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1842-1847	Lcdo. Agustín M. de Sirgado
1848-1849	Lcdo. Fernando José Montilla
1850	Lcdo. Juan de Mata Aybar
1851-1874	Lcdo. Juan de Mata Aybar
1851-1874	Lcdo. Manuel Valdez Linares
1875-1877	Lcdo. Pablo Sáez Aldao
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1943-1945	Lcdo. Samuel R. Quiñones
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1968-1970	Lcdo. Rodolfo Cruz Contreras
1970-1972	Lcdo. Francisco Aponte Pérez
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1973-1974	Lcdo. Arturo Negrón García
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1976-1978	Lcdo. Graciany Miranda Marchand
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1980-1982	Lcdo. Luis F. Camacho
1982-1984	Lcdo. Arturo Negrón García
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1986-1988	Lcdo. Héctor Lugo Bougal
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1990-1992	Lcdo. José M. Sagardía Pérez
1992-1994	Lcdo. Carlos R. Noriega Rodríguez
1994-1996	Lcdo. Harry Anduze
1996-1998	Lcdo. Manuel F. Arraiza Reyes

* Durante la época de la Asociación de Abogados de Puerto Rico, (1911-1934) presidieron la misma entre otros, los Lcdos. Francisco de Paula Acuña, Luis Muñoz Morales, Jacinto Texidor y Alcalá del Olmo, Leopoldo Feliú y el Dr. Juan B. Soto.

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REVISTA

DEL COLEGIO DE ABOGADOS DE PUERTO RICO

Vol. 58 enero-junio 1997 Núms. 1-2

AYER, HOY, Y MAÑANA

En la continuación de la puesta al día de nuestra Revista, se hace presente el tema de siempre en la vida puertorriqueña: su condición político-jurídica frente a Estados Unidos. Recogemos, pues, en estas páginas un análisis amplio de la cuestión, desde la perspectiva –no siempre bien atendida y entendida– del derecho internacional; un revelador y elocuente informe sobre el Proyecto Young, que trasciende los límites estrechos de la pieza legislativa; el comentario de un ex gobernador, a propósito de dicho proyecto de ley; y la evocación de Hostos, en los albores del problema jurídico, político y moral, que aún, resolvemos a finales del siglo al que apenas se asomó.

Este número se prestigia, además, con la presentación de una obra jurídica de un maestro jurista, formador de generaciones de abogados puertorriqueños, a cargo de otro jurista que ha dejado su impronta en la jurisprudencia del país desde el Tribunal Supremo, durante el último cuarto de siglo.

Invitamos a la lectura ponderada de estas páginas. En ellas hay lecciones importantes para la abogacía y la vida puertorriqueña en general.

Alberto Medina Carrero
Editor

PUERTO RICO IN THE DECOLONIZATION DECADE: 1990-2000*

*Fermín L. Arraiza Navas***

"THE UNITED NATIONS STANDS FOR THE SELF-GOVERNMENT AND INDEPENDENCE OF PEOPLES, AND THE ABOLITION OF RACIAL DISCRIMINATION WITHOUT RESERVATIONS. IT CAN NEVER AFFORD TO COMPROMISE ON THESE BASIC PRINCIPLES".

U. Thant (1961)
Secretary-General

"SI YO ME HUBIERA BENEFICIADO MÁS CON LA COLONIZACION,... ¿HABRIA CONSEGUIDO REALMENTE CONDENARLA CON TANTO VIGOR? QUIERO ESPERAR QUE SI, PERO INCLUSIVE HABERLA SUFRIDO APENAS ALGO MENOS QUE LOS DEMAS YA ME HA TORNADO MAS COMPRENSIVO".

Albert Memi (1966)

Introduction:

The present research concentrates on the principle of Public International Law called the Inalienable Right of Peoples to Self-Determination[1], and on the commitment of the international community to the eradication and elimination of all forms of colonialism in the world as the basis of both democracy and the promotion, protection and respect of all human rights.

In spite of the paramount relevance of the above mentioned principle's political character, the analysis of the Right to Self-Determination will not be limited to the external or political aspect of the concept. It is necessary to make reference to the internal —economic, social and cultural— aspect of the right as

*On November 22, 1988, during the 59th plenary meeting, the United Nations General Assembly declared the period 1990-2000 as the "International Decade for the Eradication of Colonialism" through Resolution 43/47.

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1. United Nations General Assembly resolution 1514 (XV) of 14 December 1960, *Declaration on the Granting of Independence to Colonial Countries and Peoples* (hereinafter resolution 1514 (XV), U.N. GAOR (Supp. No. 16) at 66-67, U.N. Doc. A/4684 (1960) as cited by José Julián Alvarez, *Constitutions of Dependencies and Special Sovereignties. United States Territories: The Commonwealth of Puerto Rico*, Booklet 2, Oceana Publication, Inc., Dobbs Ferry, New York, 1991, pp. 191-192.

an integral part of that Principle of Public International Law, without which its exercise would not be realistic or possible. To this end, the duties of the administrative or colonial powers will be of great consequence to the final solution or elimination of colonialism through their help in the elaboration of decolonizing alternatives to be included in future plebiscite processes.

The principal subject of this study will be the political and socio-economic relationship between Puerto Rico and the United States before and after the adoption of the Puerto Rican Constitution in 1952, and whether or not the adoption of the latter has changed the colonial status of Puerto Rico under the United States occupation. This analysis is vital to determine the duties of the U.S. government regarding Puerto Rico and the legality or legitimacy[2] of the referendums that have been held in the Island[3], taking into consideration the United Nations General Assembly resolution that released the United States government from its duty of providing information related to the administration of Puerto Rico before the General Assembly.[4]

Special emphasis will be made on the dependency of the economy of Puerto Rico on the United States economy, and on the psychological effect of both the financial dependence and the institutionalized and systematic persecution of persons who support the separatist movement because of their political beliefs, which has resulted in serious violations of their rights, from the loss of employment opportunities, to the loss of liberty and, even, lives. All of these have been extensively documented and established by reliable evidence since around the 1930's.[5]

Although the purpose of the thesis is not to make a deep analysis of the economic and social development of Puerto Rico, some aspects of its economic

2. According to the U.S. Constitution provisions, it could be said that the consultative elections or "plebiscites" held in Puerto Rico until the present have been legally organized. However, under the decolonization procedures provided by international law, there has been neither legitimacy nor legality.
3. Puerto Rico.
4. United Nations General Assembly resolution 748 (VIII) of 27 November 1953, *Cessation of the Transmission of Information under Article 73 (e) of the Charter in Respect of Puerto Rico* (hereinafter resolution 748 (VIII), U.N. GAOR Supp. (No. 17) (459th plen. mtg.) at 25 UN Doc. A/2630 (1953), as cited by J.J. Alvarez, op. cit., at n. 1, p.189.
5. See Ivonne Acosta, *Hacia una historia de la persecución política en Puerto Rico* ("Towards a History of Political Persecution in Puerto Rico"), Newspaper "Claridad", July 6-12, 1990, pp. 20-24; See also Puerto Rican Civil Rights Commission, *Informe sobre discrimen y persecución por razones políticas: La práctica gubernamental de mantener listas, ficheros y expedientes de ciudadanos por razón de su ideología política;* ("Report regarding discrimination and persecution based on political beliefs: The Governmental practice of keeping lists, reports and files of individuals due to their political ideology; First and Second Parts), 51 Rev. Col. de Abog. de Puerto Rico #4 (Puerto Rican Bar Association Law Review), pp. 1-62, (1990); 52 Rev. Col. Abog. de Puerto Rico #1, pp. 163-315 (1991).

relationship with the U.S. are relevant for a general understanding of the economic and social bases upon which the political and international legal issues of Puerto Rico have been taking place.

A deeper study of the economic and social forces developed in Puerto Rico and the search for alternatives to its future as a decolonized territory is an intellectual challenge to which many specialized and intellectual groups are making their contribution.[6]

A crucial topic in this respect is how to organize Puerto Rico's economy in such a way that local industries could get enough support and promotion from the government, including the rescue and development of the agricultural activity, and at the same time, how to deal with possible tax exemption policies to substitute in part the negative effect that the loss of section 936 would have in the future economy of Puerto Rico. However, all these issues require wide research efforts regarding international market and commerce practices, economic blocks integration as NAFTA and CARICOM, among others, and international economic policies regarding tax exemption agreements which would reduce the danger of a decrease in Puerto Rico's growth national product as well as an increase of the actual unemployment rate and social unrest.

Within this context, special emphasis should be directed to study the possibilities of creating incentives to less dangerous textiles, factories and enterprises, rather than making the economy more dependent on pharmaceuticals and other kind of businesses which constitute a serious threat to the environment and the nation's life.

However, any economic measures adopted should be carefully evaluated, in order to avoid the perpetuation of the dependent character of Puerto Rico's economy.

The thesis will try to up-date the discussion of the issue of the Right to Self-Determination of Puerto Rico, taking into consideration not only the internal situation of the Island, but also the most relevant reaffirmations of that principle at the international level.[7]

6. See E. Negrón Rivera, *Beyond Section 936: A Suggested Departure From Tax-Sheltered Stagnation in Puerto Rico*, 47 Rev. Col. Abog. de P.R. #2, pp. 167-182 (1986).
7. General Assembly resolution 1514 (XV); G.A. res. 1803 (XVII) of 14 December 1962 regarding "'permanent sovereignty over natural resources'"; common Art. 1 of both, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights; G.A. res. 2625 (XXV) of 24 October 1970; Draft Declaration of the Rights of Indigenous Peoples, U.N. doc. E/CN. 4/Sub. 2/1993/29, August 23, 1993; Vienna Declaration and Programme of Action, U.N. doc. A/CONF. 157/23, 1993, part I, para. 2, as cited in A. Eide; C. Krause; A. Rosas, *Economic, Social and Cultural Rights*, 1st ed., Martinus Nijhoff Publishers, Netherlands, 1995.

HISTORICAL BACKGROUND:

Situation before 1898:

Puerto Rico was a colony of Spain from 1493, when it was discovered by Christopher Columbus, until 1898, when Spain was defeated in the Spanish-American War. It has an area of 3,500 square miles and is constituted by the main Island, "La Isla Grande", and also several islands called Vieques, Culebra, Mona, Desecheo and other smaller islands and reefs close to it.[8]

During the first centuries of Spanish colonial domination, the population of Boriquén[9] was in an intensive struggle for survival due to the lack of workers and slaves, the death of the indians[10] and the lack of trade between the Island and the metropoli, Spain.[11]

One of the biggest interests of Spain in Puerto Rico, apart from the extraction of gold from its rivers[12], was the military strategical advantage of the Island in the Caribbean.[13] As we will see, that became one of the biggest United States interests as well.[14]

8. However, if we take into consideration the topographical structure of the Island, it is approximately three times bigger than the above mentioned size.

9. Fernando Picó, *Historia General de Puerto Rico,* Huracán Inc., 2nd ed., Rio Piedras, Puerto Rico, (1986), p. 23. Indigenous name of Puerto Rico before the Spanish occupation.

10. The death of the indians (Taínos) is related to different factors, such as their fight against Spanish soldiers while using inferiors weapons -though their abilities in the use of arrows- (see Ibid, p. 27), excess of work under very poor conditions, including lack of nutrition and rest hours as well as diseases brought by the Spaniards for which the indians didn't have any kind of inmunological defenses. (Ibid, p. 46). As a matter of fact, the indian rebellions against the Spanish exploitation started around the year 1511 and lasted until almost 1580, but the cruel reality is that the majority of the indian population was almost exterminated during the 1520's decade. (Ibid, p. 47.) *Fray Bartolomé de las Casas* was one of the most important exponents of the inhuman exploitation of the indians in América and Puerto Rico, and *recognized their right to resort to war to take their oppressors out of their land.* (Ibid, p. 51).

11. Carmen Dolores Hernández, *Reseña del libro "Puerto Rico: Desde sus orígenes hasta el cese de la dominación española"*, de Luis M. Díaz Soler, editorial U.P.R., 1994, 758 pp.; El Nuevo Día, en Grande, Domingo 9 de octubre de 1994, p. 14., for a better decription of the relationship between Spain and its colonies, Puerto Rico and Cuba, and the relationship of the last ones with the United States during that period.

12. F. Picó, op. cit., at n. 9, p. 43.

13. Henry Wells, *The Modernization of Puerto Rico,* 2nd ed., Editorial Universitaria, printed in Spain, 1979, p. 38; Puerto Rico as a strategical point for the protection of commerce between Spain and Venezuela, Colombia, Peru and New Spain.

14. According to Captain Alfred T. Mahan, during the war of 1898, the U.S. should have established a paramount naval base in the group of islands composed by Puerto Rico and the Virgin Islands. See Jorge Rodríguez Beruff, *La cuestión estratégico-militar y la libre determinación de Puerto Rico: El debate plebiscitario (1989-1993),* 56 Rev. Col. de Abog. de Puerto Rico #1, p. 58 (1995). ("The Military-Strategic Issue and the Right to Self-Determination of Puerto Rico: The Plebiscite Debate (1989-1993)"; Puerto Rican Bar Association Law Review).

A great unrest within the Spanish colony emerged as the result of a fiscal crisis and the development of a strong anti-slavery movement in Puerto Rico, taking place simultaneously to the end of the U. S. Civil War in 1865.[15] A liberation movement emerged in Puerto Rico during the 19th century, directed among others by Dr. Ramón Emeterio Betances, both parallel to and in coordination with the Cuban liberation movement against Spain under the leadership of José Martí, among others.

There was a revolution known as "The Cry of Lares" on September 23, 1868, where the revolutionaries of Puerto Rico, for the first time in history, proclaimed the Republic of Puerto Rico. However, the liberation movement was quickly suppressed by the Spanish government in the Island.

Despite the limited analysis adopted by some scholars, it would be a misunderstanding of the political struggles of Puerto Rico to affirm that their political leaders only worked to obtain an autonomic regime under the sovereign power of Spain. Moreover, a great number of the autonomist leaders saw in this regime a transitional stage towards the complete independence of Puerto Rico, after some economic stability could be obtained. The same position has been adopted by some sectors of the autonomist movement under the U. S. domination, and even by the present majority political party —PDP— during the beginning of its hegemonic era.

All the protests and political processes started by the People of Puerto Rico[16], together with the Cuban Independence War against Spain and other political circumstances between Spain and Puerto Rico[17], led to the approval by the Spanish Kingdom of the "Charter of Autonomy" for Puerto Rico on November 25, 1897.

The Autonomic Regime for Puerto Rico, together with "... the decadence of the Spanish Empire could be seen as the first steps towards a completely independent Puerto Rico".[18]

15. F. Picó, op. cit., at n. 9, pp. 176-177. Two of their main leaders, Segundo Ruiz Belvis and Ramón Emeterio Betances were forced by the Spanish government in the Island to leave the country. Segundo Ruiz Belvis died in Chile, but Betances started to organize a movement for the liberation of Puerto Rico living in Dominican Republic, Saint Thomas and New York at different times. The revolution planned to start on the 29th of September, 1868 in the town of Camuy, but the Spanish government discovered the conspiracy and the revolutionaries decided to start on the 23rd of September in a different location, Lares.

16. Alfonso L. García Martínez, *La Constitución Autonómica de 1897: un desarrollo no igualado en nuestra historia,* 35 Rev. Jur. Col. de Abog. de Puerto Rico 390 (1974).

17. F. Picó, op. cit., at n. 9, p. 225; The alliance of the Autonomist Party branch, directed by Luis Muñoz Rivera, together with the Liberal Monarchics in Spain had a strong influence for the final approval of the "Carta Autonómica" (Charter of Autonomy).

18. A. García, supra, at n. 16, p. 391, regarding the position of Spain towards its African colonies after the creation of the United Nations. See also A. Guevara, *Puerto Rico: Manifestations of Colonialism,* 26 Rev. Jur. U.I.P.R. 277 (1992).

This Regime gave wide liberties to the government of Puerto Rico, specially regarding its authority of intervention in commercial treaties.[19] Under the Charter of Autonomy, Puerto Rico had the right to create its own parliament (Parlamento insular) and its own cabinet and municipal districts with representatives elected by the People of Puerto Rico.[20]

One of the most important achievements for the Autonomists was found in Art. 2 of the additional articles which stated that the present Constitution " '... shall... not be modified except by virtue of a special Law and upon petition of the Insular Parliament.'"[21]

Puerto Rico also acquired 19 voting representatives at the Spanish "Courts" (Cortes), The Legislative Body of Spain.[22] The Charter of Autonomy gave Puerto Rico such a degree of internal and international legal capacities that has been impossible to attain under the United States administration. Even today, Puerto Rico has not been able to attain a right of representation to the United States Congress remotely comparable to the one conferred by the Charter of Autonomy.[23]

The Spanish-American War:

The United States economic interests in the Antilles increased during the last three decades of the 19th century. The extention of the Cuban War of Independence to the East side of that country had a strong negative effect on the investments of the U.S. in that region of the Major Antille, Cuba. Moreover, since the beginning of the war, the United States was considering the advantages that the annexation of Puerto Rico could represent as a naval military base that could secure its interests in the Caribbean.[24]

Under the same expansionist policy initiated by the United States under the Monroe Doctrine (1823)[25], the main focus of the U.S. foreign policy turned

19. Ibid, pp. 398-399; See also footnotes #9 & 10 of the same author concerning authority of the Insular Parliament regarding the currency and postal stamps.
20. F. Picó, op. cit., at n. 9, p. 215.
21. See also Carta Autonómica 1897, 1 L.P.R.A., historical documents, at I (1982) as cited by A. Guevara, *Puerto Rico: Manifestations of Colonialism,* 26 Rev. Jur. U. I. P.R. 227 (1992), at footnote #10 and, A. García, supra, at n. 16, p. 401.
22. A. Guevara, ibid, footnote #10, at p. 277, quoting from the Spanish Constitution of 1812, tit. 3, ch. I, art. 31.
23. A. García, supra, at n. 16, pp. 396-404.
24. F. Picó, op. cit., n. 9, pp. 225-226. (Due to the project of construction of a channel through Central America that would create the possibilities of controlling not only the Atlantic but also the Pacific Ocean).
25. Under that expansionist policy the U.S. acquired Louisiana (1803), Florida (1819-1820), Texas (1845), Oregon (1846), Alaska (1897) and close to 50% of the Mexican Territory in 1848. See Carlos I. Gorrín Peralta, *Historical Analysis of the Insular Cases: Colonial Constitutionalism Revisited,* 56 Rev. Jur. Col. Abog. de P.R. 1, pp. 35-36, 1995. (Puerto Rican Bar Association Law Review).

towards the expansion of their territory to the Caribbean and later on to the Pacific, applying the ideology of the Manifest-Destiny (1845) in search of better markets, cheap raw materials and strategic naval positions.[26]

However, due to the different characteristics of the new possessions —Puerto Rico and the Philippines— (non-contiguous territory, dense population, different culture and language) and to the popular support to the liberation from the previous colonial rule, a new attitude was developed towards them by the U. S. government. They were considered "... as inhabited by primitive and savage populations, lacking in civilization, and definitely not destined to become part of the United States through statehood".[27]

In February 1898, due to the mysterious explosion of the United States war ship Maine[28], the U.S. government accused Spain of the incident and, notwithstanding the great efforts of the Spanish government to avoid a military conflict, the diplomatic mediation failed, and therefore a war started on April 21, 1898.[29]

The United States invaded and occupied Puerto Rico on July 25, 1898.[30] The war ended after the signing of the Treaty of Paris between Spain and the United States on December 10, 1898[31], in which Spain ceded "all" its rights over Puerto Rico and the Philippines to the United States.[32]

26. Ibid, pp. 37-38, making references to Charles and Mary Beard, *A Basic History of the United States,* pp. 338-346 (1944) as cited by R. Serrano Geyls, infra, at n. 62, pp. 406-407.
27. Ibid, p. 38 quoting R. Serrano Geyls, ibid, pp. 390-391.
28. At this time the Autonomic Charter had already been extended to Puerto Rico and Cuba, though a bit late concerning Cuba due to the success of their independence war. The last Spanish colony that remained in America was Puerto Rico, and due to the paramount importance of the Island as a military strategic point in the Caribbean, the United States provoked the war, in order to keep it before an independent status could be acquired. Otherwise, after the adoption of the Autonomic Charter, sooner or later Puerto Rico would have become independent. See Fermín B. Arraiza Miranda, *Puerto Rico, Estado Soberano Confederado de España y América o Estado Federado de la Federación Monárquica Constitutional Española,* Doctoral Thesis in History submitted to the University of Valladolid, España, pp. 485-574. An investigation of 1976, directed by Almirant Hyman Ryckover showed that the explosion of the Maine was probably the consequence of an internal accident inside of the ship. See also expressions of Senator Moynihan during the negotiation process for a plebiscite in Puerto Rico, J.M. García Passalacqua; C. Rivera Lugo, *Puerto Rico and the United States: The Negotiation and Consultative Process of 1989-1990, Tomo I, 1990,* 1st ed., University of Puerto Rico Publisher, p. 350.
29. F. Picó, op. cit., at n. 9, pp. 225-226.
30. Ibid, p. 221; See also A. Guevara, supra, at n. 21, p. 278. During the war, the United States invaded not only Puerto Rico, but also Guam, Philippines and Cuba.
31. Ibid, p. 227; See also A. Guevara, Ibid, at footnote 14 (30 Stat. 1754, T.S. No. 343).
32. Ibid, p. 221. Even though the U.S. acquired Puerto Rico through the Treaty of Paris, the Island was occupied by the U.S. in a colonial war againt Spain; See expressions of Senator Moynihan during 1989-90 U.S. Congressional Hearings regarding the right to self-determination of the People of Puerto Rico, contained in J.M. Passalacqua; C. Rivera Lugo, op. cit., at n. 28, t. II, pp. 341, 365.

Although some people argue that after the creation of the Charter of Autonomy Spain still had sovereign powers over Puerto Rico, others support the thesis that the Treaty of Paris could not have any legal effect over the Island owing to the rights that the People of Puerto Rico had acquired byvirtue of the Charter of Autonomy before the Spanish "Cortes". This theory, which was further developed by the "Puerto Rican Nationalist Party" (hereinafter Nationalist Party) can be found in the First Federal Circuit opinion *Velázquez V. People of Puerto Rico,* 77 F. 2nd 431.[33] Moreover, if we take into consideration the development of imperative norms (jus cogens) of public international law (arts. *53* and *64* of the Vienna Convention on the Law of Treaties) the Treaty of Paris could never be upheld in the present times.

THE CONCESSION OF "SELF-GOVERNMENT" (1898-1952):

After the Spanish-American War, Puerto Rico was ruled by a military government until June, 1900. The U.S. Military Government for Puerto Rico was sovereign and absolute.[34]

Even though the military hostilities were supposed to be over, a new kind of conquest started to take place through the reorganization of Puerto Rican life according to U.S. values. This process started with the establishment of the U.S. military government for Puerto Rico, and, from 1900, by the civil governments established in the Island. However, even though the general tendency has been oriented to the U.S. model, not all sectors of Puerto Rican society has been receptive to those influences.[35] Moreover, Puerto Ricans have cultivated and preserved the most important aspects of their culture and their language, and for these reasons, according to some authors, it is impossible to think about a future complete "Americanization" of Puerto Rico.[36]

Protests against the use of English language in the public schools were growing, and finally, even though most of the texts were in English —making much more difficult the learning process—,lectures were taking place in Spanish at most part of the classrooms, in violation of the English-language provisions.[37]

33. A. García, supra, at n. 16, pp. 401-402, at footnotes #14 & 15.
34. Ibid, at n. 30, p. 393.
35. Henry Wells, op. cit., at n. 13, pp. 65-67.
36. Ibid, p. 66.
37. F. Picó, op. cit., at n. 9, pp. 247-248. However, in 1915, a change of policy reestablished Spanish as the main teaching language at the elmentary schools, see also H. Wells, op. cit., n. 13, p. 93. A first amendment was made to allow public instruction in Spanish during the first four (4) years of elementary school. However, English remained the main vehicle of education until 1934, when Spanish was extended

Moreover, the majority of the students did not have any opportunity to practice the English language out of their classrooms, and most of them —80%— dropped out from school at third grade. The issue of the preservation of the Spanish language in Puerto Rico is of special relevance, considering that it could survive in spite of the transculturation strategies used by the U.S. administration in the Island since 1898.[38]

One of the measures adopted by the U.S. government during this period was the change of currency circulating in the Island to U.S. dollars.[39]

The military government lasted until 1900, when the U.S. administration decided to establish the first civil government for Puerto Rico, after former President William McKinley expressed his intention to establish a system of free trade between Puerto Rico and the United States.[40]

The Foraker Act:

On April 12, 1900 the Foraker Act[41] was enacted to institute a civil government in Puerto Rico. In theory, under the Foraker Act, the Legislature of Puerto Rico had a wide range of authority, but it was subject to the veto power of the Governor, who came from the metropoli, appointed by the U.S. President and ratified by the U.S. Congress.[42]

According to the Act, the U.S. Congress had the "power" to amend or revoke insular legislation. The situation remained the same during the next civil government for the Island which was established in 1917, by the Jones Act[43], Art. 31, and lasted until 1952 when it was eliminated by the present "Puerto Rican Federal Relations Act" (P. R. F. R. A.).[44]

to the other eight (8) grades of public school. Yet, it was not until 1949 that Spanish language became the main teaching language, even at the high school level. English started to be taught as a second but compulsory language from first grade until the sophomore and university studies, that being the present situation. (See H. Wells, op. cit., at n. 13, p. 277).
38. H. Wells, ibid, pp. 17, 276-278.
39. F. Picó, op. cit., at n. 9, p. 228. (The change was calculated as 60 cents of U.S. $'s for each "peso provincial").
40. C. Gorrín Peralta, supra, at n. 25, p. 40.
41. 31 Stat. 77 Secc. 1-41.
42. F. Picó, op. cit., at n. 9, p. 229. See also Guevara, supra, at n. 21, p. 278.
43. 39 Stat. 951, ch. 145, Secc. 1-58 (1917).
44. A. García Martínez, supra, at n. 16, p. 394; The "Puerto Rican Federal Relations Act" which rules most part of the economic relations between P.R. and the U.S., constituted by the remaining provisions of the Jones Act after the creation of Public Law 600 by the U.S. Congress, and the adoption of the 1952 Constitution.

Several provisions of the Foraker Act remained in force under the second Organic Act set up in Puerto Rico, the Jones Act, and in the present "Puerto Rican Federal Relations Act"[45]. These provisions are: Art. 13, Foraker Act -governing matters regarding the use of harbors and navigable waters... (Art. 8 under both, the Jones Act and the "Puerto Rican Federal Relations Act"); Arts. 19, 21, 22 & 25, Foraker Act —regarding reports to be submitted to the U.S. Congress... (Art. 11 under both, the Jones Act and the P. R. Federal Relations Act); Art. 34, Foraker Act— for the establishment of a Federal Court in Puerto Rico as well as the use of the English language in its procedures... (Art. 41 of both, Jones and P.R. Federal Relations Acts)[46], and so on.

In regard to the trade relations between Puerto Rico and the U.S., the Foraker Act established a "free" commerce zone, with the exception of a 15% excise over the rum and sugar exported to the United States. These duties were reimbursed to the Treasury of Puerto Rico[47], as well as the duties imposed over products coming from other countries.[48]

Finally, Puerto Rican citizenship was recognized to those who had not opted to retain the previous Spanish citizenship.[49] At present Puerto Ricans have the right to both citizenships: the Puerto Rican Citizenship which was incorporated in the "Commonwealth" of Puerto Rico's Constitution of 1952 and the U.S. "nationality", extended by the 1917 Jones Act. See ***Miriam Ramírez de Ferrer*** v. ***Juan Mari Brás***, 97 D.T.S. 12, 102, of November 18, 1997 and the arguments presented during the P.R. Supreme Court oral hearing of April 14, 1997.

The U.S. Congress did not designate Puerto Rico as a territory because, in the past, that designation constituted the first step towards integration to the federation as a state of the Union. The U.S. Congress did not consider that alternative appropriate for Puerto Rico. That was the reason why the ***Puerto Rican citizenship*** was recognized and granted instead of the U.S. citizenship, which had been always granted or imposed to the inhabitants of the declared territories.[50]

45. Provisions of the Jones Act that remained unchanged and still apply to Puerto Rico, ruling the political and economic relations with the U.S. after the adoption of the 1952 Constitution, according to the conditions imposed by the U.S. Congress.
46. A. García Martínez, supra, at n.16, pp. 395-396.
47. F. Picó, op. cit., at n. 9, p. 229.
48. H. Wells, op. cit., at n. 13, p. 86. The meassures taken for the reimbursement of duties over imported products to the Puerto Rican Treasure, as well as the exemption of Puerto Rico from the U.S. internal revenew laws, would not be possible if the Island would be declared a territory of the U.S. in the Foraker Act. See ibid, p. 87.
49. Ibid, pp. 86-87.
50. Ibid, p. 87. These are the main reasons for the U.S. Supreme Court decisions to start treating Puerto Rico as a non-incorporated territory of the United States, a new concept in their constitutional doctrine; See the "Insular Cases", infra, pp. 13-16, especially *Downes Vs. Bidwell,* 182 U.S. 244 (1901), where they

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The Jones Act:

The second Organic Act that ruled the relationship between Puerto Rico and the U.S.A. is known as the Jones Act, adopted on March 2, 1917[51], and signed by Woodrow Wilson as President of the U.S. It included a bill of rights and privileges and an immunities clause, but its most controversial provision was section 5 (b), which declared all Puerto Ricans U.S. citizens,[52] providing a period of six (6) months to object that measure.[53] The validity of the elimination of the Puerto Rican citizenship in 1917[54], which was recognized by the previous Organic Act in 1900[55], and the right of Puerto Ricans to have both citizenships have raised intensive debates in Puerto Rico. That measure has also raised the issue of whether or not the U.S. Congress has the authority to revoke the U.S. citizenship extended to the People of Puerto Rico in 1917.[56]

used the concept of non-incorporation regarding Puerto Rico, and *Balzac Vs. People of Porto Rico,* 258 U.S. 298 (1922), where the Court clarified that the granting of the U.S. citizenship to the People of Puerto Rico did not constitute an implicit transition from a non-incorporated territory to an incorporated one.
51. Jones Act, 39 Stat. 951, ch. 145, Secc. 1-58 (1917).
52. A. Guevara, supra, at n. 21, p. 279; See also A. García Martínez, supra, at n.16, p. 390 for the relation between the imposition of the U.S. citizenship in 1917 and the late participation of the United States in the First World War; See also F. Picó, supra, at n. 9, p. 238, in 1914 the "Cámara de Delegados" refused by a resolution any attempt by the U.S. government with the aim of imposing the U.S. citizenship to all Puerto Rican citizens. The U.S. citizenship was finally accepted by the Political Party "Unión" only after they realized that its imposition was an indispensable condition to get the U.S. Congress authorization for a full elective legislature in Puerto Rico.
53. F. Picó, ibid, p. 238. However, anyone who would reject the U.S. citizenship would be considered as a foreigner in their own country. See G. Navas Dávila, *La dialéctica del desarrollo nacional: El caso de Puerto Rico,* Ed. Universitaria, Universidad de Puerto Rico, 1978, p. 48, footnote #5.
54. A. Guevara, supra, at n. 21, footnote 27, where it is shown that U.S. citizenship was imposed despite the strong opposition of the Puerto Rican House of Delegates at the 63rd Congress, 2nd Sess. Senate, 51 Cong. Rec. 6718-20 (1914) and expressions of Luis Muñoz Rivera "[r]egarding H.R. 9533 Considering Civil Government to Puerto Rico..., 64th Congress, 1st Sess., 53 Cong. Rec. 7472 (1916)". For a different opinion see José A. Cabranes, *Citizenship and the American Empire*, 127 University of Pennsylvania Law Review 391 (1978).
55. Foraker Act, 31 Stat. 77 Sec. 1-41 (1900).
56. See Puerto Rican Bar Association Law Review, José Rodríguez Suárez, *Congress Giveth U.S. Citizenship Unto Puerto Ricans: Can Congress take it Away?,* 48 Rev. Col. Abog. de Puerto Rico #1, p. 37 (1987). During the negotiation and consultative plebiscite process of 1989, the U.S. Congress guaranteed U.S. citizenship to all individuals born in Puerto Rico at the moment of the voting towards independence, but no to the next generations, notwithstanding the fact that their parents would have it. See J.M. García Passalacqua & C. Rivera Lugo, tomo I, op. cit., at n. 28, p. 85. Moreover, some sectors of the independence movement in Puerto Rico have started to renounce the U.S. citizenship, following the recognition and the re-adoption of a Puerto Rican citizenship and passport. This movement has led to the proclamation of the 23rd of September -the same date of the Cry of Lares- as the official day of the Puerto Rican citizenship. (See Fufi Santori, "Claridad" newspaper, September 23-29, 1994, p. 39).

However, it was not until 1947[57] that the Governor was also subject to popular suffrage.[58]

Even though the U.N. Charter was adopted in 1945, the new Public Law (P.L.) of the U.S. government did not mention anything about the right to self-determination and independence of Puerto Rico. Yet, according to the concept of "self-government", it granted Puerto Ricans a limited governmental authority over some internal matters, rather than following the mandate of promoting "full measures of self-government", present in Art. 73, Chapter XI, of the U.N. Charter.

