective expression of self-determination.

Furthermore, the adoption of Free Association “should be the result of a free and voluntary choice by the people . . . and [should] retain[ ] for the people . . . the freedom to modify the status of the territory through the expression of their will by democratic means and through constitutional processes.” As might be obvious by now, unlike the cases of the Cook Islands and the West Indies, Puerto Rico does not retain the freedom to modify or terminate its status through such means and processes.232

The reasons Puerto Ricans do not have the ability to modify the relationship through constitutional processes were alluded to above in the discussion regarding the effect of Puerto Rico adopting its constitution. To begin, Congress amended Puerto Rico’s Constitution to say that the relationship was one in the “nature of a compact.” That is, the relationship was not a compact between Puerto Rico and the United States.

The distinction is legally significant, because a compact is basically a treaty or an agreement between two states,233 indisputably governed by principles of international law.234 When a compact of Free Association exists, either party may denounce the compact, i.e., rescind the contract. However, since the Puerto Rican Constitution is only in the “nature” of a compact, no treaty really exists, and therefore Puerto Rico cannot simply rescind. This is actually a play on words, because it is not that they cannot rescind. The point is that there is nothing to rescind; a contract was never made.

4. **Puerto Rico has not Achieved a Full Measure of Self-government**

One of the core tests of a change in the political situation of non-self-governing territories is whether a full measure of self-government has been achieved.235 Puerto Rico has not achieved a full measure of self-government and is not a sovereign state. A sovereign state is one that is free to independently govern its own population in its own territory and set its own foreign policy.236 Puerto Rico does not have the power to independently govern its population or to set foreign policy.

There is a laundry list of powers the United States enjoys in Puerto Rico, all of which demonstrate that Puerto Rico has not reached a full measure of self-government. For example, the United States retains the power

234. See Rosene, supra note 143, at 30 (Vienna Convention § 56).
to enforce selective service in Puerto Rico.\textsuperscript{237} Puerto Ricans have to serve in United States wars, under penalty of court martial. Thus, Puerto Ricans have been drafted into every military confrontation since World War II. The United States maintains a federal court in Puerto Rico and power to control communications in Puerto Rico, including radio and television. Thus, without United States permission, Puerto Rico cannot raise a transmission tower. Nor can it send or receive messages through the existing ones without United States approval.\textsuperscript{238} In addition the United States maintains the power to control shipping, power over laws dealing with bankruptcies, power to establish or change the fundamental laws of banking; power to set Puerto Rico's immigration laws, power of an unlimited eminent domain right and thus the power to expropriate land and property, thereby controlling Puerto Rico's natural resources, and control of Puerto Rico's postal services and currency.\textsuperscript{239} Finally, the United States directs all of Puerto Rico's international relations and through Article 3 of the Federal Relations Act, controls Puerto Rico's tariffs.

As a result of all of these powers normally associated with a sovereign nation, Puerto Rico has not achieved a full measure of self-government. It is thus obvious that the United Nations incorrectly found Puerto Rico to have effectively exercised its right to self-determination. Puerto Rico did not adopt its constitution without interference. Puerto Rico did not enter into a relationship it can modify or terminate. Thus, Puerto Rico has not achieved a full measure of self-government. In essence, then, we are back to 1952. Puerto Rico was considered a non-self-governing territory then, and logic suggests that it remains a non-self-governing territory now.

The only body that has widespread legitimacy to determine the rights of a non-self-governing territory is the United Nations or its organs.\textsuperscript{240} In essence, this fact creates a presumption that the political status of non-self-governing territories is governed by international law. Indeed, the fact that countries like the United States agreed to submit reports under Article 73(e) of the United Nations Charter cemented this presumption into a rule of law. Before the United Nations took Puerto Rico off the list of non-self-governing territories, the Puerto Rico-United States relationship was clearly

\textsuperscript{237} For a fairly elaborate discussion on federal power over Puerto Rico, see David M. Helfeld, \textit{How Much of the United States Constitution and Statutes are Applicable to the Commonwealth of Puerto Rico?}, 110 F.R.D. 452 (1986).


