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## **Puerto Rico Pandemonium: The Commonwealth Constitution and the Compact-Colony Conundrum**

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# Puerto Rico Pandemonium: The Commonwealth Constitution and the Compact-Colony Conundrum

Jason Adolfo Otaño

## **Abstract**

This Note will consider the historical background of the compact-colony conundrum and examine the development of self-determination in international law and democracy in the Americas in order to bring to light a new forum for this question. Part I will discuss the historical background necessary in examining this conflict. Part II analyzes the formation of a constitutional government in Puerto Rico, and the reaction of the international and Inter-American communities. Part III argues that Puerto Rico is still a colony of the United States and thus U.S.-P.R. relations violate international and Inter-American law.

## NOTE

### PUERTO RICO PANDEMONIUM: THE COMMONWEALTH CONSTITUTION AND THE COMPACT-COLONY CONUNDRUM

Jason Adolfo Otaño\*

#### INTRODUCTION

On July 25, 2002, Puerto Rico commenced a yearlong celebration commemorating the island's fiftieth anniversary as a commonwealth of the United States.<sup>1</sup> As thousands gathered in the island's capital for a three hour ceremony, thousands more assembled to oppose the status of the Island-Nation.<sup>2</sup> In more than fifty years of commonwealth status, a conundrum has emerged regarding Puerto Rico's place in the international community.<sup>3</sup>

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\* J.D. Candidate, 2004, Fordham University School of Law, Business & Articles Editor, vol. XXVII, Fordham Int'l L.J.; B.A., *Rigoberta Menchú-Tum – Bernardo Vega Award*, Fordham University, Fordham College at Rose Hill. This Note is dedicated to the memory of Richie Perez. Special thanks go to Professor Manuelle DelValle, Cara Hirsch, Michel Paradis, Michele Totah, Margarita Melikjanian and Neil Dennis for their comments and criticism that helped this piece take shape; y por supuesto, gracias a mis padres por todo que me han dado.

1. See Manuel Roig-Franzia, *50th Anniversary Stirs Debate in Puerto Rico; Island's Commonwealth Status Satisfies Few*, WASH. POST, July 25, 2002, at A03 (describing debate over Puerto Rico's Commonwealth status at fifty year anniversary). See also Mireya Navarro & Marc Santora, *In Puerto Rico, a Milestone; in New York City, Not Much Celebrating*, N.Y. TIMES, July 26, 2002, at B1 (reporting reaction of anniversary both on island and New York City). David Medina, *50 Years of Commonwealth Is Enough for Puerto Rico*, NEWSDAY (N.Y.), July 30, 2002, at A26 (discussing celebration amidst widespread belief that status should be changed); Ivan Roman, *Puerto Rico Rejoices Amid Divisions; Island's Status an Issue on Anniversary of Commonwealth*, CHI. TRIB., July 25, 2002, at 8 (discussing oncoming celebration of fiftieth anniversary).

2. See Navarro & Santora, *supra* note 1 (reporting simultaneous gatherings alternatively celebrating and opposing status). See also Roman, *supra* note 1 (reporting expectations of thousands to gather and thousands of others demonstrating against U.S. colonialism). *Independistas*, those who favor sovereignty for Puerto Rico, gathered at the waterfront of Guánica, in the southwest end of the island, protesting another anniversary—the invasion of the island in 1898 by the United States at the closing of the Spanish American War. See Navarro & Santora, *supra* note 1 (discussing demonstrations at Guánica).

3. See Roig-Franzia, *supra* note 1 (stating that even Governor of island sometimes called Puerto Rico, Island Country and other times called it Commonwealth); Matthew Hay Brown, *Struggling to Find a Commonwealth Language; Proposal to Make Spanish 'Official'*

The Puerto Rico status question was once one of the most controversial issues in the U.S. political arena.<sup>4</sup> As the Nation was entering the twentieth century, its introspective image and its identity in the global community were being defined.<sup>5</sup> That definition would be molded, in part, by the cession and annexation of foreign territories, and by the creation of a jurispru-

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*Adds to Puerto Rico's Statehood Debate*, HARTFORD COURANT (CONN.), May 5, 2003, at A2 (citing dispute regarding origins of Puerto Rico colony of Spain later to be invaded by United States and held ever since in political limbo). See also Chimene I. Keitner & W. Michael Reisman, *Free Association: The United States Experience*, 39 TEX. INT'L L.J. 1, 13 (2003) (stating that Puerto Rico has no influence in international decisions that shape its destiny). See also Roig-Franzia, *supra* note 1 (quoting University of Puerto Rico political scientist Jose Javier Colon). Colon states, "[w]e're having a celebration of the constitution and the commonwealth. At the same time, the government and the political parties and segments of society are discussing ways of changing it." *Id.* See also Navarro & Santoro, *supra* note 1 (quoting Angelo Falcon commenting that current status is no longer adequate for Puerto Rico); Pedro A. Caban, *Give Puerto Rico Its Independence*, NEWSDAY (N.Y.), June 15, 2001, at A51 (stating current status is unworkable anachronism).

4. See Le Roy Parker, *The Constitution in Porto Rico*, 10 YALE L. REV. 136, 136 (1901) (discussing flood of judicial opinions and deluge of lay opinions regarding territorial acquisition stemming from Treaty of Paris); Seldon Bacon, *Territory and Constitution*, 10 YALE L. REV. 99, 99 (1901) (discussing determination of constitutional issues arising out of territorial acquisitions after war with Spain). See also Ediberto Roman, *The Alien-Citizen Paradox and Other Consequences of U.S. Colonialism*, 26 FLA. ST. U. L. REV. 1, 17 (1998) (stating how acquisition of territories stirred intense controversy over their future); See also Carlos R. Soltero, *The Supreme Court Should Overrule the Territorial Incorporation Doctrine and End One Hundred Years of Judicially Condoned Colonialism*, 22 CHICANO-LATINO L. REV. 1, 6 (2001) (discussing how acquisition of Spanish colonies by United States raised new political issues) See generally FOREIGN IN A DOMESTIC SENSE, PUERTO RICO, AMERICAN EXPANSION AND THE CONSTITUTION (Christina Duffy Burnett & Burke Marsh eds., 2001) [hereinafter FOREIGN IN A DOMESTIC SENSE] (presenting various points of view of Puerto Rico's colonial status under United States).

5. See Efrén Rivera Ramos, *Deconstruction Colonialism: The "Unincorporated Territory" as a Category of Domination*, in FOREIGN IN A DOMESTIC SENSE, *supra* note 4, at 105 (discussing creation of U.S. identity in international spectrum); Parker, *supra* note 4, at 137 (discussing change in U.S. policy from isolationism to foreign territorial expansion). Parker, restating such concerns states:

The fear is expressed, nay, prophetic voices warn us, that, with our accession of foreign territory, we shall place ourselves in an new and undesirable position before the world and one at variance with our professions; and that, having abandoned our policy of domesticity, we shall come into contact with hostile influences which will be destructive of our exalted national character and bring disaster to the Republic. History is invoked to show that by grasping more and more territory and expanding over vast reaches of the world, such weight of responsibility is imposed and such heavy burdens are laid upon the home government as ultimately to weaken its power and finally to break it down altogether.

*Id.*

dence<sup>6</sup> to allow control over these alien lands.<sup>7</sup>

The Puerto Ricans or *puertorriqueños* have been subject to various forms of external control since Spain claimed the island in 1493.<sup>8</sup> Historically, Puerto Rico is unique in that it was settled not for economic exploitation, but because of its strategic situs.<sup>9</sup> For most Americans, whose national heritage is based on anticolonial resistance, the idea of U.S. overseas territories as colonies causes discomfort and sometimes irritation.<sup>10</sup> But, plainly,

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6. See *Downes v. Bidwell*, 182 U.S. 244 (1901) (holding that Puerto Rico was territory appurtenant belonging to United States, but not part of United States within revenue clauses of U.S. Constitution); *Balzac v. Porto Rico*, 258 U.S. 298 (1922) (holding Sixth Amendment to U.S. Constitution did not apply to Puerto Rico); *Dorr v. United States*, 195 U.S. 138 (1904) (holding U.S. Constitution did not require enactment of right to trial by jury in territories); *Hawaii v. Mankichi*, 190 U.S. 197 (1903) (granting discharge to appellee, who had been convicted of crime, because under Hawaiian law there was no grand jury and verdicts could be reached by fewer than twelve jurors was reversed and case was remanded with instructions to dismiss appellee's petition for discharge where rights alleged to have been violated were not fundamental in nature but concerned procedure that had been shown suited to Hawaii); *Dooley v. United States*, 182 U.S. 222 (1901) (holding that proper construction of order imposing duties upon goods imported into Puerto Rico from foreign countries ceased to apply to goods imported from United States from moment United States ceased to be foreign country with respect to Puerto Rico); *DeLima v. Bidwell* 182 U.S. 1 (1901) (holding that it was not necessary for act of Congress to embrace territory for purpose of tariff laws).

7. See Pedro Capo Rodriguez, *The Relations Between the United States and Porto Rico*, 10 AM. J. INT'L L. 312, 317 (1916) (referring to Puerto Ricans as acquisitions with which U.S. government could do as it pleased). See also ELAZAR BARKAN, *THE GUILT OF NATIONS: RESTITUTION AND NEGOTIATING HISTORICAL INJUSTICES* 217 (2000) (discussing President William Clinton's apology to Native Hawaiians on behalf of United States for overthrow of kingdom). In the late 1890s the United States annexed Hawaii after the 1893 overthrow of the Kingdom of Hawaii, which resulted from an American conspiracy. See *id.* Puerto Rico, as well as other territories, was ceded to the United States after the Spanish American War. See *id.*

8. See ARTURO MORALES CARRIÓN, *PUERTO RICO: A POLITICAL AND CULTURAL HISTORY* 6 (1983) (discussing Christopher Columbus' second voyage in which he found and named island); RONALD I. PERUSSE, *THE UNITED STATES AND PUERTO RICO* 3 (1990) (discussing island being claimed for Spanish Crown). See also ALFREDO LÓPEZ, *DOÑA LICHA'S ISLAND: MODERN COLONIALISM IN PUERTO RICO* 9 (1987) (discussing discovery of island that was already inhabited).

9. See MORALES CARRIÓN, *supra* note 8, at 10 (describing island as key to Indies); G.S. Bryan, *Geography and the Defense of the Caribbean and the Panama Canal*, 31 ANNALS OF THE ASS'N OF AM. GEOGRAPHERS 83, 85 (1941) (describing Puerto Rico's central location in West Indies).

10. See José A. Cabranes, *Some Common Ground, in FOREIGN IN A DOMESTIC SENSE*, *supra* note 4, at 40. "This reaction to the word colonialism is understandable, because the term became a bad word by those who successfully revolted against colonialism, and also by propaganda machinery of the Soviet Union, which during Cold War ceaselessly attacked Western powers on account of their overseas territories." *Id.* See *THE UNITED STATES AND DECOLONIZATION: POWER AND FREEDOM* xiii (David Ryan & Victor Pungong

colonialism is the nexus between a dominant metropolitan, which holds control over an overseas dependency that is disenfranchised from the lawmaking processes that affect the very lives of its residents.<sup>11</sup> Examples of this relationship can be found in recent controversies arising out of the mid-1990s repeal of Section 936 of the Internal Revenue Code, the Possessions Tax Credit;<sup>12</sup> recent international debate over the naval weapons training in the island-municipality of Vieques (and the subsequent closure of the satellite island's naval base),<sup>13</sup> and the recent imposition of the death penalty, against the wishes of the

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eds., 2000) [hereinafter UNITED STATES AND DECOLONIZATION] (discussing American view of colonialism).

11. See Cabranes, *supra* note 10, at 41 (defining colonialism).

12. See *Puerto Rico Faces Pain of Tax-Break Halt*, CHICAGO TRIB., Nov. 26, 1995, at W8 (discussing effects of repeal of tax break which created more than 300,000 jobs, or nearly third of work force in Puerto Rico); Daniel Southerland, *Clinton Target's Territories' Tax Breaks; Puerto Rico, Drug Firms Fear Impact*, WASH. POST, Feb. 24, 1993, at D1 (discussing correlation between repealed tax break and pharmaceutical companies on island); Lisa Jarvis, *Puerto Rico on National Advantage to Promote in a Post-936 Environment; Pharmaceuticals & Fine Chemicals*, 263 CHEM. MKT. REP. 8 (2003) (characterizing Puerto Rico as long time hub for pharma manufacturing). The pharmaceutical industry, which first began to emerge over three decades ago, now includes the operation of thirty-three companies and fifty-one manufacturing facilities. See *id.* According to the P.R. Pharmaceutical Industry Association, 37% of U.S. medications are produced in Puerto Rico. See Nancy Dunne, *Creating a Climate Business Can Warm To: Puerto Rico is Eager to Use its Finely Balanced Political Relationship with the US to Spur its Economy and Attract a New League of Overseas Manufacturers*, FIN. TIMES (LONDON), Feb. 6, 2004, at 9 (discussing state of manufacturing jobs years after repeal of tax breaks).

13. See generally ALMÍCAR ANTONIO BARRETO, *VIEQUES, THE NAVY AND PUERTO RICAN POLITICS* (2002) (discussing history political development of tensions between Puerto Rico and United States regarding military presence on Vieques); KATHERINE T. MCCAFREY, *MILITARY POWER AND POPULAR PROTEST: THE U.S. NAVY IN VIEQUES, PUERTO RICO* (2002) (discussing conflict arising from military exercises on Vieques); MARIO MURILLO, *ISLANDS OF RESISTANCE: PUERTO RICO, VIEQUES AND U.S. POLICY* (2001) (discussing that while majority of *puertorriqueños* were against naval bombings in Vieques, they were powerless to change situation democratically). See also Raul A. Barreneche, *Design Dispatch; After the Bombs, Retrofitting Paradise*, N.Y. TIMES, Aug. 28, 2003, at F1 (reporting that on May 1, 2003, Navy closed base on Vieques Island); Matthew Hay Brown, *Navy Moving Center to Homestead Command Site Leaving Island*, SUN-SENTINEL (FT. LAUDERDALE), Nov. 21, 2003, at 6B (reporting that after closing of Vieques base, Roosevelt Roads Naval Station based U.S. Special Operations Command South, which has contributed U.S. \$300 million annually to Puerto Rico's economy, will be located to Homestead Air Reserve Base in Miami); Raquel Velazquez, *Vieques After the Bombs; Puerto Ricans Struggle To Deal With the Navy's Exodus*, HISP. MAG., Nov. 2003, available at <http://www.hispaniconline.com/magazine/2003/nov/Panorama/journal-vieques.html> (discussing impending closure of nearby U.S. naval station Roosevelt Roads, including reduction in base population from 13,000 to about 5,300, impacting the economies of nearby P.R. municipalities of Ciego, Fajardo, Humacao, Las Piedras, Luquillo, Maunabo, Naguabo, Rio Grande, and Yabucoa).

people of Puerto Rico.<sup>14</sup>

The Puerto Rico status question has been analyzed for more than a century.<sup>15</sup> Following different stages of government, Puerto Rico has found itself in a contentious relationship with the United States.<sup>16</sup> To some, Puerto Rico has created a unique relationship with the United States, bound by a compact, which cannot be denounced by either party unless it has the permission of the other party; to others, Puerto Rico's status has changed little since the early twentieth century.<sup>17</sup> Here, this conflict will be called the "compact-colony conundrum."

This Note will consider the historical background of the compact-colony conundrum and examine the development of self-determination in international law and democracy in the Americas in order to bring to light a new forum for this question. Part I will discuss the historical background necessary in examining this conflict. Part II analyzes the formation of a con-

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14. See *United States v. Acosta-Martinez*, 252 F.3d 13 (holding that death penalty was available under federal law in Puerto Rico, since provision of the P.R. Constitution barring death penalty only applied to territorial courts, and did not alter applicability of federal law to Puerto Rico); Amam Liptak, *Puerto Ricans Angry That U.S. Override Death Penalty Ban*, N.Y. TIMES, July 17, 2003, at A1 (reporting that local politicians, members of legal establishment, scholars and local residents have denounced trial in which Justice department is seeking execution of two men accused of kidnapping and murder, calling it betrayal of autonomy, culture, law and P.R. Constitution); Gregory Tejada, *Commentary: Feds Treat Puerto Rico Equally*, UNITED PRESS INT'L, July 29, 2003 (discussing latest dispute between U.S. government and Puerto Rico and associations of executions to punishment handed down by military government installed by United States after cession from Spain in 1898).

15. See Dick Thornburgh, *The Northwest Ordinance: No Precedent*, SAN JUAN STAR, Oct. 11, 2001 (stating that legislative history of U.S.-P.R. relations has been analyzed *ad infinitum*). See generally PERUSSE, *supra* note 8 (providing documentary analysis of development of Commonwealth status); JOSÉ TRIAS MONGE, *PUERTO RICO: THE TRIALS OF THE OLDEST COLONY IN THE WORLD* (1997) (tracing development of Commonwealth from perspective of participant).

16. See Pedro A. Cabán, *The Colonial State and Capital Expansion in Puerto Rico*, 2 BOLETIN DEL CENTRO DE ESTUDIOS PUERTORRIQUEÑOS 87, 88 (1989) (delineating five periods on evolution of colonial state). See also Southerland, *supra* note 12 (discussing fears arising over repeal of tax break); BARRETO, *supra* note 13, at 41-52 (discussing backlash against U.S. military after death of David Sanes Rodriguez); Tejada, *supra* note 14 (discussing dispute between Federal Government and Puerto Rico over imposition of death penalty).

17. See *United States v. Quinones*, 758 F.2d 40 (1st Cir. 1985) (finding that Puerto Rico was no longer territory of United States and that federal government's relationship stems from compact); *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, (1974) (stating Puerto Rico is joined in union through compact with United States); *United States v. Sanchez*, 992 F.2d 1143 (11th Cir. 1993) (holding Puerto Rico is not separate sovereignty but constitutional territory).

stitutional government in Puerto Rico, and the reaction of the international and Inter-American communities. Part III argues that Puerto Rico is still a colony of the United States and thus U.S.-P.R. relations violate international and Inter-American law.