The right to vote for the members of the Senate was one of the biggest achievements of the Act.[59] However, it was obtained at the high cost of the negotiation of the imposition of the U.S. citizenship by the local politicians, and even though the Senate was completely chosen through an electoral process, its legislative powers were still subject to the veto power of the appointed U.S. Governor for Puerto Rico and to final Congressional revision.[60]

After the United States invasion, all the political sectors in Puerto Rico awaited the concession of an autonomic form of government, similar or even more liberal than the one enacted under Spanish domination. The autonomic regime was considered as a transitional stage for the full development of the economic and political institutions in Puerto Rico. However, after the adoption of the Jones Act, it was clear that the main obstacle for the acquisition of the degree of self-government expected was the U.S. Congress' refusal to such a claim from the People of Puerto Rico.[61]

The Insular Cases:

The U.S. Supreme Court decisions related to the political and economic relations between Puerto Rico and the U.S.A. during that period are commonly known as the "Insular Cases".[62] These cases were decided between 1900 and 1922[63], and they stated that Puerto Rico would be ruled under the "Territory Clause" of the United States Constitution, which establishes that "[t]he Congress shall have power to dispose of and make all needful Rules and Regulations

57. After an amendment of the Jones Act.
58. Vicente Géigel Polanco, *La farsa del Estado Libre Asociado,* editorial Edil Inc., Río Piedras, P.R., 1st ed., 1972.
59. H. Wells, op. cit., at n. 13, p. 88.
60. Ibid, p. 89.
61. F. Picó, op. cit., at n. 9, p. 259.
62. R. Serrano Geyls, *Derecho Constitucional de Estados Unidos y Puerto Rico,* 1ra ed., P.R., Ramallo Bros. Printing Inc., 1986, vol. I, p. 449.
63. Ibid.

respecting the Territory or other property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State".[64]

With the insertion of the "Territory Clause" in its Constitution, the United States was "...constitutionally empowered to implement the colonial policy..." and a legal framework was established "... to carry out the territorial expansion".[65]

Moreover, as early as in 1828 the U.S. Supreme Court held that "... under the doctrine of implied powers articulated in *Mc Culloch v. Maryland, the United States had the powers to acquire territory as part of its explicitly delegated powers to make war and enter into treaties with foreign nations".*[66]

In *Downes v. Bidwell*[67], the Supreme Court of the U.S. stated that under the Treaty of Paris, Puerto Rico became "appurtenant and belonging to the United States, but not a part of the United States". Justice White established in this case the differences between an incorporated and a non-incorporated territory of the United States and expressed that "... [s]ince Congress did not make an express provision calling for Puerto Rico's incorporation, nor did it show any intent to do so, Puerto Rico was deemed a non-incorporated territory".[68] Three years later, the same Court, in *Dorr v. United States*[69], adopted the view of Justice White "holding that the right to trial by jury, U.S. Const. Art. III, sec. 2, does not apply to a non-incorporated territory, in this case, the Philippine Islands".[70] The real meaning of these decisions is that, although "...[t]he guaranties of certain fundamental personal rights declared in the Constitution, as, for instance, that no person could be deprived of life, liberty, or property without due process of law, had from the beginning full application in the Philippines and Puerto Rico..."[71], "... the United States Constitution as a whole, did not apply to Puerto Rico".[72]

Finally, in *Balzac v. People of Porto Rico*, supra, the Court reaffirmed that Puerto Rico remained a non-incorporated territory, notwithstanding the establishment of a new civil government under the Jones Act. Furthermore, the Court stated that the granting of the U.S. citizenship to the People of Puerto Rico

64. U.S. Constitution. Art. IV, secc. 3 para. 2.
65. See C. Gorrín Peralta, supra, at n. 25, pp. 33-35 for the origins of the necessity of the "Territory Clause" to legalize the expansionist policy developed by the United States of America.
66. Ibid, p. 35, citing *American Insurance Co. v. 356 Bales of Cotton,* 1 Pet. 511 (1828).
67. 182 U.S. 244, 287 (1901).
68. A. Guevara, supra, at n. 21, p. 280.
69. *Dorr V. U.S.,* 195 U.S. 138, 149 (1904).
70. A. Guevara, supra, at n. 21, p. 280, footnote 32.
71. *Balzac V. People of Porto Rico,* 258 U.S. 298, 312-313 (1922); See also the analysis made by Guevara, ibid, pp. 280-281, especially at footnotes 31-41.
72. *Dorr,* supra, p. 142, as cited by A. Guevara, ibid.

did not constitute an implicit transition from a non-incorporated territory to an incorporated territory of the United States.[73] The political status was still the same.

Before the adoption of this doctrine, the U.S. territories had been administered with the objectives of organizing and preparing them for future integration and, in several cases, annexation to the U.S. Federation. However, the adoption of a different doctrine in the "insular cases", drew the line between an incorporated territory, which was expected to become another state of the Union, and a non-incorporated territory, as those one which were not moving towards a future integration with the Union as a future state.[74] (Comparable with Mandate 5.)

The expressions of the U.S. Supreme Court in the above mentioned decisions clearly show that the position of the U.S. government concerning the status of Puerto Rico was that Congress, through the approval of an Organic Act, had the authority to decide about the future political status of Puerto Rico, notwithstanding the will of the inhabitants.

It is interesting how some Puerto Rican constitutional law experts have described the efforts made by the United States to use a "less opprobious word" to name their colonies, territories, as if that terminology "could resolve the inherent contradiction between the practical reality of colonialism and the principles of democracy and self-determination...". This is what the United States of North America has done with the constitutional doctrine of "territorial incorporation", created by its Supreme Court through the so-called "insular cases" mentioned above.[75]

Although the majority members of the U.S. Supreme Court had reaffirmed the powers of the U.S. under the Territory Clause, a decision from 1856 stated that:

> 'There is certainly no power given by the Constituion to the Federal Government to establish or mantain colonies bordering on the United States or at a distance, to be ruled and governed at its own pleasure... [N]o power is given to acquire a territory to be held and governed permanently in that character.'[76]

Moreover, while some Republican leaders favored the keeping of the overseas possessions, others believed that keeping them would be contrary to the principles

73. R. Serrano Geyls, op. cit., at n. 62, p. 472.

74. See C. Gorrín Peralta, supra, at n. 25, p. 42 where the constitutional effect of the incorporation doctrine is analyzed. Incorporated territories are those that are part of the United States, destined to be admitted as new states, whilst non-incorporated territories are not part of the U.S., nor are destined by the U.S. Congress to be admitted as new states. The differences regarding the applicability of the U.S. Constitution is that, while it is fully extended to the incorporated territories, only its fundamentalprovisions could limit the Congress' power over the non-incorporated territories.

75. Ibid, pp. 31-54.

76. *Dred Scott v. Sanford,* 19 How. 395 (1856), as cited by C. Gorrín Peralta, ibid, pp. 36-37.

(Two presidents)

of Liberty and Democracy and, furthermore, that their incorporation as states would not be a wise decision, due to their different cultural character.[77]

After the implementation of the Jones Act, a liberation movement started its reorganization in Puerto Rico, demanding the end of the colonial status of the Island. Yet, it was not until 1932 that the "Puerto Rican Nationalist Party" gained dramatic importance in the liberation efforts of Puerto Rico.

The Tydings Bill:

Due to the occurrence of several violent confrontations between the Nationalist movement and the insular police forces, Millard E. Tydings, senator from Maryland, promoted a bill prepared by the U.S. Congress, according to which independence to Puerto Rico should be granted, if the majority of the voters approved it in a plebiscite. Then, if the results were in favor of independence, a process of transition would be established and a draft constitution for the future republic would be adopted. Other provisions of the bill stated that, after the adoption of the Constitution, all financial and military aid from the federal government would be eliminated.

In addition, it stated that after the proclamation of the republic, within four years, the free commerce between the Island and the metropoli would be over. The immediate reaction of the most conservative sectors in the Island expressed their strong opposition to the draft legislation. Luis Muñoz Marín, member of the "Liberal Party", considered the bill as a future fiscal disaster for Puerto Rico, unless it would be substantially amended.

On the other hand, some leaders favored this iniciative, including the president of the "Republican Union" (Unión Republicana), Rafael Martínez Nadal, Antonio R. Barceló and several independence leaders from the "Liberal Party" like Ernesto Ramos Antonini and Vicente Géigel Polanco. This last group expressed their will to colaborate with the Nationalists to prepare the draft of the future Constitution. However, the influence of Muñoz Marín over the members of the "Liberal Party" that favored the Tydings draft legislation convinced them that it would be better to get a more generous agreement in which independence would be granted, but some economic and social justice safeguards were included.[78] Finally, the Tydings Bill did not succeed.

77. Jaime B. Fuster, *The Origins of the Doctrine of Territorial Incorporation and its Implications Regarding the Power of the Commonwealth of Puerto Rico to Regulate Interstate Commerce,* XLIII Rev. Jur. U.P.R. 259 (1974), pp. 263, 289-291 and Juan R. Torruella, *The Supreme Court and Puerto Rico: The Doctrine of Separate and Unequal,* 40-100 (1985), pp. 24-32, both, as cited by C. Gorrín Peralta, ibid, pp. 38-39.

78. H. Wells, op. cit., at n. 13, pp. 125-126.

Another reason for its failure, according to a U. S. "Operations Division" Report, was the huge U. S. military interest in Puerto Rico. From the report, the complete opposition of the U. S. War Department to the recognition or concession of any sovereign status to Puerto Rico is clear.[79] After the aborted Tydings Bill, other reforms were promoted by both the U. S. and the local government, such as the reforms of 1947, until the adoption of the Constitution in 1952. A relevant fact is that around that period, (1943-1945), the name "Commonwealth of Puerto Rico" started to be used by the Joint Chiefs of Staff to make reference to Puerto Rico; eight years before the adoption of the Constitution.[80]

After the failure of the Tydings Bill, the industrialization and economic development program "Operación Manos a la Obra" started to operate in the Island, mainly under the direction of the Popular Democratic Party (PDP). Despite the achievements of the program, an amazing difference still existed between the economic situation in the continental territory of the U.S. and Puerto Rico. By the 1980's, the per capita income of the inhabitants of Puerto Rico was less than half of the per capita income of the inhabitants of the poorest state of the Union, Mississippi.[81] Other social and economic circumstances of Puerto Rico in the 1980's are evidenced by the unemployment problem, which, according to the General Accounting Office (G.A.O.) of the U.S. Congress, was of 23.5% in 1983, 15.9% in 1988 and 15% in 1994. The unemployment problem today has not improved.

However, the Tydings-McDuffie Bill promoted the solution of the status issue of the Philippines, resulting in the adoption of their own Constitution and independence. On the other hand, Hawaii was *incorporated* and, subsequently, *annexed* by the U.S. federation as a state.[82]

THE UNITED NATIONS AND THE PRINCIPLE OF SELF-DETERMINATION:

"[A]rticle 1 of the United Nations Charter (signed 26 June 1945) defines the 'Purposes' of the United Nations under four headings, of which two in particular are the maintenance of international peace and security, and the development of friendly relations among nations, based on respect for the principle of equal rights and self-determination of peoples".[83]

79. See J. Rodríguez Beruff, supra, at n. 14, pp. 60-62.
80. Ibid, p. 61.
81. See J.M. García Passalacqua; C. Rivera Lugo, tomo I, op. cit., at n. 28, p. 93.
82. Ibid, pp. 91-92, 94.
83. J. G. Starke, *Introduction to International Law*, Butterworths, London, 10th ed., 1989, p. 605.

Even though the principle of self-determination appears in articles 1 and 55 of the United Nations Charter, it is absent from Chapter XI, concerning Non-Self-Governing Territories, and Chapter XII, which established the Trusteeship System.

In setting up an International Trusteeship System, the Charter established the Trusteeship Council[84] as one of the main organs of the United Nations and assigned to it the task of supervising the administration of Trust Territories placed under the Trusteeship System. The major goals of the System were to promote the advancement of the inhabitants of Trust Territories and their progressive development towards self-government or independence.

It was contemplated that mandated territories under the League Covenant, which had not been yet ready for independence, would be placed under the trusteeship system of the U.N. Furthermore, the development of international law with regard to non-self-governing territories made the principle of self-determination extendable to the trusteeship and mandated territories, whilst at the same time the concept of "sacred trust" was expanded to cover non-self-governing territories under Chapter XI. (See I.C.J. Rep., 1971, infra, pp. 31, 33). (90-93)

The aims of the Trusteeship System have been fulfilled to such an extent that only one of the original Trusteeships[85] remained by1995: Palau, in the Pacific Islands (administered by the United States). The others, mostly in Africa and the Pacific, have attained independence, either as separate States or by *joining* neighbouring independent countries.[86]

The Trusteeship System was created to apply to a sub-category of non-self-governing territories[87], mainly covered by Chapter XI of the United Nations Charter, which establishes "the principle of international responsibility for the welfare and advancement of dependent peoples who have not yet attained a full measure of self-government".[88]

84. Chapters XII & XIII of the United Nations Charter.
85. The original territories put under the Trusteeship System were: 1) Togoland (under British administration); 2) Togoland (French); 3) Cameroons (British); 4) Cameroons (French); 5) Somaliland (Italian); 6) Western Samoa (New Zealand); 7) Tanganyika (British); 8) Ruanda-Urundi (Belgian); 9) New Guinea (Australia); 10) Nauru (under the administration of Australia on behalf of Australia, New Zealand and the United Kingdom, and 11) the Pacific Islands of Mariana, Micronesia and Marshall islands (under U.S.A. administration). *The United Nations and Decolonization, Summary of the Work of the Special Committee of Twenty-Four*, Office of Public Information, United Nations, New York, 1965, p. 2.
86. *Basic Facts About the United Nations*, United Nations Publications Department of Public Information, New York, 1993, Chapter 6.
87. Hurst Hannum, *Autonomy, Sovereignty and Self-Determination: The Accomodation of Conflicting Rights*, University of Pennsylvania Press, 1990, p. 18.
88. *The United Nations and Decolonization...*, op. cit., at n. 85, p. 2.

The Declaration Regarding Non-Self-Governing Territories, Chapter XI, lays down the responsibility of the states members of the United Nations to promote the well-being of the inhabitants of those territories through the development of self-government, taking account of the political aspirations of the peoples, and to assist them in the development of their free political institutions.[89] Based on this provision, and on Art. 76 (b) of the Trusteeship System —which seeks to enable the inhabitants of trust territories to develop their economic, social, political and educational institutions towards self-government or independence, according to "the freely expressed wishes of the peoples concerned"— the right to self-determination has been interpreted to apply as the aim of these Chapters through the holding of plebiscites.

The United Nations "has acted as a major catalyst in the evolution of 100 million people from colonial rule to independence and sovereignty".[90] The new international order has moved to a stage where "... the sovereign independent state is much more the norm than the exception...".[91]

As regards international law in general, the U. N. General Assembly (G.A.) Resolutions since *1952* have gone far towards confirming a rule that dependent peoples are entitled to self-determination.[92] The right to self-determination was for the first time included in the G. A. resolution 673 (VIII) of 16 December 1952 and *extended to cover the right to economic development on 12 December 1958,* including the right of peoples to self-determine their natural resources.

Some authors have summarized the meaning of self-determination, as it has been elaborated in several G. A. resolutions:

> "The General Assembly has stressed the importance of the universal realization of the right of peoples to self-determination and of *the speedy granting of independence* to colonial countries and peoples for the effective guarantee and observance of human rights. It has also reaffirmed the legitimacy of the struggles of peoples for independence, territorial integrity, national unity and liberation from colonial and foreign domination and occupation by all available means, including armed struggle".[93] (emphasis added).

89. U.N. Charter, Art. 73, Chapter XI.
90. *Basic Facts...*, op. cit., at n. 86, p. 4.
91. H. Hannum, op. cit., at n. 87, p. 18.
92. J. G. Starke, op. cit., at n. 83, p. 52.
93. *Basic Facts...*, op. cit., at n. 86, p. 172.

Moreover:

> "[T]here is the fact that a considerable weight of contemporary opinion, represented particularly by the newly emerged states, favours, the view that *peoples as such have* certain inalienable rights under international law, among which are the right to self-determination, the right freely to choose their political, economic and social systems, the right to dispose of the natural wealth and resources of the territory occupied by them, the right to development, the right to peace and security and the right to protection of their physical and social environment... These rights of peoples as such were recognized in the Declaration *on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the United Nations Charter,* adopted by the General Assembly in 1970, where the Declaration elaborates in detail the principle of equal rights and self-determination of peoples..."[94] (emphasis added).

THE CONSTITUTION OF 1952; THE "COMMONWEALTH":

Due to international as well as internal Puerto Rican pressure, the U. S. Congress approved an Act for constitutional government for Puerto Rico.[95]

While the United Nations claimed jurisdiction over all colonies, including Puerto Rico, according to Chapter XI Art. 73 (e) of the United Nations Charter[96], the Nationalist movement in Puerto Rico headed by Dr. Pedro Albizu Campos, became involved in an armed struggle to eliminate the U. S. colonial domination and military control over the Island. As part of the Liberation Movement acts, several armed confrontations occurred.[97]

Simultaneously, due to the poverty that prevailed in the Island, as well as to the new global hegemonic position of the U. S. during the postwar period, the principal leader of the Popular Democratic Party started to consider the industrialization and economic development of Puerto Rico as a priority, rather than the discussion of the political status. However, other legislators and political leaders of the PDP understood that the project for independence should constitute the paramount objective of the political movement.

These differences in priorities were conducive to the creation of the "Puerto Rican Independence Party" (PIP) in 1946, by Gilberto Concepción de Gracia and

94. J.G. Starke, op. cit., at n. 83, pp. 68-69.
95. Public Law 600, 64 Stat. 319 (1950).
96. Declaration Regarding Non Self-Governing Territories.
97. See information provided infra, with regard to the violent events of 1950 and 1954.

other former followers of the PDP. Their ultimate aim was to obtain the independence of Puerto Rico through the electoral process, a participation that the "Nationalist Party" was not willing to accept.[98]

Due to the struggles for authority and rivalries between the Puerto Rican Legislature and the U. S. Governor for Puerto Rico, in 1946, Jesús T. Piñero was designated by the U.S. President as the first Puerto Rican Governor in Puerto Rico.[99] Moreover, due to the internal requests for more autonomy as well as to the international pressure —concerning the U. S. Congress obligations under Art. 76 of the U. N. Charter to "promote the political advancement... of the inhabitants" of their dependent territories—[100] in 1947, Congress finally amended the Jones Act to allow the People of Puerto Rico to elect their own governor, although the main points and essence of the U. S. hegemony over the economic and all the foreign affairs of Puerto Rico remained unchanged.[101] Other amendments introduced in 1947 included the power of the Governor of Puerto Rico to appoint the Attorney General and the Instruction Commissioner, previously appointed by the U.S. President.[102]

Between 1950 and 1952, a new political formula was created under the leadership of the PDP, with the aim of achieving a greater degree of "self-government" and autonomy, and the subsequent economic and social development of Puerto Rico.[103]

Because of the great economic aid invested by the U.S. for the reconstruction of Europe after the Second World War[104] (1951), within other reasons, the PDP

98. F. Picó, op. cit., at n. 9, p. 253.
99. See H. Wells, op. cit., at n. 13, pp. 112-115, regarding the way in which the Puerto Rican Legislature made full use of their prerogatives under the Jones Act to limit in this way the U.S.- appointed Executive Branch authority.
100. Ibid, p. 203.
101. Ibid, footnote #10, Chapter 9, regarding the lack of promotion given to the amendments by the Independence Party, due to their belief that it was a U.S. strategy to perpetuate the colonial status quo of Puerto Rico. Moreover, even Luis Muñoz Marín, while expressing his approval to the amendments, did not give all the necessary support to them, under the belief that once those prerogatives were attained, it would be more difficult to get a more complete autonomy. In November, 1948, Luis Muñoz Marín became the first governor elected by the people, as the President of the Popular Democratic Party. The Independence Party was the second most favored at those elections. (See Ibid, pp. 112-115).
102. Ibid, p. 204.
103. According to M. Weber, in the process of legitimizing power, there is a substantive difference between accepting a situation and being satisfied with it. It can happen that a situation of subordination can be accepted and "legitimized", due to an existential necessity and/or to a feeling of weakness or impotency before the superior power, *but not because its validity is recognized by the subordinated people*. See M. Weber, *The Theory of Social and Economic Organization* (New York, Oxford University Press, 1947) as cited by Gerardo Navas Dávila, op. cit., at n. 53, p. 7, footnote #11.
104. "The Marshall Plan".

completely changed its original political ideology and started the promotion of an autonomic regime, in permanent union with the United States.

However, the "new" political status did not change the essence of the previous political and economic relations with the U.S. Therefore, no possibilities of a real economic development of the Island were available, owing to the perpetuation of the Island's financial dependence on the United States and its economic exploitation as one of the main trade markets of the latter.

Due to the constitutional process promoted by the PDP, another revolutionary movement exploded in various towns across the Island, directed by the "Puerto Rican Nationalist Party", and took over the town of Jayuya during the end of the month of October and November. All policemen of Jayuya were killed during the struggle and after that, almost all the known members of the "Nationalist Party" were arrested, including members of the P. I. P. and other believers in the independence of Puerto Rico belonging to other political associations not affiliated to the "Nationalist Party".[105]

As part of the revolutionaries' operations, there was also an attempt by two Nationalists —Oscar Collazo and Griselio Torresola— to bring the struggle to the U.S. territory and kill President Harry Truman at the Blair House, his temporary residence. During the attack, one policeman was killed, as well as one of the Nationalists, Griselio Torresola. Oscar Collazo was arrested and sentenced to the death penalty, which was commuted afterwards to life imprisonment.

These events provoked the speedy process initiated by the U.S. government to take Puerto Rico out of the United Nations' list of colonial countries, whilst the political persecution against the independence and liberation movement in Puerto Rico was reinforced, not only by the Federal agencies, but also by the local government. Consequently, the relationship between the independence movement and the PDP deeply deteriorated.[106]

The revolution of 1950 took place at a historical moment, when the U. N. Charter had been adopted, and when Liberation Movements started to be recognized

105. See *Civil Rights Commission Report on Discrimination and Political Persecution...*, supra, at n. 5, p. 315, where according to the testimony of José Trías Monge (former Secretary of Justice and former Chief Justice of the Puerto Rican Supreme Court) and Vicente Géigel Polanco (Ex-Attorney General) the former governor of Puerto Rico, Luis Muñoz Marín, issued the arrest warrants against all the members of the Nationalist movement, according to the "lists" created under former Governor Blanton Winship.
106. *Newspaper Compilation 'Revolutionary Action', Puerto Rican Nationalist Party Directed by Pedro Albizu Campos, 1950-1954*. See also F. Picó, op. cit., at n. 9, pp. 257-258.

and supported by the international community as legitimate means to fight against colonialism.[107]

After the 1960's, the liberation movement of Puerto Rico took different forms of expression, most of them using violence to protest against the U.S. political and military presence in the Island. However, after the 1950's strong active manifestations and "declaration of war" of the "Nationalist Party" to the U.S. government, the movement has been fragmented in different organizations, acting separately, due in part to several disagreements among their leaders, but mainly to the U. S. "intelligence" work among them.[108]

Public Law 600 (1950):

On July 3, 1950, the U. S. government passed another legislative act providing for a constitutional government for Puerto Rico.[109] After an intensive public debate in the Island, the People of Puerto Rico accepted the Act in a referendum held on June 4, 1951. In this referendum, the total number of voters was calculated at 781, 914. From this number, 506, 185 exercised their right to vote; 387,016 voted for Public Law 600 and 119,169 against it.[110] The number of abstentions, 275,729, or of people that could not participate in the electoral process for other reasons[111] —without including part of the Puerto Rican population living in the United States which has never been able to participate in the referendums held in Puerto Rico until now—, was even larger than the votes against the adoption of the Act. If we take both sectors into consideration —the abstentions and the votes against—, we can see that Public Law 600 was approved with less than 50% of the voters at that time; 394,898 against 387,016 in favor (only a 65.1% of the qualified and inscribed voters participated)[112]. As we have seen, there were strong

107. *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field,* Art. 13 (2) a, b, c, d; *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick and Shipwrecked Members of Armed Forces at the Sea,* Art. 13 (2) a,b,c,d; *Geneva Convention Relative to the Treatment of Prisoners of War,* Art. 4(2) a, b, c, d. August 12, 1949, International Committee of the Red Cross, Geneva, Switzerland.

108. See the January 29, 1989 *Decision of the Permanent People's Tribunal, Barcelona:* "In the 1960's, the U.S. FBI implemented a counter-intelligence program (COINTELPRO) to disrupt and neutralize the movement for independence. Deliberate confusion and disruption was planned by undercover agents who penetrated these Puerto Rican political groups.

109. 64 Stat. 314 (1950), supra, at n. 95.

110. Sara del Valle, *Plebiscitos y referendos celebrados en Puerto Rico,* Claridad newspaper, October 8-14, 1993.

111. Most members of the Nationalist Party were in jail due to the issuance of a general arrest warrant against all its members after the "Revolution of Jayuya" in 1950. Moreover, the decision taken by the Puerto Rican Nationalist Party after the 1930's was of abstention in the colonial electoral process.

112. H. Wells, op. cit., at n. 13, p. 268.

reasons for the abstention, while other groups considered that it was an obligation to participate in the electoral process as the only way to express their political will. As a matter of fact, the "Nationalist Party" opted for abstention in any kind of colonial electoral process until the achievement of independence or until full recognition or the transference of sovereign powers would be granted to the People of Puerto Rico.[113]

During the 1950's, the liberation movement activities increased as a reaction to the political deals made by the PDP leaders in Washington, and to get the attention of the international community to intervene in the defense of the decolonization process of Puerto Rico.

The main issues raised by P. L. 600 concerned the real recognition of capacity, authority or necessary sovereign powers that the U. S. Congress was granting to the People of Puerto Rico to write and adopt its own constitution.[114]

Under Section 1, the U. S. Congress recognized the principle of the government by the consent of the people, and stated that this law was created "in the nature of a compact", allowing the People of P.R. to organize a government based on a Constitution approved by themselves. However, Section 3 stated that, once the Constitution was approved by the People of Puerto Rico, it had to be submitted to the President of the United States and the Congress for its final approval.

Moreover, while the previous Jones Act regulated the colonial[115] political and economic relations with the U. S. since 1917, section 4 of Public Law 600 provided that *all the provisions of the Jones Act that governed the Political and Economic relations between P..R. and the U. S. shall subsist. They would be known as the "Puerto Rican Federal Relations Act".* What this really meant was that the economic and political relations between Puerto Rico and the United States would remain the same.[116] A brief summary of the nature of those relations was published in "El Mundo" newspaper on May 19, 1951, which we reproduce here:

113. Abstention in an electoral process can be explained by different reasons. Within them, is the freedom to decide not to participate in the State or/and governmental affairs. Abstention, as a movement, is a political action to express different kinds of objections, or the lack of legitimacy of an electoral process. The prerrogative to participate in an electoral process is a right, rather than a duty, as it is often considered. Also the blank vote is considered as a lesser degree of abstention, but while expressing a disagreement with the political alternatives presented, it is an indirect ratification of the legitimacy of the electoral process. The first data available after an electoral process is the amount of participants and abstentions. However, according to different political points of view abstentions are always interpreted in different ways. See Eduardo Haro Tegglen, *Political Dictionary,* 1st ed., Spain, Duplex S.A., 1995, pp. 29-30.

114. V. Géigel Polanco, op. cit., at n. 58, p. 18.

115. See insular cases, where the U.S. Supreme Court stated the non-incorporated character of Puerto Rico under the "Territory Clause" of the U.S. Constitution.

116. V. Géigel Polanco, op. cit., at n. 58, pp. 19-21. Congressmen Aspinal, Donovan, Fernández and Crawford, among others, objected to an amendment proposed to include a clear language in the text of

1. The U. S. will keep its sovereignty over P. R., according to the Treaty of Paris.
2. That P. R. is still a Territorial Possession of the U. S. (Section 1 of Puerto Rican Federal Relations Act.)
3. P. R. is still under the power of Congress by virtue of Art. IV, section 3, parg. 2, U. S. Constitution. (Territory Clause).
4. P. R. is still under the Tariffs & Duties Laws of the U.S.[117]
5. P. R. is not allowed to enter into commercial agreements without the authorization of the U. S. Congress.
6. P. R. is under the Cabotage Laws of the Federal Government. It is obliged to use ships with the U. S. flag in its commercial relations.[118]
7. Free commerce between both countries.
8. Natural inhabitants of P. R. will continue to be U. S. citizens.
9. Earnings from federal taxes to Puerto Rican products exported to the U. S. like rum, cigarettes, etc., and earnings of customs or douane over products imported by P. R. will be given to the Treasury of P. R.

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the Constitution regarding the real powers that such an instrument would give to the People of Puerto Rico. Their position was that secs. 1,2,5,9 & 10 of the P.R.F.R.A. made clear the real powers of the U.S. Congress over Puerto Rican affairs. Therefore, it was not necessary to include it in the Body of P.L. 600 or the Constitution. See ibid, pp. 112-115.

117. Some authors have described the relation as one of monopoly with the Puerto Rican market, in which Puerto Rico is obliged to import to the Island only products originated from the U.S. market, at higher prices, and without any foreign competition for the U.S. industries and manufactures. See Géigel Polanco, Ibid, p. 63.

118. Ibid. This also constitutes higher expenditures for the Government of P.R., eliminating any kind of foreign competition with cheaper transportation conditions. Under this political status, the economic relations with the United States are still basically the same that exist since 1917, which include provisions extended to Puerto Rico since 1900, when the first Organic Act was created to provide a civil government to the Island. As we have said before, this group of laws that rule the present economic and political relations with the U.S. is known as the "Puerto Rican Federal Relations Act". One of the provisions of the P.R.F.R.A. that has a considerable negative impact upon the Puerto Rican economy is the "Cabotage Law", which applies to the Island since the adoption of the Foraker Act in 1900, as part of the protectionist policies of the U.S. towards its commerce. According to this legislation, all Puerto Rican commercial maritime transportation has to be carried out using transports from the United States, which are more expensive than others.

If the Cabotage Law did not apply to Puerto Rico,maritime transportation costs would decrease by40%. This means that the Puerto Rican economy would save approximately $250,000,000 - $300,000,000 per year. Moreover, the cost of Puerto Rican exports would decrease in $150,000,000 per year, thus increasing the competitiveness of our products in the international market. In 1936, the U.S. Virgin Islands were excluded from the application of these provisions, precisely to enable the economic growth of these territories. See *Resolution of the Puerto Rican House of Representatives Num. 35 of February 14, 1994 requesting the U.S. Congress to exclude Puerto Rico from the scope of application of the federal legislation known as the "Cabotage Law"*, presented by Legislator David Noriega Rodríguez.

10. The sugar industry will be subject to the quotas or the maximum fixed by the U.S. Congress.[119]
11. The sugar refinement industry is limited as well, just for local consumption, the rest was processed at the U. S. industries (problems of unemployment).[120]
12. P. R. shall be subject to a great number of federal laws related to:
    a. Labour Law on maximum hours and minimum wage.
    b. Selective Military Service.[121]
    c. Welfare for studies, agricultural development and construction of infrastructure.
13. That the Federal District Court remained operating in Puerto Rico.
14. That P. R. will continue under the Judicial System of the U. S.; this means that the decisions of our Supreme Court can be reviewed by the First Circuit in Boston and by the U. S. Supreme Court.
15. All governmental employees have to be U. S. citizens and ratify their loyalty to the U.S. and the P. R. Constitution.
16. The right of the People of Puerto Rico to elect and send a Resident Commisioner every four years, without the right to vote at the U.S. Congress.
17. P. R. will be subject to the U.S. currency and postal services. The Constitution of 1952 had to be in accordance with these provisions.[122]

While some sectors in Puerto Rico believed that Public Law 600 was a real opportunity for the acquisition of more liberties and self-government under a constitutional status, there were others that only could see an attempt of the U.S. government to perpetuate the former political and fiscal relations between both nations.[123]

The legal basis for the arguments of the latter group was that Public Law 600 did not recognize the necessary sovereign powers to Puerto Ricans to adopt their

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119. Ibid, p. 65. In this way, the U.S. limited the capacity of production of our biggest and basic industry. The production was of 1 1/2 millions tons and the quota fixed for 16 years, until 1972 was 953,000 tons.

120. Ibid.

121. See case of *U.S. v. Feliciano Grafals,* 309 F. Supp. 1292 (1970), as cited by R. Serrano Geyls, op. cit., at n. 62, p. 524-528, regarding military service, where the judge, after a deep reflection about the conscientious objection based on political beliefs, decided to impose a sentence of only one hour imprisoned.