\textsuperscript{239} "[M]any Puerto Ricans resent the fact that, among other consequences of [United States control of the Postal service], mailed literature sent to the island from the Iron Curtain countries is arbitrarily impounded by the postal authorities in San Juan." \textit{Id.}

\textsuperscript{240} \textit{See Sureda, supra} note 223, at 28-95.
governed by international law.\textsuperscript{241} It follows that if the United Nations erred in taking a territory like Puerto Rico off the list of non-self-governing territories, and it recognized this, the case of that territory would continue to be governed by international law just as it was before it was taken off the list of non-self-governing territories. The fact that the United Nations has continued to monitor the United States-Puerto Rico relationship through the Decolonization Committee of Twenty-four, is an implicit recognition that the United Nations erred in taking Puerto Rico off the list of non-self-governing territories and that Puerto Rico’s relationship with the United States is governed by international law.

The following section expands on these assertions. More specifically, the following section traces United States judicial thought on the Puerto Rico-United States relationship in an effort to show that Puerto Rico has not entered into a valid compact of free association.

\textbf{C. United States Supreme Court and Puerto Rico}

\textit{1. Courts that Follow the Compact Theory}

Before the Supreme Court could speak to the effect of the Puerto Rican constitution regarding the relationship between Puerto Rico and the United States, several lower courts ventured into interpreting the relationship for themselves. The first pronouncement said that a compact was created. The \textit{Mora v. Torres}\textsuperscript{242} court believed that “[a]s a necessary legal consequence of the said compact, neither the Congress of the United States nor the people of Puerto Rico can unilaterally amend Public Law 600 nor the Puerto Rican Federal Relations Act without the consent and approval of the other party to compact.”\textsuperscript{243}

Other courts did not take Public Law 600 so far. Rather, these courts viewed congressional action over Puerto Rico to be limited only by the fundamental provisions of the relationship. In \textit{United States v. Valentine},\textsuperscript{244} the court said that “[i]t is only the essential provisions which cannot be revoked [or amended] by one party acting alone...”\textsuperscript{245} However, “peripheral” provisions “of the compact, e.g., dealing with the Federal District Court, can be changed unilaterally without affecting ‘the inviolability of the compact.’”\textsuperscript{246}

Yet other courts insist that Puerto Rico is not a territory. For example, in dicta, one judge said: “Puerto Rico is no longer a Territory in the sense

\textsuperscript{242} 113 F. Supp. 309 (1953).
\textsuperscript{243} \textit{Id.} at 313.
\textsuperscript{244} 288 F. Supp. 957 (D.P.R. 1968).
\textsuperscript{245} \textit{Id.} at 981 & n.24.
\textsuperscript{246} \textit{Id.}
that the term is used in the Constitution and the cases." Another judge stated that "Puerto Rico's territorial status ended, of course, in 1952. Thereafter it has been a Commonwealth with a particular status as framed in the Puerto Rican Federal Relations Act."

In *Mora v. Mejías*, Judge Magruder stated that "pursuant to the terms of the compact offered to them in Pub.L. 600 . . . Puerto Rico has [ ] not become a State in the federal Union like the 48 States, but it . . . is a political entity . . . joined in union with the United States of America under the terms of the compact." Finally, in *United States v. Quinones*, Judge Bowens stated that in 1952 "Puerto Rico ceased being a territory of the United States subject to the plenary powers of Congress as provided [by the Territorial Clause of] the Federal Constitution." Judge Bowens held that congressional authority over Puerto Rico "emanated thereafter from the compact itself."

2. *Courts that Reject the Compact Theory*

Many courts are not convinced that Puerto Rico is a unique political entity or for that matter, that relations between the United States and Puerto Rico are governed by the compact. Rather, these courts hold that Puerto Rico is still a territory in the sense that congressional authority over Puerto Rico emanates from the Territorial Clause of the United States Constitution.