# I. AT THE CENTER OF THE CONUNDRUM: COLONIALISM, CONSITUTIONS AND CHARTERS

## A. *The Spanish Colonial Era*

For the island's first few decades as a Spanish colony,<sup>18</sup> Puerto Rico earned its namesake as a lucrative gold mine.<sup>19</sup> As the supply of gold dwindled, the settlers were ordered to raise sugar cane and the island was designated as a port of shelter and supply for silver convoys on their way to Spain from Mexico and Peru.<sup>20</sup>

During the nineteenth century, as the colonial population of Puerto Rico grew,<sup>21</sup> Puerto Rican peoplehood evolved.<sup>22</sup> It

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18. See TRÍAS MONGE, *supra* note 15, at 5 (discussing Spanish colonization of Puerto Rico). See also MORALES CARRIÓN, *supra* note 8, at 6 (discussing Columbus's encounter of indigenous upon landing on island on his second voyage for Spanish crown); OLGA JIMÉNEZ DE WAGENHEIM, PUERTO RICO: AN INTERPRETIVE HISTORY FROM PRE-COLUMBIAN TIMES TO 1900, at 37 (1998) (discussing how Columbus claimed island property of Spain). On his second voyage, Christopher Columbus became the first European to land on Puerto Rico. *Id.* Columbus was met by an indigenous population, the *Tainos*, who called the island *Boriquén*. See MORALES CARRIÓN, *supra* note 8, at 4-8. Subsequent to the island being renamed *San Juan Bautista* and recorded as Spanish property, it was forgotten for fifteen years. *Id.* In 1509, King Ferdinand of Spain named Ponce de Leon Captain General or Governor of the island that would be renamed Puerto Rico. See *id.* at 6 (delineating powers of Captain General); PERUSSE, *supra* note 8, at 3 (1990). Puerto Rico would be a colony of Spain for 405 years. See *id.*

19. See LOPEZ, *supra* note 8, at 10 (describing first two decades of Spanish colonialism as lucrative). See also Jalil Sued Badillo, *Facing up to Caribbean History*, 57 AM. ANTIQUITY 599, 602 (1992). Between 1503 and 1550 the amount of legally smelted gold from the Greater Antilles has been calculated at fifty tons. See *id.* The greatest producer of gold was Hispaniola, closely followed by Puerto Rico and then Cuba. See *id.*

20. See PERUSSE, *supra* note 8, at 4 (describing early evolution of Spanish colonialism in Puerto Rico). In 1586 colonial economic dependence was formalized in Puerto Rico with the institution of the *situado*, which was an annual levy against the treasury of Mexico, in order to set off the costs of construction of fortifications. See *id.*; JIMÉNEZ DE WAGENHEIM, *supra* note 18, at 54 (discussing yearly subsidy from New Spain (Mexico) to Puerto Rico until first decades of nineteenth century). See also PERUSSE, *supra* note 8, at 4 (noting that dependency was further entrenched by Spain's strict mercantilist policy). Since the colonies existed for the benefit of the Metropolis, Spanish ships conducted all commerce with Spanish crews and Puerto Rico exported and imported solely with Spain. See *id.*

21. See THE PUERTO RICANS: A DOCUMENTARY HISTORY 53 (Kal Wagenheim & Olga Jiménez de Wagenheim eds., 1996) [hereinafter THE PUERTO RICANS] (discussing popu-



was during this period that three political currents still present on the island today began to take shape: (1) full integration with the metropolis; (2) independence and; (3) autonomy.<sup>23</sup>

As pressures for self-government mounted from Cuba, Puerto Rico and externally from the United States, and as its position as a colonial power was fading, Spain granted the two Antillean colonies a Charter of Autonomy on November 25, 1897.<sup>24</sup>

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lation explosion between 1800 and 1900); See JIMÉNEZ DE WAGENHEIM, *supra* note 18, at 148-53 (describing continued growth in population). Jiménez de Wagenheim postulates:

Between 1815 and 1839 . . . the population grew by 102,946 persons, or 46.6 percent. Although the rate of increase dropped to 38.5 percent between 1830 and 1846, and to 30.2 percent during the next fifteen years, the total number of inhabitants grew to more than 600,000 by 1869.

*Id.*

22. See THE PUERTO RICANS, *supra* note 21, at 53 (stating that as early as 1809 Puerto Ricans referred to island as their beloved homeland). See also LÓPEZ, *supra* note 8, at 13 (discussing indigenous distinguishing themselves from Spaniards during nineteenth century).

23. See PERUSSE, *supra* note 8, at 4 (discussing development of three political currents as nationalism grew). The first status was reached in 1809, when Puerto Rico was allowed a representative in the *Cortes* [Spanish Parliament]. See *id.* After Napoleon's invasion of Spain, "the Spanish provinces rebelled and formed *juntas* under the *Supreme Junta of Cádiz*." THE PUERTO RICANS, *supra* note 21, at 53. In representing "the Puerto Rican People," Dr. Ramón Power y Giralt demanded "for free trade with foreign [N]ations, for a university, for equal job opportunities for natives in government posts and the like" as well as "the request that, if Spain were conquered, Puerto Rico should be granted the liberty 'to chose its own identity.'" *Id.* By 1812 the Spanish *Cortes* enacted a liberal constitution granting Puerto Rico integral status in the monarchy. See *id.* at 54. All free men were granted Spanish citizenship, and Puerto Rican deputies sat in Spanish *Cortes*, with voting power. See *id.* Power y Giralt rose to the vice presidency of the *Cortes*. See *id.*

Unfortunately, due to the political instability in Europe, Puerto Rico would lose civil rights as often as they were granted. See *id.* See also PERUSSE, *supra* note 8, at 5 (discussing oscillation between liberalization and absolutism). The Constitution of 1812 would be rescinded and restored numerous times, each resulting in Puerto Rico suffering consequences in the loss of powers originally granted. See THE PUERTO RICANS, *supra* note 21, at 53. As a result of this, and following in the trend that had started earlier in the century, on September 23, 1868, a pro-independence revolt broke out in an event that would go down in history as *El Grito de Lares*. See generally OLGA JIMÉNEZ DE WAGENHEIM, PUERTO RICO'S REVOLT FOR INDEPENDENCE: EL GRITO DE LARES (1993) (providing in-depth study of small revolt). Some look at this point in Puerto Rican history, as "the day Puerto Rico became a [N]ation." See Juan Antonio Corretjer, *The Day Puerto Rico Became a Nation*, SAN JUAN STAR SUN. MAG., Sept. 22, 1968, reprinted in THE PUERTO RICANS, *supra* note 21, at 61-67.

24. See TRIÁS MONGE, *supra* note 15, at 12 (quoting U.S. Ambassador to Spain asking for assurances that would satisfy United States that peace would be assured in ongoing Cuban Revolution); CONST. ESTABLISHING SELF-GOVERNMENT IN THE ISLAND OF PUERTO RICO BY SPAIN IN 1897, reprinted in OFFICE OF THE COMMONWEALTH OF P.R., DOCU-

Most important was Article 2, under the section captioned, "Additional Articles," which guaranteed that the charter could only be altered bilaterally.<sup>25</sup> The new autonomous government convened for the first time on February 11, 1898.<sup>26</sup> Four days later, the *U.S.S. Maine* exploded in Havana's harbor.<sup>27</sup> On July 25, 1898, just three months after the United States declared war on Spain, Major-General Nelson Appleton Miles landed in the port of Guánica.<sup>28</sup> By December 10, 1898 the Treaty of Paris had relinquished all claims of Spanish sovereignty over Cuba and ceded to the United States the island of Puerto Rico, the island of Guam in the Marianas, as well as the archipelago known as the Philippine Islands.<sup>29</sup>

### B. *United States Colonial Era*

On July 29, 1898, General Miles released a proclamation to the inhabitants of Puerto Rico.<sup>30</sup> Published generally, the proc-

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MENTS ON THE CONSTITUTIONAL HISTORY OF PUERTO RICO 22-46 (2d ed. 1964) [hereinafter AUTONOMOUS CHARTER]; TRÍAS MONGE, *supra* note 15, at 13 (describing charter as most advanced of any Caribbean colony until after Second World War). Article 37 required Spain to cooperate with the Puerto Rican in all commercial treaties affecting the island. See AUTONOMOUS CHARTER, art. 37. Article 38 allowed Puerto Rico to declare its acceptance or non-acceptance of any commercial treaties made without its participation, or any stipulations thereof, while Article 39 gave the Puerto Rican legislature the ability to fix tariffs and duties. See *id.* arts. 38-39.

25. AUTONOMOUS CHARTER, art. 2 (stating that charter could not be amended unilaterally by Spain); See TRÍAS MONGE, *supra* note 15, at 14 (stating that Autonomous Charter could not be amended unless requested by insular parliament).

26. See THE PUERTO RICANS, *supra* note 21, at 80 (discussing how autonomous government never flexed its muscles). See also MORALES CARRIÓN, *supra* note 8, at 125 (citing that legislature convened on July 17, 1898); PERUSSE, *supra* note 8, at 7 (noting that we will never know how autonomous government would have worked in practice).

27. See TRÍAS MONGE, *supra* note 15, at 24 (describing how *U.S.S. Maine* sank mysteriously on February 15, 1898); THE PUERTO RICANS, *supra* note 21, at 79 (noting that *Maine* explosion gave United States reason to enter Cuban Revolution); JAMES L. DIETZ, ECONOMIC HISTORY OF PUERTO RICO: INSTITUTIONAL CHANGE AND CAPITALIST DEVELOPMENT 80 (1986) (describing explosion as opportune event for United States).

28. See TRÍAS MONGE, *supra* note 15, at 25 (describing process ending in declaration of war against Spain). On April 19, 1898 Congress passed a series of resolutions requiring Spain to renounce its sovereignty over Cuba. See *id.* The next day, Spain broke diplomatic relations with the United States, after which the next day the United States blockaded Cuba. See *id.* On April 24, 1898, Spain declared war on the United States. See *id.* The next day the United States declared war as retroactive to four days earlier. See *id.* See also MORALES CARRIÓN, *supra* note 8, at 129-32 (discussing U.S. entrance into Spanish-American War and subsequent invasion of Puerto Rico).

29. See Treaty of Paris, Dec. 10, 1898, U.S.-Spain, 30 Stat. 1754 (passing sovereignty of foreign territories from Spain to United States).

30. See *To the Inhabitants of Puerto Rico*, reprinted in THE PUERTO RICANS, *supra* note

lamation contained the now immortalized words:

We have not come to make war against a people of a country that for centuries has been oppressed, but on the contrary, to bring you protection, not only to yourselves but to your property, to promote your prosperity, and to bestow upon you the immunities and blessings of the liberal institutions of our government.<sup>31</sup>

The era of U.S. control over the island of Puerto Rico had begun.<sup>32</sup>

### 1. The Expansion Equation

Since its birth, the United States has always been concerned with the difficulties of territorial expansion.<sup>33</sup> The Northwest Ordinance of 1787 was enacted to temporarily govern the area "with the hope that eventually its component parts could be ushered into statehood."<sup>34</sup> Apparently, the Framers of the U.S. Constitution were wary of specifically defining U.S. territoriality.<sup>35</sup> Instead, the Framers created broad Congressional jurisdiction that was not placed alongside the enumerated powers of

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21, at 95-96; TRÍAS MONGE, *supra* note 15, at 30-31 (quoting proclamation and stating that words were essentially same as those issued in Cuba and Philippines).

31. *To the Inhabitants of Puerto Rico*, *supra* note 30, at 95.

32. *See*, Treaty of Paris, art. II, *supra* note 29 (stating terms of cession of Puerto Rico).

33. *See* JAMES EDWARD KERR, *THE INSULAR CASES: THE ROLE OF THE JUDICIARY IN AMERICAN EXPANSIONISM* 4 (1982) (discussing how before present Constitution, United States found itself owner of vast unorganized land area that belonged to states collectively). *See also* Pedro Capo Rodriguez, *Colonial Representation in the American Empire*, 15 AM. J. INT'L L. 530, 531 (1921) (discussing how Territory Northwest of Ohio River came under control of Continental Congress).

34. KERR, *supra* note 33 (discussing eventuality of statehood for territories with Northwest Ordinance). *See An Ordinance for the Government of the Territory of the United States Northwest of the River Ohio*, The Confederate Congress, July 13, 1787, reprinted in FREDRICK E. HOSEN, *UNFOLDING WESTWARD IN TREATY AND LAW: LAND DOCUMENTS IN UNITED STATES HISTORY FROM THE APPALACHIANS TO THE PACIFIC, 1783-1934*, at 35-41 (1988) (reprinting ordinance). Art. IV of the Ordinance stated:

The said territory, and the States which may be formed therein, shall forever remain a part of this confederacy of the United States of America, subject to the Articles of Confederation, and to such alterations therein as shall be constitutionally made; and to all the acts and ordinances of the United States in Congress assembled, conformable thereto.

*Id.* (emphasis added).

35. *See* KERR, *supra* note 33, at 4 (discussing framers' reluctance to deal with territoriality finding adoption of rigid rule of law impractical). *See also* TRÍAS MONGE *supra* note 15, at 38 (citing eventuality of territories being admitted into Union since Ordinance).

Congress, but was instead in the second clause of Article IV, section 3 of the U.S. Constitution.<sup>36</sup> The Territorial Clause gave Congress a flexible and broad grant of power, instead of a set method of territorial incorporation, allowed in its dealings with new territories.<sup>37</sup>

## 2. The Foraker Act & Constitutional Crisis: Does the Constitution Follow the Flag?

Puerto Rico became an organized territory of the United States through the Foraker Act, passed by Congress on April 12, 1900.<sup>38</sup> This temporary Act set out to provide revenues and civil government for "Porto Rico."<sup>39</sup> Under the Foraker Act, the inhabitants of the island who had not chosen to remain Spanish citizens were declared citizens of Puerto Rico, and thus entitled to the protection of the United States.<sup>40</sup>

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36. See KERR, *supra* note 33, at 4 (discussing attention to territories in Article IV).

37. See U.S. CONST., art. 4, § 3 (stating plenary powers of Congress over territories). Article 4, § 3 states: "The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States . . . ."

38. See The Foraker Act of April 12, 1900, ch. 191, 31 Stat. 77 (1900) [hereinafter The Foraker Act]. See also THE PUERTO RICANS, *supra* note 21, at 110 (discussing passing of Foraker Act); TRÍAS MONGE, *supra* note 15, at 42 (discussing passing of Foraker Act 40-31 in Senate and 161-153 in House of Representatives).

39. See TRÍAS MONGE, *supra* note 15, at 42 (noting that Foraker Act provided revenues and civil government for Puerto Rico). See also JOSÉ A. CABRANES, CITIZENSHIP AND THE AMERICAN EMPIRE 1 n.1 (1979) (noting that Puerto Rico was incorrectly spelled Porto Rico in English version of Treaty of Paris, as way of anglicizing name). Puerto Ricans "objected 'that there [did] not even exist the pretext of changing the name to Americanize [the name], since "porto" is not an English but Portuguese word.'" *Id.* An Act of Congress later changed the name back to its correct spelling. See 48 U.S.C. § 731a (2003). Section 731a states: "From and after May 17, 1932, the island designated 'Porto Rico' . . . shall be known and designated as 'Puerto Rico.'" *Id.*

40. See The Foraker Act, *supra* note 38, at 79. The territory was put under the control of a presidentially appointed U.S. governor and an eleven-man Executive Council, of which five had to be Puerto Rican. See *id.* at 79-81. The Act also provided for a popularly elected thirty-five member House of Delegates. See *id.* at 82-83. The governor had the power of veto over acts of the Assembly, which in turn could override the veto. See *id.* at 81, 83. The judicial structure created under the military government was continued, with the federal court renamed the U.S. District Court for Puerto Rico and Puerto Ricans were given the right to elect a U.S. Resident Commissioner to Washington, over which the U.S. Government had no authority. See *id.* at 82, 84. See also STANLEY K. LAUGHLIN, JR., THE LAW OF UNITED STATES TERRITORIES AND AFFILIATED JURISDICTIONS 346 (1995) (noting that District Court was originally Article IV court). In 1966, it was re-established as an Article III court. See *id.* The Resident Commissioner was later given a seat in the House of Representatives with the right to speak and introduce legislation but no vote except in committees. See PERUSSE, *supra* note 8, at 89 (quoting

By 1900, with the cession of Cuba and Puerto Rico in the Caribbean, and Guam and the Philippines in the Pacific, the question of territorial expansion had reached a new urgency.<sup>41</sup> A debate unfolded over whether the United States should become an imperialist power,<sup>42</sup> well captured in a series of U.S. Supreme Court opinions dubbed the *Insular Cases*.<sup>43</sup> Of these cases, most scholars agree that *Downes v. Bidwell*<sup>44</sup> is the most important.<sup>45</sup>

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OFFICE OF THE COMMONWEALTH OF PUERTO RICO, DOCUMENTS ON THE CONSTITUTIONAL HISTORY OF PUERTO RICO 64-80 (1964) (providing background information on Foraker Act).

41. See Bacon, *supra* note 4, at 99 (stating that questions of constitutional law arising out of recent territorial acquisitions were to be determined as matter of law); TRIAS MONGE, *supra* note 15, at 28 (stating that many Senators argued that United States did not have power under U.S. Constitution to acquire territories for colonies, while expansionists held that the United States did not have to extend rights to conquered peoples).

42. See Capo Rodriguez *supra* note 33, at 533 (stating that period after war was new stage in development of colonial government); FOREIGN IN A DOMESTIC SENSE, *supra* note 4, at 4-6 (presenting both political and scholarly debate surrounding debates over imperialism).

43. See *A Note on the Insular Cases*, in FOREIGN IN A DOMESTIC SENSE *supra* note 4, at 389 n. 1 (citing list of Insular Cases compiled by Efrén Rivera Ramos totaling at twenty-three opinions). See generally FOREIGN IN A DOMESTIC SENSE, *supra* note 4 (presenting various points of view surrounding Insular Cases); KERR, *supra* note 33 (examining Insular Cases and their role in U.S. expansionism).

44. See *Downes v. Bidwell*, 182 U.S. 244 (1901) (presenting territorial incorporation doctrine in Justice White's concurrence).

45. See FOREIGN IN A DOMESTIC SENSE, *supra* note 4, at 389 (citing *Downes* as most important of Insular Cases). The case was brought by importer who complained about 15% duty levied on oranges that were sent from San Juan to New York. See *Downes*, 182 U.S. at 247. He claimed that the duty violated the first clause of Article I, Section 8 of the Constitution. See U.S. CONST. art. I, sec. 8 (stating "all Duties, Imposts and Excises shall be uniform throughout the United States . . ."). Hence, the question was posed, could the United States own territory to which the Constitution does not extend, or as was popular during the time, "Does the Constitution follow the flag?" See generally FOREIGN IN A DOMESTIC SENSE, *supra* note 4 (compiling various essays discussing *Insular Cases*, which examined whether constitutional guarantees were extended to newly acquired territories); KERR, *supra* note 33 (discussing importance of *Insular Cases* and presenting question of territorial incorporation that was involved). In *Downes*, Justice Brown quotes Justice Bradley regarding the powers of Congress over territory:

The power of [C]ongress over territories of the United States is general and plenary, arising from and incidental to the right to acquire the territory itself, and from the power given by the Constitution to make all needful rules and regulations respecting the territory or other property belonging to the United States.

*Downes* 182 U.S. at 268. See generally FOREIGN IN A DOMESTIC SENSE, *supra* note 4 (discussing constitutional importance of *Insular Cases*); KERR, *supra* note 33 (discussing *Insular Cases* role in U.S. expansionism. Furthermore, borrowing from the Bradley language:

The key doctrine to come from this case can be found in the concurrence of Justice White, in which he sets out the Territorial Incorporation Doctrine ("TID"),<sup>46</sup> which would be adopted by the rest of the *Insular Cases*.<sup>47</sup> Under the TID, incorporated territories would enjoy all of the Constitution's protections, while unincorporated territories would only enjoy funda-

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The power to acquire territory . . . is derived from the treaty making power and the power to declare and carry on war. The incidents of these powers are those of *national sovereignty* and belong to all independent governments. The power to make acquisitions of territory by conquest, by treaty, and by cession is an incident of national sovereignty.

*Downes*, 182 U.S. at 268. Hence, as a sovereign power, the United States had an innate power to acquire territory, and Congress has plenary powers over these territories as provided by the Territorial Clause. See U.S. CONST. art. 4, § 3. Application of the plenary powers doctrine allows U.S. Courts to defer to the political branches of government rather than addressing the constitutionality of governmental action. See Natsu Taylor Saito, *Asserting Plenary Power Over the "Other": Indians, Immigrants, Colonial Subjects, and Why U.S. Jurisprudence Needs to Incorporate International Law*, 20 YALE L. & POL'Y REV. 427, 429 (2002). The doctrine:

is used primarily with respect to those groups governments recognized in international law to be the most vulnerable: those over whom the government exercises complete power, but who are deemed by that same government to be 'outsiders'. Thus, the plenary power doctrine, though rarely discussed in general constitutional jurisprudence, is core U.S. law relating to . . . colonized territories such as Puerto Rico.