122. V. Géigel Polanco, op. cit., at n. 58, pp. 22-25.

123. See the statistics about the percentage of voters that participated in the process and the result of the referendum.

own Constitution. Consequently, without sovereignty, it was not legally possible to adopt an authentic Constitution, which should be a result of the sovereign will of the People. Moreover, this sector held that, without sovereign powers, the People of Puerto Rico lacked the necessary legal personality to get into a bilateral agreement of this nature, a "compact", and consequently would not be able to call upon the international forums for the fulfillment of the "compact".[124]

Furthermore, the scope of the phrase "in the nature of a compact" contained in the P.L. 600 was never expressly clarified or discussed at the U. S. Congressional Hearings, neither by the representatives of the U. S. government nor by the representatives of Puerto Rico[125], although the PDP leaders have always affirmed that the 1952 Constitution was the result of a bilateral compact that can be modified only by a mutual agreement and not unilaterally. Some of the expressions made by members of the U. S. executive branch support the idea of the "bilateral compact", which could be modified only by mutual consent.[126] That was one of the reasons taken into consideration by the United Nations General Assembly to take Puerto Rico out of the list of colonial countries. However, as we will see, these arguments and interpretations have been rejected not only by the U. S. Supreme Court, but also by the U. S. Congress during the process of negotiation of a new plebiscite during the period 1989-1990.[127] The situation is still the same while the Young Draft Legislation has been under discussion. In addition, the Executive Branch, represented by Jeffrey Farow, has recently confirmed the view of the other two governmental branches concerning the unincorporated territorial character of Puerto Rico, subject to the "plenary powers" of U.S. Congress by virtue of the U.S. Constitution's "Territory Clause".

According to the results of the 1951 referendum, a Constitutional Convention was organized in Puerto Rico with the objective of drafting the new Constitution. The Constitutional Convention worked on the draft constitution from September 1951 until February 1952.[128]

Because of it's non-recognition of legitimacy to the process, the Independence Party (PIP) decided to abstain.[129] On March 3, 1952 a new referendum was held in Puerto Rico for the final approval, by the People of Puerto Rico, of their new Constitution. In this second referendum, the total number of potential qualified voters was calculated at 781,914.[130] From this number, 457,572 exercised their

124. V. Géigel Polanco, op. cit., at n. 58, p. 27.
125. H. Wells, op. cit., at n. 13, p. 251.
126. J.M. García Passalacqua; C. Rivera Lugo, tomo I, op. cit., at n. 28, p. 243.
127. Ibid, pp. 81-82.
128. Sara del Valle, supra, at n. 110.
129. F. Picó, op. cit., at n. 9, p. 260.
130. The same number that were registered in the 1951 referendum.

right to vote;[131] 374,649 voted for the Constitution and 82,923 against it.[132] The number of abstentions in this process was 324,342. It was, again, larger than the votes against the adoption of the Act. The abstention, together with the votes against, was again larger than the votes in favor. The new Constitution was approved with less than 50% of the voters registered at that time[133], just like P. L. 600. Moreover, while the previous referendum had a 65.1% rate of participation, in this one participation decreased to 59%.[134]

In that same year, the local elections were held in Puerto Rico. In these elections, the Independence Party (PIP) obtained the second place with 16% of the total voters, following the PDP as the winner with a 65%, and the "Coalition" with only 11%.[135]

Public Law 447 (1952):

After the approval of the Constitution by the will of the majority of the participants, the document was submitted back to the U. S. Congress for its consideration and approval. It was modified by that legislative body and, with those modifications, sent back to the Constituent Convention of P. R. for their final approval, despite the previous expressions of Luis Muñoz Marín that the Constitution could not be modified unilaterally by the U. S. Congress.

The most dramatic alteration of the text was the complete elimination of section 20, Art. II, the Bill of Rights, which was drafted in accordance with the Universal Declaration of Human Rights and included an enumeration of paramount economic and social rights as fundamental rights.[136]

Because of the amendments made by the U. S. Congress[137], the adoption of the new Constitution was strongly criticized by one of the most liberal Congressmen,

131. There was a reduction, or abstention, of 48,613 voters, in comparison with the previous plebiscite. Approximately 58 or 59% of the registered voters participated.
132. Sara del Valle, supra, at n. 110, p. 9.
133. A study of the people that could exercise their right to vote at that moment, but that refused to be registered in the colonial electoral process of the Island is not available. Others interpret the results in a more optimistic way, arguing that the Constitution was ratified by 81% of the voters, see H. Wells, op. cit., at n. 13, p. 210. According to this author, the previous referendum for the approval of P.L. 600 shows that it was ratified by 76.5% of the voters. Ibid, p. 209.
134. Ibid, p. 268 Notwithstanding this fact, some specialists consider as more important that the Constitution was ratified by 81% of the *participants*. (Ibid, p. 210).
135. Ibid, p. 213. For further details about the reduction of the independence movement, see the sub-chapter about political repression in Puerto Rico.
136. Constitution of Puerto Rico, Art. II, secc. 20; and Géigel Polanco, op. cit., at n. 58, pp. 80-81.
137. 66 Stat. 327 (1952); P.L. 447.

Vito Marcantonio from New York, who favored independence for Puerto Rico.[138]

The most important changes under the new Constitution were that the Governor of P. R., elected by the People of Puerto Rico since 1948 —four years before the adoption of the 1952 Constitution— was authorized to appoint the judges of the Puerto Rican Supreme Court and the Contralor (Auditor); the Senate, from 19 members was enlarged to 27, and the House of Representatives, from 39 to 51. It also eliminated section 34 of the Jones Act, that provided for the Congressional revision of the Puerto Rican legislation and for the Presidential approval or disapproval of the veto power that could be exercised by the Puerto Rican Governor regarding local legislation.[139] Under the new Constitution, the U.S. citizenship as a requirement to vote in the local elections (sec. 35 of the Jones Act) ceased to exist, according to the changes made in the P.L. 600. Other changes for the internal administration of the government were allowed, but the basis of the economic and political relations between both countries remained unchanged; the P. R. F. R. A. Furthermore, even though the Constitution has not been amended by the U.S. Congress after being ratified by the Constitutional Convention, the same cannot be said about the P. R. F. R. A. See also changes made to sec. 936 recently by the U.S. Congress.

The new Constitution, however, did not close the doors for a future "integration" or recognition of independence to the People of Puerto Rico...[140], but, after its adoption, the case of Puerto Rico was taken out of the list of remaining non-self-governing territories, and the U. S. stopped giving reports to the U. N. under Chapter XI, Art. 73 (e), regarding the administration of Puerto Rico. It was a very well designed legal process to make the People of Puerto Rico give their consent to a colonial situation very similar to the one prevalent before 1950. Notwithstanding the interpretation given to the referendum results by the U. S. government and the majority political party in Puerto Rico, these political and economic relations with the U. S. have been always rejected by the majority of the People of Puerto Rico.[141]

138. Félix Ojeda Reyes (ed.), *Vito Marcantonio y Puerto Rico: Por los trabajadores y por la nación* (Río Piedras: Ediciones Huracán, 1978), as cited by F. Picó, op. cit., at n. 9, p. 260, at footnote #11.

139. H. Wells, op. cit., at n. 13, p. 210.

140. F. Picó, op. cit., at n. 9, p. 260. See also H. Wells, ibid, p. 242, regarding the position of Luis Muñoz Marín before 1956.

141. A. Guevara, supra, at n. 21, p. 34; (Position sustained at the present by both the independence and annexation or "statehood" political parties, which agree only in one point: that the actual political situation of the Island has not changed since 1900; a non-incorporated territory of the U.S. according to the most recent U.S. Supreme Court decisions). Moreover, *even the PDP has been trying without any success to promote a different form of agreement with the U.S., an "Enhanced Commonwealth"*. The U.S. Congress has never accepted its petitions and proposals.

According to the political status created by virtue of the Constitution, the government of Puerto Rico does not have the authority in practice to deal either with its own political foreign affairs or with economic relations with foreign countries, without the previous authorization of the U. S. Congress. These matters are decided by the U. S. Congress; the only representation of Puerto Ricans before Congress is a Resident Commissioner, who is sent to Washington every four years, but does not have any considerable powers and lacks the right to vote, in order to be able to affect any decision regarding Puerto Rico.

By this period, the independence movement in P. R. was larger than the one claiming for annexation[142]; The majority political party was the Popular Democratic Party, which got many votes from the independence movement after the political campaign of 1948. Ten years later, by 1958, the Independence Party (P. I. P.) was divided, due to some internal disagreements. As a result of these disruptions, the Pro-Independence Movement (M. P. I.)[143] was created, which later, in 1971, became the Puerto Rican Socialist Party (P.S.P.), clearly and openly identified with the victory of the Cuban Revolution of 1959.

THE CONCEPT OF SELF-DETERMINATION

There are different interpretations of the term self-determination. Two aspects of the concept have been elaborated, understanding of which is crucial. One is related to the concept of democracy, recently denominated "internal self-determination", that is to say, "the right of a state's population to determine its form of government, sometimes extended to include democratization or majority

142. Rubén Berríos Martínez, *Puerto Rico and the United States, A Conflict Between Two Nationalities*, January 30, 1991. While the voting power of the annexation movement was approximately 15% in 1950, it is getting close to 50% at the present.

143. H. Wells, op. cit., at n. 13, p. 341, describing the MPI as a political entity which in the mid 1960's was openly identified with the Cuban Revolution, promoting the armed upheaval as the only way to change the political relations between Puerto Rico and the United States. The movement declared itself as part of the Marxist-Leninist Latin American movement, and during 1967-68, several attacks with incendiary bombs againts supermarkets, department stores and other U.S. enterprises, were reported; However, there is enough evidence supporting the fact that even though a big part of the attacks were committed by the revolutionary movement, many of them were also organized by the Police Department of Puerto Rico in coordination sometimes with Federal agencies, to eliminate the leftist opposition through defamatory tactics, framing up its members and leaders to imprison and murder them. (See sub-chapter on political repression; All this evidence comes from the direct testimony of Puerto Rican police officers during the legislative investigations of 1987, regarding the murder of two independentists young men at "El Cerro Maravilla" in 1978, and the subsequent cover-up legislative investigations of 1992). See Vistas sobre los sucesos del Cerro Maravilla; Comisión de lo Jurídico del Senado, 24 de octubre de 1991- 11 de diciembre de 1991; 28 de enero de 1992- 30 de abril de 1992.

rule, and sometimes called internal self-determination". The other one is related to the Right to Development: "the right of a state or of a state's population, especially claimed by the developing countries, to cultural, social and economic development".[144]

Among the different aspects elaborated concerning the meaning of the term self-determination, "political decolonization and territorial integrity can be given as examples of (external) self-determination, categories which have... definitely emerged as *rules of law* binding upon states".[145] (emphasis added).

In order to achieve a satisfactory solution to the present issue of colonialism, it is of paramount importance to take an overview of the origins of the right to self-determination, to determine how it could be implemented in our days.

There is no question about the inalienable character of the principle, yet there is a problem regarding the meaning given by different authors and international organizations to the concept of "self-determination".

An indispensable factor for the best understanding of the decolonization movement through the exercise of the right to self-determination is the development of the political doctrines of Peoples Sovereignty, the National State and State Sovereignty.

Indeed, the central focus of the concept is "the sovereignty of a people as a nation, concerning the status of national units within the international system and the style of international relations".[146] Despite the world integration trends, and the elaborated theories about the transformation of the international organization based on the principle of equal sovereignty of states[147], the *Nation-State* and the importance of the principle of state sovereignty are far from obsolete in our times.

Moreover, the organization of the United Nations is based upon "...the principle of the sovereign equality of all its members"[148], and even considering the efforts made by several states to strenghten their economies through different kinds of regional agreements, it has been very difficult to attain unitary systems through the cession of the state sovereignty to a supranational unit[149], unless

144. Gudmundur Alfredsson, *Greenland and the Law of Political Decolonization,* 25 German Yearbook of International Law 290, p. 294, Duncker & Humbolt, Berlin, 1982.
145. Ibid, p. 295.
146. Harold S. Johnson, *Self-Determination within the Community of Nations,* A.W. Sijthoff, Leyden, 1967, p. 7.
147. Joseph A. Camilleri; Jim Falk, *The End of Sovereignty? The Politics of a Shrinking and Fragmenting World,* Billing and Sons Ltd, Worcester, 1992, pp. 312.
148. U.N. Charter, Art. 2(1), Chapter I.
149. See the case of the European Union, where, notwithstanding the efforts made, it is still far from constituting a federation or unitary state, and even if stronger agreements are achieved in the future, they would never give up their sovereign powers and representation at the United Nations and other international organizations.

cultural similitudes together with common political interests exist among them. Indeed, these allegiances have been organized upon the basis of each state's sovereign authority[150], notwithstanding the wording concerning the cession of "part of their sovereignty"[151] included in the international agreements concerned.

While considering the emerging ethnic and national movements in East Europe after the break-down of the U. S. S. R., the current international view of those conflicts is mainly directed towards the recognition of sovereignty and the possible creation of confederated states, as a form of integration which, while respecting the principle of national sovereignty, gives these emerging states the opportunity to get into special agreements for their common benefits. As stressed by Professor Gudmundur Alfredsson[152], "there are still... only indications of change in the traditional way of doing business, and both trends towards integration and separation are countered and even overwhelmed in international forums by strong support for maintaining the existing nation-states".

In an era when there are still multiple peoples under colonial rule, as in the case of Puerto Rico, it is even more difficult to talk about the end of the Nation State as a political organization of the world, where some peoples would be integrated into some form of economic blocks without taking note of their economic, social, cultural and political interests. There is a new era of national and minority movements that we have to deal with in order to promote international peace[153], finding acceptable solutions for them as well as for the remaining cases of the last decolonization period.

The principle of self-determination was developed by national groups "... as a natural corollary of developing nationalism in the eighteenth and nineteenth centuries"[154] and national-self-determination has become the crucial link between the doctrine of nationalism and the institution of the Nation-State.[155]

The Modern State:

"In the seventeenth century in England, and then in France during the Revolution of 1789, the state ceased to be the King's state (a period when the state

150. See H. Hannum, op. cit., at n. 87, p. 22.
151. According to Rousseau, the sovereignty of the people (and consequentely the state sovereignty) is indivisible and inalienable.
152. Officer at the Centre for Human Rights of the United Nations in Geneva, Switzerland. G. Alfredsson, *The Right to Self-Determination and Indigenous Peoples, at C. Tomuschat (ed.). Modern Law of Self-Determination,* Dordrecht Kluwer Publisher, 1993, p. 48.
153. H. Hannum, op. cit, at n. 87, pp. 1-13.
154. Ibid, p. 27.
155. H.S. Johnson, op. cit., at n. 146, p. 11.

preceded the nation); it became the people's".[156] *"The nation and people were one,* and as one, became responsible for the destiny of the state".[157] While during the 19th century in Europe and America "the people have identified themselves as the nation", in the 20th century the same current has covered Asia, Africa[158] and the Caribbean and Pacific nations which have not attained independence from their colonial rule.

The right to self-determination is strongly related to the philosphy of human dignity, equality and freedom, present in the development of human rights since the adoption of the "...British Bill of Rights (1690-1691), the American Declaration of Independence (1776), and the French Declaration on the Rights of Man and the Citizens (1779)".[159]

Indeed it is an irony for the People of Puerto Rico and for those who believe in the principles of liberty, equality and democracy, that "the American Revolution was the product of anti-colonialist forces and one of the first exercises of the right to self-determination in the history of humankind"[160], or at least since the beginning of the Nation-State world organization.

After the French Revolution —"the birth of the popular sovereignty"— the sovereign power of the Monarch was transfered to the people and moreover, "the unit in which this sovereignty was to be operative was the nation".[161] "The notion emerges that the people should not be subordinated to anyone except themselves: the sovereignty of the people became a framework for the elaboration of human rights".[162]

"It was as a nation that people were to consent to be governed. If people were sovereign as a nation, they had to be free to form their own state and each state had to be free to establish its own government".[163] (emphasis added).

According to the doctrine of "people's sovereignty", the will of the people was understood as to be exercised within the national borders, to elect their governments democratically as sovereign states. Hence, this meant that a necessary condition for the respect of the peoples' sovereignty was the existence of the nation as a sovereign state. In this line, no democracy would be possible without

156. Ibid, p. 21.
157. Ibid.
158.Ibid.
159. A. Eide, *Economic, Social and Cultural Rights* as Human Rights, at A. Eide; C. Krause; A. Rosas, *Economic Social and Cultural Rights,* op. cit., at n. 7, p. 25.
160. C. Gorrín Peralta, supra, at n. 25, p. 32.
161. H.S. Johnson, op. cit., p. 146.
162. A. Eide, *supra,* at A. Eide; C. Krause; A. Rosas, op. cit., at n. 7, p. 25.
163. H. S. Johnson, op. cit., at n. 146, p. 25.

the previous recognition of the national state sovereignty. "Rousseau found in the nation an institution for popular sovereignty".[164]

> In his view, it was only to such a community that people could give their consent and still mantain their liberty while accepting the necessity of political society... The nation embodied a 'general will', by definition devoted to the common interest, which provided a moral foundation for political society... In giving their consent, the people were sovereign... It was only through the nation that the general will could be made known and that the individual could remain free in society.[165]

In the same context, some authors have stated that "it was 'a necessary condition of free institutions, that the boundaries of governments should coincide in the main with those of nationalities' ".[166] Therefore, it was reiterated that democracy depends on the nation[167]; on the state sovereignty.

Sovereignty has been equated with independence by several authors, it is to say "... the fundamental authority of a state to exercise its powers without being subservient to any outside authority".[168]

The Principle during the First World War:

During the First World War the right to self-determination was interpretated by most of the Allies as "the right of a people to determine the sovereignty over the territory in which they live".[169] Moreover, it was considered as a collective rather than as an individual right, "extended to a people who assumed their existence as an identifiable unit".[170] "Freedom of choice was synonymous with self-government (rather than with self-determination) and meant the right of a group to determine the extent of its own government (as the internal process in which the people's sovereignty operates within the framework of the state) or the form its allegiance to any sovereign authority would take".[171]

164. Ibid.
165. Ibid, pp. 25-26.
166. See Coban, *National Self-determination,* p. 65, quoting John Stuart Mill, *Consideration on Representative Government,* 1861, Ch. XVI, as cited by H.S. Johnson, ibid, p. 26.
167. H.S. Johnson, ibid, p. 26
168. H. Hannum, op. cit., at n. 87, p. 15, footnote #30.
169. H.S. Johnson, op. cit., at n. 146, p. 32.
170. Ibid.
171. Ibid, pp. 32-33.

According to these conceptions of the principle of self-determination and the complementary character of the democratic doctrine, the principle was understood as a collective right of a people to create their own state, where the people's sovereignty could be freely exercised to enable the individuals to choose the economic, social and political systems of their preference.

Although the concept gives room for the creation of allegiances with other sovereign authorities, those allegiances should be based on mutual respect, *never allowing the main problem which the principle came to solve*: the subjugation of a people to any kind of colonial domination or unequal treatment. In other words, it would be a futile exercise of the right to self-determination, if it finally resulted in the same deficiencies that it came to resolve —lack of respect, of democracy and of the right to exist and to be recognized as a different cultural entity—, notwithstanding the reasons for such a result.

However, before the U. S. government got involved in the First World War, on May 27, 1916, President Woodrow Wilson, while apparently affirming the principle of self-determination in several statements, opened the door for a possible benefit for the Allies based on the same right, when he "proclaimed that 'every people has the right to choose the sovereignty *under which* they shall live'".[172] (emphasis added).

"On January 22, 1917, in a message to the Senate, he stated that:

> No peace can last or ought to last, which does not recognize and accept the principle that governments derive all their just powers from the consent of the governed and that no right anywhere exists to hand people about from sovereignty to sovereignty as if they were *property*.[173] (emphasis added).

Notwithstanding the previous expressions, in 1917 Puerto Rico had been under the colonial power of the United States since 1898, and ruled according to the provisions of the U. S. Constitution "Territory Clause", under which Puerto Rico became "appurtenant and belonging to the United States, but not a part of the United States".[174] It was considered a property of the United States.

Despite the fact that Wilson's expressions promoted the principle of self-determination, "his fourteen points do not refer to a right of self-determination... They contain no statement that the people themselves shall choose their own sovereignty".[175] The interpretation finally given to the principle of self-

172. See U.S. Congressional Record, LIII, Part 9, 8854 as cited in H.S. Johnson, ibid, p. 33, footnote #5.
173. See U.S. Congressional Record, LIV, Part 2, 1792, as cited in H.S. Johnson, ibid, p.33, footnote #6.
174. See *Downes V. Bidwell*, supra, at n. 99.
175. H.S. Johnson, op. cit., at n. 146, p. 33.

determination during this period by the biggest economic, military and political powers, such as an emerging U. S., was carefully elaborated to have it vested of "democratic" attributes, which would provide the possibilities to legitimize the domination of one people by another, once the administering powers would obtain their consent. Among the four points addressed to the U. S. Congress on February 11, 1918, Wilson stated:

> 'National aspirations must be respected, *peoples may now be* ***dominated*** *and governed only by their consent.* 'Self-determination' is not a mere phrase. It is an **imperative** principle of action, which statesmen will hence forth ignore at their peril'[176] (emphasis added).

The definition then given to the concept of self-determination included "political rights, political participation, elections and popular participation..." which "... are also referred to as internal self-determination". Although these rights are necessary to enable peoples to develop a democratic society where all other individual rights could be respected for all[177], they should be called by their proper names under the provisions of international instruments concerning individual rights, rather than mixing them with the concept of external self-determination or political decolonization. These rights as a democratic entitlement are more related to the first Two Generations of individual rights, rather than to the Collective Rights Generation, ie., Solidarity Rights or Right to Development.

The equation of self-determination with democracy, as the philosophical underpinning of the Wilsonian principles, could also be interpreted as referring to the participation of the people in the internal government on a democratic basis. "If self-determination is 'an expression in succint form, of the aspiration to rule one's self and not to be ruled by others', then this self rule implies meaningful participation in the process of government".[178] This was how self-determination started to be considered as the basis of democracy.

Despite the inclusion of the principle of self-determination, as understood by Woodrow Wilson in his first and second drafts of the League Covenant, it did not

176. Ibid, taken from U.S. Congressional Record, LVI, Part 2, 1952.
177. "[R]epresentative democracy, good governance, public accountability, free and open participation... equality, non-discrimination, dignity, identity, tolerance... and other political rights". See G. Alfredsson, *Different Forms if any of the Right to Self-Determination; Speaking Notes for the Martin Ennals Memorial Symposium on Self-Determination*, University of Saskatchewan, March 1993, pp. 4-5, where the author states the same problem regarding the implications of granting these democratic individual rights to some groups or minorities under the label of "internal self-determination".
178. H. Hannum, op. cit., at n. 87, p. 30.

find a place in the final draft.[179] Nevertheless, according to some authors, it was indirectly supported by the *Mandate System* and the concern for the protection of national minorities.[180]

"It was not until the peace settlement of 1919 that a principle was recognized that a dispute over a territory ought to be resolved on the basis of its nationality...", where the voters should express their preference.[181]

Yet, "in no case was national self-determination recognized to the detriment of the victorious Allies..." It has been described as "... not a means to justify what the Allies had taken, but only what they might hope to take".[182]

By the year 1919, self-determination was more concerned "... with the geopolitical and strategic interests of the Great Powers..." rather than with the demands of the peoples. In the same context, no plebiscites were conducted in many cases as a means of self-determination after the disintegration of the Austro-Hungarian and Ottoman empires. Self-Determination was understood as a legal vehicle to re-define and recognize as sovereign states the "nations" comprehended within the territory of the former empires. However, it was not yet considered to be extended to the overseas colonies.[183]

The New International Order after the Second World War:

"There still remains some difficulty as to what the expression 'self-determination' itself means, or includes. Some writers decline to treat it as a right of an absolute nature, stressing that it must be considered within the context of the people or group demanding to exercise it." According to these authors, "[p]resumably, it connotes freedom of choice to be exercised by a dependent people through a plebiscite or some other method of ascertainment of the people's wishes".[184]

Although the right to self-determination does not appear in the Atlantic Charter, it is suggested as the " 'desire to see no territorial changes that do not

179. See ibid, p. 29.
180. H.S. Johnson, op. cit., at n. 146, pp. 33-34.
181. Ibid, p. 129.
182. Ibid, p. 34. See also T. Franck, *The Emerging Right to Democratic Governance,* 86 The American Journal of International Law 47, p. 53, (1992), where the author expressed that "Wilson reluctantly came to concede that sometimes one had to consider 'other principles' —strategic, economic and logistic— that could 'clash with the requirements of self-determination". [citing from M. Pomerance, Self-Determination in Law and Practice 4 (1982); D. Fleming, The United States and World Organization, 152-55 (1938).]
183. See H. Hannum, op. cit., at n. 87, pp. 27-29. [S]elf-determination played little part in the disposition of the vast overseas lands and peoples of the former German Empire, which were doled out to Australia, Belgium, Britain, France, Japan, New Zealand and South Africa. See T. Frank, supra, at n.182, p. 54.
184. S.G. Starke, op. cit., at n. 83, pp. 123-125.

accord with the freely expressed wishes of the people concerned' and that they respect the right of all people to choose the form of government under which they would live".[185] Nevertheless, according to the British Prime Minister, Winston Churchill, "the Charter was not intended to apply to colonies but was concerned with the restoration of the sovereignty, self-government, and national life of the states and nations of Europe under the Nazi yoke",[186] rather than under the yoke of the other western colonial powers at that time.

The refusal of the Allied forces to enable the territories under their control to be independent was obvious, due to the fact that most of these territories, especially those located in the Pacific and the Caribbean, constituted important military strategic zones.

On the other hand, the Universal Declaration of Human Rights does not mention the rights of a people, minorities or any other ethnic groups, except the family. The suggestions for its inclusion were strongly opposed between 1946-48, among others by Eleanor Roosevelt, the Commission's Chairwoman. Thus, the final omission was a disappointment to many peoples and countries,[187] in spite of the extention of individual human rights to the inhabitants of those territories, as it is stated in Article 2.

The principle of self-determination, however, was included in Articles 1 and 55 of the United Nations Charter. It was also included indirectly in the "preamble" of the Charter when it states the "equal rights... of nations large and small, and... to promote social progress and better standard of life in a larger freedom ... and for these ends... to employ international machinery for the promotion of the economic and social advancement of all peoples...".

Some authors have affirmed that the principle of self-determination did not have the category of a rule of international law at the end of the Second World War.[188] However, its evolution as a right is unquestionable after the adoption of the *Declaration on the Granting of Independence to Colonial Countries and Peoples* in 1960, and moreover after its inclusion in common Article 1 of the International Covenants on Civil and Political Rights and Economnic, Social and Cultural Rights.[189]

Res. 1514 (XV)

185. H.S. Johnson, op. cit., at n. 146, p. 35, footnote #14.
186. Ibid, footnote #15.
187. Rodolfo Stavenhagen, *Cultural Rights and Universal Human Rights,* at A. Eide; C. Krause; A. Rosas, op. cit., at n. 7, p. 73.
188. H. Hannum, op. cit., at n. 87, pp. 33-34.
189. Some authors have interpreted that, according to the wording of the covenants, the scope of application of the principle of self-determination has been enlarged to cover *all peoples*, including national and ethnic groups living within the borders of sovereign states. Therefore, there have been serious debates regarding the scope of application of the right to self-determination to these groups and to indigenous peoples.

Although the present practice is apparently to accept the possibility of integration as a valid alternative if ratified by the will of the people —based on the wording of Art. 76 (b): "... the freely expressed wishes of the people's concern..."— the principle was proposed for the first time by the Soviet Union at the consultation process in San Francisco, U.S.A. Furthermore, "during a press conference, Soviet Foreign Minister Molotov indicated that his government supported the movement of dependent countries to achieve national independence as soon as possible".[190] Hence, the original proposal supported national self-determination in its original meaning, as independence, rather than as it has been adjusted for the plausible benefit of the colonial administrators.

Yet, some authors hold that "self-determination may not necessarily involve solely and exclusively an absolute right to elect for autonomous statehood (or independence), but also an option to choose integration with the 'parent' state.[191] On the other hand, while some consider that although independence should be the natural result of self-determination, it is not a necessary result[192], others understand the right of nations to self-determination as implying "... exclusively the right to independence in the political sense, the right to free political separation from the oppressor nation...".[193]

Plebiscites processes held under different kind of circumstances (revolution, occupation, trusteeship or other peaceful settlement agreements) have been documented since 1791, until recent plebiscites as the one held in Bermuda Islands in 1995, where the inhabitants of the islands rejected the alternative of independence from Great Britain, and the referendum of Quebec, where the alternative for secession from Canada lost by less than 1% of the casted votes.

The alternative of integration has been supported by the decision of sovereign states to integrate into forms of federations. An example of these circumstances are the unquestioned formation of the United Arab Republic in 1958, the federation of Egypt and Syria, and Tanzania in 1964 by the federation of

190. H. S. Johnson, op. cit., at n. 146, p. 35.

191. According to the Czech leader Jan Masaryk "...self-determination does not carry with it an unconditional right to political independence", and in the same sense it was interpreted by the Great Powers, while not recognizing this right to minorities. See H. Hannum, op. cit., at n. 87, p. 31 citing Cobban at footnote #94.

192. H. Hannum, op. cit., at n. 87, p. 39.

193. See V.I. Lenin, *Questions of National Policy and Proletarian Internationalism* (Moscow: Foreign Languages Publishing House, n. d.) at 138-139 as cited by Hannum, ibid, p. 32.

Tanganyika and Zanzibar. However, in other cases, like the incorporation of Tibet to China, the accomplishment has been obtained by force.[194]

Even when the alternative of integration has been accepted under certain circumstances, *in few or maybe any of the held plebiscites after 1961, the integration agreement has been accomplished with the metropolitan power.* Integration, during decades has been possible due to the cultural, racial and historical background that these territories developed previous to their colonization and which was interrupted by it. Therefore, the integration in many of these cases was a real act of national reaffirmation, though several issues have arisen in some of these new sovereign states as a consequence of the integration process. In the case of Puerto Rico, as stressed by Mr. Luis E. Agrait representing the group "Pro Estado Libre Asociado" before the G. A. Decolonization Committee during 1978, integration with the United States constitutes an act of national dissolution, rather than national reaffirmation.

"Vattel's views in this connection led him to hold that the assumption that one or more states could overview and control the conduct of another state would be contrary to the laws of nature".[195]

Notwithstanding the previous declarations of the French National Assembly, French policy after the creation of the people's sovereignty doctrine was one of expansionism and annexation through the plebiscites processes, validating the alternative of annexation in a shameful transformation of the doctrine of popular sovereignty previously adopted, whilst most of these plebiscites were hold under the influence of French military forces.[196] The circumstances where different peoples or nations are annexated and assimilated by other states are clear examples of how the concepts of nationhood and sovereignty have been more used "... to obscure questionable motives and defend existing privileges than to promote comprehension or compromise".[197]

However, many of these territories were willing to become part of France, not as a process of annexation, but as a natural process of integration with their natural

194. H. Hannum, op. cit., at n. 87, p. 22. Other cases of absortion or integration of territories as the annexation by India of Goa, the cession of certain French enclaves to India and the Dahomey's incorporation of the Portuguese enclave of Sao Joao Batista de Ajuda, are present at p. 37, among others of questionable legitimacy. An interesting case is the circumstances under which East Timor was annexated by Indonesia after a strong armed opposition of its population. Despite the cultural similarities with Indonesia, the alternative for independence has been strongly supported not only by the inhabitants of the territory, but also by the International Community of States. See Lauri Hannikainen, *Peremptory Norms (Jus Cogens) in International Law; Historical Development, Criteria, Present Status,* Finnish Lawyers Publishing Company, 1988, pp. 409-414.

195. J.G. Starke, op. cit., at n. 83, p. 22.

196. H.S. Johnson, op. cit., at n. 146, p. 74.

national unit. In this case, the change of sovereignty should be understood as integration rather than annexation. This is also the case of the integration of Venetia to Italy (1866)[198], after the Austrian occupation, and the formation of several European States through territorial disputes between them, in spite of the illegitimate vestiges of these processes, which were conducted with the ultimate goal of expansionism, destroying the existence of different cultures and nationalities.

"[T]he practice of what might be termed 'empire nationalism' not only was prevalent throughout Europe in the late nineteenth century but also was employed in British, French, German, Belgian and Dutch colonialism in Asia and Africa, and the United States in Latin America in the early twentieth century".[199]

The right to self-determination has been understood by several states' delegations at the U. N. in different forms. The position of the United States in 1956 was that "... in most cases, self-determination precedes the granting of self-government or independence; it is a process for determining the wishes of the majority and involves the freedom of a group to become the majority".[200] Hence, it was not considered as a right, but as a process, that could be a plebiscite. However, for most of the Afro-Asian and Latin American states "self-determination meant national independence".[201] Furthermore, for the African countries it "... has meant the desire to create modern nation-states possessing an internal state apparatus and external sovereignty".[202]

One of the most precious discernments between self-determination and political liberty, ie., democracy or popular sovereignty, was stressed by the representatives of Iraq and Ceylon at the debates of the General Assembly's Third Committee on 1957 and 1958. It was pointed out that "self-determination should not be confused with political liberty". Moreover, the representative from Ceylon (present Sri Lanka) stated that:

> [T]here were sovereign countries where the people had no political freedom or whose government was not what most of the people wanted, and yet the principle of self-determination was not violated. These people were free to establish their own political institutions, to develop their own economy, and to direct their cultural and social evolution without any foreign intervention.[203]

197. H. Hannum, op. cit., at n. 87, at n. 121, p. 25.
198. H.S. Johnson, op. cit., at n. 146, pp. 72, 76.
199. H. Hannum, op. cit., at n. 87, p. 28, footnote #8.
200. H.S. Johnson, op. cit., at n. 146, p. 54.
201. Ibid, footnote #72, citing Indian delegation T/SR 672 (29 February 1956).
202. See James S. Coleman, *Nationalism in Tropical Africa*, as cited ibid, pp. 96-97.
203. Ibid, pp. 54-55.