In one of the early cases the court was not convinced that Puerto Rico ceased being a territory because the legislative history of Public Law 600 indicated that Congress intended otherwise. In *Detres v. Lions Building Corp.*, the court found that Congress intended that Senate Bill 3336 "would not change Puerto Rico's fundamental political, social, and economic relationship to the United States." More importantly, Senate Bill 3336 was not intended to "preclude a future determination by Congress of Puerto Rico's ultimate political status." The court pointed out that staff analysis of Senate Bill 3336 indicates "that the persons interested in and responsible for the Act did not think that Puerto Rico was thereby being changed from a territory to some other political entity."

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249. 206 F.2d 377 (1st Cir. 1953).
250. *Id.* at 387.
251. 758 F.2d 40 (1st Cir. 1985).
252. *Id.* at 42.
253. *Id.* Bowens also said that "under the compact between the people of Puerto Rico and the United States, Congress cannot amend the Puerto Rico Constitution unilaterally . . . ." *Id.*
254. 234 F.2d 596 (7th Cir. 1956).
255. *Id.* at 599 (quoting 2 U.S.C.C.A.S. 2682).
256. *Id.* at 560.
257. *Id.*
held: "Puerto Rico both before and after the adoption and approval of its constitution was a territory of the United States . . . .\"258

At least one lower court and the Supreme Court in one of its terms tried to strike a compromise between those who believed in the compact theory and those who did not. Citing only one pre-1952 case of dubious precedential value,259 the Court claimed that the term "territory" does not "have a fixed and technical meaning that must be accorded to it in all circumstances.\"260 The Court thus held that Puerto Rico is a territory within the meaning of United States Constitutional article 4, section 3,261 but not necessarily so within the meaning of other provisions. In Examining Board v. Flores de Otero,262 the Court compared Puerto Rico with the District of Columbia and said that "Puerto Rico occupies a relationship to the United States that has no parallel in our history. . . .\"263 However, the Court still did not directly confront the issue whether congressional power emanated from the Territorial Clause\textsuperscript{264} or from a compact.

Rejecting the compact theory, the Supreme Court has implied in a per curiam decision that Congressional authority does not emanate from a compact. In Harris v. Rosario,265 the Court summarily held that Congress is "empowered under the Territory Clause of the Constitution, U.S. Const., Art. IV, § 3, cl. 2, to 'make all needful Rules and Regulations respecting the Territory belonging to the United States,' [and therefore] may treat Puerto Rico differently from States so long as there is a rational basis for its actions.\"266

The summary nature of the Rosario decision left many questions unanswered. For example, did the Puerto Rican Constitution restrict Congressional power over Puerto Rico?267 This Comment argues that it did not. Juxtaposing Rosario with Flores de Otero leads nowhere. Rosario is dispositive on the issue of whether Puerto Rico is subject to the territorial

\begin{enumerate}
\item \textsuperscript{258} Id.
\item \textsuperscript{259} Dubious because the case cited deals with Puerto Rico in 1937, the exact subject under consideration. See Puerto Rico v. Shell Co., 302 U.S. 253 (1937).
\item \textsuperscript{260} Americana of Puerto Rico v. Kaplus, 368 F.2d 431, 435 (1966) (citing Shell).
\item \textsuperscript{261} Id.
\item \textsuperscript{262} 426 U.S. 572 (1976).
\item \textsuperscript{263} Id. at 596.
\item \textsuperscript{264} See Id. at 597 ("Whether Puerto Rico is now considered a Territory or a State . . . makes little difference because each is included within § 1983 [the legislation before us] . . . .").
\item \textsuperscript{265} 446 U.S. 651 (1980).
\item \textsuperscript{266} Id. at 651-52. For a lower court decision following Harris, see Sea-Land Services, Inc. v. Municipality of San Juan, 505 F. Supp. 533, 543 (D.P.R. 1980) (stating that "the Territorial Clause is a source of congressional power over the island"). For a more recent Supreme Court case rejecting the compact theory, see Puerto Rico v. Branstad, 483 U.S. 219, 229 (1987) (permitting extradition of a fugitive because the Extradition Act applies to territories).
\item \textsuperscript{267} The Supreme Court has never accepted that a legally binding compact exists, or for that matter defined the parameters of such a relationship or considered whether any of the terms of the compact could be specifically enforced. Helfeld, supra note 237, at 8-10.
\end{enumerate}
clause of the United States Constitution. Absent any subsequent contrary Supreme Court pronouncement, and furthermore, pursuant to the doctrine of stare decisis, subsequent courts are bound to uphold that Congress’ power is plenary over Puerto Rico under the Territorial Clause of the United States Constitution.