*Id.*

46. See *Downes*, 182 U.S. at 338-39 (White, J., concurring) (presenting the Territorial Incorporation Doctrine). White sets out the Territorial Incorporation Doctrine:

It is then . . . settled by the principles of the law of nations, by the nature of the government created by the Constitution, by the express and implied powers conferred upon that government by the Constitution, by the mode in which those powers have been executed from the beginning, and by an unbroken lien of decisions of this court . . . that the treaty-making power cannot incorporate territory into the United States without the express or implied assent of Congress, that it may insert in a treaty conditions against immediate incorporation, and that on the other hand, when it has expressed in the treaty the conditions favorable to incorporation they will, if the treaty be not repudiated by congress, have the force of the law of the land, and therefore by the fulfillment of such conditions cause incorporation to result. It must follow, therefore, that where a treaty contains no conditions for incorporation, and, above all, where it not only has no such conditions, but expressly provides to the contrary, that incorporation does not arise until 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 part of the American Family.

*Id.*

47. See *A Note on the Insular Cases*, in *FOREIGN IN A DOMESTIC SENSE*, *supra* note 4, at 389 n. 1 (citing list *Insular Cases* compiled by Efrén Rivera Ramos totaling twenty-three opinions). See *generally* *FOREIGN IN A DOMESTIC SENSE*, *supra* note 4 (discussing pivotal importance of *Downes* concurrence).

mental constitutional rights.<sup>48</sup>

### 3. The Jones Act: Does Citizenship Equal Incorporation?

The Organic Act of 1917 was signed by U.S. President Woodrow Wilson<sup>49</sup> on March 2, 1917.<sup>50</sup> Popularly known as the Jones Act, the enactment represented a meek concession to Puerto Rico's arduous path toward self-government.<sup>51</sup> It granted a bill of rights and statutory citizenship to the people of Puerto Rico.<sup>52</sup> This granting of citizenship would become a point of

48. See Roman, *supra* note 4, at 12 (discussing how incorporated territories received more rights than unincorporated territories).

49. See PERUSSE, *supra* note 8, at 20 (describing change in political environment when Wilson took office). Before taking office Wilson pronounced himself in favor of citizenship and home rule for the island. See *id.* See also MORALES CARRIÓN, *supra* note 8, at 193 (quoting Wilson's Third Annual Message). Resident Commissioner Luis Muñoz Rivera asked the President, prior to his Third Annual Message to Congress, to take action regarding the status of the island. See *id.* Wilson responded that he "shall certainly not forget Porto Rico," proclaiming his interest as "deep and sincere." *Id.* In the international climate of a world at war, Wilson declared during the Message, "Our treatment of them and their attitude toward us are manifestly of the first consequence in the development of our duties in our world and in getting a free hand to perform those duties." *Id.* Puerto Rico's status question was now part of a global defense strategy, and in this international crisis, would come a change in the island's place in the world. See *id.*

50. See Jones Act of March 2, 1917, ch. 145, 39 Stat. 951 (1917).

51. See TRIAS MONGE, *supra* note 15, at 75 (describing enactment of Jones Act as modest step toward self-government). The Act allowed Puerto Rico to have an elective Senate, "but subject to strong safeguards: the Governor's veto and the President's final say in the event that the Legislative Assembly was able to override the veto, and, for good measure, the right of Congress to annul any insular law at any time." *Id.* See PERUSSE *supra* note 8, at 21 (stating Act did not change constitutional status of Puerto Rico).

52. See The Jones Act, § 5, ch. 145, 39 Stat. 951 (1917); Balzac v. Puerto Rico, 258 U.S. 298, 308 n.1 (quoting Jones Act). Section 5 of the Jones act states:

That all citizens of Porto Rico as defined by section seven of the act of April twelfth, nineteen hundred, 'temporarily to provide revenues and a civil government for Porto Rico, and for other purposes,' and all natives of Porto Rico who were temporarily absent from that island on April eleventh, eighteen hundred and ninety-nine, and have since returned and are permanently residing in that island, *and are not citizens of any foreign country*, are hereby declared and shall be deemed and held to be, citizens of the United States: Provided that any person hereinbefore described may retain his present political status by making a declaration, under oath, of his decision to do so within six months of taking effect of this act before the district court in the district in which he resides, the declaration be in the form as follows: I, \_\_\_\_\_, being duly sworn, hereby declare my Intention not to become a citizen of the United States as provided in the act of Congress conferring United States citizenship upon citizens of Porto Rico and certain natives permanently residing in said island . . . ."

contention, characterized by one commentator as a "legislated and colonial concession, not constitutionally derived right, [that can be] *revoked* altogether."<sup>53</sup> Notably, the Jones Act provided the Puerto Ricans a chance to opt out of U.S. citizenship by official declaration.<sup>54</sup> This Act, framed to placate Puerto Rican sentiments of irritation and injustice, was nonetheless met with resentment.<sup>55</sup> Just six months after citizenship was granted, the two Houses of the P.R. Legislative Assembly demanded complete self-government for Puerto Rico.<sup>56</sup>

As Puerto Ricans were now U.S. citizens, the question of whether the Jones Act incorporated the island territory emerged.<sup>57</sup> The Supreme Court in *Balzac* answered the question

*Id.* (emphasis added).

53. Roman, *supra* note 4, at 11 (emphasis added). See TRÍAS MONGE, *supra* note 15, at 75-76 (stating extreme caution displayed at extending limited self-government in Jones Act).

54. See The Jones Act, § 5, ch. 145, 39 Stat. 951 (allowing Puerto Ricans to opt out of U.S. citizenship). See also TRÍAS MONGE, *supra* note 15, at 79 (stating that 288 people would take option to refuse American Citizenship).

55. See ALFREDO MONTALVO-BARBOT, POLITICAL CONFLICT AND CONSTITUTIONAL CHANGE IN PUERTO RICO, 1898-1952, at 51 (1997) (presenting driving factors for Jones Act). See also MORALES CARRIÓN *supra* note 8, at 185 (discussing several factors influencing Congress in passing Act). External factors included: "presidential interests or indifference, the coming of power of the Democratic party, the changing pressures from the Bureau of Insular Affairs, the complex political structure of Puerto Rico, and the rumblings of war which finally accelerated the war." *Id.* See BYRON WILLIAMS, PUERTO RICO: COMMONWEALTH, STATE OR NATION? 141-42 (1972) (quoting Hunter who describes Puerto Rican sentiment). Hunter in writing of the new generation of Puerto Ricans states:

For such men, the Jones bill was not enough. The permanent status of Puerto Rico was still unresolved. Its resolution seemed as far away as ever. Despite the provisions for a popularly elected legislature, there was still a veto power vested in a mainland-appointed governor, and in a U.S. Congress in which they had no vote. They were subject to be drafted to fight in a war to make the world safe for democracy, to secure the right to self-determination for others, when they felt they lacked those privileges for themselves.

*Id.* One Congressman was quoted on a trip to Puerto Rico in 1919 saying, "Why are you worrying about Statehood or Independence? You will get either or both just as soon as you are ready." *Id.* at 142.

56. See THE PUERTO RICANS, *supra* note 21, at 137 (quoting from P.R. Legislative Assembly's telegram to Wilson). The telegram stated:

The House also revolved to express to the people of the United States that the people of Puerto Rico were ready to contribute with their blood, under the glorious flag of the United States, to the triumph of democracy throughout the world, and demand from the United States the completion of its work in Porto Rico by granting to our people the full right of self government.

*Id.*

57. See *Balzac v. Puerto Rico*, 258 U.S. 298 (1922).



negatively.<sup>58</sup> As Chief Justice Taft wrote for the Court:

Had Congress intended to take the important step of changing the treaty status of Porto Rico by incorporating it into the Union, it is reasonable to suppose that it would have done so by the plain declaration, and would not have left it to mere inference . . . incorporation is not to be assumed without express declaration, or an implication so strong as to exclude any other view.<sup>59</sup>

Nevertheless, the court still found that this was clearly a benefit for the *puertorriqueños*.<sup>60</sup>

#### 4. The Creation of the Commonwealth

The resentment that grew as a result of the imposition of U.S. Citizenship spurred a rise in nationalist sentiment.<sup>61</sup> With this, came major antagonism from Washington.<sup>62</sup> The need for a popularly elected Governor was becoming more urgent on the island, as was the need for a more moderate stance for self-government in Puerto Rico.<sup>63</sup>

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58. *See id.* at 306.

59. *Id.* at 306.

60. *See id.* at 308 (stating that it enabled Puerto Ricans to move to States and enjoy rights of that State's citizens).

61. *See* MONTALVO-BARBOT, *supra* note 55, at 120 (citing increased nationalism, institutional political tension and popular dissatisfaction); WILLIAMS *supra* note 55, at 143 (stating Nationalist Party was Puerto Rican response to U.S. movement to banish independence sentiment).

62. *See* PERUSSE, *supra* note 8, at 23 (citing Warren G. Harding's opposition against Puerto Rican independence during 1920 presidential election). As warnings came from Washington "that independence propaganda was hurting Puerto Rico's cause in Congress," the newly-appointed governor, made it plain that he would never appoint any advocate of independence to public office. *Id.* *See* MONTALVO-BARBOT, *supra* note 55, at 91 (noting anti-independence pre-disposition of Reily in his inauguration address and his on-going communication with legislators). *See id.* Reily in his inauguration speech said, "Neither, is there any room on this island for any flag other than the Stars and Stripes. So long as Old Glory waves over the United States, it will continue to wave over Puerto Rico." WILLIAMS *supra* note 55, at 143. Soon thereafter in a note to the president of the Puerto Rican Senate he wrote, "I want you to fully understand that I shall never appoint any man to any office who is an advocate of independence. When you publicly renounce independence and break loose from your pernicious and un-American associates, then I will be glad to have your recommendations." *Id.* On February 22, 1922, despite not being granted the power by the Jones Act, the Puerto Rican Senate filed articles of impeachment against Reily, the anti-independence governor. *See* TRIAS MONGE, *supra* note 15, at 80.

63. *See* MONTALVO-BARBOT, *supra* note 55, at 92 (stating that after Reily's resignation, dozens of bills were introduced to provide for popular election of governor); TRIAS MONGE, *supra* note 15, at 80 (describing origins of Puerto Rico Elective Governor

As the 1940s came, a general consensus arose both on the island and in the States that there was a serious need to grant Puerto Ricans greater self-government and the power to elect their own governor.<sup>64</sup> Poignant in demonstrating the changes in the international view of colonialism, Winston Churchill and President Franklin D. Roosevelt signed the Atlantic Charter.<sup>65</sup> Roosevelt recommended to Congress that Puerto Ricans be allowed to elect their own governor, and establish a commission to advise the President on the amendments to the Jones Act required to bring this to fruition.<sup>66</sup>

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Act). See also PERUSSE, *supra* note 8, at 23. The first bill for a Puerto Rican dominion status was filed on January 19, 1922. See TRÍAS MONGE, *supra* note 15, at 80. The Campbell bill, named after Congressman Philip Campbell, called for significant changes in the status of the island, but died in committee. See *id.* The Bill called for:

the election of the Governor by the Legislative Assembly; the appointment of all government secretaries and judges by the Governor, with the advice and consent of the Senate; the power of the legislature to override the Governor's veto, to impeach the Governor, and to determine the electoral districts; and the election of two Resident Commissioners.

*Id.*

64. See MONTOLVO-BARBOT, *supra* note 55, at 88 (citing need to expand self government and allow Puerto Ricans right to elect own governor). See also TRÍAS MONGE, *supra* note 15, at 102 (stating that appointed governor, Rexford G. Tugwell, privately recommended to Roosevelt to allow Puerto Rico to elect own Governor).

65. See TRÍAS MONGE, *supra* note 15, at 103 (discussing Atlantic Charter). The Charter stated that the United States and United Kingdom "respect the right of all peoples to choose the form of government under which they will live, and they wish to see sovereign rights of self-government restored to those who had forcibly deprived of them." *Id.* This had no legal holding, as Governor Tugwell would observe, "Puerto Ricans thought this applied to them; but they tended to forget that it was a Roosevelt-Churchill declaration and not a Congressional one." MORALES CARRIÓN, *supra* note 8, at 258.

66. See TRÍAS MONGE, *supra* note 15, at 103 (discussing President Roosevelt's recommendation to Congress regarding Puerto Rican self-government and announcement of commission to advise to these ends). Luis Muñoz Marín, who at the time was the President of the Senate, would emerge as the most important member of the commission in the creation of the commonwealth status. See LÓPEZ, *supra* note 19, at 30 (referring to Muñoz Marín as "father of modern Puerto Rico"). As the son of Muñoz Rivera, Muñoz Marín, for most of his life, was concerned with his contribution to the island's future vis-à-vis that of his father's. See MORALES CARRIÓN, *supra* note 8, at 224 (stating "A powerful bond linked him to his father's times; but he also felt the need to go out into the world and carve a name for himself"). Contrary to the platform of his party, Muñoz Marín obtained a joint resolution from the Legislative Assembly "demanding an end to colonial rule in Puerto Rico and the recognition of the right to self-determination once the war ended." See PERUSSE, *supra* note 8, at 27 (discussing party's commitment not to enter status debate); TRÍAS MONGE, *supra* note 15, at 103 (describing Muñoz as dominant member of commission). By late 1943, a bill was proposed by the commission, but Muñoz Marín, unsatisfied with the limited nature of the bill, pressed to let the bill die. See *id.* at 104-05 (describing Muñoz Marín's fear that bill would create impediments to

The first concession granted to Puerto Rico since the Jones Act was the Elective Governor Act,<sup>67</sup> signed by President Truman on August 4, 1947.<sup>68</sup> The enactment amended Section 12 of the Jones Act, granting qualified voters of Puerto Rico the right to elect their own governor.<sup>69</sup> The United States government could still keep a close eye on the unincorporated territory with the newly created office of Coordinator of Federal Agencies in Puerto Rico.<sup>70</sup> Furthermore, the Elective Governor Act was simply an amendment of the Jones Act, making it a unilateral concession that Congress could withdraw if unsatisfied with the future political climate of the island.<sup>71</sup>

### C. *The Commonwealth of Puerto Rico and International Law*

Two major events in 1999 would bring international attention to the Puerto Rico status issue.<sup>72</sup> The first was the death of David Sanes Rodriguez, a civilian Puerto Rican Security Guard, who was killed by an errant bomb on the island of Vieques.<sup>73</sup> The second would be the clemency granted to eleven Puerto Rican nationalists, members of a radical pro-independence organization, jailed for their support of extremist activities during the 1970s and 1980s.<sup>74</sup>

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future attempts at further self-government). The next major attempt at self-government legislation for Puerto Rico was the Tydings-Piñero bill, filed May 16, 1945. *See id.* at 108. The bill called for a referendum on the traditional status options, each defined in detail. *See id.* With three basic components, the bill represented an attempt to develop self-government through the adoption of a Puerto Rican Constitution, created a bilateral relationship between the United States and Puerto Rico, while proposing substantial change in the relations. *See id.* Unfortunately, much like the Campbell bill, the Tydings-Piñero bill also died in committee. *See id.* At 109.

67. *See* Puerto Rico Elective Governor Act, ch. 490, 61 Stat. 770 (1947).

68. *See* TRIAS MONGE, *supra* note 15, at 106 (discussing passing of Elective Governor Act). *See also* PERUSSE, *supra* note 8, at 29 (discussing signing of Elective Governor Act).

69. *See* Puerto Rico Elective Governor Act, § 6, 61 Stat. 770.

70. *See* Puerto Rico Elective Governor Act, § 6, 61 Stat. 772.

71. *See* MORALES CARRIÓN, *supra* note 8, at 271 (citing act as insignificant, while in practice signified profound change in how island was governed).

72. *See* Press Release Decolonization Committee Takes Action on Text Related to Puerto Rico, GA/COL/3016.

73. *See* MURILLO *supra* note 13, at 18 (discussing death of Sanes during Navy's ongoing war exercises); Special Commission on Vieques, Report to the Governor of Puerto Rico, Executive Summary, June 25, 1999 (describing dropping of number of 500-pound bombs on observation post).

74. *See* MURILLO *supra* note 13, at 19 (discussing release of eleven Puerto Rican nationalists). *See also* John M. Broder, *12 Imprisoned Puerto Ricans Accept Clemency Condi-*

## 1. Colonialism in the Late Nineteenth Century

When Puerto Rico came under U.S. control at the end of the nineteenth century, there were few limits under international law regarding what a country could do regarding the acquisition of territories.<sup>75</sup> In fact, special doctrines and norms were created to facilitate the colonization of the uncivilized and the acquisition of territory.<sup>76</sup> As the century closed, the controversy over U.S. expansionism was at the forefront of American politics.<sup>77</sup> Yet, as the United States attempted to veil its colonial possession under the nomenclature of unincorporated territo-

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tions, N.Y. TIMES, Sept. 8, 1999, at A1 (announcing acceptance of conditioned for clemency by Puerto Rican Nationalists); Amy Waldman, *New York's Puerto Ricans Show Little Solidarity on Clemency Issue*, N.Y. TIMES, Sept. 9, 1999, at B1 (reporting on divergence of opinion on offer of clemency in P.R. community in New York); Dirk Johnson, *Puerto Ricans Clinton Freed Leave Prisons*, N.Y. TIMES, Sept. 11, 1999, at A1 (reporting that eleven members of P.R. nationalist group were freed after vowing to renounce terrorism); Neil L. Lewis, *Records Show Puerto Ricans Got U.S. Help With Clemency*, N.Y. TIMES, Oct. 21, 1999, at A1 (discussing documents released that showed that prisoners did not apply for clemency themselves, as usually required, but application was processed anyway); *Excerpts From Letters on Commutations*, N.Y. TIMES, Sept. 22, 1999, at A25 (excerpting letter from President Clinton to Representative Henry A. Waxman). President Clinton wrote:

When Theodore Roosevelt granted amnesty to Filipino nationalists who attempted to overthrow U.S. Control of the Philippines, when Harry Truman commuted the death sentence of Oscar Collazo, and when Jimmy Carter commuted the sentence of Collazo and other Puerto Rican nationalists who had fired upon the House of Representatives, they exercised the power vested them by the constitution to do what they believed was right, even in the face of great controversy. I have done the same.

*Id.* See generally RONALD FERNANDEZ, PRISONERS OF COLONIALISM: THE STRUGGLE FOR JUSTICE IN PUERTO RICO (1994) (discussing four generations of P.R. political prisoners).

75. See Roberto P. Aponte Toro, *A Tale of Distorting Mirrors: One Hundred Years of Puerto Rico's Sovereignty Imbroglio*, in FOREIGN IN A DOMESTIC SENSE, *supra* note 9, at 253 (describing period as one of limited international standard setting and norm creation regarding acquisition of territories). See also UNITED STATES AND DECOLONIZATION, *supra* note 10, at 30 (stating that decolonization had little place in world of 1880-1914).

76. See UNITED STATES AND DECOLONIZATION, *supra* note 10, at 30 (discussing colonialism in late nineteenth century). See also Antony Anghie, *Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law*, 40 HARV. INT'L L.J. 1, 5 (1999) (stating that special doctrines were devised for acquisition of territories inhabited by uncivilized peoples).