The previous description could be clearly illustrated by South Africa's former apartheid regime, which, though constituing a contemptious violation of individual human rights and the basic principles of democracy, was not considered by some specialists as an issue under the principle of self-determination, due to the sovereign character of the state. However, if the right to self-determination is to be simply understood as the exercise of the will of the people through a referendum, then all dictatorial, tyrannical and totalitarian regimes should also be considered under the scope of self-determination.

"Most anti colonial advocates, which included most African, Asian and Latin American countries, indicated that ... it was to apply to each group which regarded itself as a nation".[204]

After the adoption of the International Covenant on Civil and Political Rights (CCPR) in 1966, "the permanent character of the right of self-determination was emphasized, ... and it was made clear that the *free decision as to political status and free determination of economic, social and cultural development* (instead of status) were *not a definition*, but rather *a consequence*, of the right of self-determination".[205] (emphasis added). The only possible interpretation of this is that, once a people has exercised its right to external self-determination and independence, they are free to determine their own political and economic future (without being subjugated to foreign powers) implementing the doctrine of people's sovereignty as the cornerstone of any democratic system.

Moreover, under Article 1 (3) of the CCPR, all States Parties to it became obliged to respect and promote the right to self-determination, which concerning "... the administration of Non-Self-Governing and Trust Territories, ... means the duty —not yet specified in the UN Charter— *to grant the relevant peoples their independence*".[206] (emphasis added).

Carefully analyzed by huge, powerful multi-national states, and sovereign states with large and diverse minority groups within their territory, it has been stressed that the principle of self-determination was not created to destroy the national unity, ie., State unity, but was based upon the principle of national sovereignty and territorial integrity.[207] Hence, it should not be applied to territories which are an integral part of a national entity, but to peoples or nations living in

204. Ibid, p. 53.
205. M. Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary*, N.P. Engel Publisher, 1993, p. 12.
206. Ibid, p. 23, citing Cassese, *The Self-Determination of Peoples*, in Henkin 92, 111, p. 98, at footnote #93.
207. H.S. Johnson, op. cit., at n. 146, p. 53.

a definite territory. Based on this some authors stressed that the right to self-determination does not endorse the right to secession.[208]

Based on the principle of national sovereignty and territorial integrity, if the right to self-determination should not allow secession (when state sovereignty disintegration is implicated), it should neither provide for annexation (when it constitutes the subjugation of one nation by another, implicating cultural disintegration and anti-democratic relations). Both secession and annexation should be declared contrary to the principles enunciated in the Charter of the United Nations, as attempting against the principle not only of state sovereignty, but also against the right to national self-determination, national sovereignty over natural resources and democracy.

Notwithstanding the fact that the official interpretation of self-determination in our days includes more options than just independence, the language of the Declaration on the Granting of Independence to Colonial Countries and Peoples clearly stresses the important role of the United Nations *in assisting the movements for independence* in Trust and Non-Self-governing Territories and the paramount importance of eradicating all forms of colonialism in the world.

DECLARATION ON THE GRANTING OF INDEPENDENCE TO COLONIAL COUNTRIES AND PEOPLES;

Resolution 1514 (XV); of 14 December 1960:

Due to the commitment of the international community to the promotion of the right to self-determination and the eradication of all forms of colonialism, the United Nations General Assembly approved Resolution 1514 (XV), with 89 votes in favor, none against and 9 abstentions. Among the abstentions were Spain, Portugal, United Kingdom, France, South Africa and the United States. Through this declaration, the General Assembly ratified the principle that " 'the subjection of peoples to alien subjugation, domination and exploitation... is an impediment to the promotion of world peace... (with) all peoples (having) the right of self-determination' ".[209]

Through Resolution 1654 (XVI), 27 November 1961, the General Assembly created as a subsidiary organ a Special Committee (17 members), known as the *Special Committee on the Situation with Regard to Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples*.[210]

208. Ibid, pp. 55-57.
209. Ibid, p. 7.
210. Ibid, p. 41

Later on, the Committee was enlarged in 1962 by the addition of seven members.[211] In 1963, the General Assembly eliminated the Committe on Information from the Non-Self-Governing territories[212] and as a result, the *Special Committee* is the only Body, apart from the Trusteeship Council, responsible for matters relating to dependent territories.

The Declaration, in conjunction with the U. N. Charter, supports the view that Self-Determination is now a legal principle. Therefore, its expressions go beyond the internal aspect, given by some colonial powers, to the concept of "self-government", present in Art. 73, Chapter XI of the U. N. Charter, giving to it a wider definition: "political sovereignty".

The Declaration expresses that "Convinced that all people have an *inalienable right to complete freedom, the exercise of their sovereignty and the integrity of their national territory, Solemnly proclaims the necessity of bringing to a speedy and unconditional end colonialism* ***in all its forms and manifestations***". (emphasis added).

Paragraph 5 of the Declaration clearly states the requirement of taking immediate steps... *to transfer all powers* to the peoples of those territories, *without any conditions or reserves*, in accordance with their freely expressed will and desire... *in order to enable them to enjoy complete independence and freedom"*. However, these conditions have never been respected in the case of Puerto Rico.

The Committee of Twenty-Four has determined during its existence "... the status of each territory, *the circumstances under which it was to become self-determining,* and the seriousness of any delay relative to a general threat to international peace and security".[213] (emphasis added).

On December 20, 1965, the General Assembly requested[214] the Special Committee "to recommend a deadline for the accession to independence of each territory, in accordance to the wishes of the people". Once again the right to become independent was conditioned on the wishes of the people without giving special importance to the factors used to manipulate their consent. Under this circumstances we have to ask ourselves if the wishes of peoples could be influenced or conditioned in such a way that would thwart what the Committee understands as "*circumstances under which it was to become self-determining*" or "according to the *freely expressed* wishes of the peoples concerned". The

211. United Nations General Assembly Resolution 1810 (XVII), 17 December 1962, as cited, ibid, footnote #35.
212. United Nations General Assembly Resolution 1970 (XVIII), 16 December 1963, as cited, ibid, pp. 41-42.
213. Ibid, p. 42.
214. United Nations General Assembly Resolution 2105 (XX), 20 December 1965, as cited, ibid, p. 42.

(60-61)

issue concerning the validity of the peoples' consent has been also stressed by the representatives of Honduras (See infra, pp. 58-59), and by professor Hurst Hannum in 1993 when he stressed that "consent is only legitimate if it is given by a people that is *knowledgeable*...". (See infra, pp. 102-103). (108-109)

The question has been answered in cases where the population is under military coercion by the colonial powers' armed forces.

Moreover, the creation of the Committee of Twenty-four erased the line between domestic jurisdiction and international competence regarding the supervision of the exercise of the right to self-determination. "The thesis has developed that a right to national self-determination transcends the legal sovereignty of colonial possession". The basis is that "one nation should not be subjugated by another... It is no longer a matter of the administering power but of the national sovereignty of the dependent territories themselves".[215]

However, it was not until the negotiation and consultation process of 1989-90 that the U. S. Congress accepted to deal with the case of Puerto Rico according to the principles of public international law. Nevertheless, the process was never concluded, notwithstanding that it was considered as a noble effort of the U. S. government to honor self-determination and people's rights during the Decolonization Decade. On the other hand, the 1998 Young Bill (U.S. Congress H.R. 856, 105th Congress) has been distiguished by the promotion of the annexation of Puerto Rico to the U.S.A., in clear violation of peremptory norms of public international law.

The right to self-determination "... is often cited as one of the cornerstones of the international system, invoking *perceptions of independence and non-interference*". (emphasis added). This is commonly known as the external aspect of the right to self-determination, which implicates "the right of a people to be free from outside interference and intervention". After 1945, it has been seen within the context of the decolonization process as "the rights of peoples under colonial domination and alien occupation to achieve statehood and independence".[216] The 'internal aspect' of the right to self-determination is another perspective from which this legal principle should be analyzed, ie., the "right of the people against its own government", which leads to a "general right to Democracy". The concept of internal self-determination is also related to economic and social elements, as we will see.[217]

215. Ibid, pp. 91-92.
216. A. Rosas, *The Right of Self-Determination,* A. Eide; C. Krause; A. Rosas, op. cit., at n. 7, pp. 79-80, footnotes #2, 3 & 4, making reference to C. Tomuschat (ed.), Modern Law of Self-Determination, op. cit. at n. 152, *Self-Determination in a Post-Colonial World*, p. 1, 1993.
217. Ibid, p. 80, footnote #8, p. 82. As an internal aspect, it has been considered as a right against oppression and tyranny.

Notwithstanding the clear wording of the Declaration of the Granting of Independence..., the modern colonial powers have adopted the classic option of "**annexation**" as an alternative to be included on a decolonization process under the label of **integration**, using arguments that go from the original doctrine of popular sovereignty, democracy and the will of the people, to arguments of minuteness and incapacity of the so-called micro states to subsist and to fulfill their international obligations as sovereign states.

However, "[i]n principle, minuteness of territory and population, imposing practical limitations upon capacity to conduct external relations, does not constitute a bar to state-hood", as independence. It has been proposed (by the United States, among others) that micro-states should be accepted by a special form of "associate membership" of the United Nations as such, not merely in relation to particular organs; thus, this would require an amendment to article 4 of the Charter and related provisions.[218]

Many of these 'petty sovereignties' like Andorra, Liechtenstein, San Marino and Monaco, have been considered as *protected independent states*.[219] It has been reiterated that the minuteness of a territory can not be used as a pretext to exclude statehood.[220]

Puerto Rico, however, has not been considered as a territory having these limitations, together with other remaining colonies as East Timor, Hong Kong (before 1997) Northern Ireland and Western Sahara, among others.[221]

During the 1960's, the Committee was requested to consider the special situation of small territories that had not exercised "... fully their right to self-determination and independence". The territories referred to included mainly several islands located in the Atlantic, Pacific and Indian Oceans, regarding which, according to resolution 1514 (XV), independence would never be delayed based on pretexts of political, economic, social or educational preparedness inadequacy.[222] In this way, the Committee has been dealing with the difficult task of promoting "the most effective ways of enabling the territories to attain the objectives of the 1960 Declaration which has

218. S.G. Starke, op. cit., n. 83, p. 98.
219. H. Hannum, op. cit., at n. 87, pp. 16-17.
220. Ibid, p. 37, at footnote #113, regarding the creation of a Sub-Committee by the Committee of 24 to study the situation in 13 small non-self-governing island territories: American Samoa, Anguila, Bermuda, the British and U.S. Virgin Islands, Cayman Islands, Pitcairn, the Turks and Caicos, Guam, Tokelaw, Montserrat, St. Helena, and the U.S. Trust Territories of the Pacific Islands.
221. Gudmundur Alfredsson, *Greenland*..., op. cit., at n. 144, pp. 291-308, p. 298.
222. H.S. Johnson, op. cit., at n. 146, pp. 42-43.

increasingly been claimed to have meant a *status of self-government by independence*".[223] (emphasis added).

An interesting case was the October 23, 1956 referendum held by France before the creation of the Committee of the Twenty-Four, but without any U. N. approval or participation. The U. N. refused to terminate the trust under the belief that the referendum was presented in a way designed to preclude independence as an alternative to the termination of the trusteeship.[224]

Although the situation of Puerto Rico was not ruled by the provisions of the trusteeship system, but under Chapter XI, the referendums held in Puerto Rico for the final approval of the 1952 Constitution were also presented in a way that not only precluded, but suppressed any reference to independence as an alternative. However, contrary to the situation in French Togoland, the U. S. government was released from its duty to inform about the administration of their territory to the General Assembly, after the approval of resolution 748 (VIII), which removed Puerto Rico from the list of colonies or non-self-governing territories in 1953.

The Three Classic Alternatives:
UN G. A. Res. 742 (VIII) and Res. 1541 (XV):

There is no doubt that before any decision for integration or free association —expressly mentioned in res. 1541 (XV)— the sovereignty of the peoples concerned has to be recognized according to the principles set forth in res. 1514 (XV). This condition is necessary for the creation of a juridical context in which an informed decision can be taken. According to Dr. Gerardo Navas Dávila, any decision shall be taken with full knowledge of the economic, social, cultural and ethnic consequences, and only in this way a real process of decolonization can become a reality. Moreover, the author added that all these conditions exist to preserve the integrity of the colonized people and *to prevent any collective action which would result in the negation of the existence of the peoples themselves.* (emphasis added).

Concerning the different alternatives set forth in resolutions 742 (VIII) and 1541 (XV), "the first issue in respect to a trust territory was whether or not integration with a neighboring territory was a legitimate trusteeship objective...", but finally the delegates recognized that " '... integration of British Togoland *into an independent African-governed Gold Coast* was not 'colonial annexation'.' "[225] (emphasis added).

223. Ibid, p. 43.
224. Ibid, p. 87.
225. Id., p. 129, footnote #49, statements of Professor Coleman...

Through resolution 1541 (XV), the concept of non-self-governing territory as peoples entitled to the right of self-determination was defined as " 'a territory which is geographically separate and is distinct ethnically and/or culturally, from the country administering it'."[226] The resolution was also approved as a desperate effort to restate the three classic alternatives previously included in resolution 742 (VIII), because of the strong wording of the "Declaration on the Granting of Independence to Colonial... Peoples", which was mainly interpreted to mean decolonization through independence.[227] Whether or not the exercise of the right to self-determination should be analyzed under resolution 1541 (XV) or under the "Declaration...", U. N. G. A. Res. 1514 (XV), is a question to be considered without ignoring that, while the "Declaration on Decolonization" was approved by unanimity (with only 9 abstentions), close to 90% of the General Assembly members' support, resolution 1541 (XV) was approved with a vote of 38 to 24, and twenty-six (26) abstentions.

On the other hand, the alternatives of free association and integration would be acceptable, if based on the mutual respect of the respective peoples' cultures and the principle of state sovereignty, which, in the case of integration, would be possible in the form of a confederation between both nations, especially in the case of these small territories, where this kind of association would help their economic, social and cultural development, and the welfare of their inhabitants.

Other alternatives which would create unfair and non-democratic relations, and the subsequent cultural assimilation and complete annexation of one nation by another, might be considered contrary to the principles of the United Nations and to more recent resolutions of the General Assembly, such as Resolution 2160 (XXI), 30 November 1966, recognizing " 'that peoples subject to colonial oppression are entitled to seek and receive all support in their struggle, which is in accordance with the purposes and principles of the Charter.' " Moreover, during the discussions of the implications of this resolution on another resolution "condemning all forms of intervention in the domestic affairs of states", U. N. G. A. Res. 2225 (XXI), the position was that "... assistance to national liberation movements would not be considered intervention and, under certain circumstances, could be strongly recommended in defense of that nation's right to self-determination".[228]

226. Id., p. 185.
227. The U.N. G.A. Res. 1514 (XV) stressed that "the submission of peoples to alien subjugation is contrary to the Charter of the United Nations", debilitating the legitimate character of the three classic alternatives present at resolution 742 (VIII) under certain circumstances.
228. H.S. Johnson, op. cit., at n. 146, p. 44, footnotes #41 & 42.

Notwithstanding the support received from the Decolonization Committee through their continuous resolutions, *the right to self-determination and independence,* according to the "Wambaugh studies", "... has been used as a means by which to justify annexation of a territory following its occupation". In this way the consent of the people gives "validity" to "an action already taken", avoiding the imputation of conquest[229] and cultural assimilation.

The Concept of Peoples:

A difficult problem to evaluate whether or not a claim for self-determination is legitimate is "... which communities of human beings constitute 'peoples' (ie the 'self') for the purpose of enjoying the right to self-determination. Aspects such as common territory, common language, and common political aims may have to be considered. There must normally be a territorial unit corresponding to the people to which the right may be regarded as attaching".[230]

For a better understanding of the concept of "people", it is of great importance to understand the concepts of "state", "culture", "ethnicity", "tribes", "indigeneous peoples", "nation" and "nationalism", to which the principle of self-determination, internal and/or external is related, moreover after the adoption of the International Covenants. There are no specific definitions and/or clear differentiations between some of these concepts, and it is not the intention of the present work to find them.[231]

In some cases, the demand of collective rights and autonomy can only be satisfied by the emergence of a sovereign state, which is the case of a people located in non-self-governing territories. In other instances, only protection from discrimination, preservation of cultural, linguistic and other values is possible, and sometimes the achievement of a degree of autonomy within a State.[232]

229. Ibid, pp. 200, 92, 94, 112.
230. J.G. Starke, op. cit., at n. 83, pp. 124-125.
231. For more information regarding indigenous peoples and minority rights see *United Nations Centre for Human Rights Fact Sheets 1-21,* published by the Raoul Wallenberg Institute of Human Rights and Humanitarian Law, Lund 1994, pp. 144-159, 270-286. At the 1993 Vienna Declaration, in spite of the commitment of the international community to support liberation movements in their struggles against colonialism, the right to self-determination was partially restricted, linking the concept to the territory and the people living within this territory, rather than to *all peoples.* However, the Declaration grants to minorities all human rights, especially rights of equality and non-discrimination to be enjoyed within a given state. See Anne-Christine Bloch, *Minorities and Indigenous Peoples,* as included in A. Eide; C. Krause; A. Rosas, op. cit., at n. 7, p. 311, citing the *Vienna Declaration and Programme of Action,* U.N. doc. A/CONF. 157/23, part I. para. 2. Regarding the rights of indigenous peoples see also the same publication, pp. 309-321.
232. H. Hannum, op. cit., at n. 87, p. 4.

Culture and Nation:

The development of cultural protection-related provisions was necessary in several international instruments to protect the existence and development of minority groups, cultures and peoples under the sovereign power of several Nation-States or parts of a Multi-National-State and so on.[233]

Reference to cultural rights and cultural identity as related to other fundamental freedoms can be found in the "Declaration of the Principles of International Cultural Co-operation, proclaimed by the General Conference of UNESCO on 4 November 1966".[234] (emphasis added).

As collective rights, cultural rights have been included in several international instruments. *The Algiers Declaration on the Rights of Peoples,* Art. 14, and the African Charter on Human and Peoples Rights (AfCHPR), Art. 22 support this approach. These three international instruments have also recognized "... the right to develop a culture".[235] Moreover, the Algiers Declaration also states "the right to respect of cultural identity (Art. 2), and *the right of a people to not have an alien culture imposed on them* (Art. 15)".[236]

The *Convention on the Prevention and Punishment of the Crime of Genocide* (Genocide Convention), ratified by the U.S.A., while "... outlawing the destruction of national, ethnic, racial and religious groups...", it "... formally recognizes the rights of these groups to exist as groups, which surely must be considered the most fundamental of all cultural rights".[237]

Although the rights enunciated in the Universal Declaration of Human Rights (UDHR) and both international covenants refer mainly to individual rights, "... when we refer to cultural rights as well as to many social and economic rights, a collective approach is often required, since some of them can only be enjoyed in community with others and that community must have the possibility to preserve, protect and develop what it has in common". While their beneficiaries are individuals, their claims would not be satisfied if their collective rights as a group are not protected.[238]

233. A. Eide; C. Krause; A. Rosas, op. cit., at n. 7, p. 71. "Very few countries are, in fact, culturally homogenous... Most of the States parties to various international human rights instruments are themselves mosaics of different cultures, be it either cultures of ethnic groups, minorities, nationalities or nations".
234. Ibid, p. 63, footnote #1.
235. Ibid, pp. 63-64. In spite of the non-binding character of the Algiers Declaration... and the binding force of the AfCHPR only over the African countries parties to the Charter, its *persuasive character* is relevant as moral obligations of states and *possible customary international law.* Art. 14 recognizes "the right of a people to its own artistic, historical and cultural wealth, while article 22 of the AfCHPR states the "...equal enjoyment of the common heritage of mankind...".
236. Ibid, p. 64.
237. See T. Buergenthal, *International Human Rights in a Nutshell,* 1988, p. 49, as cited ibid, pp. 64-65.
238. Ibid, p. 68.

UNESCO had also proclaimed *the right to cultural identity* stating that:

> 1. Every culture represents an unique and irreplaceable body of values since each peoples' traditions and forms of expression are its most effective means of demonstrating their presence in the world.
> 2. The *assertion of cultural identity therefore contributes to the liberation of peoples. Conversely, any form of domination constitutes a denial or an impairment of that entity.*[239] (emphasis added).

Concerning the rights of a people, their cultural rights are clearly protected by their exercise of the right to self-determination, according to which each nation, possessing a delimited territory, should form its own sovereign State. Upon these circumstances, any dangers of discrimination or cultural assimilation would be avoided. However, the implementation of these cultural protection provisions are mainly necessary within the borders of existing or emerging sovereign states to avoid the same opprobious practice, not regarding peoples, but towards other minority groups which are entitled to these cultural rights, even when they have not been recognized as possessing a right to external or political self-determination.

Five different categories of peoples have been identified by a member of the Human Rights Committee as entitled to the right of self-determination in the 1919-1945 period:

> [A] people living entirely within a state ruled by another people (e. g., the Irish before 1920); peoples living as minorities in various countries without controlling a state of their own (e. g., Poles in Russia before 1919); a people living as a minority group in a state but understanding themselves as forming part of the people of a neighboring state (e. g., Hungarians in Rumania); a people dispersed throughout many separate states (e. g., the German people in various European states); and *a people who constitute a majority in a territory under foreign domination* (e. g., colonial regimes).[240] (emphasis added).

Even though nowadays there is no legal document with a clear definition of "peoples" as those who are entitled to the right of self-determination, it could be

239. See *Mexico City Declaration, World Conference on Cultural Policies. Final Report*, UNESCO, November 1982 as cited ibid, p. 64, footnote #5.

240. See Karl Josef Partsch, *Fundamental Principles of Human Rights: Self-Determination, Equality and Non-Discrimination*, in Karel Vasak and Philip Alston, 1 The International Dimensions of Human Rights (Paris: Unesco and Westport, CT: Greenwood Press, 2 Vols. 1982), at 63, as cited by H. Hannum, op. cit., at n. 87, p. 35.

affirmed without any doubt that the principle applies at least to those peoples which constitute a nation with their respective cultural identity and relatively defined territorial demarcations.[241] If we depart from this basis, it would be easier to understand why some ethnic and minority groups within other sovereign states are not recognized as possessing a right to self-determination, though other rights, such as *the right to use their own tongue* and to have their own cultural and educational institutions, are rights that every state is compelled to respect with regard to all minorities, as well as the right to equal treatment under non-discrimination provisions.[242]

That is why already, according to present United Nations practice, colonies and/or non-self-governing territories "... have been defined as overseas (salt water theory) territorial and political entities under foreign domination", regarding the application of General Assembly resolution 1514 (XV). This is how the colonial powers have avoided the negative impact that the decolonization process would create to their territorial integrity. The principle of territorial integrity, however, has been upheld not only by the old states, but also by newly independent states that have emerged in the Third World as a result of their struggles for independence, supported by the decolonization movement initiated under the U. N. Charter provisions.[243]

Hence, the main characteristics that we might have in mind to determine whether or not a colonial status exists are: 1. "overseas territory"; 2. "separate geographic and political entity" and 3. "foreign domination".[244] A well balanced theory was developed to protect both the right of peoples to protect and develop their culture and to become independent, and the principle of territorial integrity of already existing states.

However, in the case before our consideration -Puerto Rico- these difficulties are not present; it has been recognized as the prototype of a nation and maybe one of the most homogeneous nationalities of the new world, with its national territory

241. See H. Hannum, id., p. 36 where reference to the territorial component is made.

242. H.S. Johnson, op. cit., at n. 146, p. 56. See also R. Stavenhagen, supra, at A. Eide; C. Krause; A. Rosas, op. cit., at n. 7, pp. 68-69, and G. Alfredsson, *Speaking Notes...*, supra, at n.177, p. 1, where the author stressed that although the "...term 'peoples' is not expressly defined in any of the instruments,... by intention of the lawmakers and in practice *it means the population of a separate political unit on delimited territory with a background in colonial history or recent occupation.* (at least since 1945 or possibly sometime after the conclusion of the Kellogg-Briand Pact in 1928)".

243. G. Alfredsson, *Greenland...*, op. cit., at n. 144, p. 295. See also H. Hannum, op. cit., at n. 87, pp. 45-47, where the support received by the independent African states to the principle of territorial integrity is stressed, making reference to the danger that these states would face if all the ethnic groups and tribes of which they are composed start claiming a right to external self-determination to create their own states.

244. G. Alfredsson, Id., p. 299.

completely separated and identifiable from the metropolitan territorial area, and subject to the authority of the U. S. Congress according to the U. S. Constitution. Furthermore, it was recognized not only as a different nation, but also as a People by the United States itself in the enactment of the Foraker Act, according to which Puerto Rico would constitute a *"political body"* called "the People of Puerto Rico".[245]

Yet, a wider interpretation has been made by Special Rapporteur Asbjørn Eide listing as the beneficiaries of external self-determination, within the context of peoples: 1. "colonized peoples"; 2. "territories colonized since 1945"; New emerging states through 3. "peaceful divorce"; and 4. "republics of federal states formed by voluntary accession with constitutional provisions allowing for separation".[246]

Other Reaffirmations of the Right to Self-Determination:

The right to self-determination of peoples and dependent countries has also been expressly recognized not only by the United Nations General Assembly in its Resolution on Self-Determination of 12 December 1958, and in its Declaration of 14 December 1960 on the Granting of Independence to Colonial Countries and Peoples, but also in several further resolutions of the United Nations. "The right was defined in some detail, under the heading 'The principle of equal rights and self-determination of peoples', in the *Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the United Naitons Charter...*", adopted by the General Assembly resolution 2625 (XXV) in 24 October 1970. "On 10 November 1975, the General Assembly adopted a resolution reaffirming 'the importance of the universal realisation of the right of peoples to self-determination, to *national sovereignty* and territorial integrity, and of the speedy granting of independence to colonial countries and peoples as imperatives for the enjoyment of human rights'."[247] (emphasis added). Another international instrument which supports the principle is the Helsinki Final Act adopted in 1 August 1975 by the Conference on Security and Co-operation in Europe (CSCE), 14 I. L. M. 1292 (1975), Principle VIII of the Declaration on Principles Guiding Relations between Participating States.[248]

245. Antonio Fernós Isern, *Estado Libre Asociado de Puerto Rico, antecedentes, creación y desarrollo hasta la era presente,* 2nd ed., Editora Corripio, Dominican Republic, 1988, p. 13. See also R. Berríos Martínez, supra, at n. 140.
246. G. Alfredsson, supra, at n. 222, p. 49, footnote #14, quoting from U.N. doc. E/CN.4/Sub. 2/1992/37, paras. 156-172. See also M. Nowak, op. cit., n. 205, pp. 20-21, for further discussion of the meaning of all peoples as the ones entitled to exercise the right to self-determination under Art. 1 of the CCPR.
247. J.G. Starke, op. cit., at n. 83, p. 123.
248. See A. Rosas, supra, at A. Eide; C. Krause; A. Rosas, op. cit., at n. 7, p. 81, footnotes #11 & 12.

The right of self-determination has been also referred as:

> [N]ecessarily involving a number of correlative duties binding upon states, including the duty to promote by joint and separate action the realisation of the right of self-determination, and the transfer of sovereign powers to the peoples entitled to this right, and the duty to refrain from any forcible action calculated to deprive a people of this right. These duties have been expressed, or if not expressed are implied in the Declarations, above, adopted by the General Assembly... In this Declaration the General Assembly proclaimed the necessity of bringing *to a speedy and unconditional end, colonialism in all its forms and manifestations and called for immediate steps to be taken to transfer all powers to the peoples of territories which had not yet attained independence".*[249] (emphasis added).

The International Court of Justice had stated in some of its advisory opinions that the right to self-determination is a legal principle rather than only a political aspiration.[250]

The majority of states, members of the United Nations, have ...continued to stress that reference to self-determination solely as a 'principle' ignores the numerous resolutions of the General Assembly which have recognized self-determination as a *fundamental right.*[251] (emphasis added).

In a Resolution of December 13, 1966, United Nations General Assembly Resolution 2189 (XXI), before the adoption of the international covenants, the General Assembly reaffirmed its previous resolutions, declaring "...the continuation of colonial rules a threat to international peace and security and reaffirmed 'its recognition of the legitimacy of the struggle of the people under colonial rule to exercise their right to self-determination and independence 'and urged' all states to provide material and moral assistance to the national liberation movements in colonial Territories'."[252]

The International Covenants (1966):

After several deliberations and proposals from different states' representatives, the General Assembly stated by resolution 545 (VI) their decision to "include in

249. J.G. Starke, op. cit., at n. 83, p. 124.
250. A. Rosas, supra, at A. Eide; C. Krause; A. Rosas, op. cit., at n. 8, p. 81, footnote #13; *Legal Consequences for States for the Continued Presence of South Africa in Namibia...* notwithstanding Security Council resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971, p. 16, at p. 31; Western Sahara, Advisory Opinion, I.C.J., Reports 1975, p. 12 at pp. 31-33... I.C.J. Reports 1992, p. 240, Nauru (at p. 243)...".
251. H.S. Johnson, op. cit., at n. 146, p. 49.
252. Ibid, pp. 44-45.

the international covenants an article on the right of all peoples and nations to self-determination in reaffirmation of the principle enunciated in the Charter of the United Nations...".[253] It also included the responsibility of the administrators of non-self-governing and trust territories to promote the realization of this right in relation to the peoples of those territories. Moreover, through another resolution, the Economic and Social Council was requested to give priority to this question.[254]

On several occasions, the General Assembly requested some proposals from the Commission on Human Rights[255] for the drafting of the article, but it was not until the thirteenth session that action was finally taken. The General Assembly's Third Committee approved a revised draft for the covenants on the right to self-determination.[256]

However, from "the colonial and NATO powers, all except Greece either abstained or voted against the article".[257] At present, the right to self-determination is comprehended in the International Bill of Human Rights, ie., two of its three components: the International Covenant on Economic, Social and Cultural Rights as well as the Covenant on Civil and Political Rights, unanimously approved by the General Assembly on 16 December 1966. Common Article 1 of both covenants state:

1. *All peoples* have the right to self-determination. By virtue of that right, they freely determine their political status and freely pursue their economic, social and cultural development.
2. *All peoples* may, for their own ends, *freely dispose of their natural wealth and resources* without prejudice to any obligations arising out of international economic cooperation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.
3. The states parties to the present Covenant, *including those having responsibility for the administration of Non-Self-Governing and Trust Territories,* ***shall promote*** the realization of the right of self-determination, and ***shall respect*** that right, in conformity with the provisions of the Charter of the United Nations. (emphasis added).

253. Ibid, pp. 37-38.
254. Ibid, p. 38.
255. United Nations General Assembly Resolutions 637 (VII), 1952; 738 (VIII), 1953; 837 (IX), 1954 at ibid, pp. 38-40.
256. Ibid, p. 41.
257. Ibid, p. 40.

Common Article 1 supports the nature of the right to economic, social and cultural development as an inherent compound of the right to self-determination, when it states that "peoples can freely pursue their economic and cultural development as a result of their exercise of their right to (external) self-determination".[258]

After the adoption of the Covenants, "the right is claimed to be no longer open to challenge. It is regarded as an essential prerequisite for all other human rights", "... an essential condition for the effective guaranty and observance of individual human rights and for the promotion and strengthening of those rights". Furthermore, it "... is considered as a collective right operating to all peoples and all nations, without which neither they nor their individual members can be considered free".[259] According to the General Comments of the Human Rights Committee, " 'history had proved that the realization of and respect for the right to self-determination of peoples contributes to the establishment of friendly relations and co-operation among states and to strenghtening international peace and understanding'."[260]

Moreover, the universal significance and recognition of the right to self-determination has led to the qualification of this right as a customary norm of public international law -Jus Cogens- in the sense of Article 53 of the Vienna Convention on the Law of Treaties (VCLT). "At least for the case of colonial peoples, the right of self-determination is today viewed as a peremptory norm of international law. It follows that Art. 1 involves a subjective right in the sense of international law", rather than only a political principle.[261]

Regarding the duty of states to ensure and enforce the right to self-determination, the Human Rights Committee "has left no doubt that the Covenant's enforcement provisions include the right of self-determination". Furthermore, in the practice of examining state reports, the Committee has emphasized that the reporting duty of states includes Article 1, and therefore, "it would be contrary to the precept of contextual interpretation (Art. 31 of the VCLT) if the right of self-

258. G. Alfredsson, *Speaking Notes...*, supra, at n. 177, pp. 5-6.
259. H.S. Johnson, op. cit., at n. 146, p. 49. See also R. Stavenhagen, supra, at A. Eide; C. Krause; A. Rosas, op. cit., at n. 7, p. 76, where reference is make to *General Comment 12 on peoples' right to self-determination* (U.N. doc. A/39/40 and Corr. 1 and 2).
260. See A. Eide; C. Krause; A. Rosas, id. We should keep in mind the importance of The General Comments of the Human Rights Committee, since it is the maximum authority to comment and interpret the Covenant articles. The General Comments are, in most cases, a summary of the case law, and represents an example of how the Committee will decide future issues before it. Regarding the positive character of the right to self-determination, see General Comment 12/21 of 12 April 1984.
261. Manfred Nowak, op. cit., at n. 205, pp. 7-8, 13.

determination were not subject to the (primary) domestic implementation duty of the States Parties under Art. 2".[262]

It has also been stated that, even though most of the provisions contained in the International Covenant on Economic, Social and Cultural Rights (ICESCR) are obligations of results rather than of conduct, some rights "... can be justiciable immediately..." instead of being progressively attained.[263]

Under article 40 of the Covenants, all contracting parties are compelled to submit reports to the Human Rights Committee concerning the implementation of the covenants' provisions. However, the submission of information regarding the implementation of Art. 1 has not been successful. Moreover, regarding the Covenants' Optional Protocol for individual complaints, the Human Rights Committee had found that "... an alleged violation of the right of a 'people' to self-determination under article 1 could not be raised..." through this procedure.[264]

Even though the right to self-determination was neither included in the European nor in the American conventions on human rights, it is present and strongly supported in the Preamble of the African Charter of Human and Peoples Rights (1981), in articles 19-23. Articles 19 and 20 state:

Article 19:

> All peoples shall be equal; they shall enjoy the same respect and shall have the same rights. *Nothing shall justify the domination of a people by another.* (emphasis added).