Congress has apparently agreed with the effect of Rosario. That is, it agrees that it has the power to unilaterally legislate for Puerto Rico. Professor Helfeld explains:

By far the most significant unilateral change occurred in 1984 when Congress enacted legislation which, it is claimed, violated Section 9 of the Federal Relations Act by not returning to Puerto Rico the impost on Puerto Rican-produced rum in excess of $10.50 a gallon.268 . . . The claim that a violation occurred is based, of course, on the premise that Section 9 is an integral part of the compact.269

No court has had opportunity to review Congress’ action on this issue because Puerto Rico has not brought suit to challenge the change.270 Rather, Puerto Rico is “trying to convince Congress to reconsider its action and reinstitute its policy of over 80 years of returning all rum tax receipts to Puerto Rico.”271

Note that with the exception of Downes, none of these cases deal with the international issue of whether the United States properly may continue to control Puerto Rico. That is, all cases assume, without more, that the United States has plenary power over Puerto Rico without regard to international law. This may be because of Justice White’s opinion in Downes, where he analyzed the power granted by international law to conquering nations to legislate for their colonies.272 Downes, however, was not concerned with this question and only mentioned international law in dicta.

In Rosario, the Supreme Court ruled that Congress is empowered to treat Puerto Rico differently from States pursuant to the Territorial Clause of the United States Constitution. Rosario implicitly held that Puerto Rico is subject to the absolute power of Congress. Indeed, in District of Columbia v. Thompson, the Supreme Court clearly stated that Congress under the territorial clause has the power “at any time to revise, alter or revoke [any] authority granted [to a territory].”273

270. Id.
271. Id. at 10.
272. See Downes, 182 U.S. at 300-02 (“A state may acquire property or domain . . . by conquest, confirmed by treaty or tacit consent . . . .”) (quoting Halleck’s treatise on International Law).
273. 346 U.S. 100, 106 (1953).
In sum, because Puerto Rico cannot modify its relationship to the United States even through constitutional processes, the adoption of the so-called Free Associated State of Puerto Rico is not an effective exercise of the right to self-determination as outlined in General Assembly Resolution 1541.

III. Conclusion

Thus, Puerto Rico's November 1993 plebiscite is governed by international law. The United Nations must consider what "expanded" commonwealth means. It is this author's belief that what the commonwealth party desires when it requests an expanded commonwealth is really "Free Association" as defined under international law. The Partido Popular Democrático wants complete self-government and a bilateral compact — albeit one that cannot be changed except by mutual agreement.274 Regardless of the terms of such a compact, it remains a fact that the Partido Popular Democrático wants Free Association. Now that Puerto Rico has once again expressed its desire for an "expanded" commonwealth — or true free association — it is within the United Nations' right and obligation to address these expectations.

In conclusion, Puerto Rico should be on the list of non-self-governing territories and have the right to self-determination. The relationship between non-self-governing territories and the metropolitan power and the exercise of self-determination is a matter of international law. Puerto Rico's status question is therefore not exclusively an internal affair. Since it is not an internal affair, customary international law governs the relations between Puerto Rico and the United States. Since it governs the United States-Puerto Rican relationship, it also governs the holding and results of a plebiscite in Puerto Rico. This customary law is that analyzed above, where the principle of self-determination has become a customary norm of international law at a minimum and a rule of jus cogens at a maximum.

274. This changes the classic free association option in the sense that neither party can terminate the relationship without the other party's agreement. Under free association, either party can terminate the relationship.