77. See Parker, *supra* note 4, at 136 (discussing flood of judicial opinions and deluge of lay opinion regarding territorial acquisition stemming from Treaty of Paris); Bacon, *supra* note 4, at 99 (discussing determination of constitutional issues arising out of territorial acquisitions after war with Spain); Soltero, *supra* note 4, at 6 (discussing how acquisition of Spanish colonies by United States raised new political issues). See also Roman *supra* note 4, at 17 (stating how acquisition of territories stirred intense controversy over their future). See generally FOREIGN IN A DOMESTIC SENSE *supra* note 4 (presenting various points of view of P.R. colonial status under United States).

ries, an international legal system of sovereignty developed to allow it to carry on imperialistic policies in foreign lands.<sup>78</sup>

Traditionally, international law relied upon reciprocity amongst sovereigns.<sup>79</sup> The system of recognition<sup>80</sup> enabled a sovereign State to assert control over "uncivilized" States.<sup>81</sup> As

78. See Anghie, *supra* note 76, at 5 (citing development of Internal Law allowing colonization of uncivilized peoples). See also Govert Buijs, 'que les Latins Appelent Mais-tatem': An Exploration into the Theological Background of the Concept of Sovereignty, in SOVEREIGNTY IN TRANSITION 232-33 (Neil Walker ed., 2003) (discussing etymological roots of word sovereignty as being derived from medieval Latin adjective *superanus*, meaning "being above" and in twelfth century term *souveraineté*, meaning "the top"). Buijs discussed the origins of "Sovereignty" which was introduced by Bodin in his work *Six Livres de la République*.

[H]e refers to similar Roman antiquity ('que les Latins appellent maiestatem'), to the Israelite scriptures ('tomeed sjéftèt': he that holds the scept[er]), to classical Greek equivalents like *akra exousia* (highest power), *kuria archè* (masterly or highest rule) and *kuion polieuma* (masterly or highest government).

*Id.* at 236. See Martin Loughlin, *Ten Tenets of Sovereignty*, in SOVEREIGNTY IN TRANSITION, *supra* note 78, at 64-65 (stating Bodin's marks of sovereignty). Bodin's marks of sovereignty include: "the power of law-making, the power to declare war and make peace, the power to establish offices of state, the ultimate right of judgment, the power of pardon, the right of coining money, and the right of taxation." See *id.* See also Timothy P. Terrell & Bernard L. McNamee, *Transovereignty: Separating Human Rights From Traditional Sovereignty and the Implications for the Ethics of International Law Practice*, 17 FORDHAM INT'L L.J. 459, 462 (discussing sovereignty in classic nineteenth century model which has persisted much till today). Terrell and McNamee in describing sovereignty state that, "from the formation of a state would simultaneously flow the attributes of sovereignty on the part of the government and a corresponding submission on the [part of the citizenry, together permitting rules of all sorts to be promulgated." See *id.*

79. See BARRY E. CARTER & PHILLIP R. TRIMBLE, INTERNATIONAL LAW 20 (3d ed. 1999) (discussing reciprocal nature of sovereignty); Ronald A. Brand, *External Sovereignty And International Law*, 18 FORDHAM INT'L L.J. 1685, 1688 (1995) (stating that era of equal sovereigns began with 1555 Peace of Augsburg and became more formalized in 1648 Peace of Westfalia). See generally Robert Lansing, *Notes of Sovereignty in a State*, 1 AM. J. INT'L L. 105 (1907) (analyzing source and nature of sovereignty). See also Robert Lansing, *Notes on World Sovereignty*, 15 AM. J. INT'L L. 13, 13 (1921) (stating assumption of equality and equal independence amongst sovereigns).

80. Hersch Lauterpacht, *Recognition of States in International Law*, 53 YALE L.J. 385, 385 (discussing recognition of community as State upon fulfillment of requirements of statehood by international law).

81. See *id.* at 413 (citing Lorimer's description of varying degrees of civilization and exclusion of barbarous and savages from recognition); Anghie, *supra* note 76, at 4 (stating that positivist international law distinguished between civilized and non-civilized states and that Nineteenth Century international law applied only to sovereign states that composed civilized "Family of Nations"); David Kennedy, *Symposium: International Law and the Nineteenth Century: History of an Illusion*, 17 QUINNIPIAC L. REV. 99, 129 (stating that by the end of the Nineteenth Century, native and nomad awaited display of sovereignty and organization into a State). Commenting on Lorimer, Lauterpacht states:

The question, he says, is one of ascertaining whether there exist the necessary requirements of statehood. . . . Lorimer then proceeds to suggest what the

the sovereign was the fundamental basis of international law, the ability to "recognize" sovereignty was placed solely on States that were already "sovereign."<sup>82</sup> Hence, Nations already recognized as sovereign were the only Nations that could assert rights recognized as legal.<sup>83</sup> This was the very law that Justice White spoke of in his concurrence in *Downes*.<sup>84</sup> It was this "law of Nations," particularly the sovereign's ability of cession, that allowed courts to protect U.S. interests by reference to the Treaty of Paris where Puerto Rico's sovereignty passed from Spain to the United States.<sup>85</sup>

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proper tests are. He divides humanity into three concentric spheres: into civilized, barbarous, and savage peoples. The Last two are excluded from recognition. They are excluded because they are unable to fulfill the fundamental condition of possessing what Lorimer calls a "reciprocated will." That requirement disposes not only of savage or barbarous peoples as candidates for statehood. It eliminates religious creeds whose doctrine renders impossible the presumption of reciprocal will, as, for example, the Mohommedan religion. It excludes further, secular creeds which are devout of the "reciprocating will," such as intolerant monarchies . . . intolerant republics . . . intolerant anarchies, communities wedded to communism or nihilism. . . .

Lauterpacht, *supra* note 80, at 413-14.

82. See Anghie, *supra* note 76, at 64 (stating that recognition is based on assumption that properly constituted sovereign exists). See also Lauterpacht, *supra* note 80, at 410 (quoting U.S. President Ulysses S. Grant, in his Annual Message of December 7, 1875). In order for a state to be recognized U.S. President Grant stated that there must be:

[S]ome known and defined form of government, acknowledged by those subject thereto, in which the functions of government are administered by usual methods, competent to mete out justice to citizens and strangers, to afford remedies for public and for private wrongs, and able to assume the correlative international obligations and capable of performing the corresponding international duties resulting from its acquisition of the rights of sovereignty.

*Id.*

83. See Anghie, *supra* note 76, at 23 (stating trend toward excluding uncivilized Nations from recognition, hence not). Here, the sovereign Nation was that which was made up of civilized and Christian people or those of European origin. See *id.* See also Ronald A. Brand *Sovereignty: The State, the Individual, and the International Legal System in the Twenty First Century*, 25 HASTINGS INT'L & COMP. L. REV. 279, 280-81 (2002) (attributing sovereignty as concept of Western political and philosophical thought and international law as it is known today as product of Western thought); Brand, *supra* note 79, at 1689 (discussing evolution of sovereignty allowing for provision of religious domination of, exceptions to, or freedom from power of State); Buijs, *supra* note 78, at 246 (citing dictum of Pope Gelasius). The dictum states: "that there are 'two powers by which the world is chiefly ruled, the sacred authority (*auctoritas*) of the Popes and the royal power (*potestas*)'". *Id.*

84. See *Downes*, 182 U.S. 244 (White, J., concurring) (establishing territorial incorporation doctrine).

85. See Treaty of Paris, *supra* note 29 (ceding Puerto Rico to United States).

## 2. Colonialism and the United Nations

As the nineteenth century came to a close with the First World War ("WWI"),<sup>86</sup> doctrines of annexation gave way to a supposedly more cosmopolitan mindset and the promotion of decolonization and self-determination.<sup>87</sup> Though doomed to fail, the League of Nations created a system of mandates,<sup>88</sup> which administered colonies of the defeated powers for the benefit of their inhabitants and attempted to provide minority protection.<sup>89</sup> As an architect of the League, President Wilson vocalized the change in the norm of colonization: "no right anywhere exists to hand peoples about from sovereignty to sovereignty as if they were property."<sup>90</sup> It was during this period that "Wilsonian self-determination" came into vogue, focusing particularly on ethnic communities, Nations and nationalities defined primarily by language and culture, under which every people, so defined, have the right to choose the sovereign under which they live.<sup>91</sup>

The international progression toward decolonization and self-government did not fully crystallize until the formation of

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86. See Anghi *supra* note 76, at 1 n. 1, (citing historians of time looking to WWI as end of nineteenth century); Kennedy, *supra* note 81, at 106 (stating that when international lawyers speak of the nineteenth century it is from roughly 1870 until 1914).

87. Anghi *supra* note 76, at 74 (noting transition of international law to more open and cosmopolitan mindset leading to promotion of decolonization).

88. See THOMAS G. WEISS, ET AL., *THE UNITED NATIONS AND CHANGING WORLD POLITICS* 129 (2d ed. 1997) (stating that system in theory was supposed to protect welfare of dependent peoples). "The mandate Commission was supposed to supervise European States that controlled certain territories taken from the losing side in World War I." *Id.* It was found by the controlling States as a nuisance. See *id.*

89. See CARTER & TRIMBLE, *supra* note 79, at 16 (emphasis added) (describing mandates system). See also Rupert Emerson, *Self Determination*, 65 AM. J. INT'L L. 453, 459 (1971) (discussing first period of self-determination in which term came into substantial measure of acceptance for European territorial settlement after WWI). The Leagues connection to Minority Protection Rights Treaties resulting from the break-up of Germany, Austria, and Russian Empires, and the incorporation of minorities in new democracies, was an effort to curtail "ethnic passions that contributed to the outbreak of The Great War in the Balkans." See WEISS, *supra* note 88. Designed for about a dozen states, only a few were "legally obligated to give rights to minorities." *Id.* The system would fail under the pressures of the 1930s and would not be renewed in the U.N. until the 1980s. See *id.*

90. Aponte Toro, *supra* note 75, at 256 (discussing President Woodrow Wilson's posture toward colonialism). Oddly enough, the Treaty of Paris which is still valid today, does the same thing with regard to Puerto Rico. See Treaty of Paris, *supra* note 29.

91. See Emerson *supra* note 89, at 463 (citing Wilsonian era for its focus on ethnicity); Michla Pomerance, *The United States and Self-Determination: Perspectives on the Wilsonian Conception*, 70 AM. J. INT'L L. 1, 2 (1976) (quoting Wilson on right to self-determination).

the United Nations.<sup>92</sup> The founding document of the United Nations states its second purpose: “[t]o develop friendly relations among Nations based on respect for the principle of equal rights and *self-determination* of peoples . . . .”<sup>93</sup> Though collective security is the crux of the Charter’s purpose, it also has a “Declaration Regarding Non-Self-Governing Territories,” which describes the responsibilities of Member States in “ensuring that these territories attain ‘a full measure of self-government.’”<sup>94</sup> The Charter required those Member States controlling any of these territories to periodically report to the Secretary-General statistical information and other technical information relating to the conditions in territories for which they were respectively responsible.<sup>95</sup> While circumspect regarding colonialism, the United Nations Charter was a step up from the Covenant of the League of Nations, which was primarily concerned with the interests of those territories of the Nations defeated during WWI.<sup>96</sup> This turn was undoubtedly affected by the changes in attitude created by “the scourge of war,” which by the late 1940s “brought untold sorrow to mankind.”<sup>97</sup> Hence, the “maintenance of justice”<sup>98</sup> that was proclaimed in League’s Covenant made way for the reaffirmation of “faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of Nations large and small . . . .”<sup>99</sup>

a. General Assembly Resolution 742 (VIII)

Though the right to self-determination is clearly set forth in the U.N. Charter, the criteria for deciding whether or not a territory or people has earned this collective right was established by

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92. See U.N. CHARTER art. 1, para. 2. See also Emerson, *supra* note 89, at 463 (citing period after World War II (“WWII”) for focus upon disintegration of overseas empires left untouched by Wilsonian self-determination).

93. U.N. CHARTER art. 1, para. 2.

94. U.N. CHARTER art. 73. See also Robert Pastor, *The International Debate on Puerto Rico: The Costs of Being an Agenda-Taker*, 38 INT’L ORG. 575, 577 (1984) (providing brief survey of Puerto Rico being on and off List between 1946 through 1959).

95. See U.N. CHARTER art. 73e.

96. See Pastor, *supra* note 94, at 577 (characterizing U.N. Charter as “cautious” on issue of colonialism); Emerson, *supra* note 89 (discussing shift in concentration from those territories of settlement following WWI to territories left by disintegration of overseas empires).

97. See U.N. CHARTER pmbl.

98. See LEAGUE OF NATIONS COVENANT pmbl.

99. U.N. CHARTER pmbl.



the U.N. General Assembly ("UNGA") in Resolution 742.<sup>100</sup> The Resolution states that territories attain self-government through independence, also recognizing that self-government can be realized by association with another or a group of States if executed on the basis of absolute equality.<sup>101</sup> Finally, the Annex to the Resolution lists the "factors indicative of the attainment of independence or of other separate systems of self-government."<sup>102</sup>

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100. See G.A. Res. 742, U.N. GAOR, 8th Sess., Supp No. 17, U.N. Doc. A/2430 (1953) (setting forth requirements for self-determination).

101. See G.A. Res. 742, *supra* note 100.

102. See *id.* annex (providing factors for self government). The Third Part of the Annex provides the Factors Indicating the Attainment of Other Separate Systems of Self-Government:

A. *General*

1. *Opinion of the population.* The opinion of the population of the Territory, freely expressed by informed and democratic processes, as to the status or change in status which they desire.
2. *Freedom of choice.* The Freedom of the population of a Non-Self-Governing Territory which has associated itself with the metropolitan country as an integral part of that country or in any other form to modify this status through the expression of their will by democratic means.
3. *Geographical considerations.* Extent to which the relations of the Territory with the capital of the central government may be affected by circumstances arising out of their respective geographical positions, such as separation by land, sea or other natural obstacles. The right of the metropolitan country or the territory to change the political status of that Territory in the light of the consideration whether that Territory is or is not subject to any claim or litigation on the part of another State.
4. *Ethnic and cultural considerations.* Extent to which the population are of different race, language or religion or have a distinct cultural heritage, interests or aspirations, distinguishing them from the peoples of the country with which they freely associate themselves.
5. *Political advancement.* Political advancement of the population sufficient to enable them to decide upon the future destiny of the Territory with due knowledge.
6. *Constitution considerations.* Association by virtue of a treaty or bilateral agreement affecting the status of the Territory, taking into account (i) whether the constitutional guarantees extend equally to the associated Territory, (ii) whether there are powers in certain matters constitutionally reserved to the Territory or to the central authority, and (iii) whether there is provision for the participation of the Territory on a basis of equality in any changes in the constitutional system of the State.

B. *Status*

1. *Legislative representation.* Representation without discrimination in the

b. The Declaration on the Granting of Independence to Colonial Countries and People

On December 14, 1960, the UNGA passed Resolution 1514 (XV), dubbed the Declaration on the Granting of Independence to Colonial Countries and Peoples.<sup>103</sup> The Declaration called for procedures to be immediately implemented in territories which have not yet attained independence, to unconditionally transfer governmental control to the people through universally democratic means, so that they may enjoy total independence

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central legislative organs on the same basis as other inhabitants and regions.

2. *Participation of the population.* Effective participation of the population in the government of the Territory: (a) Is there an adequate and appropriate electoral and representative system? (b) Is this electoral system conducted without direct or indirect interference from a foreign government?
  3. *Citizenship.* Citizenship without discrimination on the basis of other inhabitants.
  4. *Internal Legislation.* Local self-government of the same scope and under the same condition as enjoyed by other parts of the country.
  5. *Government officials.* Eligibility of officials from the Territory to all public offices of the central authority, by appointment or election, on the same basis as those from other parts of the country.
- C. *Internal constitutional conditions.*
1. *Suffrage.* Universal and equal suffrage, and free periodic elections, characterized by an absence of undue influence over and coercion of the voter or of the imposition of disabilities on particular political parties.
  2. *Local rights and status.* In a unitary system equal rights and status for the inhabitants and local bodies of the Territory as enjoyed by inhabitants and local bodies of other parts of the country; in a federal system an identical degree of self-government for the inhabitants and local bodies of all parts of the federation.
  3. *Local officials.* Appointment or election of officials in the Territory on the same basis as those in other parts of the country.
  4. *Economic, social and cultural jurisdiction.* Degree of autonomy in respect of economic, social and cultural affairs, as illustrated by the degree of freedom from economic pressure as exercised, for example, by a foreign minority group which, by virtue of the help of a foreign Power, has acquired a privileged economic status to the general economic freedom and lack of discrimination against indigenous populations of the territory in social legislation and social developments.

*Id.* See also PERUSSE, *supra* note 8, at 61 (arguing that Commonwealth of Puerto Rico does not meet five factors). According to Perusse, the factors not met are: freedom of choice, constitutional considerations, legislative representation, citizenship, and government officials. See *id.*

103. See G.A. Res 1514, U.N. GOAR, 15th Sess., Supp. No. 16, U.N. Doc. A/4684 (1960).

and freedom.<sup>104</sup> As decolonization secured an importance that it had not realized in the early 1950s, terms previously used to skirt around what became a political expletive, were now equated to it.<sup>105</sup> Trust Territories, non-self-governing territories and territories that had not gained independence, were officially equated with one thing — *colonialism*.<sup>106</sup>

c. Fine-Tuning Self Governance: UNGA Resolution 1541 (XV)

The day after directly correlating non-self governing territories with colonialism, the UNGA embarked upon clarifying the intent of Resolution 742 of 1953.<sup>107</sup> Resolution 1541 (XV), titled *Principles Which Should Guide Members in Determining Whether or not an Obligation Exists to Transmit the Information Called for under Article 73e of the Charter*, establishes that non-self governing territories can be said to have attained self-government by becoming an independent sovereign State by freely associating with an independent State or by integrating with an independent State.<sup>108</sup>

d. Dealing with Decolonization

One year after passing UNGA Resolution 1514 (XV), the UNGA established the Special Committee on the Situation with Regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries ("Decolonization Committee"), to implement UNGA Resolution 1514 and pressure colonial powers to grant independence to their territo-

104. See G.A. Res 1514, *supra* note 103.

105. See TRIAS MONGE, *supra* note 15, at 137 (describing change in makeup of UN since early 1950s); Cabranes, *supra* note 10, at 40 (describing politics of language in which word *colonialism* became political expletive) (emphasis added).

106. See G.A. Res. 1514, *supra* note 103.

107. See PERUSSE, *supra* note 8, at 63 (discussing passing of U.N. Res. 1541); TRIAS MONGE, *supra* note 15, at 136 (recounting that resolution was approved by vote of 96-2 with 21 abstentions day after Resolution 1514 was passed).

108. See G.A. Res. 1541, U.N. GOAR, 15th Sess., Supp No. 16, U.N. Doc. A/4684 (1960). See also Pastor, *supra* note 94, at 579. The seventh principle qualifies that free association "should be a free and voluntary choice by the peoples of the territory concerned through informed and democratic processes" and that the people of the territory have "the freedom to modify the status of the territory through the expression of their will by democratic means and through constitutional processes." *Id.* Prin. VII, at 29-30. Furthermore, the principle states, "the territory should have the right to determine its internal constitution without outside interference," not precluding "consultations appropriate or necessary under the terms of free association agreed upon." *Id.* See generally Keitner & Reisman, *supra* note 3 (outlining basic features of free association, one of three options for self-determination under Resolution 1541).

ries.<sup>109</sup> In 1965, Cuba, a member of the Committee, asked that the case of Puerto Rico be added to the agenda of the Decolonization Committee.<sup>110</sup> Citing UNGA Resolution 748 (VII), the United States (also at the time a member of the Committee), argued that the question of Puerto Rico was an internal matter.<sup>111</sup> In the period of 1972-1977, the Decolonization Committee approved annual resolutions reaffirming "the inalienable right of the People of Puerto Rico to self-determination and independence," and asked the United States to abstain from impeding "the exercise of such rights, and deciding to keep the matter under permanent review."<sup>112</sup> In 1980 the UNGA adopted a Plan of Action to reaffirm its commitment to UNGA Resolution 1514 (XV), commemorating its twentieth anniversary.<sup>113</sup> The Resolution declared colonialism of any form and manifestation incompatible with the U.N. Charter, UNGA Resolution 1514 (XV) and the principles of international law, and urged all Nations to collaborate with the Decolonization Committee in proposing procedures to liberate the remaining colonies.<sup>114</sup>

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109. See Pastor, *supra* note 94, at 580 (discussing creation of Special Committee of 24). The Committee was initially composed of seventeen members, but in 1962, it added seven more members and is now also called the Committee of 24. See *id.* at 580 n. 12. See also Special Committee of 24 on Decolonization, available at <http://www.un.org/Depts/dpi/decolonization/committee.htm> (stating that committee meets annually to discuss developments in Non-Self-Governing Territories, hears from appointed and elected representatives of Territories and petitioners, organizes visiting missions to Territories, and organizes seminars on situations in Territories).