Article 20:

1. All peoples shall have the right to existence. They shall have the unquestionable and inalienable right to self-determination. They shall freely determine their political status and shall pursue their economic and social development according to the policy they have freely chosen.
2. Colonized or oppressed peoples shall have the right to free themselves from the bonds of domination by resorting to any means recognized by the international community.

262. Ibid, p. 17.
263. See the *Limburg Principles* on the implementation of the Covenant on Economic, Social and Cultural Rights as cited in Eide, supra, at A. Eide; C. Krause; A. Rosas, op. cit, at n. 7, p. 39.
264. See H. Hannum, op. cit., at n. 87, pp. 41, 43, citing United Nations, Report of the Human Rights Committee, 42 UN GAOR Supp. (No. 40) UN Doc. A/42/40 (1987), regarding issues raised by Indian groups from Canada.

3. All peoples shall have the right to the assistance of the states parties to the present Charter in their liberation struggle against foreign domination, be it political, economic or cultural.[265]

While self-determination "... is usually given a political dimension, focusing on independence and non-interference (external) or democracy (internal)...", common Article 1 of the Covenants refers also to the economic, social and cultural development as an inherent aspect of self-determination.[266] The references made to this aspect of the right emanates from General Assembly resolution 1803 (XVII), 14 December 1962 on "Permanent Sovereignty over Natural Resources", and was one of the inspirations for the 1986 Declaration on the Right to Development.[267]

The Right to Development and Self-Determination:

As the right to self-determination, the right to development is a legal principle present in Articles 1(3) and 55 of the United Nations Charter. Art. 55 of the Charter, requires the Organization "... to promote (a) higher standards of living and conditions of economic and social progress and development nationally; (b) solutions to international economic, social, health and related problems and international cultural and educational cooperation; and (c) universal respect for human rights and fundamental freedoms". Moreover, according to Art. 56 " 'all Members pledge themselves to take joint and separate action, in cooperation with the Organization, for the achievement of the purposes set forth in Art. 55'."[268]

The central objective of Art. 55 is "... the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations 'based on respect for the principle of equal rights and self-determination of peoples'." The right of self-determination has achieved the status of a legal principle in the hierarchy of international legal norms.[269]

Although in recent years most of the territories under colonial rule have attained independence, there are still some areas that have not been decolonized, mainly islands located in the three major oceans and in the Caribbean.[270]

265. See AfCHPR, as included in *Human Rights in International Law,* Council of Europe Press, 1992, p. 348.
266. A. Rosas, supra, at A. Eide; C. Krause; A. Rosas, op. cit., at n. 7, p. 83.
267. Ibid, citing General Assembly resolution 41/128, 4 December 1986, known as the *Declaration on the Right to Development.*
268. Ibid, p. 247.
269. Ibid, Chapter V, p. 247.
270. H.S. Johnson, op. cit., at n. 25, p. 45.

Notwithstanding the importance given to the protection of the "national culture" and the development of the international legal principle of self-determination, the development of modern states has followed a "... process of 'nation destroying' rather than 'nation building'...", similar to the doctrines of annexation adopted originally by France and other expansionist states. "[I]n the name of the modern Nation-State, numerous non-state peoples have, in fact, been destroyed or eliminated".[271]

When a determinate ethnic group or Nation tries to extend its cultural hegemony over other peoples, "... it can safely be said that a violation of cultural rights occurs".[272] In some extreme circumstances, this practice has been labeled "cultural genocide".[273] Cultural genocide has also been referred to as "ethnocide", yet these are different terms. Genocide refers to "... the physical destruction of peoples". However, both are "equally reprehensible".[274] Although the concept of ethnocide has been recognized as a deliberate process of cultural destruction, it has not yet been incorporated in any international legal instrument.[275]

The collective cultural rights of peoples, as well as their right to economic and social development, "... must be considered within the framework of the right of peoples to self-determination, which by accepted international standards is the fundamental human right, in the absence of which all other human rights cannot really be enjoyed".[276] Thus, it has been generally assumed that, in order to be able to grant to the population of all non-self-governing territories the individual rights contained in the International Covenants, these territories should hold a right to become independent.[277]

The interdependence between civil and political rights and economic, social and cultural rights has been present since the adoption of the United Nations

271. See Walker Connor, *Nation Building or Nation Destroying?, World Politics,* Vol. 24 (1972), No. 3 as cited by R. Stavenhagen, supra, at A. Eide; C. Krause; A. Rosas, op. cit., at n. 7, p. 71.
272. Ibid, p. 71.
273. Ibid. However, "...the notion is not actually referred to in the Genocide Convention or other human rights instruments, though, at the time of the United Nations debates leading to the adoption of the Genocide Convention, some states wanted to include cultural genocide as an international crime".
274. See F. Ermacora, *The Protection of Minorities Before the United Nations,* in: Recueil de Cours, 1984, pp. 312-318 and R. Stavenhaven, The Ethnic Question. Conflicts, Development and Human Rights, 1990, pp. 85-92, both cited in A. Eide; C. Krause; A. Rosas, ibid, p. 72, footnotes #17 and 18.
275. Ibid, p. 76.
276. Ibid, pp. 76-77.
277. Ibid, p. 77. However, for ethnic and cultural groups within a sovereign state, which are not considered as peoples entitled to the external right to self-determination, there is an increasing support to grant them the right to a degree of internal self-determination to enable them to preserve and develop their culture within the borders of a sovereign states. The granting of an external right to self-determination of minorities has been assumed as a danger that could provoke the destruction of sovereign state through the emergence of secessionist movements.

Charter, specially concerning its article 55 which requires the promotion of "economic and social progress and development nationally". It also refers to the right to development as part of the right to self-determination. In this regard it includes "... the right of all peoples to 'freely pursue their economic, social and cultural development' ".[278]

The economic aspect of the righ to self-determination has also been supported by the *Declaration on the Establishment of a New International Economic Order,* of 1 May 1974 and the *Charter of Economic Rights and Duties of States*.[279]

However, the only legally binding international instrument recognizing the right to development, apart from the ICESCRs, is the AfCHPR, Art. 22, which states that "(2) States shall have the duty, individually or collectivelly, to ensure the exercise of the right to development", and mentions all peoples as its beneficiaries.[280]

A Declaration on the Right to Development was adopted in 1986 with a vote of 146 against one (the United States) and eight abstentions (the Nordic countries except Norway, ... Germany, Israel, Japan and the United Kingdom).[281] Although a non-binding instrument, some countries —the majority— affirm that it "... reflects binding customary law",[282] despite the fact that these are rights considered to be progressively attained.

Moreover, the Right to Development has received strong support since the creation of a Working Group of Governmental Experts on the Right to Development by the Commission on Human Rights in 1981. It was not until the adoption of the Vienna Declaration and Programme of Action at the World Conference on Human Rights, when the right to development was reaffirmed as " 'a universal and inalienable human right and *an integral part of fundamental human rights*'."[283]

278. Ibid, p. 247. See Common Art. 1 of the International Covenants.
279. See G.A. Res. 3201 (S-VI) and G.A. Res. 3281 (XXIX) of 12 December 1974, as cited by M. Nowak, op. cit., at n. 205, p. 7.
280. A. Eide; C. Krause; A. Rosas, op. cit., at n. 7, pp. 248, 252.
281. Ibid, pp. 248-249, citing General Assembly resolution 41/128 of 4 December 1986.
282. Ibid, p. 249.
283. Ibid, taken from United Nations Doc. A/CONF.157/23, para. 1/10. For a more detailed explanation of the evolution of the Right to Development, see ibid, Chapter 6, pp. 247-251. After the creation of the United Nations, several Declarations have granted to the Right to Development the status of a legal principle. See *Proclamation of Teheran of 1968,* Articles 12 & 13; U.N. General Assembly resolution 2542 (XXIV) of 11 December 1969, *Declaration on Social Progress and Development;* U.N. G.A. resolution 32/130 *Alternative approaches and ways and means within the United Nations System for improving the effective enjoyment of human rights and fundamental freedoms;* U.N.G.A. resolution 45/199 of 21 December 1990; International Covenant on Economic, Social and Cultural Rights, Article 11; Seoul Declaration of 1986.

According to this recognition, it can be affirmed that the third branch of international human rights, ie., "Solidarity Rights", such as the collective Right to Development[284] and Self-Determination, are the basis upon which the respect and protection of all other individual rights contained in both international covenants are possible. In the same context, the "Declaration", Art. 6 (2) stated the *"indivisible and interdependent"* character of all human rights.[285]

It is difficult to determine the specific obligations of states and international institutions such as the World Bank, the International Monetary Fund and so on, to advance development.[286] However, the right to economic, social and cultural development is indeed a moral and legal obligation of all colonial powers towards its administrated territories, although it should not be limited to the framework of colonialism. As it is stated in the 1986 Declaration, Article 1, it is an "...inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized". Moreover, it is a State obligation that concerns and requires international supervision in order to make the right to self-determination a realistic alternative for peoples. Within this context, the same Declaration establishes in its Articles 1 (2) and 2 (3) that *individuals, states and all peoples* are the beneficiaries of the right and that the real spirit of the right is the full realization of the right of peoples to self-determination.

The Plebiscite as a means for self-determination:

Under the United Nations, the use of plebiscites or other recognized democratic means were supported for the exercise of the right to self-determination in General Assembly's resolution 637 (VII), 16 December 1952. However, while colonial powers believe that each case should be studied on its own merits, the representative from ***Honduras*** expressed in 1952 that, in some cases, a plebiscite might result ***in the denial of the right to self-determination:***

> [T]he people of a given area might not always act in its own best interest. *A cleverly organized plebiscite could easily influence a people to express a wish contrary to their real desires.* Even if they act freely, historical, geographical, and social factors should not be discounted".[287] (emphasis added).

284. "Article 1(1) of the Declaration mentions as beneficiaries 'every human person *and all peoples*' ". Ibid, p. 252.
285. Ibid.
286. Ibid, p. 254.
287. H. S. Johnson, op. cit., at n. 146, p. 65, footnote #28, citing A/C 3/SR456 (1952).

He suggested that the plebiscite should not always be used "because it might not provide the 'right' choice".

Yet, even if the alternatives for decolonization would be acceptable according to the United Nations Declarations and resolutions regarding self-determination and the right to economic, social and cultural development, there are other factors that could nullify any voting process. In Puerto Rico, the representatives of the political parties PIP and PPD have agreed that an absolute majority might be needed to validate a vote for integration with the U.S. It is a peculiar situation because close to 10% of the voting power in Puerto Rico is under the control of foreigners, mainly immigrants from Cuba and the Dominican Republic, without mentioning thousands of U.S. citizens that have moved to the Island. Most of them would vote for annexation. Other factors that could affect the validity of the process is the consideration of the abstentions and whether or not the so-called "absent vote" would be authorized, to avoid the exclusion of close to 1/3 of Puerto Rico's nationals from participating in the decision of the political future of their nation.

Under these circumstances, is an alternative for annexation acceptable? If not, what other kind of integration formula would be valid, if any? Assuming that some type of integration would be valid, is a simple majority acceptable? Furthermore, some authors have stressed the following questions:

> [I]s it a simple majority of the voters or of the eligible voters? ...should the non-residents natives be kept separate, and if the results are close should they be analised on different criteria? Since the future destiny of a people is a major constitutional issue, should the requirement include some form of absolute majority increased to two-thirds or even three-fourths? Lastly, can the differences of opinion be broken down into a formula, which, when presented to the voters, will command a majority?[288]

All these queries lead to think about the right to self-determination as one towards national liberation, rather than annexation, as an inalienable fundamental right. Hence, any measure adopted, as the ones mentioned above, which would represent undue influence over peoples to choose for annexation would lead to the annulment of the process. Any similitudes to the Young Bill, as well as to the 1998 insular legislature attempts to hold a plebiscite in Puerto Rico is not a coincidence. See P. de la C. 1903.

Among the main considerations of this thesis, one of the most difficult issues faced by the United Nations emerges: to determine "... what is a legitimate

288. Ibid, p. 125.

aspiration for dependent peoples", to be included in a plebiscite. For example, during the plebiscites conducted in some African territories, "...the delegates did not consider certain continued relationships between France and French Togoland, ...Western Samoa and New Zealand, or ...Ruanda-Urundi and Belgium, as legitimate."[289]

Hence, acceptable decolonizing alternatives have to be found, making the plebiscite a more complex device for self-determination, though the only possible mean for decolonization, apart from revolution[290] or the unilateral recognition of independence by the colonial power.[291]

Due to the international concern for peace and security, the United Nations has the authority to offer its services and intervene to secure the effective exercise of the right to self-determination according to articles 1 & 55 of the Charter, together with Chapters XI, art. 73 (e), Ch. XII, art. 76 (d) and Ch. VI regarding peaceful settlement of disputes.

The validity of the exercise of self-determination through a plebiscite, however, depends on each particular circumstances and, in great part, on the reasons for abstention during the process and the granting of the right to vote to those nationals living outside the territory due to circumstances beyond their control; the demilitarization of the territory; and the granting of political amnesty in trusts and other non-self-governing territories before major elections.[292]

THE 1967 PLEBISCITE

Due to the limited scope of autonomy granted to Puerto Rico under the 1952 Constitution[293], many efforts were made in Washington by the Resident Commissioner of the PDP and other political leaders, to increase the autonomous

289. Ibid, p. 134, 198.

290. Although the plebiscite has become the main international means for giving effect to the principle of self-determination, "... revolution has not been replaced as a means for self-determination". Ibid, p. 183.

291. C. Gorrín Peralta, supra, at n. 25, p. 53, regarding the authority of the U.S. Congress under the "incorporation" doctrine set forth in the insular cases to dispose of its territories. The author added, citing R. Serrano Geyls, supra, p. 439 that it is an implied and inherent power of any sovereign state; "...to surrender or withdraw sovereignty over portions of its territory". See also G.A. resolution 1541 (XV) according to which no procedural requirements exist for the granting of independence to colonial peoples and countries. The same cannot be said about free association and integration.

292. H.S. Johnson, op. cit., at n.146, pp. 123-124 (absentist vote in Cameroon and Western Samoa); pp. 124-125 (regarding pleas in the United Nations for political amnesty).

293. H. Wells, op. cit., at n. 13, p. 227. According to Carl J. Friedrich, the new political invention, the "Free Associated State", which goes beyond the Federal Union, is an incomplete innovation that needs to be completed.

authority of the People of Puerto Rico,[294] none of which received Congressional approval. On March 19, 1959 the legislature of Puerto Rico presented a Resolution to the U. S. Congress for its consideration, with the aim of clarifying and modifying the present "Puerto Rican Federal Relations Act" (P.R.F.R.A.). The proposal was incorporated in the House of Representatives (H.R.) Draft Legislation 5926 by Resident Commissioner Antonio Fernós Isern, and presented to the U. S. House of Representatives on March 25, 1959. While the bill was supported by senator James E. Murray, from Montana,[295] after several modifications and extensive legislative hearings in Puerto Rico, nothing was finally presented.[296] Nonetheless, under the John F. Kennedy administration, a "Status-Commission"[297] was created, following several public hearings in Puerto Rico for a final plebiscite to be held on July 23, 1967.[298]

The process was promoted by Luis Muñoz Marín, who was convinced that after the triumph of the formula he represented in this plebiscite, a culminated autonomic status could be reached dealing directly with the U.S. Congress, according to the agreement made by the U.S. Executive Branch through its representative at the UN GA in 1953, Henry Cabot Lodge. The agreement was to "respect the will of the people of Puerto Rico, if in the future they decide to modify the agreement" (contained in P. L. 600). The Puerto Rican Independence Party (P. I. P.) announced that it would not participate in the process, due to its alleged lack of legitimacy. The P. I. P.'s argument was based on the fact that the U.S. did not transfer full sovereign powers to the People of Puerto Rico before the plebiscite, as was required by the United Nations General Assembly resolution 1514 (XV). Other factors that contributed to the abstention were the lack of commitment of the U. S. Congress to respect the final results of the plebiscite,[299] as well as the

294. Ibid, pp. 258-259, concerning the efforts made by Muñoz in 1954 and 1955 to obtain more autonomous powers. See also the Fernos-Murray propossal; the 1963 and 1975 Congressional records, and; the 1993 referendum.

295. Ibid, citing U.S. Congress Draft Legislation S. 2023.

296. H. Wells, id., p.. 259.

297. Ibid, pp. 262-263, due to the existing discrepancies within the U.S. Congress regarding H.R. 5945, which mentioned the "recognition and reaffirmation of the sovereignty of the People of Puerto Rico", the same legislative body enacted the P.L. 88-271 for the creation of a Status Commission. This one existed from June 9, 1964 until August 5, 1966.

298. F. Picó, op. cit., at n. 9, pp. 266-267, 250.

299. Their position has been always that any plebiscite result would not be binding upon the U.S. Congress authority over Puerto Rico. (That the results of the plebiscites are not *self-executing*). See infra, reservations made by the U.S. Government at the moment of ratification of the CCPR. Emphasis was made on the non-self-executing character of articles 1-27. ***Is the reservation made by the U.S. government acceptable under the provisions of the VCLT?*** This kind of reservation resembles the *clawback clauses* of the African Charter of Peoples and Human Rights, so much criticized by the Western powers, including the U.S. itself.

inclusion of the present political status —"Commonwealth" or "Estado Libre Asociado", as it is called in Spanish— as a valid alternative for decolonization. This last opposition to the inclusion of the present status quo was also criticized by the "Statehood Party".

Due to the position adopted, Gilberto Concepción de Gracia, the leader of the Independence Party, left the Commission on May, 1966, before a final report was approved.[300]

However, even though these circumstances also created a division in the "Statehood Republican Party", Luis A. Ferré, one of its candidates for governor since 1956, decided to bring that political sector to participate. For that purpose, an organization (Estadistas Unidos) that grouped the followers of that political formula was created.[301] Despite the decision of the Independence Party to abstain from the process, the alternative for independence was also included in the plebiscite process, with the participation of a small sector of the independence movement under the leadership of Héctor Alvarez Silva, who organized the group "Funds for the Puerto Rican Republic" (Fondo para la República de Puerto Rico).[302]

Language; Annexation

An obstacle faced by the annexation movement under the leadership of Luis A. Ferré was that according to the majority of the U. S. Congress, the future "statehood" or integration of Puerto Rico to the U. S., would implicate the cultural and language modification, necessary to adapt the Island to the other federated states. According to Senator Henry M. Jackson, " '... the unity of our states-federation structure requires a common language...' ", so a previous condition for "statehood" would be the recognition and acceptance of English as the official language of Puerto Rico.[303] Since 1967 until the present, the debate is still the same. Moreover, in the last 30 years, no goals have been reached in the search for a greater degree of sovereignty.

One of the main conclusions of the Commission Report was that the three political formulas proposed -Independence, "Commonwealth" and "Statehood"- were valid, granting to the People of Puerto Rico the same dignity, equal opportunities and "national" citizenship. Moreover, it mentioned that it was the

300. H. Wells, op. cit., at n. 13, pp. 265, 264.
301. F. Picó, op. cit., at n. 9, p. 267.
302. H. Wells, op. cit., at n. 13, p. 267.
303. Ibid, pp. 424-425, footnote #12, Chapter 12. See also request of clarification made by Rubén Berríos Martínez to the U.S. Congress on January 30, 1991, supra, at n. 142, regarding the conditions under which the U.S. Congress would agree to grant "statehood" to Puerto Rico. Two of its main beliefs are that the U.S. would not grant "statehood" until a wide majority of the Puerto Rican inhabitants speak English, and until a wide majority of our people express in several plebiscites their willingness *to renounce their separate identity as Puerto Ricans, accepting the U.S. as their own nation.*

People of Puerto Rico who should decide the future of the Island. Yet, once the decision had been taken, the agreement and full cooperation of the U. S. government were necessary. Furthermore, the Commission concluded that due to financial factors, the alternative of "statehood" would need a transition period of at least 15 years, and a longer period for independence. The position of the U.S. government was that this transition period could be better achieved under the prevailing economic and political relations which would be maintained for the next two decades. Finally, it stated that the economic growth of Puerto Rico under such conditions would be in complete harmony with a future decision between independence or "statehood".[304] However, the requirements present at the "Declaration on the Granting of Independence to Colonial Countries and Peoples" of the "...necessity of bringing to a speedy and unconditional end colonialism in all its forms and manifestations" and the "... transfer of all powers ...without any conditions or reserves..." were not fulfilled.

The plebiscite was held on July 23, 1967, three months after the "Special Committee on the Situation with regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples"[305] of the United Nations decided to postpone "sine die" the hearings regarding the case of Puerto Rico.

The total of voters registered at the time was 1,067,349, while the active participation amounted to 703,692 voters. The Popular Democratic Party won with 425,132 votes, "statehood" came second with 278,560, and independence finished in the third place with 4,248 votes[306]; According to these statistics, 363,657 registered voters did not participate in the process. The massive abstention of the Independence Party (P. I. P.) members in the process was interpreted by the leaders of that organization as a sign of the strong political structure of the latter.[307] An interesting aspect of these statistics is that, while from 1940 until 1964 almost 80% of the voters exercised their right to vote at the internal elections, in the 1967 Referendum only 65.8% participated.[308] Therefore, strong arguments were raised again against the legitimacy of the process.

Notwithstanding the intentions and efforts made for the development of a real autonomic status by the PDP, the plebiscite of 1967 did not change the lack of powers of the government of Puerto Rico under the Constitution of 1952 and the

304. Ibid, pp. 264-265.
305. Hereinafter "Decolonization Committee"; See *The United Nations and Decolonization: Summary of the Work of the Special Committee of Twenty-Four*, op. cit., at n. 85.
306. Sara del Valle, supra, at n. 110.
307. F. Picó, op. cit., at n. 9, p. 267.
308. See H. Wells, op. cit., at n. 13, p. 268.

P. R. F. R. A...[309] The plebiscite, once again, contrary to the intentions of their promoters, was interpreted by the U. S. Congress as a consent of the majority of the voters in Puerto Rico to the existing political and economic relations with the United States. Therefore, the wider autonomous authority that the people were trying to obtain, represented by the majority political party (PDP), was not granted. One more time, the commitment made by the U. S. Executive Branch through its ambassador (Henry Cabot Lodge) at the UN G. A. in 1953, was not fulfilled.

Situation After 1967:

After the 1969-1973 governing period[310], the political issues on the Island dealt more with matters related to the internal administration of the country and the scope of the public services that the main parties (NPP & PDP) were able to offer to the people, rather than with the political status of Puerto Rico. As recently as in 1985, the priorities in the agenda of the principal political parties concerned the socio-economic problems that Puerto Rico was facing.[311] However, the leaders of the PSP and PIP assumed the task of denouncing the colonial situation of Puerto Rico, in order to promote its consideration by the international community, especially supported by the activities of the Non-Aligned Movement and other non-governmental organizations.[312]

Although the PDP at this stage clearly opposed both alternatives, "statehood" and independence, in 1970, the Central Council of that political party assumed an advanced position, expressing its disagreement with some aspects of the present economic and social relations, which were affecting Puerto Rican interests. The intentions of the PDP, under the leadership of Rafael Hernández Colón, were to completely revise the "compact" contained in P. L. 600, in order to achieve a more complete autonomy, if they won the 1972 elections.[313] Again, no improvements were attained.

309. Sara del Valle, supra, at n. 110.
310. It was a historical period of strong confrontation between the different factions of the Puerto Rican Liberation Movement and the Independence Party, against the local police and federal authorities.
311. F. Picó, op. cit., at n. 9, pp. 268-269.
312. Permanent Peoples' Tribunal, supra, at n.108, and the Russell Tribunal; See also the reference made in the Decolonization Committee resolutions regarding the case of Puerto Rico to the decisions on Puerto Rico made by the Conferene of Ministers for Foreign Affairs of Non-Aligned Countries held at Lima in 1975, and other Conferences of the Head of State of the Non-Aligned Countries held at Colombo in 1976; Belgrade in 1978; Colombo in 1979; Havana in 1979; Havana in 1982; Helsinki in 1983; Harare in 1986; Harare in 1989, and so on.
313. H. Wells, op. cit., at n. 13, p. 362. "El pronunciamiento de Aguas Buenas", November 19, 1970. During the period previous to the 1972 elections, some leaders of the second majority party in the Island,

Today, the "New Progressive Party" (NPP) has a bigger membership than the "Independence Party".[314] Some reasons for this transformation have been, together with the strong financial dependence on the United States, the impact caused by the incorporation of Alaska and Hawaii as states of the "Union" in 1959[315] on an undecided sector of the Puerto Rican population, which saw in this alternative an economic safeguard.[316] Another important factor was the creation of a discriminatory and institutionalized political persecution system against the independence movement, which became an official practice of the government of Puerto Rico, in cooperation and coordination with the U. S. government.[317]

Moreover, after 1959, a great number of Cuban immigrants came to Puerto Rico, bringing with them an enormous fear of communism. Therefore, the first reaction of this sector was to promote the U. S. presence in Puerto Rico and, if possible, the annexation of the Island to the United States. For example, after 1968, the news received about the Cuban government dealt with the political repression of the new regime and the lack of liberties, rather than on the measures taken by that government to promote economic, social and cultural rights and to eradicate corruption and crime from their society. These news, together with the

the NPP, had expressed their doubts about the convenience of an immediate annexation of the Island to the U.S., *because of the cultural assimilation implications for Puerto Rico.* (See Ibid, p. 365). The PDP leaders made several efforts after 1952 to try to obtain more autonomy through a complete review of the Puerto Rican Federal Relations Act, due to the commitment of the U.S. government to enable the People of Puerto Rico to do so. However, no success has been achieved regarding the creation of an "enhanced commonwealth" until the present. See J.M. Passalacqua; C. Rivera Lugo, op. cit., at n. 32, t. II, pp. 245-247. "For the past two decades, proponents of the island's commonwealth status have unsuccessfully tried to reform the island's relationship with the United States". See José Cabranes, *Citizenship and the American Empire*, 127 University of Pennsylvania Law Review 316, 391 (1978). See also Philip A. Lacovara and W. Michael Reisman, XII Rev. Jur. Interamerican University of Puerto Rico 449 (1975).
314. While the membership of the PIP and PDP have been decreasing, the membership of the NPP has been increasing. At the present, the voting power of the annexation movement is close to 50%. See R. Berríos Martínez, supra, at n. 142.
315. H. Wells, op. cit., at n. 13, p. 260.
316. See G. Alfredsson, *Greenland...*, op. cit., at n. 144, p. 298, regarding *economic weakness,* together with other factors, such as the size of the country and the small populations, as ways in which the colonial powers "...have managed to hold on to these territories...".
317. Supreme Court of Puerto Rico, Decisions, 92 J.T.S. 85; See also Chapter on political persecution, regarding the "Maravilla Case". See also the Investigative Hearings of the Puerto Rican Senate, 1992, supra, at n. 143, where several undercover agents admitted their special intervention within the liberation movements groups to commit acts of sabotage in federal buildings and public service offices in the island. See also January 29, *1989 Permanent People's Tribunal,* supra, at n.108, concerning the counter-inteligence work done by the U.S. FBI in Puerto Rico to eradicate the independence political opposition.

media projection of the political struggles taking place in Puerto Rico, affected the image and growth of the independence sector,[318] among other reasons.[319]

The issue regarding the right of foreigners to participate in the plebiscite processes has been discussed in relation to other territories under colonial domination, when the settlers have been brought to the territory by the colonial power.[320] The issue of "settler" populations on colonial territories is not necessarily limited to naturals of the colonial powers, but also to other foreigners present in the territory due to the immigration policies of the colonial power. Due to the high percentage of foreigners in Puerto Rico, the PIP and PDP have asked for the requirement of a super-majority as the only way in which integration to the U. S. would be possible.

During the 1989-90 negotiation process for holding a new plebiscite in Puerto Rico, the U. S. Congress expressed its deep concern about the results of several polls conducted at that time, showing that a huge number of voters were supporting "statehood" due to the individual economic benefits —mostly social welfare— that they could acquire, rather than for the civic, political and cultural implications of their final decision. This belief forced the U. S. Congress to compare the federal benefits that the People of Puerto Rico would acquire under "statehood" with those received by Puerto Ricans under the prevailing political status —"commonwealth"—, promising the supporters of the latter a gradual extension to Puerto Rico of the social aid benefits that apply to the states of the Union, and describing with enough details the economic disruptions that "statehood" would create in the insular economy, in spite of the extension of the above mentioned social aid benefits.[321]

318. For more details regarding this issue, see H. Wells, op. cit., at n. 13, p. 364. It was a period in which a great number of "right wing" Cubans came to Puerto Rico, after the Cubans Revolution in 1959. The majority of them favored "statehood" for Puerto Rico, due to their fear of the extension of communist ideals to Puerto Rico, which, according to the majority of them, was much more possible if Puerto Rico were to become independent. However, in spite of this situation, it would not be fair if we don't mention the capacity for work and progress of these immigrants and the support that many of them have given to the independence movement in Puerto Rico, as well as to the economic development of the country.

319. H. Wells, ibid, p. 340. Although in was under the PDP rule that Puerto Rico achieved the highest economic and social development between 1940 and 1968, most of the members of the middle class started supporting the NPP, believing that the "economic gains" would be more secure under "statehood" or permanent "integration" with the United States.

320. Examples of these situations are illustrated by the cases of the Falklands (Malvinas) and Gibraltar concerning British settlers, and Fiji in relation with Indian settlers. See H. Hannum, op. cit., at n. 87, pp. 38-39.

321. J.M. García Passalacqua; C. Rivera Lugo, op. cit., at n. 32, t. II, p. 74. There are other reasons that had been mentioned as factors for the growing pattern of the "statehood" movement in Puerto Rico. Among them are the strong campaign developed by the NPP promoting "statehood" as the best alternative for the poor of Puerto Rico, due to the huge federal economic aid that they would receive under that status.

Notwithstanding the promises of extension of federal benefits under the actual status, the federal government has been very clear in establishing that none of the alternatives to be included in a future plebiscite can cost more to the federal government than the cost of the present political status.[322] Therefore, any extension of federal benefits to Puerto Rico would be accompained by several tax reforms, affecting section 936 of the Internal Revenue Code and capital investment in Puerto Rico, the main sources of employment in the Island.

An Overview the Political Persecution and Civil Rights Violations in Puerto Rico

For a better understanding of the independence movement's decreasing tendency in Puerto Rico, it is necessary to consider the constant attack to which its followers and members of their families have been submitted, not only by the insular police forces, but also by the U. S. F.B.I. and other federal intelligence agencies.[323]

The political persecution in Puerto Rico under the Spanish colonial domination has been widely documented. However, after the U.S. invasion in 1898, the issue was never seriuosly considered by the government of Puerto Rico, despite the efforts made by several civic and political organizations to denounce acts of political repression in the Island.[324]

The repressive practices against the independence and nationalist movements of Puerto Rico under the U. S. colonial rule have been documented since the 1930's by the discovery of a list of names compiled under the administration of the U.S. governor for Puerto Rico, Blanton Winship.[325] The information on the

(60 percent of the Puerto Rican population for 1989, was under the federal standards of poverty); The theory that P.R. would be able to preserve its language and culture within the U.S. Federation, *"La Estadidad Jíbara";* The fear campaign developed in Puerto Rico, based on a study published by the Congressional Research Service (CRS) establishing that the U.S. citizenship of the Puerto Ricans could be modified or revoke by the U.S. Congress. However, Congress finally accepted that all individuals born in Puerto Rico before the declaration of independence could decide to retain their U.S. citizenship, but not future generations. (See ibid, pp. 37-39, 249-250, 252).

322. Ibid, p. 363.

323. Although the study of Professor Gudmundur Alfredsson about Greenland demonstrates that this country and its inhabitants have not exercised their right to self-determination yet, according to the principles of international law, "there have been no instances of excecutions, torture, or lock-up political prisoners..." as in the case of Puerto Rico. See G. Alfredsson, op. cit., at n. 25, p. 307.

324. See I. Acosta, supra, at n. 5.

325. Under the Winship administration, the Massacre of Ponce took place on March 21, 1937, when the police forces of Puerto Rico opened fire against a pacific nationalist rally, killing 20 persons and resulting in more than 150 or 200 wounded civilians. See the Report of the Civil Rights Commission, supra, at n. 5, 1rst part, p. 33.

lists was carefully reviewed in 1948, and used in 1950 by former Governor of Puerto Rico, Luis Muñoz Marín, to order arrest warrants against all the members of the nationalist movement after the revolution of 1950.[326]

Moreover, since the 1930's, the political repression and persecution in Puerto Rico was not only directed by the insular police, but also by the Federal Bureau of Investigation (F. B. I.), which had the main control and surveillance of the nationalist movement members.[327]

In 1948, the Police Department of Puerto Rico created a "Security Squadron". Its main objective, according to its own training manual, was to deal with the problems of socialist and nationalist movements in Puerto Rico.[328] It was during the same year, 1948, that Law #53, known as "La Ley de la Mordaza", was enacted and amended after the 1950 revolution to make it a crime —a felony— to belong to any political party considered as subversive. It was in this period, 1948-50, that the Police Department of Puerto Rico, under U.S. F.B.I. instruction, started using undercover agents and confidants to infiltrate the independence movement.[329]

According to testimony given before the Civil Rights Commission by José Trías Monge,[330] supporter of Law #53 in the 1940's-1950's, the mass arrests of members of the nationalist movement after the attack to the U. S. Congress in 1954, was an abuse of power that contributed to the final repeal of the mentioned statute. However, other studies reveal that the main pressure over former Governor Luis Muñoz Marín to repeal the "Mordaza" Law was a 1956 decision by the U. S. Supreme Court against similar practices.[331]

Although Law #53 was repealed in 1956, the 1959 Civil Rights Commission report recommended once again the elimination of the preparation of lists of persons based on their political beliefs, as well as the elimination of the "Internal Security Division" of the Police Department of Puerto Rico. However, when Governor Muñoz Marín was asked in 1959 about the lists and the great number of persons included in them, the Governor answered that the situation had to be corrected, and that "it should be done in a more scientific way".[332]

326. See I. Acosta, supra, at n. 5: According to Vicente Géigel Polanco, who worked under the administration of Muñoz Marín, the main purpose of the arrests was to avoid any interference with the holding of the June 4, 1951 referendum, for the enforcement of Public Law 600, due to the violent reaction of the nationalist movement against the process.

327. See Report of the Civil Rights Commission, supra, at n. 5, pp. 20 et. seq., regarding the lists mantained in 1936 of the Puerto Rican Nationalist Party members at the F.B.I. offices in Pittsburgh, U.S.A.

328. I. Acosta, supra, at n. 5.

329. Ibid.

330. Former Chief Justice of the Supreme Court of Puerto Rico.

331. I. Acosta, supra, at n. 5.

332. Ibid, citing expressions of Vicente Géigel Polanco before the Civil Rights Commission public hearings.

After the adoption of the 1952 Constitution, several efforts were made to create a permanent "Civil Rights Commission" in Puerto Rico. Notwithstanding the efforts made to study the existing situation of civil rights in Puerto Rico, the ad hoc committee created between 1958-59 to investigate this situation concluded that, in general, the status of civil rights in Puerto Rico was satisfactory. Regarding a proposal for the creation of a Commission of Human Rights, Muñoz Marín and other governmental officials decided that it would be favorable to keep creating "ad hoc" committees, rather than a permanent Commission, due to the high cost of the latter. Moreover, the recommendation of the Permanent Commission was rejected by Muñoz, who believed that such a proposal would imply that the PDP administration was not giving enough attention to the civil rights issues. However, after Muñoz Marín retired, a permanent "Civil Rights Commission" was created in 1965.[333]

After the victory of the 1959 Cuban revolution, the F. B. I. started a new method of political repression, more "scientific" than the methods used previously by the local police forces. The new strategy was called the "Counterintelligence Program" (COINTELPRO). Under these new techniques, the main objectives of the F. B. I. were to: a) find prominent Puerto Ricans with access to Cuba to be trained as informers; b) promote and take advantage of the divisions within the independence movement; c) raise doubts about the convenience of belonging to the independence movement in Puerto Rico (here, part of the practice that most affected the independence movement was the discrimination against "independentistas" in employment opportunities not only in the public sector, but also at private enterprises); d) cause desertions from the independence movement and so on. Other methods of defamation and discredit were implemented in coordination with the local police, using strong and dirty propaganda, projecting the use of drugs and sexual liberalism as part of the values promoted by the independence ideals in an attempt to affect their moral image, and framing members of the movement with false drug posession cases, and so on.[334]

Regarding the 1967 plebiscite, the main efforts of the F. B. I. were directed

333. H. Wells, op. cit., at n. 13, pp. 315, 316 (footnote 36, Chapter 13), 434 (footnote 34, Chapter 13). As we will see, the results of these investigations were totally different from the recent report of the "Civil Rights Commission" concerning the "subversives lists", supra, at n. 5, published at the Puerto Rican Bar Association Law Review.

334. See I. Acosta, supra, at n. 5, and the decision of 1989 of the Permanent People's Tribunal, supra, at n. 108.

against the development of a unitary front against that process.[335] Officially, the operations of the F.B.I. (COINTELPRO) continued in Puerto Rico until 1974. However, collaboration between that agency and the insular police in political repression was not over, as was documented by the discovery of new files at the "Intelligence Division" of the Police Department of Puerto Rico after 1987.

During the 1970's, the department in charge of the independence movement surveillance, persecution and repression was the "Intelligence Division". Another Division was established on July 13, 1978, the "Special Investigations Bureau" (Negociado de Investigaciones Especiales —N.I.E.—) only a few days before the murders occurred at the "Maravilla" sector, in the mountanious center of Puerto Rico.[336]

In 1978, two young members of the Puerto Rican independence movement were cruelly tortured and murdered by a "gang" of police officers who were acting in accordance with orders received from government officials of superior rank, whose identity remains unknown. The publicity that followed the murders was extremely intense, especially during the political campaign of 1980 and 1984, when the New Progressive Party (NPP) was faced with one of the most dramatic and scandalous situations that have affected the People of Puerto Rico in the last 20 years, which became known as the "Maravilla Case". In 1980, the Popular Democratic Party (PDP) won the Senate majority and opened an investigation about the mysterious murders of the two young members of the independence movement on July 25, 1978. The proceedings were public and transmitted by both radio and television. The results of the investigations demonstrated that both young men, Carlos Soto Arriví and Arnaldo Darío Rosado, were entrapped by undercover police agents who captured them alive, tortured and murdered them. The agents acted under orders of high government officials whose identity has not been discovered.[337]

335. I. Acosta, id. When U.S. President James Carter was evaluating the possibilities of using the 1967 plebiscite process as a historical precedent in a Presidential Speech in 1978, the Secretary of Justice Griffin Bell did not recommend it, due to the obvious irregularities of the process.

336. Ibid.

337. See the last investigative sessions of the Puerto Rican Senate in 1992, regarding the possible cover up of all the police operative by high governmental officers, including the former governor of Puerto Rico in 1978 and present Resident Commissioner in Washington, Carlos Romero Barceló. See also Carmelo Delgado Cintrón, *Las aportaciones del Colegio de Abogados a la sociedad puertorriqueña: Reflexiones históricas a propósito del sesquicentenario 1840-1990,* 51 Rev. Col. Abog. de Puerto Rico 2-3, p. 167 regarding the Governmental Board resolution of February 8, 1980 to *request from the United Nations Organization an investigation concerning the interventions of the investigative and police U.S. government agencies within the national territory of Puerto Rico.*

However, the investigations led to the discovery, in 1987, of a comprehensive and professional system of lists and files used by the Police Department of Puerto Rico and the F. B. I. for political persecution and discriminatory practices against the independence movement in Puerto Rico. Although the Judicial Branch in Puerto Rico finally condemned the practice as unconstitutional, its inactivity and refusal to put all the evidence under the jurisdiction of the court —which lasted for around two years—, enabled the Police Department of Puerto Rico to arrange the disappearance and destruction of part of the evidence under its control.[338]

According to the evidence found in the archives of the "Intelligence Division", from 1,000 members of the independence movement arrested in 1950 and a total of around 4,000 nationalists identified that same year, the files found at the police headquarters in 1987 had more than 130,000 names of individuals considered as "subversive".[339] The information of some of the individual files consists of thousands of pages.

The litigation for political persecution against the government of Puerto Rico, based on these discriminatory and illegal practices, has not finished at the present, though the first stages of the case concluded in 1992.[340]

To further political repression in Puerto Rico, the U.S. government "has relied on the U.S. Federal Grand Jury,[341] which can function as a secret inquisitorial body, to imprison without specific criminal charges many 'independentistas' who refuse to submit to compulsory interrogations about their political work and the independence movement". In 1989, "15 Puerto Rican men and women, anti-colonial combatants, asserted their right to prisoner-of-war (POW) status under international law". These individuals have been serving "draconian prison sentences of between 35 and 90 years, and had been subject to particularly inhuman conditions of isolation and selective punishment".[342]

338. Among the apparently destroyed evidence figures the files belonging to Santiago Mari Pesquera, son of the socialist leader Juan Mari Brás and university Professor Paquita Pesquera, who was murdered in 1976 under unknown circumstances. Regarding this case strong suspicions were raised concerning the involvement of the insular police and the F.B.I. in the assassination. However, the case has been treated as a common crime.

339. I. Acosta, supra, at n. 5.

340. See *David Noriega v. Hernández Colón,* 92 J.T.S. 85, supra, at n. 317.

341. See U.N. General Assembly Decolonization Committee resolution of August 24, 1983, regarding the use of the federal Grand Jury as an instrument of pressure against the Puerto Rican patriots. U.N.G.A., Offic. Doc. A/AC.109/751, as cited by J.J. Alvarez, op. cit., at n. 1, p. 209.

342. *Decision of the Permanent People's Tribunal of January 29, 1989,* supra, at n. 108, p. 15. See also Annual Report of Amnesty International (1988) regarding the treatment received by a member of a Puerto Rican independence organization, Filiberto Ojeda Ríos, while imprisoned in U.S. Federal jails. (Lenghtly pretrial detention, held in virtual incommunicado detention, denied of dietary and other health requirements necessary for his health conditions, and so on). See Response to Information Request Number: PR100001, *The Centre for Documentation on Refugees, UNHCR, Geneva.*

Moreover, several members of the Puerto Rican independence movement have been accused of belonging to the clandestine group "Los Macheteros",[343] which in the late 1980's assumed responsibility for a $7 million robbery from Wells Fargo, which took place at Hartford, Connecticut. The money was destined for the support of that liberation movement organization. After these events, a mass arrest was ordered in Puerto Rico in "an operation of over 200 heavily armed U.S. F.B.I. agents, including wholesale search and seizure of more than 35 homes and work places". According to the 1989 Permanent People's Tribunal decision regarding the case of Puerto Rico, "it resembled a paramilitary undertaking, more than a civil arrest".[344]

At present, several human rights organizations are working to achieve an amnesty for the Puerto Rican nationalists imprisoned in United States jails.[345] During the "International Day of Human Rights"[346], some activities were celebrated in support of the liberation of the Puerto Rican political prisoners all around the world, including activities in Sweden, Zimbabwe, Japan, Puerto Rico and several cities of the U.S., such as Chicago and New York.[347]

The Military Presence in Puerto Rico: Vieques and Culebra

In 1970, a strong opposition to the U.S. military practices in the island of Culebra, caused intense public discussions. Since 1941, the U.S. Navy had been expanding the scope of its practices and dominion over the island, using ships and

343. This group assumed the responsibility for the destruction of ten U.S. fighter jets in January 1981, placed at the Muñiz U.S. Air National Guard Base in Puerto Rico. It also claimed responsibility for an armed robbery of $7,000,000 from a depot in West Hartford, Connecticut on September 12, 1983. See *The Centre for Documentation on Refugees, UNHCR, Geneva.*, id.

344. Permanent People's Tribunal, supra, at n. 108, p. 35. See also Carmelo Delgado Cintrón, *Las aportaciones del Colegio de Abogados a la sociedad Puertorriqueña: Reflexiones históricas a propósito del sesquicentenario 1840-1990:* Annual Assembly 1986 resolution Num. 13 to *Reaffirm the Acts of the Puerto Rican Bar Association and its Governing Board concerning the decisions taken regarding the events occurred on August 19, 1985:* when agents of the United States Government carry out a massive search and seizure of several homes and a review dependency, keeping for their analysis a great ammount of articles and documents.

345. See Carmelo Delgado Cintrón, ibid; Governing Board resolution draft No. 20 concerning *the Nationalists Imprisoned and their Liberation.* See also resolutions of the G.A. Decolonization Committee from September 12, 1978; August 20, 1980; August 11, 1987 and August 17, 1988, among others, in which the Special Committee denounces the flagrant violation of civil and political rights of the members of the independence movement by both, the U.S. and the local governmental authorities. See J.J. Alvarez, supra, at n. 1.

346. December 10, 1994.

347. Claridad newspaper, December 23-29, p. 7, 1994.

supersonic aircrafts with real ammunition to carry on frequent bombardments. Due to the small size of the island (10.4 square miles), its inhabitants, which were calculated at around 725, started suffering from all the military training of the U.S. Navy, mainly because of the noise produced by the airplanes and the explosion of bombs, which were also jeopardizing the population of Culebra. Moreover, the U.S. Navy restricted the fishing activities in the waters around Culebra, depriving the inhabitants of one of their main sources of food and commercial activity. While political leaders were claiming for the complete withdrawal of military forces from Culebra, Governor Ferré did not show a strong committment to the inhabitants of the island. However, due to the pressure exercised by public opinion and the other political forces, including civil rights associations and lawyers from the United States, the PNP administration finally participated in the formulation of the agreements that improved the situation on January 11, 1971. According to the agreements, the U.S. Navy would limit its military practices to a small sector of the island in 1972, and the restrictions regarding the use of land and sea waters would be gradually loosened until the subsequent ending of all Navy activities in Culebra, which was set for June, 1975.[348]

The militarization of Puerto Rico had also affected the island of Vieques since the early 1940's. The U.S. Navy had appropriated around two thirds of the island's territory for its military trainings, using these islands and the Roosevelt Roads Military Base, of Ceiba, as the main training locations for the U. S. military interventions in Latin America, as evidenced by interventions in Honduras, Panama and Grenada.[349]

348. H. Wells, op. cit., at n. 13, pp. 352-353. The strongest protests started after an announcement by the U.S. Navy of its intentions to acquire 2,000 additional acres from the 6,700 that has the island in total. Even though the U.S. Navy eventually stopped the military practices in Culebra, the activities were intensified in Vieques, a neighbouring island, in which the U.S. Navy controls 2/3 of the land. One of the most relevant aspets of this protests was when the leader of the independence movement, Rubén Berríos Martínez, together with other followers of the PIP, were arrested and sentenced to three months in jail due to their refusal to leave the "Flamingo" beach (one of the areas used by the Navy for their shooting practices), pursuant an order by the Federal District Court for Puerto Rico. (Ibid, p. 359).

349. See *Permanent People's Tribunal,* supra, at n. 108, pp. 12-13. Roosevelt Road is the largest military base of the U.S. out of their continental territory. "Despite the fact that the U.S. is a signatory of the Treaty Tlatloco (sic) (in 1977),... available evidence suggested that the U.S. has violated this treaty. According to the 1984 Puerto Rican Bar Association fact-finding committee, Puerto Rico is nuclear-ready: (i) circumstantial evidence suggests that nuclear submarines frequently pass through the Roosevelt Roads base; (ii) a nuclear military infrastructure exists in Puerto Rico. Sophisticated military hardware, equipment and personnel exist in Puerto Rico, and *there is a contingency plan to receive and store nuclear weapons at Roosevelt Roads. Puerto Rico is also a command control for 30 nuclear submarines.* Thus, whether or not there are nuclear weapons stored on Puerto Rican soil, Puerto Rico is a major target for retaliation in the event of a nuclear war". See Carmelo Delgado Cintrón, op. cit., at n. 344, p. 167. (Assembly 1982, resolution #9 regarding *Nuclear Weapons in Puerto Rico;* Assembly 1984 resolution #2 about *Nuclear Weapons;* Governing Board resolution #33 *condemning the agression against citizens*

It is interesting to observe that at the time the decision of the Permanent People's Tribunal was handed down, according to their findings and to the information submitted before this organization, Puerto Rico had around 13,000 of its nationals serving in the U. S. military forces, without including the 12,400 individuals who are part of the Puerto Rican National Guard, and the over 200,000 Puerto Ricans who have served in the U. S. Armed Forces since the First World War until the Vietnam War. These statistics do not include the U. S. Government most recent military interventions, such as the events at the Persian Gulf, among others. Without any doubt, due to the high unemployment rate in Puerto Rico, the aggressive and specialized recruiting techniques, and the educational and retirement benefits offered to its soldiers, the U.S. Armed Forces have become an alternative and a major source of employment for young "puertorriqueños".[350]

Therefore, despite the protests against military presence in the Island, it should be considered as an important factor for the support of the U. S. institutions in Puerto Rico.

The U.S. military presence and manoeuvres in Puerto Rico, mainly at the Island of Vieques, have been condemned by the G.A. Decolonization Committee in its resolutions regarding the right of the People of Puerto Rico to self-determination and independence.[351]

It has been reiterated that to attain a fair and legitimate process towards self-determination, the demilitarization of the territory is essential.[352]

THE CONTEMPORARY INTERNATIONAL DEBATE

On July 25, 1952 the Constitution of Puerto Rico was finally adopted. Therefore, the United States, under the Eisenhower presidency, informed the United Nations that it would no longer transmit information under Art. 73 (e) of the U.N. Charter.

while protesting against Navy presence in 1979; Governing Board/resolution Num. 10-sessions year 1980-1982 regarding the *Navy Armed Forces in Vieques;* and several other resolutions, núm. 22; 29 regarding *Peace in Central America: Nicaragua and the military practices in Vieques;* res. #11 —sessions year 1984—1986 regarding the *Nuclear Weapons Treaty.*

350. Permanent People's Tribunal... ibid.

351. See Decolonization Committee resolutions from September 12, 1978; August 15, 1979; August 20, 1980 and August 24, 1983, which have been reaffirmed until the present.

352. H.S. Johnson, op. cit., at n. 146, pp. 135-140. The principle of evacuation of partisan forces was recognized in every European plebiscite under the Paris treaties and later agreements. See also reference made to U.N. Decolonization Committee resolution of September 12, 1978, and August 15, 1979, U.N. Gen. Ass., Offic. Doc. A/AC. 109/574; 109/589 as cited by J.J. Alvarez, op. cit., at n. 1, pp. 209-211, regarding military presence in Puerto Rico.

To some authors, this initiative of the United States Executive Branch showed the willingness of the U.S. government to respect the "bilateral compact"[353] claimed by the PDP leaders who supported the legitimacy of the 1952 Constitution. However, for others it was just a political coordination strategy of, at least, the U. S. executive and legislative branches to stop bringing information to the General Assembly regarding the administration of Puerto Rico.

Considering the strong political and economic power of the U.S. after the Second World War, and after an extensive debate, the U. N. General Assembly voted 26 in favor of a Resolution in 1953 with that purpose, 16 against and 18 abstentions. The representatives of the "Puerto Rican Independence Party" and the "Puerto Rican Nationalist Party" were not allowed to testify before the U. N. due to the strong pressure exercised by the U.S., despite the observer status recognized to other national liberation or resistance movements.[354] Finally, the U. N. approved resolution 748 (VIII) confirming the U.S. decision to cease sending information due to the new constitutional government attained by the People of Puerto Rico under a "Commonwealth" relationship with the United States.[355]

As a response to what they understood as an abuse of power exercised by the U.S. representatives and the colonial situation of the Island, on March 1, 1954, four members[356] of the "Nationalist Party" went to the U. S. Capitol, in Washington,

353. H. Wells, op. cit., at n. 13, p. 255.

354. J.G. Starke, op. cit., at n. 83, p. 139, footnote #5. "Another category of recognition advocated in recent years is that of national liberation or resistance movements, on the one hand, and also, on the other hand, of peoples having a right to self-determination. National liberation or resistance movements have been admitted as participants, or on the basis of observer status, to international conferences or meetings. Cf also the case of the recognition by the United Nations General Assembly (by its Resolution of 20 December 1976) of the South West Africa People's Organization (SWAPO) as the 'sole and authentic' representative of the people of Namibia (South West Africa). However, some states have declined to follow others in recognising some particular liberation movements as the sole representatives of peoples awaiting self-determination." See also *Basic Facts About the United Nations,* op. cit., at n. 86, pp. 65, 67. (Promoting Peaceful Relations) "In 1974, the Assembly reaffirmed 'the inalienable rights of the Palestinian people in Palestine' to self- determination, independence and sovereignty, and recognized the Palestinian people as a principal party in the establishment of a just and lasting peace in the Middle East". "The Assembly also aknowledged the proclamation of the State of Palestine by the PNC on 15 November 1988 and decided to designate the PLO as 'Palestine'".

355. In 1988, from around 105 declared non-self-governing territories, only nineteen remained as official non-self-governing entities: Namibia, which had acquired independence at the present; Western Sahara; East Timor; Gibraltar; New Caledonia; Anguila; Pitcairn; Montserrat; British Virgin Islands; Turks and Caicos Islands; Tokelau; Caiman Islands; St. Helena; Bermuda; Guam; Falkland (Malvinas) Islands; American Samoa; U.S. Virgin Islands and the Trust Territories of the Pacific Islands, which have certainly resolved their political status. See H. Hannum, op. cit., at n. 121, p. 87, quoting the *Report of the Special Committee on the Situation with Regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples,* 43 U.N. GAOR, Supp. (No. 23), U.N. Doc. A/43/23 (1988), chaps. 8-10.

356. Lolita Lebrón, Rafael Cancel Miranda, Irving Flores and Andrés Figueroa Cordero.

and shot some Congressmen during the hearings of the House of Representatives. The attack was committed after the nationalists took out the Puerto Rican flag and shouted "Viva Puerto Rico Libre", asking for the freedom of their nation. Nobody was killed during the attack, yet five Congressmen were wounded.[357] The nationalists were captured and sent to jail for the rest of their lives without extending to them the character of political prisoners and/or combatants, according to the Geneva Convention of August 12, 1949 -***Regarding the political prisoners' character of Puerto Ricans imprisoned in U. S. jails, see annual reports of Amnesty International***- and its Additional Protocols of 1977, especially Additional Protocol I, Art. 1 (4), which covers those armed conflicts:

> 4. ... in which peoples are fighting against colonial domination and alien occupation ... in the exercise of their right to self-determination, as enshrined in the Charter of the United Nations ...

Between 1978 and 1979, even though the Optional Protocols had not been ratified by the U.S. government, U.S. President James Carter granted an unconditional amnesty to the nationalists, including Oscar Collazo, who attempted to kill President Harry Truman in 1950 as part of the struggle for independence.[358] The decision to grant the amnesty was welcomed by the Decolonization Committee resolution of August 20, 1980 regarding the right of the People of Puerto Rico to self-determination and independence.[359]

As it has been argued, the support received by the liberation movements to end colonialism by any means, including armed struggle, could depend on the real possibilities of the population of those territories to freely decide their political future according to the principles of self-determination and decolonization

357. See newspaper "El Mundo", Tuesday, March 2, 1954, and "El Imparcial", Wednesday, March 3, 1954, taken from *"Newspaper Compilation 'Revolutionary Action' from the Puerto Rican Nationalist Party"*, supra, at n. 106.

358. See J.M. García Passalacqua; C. Rivera Lugo, op. cit., at n. 32, t. II, p. 81, regarding the recognition of the U.S. Congress, in 1989, of the armed opposition to the constitutional process of 1952. According to the authors it is the first time that this fact is included in a U.S. Congress official document; S. 712. Moreover, The Armed Forces of National Liberation (FALN), have claimed to be "an army of national liberation entitled to the privileges of prisoners of war under the Geneva Convention —a claim supported annually at the hearings of the United Nations Decolonization Committee", See *The Centre for Documentation on Refugees. UNHCR, Geneva,* supra, n. 342.

359. See U.N. Gen. Ass., Offic. Doc. A/AC.109/628, as cited by J.J. Alvarez, op. cit., at n. 1. See also Hannikainen, op. cit., at n. 194, p. 390, footnote #87, making reference to GA res. 2871 (XXVI), S-9/2, 38/17, and 38/36 A and B, as well as the Declaration of the Namibia Conference of 1983 in UN Chronicle 6/1983, p. 56, where *the U.N. recognized the captured freedom fighters of the SWAPO as having the international status of prisoners of war.*

present in resolution 1514 (XV). In the case of Puerto Rico, its inhabitants have never been invested with the degree of authority and sovereignty required by international law to exercise their right to self-determination. No commitment from the U.S. Congress to respect the will of the People of Puerto Rico in a referendum has ever been obtained. Furthermore, the alternatives proposed by several political sectors in Puerto Rico, and considered by the Congress for inclusion in a possible future plebiscite in Puerto Rico, would not resolve the colonial status of Puerto Rico. They would not satisfactorily solve the political character of the issue, and infringe on the right of Puerto Ricans to preserve their *culture* and to *economic and social development* as well as their right to develop a *democratic form of government.*

The U.S. Congress has accepted that all of the alternatives —"statehood", actual "commonwealth" and independence— are valid to be included in a future plebiscite process, and of "equal dignity" for the People of Puerto Rico. However, the alternative of "statehood", as accepted by the U. S. Congress would promote the eventual assimilation of Puerto Rican culture and values, and on the other hand, "commonwealth" constitutes a political status based on a non-democratic relationship with the United States and discriminatory treatment against the residents of Puerto Rico.

Moreover, through the non-recognition of a valid *alternative* of permanent Free Association formula (rather than the present non-democratic and unequal relations under the Commonwealth), based on the principles of equality and sovereignty of both nations, the United States is directly or indirectly promoting the future annexation of the Island. This assertion is based on the fact that "statehood" movement in Puerto Rico is increasing and, in the future, may attain the absolute majority necessary for a decision towards annexation. Then, we will see whether or not the U.S. government would be willing to accept Puerto Rico as another state of the Union. Yet, a more important issue is to avoid this possible future circumstance through the final solution of the status quo of the Island "without *unnecessary delay"*, as provided in the Declaration on Decolonization. This means to conduct a plebiscite or other accepted political process that will enable the People of Puerto Rico to find a non-colonial solution to the political status of the Island permanently, rather than having it submitted to an eternal debate, which clearly serves the annexation purposes and at the same time wastes, not only the time and money of the Puerto Rican government and its people, but also affects the U.S. budget.

For the holding of a valid, legitimate plebiscite, *the alternatives to be included have to be decolonizing.* That means that none of those alternatives can attempt against Puerto Rico's different cultural and national identity, and all of them should be in accordance with the principles of democracy and State sovereignty.

While these circumstances have not been achieved, the People of Puerto Rico would still have the option to exercise their right to self-determination, and end their colonial status by any means, including secession, in case Puerto Rico would be finally annexed by the North American Union. [360]

The "Commonwealth" of Puerto Rico:

Even though the political status of Puerto Rico under the new Constitution was denominated as "Estado Libre Asociado", in Spanish, the U.S. government refused to use the same terminology in English, "Free Associated State", adopting the name of "Commonwealth" as the official title of the "new" relations.

However, if we take the example of the former British Commonwealth of Nations, their position has always been sui generis.[361] "It is only since the Second World War that they have finally completed a long process of emancipation [362], ...moving towards the final goal of 'statehood.'"[363]

The members of the British Commonwealth now "...are fully sovereign states in every sense. In the field of external affairs, autonomy is unlimited; members enjoy and exercise extensively the right of separate legation and of independent negotiation of treaties... and are at liberty to contract ties with non-Commonwealth states."[364]

The development of this special relation had attained the "...supersession of inter se Commonwealth Rules by the application of international law itself to practically all the relations between the member states...".[365]

We cannot describe the British Commonwealth as either a super-state nor a federation; it is defined as:

360. The right to resort to armed struggle to eradicate colonialism has been reaffirmed by several G.A. resolutions, including resolution 33/44 (voting 129-0-6), resolution 36/68 (130-3-10), resolution 38/54 (141-2-8); resolution S-9/2; resolution 31/34 (109-4-24); res. 34/121 (120-0-27) and res. 38/17 (104-17-6), as cited by Hannikainen, id., n. 194. It was also reaffirmed in the *Vienna Declaration and Programme of Action of 1993,* which "...recognizes *any legitimate action...*" with the aims to end colonialism. (emphasis added).

361. J.G. Starke, op. cit., at n. 83, p. 116.

362. Ibid; "beginning as dependent colonies, next acquiring the status of self-governing colonies under the nineteenth century system of responsible government...".

363. Ibid. Here according to the meaning of the text, statehood shall be understood as a free sovereign state, not as annexation, as it is understood in Puerto Rican local politics.

364. Ibid.

365. Ibid, pp. 116-117.

> [S]imply a multi-racial association of free and equal states who value this association, who support the United Nations, who follow common principles of non-discrimination..., who recognise for the purpose of their association, although some of them be republics, that the British Sovereign is head of the Commonwealth, and who, subject to exceptions, have somewhat similar institutions and traditions of governments. There is no formal constitution, reliance being place on accepted practices and consensus procedures.[366]

When sovereign powers have been recognized within the Commonwealth, a different development can be noticed. Its nature and purposes have been defined as: " '[A] voluntary association of sovereign States, each responsible of its own policy, consulting and co-operating in the common interest of their peoples and in the promotion of international understanding and world peace' ".[367] The same Declaration affirmed that " '...membership of the Commonwealth is compatible with the freedom of member governments to be non-aligned or to belong to any other grouping association or alliance.'"[368]

Therefore, regarding the resolution of the United Nations concerning the future economic and political status of Puerto Rico, different reactions and expressions were established for the record.

Ambassador Lawrence from Liberia said: " 'I don't believe that any of the representatives sustains that P.R. is independent or has achieved self-government' ". Other representatives, such as Mr. Espinosa y Prieto[369] from Mexico, stressed that:

> [T]he 'new and original association between P.R. and the U.S. suffered from certain obvious defects. ...The Fourth Committee should be consistent and apply to P.R. the same criteria it had recently applied to the Netherland Antilles and Surinam. But by withdrawing [P.R.] from the scope of Chapter XI [of the U.N. Charter] before it was fully self-governing, the U.S. would endanger the whole system embodied in that Chapter'.[370]

366. Ibid, p. 117.

367. Id., concerning the Declaration adopted on January 22, 1971 by the Commonwealth Heads of Governments at Singapore.

368. Id., pp. 117-118.

369. Mr. Espinosa y Prieto served as "United Nations Plebiscite Commissioner for British Togoland". See H.S. Johnson, op. cit., at n. 146, p. 131.

370. A. Guevara, supra, at n. 21, pp. 283-84.

Moreover, Ambassador Menon, from India reacted:

> 'She was surprised to see that the term 'Commonwealth', used in English to designate the present status of P.R., had acquired a new and different meaning from that attaching to the term when used to describe relations between Australia and India and the United Kingdom, for example. A dangerous tendency was developing of giving words like 'union', 'federation', and 'commonwealth' in order to camouflage unequal relationships under a term having pleasant connotations. In effect, *the Committee was witnessing the creation of a new form of colonialism,* for in all cases a metropolitan country was associating itself with a Non-Self-Governing Territory or group of territories, not on a basis of absolute equality as in the case of the British Commonwealth, but on an unequal basis, as in the case of Puerto Rico. *The purpose of the Charter, however, was not the creation or the perpetuation of colonialism, but its complete and total elimination from the political thoughts and order of the new world'*.[371] (emphasis added).

According to these testimonies, it is clear that an authentic Commonwealth is composed of sovereign or independent states. It cannot exist under circumstances where one party is superior to the other, in a formula lacking the most elementary democratic requirements: the right to vote and to be represented. Indeed, that could not be called a Commonwealth, but a brilliant strategy to perpetuate a colonial situation, under a fraudulent rubric of the label.

Furthermore, most of the testimonies calling for the cessation of information mostly emphasized "...not on whether P.R. had achieved true self-government, but only on the fact that the new status was a change and that the people of P.R. had voted in favor of the change".[372]

On the other hand, the text of the Resolution strongly emphasized the constitutionaal and international status of P.R. and the concept of sovereignty: " '[The U.N.] recognizes that in the framework of their [P.R.] constitution and of the *compact* agreed upon with the U.S., the People of the Commonwealth of P.R. have been invested with *attributes of political sovereignty* which clearly identify the status of *self-government attained* by the Puerto Rican People as that of an *autonomous political entity*' ". (emphasis added).

"The emphasis on sovereignty comes from the belief that, in order to decolonize a Territory, whatever the final status, it must first have its sovereignty".[373]

371. Ibid, p. 286.
372. Ibid, p. 284. See also expressions of the representative of Honduras, supra, regarding the validity of consent under certain circumstances.
373. Ibid.

"Territorial sovereignty was described by the learned Max Huber, Arbitrator in the Island of Palmas Arbitration, in these terms:

'Sovereignty in the relations between states signifies independence. Independence in regard to a portion of the globe is the right to exercise therein, to the exclusion of any other State, the functions of a State.' "[374]

Article 2 of the United Nations Charter also sets out certain 'Principles':

> Two of these 'Principles' are laid down for organic observance by the United Nations itself, namely, that the basis of the United Nations shall not intervene (except where 'enforcement action' is called for) in matters 'essentially' within the domestic jurisdiction of any state (paragraph 7 of article 2 of the Charter). Four other 'Principles' are set down for observance by member states, namely, that they should fulfilled their obligations under the Charter, settle their disputes by peaceful means, not threaten or use force against the territorial integrity or political independence of any state, and give assistance to the United Nations, while denying such assistance to any state against which preventive or enforcement action is being taken.[375]

Moreover, the main resolutions and declarations on peace, peaceful settlement of disputes and international cooperation in strengthening peace adopted by the General Assembly over the years include: "...the 1965 Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of Their Independence and Sovereignty".[376]

If these were the intentions of the General Assembly for the inclusion of the wording "attributes of political sovereignty" in Res. 748 (VIII), the theoretical problem of self-determination would be finally resolved regarding Puerto Rico. On the other hand, the U.S. has been governing Puerto Rico in the same way that it did before the Constitution of 1952, under the "Territory Clause" of the U.S. Constitution, which under the actual development of international law should be considered as a crime against humanity concerning its application to overseas territories. Moreover, the resolution was adopted, notwithstanding the *lack of options* presented to the People of Puerto Rico at the referendums of 1951 and 1952, where the alternative for independence was precluded.