110. See TRÍAS MONGE, *supra* note 15, at 137 (citing Cuba asked for Puerto Rico to be added to agenda at behest of independence advocates in Puerto Rico); Keitner & Reisman, *supra* note 3, at 31 (citing Cuba's continued press for assumption of issue of Puerto Rico by committee).

111. See TRÍAS MONGE, *supra* note 15, at 137 (citing U.S. Ambassador George Bush's opposition due to undue intervention in U.S. domestic matters). See also Pastor, *supra* note 94, at 581 (citing U.S. withdrawal from Committee because of endless anti-imperialistic propaganda of Soviet bloc).

112. TRÍAS MONGE, *supra* note 15, at 138 (citing that general pattern of resolution was set in 1973). See also Pastor, *supra* note 94, at 581-82 (tracing institutionalization of issue of Puerto Rico's status from 1971-1976).

113. See G.A. Res. 118, *Plan of Action for the Full implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples*, U.N. GAOR, 35th Sess., U.N. Doc. A/Res.35/118 (1980), available at <http://www.un.org/documents/ga/res/35/ares35.htm>; TRÍAS MONGE, *supra* note 15, at 139 (discussing adoption of plan of action by General Assembly).

114. See G.A. Res. 118, *supra* note 113; TRÍAS MONGE, *supra* note 15 at 139 (stating that United States voted against resolution which passed by vote of 121-6 with twenty abstentions and eight absent).

### 3. The Inter-American System: Democracy and the Organization of American States

The Charter of the Organization of American States ("OAS Charter") was adopted on April 30, 1948 and entered into force on December 13, 1951.<sup>115</sup> In stark contrast to the U.N. Charter, the essential purposes set out in the OAS Charter did not explicitly include the right to self-determination.<sup>116</sup> The principle of "effective exercise of representative democracy"<sup>117</sup> was solely a

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115. See CHARTER OF THE ORGANIZATION OF AMERICAN STATES, April 30, 1948, 2 U.S.T. 2394, T.I.A.S. No. 2361, ch. 1 [hereinafter ORIGINAL O.A.S. CHARTER]. The Inter-American System finds its origins in the Congress of Panama held in 1826. See CHARLES G. FENWICK, *THE ORGANIZATION OF AMERICAN STATES: THE INTER-AMERICAN REGIONAL SYSTEM* 14 (1963) (discussing letter from Simón Bolívar to governments of Brazil, Central America, Chile, Columbia, Mexico, United Provinces of Buenos Aires, and proposing congress of representatives from each State to act as council in conflicts, interpret treaties and generally conciliate differences). The Congress of Panama met on June 23, 1826 and ended with the signing of the Treaty of Perpetual Union, League and Confederation. See *id.* at 18. See also José A. Mora, *The Organization of American States*, 14 INT'L ORG. 514, 514 (1960). Though the treaty created by the Congress was a failure at the time, it became a symbol of hemispheric unity, and remained an ideal for many Latin American Leaders. See FENWICK, *supra* at 18; Mora, *supra* at 514 (noting that for sixty-four years, treaty remained as goal of many Latin American Statesmen). The modern Inter-American system began with the International Union of American Republics ("International Union") on April 14, 1890 at the First American International Conference of American States. See FENWICK, *supra*, at 18, 35-36 (discussing failure of treaty due much to unfavorable political conditions and delineating objectives proposed for conference most of which dealt with trade and resolution of disputes). See also SCOTT DAVIDSON, *THE INTER-AMERICAN HUMAN RIGHTS SYSTEM* 1 (1997) (describing International Union as "system of Conferences"); Mora *supra* (describing International Union as "group of states cooperating for specific object"). Fifty-eight years after the First International Conference, the Inter-American System would make its final transition into the OAS at the Ninth International Conference of American States in Bogotá Colombia. See FENWICK, *supra*, at 80 (noting resolutions adopted at conferences).

In addition to the Charter of the Organization and four separate treaties dealing respectively with procedures of pacific settlement, economic relations and the civil and political rights of women, the Conference adopted forty-six resolutions, declarations and other agreements covering the wide field of activities falling within the scope of the regular conferences." Since its inception the OAS Charter has been amended four times.

*Id.*

116. See ORIGINAL O.A.S. CHARTER, *supra* note 115.

117. See *id.* at ch. 2 art. 5(d). The principle reads: "The solidarity of the American States and the high aims which are sought throughout it require the political organization of those States on the basis of the effective exercise of representative democracy . . ." *Id.* See CELIA MEDINA QUIROGA, *THE BATTLE OF HUMAN RIGHTS: GROSS, SYSTEMATIC VIOLATIONS AND THE INTER-AMERICAN SYSTEM* 47 (1988) (stating that meaning of expression is not clarified by either Charter or previous resolution adopted in Inter-American system).

"principle" and not a duty or right of States.<sup>118</sup> A fundamental prerequisite to self-determination is the "right of a people to determine its political status in a democratic fashion and is hence at the crux of the democratic entitlement."<sup>119</sup> It can be argued that self-determination was implicit in Chapter VII, (now Chapter VIII<sup>120</sup>) which provides that States develop legislation on the basis which all human beings are universally entitled to—"material well-being and spiritual growth" under conditions of "liberty, dignity, equality of opportunity, and economic security."<sup>121</sup> Similarly, the principle proclaiming the universally fundamental rights of the individual without discrimination can also be found in the Charter's second chapter.<sup>122</sup> Though the principles of representative democracy and fundamental human rights are clearly delineated in the Charter, they historically took a back seat to the right of non-intervention originally found in Article 15<sup>123</sup> (now Article 18<sup>124</sup>), which states: "[n]o State or group of States has the right to intervene, *directly or indirectly, for any reason whatever*, in the internal or external affairs of any other [S]tate."<sup>125</sup> Non-intervention would prove to be a legal obstacle in which proponents of democracy and human rights would have to overcome in the regional system.<sup>126</sup>

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118. See ORIGINAL OAS CHARTER, *supra* note 115, at chs. 2, 4. See also MEDINA QUIROGA, *supra* note 117, at 42 (1988) (citing *travaux préparatoires* regarding separation of "principles" and "rights and duties of [S]tates").

119. Thomas M. Franck, *The Emerging Right to Democratic Governance*, 86 AM. J. INT'L. L. 46, 52 (1992) (discussing self-determination as historic root of democratic entitlement).

120. See CHARTER OF THE ORGANIZATION OF AMERICAN STATES, Apr. 30, 1948, 2 U.S.T. 2394, T.I.A.S. No. 2361; amended effective 1970, 21 U.S.T. 607, T.I.A.S. No. 6847 [hereinafter AMENDED O.A.S. CHARTER]

121. ORIGINAL O.A.S. CHARTER, *supra* note 115, at ch. 8, art. 42(a).

122. See *id.* art. 5(j)

123. See *id.* art. 15.

124. See AMENDED O.A.S. CHARTER, *supra* note 120, art. 18.

125. *Id.* (emphasis added). The Article continues: "The foregoing principle prohibits not only armed forces but also any other form of interference or attempted threat against the personality of the State or against its political, economic, and cultural elements." *Id.*

126. See LAWRENCE J. LeBLANC, *THE OAS AND THE PROMOTION AND PROTECTION OF HUMAN RIGHTS* 11 (1977) (stating when American States were given choice between principles, more emphasis was placed on non-intervention). See also MEDINA QUIROGA, *supra* note 117, at 43 (1988) (stating that legal establishment of non-intervention which had been sought "persistently, undoubtedly and uninterruptedly" was a "duty," while democracy and human rights were "principles").

## a. American Declaration of Human Rights

Though the OAS Charter refers to fundamental human rights, it does not enumerate the rights to be protected.<sup>127</sup> This ambiguity was partially solved with the adoption of the American Declaration of the Rights and Duties of Man ("American Declaration").<sup>128</sup> The American Declaration affirmed the recognition that the fundamental rights of man do not come from his nationality, but are based on the virtue of his human personality, and that the international protection of the rights of man should be the basis of developing American law.<sup>129</sup> With the declaration, American States recognized that when legislating on this area, the rights are not conceded or created, but instead pre-existed the State and originated in the very nature of human personality.<sup>130</sup>

While the American Declaration does not specifically refer to self-determination *per se*, rights implicit in self-determination are included in the Declaration.<sup>131</sup> Article II of the Declaration refers to the right to equality before the law,<sup>132</sup> and Article XX protects the right to vote and participate in government.<sup>133</sup>

127. See DAVIDSON, *supra* note 115, at 10 (stating that Charter does not contain catalogue of protectable human rights, nor indicate method by which rights might be identified).

128. See American Declaration on the Rights and Duties of Man, Resolution XXX, Final Act of the Ninth International Conference of the Americas, OEA/Ser. G (1948) [hereinafter American Declaration]. Although it was deemed the most important human rights document to come out of the Ninth Conference, it was not adopted as a legally binding Inter-American instrument. See LEBLANC, *supra* note 126, at 13-17 (delineating history of decision to make declaration instead of convention); MEDINA QUIROGA, *supra* note 117, at 36 (describing debate that arose regarding legal character of instrument showing that majority of States favored declaration over treaty). On the question of incorporating the Declaration into the OAS Charter, only six of twenty-one states were in favor of the action. See *id.* at 38.

129. See American Declaration, *supra* note 128 (presenting intent of approval of American Declaration by Ninth International Conference of American States).

130. See Inter-American Commission on Human Rights, Basic Documents Pertaining to Human Rights in the Inter-American System, OAS/Ser.L/V/I.4 Rev. 9 (2003), available at <http://www.cidh.org/Basicos/basic1.htm> (stating that American Declaration is recognizing rights that existed before the State was ever created and flow from very nature of human person).

131. See American Declaration, *supra* note 128, arts. 2, 20.

132. See American Declaration, *supra* note 128, art. 2. Article 2 states: "All persons are equal before the law and have the rights and duties established in this Declaration, without distinction as to race, sex, language, creed or any other factor." *Id.*

133. See American Declaration, *supra* note 128, art. 20 (stating "Every person having legal capacity is entitled to participate in the government of his country, directly or

## b. The Inter-American Commission of Human Rights

At the Third Special Inter-American Conference in Buenos Aires, the Inter-American Commission on Human Rights ("IACHR")<sup>134</sup> transformed from an autonomous entity<sup>135</sup> into an

through his representatives, and to take part in popular elections, which shall be by secret ballot and shall be honest, periodic and free"). The origins of this are discussed by Medina Quiroga who quotes a draft declaration from which Article XX emerged:

Every person, national of the state, has the right to participate in the election of the legislative and executive officer of the government in accordance with provisions of the national constitution. The practical exercise of this right may however, be subject to the condition of not being illiterate. The constitution of the state shall provide for a government of people, by the people and for the people.

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This right presupposes the right to form political parties.

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No person shall be denied the right to hold public office, or to be appointed to any of the public service of the state of which he is a national, upon grounds of political affiliation, race, religion, sex, or any other arbitrary discrimination.

MEDINA QUIROGA, *supra* note 117, at 48. Also included in Medina Quiroga's discussion is a comment to the draft:

Since the right of suffrage is a fundamental one in the democratic organization, the basis of which lies precisely in the power of the people to choose freely its representatives and leaders, we emphasize that the article is of great importance, but it will be of no value if it is not faithfully complied with . . . if governments and statesmen of America do not insist upon improving political customs and upon having their reiterated protests and declarations in favor of democracy accomplished by a persistent effort to have the democratic system applied and respected in the field of reality and constantly perfected.

*Id.* (quoting *Report to Accompany the Definitive Draft Declaration of the International Rights and Duties of Man*, annex to document CB-7-E, 9th International Conference of American States, at 11).

134. See LEBLANC, *supra* note 126, at 41 (introducing history of IACHR); DAVIDSON, *supra* note 115, at 15-17 (describing early evolution and development of IACHR). The IACHR was created in 1959 at the Fifth Meeting of Consultation of Ministers of Foreign Affairs in the second part of Resolution VIII. See *id.* at 15. The Resolution called upon the OAS:

To create an Inter-American Commission on Human Rights Composed of seven members elected, as individuals, by the Council of the Organization of American States from panels of three presented by the governments. The Commission, which shall be organized by the Council of the Organization and have the specific functions that the council assigns it, shall be charged with furthering respect for such rights.

*Id.* at 15-16; LEBLANC, *supra* note 126, at 47; MEDINA QUIROGA, *supra* note 117, at 67. The original Statute of the Commission, approved on May 15, 1960 would remain in force until 1965, when its functions and powers were expanded. See *id.* See also DAVIDSON, *supra* note 115, at 16 (noting that for purposes of Statute, "human rights" were those established in American Declaration).

135. See MEDINA QUIROGA, *supra* note 117, at 87 (stating that meaning of expression has never been discussed or explained). See also LEBLANC, *supra* note 126, at 50



organ of the Organization of American States ("OAS").<sup>136</sup> The OAS Charter was amended to include the IACHR on its list of organs.<sup>137</sup> A new Article 112 provided that the IACHR would promote the observance and protection of human rights and that its structure would be determined by a forthcoming convention on human rights.<sup>138</sup> The IACHR, henceforth, derives its existence and powers from a multilateral treaty.<sup>139</sup> On July 18, 1978, the American Convention on Human Rights ("American Convention") entered into force,<sup>140</sup> after which the new Statute of the Inter-American Court of Human Rights ("IACHR Statute") would define human rights separately for the State parties to the Convention and the other Member States.<sup>141</sup> Since the United States has not ratified the Convention, for the purposes of the IACHR Statute, human rights take their definition from the American Declaration.<sup>142</sup>

The IACHR is a unique venue in the area of human

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(noting that "this means that the IACHR was established as an internal commission of the OAS but designed to function autonomously").

136. See, DAVIDSON, *supra* note 115, at 21 (describing transformation as major modification that would have profound effect on promotion and protection of human rights); MEDINA QUIROGA, *supra* note 117, at 87 (discussing inclusion of IACHR in list of organs).

137. See AMENDED OAS CHARTER, *supra* note 120, art. 51.

138. See *id.* art. 112. Article 112 reads:

There shall be an Inter-American Commission on Human Rights, whose principle function shall be to promote the observance and protection of human rights and serve as a consultative organ of the Organization in these matters. An Inter-American convention on human rights shall determine the structure, competence and procedure of this commission, as well as those of the other organs responsible for these matters.

*Id.*

139. See MEDINA QUIROGA, *supra* note 117, at 22-23 (discussing IACHR's new treaty-based legal foundation).

140. See THE INTER-AMERICAN SYSTEM OF HUMAN RIGHTS 562 (David J. Harris & Stephen Livingstone eds., 1998) (providing list of signatory countries and date ratification or accession).

141. See Statute of the Inter-American Commission on Human Rights, [hereinafter IACHR statute] art. 1, available at, <http://www.cidh.org/Basicos/basic15.htm> (setting forth rights to be understood for purpose of statute). For the purposes of the Statute, human rights are defined as:

- a. The right set forth in the American Convention on Human Rights, in relation to the states party thereto;
- b. The rights set forth in the American Declaration of the Rights and Duties of Man in relation to the other Member states.

*Id.*

142. See American Declaration, *supra* note 128 (affirming essential human rights including right to vote and participate in government).

rights.<sup>143</sup> Article 23 of the Rules of Procedure of the Inter-American Commission on Human Rights ("IACHR Rules") enables any individual, group of persons, or nongovernmental entity to submit petitions to the IACHR.<sup>144</sup> The IACHR Statute grants a wide range of powers with respect to Member States of the OAS.<sup>145</sup> For those Member States not a party to the American

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143. See Christopher P. Cline, *Pursuing Native American Rights in International Law Venues: A Jus Cogens Strategy after Lyng v. Northwest Indian Cemetery Protective Association*, 42 HASTINGS L.J. 591, 613 (1991) (characterizing IACHR as unique venue in human rights law).

144. See Rules of Procedure of the Inter-American Commission on Human Rights, art. 23, available at <http://www.cidh.org/Basicos/basic16.htm> [hereinafter IACHR Rules]. Article 23 states:

Any person or group of persons or nongovernmental entity legally recognized in one or more of the Member States of the OAS may submit petitions to the Commission, on their own behalf or on behalf of third persons, concerning alleged violations of a human right recognized in, as the case may be, the American Declaration of the Rights and Duties of Man, the American Convention on Human Rights, the Additional Protocol in the Area of Economic, Social and Cultural Rights, the Protocol to Abolish the Death Penalty, the Inter-American Convention to Prevent and Punish Torture, the Inter-American Convention on Forced Disappearance of Persons, and/or the Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women, in accordance with their respective provisions, the Statute of the Commission, and these Rules of Procedure. The petitioner may designate an attorney or other person to represent him or her before the Commission, either in the petition itself or in another writing.

*Id.*

145. See IACHR Statute, *supra* note 141, art. 1 (delineating powers of IACHR respecting Member States of Organization of American States). The powers of the IACHR are:

- a. to develop an awareness of human rights among the peoples of the Americas;
- b. to make recommendations to the governments of the states on the adoption of progressive measures in favor of human rights in the framework of their legislation, constitutional provisions and international commitments, as well as appropriate measures to further observance of those rights;
- c. to prepare such studies or reports as it considers advisable for the performance of its duties;
- d. to request that the governments of the States provided it with reports on measures they adopt in matters of human rights;
- e. to respond to inquiries made by any Member State through the General Secretariat of the Organization on matters related to human rights in the States and, within its possibilities to provide those States with the advisory services they request;
- f. to submit an Annual Report to the General Assembly of the Organization, in which due account shall be taken if the legal regime applicable to those States Parties [sic] to the American Convention on Human Rights and of that system applicable to those that are not Parties;

Convention, the IACHR is charged to “pay particular attention to the observance” of the right to life, liberty, and personal security; the right to equality before the law; the right to religious freedom and worship; and the right to freedom of investigation, opinion, expression, and dissemination, all integral to the right of self-determination.<sup>146</sup>

## II. *THE CORE OF THE CONUNDRUM: THE QUESTION OF PUERTO RICAN SELF-DETERMINATION AND DEMOCRACY*

### A. *Plenary Powers at Work*

On January 2, 1949 Luis Muñoz Marín became the first popularly elected governor of Puerto Rico.<sup>147</sup> He began working diligently to change Puerto Rico’s status.<sup>148</sup>

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g. to conduct on-site observations in a state, with the consent or at the invitation of the government in question; and

h. to submit the program-budget of the Commission to the Secretary General, so that he may present it to the General Assembly.