374. J.G. Starke, op. cit., at n. 83, pp. 157-158.
375. Ibid, p. 634.
376. *Basic Facts About the United Nations*, op. cit., at n. 86, p. 28.

Decisions of the U.S. Supreme Court Affecting Puerto Rico's Political Status

In general terms, the decisions of the U.S. Supreme Court had established that, in a limited number of cases, P.R. should be considered as a state of the U.S. for the purposes of the applicability of some federal provisions. But, on the other hand, the Court has been clear enough since *Downes v. Bidwell*, 1900, until *Harris v. Rosario*, 446 U.S. 651 (1980), concerning the powers of Congress over its territories, in this case Puerto Rico. In the latter case, it was decided that "Congress discrimination of Puerto Ricans under the Federal Program Aid to Families with Dependent Children (AFDC) did not violate the Fifth Amendment's Equal Protection Guaranty of the U.S. Constitution".

The fundamental doctrine of the *Insular Cases was expressly ratified by United States v. Verdugo-Urquidez*, 110 S.Ct. 1056 (1990), where the cases of *Downes v. Bidwell*, supra, and *Examining Board v. Flores de Otero*, were cited by the Court.[377]

Why? Because "Congress, which is empowered under the Territory Clause of the Constitution... to make all needful Rules and Regulations Respecting the Territory ...belonging to the U.S. may treat P.R. differently from states, as long as there is a rational basis for its action".

According to the U.S. constitutional doctrine of "equal protection under the law", the "rational basis" is the minimum constitutional standard that should be applied to legislative action that creates a classification based on economic regulations. Judicial intervention with this kind of legislation is minimal, while the State needs only to establish that the legislative purposes are legitimate, as well as the relations between those purposes and the classification itself.[378] Therefore, the adoption of this kind of analysis to deal with Puerto Rican affairs opens the door for unequal treatment and discrimination, while putting excessive powers over Puerto Rico in the U.S. legislative body.[379]

377. See R. Serrano Geyls, op. cit., at n. 62, 1990-1991. Suplement, p. 14. For an extensive discussion of the constitutional doctrine development after the insular cases and the adoption of the 1952 Constitution, see the same author, pp. 496-568.

378. R. Serrano Geyls, ibid, p. 1086. A deeper analysis of the other standards for constitutional revision is present in this publication.

379. If we compare the situation of Puerto Rico under the present "commonwealth" and the circumstances under which the People of Greenland attainedtheir degree of "home rule", there are some similarities. While the "home rule" of Greenland was attained after being integrated to Denmark through a Danish constitutional amendment, the Constitution and self-government of Puerto Rico was authorized by a U.S. Congress legislative Act, followed by two referendums in which the only option was to accept or reject the Congressional Act and the constituion. In both circumstances, the lack of options were obvious. Moreover, in the case of the "home rule" of Greenland, according to the Danish Constitution, it "...can

One of the most recent cases that analyzes the relations between Puerto Rico and the U.S. is dated June 4, 1994. The decision, *U.S. v. Sánchez*, 992 F.2nd 1143 (1994), is from the Eleventh Federal Circuit, and adopted the same interpretation given in the previous decision.

While the position of the United States regarding Resolution 748 (VIII) has been that the case of Puerto Rico, once taken off the list of colonial countries and peoples, is now under the exclusive internal jurisdiction of the U.S., this resolution has been interpreted in a different and more comprehensive way by several authors. Due to the commitment made by President Dwight D. Eisenhower - through U.S. ambassador, Henry Cabot Lodge, at the United Nations G.A.- to respect the will of the People of Puerto Rico if, in the future, they decided to modify the agreement, Resolution 748 (VIII) became an international agreement that was not respected by the government of the United States. Moreover, the General Assembly reserved its jurisdiction under the belief that the self-government attained by the People of Puerto Rico at that moment was not complete ("Full Measures of Self-Government"). After several refusals by the U.S. government to modify the political status of Puerto Rico according to the requests of the insular legislature, an important sector of the international community and the Puerto Rican population managed once again to include the case in the "Decolonization Committee" agenda.

Hence, in 1972, this Committee extended the applicability of resolution 1514 (XV) to the case of Puerto Rico, but due to the complicated political and diplomatic tension that it could provoke, Resolution 748 (VIII) was not expressly revoked. This means that, since 1972, the "Decolonization Committee" and the General Assembly declared that the case of Puerto Rico constitutes an international issue, under the jurisdiction of the international community rather than a matter under the domestic jurisdiction of the U.S.[380] Concerning this point, the wording used in the drafting of resolution 1514 (XV) is of paramount importance, when it establishes its application not only to non-self governing territories or those under trusteeship agreement, but also to other peoples or "territories which have not yet attained independence".

be changed or cancelled at any time...". The same situation appears in the case of Puerto Rico, where the U.S. Congress claim to has the same authority under the provisions of the "Territory Clause" of the U.S. Constitution, notwithstanding the decision taken by the People of Puerto Rico in the referendums of 1950-52. For a deeper understanding of the case of Greenland, see G. Alfredsson, *Greenland...*, op. cit., at n. 144, pp. 290-308.

380. J.M. Passalacqua; C. Rivera Lugo, op. cit., at n. 28, t. I, pp. 28-29.

The Puerto Rican Bar Association

From 1944 to the present, this institution has officially called for the decolonization of Puerto Rico. Since 1972, the Association has testified before the Decolonization Committee with that purpose. In its 1982 Resolution, the Bar Association recognized "the applicability of international law to the case of P.R. and reaffirmed the obligation of the U.S. to decolonize P.R. applying current international legal norms". This, of course, includes the "Declaration on the Granting of Independence to Colonial Countries and Peoples".

General Assembly resolution 748 (VIII), 1953, concerning Puerto Rico, can be analyzed under the same criteria as resolution 849 (XI) of 22 November 1954, which enabled the Danish government to remove the case of Greenland from the list of non-self-governing territories under similar circumstances; mainly lack of geographical representation (in the case of Puerto Rico at the U.S. Congress), and *lack of options* to freely decide the future of the peoples concerned. In both cases, the General Assembly had acted as a quasi-judicial organ making decisions under Art. 73 (e) of the U.N. Charter, a doubtful function of that Body.[381] Yet, assuming that the General Assembly has enough authority to pass these resolutions, the grounds for their annulment are extremely strong. Although it happened indirectly in the case of Puerto Rico through the latest resolutions of the Decolonization Committee, resolution 748 (VIII) has not been enforced or directly repealed by the G.A.

There have always been two possible steps to be taken for the solution of these colonial issues: the first one being to bring new evidence before the General Assembly that could produce a change in its previous decision.[382] This alternative is strongly supported by the case of New Caledonia, which, in 1986, was returned to the list of non-self-governing territories by a U.N. General Assembly resolution.[383]

The other option is to direct a request for an advisory opinion to the International Court of Justice (I.C.J.). However, if it is done, the General Assembly would not be exercising its retained jurisdiction over the case of Puerto Rico. Furthermore, in the present case, there is new evidence to review the Puerto Rican case, found in the most recent cases of the U.S. Supreme Court, which reaffirm the colonial status of Puerto Rico, describing it as a non-incorporated territory of the United States; the same political status existing since the Foraker

381. G. Alfredsson, *Greenland...*, op. cit., at n. 144, pp. 304-305.
382. Ibid, p. 305.
383. G.A. resolution 41/41/A, 41 U.N. GAOR, Supp. (No. 53), U.N. Doc. A/41/53 (1986) at 49, as cited by H. Hannum, op. cit., at n. 87, p. 39.

Act of 1900. Moreover, the violation of the agreement made by the U.S. Government under the Eisenhower administration,[384] to grant a more complete independence, placed the issue under the jurisdiction of the General Assembly, instead of being an issue under the U.S. domestic affairs.

While there is a need to clarify which is the present political status of Puerto Rico, making use of the Advisory Opinion procedure present in the U.N. Charter, it should not be confused with an attempt to use the I.C.J. as a Court of Appeals to review the previous G.A. resolution. The real effect of the Advisory Opinion would be to clarify which is the present political status of Puerto Rico, once the new evidence that appeared after 1953 has been considered by the Court. (See I.C.J. Rep., 1971, p. 33, regarding the powers of judicial review of the Court).

The next step in the peaceful solution of Puerto Rico's colonial issue is to ask the General Assembly to request from the International Court of Justice an Advisory Opinion to clarify which is the political status of Puerto Rico at present, under the scope of international law and U.S. Constitutional Law. A process has been organized to promote the request in a near future, and, for that purpose, similar procedures as the ones used by Namibia (1970), Western Sahara (1975) and Nauru (1992), should be followed.[385]

However, due to the recent ratification of the International Covenant on Civil and Political Rights by the United States Government in 1992, a new alternative is presented to the People of Puerto Rico to submit a complementary report before the Human Rights Committee, in order to challenge the U.S. government position regarding Puerto Rico as a non-colonial territory. This would be possible, due to the obligation of every state party to the Covenant, under Article 40, to submit annual reports concerning their fulfillment of its provisions, in this case Article 1. Article 40 (1) a-b states that:

> 1. The States Parties to the present Covenant undertake to submit reports on the measures they have adopted which give effect to the rights recognized herein and on the progress made in the enjoyment of those rights:
>   a. within one year of the entry into force of the present Covenant for the States Parties concerned;
>   b. thereafter, whenever the Committee so requests.

384. See reference made to it by U.N. Decolonization Committee resolution of September 12, 1978, para. 8. U.N. Gen. Ass., Offic. Doc. A/AC. 109/574, as cited by J.J. Alvarez, op. cit., at n. 1, p. 209.
385. See G. Alfredsson, supra, at n. 177, p. 8, where a recommendation is made to enhance the use of the International Court of Justice, by seeking advisory opinions, in order to avoid unnecessary amendments to the UN Charter. (In this case to resolve an error committed by the General Assembly acting as a quasi-judicial organ).

United States of America Report: CCPR/C/81/Add.4 24 August 1994.

The United States of America finally ratified the CCPR in 1992, and submitted its first report on August 24, 1994. Regarding the reservations made concerning Covenant's Article 1, the United States declared that "...the provisions of article 1 through 27... are not self-executing". On the other hand, the U.S. Government expressed that "States Parties to the Covenant should, wherever possible, refrain from imposing any restrictions or limitations on the exercise of the rights recognized and protected by the Covenant, even when such restrictions and limitations... are permissible under the terms of the Covenant".[386]

Despite the facts and legal issues raised in the present work, the U.S. first report under Article 40 of the CCPR stated in part that:

> Guam, the Virgin Islands, American Samoa and Puerto Rico each are represented in the U.S. House of Representatives by an electoral delegate. Other than the right to vote on the final passage of a bill or resolution, the delegate from each insular area enjoys the same privileges and exercises the same powers as a member of Congress from one of the states.[387]

However, based on the principles of equality and democracy upon which the U.S. government has emerged, for a fair representation in the U.S. Congress in equal footing with the rest of the U.S. population, the People of Puerto Rico should be granted not only the right to vote, but also to have not one but seven representatives in the U.S. H.R., as well as two Senators in the U.S. Senate, all of them with the right to vote and to be able to participate in the decisions which affect Puerto Rico as a non-incorporated territory of the United States.

In its report, the U.S. Government went further concerning Puerto Rico, establishing that: "Alaska, Hawaii, as well as the Commonwealth of Puerto Rico, all of which used to be 'non-self-governing' for purposes of Art.73, have completed acts of self-determination through which they have resolved the terms of their respective relationships with the rest of the United States".[388] Without considering whether or not the acquisition of Hawaii and Alaska were the product of a legitimate process, the historical circumstances under which the U.S. has

386. Liesbeth Lijnzaad, *Reservations to UN-Human Rights Treaties: Ratify and Ruin?*, Martinus Nijhoff Publisher, 1995, pp. 278-279387. See CCPR/C/81/Add. 4, p. 6.
387. Ibid.
388. Ibid.

conducted the administration of Puerto Rico are different from the particularities of the other territories. However, the U.S. Report states:

> 14. *The Commonwealth of Puerto Rico.* The largest and most populous of the U.S. Insular Areas, Puerto Rico was acquired by the United States in 1899 after the Spanish-American War. Between 1900 and 1950, Congress provided for the governance of Puerto Rico through Organic Acts. In 1950, Congress enacted legislation which authorized Puerto Rico to organize its own government and adopt a constitution. Puerto Rico did so, and its constitution became effective on 25 July 1952, at which time Puerto Rico achieved the status of a Commonwealth of the United States. Since then, the question of Puerto Rico's relationship to the United States has continued to be a matter of public debate and discussion. Most recently, the people of Puerto Rico expressed their views in a public referendum in November 1993; continuation of the current commonwealth arrangement received the greatest support, although nearly as many votes were cast in favor of statehood. By contrast, a small minority of some 5 per cent chose independence.

Nevertheless, as we have seen in detail, there are strong arguments which support the position of those who consider the post-1952 constitutional status quo, as one based on colonial and non-democratic relations, and moreover, far from constituting a real commonwealth. In addition, the last referendum held in Puerto Rico, November 1993, as we will see, while including the same traditional alternatives, suffered from the same colonialistic and non-democratic deffects which had affected the legitimacy of the previous processes. The same can be affirmed with regard to the 1998 Young Bill.

The reservation made by the U.S. Government concerning the non-self-execution of Articles 1-27 affect, at least, the essence of the right to self-determination present in the Covenant, which according to the Declaration on the Granting of Independence to Colonial Countries and Peoples "proclaims the necessity of bringing to a *speedy* and *unconditional* end colonalism *in all its forms and manifestations*". According to the Comments of the Human Rights Committee regarding the U.S. State Report (CCPR/C/79/Add.50, 7 April 1995; Human Rights Committee Fifty-third session):

> The Committee regrets the extent of the State party's reservations, declarations and understandings to the Covenant. It believes that, taken together, they intended to ensure that the United States has accepted what is already the law of the United States.

However, notwithstanding the incompatibilities of the reservations made by the U.S. government with the object and purpose of the Covenant, no reference or recomendations were made by the Committee regarding the status of non-self-governing and non-incorporated territories under the U.S. jurisdiction, nor of the legality of the Territory Clause of the U.S. Constitution, as it has been applied to those territories, and, in particular, to the case of Puerto Rico.

Notwithstanding these reservations, the right to self-determination has been universally accepted as a Principle of Public International Law under the scope of *jus cogens* and therefore, binding upon all states. As stated by the Human Rights Committee in its General Comment 12/21 of 12 April 1984, Article 1 of the CCPR enshrined an inalienable right of peoples, which is an essential condition for the effective guarantee and observance of individual human rights and therefore, the obligation of States "exists irrespective of whether a people entitled to self-determination depends on a state party to the Covenant or not".

The report submitted by the U.S. Government concerning its fulfillment under Article 1 with regard to Puerto Rico is not illustrative of the reality of the People of Puerto Rico under their present relationship with the United States. While the People of Puerto Rico were allowed to adopt their own constitution in 1952, the political and sovereign powers exercised by the United States over the island are still unchanged since 1917. Hence, the international community should be consistent in their practice of not recognizing a number of entities "where genuine self-determination of the people has been nullified by a racist minority regime *or by an external power.*"[389] (emphasis added).

The Case of Namibia

The practice followed in order to request an Advisory Opinion from the I.C.J. has been based on resolutions either from the U.N. G.A. or the Security Council, followed by a letter addressed to the Court by the U.N. Secretary General.

While the 1971 Advisory Opinion regarding the presence of South Africa in Namibia was originated by Security Council resolution 276 (1970), due to the refusal of the South African Union to fulfill with G.A. and S.C. resolutions concerning its obligation to submit periodical reports to the U.N. G.A. regarding the administration of Namibia -from 1950 until 1979-, in the case of Puerto Rico, the basis to request an Advisory Opinion from the I.C.J. could be considered due to the refusal of the U.S. Government to comply with the reiterated resolutions of the G.A. Decolonization Committee reaffirming the right of the People of Puerto

389. Lauri Hannikainen, *op. cit.*, at n. 194, p. 321.

Rico to exercise its right to self-determination and independence, according to G.A. resolution 1514 (XV), from 1972 until the 1990's.

In the case of Namibia, the Advisory Opinion was requested to seek legal advice from the I.C.J. on the consequences or implications of the previous resolutions of the Security Council. On the other hand, the position adopted by South Africa was to challenge the Security Council previous resolutions, and therefore, to object to the request for an Advisory Opinion from the I.C.J. According to the South African government, the Union was not under the obligation to report to the G.A. with regard to its administration of the territory of Namibia, once the Mandate System created under the League of Nations was over due, to the termination of the League's System. Moreover, the Government of South Africa argued that, due to the classification of Namibia under category "C" of the Mandate, it was natural to think of Namibia as a territory "not far removed from annexation", as a practical effect. (See I.C.J. Rep., 1971, pp. 28,30).

In this context, since 1946, the Government of South Africa had asked for the integration of Namibia to the Union. However, on 14 December 1946, the U.N. G.A. objected to the integration of Namibia to South Africa through resolution 65 (I). Notwithstanding the resolution of the G.A., as late as 1971, the government of South Africa was still arguing that the administration of the territory was for the benefit of its inhabitants *and was desired by them,* and therefore, no legal provision prevented its annexation of Namibia. (See I.C.J. Rep., 1971, pp. 39-40,43).

The Court responded to these arguments by making reference to previous advisory opinions concerning the same territory, like the one of 1950 with regard to the International Status of South-West Africa (Namibia). In the opinion of the Court, in "...the setting up of a mandate system, two principles were considered to be of paramount importance: *the principle of non-annexation* and the principle that the well-being and *development* of such peoples form 'a sacred trust of civilization.'" The Court added:

> It is self-evident that the 'trust' had to be exercised for the benefit of the peoples concerned, who were admitted to have interests of their own and to posess a potentiality for independent existence, on the attainment of a certain stage of development: the mandate system was created to provide peoples 'not yet' able to manage their own affairs with the help and guidance neccesary to enable them to arrive at the stage where they would be 'able to stand by themselves'. (See I.C.J. Rep., 1971, pp. 28-29).

Furthermore, the Court stressed that to "...accept the contention of the Government of South Africa... would have entailed the reversion of mandated territories to colonial status, and the virtual replacement of the mandates régime by annexation, so determinedly excluded in 1920". The Court concluded that "'the principle of non-annexation' was 'considered to be of paramount importance' when the future of South-West Africa and other territories was the subject of decisions after the First World War. What was in consequence excluded by Article 22 of the League Covenant is even less acceptable today". (See I.C.J. Rep., 1971, pp. 33,43).[390]

The I.C.J. also stated that, in order to interpret an international instrument, the framework of the whole international legal system has to be taken into consideration. Hence, due to the provisions regarding the interpretation of legal norms *in pari materia* and to the developments of the last fifty years, it is clearly illustrated that the "ultimate objective" of the mandate and the trusteeship systems was the *"self-determination* and independence" of peoples. "In this domain, as elsewhere, the *corpus juris gentium* has been considerably enriched, and this the Court, *if it is faithfully to discharge its functions, may not ignore"*. (See I.C.J. Rep., 1971, pp. 31-32; emphasis added).

> [T]he International Court of Justice treated the people of the Mandated Territory of South West Africa as having, in effect, rights at international law, including a right of progress towards independence, which had been violated by South Africa's failure as Mandatory Power to comply with its obligations to submit to the supervision of United Nations organs (see ICJ 1971, 16 at 56 where the Court referred to the people of the Territory as a 'jural entity' and as an 'injured entity').[391]

390. See U.N. G.A. Doc. A/AC. 109/PV. 1157, 13 agosto 1979 (Español), Mr. Francisco Hernández Vargas stressed that, due to the particular situation of Puerto Rico, it has been considered as a case of military occupation. Moreover, Hernández Vargas stated that integration in the case of Puerto Rico would result in the elimination of the Puerto Rican nationality, contrary to international law and to the right of peoples. Furthermore, it was stated that, as the United Nations has decided in previous cases, such as Goa and East Timor, *integration or annexation* -in the case of Puerto Rico, *"statehood"- is not a political solution for countries militarily occupied.* Therefore, the alternatives for Puerto Rico in a future plebiscite shall be to choose between Independence and Free Association, based upon the principles of political and juridical equality with the United States. As a matter of fact, it has been the position adopted by the Decolonization Committee until 1998, concerning the decolonization of Puerto Rico. (See Dec. Committee resolutions). For the degree of military occupation of the Island see chapter on *Military Presence in Puerto Rico.*

391. J.G. Starke, op. cit., at n. 83, pp. 68-69.

Considering the apparent contradiction between the United States Supreme Court decisions after 1953, and the U.N. General Assembly resolution 748 (VIII), if a future advisory opinion is requested to the International Court of Justice to define the present political status of Puerto Rico, and if the position of the I.C.J. would be that the colonial situation of the Island was resolved through the approval of the 1952 Constitution and according to resolution 748 (VIII), then, they should rule in the same way that they did regarding the presence of South Africa in Namibia.

In the same Advisory Opinion of 21 June 1971, the International Court of Justice ruled:

> 1. [T]hat, inasmuch as the continued presence of South Africa in Namibia was illegal by reason of its refusal to submit to the supervision of United Nations organs, South Africa was under an obligation to withdraw its administration from the territory immediately, and to end its occupation there; and
> 2. [T]hat member states of the United Nations were under an obligation not to recognise the legality of South Africa's presence in Namibia, or the validity of South Africa's acts on behalf of or concerning Namibia, and were to refrain from any acts and any dealings with the South African Government implying recognition of the legality of, or lending support or assistance to, such presence and administration. Moreover, the validity or effects of any relations entered into by any state with South Africa concerning Namibia ought not to be recognised by the United Nations or its Member States.[392] Although the Advisory Opinion is confined to rulings upon the particular circumstances of South Africa's relationship to Namibia, *these pronouncements may well be used in the future for wider purposes, to support a generalised rule imposing a duty of non-recognition of all territorial and other situations brought about in breach of international law.*[393] (emphasis added).

Finally, as one of its last strategies, the Government of South Africa requested the Court for an authorization to hold a plebiscite in the territory, to take into consideration the desires of the People of Namibia. The Court concluded that, due to the fact that no further evidence was needed, the mandate should be considered validly terminated and, in consequence, "South Africa's presence in Namibia is illegal,... it follows that it cannot entertain this proposal". (See I.C.J. Rep., 1971, pp. 57-58).

392. Ibid, p. 156.
393. Ibid.

Any future opinion of the I.C.J. concerning Puerto Rico, according to its previous rulings in the case of Namibia, would be in harmony and complementary to the Decolonization Committee resolutions reaffirming the right of the People of Puerto Rico to self-determination and independence. The presence of the U.S.A. in Puerto Rico should be considered illegal, after the missleading representations that Government filed before the U.N. in the 1950's. In spite of the fact that the federal government considered Puerto Rico a non-incorporated territory of the U.S., subject to its plenary powers, that government has been without reporting under Art. 73 (e) of the U.N. Charter for 45 years. The same violation was attributed to South Africa in 1971 in regard to Namibia; its penalty: to withdraw from its jurisdiction.

The Pacific Islands

After the end of the Second World War, the Pacific Islands became part of the list of territories under United States administration, yet their acquisition was not intended to be ruled under the same constitutional framework applied to Puerto Rico and previous territories. They were within the scope of international standards set up by the United Nations[394] under Chapter XII, rather than Chapter XI, regarding non-self-governing territories, ie., old, traditional colonies.

However, the alternative of Free Association adopted in the context of the Pacific Islands could be one of the alternatives available to the People of Puerto Rico in a future plebiscite, an alternative which is supported by resolution 1541 (XV), yet totally different from the actual "Free Associated State" or "Commonwealth" status designed for Puerto Rico in 1952.[395] Under the formula of Free Association, the plenary powers of the United States under the "Territory Clause" would cease,[396] but only according to the General Assembly resolutions, meaning, to become an independent State associated to the U.S. Otherwise, it would be another legal maneuver to perpetuate the colonial system under a new label.[397] It is a relatively modern concept which can be compared to the *protected independent states,* but with the authority to unilaterally terminate the association

394. C. Gorrín Peralta, supra, at n. 25, p. 45.
395. See Mayra Enid López Mulero, *Una Mirada al Pacífico: Análisis comparado de la relación entre Estados Unidos y Micronesia, con el caso de Puerto Rico,* 50 Rev. Jur. Col. Abog. de Puerto Rico 1-2, p. 29 (1989), for a comparison with some of the Pacific territories.
396. C. Gorrín Peralta, supra, at n. 25, pp. 53-54.
397. For an analysis of the possibilities to create an Associated Republic or a Free Association treaty with the U.S., see Marco Antonio Rigau; J.M. García Passalacqua, *República Asociada y Libre Asociación: Documentación de un Debate,* Editorial Atlántico, Dominican Republic, 1987, pp. 406. (See also resolutions 742 (VIII) & 1541 (XV).)

with another state.[398] However, even though the promotion of the alternative of free association has been carefully considered and promoted by a liberal sector of the PDP, the majority leaders have not accepted it. On the other hand, neither the alternative of *integration* nor resolution 1541 (XV) have been mentioned by the Decolonization Committee as possible solutions for the colonial status of Puerto Rico. All the resolutions call for the implementation of resolution 1514 (XV) to enable the People of Puerto Rico to exercise their right to self-determination *and* independence, including the most recent resolution of August 1998.

The Decolonization Committee and Puerto Rico

It was in 1972 when, for the first time, the "Decolonization Committee" claimed jurisdiction over the case of P.R., calling for its decolonization.[399] Yet, since that time, the Committee has continually reaffirmed, through its resolutions, the right to self-determination and independence of Puerto Rico.[400] Notwithstanding the reinstatement of the case Puerto Rican case on the international community's agenda, the U.S. government has never resumed the fulfillment of its obligation to send information about Puerto Rico to the U.N. General Assembly. Moreover, the case of Puerto Rico, even though on the agenda of the "Decolonization Committee", does not appear in the official list of colonial countries at present.[401]

Notwithstanding the absence of Puerto Rico from the official list of remaining colonies, in a resolution of 1980,[402] the Decolonization Committee stated " '[The Decolonization Committee] urges once again the Government of the United States of America to adopt all necessary measures for the full transfer of all powers to the people of Puerto Rico, and to this end, requests that government to present, as soon as possible, a plan for the decolonization of Puerto Rico, in accordance with General Assembly resolution 1514 (XV)'".

Furthermore, the right to self-determination and independence, according to General Assembly resolution 1514 (XV), has been consistently reaffirmed by

398. H. Hannum, op. cit., at n. 87, p. 17.
399. A. Guevara, supra, at n. 21, p. 303, footnote 203. According to the author, one of the main reasons for the delay was that the U.S. was one of the original members of the Committee.
400. Ibid, footnote 204, where several Resolutions reaffirming the right to self-determination and independence of Puerto Rico are mentioned: 28 U.N. GAOR Committee on Colonial Countries (948th mtg.) U.N. Doc. A/AC.109/438 (1973); 33 U.N. GAOR Committee on Colonial Countries (1133d mtg.) U.N. Doc. A/AC.109/574 (1978), and after this resolution the "Committee" reafirmed the right to self-determination and independence of Puerto Rico, every year, until 1988, 43 U.N. GAOR Committee on Colonial Countries (1345th mtg.) U.N. Doc. A/Ac. 109/973 (1988). The last resolution, after seven years of inaction, was approved on august 1998.
401. *Basic Facts About the United Nations,* op. cit., at n. 86, p. 192.
402. U.N. Doc. A/AC.109/628 (1980), as cited by A. Guevara, supra, at n. 21, p. 303.

several international movements and organizations like the Non-Aligned Movement, and its Coordinating Bureau since 1964, the Inter-Parliamentary Union (where the U.S. government was represented), Socialist International, Conference of Latin American Political Parties, International Association of Democratic Lawyers and the Permanent People's Tribunal.[403]

Later, in 1982, when it appeared that the issue of the political status of Puerto Rico would be included on the U.N. agenda, U.S. Ambassador Jeanne Kirkpatrick "'made it clear to the non-aligned nations that, while abstention was understandable, a vote againts the U.S. would carry penalties.' "[404]

In 1953, the United Nations General Assembly approved Resolution 742 (VIII) indicating the factors that have to be considered in determining whether there has been decolonization in a plebiscite process.[405] One of the most important factors in the process is the absolute equality between the two parties, and this equality presupposes the transference of powers from the metropoli to the colony.[406] At present, resolution 1541 (XV) has replaced resolution 742 (VIII) regarding both alternatives to be included in a plebiscite process and the criteria to determine whether or not a territory is non-self-governing.

According to resolution 742 (VIII), "Free Association" would be a decolonizing alternative, only if there is absolute equality between the territory and the metropoli. Under resolution 1541 (XV), the additional alternatives are described as:

> [T]he alternative of *Free Association* requires a 'free and voluntary choice... through informed and democratic processes' and must include the right of unilateral modification of the association by the people of the territory. *Integration* must be *on the basis of 'complete equality' between peoples of the territory and the independent country to which they are adhering,* and it can only come about if the territory has attained 'an advanced stage of self-government with free political institutions' and if the option of integration is chosen with *'full knowledge'* through democratic processes, 'impartially conducted and based on universal adult suffrage'"[407] (emphasis added).

403. A. Guevara, ibid, pp. 304-305. "This Tribunal found against the U.S. and in favor of the Puerto Rican plaintiffs, supporting the recognition of the political prisoners status to the Puerto Ricans in U.S. jails for their struggle for independence; the renouncement of power by the U.S. Congress over Puerto Rico; the transfer of all powers from the U.S. to a Puerto Rican political constituency made up of leaders from all political perspectives on the island" (footnote #217).
404. Ibid, p. 287.
405. See Resolution 742 (VIII).
406. See Resolution 1514 (XV).
407. G.A. resolution 1541 (XV), Principles VII, VIII, and IX, as cited by H. Hannum, op. cit., at n. 87, pp. 40-41, footnotes #129 & 130. See also C. Tomuschat, *Self-Determination in a Post-Colonial World,* Modern Law of Self-Determination, op. cit., at n. 152, p. 12.

The inclusion of the alternatives of integration and free association have been also favored by the 1970 Resolution on Friendly Relations... However, there are no procedural requirements for a territory to emerge as a sovereign state; for independence.[408] Why?

General Assembly resolution 1541 (XV) includes in its Principle V that, in order to determine whether or not a territory should be considered as non-self-governing, due regard has to be given to the administrative, political, juridical, economic and historic nature of its relationship with the metropoli. After the characteristics of the territory are established, the next step is to determine if the territory has been *arbitrarily* placed in a position of subordination regarding the metropolitan State, in conection with those characteristics. If this last criterium is fulfilled, the territory should be considered as non-self-governing. Do these criteria describe the political status of Puerto Rico?, What does the word *arbitrarily* imply within the context of the resolution?, Which is the effect of Res. 748 (VIII) on the validity of Res. 1541 (XV) regarding Puerto Rico?

Despite the treatment of the case of Puerto Rico as a domestic jurisdiction issue since 1953, the U.S. government had expressed its willingness to apply the principles of international law to Puerto Rico, although refusing to recognize its colonial status. The several failed attempts to negotiate a plebiscite process at least served the purpose of showing under which alternative the future economic, social, cultural and political development of Puerto Rico would be more realistic and possible. The organizing of plebiscites has been useful in several cases for the formulation of the conditions and circumstances under which self-determination would be possible. However, the participation of the people in the formulation of the alternatives is necessary.[409] The latter criteria, however, has been absent in the Young Bill of 1998 and the Craig draft propossal in the U.S. Senate.

1991 Plebiscite Negotiation Process (1989-1990)

During 1988, the leaders of the three main political parties in Puerto Rico reached an agreement for the solution of the political status of Puerto Rico. On January 17, 1989, they addressed the President of the United States, George Bush, and the U.S. Congress requesting an agreement for holding a plebiscite. The U.S. government answered, expressing its support for the proposal. It was the first time in history that the leaders of the three main political parties in Puerto Rico had agreed to participate in a plebiscite process.[410]

408. Ibid, p. 41.
409. H.S. Johnson, op. cit., at n. 146, pp. 111, 134.
410. J. M. García Passalacqua; C. Rivera Lugo, op. cit. at n. 28, t. I, p. 2.

At that time, the population of the Island was calculated at 3.5 million inhabitants, with 2.3 more millions living in the continental territory of the United States[411], for an approximate total of 5.8 million.