*Id.*

146. See IACHR Statute, *supra* note 141, art. 20(a) (delineating specific powers of IACHR regarding Member States not party to the American Convention). Article 20 grants powers in addition to those delineated in Article 18:

a. to pay particular attention to the observance of the human rights referred to in Articles I, II, III, IV, XVIII, XXV, and XXVI of the [American Declaration];

b. to examine communications submitted to it an any other available information, to address the government of any Member State not a Party to the Convention for information deemed pertinent by this Commission, and to make recommendations to it, when it finds this appropriate, in order to bring about more effective observance of fundamental human rights; and

c. to verify, as a prior condition to the exercise of the powers granted under subparagraph b. above, whether the domestic legal procedures and remedies of each Member State not a party to the Convention have been duly applied and exhausted.

*Id.*

147. See MORALES CARRIÓN, *supra* note 8, at 271 (citing Muñoz’s landslide victory); JAMES J. DIETZ, *PUERTO RICO: NEGOTIATING DEVELOPMENT AND CHANGE* 178 (2003) (stating that Muñoz won governorship with more than 61% of vote); WILLIAMS *supra* note 55, at 168 (referring to election as first time in post-Columbian history that island elected its own governor). President Eisenhower was quoted on Muñoz Marín stating, “This is the man who will run Puerto Rico for us. We selected him to be elected.” See also LÓPEZ, *supra* note 19, at 44 (quoting Eisenhower on Muñoz Marín); Roman, *supra* note 8, at 492 (stating that with help of influential Puerto Ricans, hegemonic tool of international status was used).

148. See WILLIAMS *supra* note 55, at 168 (stating that once Muñoz became governor, his party took stand on question of status, choosing autonomy); THE PUERTO RICANS, *supra* note 21, at 196 (discussing Muñoz’ intentions in finding midway alternative

## 1. Public Law 600

Shortly after the failure of the Tydings-Piñero Bill,<sup>149</sup> Muñoz and the new Resident Commissioner, Dr. Antonio Fernós Isern, started drafting what would become Public Law 600 ("P.L. 600").<sup>150</sup> The two Puerto Rican leaders pressed Congress to pass the Law that would allow Puerto Rico to draft its own constitution as a compact between Puerto Rico and the United States.<sup>151</sup> The compact language of contention would mirror that of the Northwest Ordinance of 1787.<sup>152</sup> Although the Commonwealth Constitution would finally have to be approved by congress,<sup>153</sup> P.L. 600 stated: "the Act is now adopted in *the nature of a compact* so that the people of Puerto Rico may organize a government pursuant to a constitution of their own adoption."<sup>154</sup> There would be no confusion — the political status of Puerto Rico had not changed with the enactment of P.L. 600.<sup>155</sup> Hence, the sov-

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between colonialism and independence); MORALES CARRIÓN, *supra* note 8, at 271 (discussing many appointments made to further cause of self-government).

149. See S. 1407, 78th Cong., 2d Sess. (1943). See also TRIAS MONGE, *supra* note 15, at 105 (discussing bill that called for binding status plebiscite); MONTALVO-BARBOT, *supra* note 55, at 118 (noting that bill provided for referendum that would have allowed Puerto Rico to choose between statehood, independence and associated State).

150. See TRIAS MONGE, *supra* note 15, at 110 (stating that after demise of Tydings-Piñero Bill Muñoz Marin and Fernós Isern began to draft Law 600); MONTALVO-BARBOT, *supra* note 55, at 126 (stating that on March 13, 1950, Resident Commissioner Fernós Isern introduced final version of Bill that would become P.L. 600). See also Public Law 600, ch. 446, 64 Stat. 319 (1950).

151. See TRIAS MONGE, *supra* note 15, at 111 (discussing debate whether compact language for P.L. 600 should follow that in Northwest ordinance); MONTALVO-BARBOT, *supra* note 55, at 132 (discussing confusion that was compounded by term compact).

152. See NORTHWEST ORDINANCE § 14, *available at* <http://www.yale.edu/lawweb/avalon/nworder.htm>. See also TRIAS MONGE, *supra* note 15, at 111 (discussing concept of compact in Northwest Ordinance). The provisions of the Ordinance were adopted "as articles of compact" between the States and the citizens of the territories, "and forever remain unalterable, unless by common consent." *Id.*

153. See Public Law 600, *supra* note 150, § 3. Section 3 of P.L. 600 reads:

Upon adoption of the constitution by the people of Puerto Rico, the President of the United States is authorized to transmit such constitution to the Congress of the United States if he finds that such constitution conforms with the applicable provisions of this Act and the Constitution of the United States.

*Id.*

154. Public Law 600, *supra* note 150, pmb. (stating that Act was adopted in nature of compact) (emphasis added).

155. See TRIAS MONGE, *supra* note 15, at 112 (quoting Oscar Chapman during address regarding P.L. 600). Interior Secretary Oscar Chapman wrote, "It is important at the outset to avoid any misunderstandings as to the nature and scope of the proposed legislation . . . . The bill under consideration would not change Puerto Rico's political,

ereignty acquired by the United States under the Treaty of Paris would remain intact.<sup>156</sup> For the most part, the Jones Act would be “continued in force and effect,” but renamed the “Puerto Rican Federal Relations Act.”<sup>157</sup>

## 2. The Commonwealth Constitution

On August 27, 1951, the people of Puerto Rico elected the members for the Constitutional Convention.<sup>158</sup> Prior to approving the new constitution, the Constitutional Convention passed two significant resolutions.<sup>159</sup> First was Resolution 22, which specified the name by which the body politic would be known.<sup>160</sup> In English, the convention chose the word “Commonwealth,” meaning a “politically organized community” or “[S]tate,” which is simultaneously connected to a larger political system and hence does not have an independent and separate status.<sup>161</sup> Unable to translate the word into Spanish, the convention adopted a translation, *Estado Libre Asociado*, which is literally translated in English as “Free Associated State.”<sup>162</sup> The second, Resolution 23, attempted to affirm the notion that the status of the island had changed, “within the terms of compact entered into with the United States”<sup>163</sup> and that the power of the Commonwealth of

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social, and economic relationship to the United States.” *Id.* See Rosalind de Jesus, *Let Puerto Rico Decide How to End its Colony Status*, MORNING CALL, July 21, 2002.

156. See TRÍAS MONGE, *supra* note 15, at 113 (quoting Resident Commissioner Fernós stating that new law would not change status of Puerto Rico); PERUSSE, *supra* note 8, at 32 (stating that P.L. 600 did not change relationship significantly).

157. See Public Law 600, *supra* note 150, at § 4.

158. See MONTALVO-BARBOT, *supra* note 55, at 135 (discussing Puerto Rico’s election for constitutional convention); TRÍAS MONGE, *supra* note 15, at 114 (stating that members of constitutional convention were selected at elections held on August 27, 1951).

159. See Resolution 22, P.R. Constitutional Convention (Feb. 4 1952) *reprinted in* PERUSSE, *supra* note 8, at 113-14 [hereinafter “Resolution 22”]; Resolution 23, P.R. Constitutional Convention (Feb. 4, 1952) *reprinted in* PERUSSE, *supra* note 8, at 115-16 [hereinafter “Resolution 23”].

160. See Resolution 22, *supra* note 159.

161. See *id.*

162. See Rafael A. Declet, *The Mandate Under International Law for a Self-Executing Plebiscite on Puerto Rico’s Political Status, and the Right of U.S.-Resident Puerto Ricans to Participate*, 28 SYRACUSE J. INT’L. & COM. 19, 34 (2001). U.S. officials initially did not support this translation because of its connotation of sovereignty or equality with a state of the Union. See *id.*

163. See Resolution 23, *supra* note 159. Resolution 23 resolved in part:

*Third:* That the following final declaration of this Convention be entered on its journal and also published:

Puerto Rico shall be exerted consistently with its Constitution the conditions of the said compact.”<sup>164</sup> The Constitution that was to be distributed for the public referendum gave the false sense of change that the drafters of P.L. 600 clearly avoided.<sup>165</sup>

By March 1952, the people of Puerto Rico approved the new Constitution,<sup>166</sup> and on the twelfth day of that month, the Constitutional Convention submitted a copy of the Constitution to the President.<sup>167</sup> Before approving the Constitution, U.S. legislators added an amendment requiring that any change to the Commonwealth Constitution should be consistent with the

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- (a) This Convention deems that the Constitution as approved fulfills the mission assigned it by the people of Puerto Rico.
  - (b) When the constitution takes effect, the people of Puerto Rico shall thereupon be organized in a commonwealth established within the terms of the compact entered into by mutual consent, which is the basis of our union with the United States of America.
  - (c) The political authority of the Commonwealth of Puerto Rico shall be exercised in accordance with its Constitution and within the terms of said compact.
  - (d) Thus we attain the goal of complete self-government, the last vestiges of colonialism having disappeared in the principle of Compact, and we enter into as era of new developments in democratic civilization. Nothing can surpass in political dignity the principle of mutual consent and of compacts freely agreed upon. The spirit of the people of Puerto Rico is free for great undertakings now and in the future. Having full political dignity the commonwealth of Puerto Rico may develop in other ways by modifications of the Compact through mutual consent.
  - (e) The people of Puerto Rico reserve the right to propose and accept modifications in the terms of its relations with the United States of America, in order that these relations may at all times be the expression of an agreement freely entered into between the people of Puerto Rico and the United States of America.

*Id.*

164. Resolution 23, *supra* note 159, at (c) (stating that power of Commonwealth is based on Constitution and compact).

165. Recall that prior to the passing of Public Law 600, the U.S. announced that the status of Puerto Rico would not change with the enactment. See TRIAS MONGE, *supra* note 15, at 112 (quoting Oscar Chapman during address regarding P.L. 600)

166. See 48 U.S.C. § 731 (2003) (discussing submission of legislative materials for acceptance by Puerto Rican people).

167. See 48 U.S.C. § 731(d) (2003). Section 731(d) provides:

[u]pon adoption of the constitution by the people of Puerto Rico, the President of the United States is Authorized to transmit such constitution to the Congress of the United States if he finds that such constitution confirms with the applicable provisions 731b to 731e of this title and of the constitution of the United States. Upon approval by the Congress the constitution shall become effective in accordance with its terms.

*Id.*

United States Constitution, P.L. 600, and the Federal Relations Act.<sup>168</sup> In the joint resolution Public Law 447 of July 3, 1952, which states that P.L. 600 was a compact, the United States approved the Commonwealth Constitution, while *adding* to Section 3 of Article 7 of the Constitution that any changes to the P.R. Constitution must follow provisions of the U.S. Constitution and applicable U.S. law.<sup>169</sup>

### B. *Puerto Rico and the United Nations*

On December 14, 1946, the United States included Puerto Rico on the list of seventy-four non-self-governing territories ("the List") compiled by the UNGA.<sup>170</sup> Two years later, the UNGA passed Resolution 222, indicating its desire to be informed of any change in the constitutional status of a non-self-governing territory which would result in the discontinuance of the need to send information regarding the territory.<sup>171</sup> From 1947 to 1951, the United States submitted the requisite informa-

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168. See MONTALVO-BARBOT, *supra* note 55, at 140 (discussing amendment by Senator Olin Talmadge Johnson that would make any amendment to Commonwealth Constitution subject to U.S. congressional approval). See also TRIAS MONGE *supra* note 15, at 117 (discussing Senator Johnston's serious doubts about allowing Puerto Rican right to amend constitution).

169. See Public Law No. 447 of July 3, 1952, ch. 567, 66 Stat. 327 (1952). Public Law 447 states:

Provided further, that except for the purpose of adopting the amendments to section 5 of article II and to section 3 of article VII as herein provided, article VII of said constitution likewise shall have no force and effect until amended by the people of Puerto Rico under the terms of said article by adding section 3 of article VII the following new sentence: 'Any 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.

*Id.*

170. See Pastor, *supra* note 94, at 577 (discussing inclusion of Puerto Rico on list of seventy-four non-self-governing territories compiled by General Assembly). See also PERUSSE, *supra* note 8, at 60 (noting that in 1943 seven Nations including Australia, Belgium, Denmark, France, Netherlands, United Kingdom and United States sent their lists of non-self-governing territories to U.N. General Assembly). Also included on the List were Alaska, American Samoa, Guam, Hawaii, the Panama Canal Zone and the Virgin Islands. See *id.*

171. See G.A. Res. 222, 3d Sess. (1948). See also TRIAS MONGE, *supra* note 15, at 121 (discussing 1948 resolution indicating General Assembly's wish to be informed of changes in constitutional status of non-self-governing area).

tion to the UNGA on conditions in Puerto Rico.<sup>172</sup> Upon the Creation of the Commonwealth, the United States informed the United Nations of the "change in government" in Puerto Rico and requested that the island be removed from the list.<sup>173</sup> On January 29, 1953, the Department of State informed the United Nations that it would cease to transmit information on Puerto Rico as required by article 73e.<sup>174</sup>

### 1. Off the Hook: UNGA Resolution 748 (VIII)

Adopting the position that they opposed during the debates prior to passing P.L. 600, the United States argued before the UNGA that there was in fact a compact between Puerto Rico and the United States, and fervently denied charges that Puerto Rico's colonial status had not changed.<sup>175</sup> On November 27, 1953, the UNGA passed Resolution 748 (VIII), recognizing that the *puertorriqueños*, "by expressing their free will in a free and

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172. See PERUSSE, *supra* note 8, at 60 (stating that United States submitted information on Puerto Rico from 1947 to 1951). See also MORALES CARRIÓN, *supra* note 8, at 283 (noting that it was Committee on Information that examined U.S. reports on Puerto Rico).

173. See PERUSSE, *supra* note 8, at 60 (discussing that United States stated that Puerto Rico had attained self-government and requested that it be removed from list). Pastor, *supra* note 94, at 577 (stating that United States informed United Nations of change in government in Puerto Rico and requested that Puerto Rico be removed from non-self-governing list).

174. See TRÍAS MONGE, *supra* note 15, at 122 (citing request by Department of State that request that Puerto Rico be taken off list did not originate from United States Department of State, but from Muñoz Marín). For some time Muñoz Marín and his party's leadership rejected any reference to Puerto Rico as a U.S. colony. See also MONTALVO-BARBOT, *supra* note 55, at 125 (citing Muñoz stating that after many years of economic and political relations with United States, Puerto Rico had developed unique political and economic structure which, did not fit traditional paradigm of colony).

175. See TRÍAS MONGE, *supra* note 15, at 123 (citing testimony of U.S. Delegate Mason and U.S. Delegate Bolton). Mason Sears, Delegate to the U.N. Committee on Information argued, "A compact is far stronger than a treaty. A treaty can be denounced by either side, whereas a compact cannot be denounced by either party unless it has the permission of the other." *Id.* Francis B. Bolton the U.S. delegate to the Fourth Committee declared:

The present status of Puerto Rico is that of people with a constitution of their own adoption, stemming from their own authority, which only they can alter or amend. The relationships previously established also by a law of Congress, which only the Congress could amend, have now become provisions of a compact of a bilateral nature whose terms may be changed only by common consent.

*Id.*



democratic way, have achieved a new constitutional status.”<sup>176</sup> Furthermore, the Resolution “expressed its assurance” in giving “due regard” to the wishes of the Puerto Rican and American peoples in the conduct of their relations under their current legal status, considering that either party may eventually desire to change the associations’ terms.<sup>177</sup>

The United States successfully persuaded the United Nations to stay out of the Puerto Rico status question, yet no change had been made to the Federal Relations Act.<sup>178</sup> Thus, the United States still held all plenary powers afforded it by the Treaty of Paris.<sup>179</sup> In the future, when the status question was to be brought up, the United States would look to this resolution to shield it from international scrutiny as an internal issue between the United States and Puerto Rico.<sup>180</sup>

### C. *The Inter-American System: Puerto Rico and the Organization of American States*

In 1949, the OAS Committee on Dependant Territories attempted to consider the matter of Puerto Rico.<sup>181</sup> After meeting opposition from the Puerto Rican Senate, the Committee adopted a resolution entitled, “Study of the Case of Puerto Rico,” which cited economic, political and social situation of the Island and stated hopes the Nation would “have an opportunity to freely voice its stance in order to determine its own fate.”<sup>182</sup>

176. See G.A. Res. 748, 9th Sess. (1953).

177. See *id.* art. 9.

178. See Public Law 600, *supra* note 150, at § 4.

179. See Treaty of Paris, *supra* note 29, art. 4.

180. See PERUSSE, *supra* note 8, at 66 (stating that United States does not recognize Decolonization Committee’s authority to deal with Puerto Rico citing undue interference in domestic affairs since Puerto Rico had been taken off List); TRIAS MONGE, *supra* note 15, at 163 (citing that since the 1960s, it has been claimed that status issue is matter between United States and Puerto Rico). Unfortunately, Muñoz Marín would come to regret his request that Puerto Rico be declared a self-governing people, as The Federal Relations Act would remain unchanged. See *id.* at 124.

181. See C.G. Fenwick, *The American Committee on Dependant Territories*, 44 AM. J. INT’L L. 363, 370 (1950) (citing resolution on Puerto Rico which transmits to Council of Organization all antecedents and reports with reference to Puerto Rico so that Council could deal with them as it found proper). The resolution declared:

[I]n view of the present economic, political, and social situation in Puerto Rico, the Committee hopes that this [N]ation will have an opportunity to express itself definitely and freely so as to decide its own destiny.

*Id.*

182. See Fenwick, *supra* note 181, at 370. In April, 1949, the Senate of Puerto Rico

In the only major OAS attempt at the Puerto Rico status issue, the report was given to members of the OAS "for their information and study."<sup>183</sup>

The preamble of the P.R. Constitution declares that the "democratic system is fundamental to the life of the Puerto Rican community."<sup>184</sup> It defines the democratic system as government "in which the will of the people is the source of public power, the political order is subordinate to the rights of man and the free participation of the citizen in collective decisions is assured."<sup>185</sup> These principles align with the principles found in the OAS Charter.<sup>186</sup> Nonetheless, the question remains open as to whether the present arrangement of government meets Article 20 of the American Declaration that entitles every person to "participate in the government of his country, directly or through his representatives," as well as participate in "honest, periodic and free" popular elections.<sup>187</sup>

### 1. The Right of Democratic Self-Determination

On September 11, 2001, following a long history of attempted promotion and protection of democracy in the region,<sup>188</sup> the General Assembly of the OAS adopted the Inter-American Democratic Charter ("IADC").<sup>189</sup> Referring to the

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adopted a unanimous resolution "stating that Puerto Rico would make its own decision on the matter of its future relationship with the United States." *Id.* at 369. The resolution further stated that Puerto Rico "enjoyed all the rights of American citizens and would be granted independence immediately if it were asked for." *Id.*

183. Fenwick, *supra* note 181, at 370 (quoting resolution on Puerto Rico).

184. P.R. CONST. pmbl.

185. P.R. CONST. pmbl.

186. See ORIGINAL OAS CHARTER, art. 3 (delineating principles originally found in OAS Charter).

187. See American Declaration, *supra* note 128, art. 20.

188. See Herald Muñoz & Mary D'Leon, *The Right to Democracy in the Americas*, 40 J. INTERAMERICAN STUD. & WORLD AFF. 1, 3-9 (1998) (describing evolution of doctrine of democracy in Inter-American System); MEDINA QUIROGA, *supra* note 117, at 24. During the Inter-American Conference for the Maintenance of Peace, held in Buenos Aires in 1936, "the existence of a common democracy throughout America" was declared for the first time. *Id.* See Muñoz & D'Leon, *supra*, at 3 (quoting declaration of existence of democracy as common cause in America). See also Representative Democracy, OAS Doc. OEA/Ser.P/AG/RES. 1080(XXI-O/91) (June 5, 1991) (citing democracy as indispensable condition for stability peace and development and promotion of such as basic purpose of OAS).

189. See Inter-American Democratic Charter, OAS Doc. OEA/Ser.P/AG/RES.1 (XXVIII-E/01) (Sept. 11, 2001) [hereinafter Democratic Charter] (affirming participatory nature of democracy contributes to consolidation of democratic values and to

OAS Charter,<sup>190</sup> the American Declaration, and the American Convention,<sup>191</sup> the IADC defines, for the first time, “the essential elements of democracy.”<sup>192</sup> Article 1 ensures the people of the Americas a right to democracy and their governments have an obligation to promote and defend it.”<sup>193</sup> Article 3 of the IADC sets out *inter alia* the essential elements of the new “right,” which include representative participation in government, equal access

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freedom and solidarity); Press Release, OAS, Foreign Ministers Of The Americas Adopt Inter-American Democratic Charter, By Acclamation (Sept. 11, 2001) *available at* [http://www.oas.org/charter/docs/comuni\\_eng/E\\_003.htm](http://www.oas.org/charter/docs/comuni_eng/E_003.htm) [hereinafter By Acclamation] (announcing adoption of Democratic Charter which came out of mandate from Third Summit of Americas, held from April 20 to April 22, 2001 in Quebec City, Canada); Press Release, OAS, In The Wake of Tragedies In U.S., Colin Powell Thanks Hemisphere's Foreign Ministers For Solidarity (Sept. 11, 2001) *available at* [http://www.oas.org/charter/docs/comuni\\_eng/E\\_004.htm](http://www.oas.org/charter/docs/comuni_eng/E_004.htm) (noting that at U.S. Secretary of State Colin Powell's request, Assembly President, Peruvian Foreign Minister Diego García Sayán, moved adoption of IADC forward so Powell could be part of consensus on new charter on same morning of terrorist attacks U.S. Powell stated:

I very much want to be here to express the United States' commitment to democracy in this Hemisphere . . . It is the most important thing I can do before departing to go back to Washington D.C. and attend to the important business that awaits me and all of my other colleagues in the Administration and all Americans.

*Id.* See also Third Summit of the Americas: Declaration of Principles, Quebec City, Can., ¶ 5, Apr. 22, 2001, *available at* [http://www.ftaa-alca.org/Summits/Quebec/declara\\_e.asp](http://www.ftaa-alca.org/Summits/Quebec/declara_e.asp).

At the Third Summit, the Heads of State and Government of the Americas declared:

[T]hat the values and practices of democracy are fundamental to the advancement of all our objectives. The maintenance and strengthening of the rule of law and strict respect for the democratic system are, at the same time, a goal and a shared commitment and are an essential condition of our presence at this and future Summits. Consequently, any unconstitutional alteration or interruption of the democratic order in a state of the Hemisphere constitutes an insurmountable obstacle to the participation of that state's government in the Summits of the Americas process.

*Id.*

190. See Democratic Charter, *supra* note 189, pmbl. (referring to O.A.S. Charter which recognizes representative democracy as indispensable for stability, peace, and development of region, and one of purposes of the OAS is to promote and consolidate representative democracy).

191. See Democratic Charter, *supra* note 189, pmbl. (stating that American Declaration on Rights and Duties of Man and American Convention on Human Rights contain values and principles of liberty, equality, and social justice that are central to democracy).

192. See *Strengthening the Democratic Commitment*, *available at* [http://www.oas.org/key\\_issues/eng/GAstrengthenedemocratic.htm](http://www.oas.org/key_issues/eng/GAstrengthenedemocratic.htm) (delineating significance of IADC).

193. See Democratic Charter, *supra* note 189, art. 1.

to public service, and periodic and general elections.<sup>194</sup> Significant for Puerto Rico, Article 6 claims “the right and responsibility” of citizens to partake in decisions concerning their own development which sets forth the right of democratic self-determination.<sup>195</sup> Following the Democracy Clause created during the Quebec City Summit of the Americas, Article 20 provides a mechanism against any “unconstitutional *alteration* of the constitutional regime that seriously impairs the democratic order in a member [S]tate.”<sup>196</sup>

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194. See Democratic Charter, *supra* note 189, art. 3 (listing essential elements of right to democracy). Article 3 states:

Essential elements of representative documents include, *inter alia*, respect for human rights and fundamental freedoms, access to and the exercise of power in accordance with the rule of law, the holding of periodic, free, and fair elections based on secret balloting and universal suffrage as an expression of the sovereignty of the people, the pluralistic system of political parties and organizations, and the separation of powers and independence of the branches of government.

*Id.* See also John W. Graham, *A Magna Carta for the Americas The Inter-American Democratic Charter: Genesis, Challenges and Canadian Connections*, FOCAL POL'Y PAPER, 7 (Can. Found. for the Am., Ontario, Canada) (Sept. 2002), available at [http://www.focal.ca/english/publicat\\_2002.htm](http://www.focal.ca/english/publicat_2002.htm) (stating that words *inter alia* were added because list to follow is non-exhaustive). Graham states that the “right” finds roots in Article 21 of the Universal Declaration of Human Rights. See *id.* See also Universal Declaration of Human Rights, U.N.G.A. Res. 217, art. 21 (III 1948). Article 21 of the Universal Declaration states:

1. Everyone has the right to take part in the government of his country, directly or through freely chosen representatives.
2. Everyone has the right of equal access to public service in his country.
3. The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures.

*Id.* See ASBJØRNE EIDE ET AL., THE UNIVERSAL DECLARATION OF HUMAN RIGHTS: A COMMENTARY 312 (1992) (explaining creation of Article 21 through coalition between Western countries including France, Latin American countries and socialist countries).

195. See Democratic Charter, *supra* note 189, art. 6.

196. See Democratic Charter, *supra* note 189, art. 21 (emphasis added). Article 21 states:

In the event of an unconstitutional alteration of the constitutional regime that seriously impairs the democratic order in a [M]ember [S]tate, any member state or the secretary General may request the immediate convocation of the Permanent Council to undertake a collective assessment of the situation and to take such decisions as it deems appropriate.

The permanent Council, depending on the situation, may undertake the necessary diplomatic initiative, including good offices, to foster the restoration of democracy.

If such diplomatic initiatives prove unsuccessful, or if the urgency of the situation so warrants, the Permanent Council shall immediately convene a special

## 2. A Legal Framework for Democratic Self-Determination

The Preamble of the OAS Charter established representative democracy as "indispensable"<sup>197</sup> to the solidarity and high aims sought by the American States.<sup>198</sup> As the IACHR became an official organ of the OAS, Articles 2 and 20 of the American Declaration gained a normative status.<sup>199</sup> Subordinate to the OAS Charter, the IADC follows the organization's legal framework.<sup>200</sup> One expert claims the language of Article 1 of the IADC creates a reciprocal contract of peoples with their governments.<sup>201</sup> Though not explicitly mentioned, self-determination is implicit in the definition of American representative democracy.<sup>202</sup>

### D. *The Compact Question in Global and American International Law*

Central to the Commonwealth Constitution conundrum is the question of whether the Federal Relations Act creates a compact between the people of Puerto Rico and the United States government.<sup>203</sup>

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session on the General Assembly. The General Assembly will adopt the decisions it deems appropriate, including the undertaking of diplomatic initiatives, in accordance with the Charter of the Organization, international law, and the provisions of this Democratic Charter.

The necessary diplomatic initiatives, including good offices, to foster the restoration of democracy, will continue during the process.

*Id.*

197. See Representative Democracy, *supra* note 188 (characterizing representative democracy as indispensable condition for stability, peace and development of region).

198. See OAS Charter, *supra* note 115, pmbl.

199. See DAVIDSON, *supra* note 115, at 21-23 (describing transformation of IACHR as major modification that would have profound effect on promotion and protection of Human Rights with its new treaty-based legal foundation); MEDINA QUIROGA, *supra* note 117, at 87 (discussing inclusion of IACHR in list of organs)

200. See Graham, *supra* note 194, at 6 (stating that order of paragraphs in IADC preamble was reworked to emphasize subordination to OAS Charter and respective legal framework of OAS).

201. See Democratic Charter, *supra* note 189, art. 1 (stating peoples of Americas have right to democracy); Graham, *supra* note 194, at 7 (stating that language of Article 1 lifts concept of representative democracy to a significantly advanced reciprocal contracts of people with governments).

202. See Democratic Charter, *supra* note 189, art. 2 (citing effective exercise of representative democracy is basis for rule of law and constitutional regimes); Democratic Charter, *supra* note 189, art. 6 (stating right and responsibility of all citizenship to participate in their own development).

203. See 48 U.S.C. §731 (1950); See also Dorian A. Shaw, *The Status of Puerto Rico*

## 1. Recent Case Law on Compact Theory

Since the Commonwealth's inception, the courts have weighed in on the question whether P.L. 600 and the P.R. Constitution create a compact.<sup>204</sup> Notably, the First and Eleventh Circuits have split on the question.<sup>205</sup>

In *United States v. Quiñones*,<sup>206</sup> the First Circuit held that upon adopting its Constitution, Puerto Rico was no longer a territory of the United States subject to the Congressional plenary powers provided in the U.S. Constitution.<sup>207</sup> From thereon, the federal government's authority originated from the compact itself.<sup>208</sup> Finally, under the compact, Congress cannot unilaterally amend the P.R. Constitution, and the government of Puerto Rico ceased being a federal government agency exercising delegating power.<sup>209</sup>

More recently in *United States v. Sánchez*<sup>210</sup> the Eleventh Circuit held that Puerto Rico is not a separate sovereign, but consti-

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*Revisited: Does the Current U.S.-Puerto Rico Relationship Uphold International Law?* 17 FORDHAM INT'L L.J. 1006, 1028-53 (1994) (presenting overview of compact discrepancy).

204. See *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 672 (1974) (referring to Puerto Rico as "a political entity created by the act and with consent of the people of Puerto Rico and joined in union with the United States of America under the terms of the compact"); *Examining Bd. of Eng'rs., Architects and surveyors v. Flores de Otero*, 426 U.S. 572 (1976); *United States v. Quinones*, 758 F.2d 40, 43 (1st Cir. 1985) (holding that Omnibus Crime Control Act, which permitted admission of recorded telephone conversation was not preempted by Puerto Rico laws which would exclude conversation).

205. See *United States v. Quiñones*, 758 F.2d 40 (1st Cir. 1985); *United States v. Sanchez* 992 F.2d 1143 (11th Cir. 1993); Shaw *supra* note 203, at 1033-36, 1042-48 (discussing case law conversely supporting and opposing compact theory).

206. 758 F.2d 40 (holding that Omnibus Crime Control Act is controlling law for federal prosecutions in Puerto Rico). See Shaw, *supra* note 203, at 1036 (discussing *Quiñones* in context of compact-colony conundrum).

207. See *United States v. Quiñones*, 758 F.2d at 42 (concluding that in 1952, Puerto Rico ceased being territory); Shaw *supra* note 203, at 1036 (stating First Circuit position that in 1952 Puerto Rico ceased to be territory).

208. See *United States v. Quiñones*, 758 F.2d at 42 (stating "authority exercised by the federal government emanated thereafter from compact itself"); Shaw *supra* note 203, at 1036 (stating First Circuit opinion that Puerto Rico is self-governing and has delegated powers to federal government through compact).

209. See *United States v. Quiñones*, 758 F.2d at 42; Shaw *supra* note 203, at 1036 (stating First Circuit holding that compact could not be amended unilaterally).

210. 992 F.2d 1143 (1993) (finding that dual sovereignty exception was inapplicable to Puerto Rico because Puerto Rico's authority to prosecute was derived from United States as sovereign). See Shaw *supra* note 203, at 1046 (stating Eleventh Circuits holding in *Sánchez*).

tutionally a territory.<sup>211</sup> The court concluded: "Congress may unilaterally repeal the Puerto Rican Constitution or the Puerto Rican Federal Relations Act and replace them with any rules or regulations of its choice."<sup>212</sup>

## 2. Democratic Deficiency: The Right to Federal Representation

On April 5, 2000, eleven individuals from Puerto Rico filed a complaint alleging their right to vote for the candidates to the offices for President and Vice-President of the United States.<sup>213</sup> The deprivation of the right to vote, according to the Plaintiffs, was "a 'violation of their constitutional rights to the same privileges and immunities, treaty rights, due process and equal protection of the laws' enjoyed by [U.S. c]itizens residing in the States."<sup>214</sup> On August 29, 2000 the District Court entered a final judgment declaring the right to have electoral votes counted in Congress and vote in Presidential elections for U.S. Citizens residing on the island.<sup>215</sup> On appeal, the Eleventh Circuit held that since Puerto Rico is not a State, it may not designate electors to the electoral college, and hence the puertorriqueños on

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211. See *United States v. Sánchez*, 992 F.2d at 1151; Shaw, *supra* note 203, at 1046 (discussing Eleventh Circuit's holding that Puerto Rico is still constitutionally territory).

212. *United States v. Sánchez*, 992 F.2d at 1152-53. See Shaw, *supra* note 203, at 1046 (discussing court's holding that Congress may unilaterally repeal P.R. Constitution).

213. See *Gregoriano Iguarta de le Rosa, et al. v. United States*, 229 F.3d 80, 82 (1st Cir. 2000). The Plaintiffs comprised of two groups. See *id.* The first group included individuals who always resided in Puerto Rico and based their claim that the right was inherent in United States citizenship. See *id.* The second group included former residents of states who were eligible to vote while residents of those states, but became ineligible upon taking residency in Puerto Rico. See *id.* See generally Eduardo Guzmán, *Iguartúa de la Rosa v. United States The Right of the United States Citizens of Puerto Rico To Vote For President and the Need to Re-Evaluate America's Territorial Policy*, 4 U. PA. J. CONST. L. 141 (2001) (arguing for need to allow territories to be considered States for purposes of national elections).

214. *Iguartua*, 229 F.3d at 82 (discussing plaintiff's contentions). See Guzmán, *supra* note 213, at 162-63 (questioning whether Puerto Ricans have same U.S. citizenship as those born or naturalized in United States under Fourteenth Amendment or second class citizenship making them ineligible to vote for President).

215. See *Iguarta v. United States*, 107 F. Supp. 2d 140 (D. P.R. 2000); *Iguartua*, 229 F.3d at 83. On September 10, 2000, the Puerto Rico Legislature "enacted Law No. 403 for the purpose of allowing the citizens of the United States domiciled in Puerto Rico to vote in the election for the offices of President and Vice-President of the United States, and to establish the procedures and mechanisms to effectuate said vote." *Id.* See also Guzmán, *supra* note 213, at 144 (stating that P.R. Governor printed ballots with names and pictures of presidential candidates).

the island could not constitutionally vote in the national elections for President and Vice President.<sup>216</sup> In his concurrence, Circuit Judge Torruella examines what he called "larger issues at stake."<sup>217</sup> Describing the situation of Puerto Ricans as an "untenable Catch-22," Torruella states: "The national disenfranchisement of these citizens ensures that they will never be able, through the political process, to rectify the denial of their civil rights in those very political processes."<sup>218</sup>

### 3. The Compact-Colony Conundrum Up Close: Does the Commonwealth Constitution Violation International Law?

Some commentators contend that P.L. 600, P.L. 447 and the P.R. Constitution created a compact between the governments of United States and Puerto Rico that controls the relationship between the two peoples.<sup>219</sup> To them, the self-determination sought in UNGA Resolution 742 and the democracy discussed in the American Declaration and defined by the Democratic Charter, all had been reached by the adoption of the new system of government between 1950 and 1952 by the

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216. See *Iguarta*, 229 F.3d at 83 (holding that since Puerto Rico is not state, Puerto Ricans may not vote for national office). See also Guzmán, *supra* note 213, at 144 (discussing reversal of District Court's opinion)

217. *Iguartua*, 229 F.3d at 85 (concurring with majority opinion). Torruella states: The granting of so-called Commonwealth status is 1952, itself an enigmatic condition which merely allowed the residents of Puerto Rico limited self-government, did nothing to correct Puerto Rico's fundamental condition of national unempowerment, embodied most notably in the lack of voting representation in Congress and the ineligibility to vote for President and Vice-President. The United States citizens residing in Puerto Rico to this day continue to have no real say in the choice of those who, from afar, really govern them, nor as to the enactment application, and administration of the myriad of federal laws and regulations that control almost every aspect of their daily affairs.

*Id.*

218. *Id.* at 86 (stating that Puerto Ricans cannot rectify the violation of their human rights).

219. See *Puerto Rico Status: Hearing on H.R. 856 Before the House Comm. on Resources*, 105th Cong. 221 (1997) [hereinafter *Hearing on 856*] (statement of Anibal Acevedo-Vilá, President, Popular Democratic Party, Commonwealth of Puerto Rico) Acevedo Vilá states: "The Constitution of the Commonwealth of Puerto Rico, adopted by the People and approved by Congress clearly recognizes the sovereignty of the people and the compact between Puerto Rico and the United States . . . ." *Id.* See FOREIGN IN A DOMESTIC SENSE, *supra* note 4, at 18 (discussing compact theory that which posits that P.L. 600 and 1950-52 process terminated Puerto Rico's Territorial status).



United States and Puerto Rico.<sup>220</sup> These supporters look to the language of P.L. 447, which describes P.L. 600 as a "compact with the people of Puerto Rico."<sup>221</sup> Furthermore they point to UNGA Resolution 748, which took Puerto Rico off the List of non self governing Territories on November 27, 1953.<sup>222</sup>

Contrary to this view, other commentators believe that a bilateral compact does not control the U.S.-P.R. relationship.<sup>223</sup> These commentators thus characterize U.S. power over the people of Puerto Rico as colonial.<sup>224</sup> Supporters look to the language of P.L. 600, which was adopted in the "nature of a compact."<sup>225</sup> Here, experts find that the language of P.L. 600 clearly differs from the language used in the Compact of Free Associa-

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220. See Shaw, *supra* note 203, at 1030 (stating that commentators argue P.L. 447, Puerto Rico Federal Relations Act and Constitution of Commonwealth required U.S. and P.R. approval and as such, there was mutual consent to adopt government). See also Guzmán, *supra* note 213, at 157 (citing argument of many commentators that Commonwealth was bilateral pact between United States and Puerto Rico).

221. See Decler, *supra* note 162, at 37 (discussing language used in P.L. 600). See also TRÍAS MONGE, *supra* note 15, at 127 (quoting Muñoz Marín at 1959 Senate hearing). Muñoz Marín spoke of PL 600:

Senator, the law that you have mentioned, plus its acceptance by the people at the polls, plus Law 447, in which the Congress approved the Puerto Rican constitution—those three actions, Senators, I undoubtedly and unequivocally regard as a compact, which gave great dignity to the people of Puerto Rico and great prestige to the American Union as a whole.

*Id.*

222. See G.A. Res. 748, *supra* note 176 (taking Puerto Rico off List). See also TRÍAS MONGE, *supra* note 15, at 124 (describing the approval of U.N.G.A. Resolution 748(VIII)).

223. See Shaw, *supra* note 203, at 1037 (stating that some legal scholars assert that there is no compact and even if there was, it has not been upheld). See also *Hearing on H.R. 856*, *supra* note 219, at 21 (quoting statement of Hon. Robert J. Lagomarsino, U.S. Representative from California). Lagomarsino states:

That doctrine of an illusory bilateralism between the people of Puerto Rico and the larger national community is the product of tortured intellectualism which has been harnessed in service to paternalistic and anti-democratic attitudes. Those who do not trust the people, or do not want them to have a free choice, have used the myth of an "unalterable bilateral pact" to perpetuate their own power and prevent the decolonization process from being fulfilled.

*Id.*

224. See Michael Gonzalez-Cruz, *The U.S. Invasion of Puerto Rico: Occupation and Resistance to the Colonial State, 1898 to the Present*, 25 *LATIN AM. PERSP.* 7, 15 (1998) (stating Commonwealth, though going beyond limits of Jones Act, perpetuated Puerto Rico's *de facto* colonial status). See generally TRÍAS MONGE, *supra* note 15 (concluding that Puerto Rico is still colony).

225. See P.L. 600, *supra* note 150; TRÍAS MONGE, *supra* note 15, at 110 (stating that after demise of Tydings-Piñero Bill Muñoz Marín and Fernós Isern began to draft P.L. 600).

tion between the government of the United States of America and the governments of The Marshall Islands and The Federated States Of Micronesia in which the governments agree that the "relationships" and "respective rights and responsibilities" of the governments involved, are derived from and delineated in the compact.<sup>226</sup> Furthermore, those who consider Puerto Rico a colony, point to the opinions of the U.S. Supreme Court<sup>227</sup> as well as denunciation by the UN Decolonization Committee.<sup>228</sup> Lastly, proponents point to the proposed *United States and Puerto Rico Political Relations Act*, a 1997 Bill "to provide a process leading to full self-government for Puerto Rico," as proof of the need of full self determination.<sup>229</sup>

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226. See Public Law 99-239, 99 Stat. 1800 (1986). It states:

[T]he relationships of free association derive from and are as set forth in this Compact; and that, during such relationships of free association, the respective rights and responsibilities of the Government of the United States and the Governments of the freely associated states of the Marshall Islands and the Federated States of Micronesia in regard to these relationships of free association derive from and are as set forth in this Compact.

*Id.*

227. See *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 672 (1974) (referring to Puerto Rico as "a political entity created by the act and with consent of the people of Puerto Rico and joined in union with the United States of America under the terms of the compact"); *Examining Bd. of Eng'rs., Architects and Surveyors v. Flores de Otero*, 426 U.S. 572 (1976); *United States v. Quinones*, 758 F.2d 40 (1st Cir. 1985) (holding that Omnibus Crime Control Act, which permitted admission of recorded telephone conversation was not preempted by Puerto Rico's laws which would exclude conversation).

228. See TRÍAS MONGE, *supra* note 15, at 138 (citing that general pattern of passing resolution was set in 1973 and ended in 1977). See also Pastor, *supra* note 94, at 581-82 (tracing institutionalization Puerto Rico's status issue from 1971-1976).

229. See H.R. 856 105th Cong. (1997). Section 2 of the Bill finds: "The Commonwealth remains an unincorporated territory and does not have the status of 'free association' with the United States as that status is defined under United States law or international practice." *Id.* at § 2(4). See Press Release, Richard A. Gephardt, Congressman, House of Representatives, Statement on H.R. 856 — The U.S.-Puerto Rico Political Status Act (Mar. 5, 1995) (stating that Puerto Ricans have waited long enough to be able to decide their status); Testimony of Congressman Jose Serrano on H.R. 856 — The United States-Puerto Rico Political Status Act before the House Rules Committee (Mar. 3, 1998) (supporting process for decolonization and self-determination in bill characterizing it as basic right of all free peoples); *Prepared Statement by Gerald. B.H. Solomon (R-NY), Chairman of the House Rules Committee Before the Senate Committee on Energy and Natural Resources*, FED. NEWS SERVICE, July 16, 1998 (describing bill to permanently resolve political status of Puerto Rico through process of self-determination). Cf. *Prepared Testimony by Rep. Nydia M. Velazquez Before the Senate Committee on Energy and Natural Resources*, FED. NEWS SERVICE (July 16, 1988) (stating bill as result of flawed legislative process).

### III. DEMOCRACY'S DEBACLE

On November 27, 2003, Puerto Rico reached another milestone, the fiftieth anniversary of UNGA Resolution 748, which effectively declared Puerto Rico decolonized.<sup>230</sup> This Part of the Note will argue that Puerto Rico is still a U.S. colony and thus the P.R. Constitution is invalid, as well as present a new forum of discourse for the compact-colony conundrum.

#### A. *The Commonwealth Constitution is Invalid*

Puerto Rico's status did not change significantly with the adoption of the P.R. Constitution.<sup>231</sup> The Constitution approved by referendum on March 2, 1952,<sup>232</sup> was a document that could be changed bi-laterally,<sup>233</sup> similar to that which had been created in the Autonomous Charter with Spain in 1898.<sup>234</sup> Resolution 23, published concurrently with the Constitution, stated that the "Constitution as approved" created a Commonwealth that may be changed and improved upon by adjusting the Compact through mutual consent.<sup>235</sup> The Constitution that the people of Puerto Rico chose, however, was markedly different from that which was approved by Congress.<sup>236</sup> The document signed into law by P.L. 447 was a unilateral document because it affirmed the right of the U.S. Congress to change the status of the puertorriqueños without their consent.<sup>237</sup>

The regime that was created in 1900 with the Foraker Act, and was continued through the Jones and Elective Governor acts, still governs the island, now under the name of the Federal Relations Act.<sup>238</sup> Moreover, the sovereignty that was ceded to

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230. See *supra* notes 176-80 and accompanying text (discussing passing of Res. 748 by UNGA).

231. See *supra* notes 155-57 and accompanying text (discussing how P.L. 600, which authorized drafting of Constitution, did not change status of Puerto Rico).

232. See *supra* note 166 and accompanying text (discussing approval of new constitution).

233. See *supra* notes 159-65 and accompanying text (discussing Resolution 23 which provided that Constitution created bilateral relationship).

234. See *supra* Part II.A.2 (discussing creation of Commonwealth Constitution); *supra* note 25 (discussing bilateral nature of Autonomous Charter).

235. See *supra* note 163 and accompanying text (delineating third part of Resolution 23).

236. See *supra* note 169 and accompanying text (quoting P.L. 447).

237. See *id.* (stating that Commonwealth constitution must follow U.S. Constitution and Federal Laws).

238. See *supra* note 156-57 and accompanying text (discussing P.L. 600).

the United States in the Treaty of Paris has continued under the Commonwealth.<sup>239</sup> The celebration of the island's Fiftieth Anniversary of Commonwealth status was in vain, since little has changed regarding the island's status in the international community.<sup>240</sup>

B. *The U.N. Should Revisit UNGA 748 (VIII) and Place Puerto Rico Back on the Non-Self Governing Territories List*

On the same day the UNGA delineated the criteria to be used to determine self-determination,<sup>241</sup> it passed Resolution 748,<sup>242</sup> in effect, ignoring the rules they just established. Those who claim that Puerto Rico has attained self-government, point to free-association that is delineated in resolution.<sup>243</sup> Of the fifteen factors indicative of free association, the P.R. Commonwealth arrangement fails to fulfill five.<sup>244</sup> The first, Section A.2., captioned, *Freedom of choice*,<sup>245</sup> is not satisfied because only the U.S. Congress, in which Puerto Rico has no representation, can change the Federal Relations Act.<sup>246</sup> The second, Section A.6., captioned, *Constitutional considerations*, requiring a bilateral agreement affecting the status of the territory and equal constitutional guarantees being extended, is not met since equal status is not guaranteed by the Federal Relations Act.<sup>247</sup> Furthermore, P.L. 600 does not establish a bilateral agreement between the people of Puerto Rico and the United States; constitutional guarantees are not afforded to the territory.<sup>248</sup> Factor B.1., cap-

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239. See *supra* note 29 (discussing cession of Puerto Rico in Treaty of Paris); *supra* notes 156-157 and accompanying text (discussing how P.L. 600 did not change P.R. status).

240. See *supra* Part II.D.3 (discussing how Commonwealth Constitution violates international law).

241. See *supra* note 102 and accompanying notes (discussing criteria set for granting self determination to non-self-governing peoples.)

242. See *supra* note 176 and accompanying text (discussing passing of U.N.G.A. 748).

243. See *supra* note 102 and accompanying text (delineating factors for free-association).

244. See *id.* (listing factors, five of which are not met).

245. See *id.* (presenting § A.2., which provides factor giving freedom of choosing between possibilities through self-determination).

246. See *supra* note 217 (stating Puerto Rico's lack of representation in Congress).

247. See *supra* note 102 and accompanying text (delineating § A.6. which requires association by bilateral agreement taking into account whether constitutional guarantees are extend equally to associated Territory).

248. See *supra* Part II.A.1 (discussing P.L. 600 and its limits).

tioned, *Legislative representation*,<sup>249</sup> is obviously not met, in that Puerto Rico has no representation in the central legislative organs of the association on the same basis as other inhabitants and regions.<sup>250</sup> Section B.3., captioned, *Citizenship*,<sup>251</sup> is the fourth factor that is not met, since U.S. Citizenship in Puerto Rico is subordinate to that of the citizens of the fifty States.<sup>252</sup> Finally, the factor regarding *Government officials* is not met in that U.S. citizen-residents of Puerto Rico are not eligible for the U.S. Congress, by appointment or election, on the same basis as those from other parts of the United States.<sup>253</sup>

Moreover, the second half of *Principle VII* of Resolution 1541 (XV),<sup>254</sup> which gives territories the right to draft their constitution without outside interference, is not met because there is an interference imposed upon any alteration of the Commonwealth Constitution in the requirements set forth in the amendment by the U.S. Congress.<sup>255</sup> The requirement that any amendment to the constitution be consistent with the U.S. Constitution, P.L. 600, and the Federal Relations Act goes beyond mere "consultation."<sup>256</sup> Since no changes have been made to these federal laws, it is clear that Puerto Rico remains a colony, and as such, Puerto Rico should be placed back on the List.<sup>257</sup>

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249. See *supra* note 102 and accompanying text (delineating factors for free-association).

250. See *supra* Part II.A.1. (discussing passing of P.L. 600, which did not change P.R. status).

251. See *supra* note 102 and accompanying text (delineating factors for free-association).

252. See *supra* note 48 and accompanying text (discussing how unincorporated territories are subordinate to incorporated territories). See also *supra* note 102 (citing Perusse's argument that five of fifteen factors are not met).

253. See *supra* note 102 and accompanying text (discussing factor of eligibility for all public offices of central authority).

254. See *supra* note 108 and accompanying text (discussing UNGA Res. 1541 (XV), *Principle VII* which states that territory should have right to determine internal constitution without outside interference not excluding consultations appropriate or necessary under terms of free association agreed upon).

255. See *supra* note 169 and accompanying text (citing P.L. 447 amending and approving the P.R. Constitution).

256. See *supra* note 108 and accompanying text (discussing UNGA Res. 1541 (XV), *Principle VII* characterizing consultation as essential to Free Association).

257. See *supra* note 224 and accompanying text (stating that Puerto Rico is still colony)

C. *The Commonwealth Constitution Violates the Inter-American Right to Democracy*

The preambles of both the P.R. Constitution and the OAS Charter express the importance of democracy to their respective existence.<sup>258</sup> When given a chance to take a stance on the Puerto Rico Status issue in 1949, the Organization of American States chose to let the United States and Puerto Rico to work it out amongst themselves.<sup>259</sup> The value the Organization of American States places on democracy, however, has changed dramatically since the organizations inception — what was once a mere principle, has become a right of the people of the Americas.<sup>260</sup> As such, the organization's view of Puerto Rico must also change.<sup>261</sup>

The Commonwealth Constitution that was accepted in 1952 by the people of Puerto Rico is not the Constitution accepted by the U.S. Congress in P.L. 447.<sup>262</sup> Because of the amendments made, the only body that can change the status of Puerto Rico is the U.S. Congress. As clarified in *Iguarta*, the residents of Puerto Rico have no right to participate in elect representation in Congress and are ineligible to vote for President and Vice President.<sup>263</sup>

Clearly, this flies in the face of the democracy defined in the IADC.<sup>264</sup> The right to democracy in Article 1, and the responsibility of all citizens to “participate in decisions relating to their own development” as set out in Article 6, are clearly irreconcila-

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258. See *supra* notes 184-87 and accompanying text (declaring democratic system as fundamental to life of P.R. community); *supra* notes 117-18 and accompanying text (discussing principle of effective exercise of democracy).

259. See *supra* notes 181-83 and accompanying text (discussing O.A.S. study which essentially left P.R. status issue to be worked out between United States and Puerto Rico).

260. See *supra* notes 117-18 (discussing democracy as principle and adoption of IADC essentially creating a right for democracy in Americas).

261. See *supra* notes 181-83 and accompanying text (discussing O.A.S. study which left P.R. status internal issue between United States and Puerto Rico). See also *supra* note 217 (discussing Puerto Rico's lack of representation in Congress).

262. See *supra* note 166 and accompanying text (discussing approval of new constitution). See also *supra* note 169 (discussing approval of Commonwealth Constitution by U.S. Congress as well as addition of clause).

263. See *supra* Part II.D.2 (discussing *Iguarta* which held that U.S. citizen residents of Puerto Rico cannot vote for President since Puerto Rico is not State of Union).

264. See *supra* notes 188-96 (presenting IADC and rights in democracy created by it).

ble with the P.R. Constitution and the Federal Relations Act.<sup>265</sup> Thus the relationship defined by P.L. 600, the P.R. Constitution and the Federal Relations Act is illegal in the eyes of the Inter-American community.<sup>266</sup>

Contrary to the organization's actions in 1949, Puerto Ricans are now able to seek redress from the Organization of American States.<sup>267</sup> As a right to democracy has been created through the IADC, Puerto Ricans, who are legally recognized by the Organization of American States, may submit petitions against the United States for violation of Article II and XX of the American Declaration,<sup>268</sup> to the IACHR, which can serve as an important venue in which the conundrum may be candidly examined.<sup>269</sup>

### CONCLUSION

For more than fifty years, Puerto Rico has lived under a U.S. regime that many have come to believe to be nothing but colonialism shrouded in a façade of democracy. Puerto Ricans today are very much in the same position that they were in 1900. Without their consent, the people of the island are subject to U.S. laws that can override their Constitution. The development of international law concerning colonialism can be traced to the United State's articulated posture towards Puerto Rico. As attitudes have shifted, new mechanisms of control have been implemented. The fact that a law promulgated in 1900, a time when international law permitted colonialism and domestic law permitted racism, is still the law more than one hundred years later, highlights the imperialism that persists.

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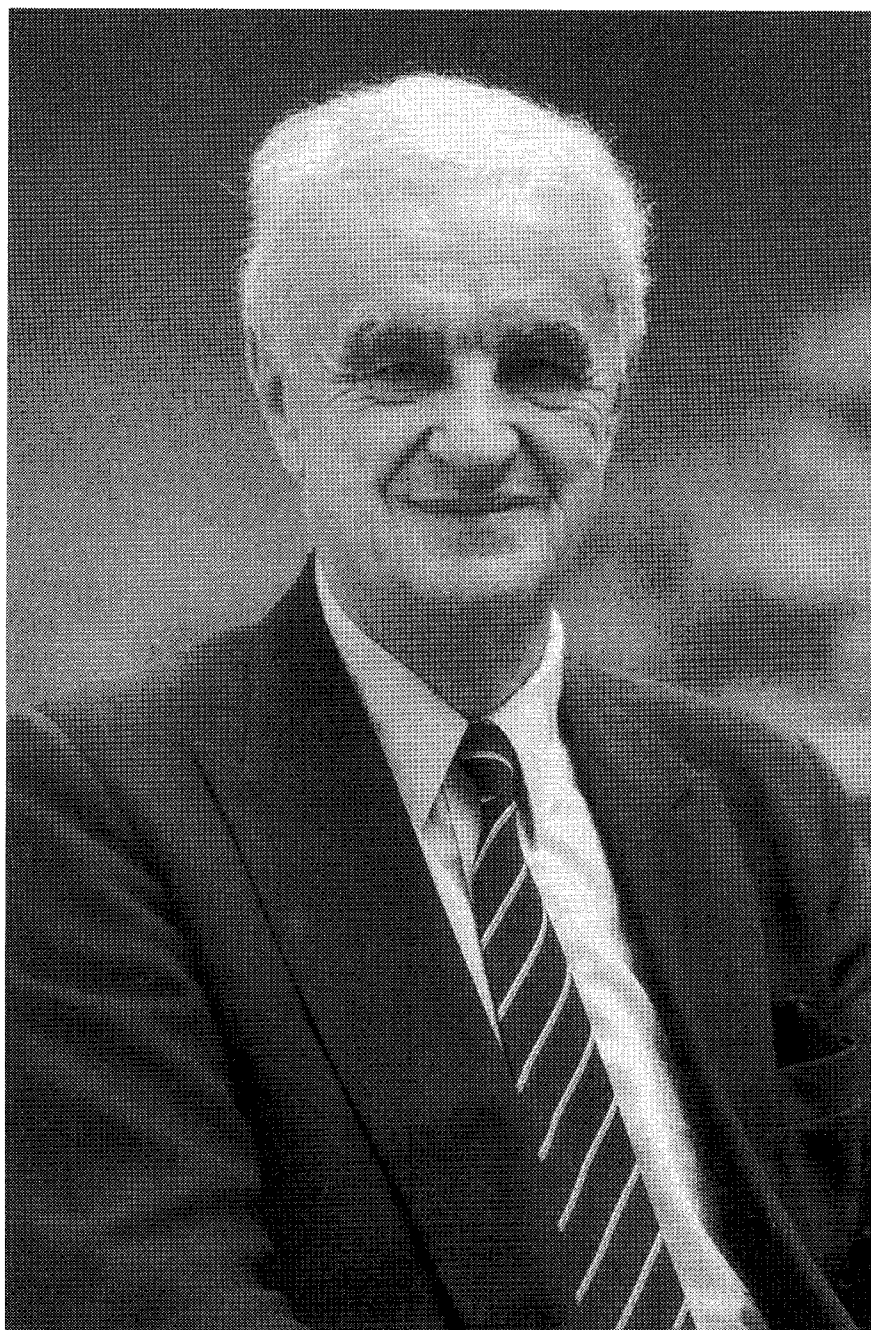
265. See *supra* notes 193-94 (citing Article 1 and 6 of IADC which requiring articulate right of democracy). See *supra* Part II.A.2. (discussing P.R. constitutional process including amendments made by U.S. Congress).

266. See Part II.A.2. (discussing P.L. 600, P.R. Constitution and Federal Relations Act). See also Part II.C.1. (discussing creation of right to democracy in IADC).

267. See *supra* notes 181-83 and accompanying text (discussing O.A.S. leaving P.R. status issue as internal status debate between United States and Puerto Rico).

268. See *supra* note 131-33 (citing Articles II and XX of American Declaration which provide for right of equality before law and right to vote and participate in government).

269. See *supra* note 144 and accompanying text (citing IACHR Regulations, art. 26, which gives right of person in Member State to petition IACHR).



LUDWIK A. TECLAFF



Volume 27, Book 6 of the *Fordham International Law Journal*, is dedicated in memory of Ludwik Andrzej Teclaff, who passed away on May 29, 2003 in St. Petersburg, Florida.

Professor Teclaff was Professor Emeritus as well as a Director of the Law Library at Fordham University School of Law. He was also a founding faculty advisor for *ILJ*. Professor Teclaff has been the *Journal's* faculty advisor, both personally and in spirit, since Volume 3, in 1979. Moreover, he played an integral role in our transition from the *International Law Forum* to the *International Law Journal*, in 1980-1981. As part of a Faculty Committee, Professor Teclaff, along with Professors Helen Bender and Constantine N. Katsoris, reviewed the high performance of the *International Law Forum* and recommended to the Faculty that the *Forum* be awarded "Journal" status and a budget for publication.

*ILJ* owes a huge debt of gratitude to Professor Teclaff for his assistance in making our *Journal* what it is today. He will be missed dearly.