However, it was in1975 that President James Carter decided to evaluate the issue of the political status of Puerto Rico. Furthermore, under the Jimmy Carter administration, around 1977, a sector from the State Department, among them Eric Svendsen, started promoting the independence of Puerto Rico as the most favored solution for the political status.[412]

Taking into account this background, some authors have analyzed the right to self-determination of Puerto Rico, not only as a prerogative of the People of Puerto Rico but as a process of "mutual-determination", taking into consideration the interests of the metropoli.[413] However, while in practice that is the style of negotiations promoted and directed by the U.S. government, this position or new doctrine of "mutual-determination" does not find any legal support on the "Declaration on the Granting of Independence to Colonial Countries and Peoples", according to which the case of Puerto Rico has to be finally resolved.[414]

In spite of the inadmissibility of any conditions imposed by the metropoli to enable the People of Puerto Rico, or any other peoples, to exercise their right to self-determination, the process of negotiation and consultation initiated by the three main political parties in Puerto Rico has a special value, for several reasons, which are present in Senate Draft Legislation 712 and in different reports from the special committees of the U.S. Congress in charge of studying and promoting the solution to the issue of Puerto Rico.[415]

The main issues presented in the whole process can be studied not only from the perspective of the right to self-determination, but also from the economic and military interests of the United States in Puerto Rico. An interesting aspect of the process was that the U.S. Congress, while recognizing in its draft legislation S. 712 the applicability of the principle of self-determination to the case of Puerto Rico, as well as that Puerto Rico was acquired by the U.S. through a colonial war against Spain, its present position is that, due to the 1952 constitutional process, Puerto Rico is not a colony anymore.[416] Therefore, we have to ask ourselves: Why

411. Ibid.
412. Ibid, pp. 3-4.
413. Ibid, p. 5.
414. See Resolutions of the "Decolonization Committee" regarding Puerto Rico, since 1972.
415. The most important documents are reproduced at J.M. Passalacqua & C. River Lugo, tomos I & II, op. cit., at n. 43. See also J.J. Alvarez, op. cit., at n. 1, pp. 45-151 (S: 712); pp. 153-158 (H.R.: 4765); pp. 159-180 (Cong. Records).
416. See expressions of Senator Moynihan, ibid, t. II, pp. 316, 351, 356.

is the U.S. government still feeling responsible to conduct a plebiscite according to the international law principle of self-determination, if they really believe that Puerto Rico is not a colony anymore? This question is still unanswered.

Section 1 (1) of the draft legislation stated:

> (1) the United States of America recognizes the principle of self-determination and other applicable principles of public international law with respect to Puerto Rico...

Moreover, although Congress draft S. 712, to hold a referendum regarding the political status of Puerto Rico, recognized the applicability of the principle of self-determination (sec.1 [1]) to the case of Puerto Rico, the U.S. Congress H.R. was considering the process as one of internal administration, rather than international concern,[417] without accepting the "self-execution" of the results. The main conditions imposed by the U.S. Congress, according to S.712, were that the plebiscite would be administrated, supervised and financed by the federal authorities, that any legal issue would be resolved by a federal court created for that purpose, and that the qualified voters would be those authorized to vote under the electoral laws of Puerto Rico.[418]

According to the debates at the Congressional sessions, "commonwealth" status was defined as a non-permanent solution to the political status of Puerto Rico. Moreover, under this status, the U.S. Congress is not compelled, but is allowed, to discriminate against the residents of Puerto Rico concerning the extension of several federal social financial aid program. On the other hand, Congress expressed that "statehood" for Puerto Rico means the integration within the U.S. nation, with the subsequent cultural and language assimilation; that any preference or different treatment of Puerto Rico under "statehood", as part of an economic transition period could be declared unconstitutional by the U.S. Courts based on the "Uniformity Clause" of the U.S. Constitution; that, even though in the long term "statehood" could cost less than the actual status to the U.S. budget, during the first four years, at least, the cost would be twice of what it is, according

417. Ibid, pp. 27-28, 101. As a reason why the U.S. Congress did not include in the bill any international supervision of the process.
418. Ibid, p. 30. The process not only avoided any international supervision, but also excluded from participation 2.3 million of Puerto Ricans living in the continental territory of the United States. Was the U.S. Senate really recognizing the application of the principles of international law and self-determination to the People of Puerto Rico, or only organizing a consultative process according to their internal constitutional provisions, to find out what was the will of the people at that moment, without any further commitments?

to the General Accounting Office of the U.S. Congress; that independence would be possible only with the negotiation of the military permanence in some strategic points in Puerto Rico and a commitment from the government of Puerto Rico to forbid any other foreign military forces to be placed on the Island. Even with independence, the U.S. citizens born in Puerto Rico would not lose their citizenship, but their next generation and individuals born in Puerto Rico after the proclamation of independence will not be considered U.S. citizens but only citizens of Puerto Rico; that agreements of free trade could be developed between Puerto Rico and the United States, after the proclamation of independence of Puerto Rico; that after the proclamation of independence, Puerto Rico could receive the status of "favored nation" in economic and trade relations with the United States, and that the U.S. would promote the same treatment from other nations towards Puerto Rico. Apparently, according to S. 712, an economic transition period towards independence would be easier for the United States, not only from the financial perspective, but also because *of the cultural and constitutional problems that "statehood" would imply.*[419]

The U.S. government used the negotiation process to send a message to the People of Puerto Rico: a message that has been interpreted in many different ways, but that, without any doubt, is of an invaluable importance to conduct a real decolonization process, taking into consideration not only the traditional political and moral arguments, but also the paramount duties of all colonial powers to promote the economic, social and cultural development of the inhabitants of the territories under their control, as an inherent attribute of the right to self-determination.

Notwithstanding the multiple issues that emerged during the negotiations,[420] the main issue, from the U.S. budget perspective, can be summarized as the financial impracticality for the U.S. to extend to Puerto Rico the same amount of federal aid for social benefits that is granted to the states of the Union. The main reasons are obvious: while the states' inhabitants and corporations pay federal taxes, the people from the territory of Puerto Rico are exempted. However, even

419. J. M. García Passalacqua; C. Rivera Lugo, ibid; See S. 712 for a detailed description of the conditions accepted by the U.S. Congress for each of the political alternatives presented. *At page 128, some constitutional obstacles are mentioned for the creation of an economic transition process towards "statehood".* A copy of the document in English can be found in J.J. Alvarez, op. cit., at n. 1, Booklet 2, pp. 45-151.

420. Such as the right of Puerto Ricans residing in the U.S. (around 2.3 millions) to vote in the plebiscite process, as well as the lack of legitimacy of foreigners with residence in Puerto Rico to vote at the process; constitutional issues under the "Territory Clause" to develop the actual "Status Quo" or "Commonwealth" and the constitutional issue under the "Uniformity Clause" for the granting of "statehood" with some preference treatment, within others. See J.M. García Passalacqua; C. Rivera Lugo, op. cit, at n. 32, Tomo II.

if Puerto Ricans would start paying federal taxes, the amount of money that the U.S. government would receive will not be enough to offset those outlays. Consequently, other modifications in the commerce and tax policy towards Puerto Rico would be necessary, as, for example, the total or partial elimination of the investment benefits that section 936 of the U.S. Internal Revenue Code provides for Puerto Rico, which, at the moment, is in a phase-out process, resulting in a considerable economic dislocation for the Island. The situation of section 936 has been under constant U.S. Congress review for amendment and its total elimination has just started, due to the loss of income that it constitutes for the U.S. Treasury.[421]

Another serious problem, presented by the actual status quo, is the lack of representation in the U.S. government, as well as the impossibility of the residents of Puerto Rico to vote for the election of the U.S. Congress and President, whilst these political branches of the U.S. government are still taking the most important decisions regarding the political and economic future of the Island. According to the 1989-1990 negotiation process, these circumstances would remain the same in the "enhanced commonwealth", except for some f*ederal judicial review* process that would be created to enable the government of Puerto Rico to review the applicability of some provisions of the P.R.F.R.A. Under these circumstances, the present political status would still suffer from serious non-democratic characteristics in regard to its political and economic relations with the U.S., and, therefore, it could not be considered as a decolonizing alternative to be included in a plebiscite to be hold under the international principles that apply in a decolonization process. Furthermore, an important fact is that even though the majority of the people in Puerto Rico —represented by the PDP— have requested from the U.S. Congress to include in a future plebiscite an *Enhanced Commonwealth* with a wider degree of autonomous powers —in accordance with the commitment made by the U.S. government in 1953—, Congress has never accepted the proposals of the majority political party, creating a political atmosphere where the

421. See U.S. Treasury Department, *Tax Reform for Fairness, Simplicity, and Economic Growth,* Nov. 1984, at 144. For an explanation of the phase-out process, which would be completed by 1997, see id., vol. 2 (General Explanation of Treasury Proposals), Ch. 15.05. See also, *U.S. Treasury Report Starts Premature Panic on 936,* Caribbean Business, Dec. 5, 1984, at 1; Hacia la gradual eliminación de las 936, El Nuevo Día, Nov. 28, 1984, at 1; and *Puerto Ricans Fear Tax Overhaul Would Force Island's Retreat to 'Rum-and-Textile Economy',* The Wall Street Journal, Feb. 13, 1985, at 64, all of these as cited by Erick G. Negrón Rivera, *Beyond Section 936: A Suggested Departure From Tax-Sheltered Stagnation in Puerto Rico,* supra, at n. 6 (This research was presented by Erick Negrón to professor Oliver Oldman at the Law Faculty of Harvard University). See also J.M. García Passalacqua; C. Rivera Lugo, ibid, p. 150. See also pp. 323-324, and 341 for more details about the phase-out of section 936.

leaders of that party had no other alternative than to consent to the present political status.

According to Rubén Berríos Martínez, leader of the Independence Party in Puerto Rico, the present relationship between Puerto Rico and the United States, under any name, and notwithstanding if adopted by imposition or by the consent of the People, is contrary to the principles of Democracy, and attempts against the values and principles of the United States, constituting a shameful practice before the international community.[422]

It has been stressed by some specialists on self-determination that in some cases peoples could genuinely wish to keep their good relationship with the metropolitan colonial power, but that the problem persists if the metropoli does not eradicate the colonial rule "...by instituting democratic representation of the peoples in question in the central capital...".[423] Moreover, even for other groups that don't normally have the right to external self-determination, the *"systematic non-representation* or exclusion of group(s) in the national government, ... would entitle groups to separate from the states concerned". This position is supported by the "...references to the 'recourse... to rebellion against tyranny and oppression' set forth in the Universal Declaration and to language in the Declaration on Friendly Relations".[424]

In one of the latest Sub-Commission reports, Special Rapporteur Asbjorn Eide stressed that:

> 'It is overriden by the basic principle of territorial integrity, provided, however, that the states conduct itself in accordance to the principles of equal rights and self-determination of peoples and is possessed of a government representing the whole people of the territory without distinction as to race, creed or colour. ...*When the government does not allow all segments and all peoples to participate, the question on the right to self-determination of the different components becomes more pertinent*'[425] (emphasis added).

This means that, even though some ethnic groups and minority groups are not entitled to the right of external self-determination, when the internal democratic process within the state does not enable them to enjoy their individual and collective rights, their right to rebellion could become

422. Ibid, p. 360.
423. G. Alfredsson, *Greenland...*, op. cit., at n. 144, p. 299.
424. G. Alfredsson, *Speaking Notes,* supra, at n. 177, p. 3.
425. G. Alfredsson, *Greenland...*, op. cit., at n. 144, p. 299, and from the same author, *The Right to Self-Determination and Indigenous Peoples,* op. cit., at n. 152, p. 49.

paramount, and even more pertinent than the principle of territorial integrity and state sovereignty.[426]

Regarding the alternative of "statehood", several obstacles were found. While the draft legislation S. 712 accepted the auto-execution of the results of the plebiscite, that possibility was strongly objected to by the different committees, mainly at the U.S. House of Representatives.

The main arguments against the self-execution of the plebiscite were based on economic and constitutional obstacles. Therefore, Congress tried to propose a transition process for the granting of "statehood", which has been also strongly criticized on constitutional grounds. However, after their latest economic impact researches, "statehood" would be not only the most expensive alternative for the U.S. budget, but it would also affect dramatically the economic, social and cultural development of Puerto Rico. To be brief, while "statehood" would produce an extention to Puerto Rico of all the federal aid for social benefits that apply to the states of the Union[427], it would imply the elimination certain benefits, extending the general rule of federal taxes, not only to individuals, but also to the U.S. corporations established in Puerto Rico, which, until recently, were entitled to a tax exemption policy that only applies to those companies which opperate in possessions of the United States.[428]

According to U.S. Congress research data, the elimination of section 936 would possibly cause the reduction and closing of operations of these companies in Puerto Rico, creating some economic and social disruptions. The immediate results would be the decrease of the gross national product (GNP),[429] and the

426. See the struggles of the indigenous peoples of Chiapas, México and other Latin American countries like Guatemala, Bolivia and indian tribes in the United States, Canada, and so on.
427. One of the U.S. Congress reports deemed necessary the commitment of the White House to find the additional $3 billion that "statehood" would cost to the federal budget, before any further commitment with the People of Puerto Rico to grant "statehood" was made. See J.M. García Passalacqua; C. Rivera Lugo, op. cit., at n. 32, tomo II, pp. 138, 349. According to other Congressional Budget Office sources, "statehood" for Puerto Rico would cost around $9.4 billions to the U.S., see ibid, p. 347.
428. Section 936 was originally designed for the promotion of economic investment of U.S. enterprises in the Philippines, during the 1920's. See J.M. García Passalacqua; C. Rivera Lugo, op. cit., at n. 32, tomo II, pp. 329, 343.
429. Ibid, p. 184, where it is stated that the GNP would decrease approximately between 10 and 15% for the year 2000 under "statehood", according to the model of statistics used by the U.S. Congressional Budget Office (CBO). See also p. 135, where it is said that under "statehood" the economic development of Puerto Rico would decrease in 1 or 2% per year, while under independence the reduction would be of 0.3% in comparison with the economic development projected under the actual political status and under the actual tax exemption policy, which are not secured for the future. For more information about economic effects of the different alternatives proposed, see also pp. 116, 132-135, 137-138, 141, 147-148, 150, 152, 175, 188, 196, 323-324, 341, 347, 349.

increase of unemployment, which in 1989 was estimated at 19.5% of the working class,[430] and 15% for 1994.

For an idea of the awareness among the NPP leaders regarding the economic disruption that "statehood" would create to Puerto Rico, according to Carlos Romero Barceló, former governor of Puerto Rico from the "statehood" New Progresive Party and present Resident Commisioner from P.R. at the U.S. Congress:

> [H]e will call a yes-or-no plebiscite on statehood in early 1985, *and will define the request as one including the retention of Spanish as [Puerto Rico's] official language, a 20-years transition period on federal taxes and the assumption by Congress of the island's public debt.*
>
> If Congress does not approve any of the three conditions, the governor intimated, it is possible that the Puerto Rican people may reject any other kind of statehood than that including the three conditions. If they do, then no other statehood would be acceptable. If that were the case, the governor did not elaborate on the option. Yet it was clear to everybody listening that the governor seems ready... to keep the word he gave to the New York Times and to CBS news several years ago, and opt for independence..."[431]

From the data collected by the U.S. Congress it is clear that according to the information available now, "statehood" would result in a decrease of the economic development opportunities of Puerto Rico, as well as in a large increase of unemployment in the Island. An interesting fact, is that while more than half of the Puerto Rican population is considered to be under the federal government poverty standards[432], this percentage would grow in proportion to the unemployment increment, making more people eligible to qualify for federal welfare benefits and, therefore, the whole burden of responsibility would become more critical for the U.S. budget.

430. J.M. García Passalacqua, ibid, p. 198, making reference to the statistics of the Puerto Rico Planning Board. For 1983, these "936 enterprises" were creating job opportunities in approximately 68% of the manufacturing sector in Puerto Rico, ibid, p. 77. The consequences of "statehood" have been estimated by the U.S. Congress reports asapproximately 100,000 more unemployed for the year 2000, ibid, p. 137. (For present statistics see the Government Development Bank for Puerto Rico statistics).
431. See J.M. García Passalacqua, *Castro, Rockefeller and Harvard,* The San Juan Star, Mar. 23, 1983, at 31, making reference to symposium on "Press and the Political Status of Puerto Rico", sponsored by the *American Society* in New York; and Romero Barceló, Puerto Rico, U.S.A.: The Case for Statehood, 59 Foreign Affairs 60, 79 (1980), as cited both of them by E. Negrón Rivera, supra, at n. 6, p. 167, footnote #139.
432. J.M. García Passalacqua; C. Rivera Lugo, op. cit., at n. 32, tomo II, p. 347.

Moreover, under "statehood", even though none of the Congressional bodies wanted to give an official position about the future of Puerto Rican culture and language, Senator Daniel Patrick Moynihan was clear enough when he asked the representatives of Puerto Rico, mainly the ones that promote that political status, "if the People of Puerto Rico wanted to become 'North Americans', because that was what "statehood" would bring to Puerto Rico sooner or later".[433] The same position has been adopted recently (1996-98) by the U.S. Congress in the negotiation process promoted by Congressman Don Young, from Alaska, when the English language was imposed as a pre-requisite to any future definition of "statehood" for Puerto Rico.

Submitting a people to a plebiscite where the alternative of integration implies cultural assimilation, increase of economic dependency from the metropoli and deterioration of the economic and social development of the territory in question could be easily described as a traditional practice consisting of the "...employment of colonial practices to *'end'* the colonial system itself..."[434], which is absolutely unacceptable. (emphasis added).

On the other hand, the financial reports of the U.S. Congressional Committees regarding the formula of independence did not find the economic and constitutional obstacles of the other two alternatives. Although the proclamation of independence would also have the consequence of the elimination of section 936, other alternatives of economic development and tax exemption policies could be developed, not only for U.S. enterprises, but also for companies coming from other countries. Due to these and other alternatives present in independence (but not under the other two proposed alternatives), and to other commercial favored treatment that Puerto Rico could receive not only from the United States, but also from other countries,[435] the economic impact on the Island would not be as damaging as the one described under "statehood"[436], and additional trade opportunities could be developed, which are not possible under the present "commonwealth" status.

Moreover, notwithstanding the gradual reduction of the federal benefits, the economy of the Island would become more independent from the economy of the United States[437], having also the possibility of applying for international credits to attain an acceptable level of development.[438]

433. Ibid, p. 345.
434. G. Alfredsson, Greenland..., op. cit., at n. 144, p. 302.
435. J.M. García Passalacqua; C. Rivera Lugo, op. cit., at n. 32, t. II, p. 137.
436. Ibid, tomo II, p. 43; tomo I, p. 63.
437. Ibid, tomo II, pp. 152, 196.
438. Ibid, tomo II, pp. 186, 192-193.

Although the federal benefits that apply to Puerto Rico at present would be gradually reduced, the U.S. Government has expressed its willingness to continue with a considerable federal financial aid to Puerto Rico, with the condition of keeping some of the most important military installations that they have established on the Island until the present.[439]

Finally, after the negotiation process, the plebiscite was not held during the planned year, 1991, due to the lack of agreement between the two U.S. legislative bodies.[440] Yet, one of the leaders of the pro "statehood" movement clearly expressed that the formula of independence is the only one that the U.S. Congress is willing to grant, with generous concessions for its realization.[441]

The Referendum in Puerto Rico in 1967, the negotiation and consultative process of 1989-90, and the referendum of November 1993, as well as the 1996-98 Young-Bill process, have not fulfilled the international law requirements for their validity as a real process of decolonization. Contrary to the position adopted by some scholars, the International Community of States has created specific procedural requirements that should be followed in order to include an alternative of integration and/or association in any decolonization process. Moreover, the only alternative given to the People of Puerto Rico previously, in 1951 and 1952, was to draft a Constitution, with all the colonial implications that surrounded the adoption of such a document,[442] or to remain under the authority of the U.S. Congress according to the Jones Act, which was clearly unacceptable under international law principles and for all the political sectors in Puerto Rico. However, the Jones Act is the federal statute that still governs the present economic and political relations between Puerto Rico and the United States under the name of "Puerto Rican Federal Relations Act".

The referendum of 1993 was an internal response from Puerto Rico to the U.S. Government lack of agreement for holding the plebiscite of 1991. However, the pathetic characteristics of the process, were once again, the essence of its illegitimacy: lack of transference of sovereign powers to the people; lack of

439. However, that is a point to be discussed in a separate work, due to the different positions in Puerto Rico regarding the U.S. military presence in the Island. Any agreement would probably need to focused on a future total demilitarization of Puerto Rico. On the other hand, apparently this is the only strong condition by the U.S. Congress to accept the final recognition of independence to Puerto Rico. See ibid, tomo I, pp. 26-27. However, it is a dramatic change of position of the U.S. Defense Department (old War Department), from their previous position in the 1940's when any alternative of sovereign status for Puerto Rico was strongly opposed. See J. Rodríguez Beruff, supra, at n. 14, p. 61.

440. J.M. García Passalacqua; C. Rivera Lugo, op. cit., at n. 32, t. II, p. 214, 284.

441. Ibid, tomo II, p. 379.

442. The colonial implications were not transmitted to the People of Puerto Rico during the campaign for the referendum. See V. Géigel Polanco, op. cit., at n. 58.

commitment of the U.S. Congress to respect the final decision of the People of Puerto Rico (as expressed by the U.S. Congress, any plebiscite result will be non-self-executing); and the inclusion of the three classic alternatives with the colonialist and anti-democratic characteristics inherent to their definitions.[443]

The dramatic increase of the pro "statehood" movement in P.R. illustrates the genuine interest present at the U.N. General Assembly resolution 1514 (XV) debates to include as a requirement of a valid decolonization process "...the necessity to bring to *a speedy and unconditional* end colonialism in all its forms and manifestations...". (emphasis added). This provision, together with other provisions of the resolution, such as the one condemning the pretext of "inadequacy of political, economic, social or educational preparedness... for delaying independence", are clear illustrations of their concern about the doubtful effectiveness of a decolonization process if submitted to a plebiscite after an intense and prolonged process of cultural assimilation, economic dependency and political repression have been institutionalized by the metropoli.

The issue regarding the alternatives to be included in a future decolonization plebiscite in Puerto Rico, the validity of the consent of the peoples and the disagreements between different sectors in Puerto Rico and the United States concerning these controversies are illustrated by the debate originated during the Conference Proceedings *A Time to Change: Relations Between the United States and American Samoa, Guam, the Northern Marianas, Puerto Rico and the United States Virgin Islands,* between the Electoral Commissioner of the P.I.P., Manuel Rodríguez Orellana and U.S. Professor Hurst Hannum. During the debate, Rodríguez Orellana reacted:

> [Y]our view on consent seems to me terribly lax, is too loose, it does't take into account in any way how that consent is arrived at by the people in the territory. The problem which I have with the idea of consent is... whether it is such a lax concept as you have used it that one might even begin to think anew the idea of bringing back slavery or amending the U.S. Constitution to establish apartheid if that were the majority opinion,... under international law there are also notions of the jus cogens, of those things that are inalienable rights, such as self-determination, and for which the consent has to be within the parameters of civilized development in the international world order.

443. See Senate Bill S. 712 and H.R. 4765, which can be found in José Julián Alvarez González, op. cit., at n. 1, pp. 45-151, 153-158. See also in the same publication U.S. Senate Congressional Records S. 1056-1068, January 23, 1991, at pp. 159-180.

Professor Hannum agreed with one point:

> [T]hat consent is only legitimate if it is given by a people that is knowledgeable, and has self-governing institutions, so that the world is confident that this was not a 'consent' manipulated by the colonial power in order to keep its tentacles in the colony... That is fine. But it is incorrect to assert that the right to self-determination can be repeated indefinitely until one achieves independence and not thereafter... People have the right to join or separate. And I think that, as long as we are clear that the people have freely expressed themselves and knowledgeably expressed themselves, the international community, at least, is going to accept whatever decision the people have made.

With regard to the validity of the consent given by the People of Puerto Rico, Professor Carlos Gorrín Peralta expressed previously:

> Puerto Rican decisions regarding status have been always severely tainted by illegal interventions by the government, through political persecution of the independence movement.

Furthermore, Rodríguez Orellana added:

> I do not want to leave you with the impression that I believe that consent can only be given to independence. I am saying that a valid consent can only be given to non-colonial statuses. And of course, as you well know, there are at least three non-colonial statuses that are recognized by the United Nations, and they are all based, by international law,... on sovereignty: integration, free association, or independence.

Professor Hannum:

> I think that your interpretation of only three rather technical forms of a relationship between one people and another people... is an unjustifiable limitation on the democratic rights of the people in the colony to choose whatever they want. And I think that (cut off by Orellana).

Manuel Rodríguez Orellana: "So colonialism by consent is okay?".

Professor Hannum:

> Any relationship freely arrived at between two people is okay. You may dislike what a majority of your own people has decided. But I don't think that either the international community or the United States or Puerto Rico should say that self-

> determination can be exercised only by adopting one of these three options. It is fundamentally unacceptable to say that there are a thousand options out there in the world which are irrelevant because for you, the people of Puerto Rico, there is only integration, free association or independence. International law certainly does not recognize that limitation. I *think the principles of democracy reject that limitation.* And I think it is really unfair to equate any solution outside those three with *colonialism or slavery.* (emphasis added).

Manuel Rodríguez Orellana:

> No, I agree with you that there can be many options, but I do think that international law does prohibit colonialism in any form, way, shape or manner. And I think that colonialism by consent is nonetheless colonialism and something that has been outlawed whether it has consent or not. I think, however, you have made your position very clear. And I thank you for being so frank about your options.

Professor Hannum: "As you said, yesterday, Manuel, from good friends you expect the truth even if you don't agree with it".[444]

THE RIGHT TO SELF-DETERMINATION AS PART OF JUS COGENS

Jus Cogens or Peremptory Law has been described by Rozakis as:

> In principle, the *ratio legis* of the *jus cogens* rules is to protect some common concerns of the subjects of law. A contractual arrangement, despite its being *inter partes,* may nevertheless affect such general values and interests as are considered indispensable by a society at a given time. In an organised legal order, therefore, the function of the *jus cogens* norms is to protect the society and its institutions from harmful consequences of individual agreements.

Suy added to the previous definition: "Thus, the jus cogens restricts the freedom of the parties; its rules are *absolutely binding.*"[445]

The 1969 Vienna Convention on the Law of Treaties included in its Article 53:

444. Conference Proceedings, A Time to Change: Relations Between the United States and American Samoa, Guam, the Northern Marianas, Puerto Rico and the United States Virgin Islands, February 8-11, 1993, pp. 122, 130-132.
445. L. Hannikainen, op. cit., at n. 194, p. 1.

> Treaties conflicting with a peremptory norm of general international law (jus cogens).
> A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm *accepted and recognized by the international community of States as a whole* as a norm *from which no derogation is permitted* and which *can be modified only by a subsequent norm of general international law* having the same character.[446]

The 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations has accepted the same definition of *jus cogens.*[447]

Concerning the criteria to determine whether or not a legal principle should be considered as a peremptory norm of general international law, the prevailing interpretation affirms that the concept "*the international community as a whole*", means "the overwhelming majority of States, including all essential components of the international community of States, but not necessarily every State."[448]

Although the concept of *Jus Cogens,* i.e., Peremptory Law, has been used within the context of the treaty law, its operation is not confined only to the prohibition on treaties which conflict with it. This interpretation has been sustained by the International Law Commission (ILC) in its commentary to draft Art. 61 (final Art. 64 of the VCLT) in 1966 when it stated: "'a rule of *jus cogens* is an overriding rule depriving *any act or situation* which is in conflict with it of legality.'" In the contemporary doctrine, "the operation of peremptory norms beyond the realm of treaty law has gained much support."[449] An ILC commentary reported that "some members suggested as example obligations to respect human rights, the equality of States and the *principle of self-determination*".[450] (emphasis added).

On the other hand, some States, like France, have been oppossed to the recognition of the concept of jus cogens. However, even the French representatives have expressed their "willing to recognize the invalidation, because of their conflict with peremptory norms, of treaties providing for the unlawful use of force contrary to the principles of the UN Charter, or for the perpetration of an international crime, or for the violations of the *principles of human rights, sovereign equality of States, or self-determination*".[451] While the French government accepts to have no reasons to decline to recognize these basic principles of humanity and morality as peremptory, it is strongly oppossed to go further in the interpretation of the concept of jus cogens.

Notwithstanding the imperative character of jus cogens norms, the international community has not made a concerted effort to enumerate specifically which norms are peremptory. However, several suggestions have been made in order to consider certain principles as peremptory norms. For example, Article 103 of the U.N. Charter puts the Charter above other treaties. Therefore, in cases of conflict between the Charter and a specific treaty, the provisions of the former shall prevail.[452] Regarding the Charter, some authors have stressed that it "has initiated the transformation of jus cogens from *de lege ferenda* into lex lata" and that "the most important provisions of the Charter are now considered to be peremptory norms, binding on members and non-members alike".[453] The principle of self-determination is present in articles 1 and 55 as one of the cornerstones of the Charter System.

Furthermore, the resolutions and declarations of the U.N. G.A. and the S.C. have been of an invaluable help to clarify, without any doubt, the peremptory character of certain norms of general international law, through their declarations of invalidity of certain *treaties* and *acts* of states.[454] In G.A. resolution 35/118 of 1980, this body rejected any act or agreement of colonial and racist powers which ignores, violates or denies the inalienable rights of peoples under colonial domination to self-determination *and* independence. In G.A. res. 34/65 B, the same body rejected, as invalid, the provisions of the *Camp David Accords* of 1978, which violate or interfere with the exercise of the right to self-determination and national independence of the Palestinian People.[455]

The right to self-determination has been also considered as a peremptory norm of general international law in the *World Conference to Combat Racism and Racial Discrimination* conducted in Geneva in 1978, by stating that "the principles

446. Id., p. 2.
447. Id., p. 3.
448. Id., p. 4.
449. Id., pp. 6-8.
450. Id., p. 164.
451. Id., p.173.
452. Id., p. 13.
453. See opinions of Paul, Kreca, and Schwelb, as cited in ibid, p. 16, footnote #48.
454. Id., p. 15.
455. See also G.A. res. 36/120 F. Res. 37/123 F and 38/180 D which "rejected all agreements, in so far as they violate the recognized rights of the Palestinian people". Ibid, p. 191. Other examphes of rejection of State acts or agreements which clash with the right to self-determination of peoples, placing it in within the peremptory norms of jus cogens, are the non-recognition of the "measures of the 'racist minority regime' of Southern Rhodesia, the establishment of so-called Bantustans by South Africa and the domination by South Africa of Namibia. See ibid, pp. 306-307.

of non-discrimination and self-determination are *imperative* norms of international law".[456]

The ILC has also given examples of obligations whose serious violations constitute international crimes committed by States:

> 'on the basis of the rules of international law in force, an international crime may result, *inter alia,* from:
>
> * * *
>
> (b) a serious breach of an international obligation of essential importance for safe-guarding the right of self-determination of peoples, such as that prohibiting the establishment or maintenance by force of colonial domination'.[457]

As we have seen, the "legal principle of self-determination of (dependent) peoples has been among those principles or rules the Jus Cogens status of which has received most support". Consequently, the obligation of states to refrain from obstructing the right of dependent peoples to self-determination has become a norm of peremptory status under the process of decolonization, at least with regard to colonial-type domination. Moreover, as it has been supported by Brownlie, Hossain and Bollecker-Stern, this obligation of states includes the abstention of States from exploiting the natural resources of dependent territories to the serious detriment of the peoples of those territories, which has also developed as part of the peremptory norm.[458]

While some experts have stressed the importance of the non-binding character of the U.N. G.A. resolutions, there are exeptions to the general rule that should be mentioned. The U.N. G.A. resolutions binding character has been recognized when:

1. They are unanimous or adopted by the International Community of States as a whole.

456. Ibid, where the author stressed that the Conference was attended by representatives of 123 governments.
457. Ibid, p. 287. Examples of State obligations under draft art.19 (3) Part I; ILC Report, 1976, UN Doc. A/31/10, p. 226.
458. Ibid, pp. 381, 717, 421. See also G.A. resolutions 2288 (XXII), 2554 (XXIV), 3171 (XXVIII), 3299 (XXIX), 33/40, and regarding Namibia resolutions 3295 (XXIX), 3399 (XXX), 34/92 B, 35/227 I, 36/121 A, 37/31, 38/36 A, 38/50, 39/50 A, and 40/52. Regarding Portugal's colonies in Africa see res. 2270 (XXII), regarding the Palestinian People see res. 3336 (XXIX), and 3005 (XXVII) and so on, where the UN has expressed its position, due to the non-renewable character and limited quantity of those resources. See ibid, pp. 417-421, notes 171, 177, 179, 185.

2. Include legal wording reflecting the legal character of such resolutions.
3. When they are ratifying or reaffirming principles contained in the U.N. Charter and of Ius Cogens or Customary International Law.[459]

In these circumstances, the intention of the state, while consenting, is implicit, and representatives are considered as authorized to make decisions binding upon the respective states. Moreover, the customary character of a rule should not be affected by a dissenting state, if it has been widely recognized. As it has been said, it will depend on the General Custom which is binding upon all parties and the opinio juris.[460]

In a particular situation, South Africa was claiming that a certain resolution of the G.A. did not have any binding character upon S.A., with regard to its administration of Namibia (S.W.A.) and the right to self-determination of the latter, due to their vote against the resolution. The I.C.J. ruled in this case that the U.N. Charter obligations, Art. 55, were already binding upon South Africa and, therefore, the government of South Africa was obliged to comply with the G.A. resolution which was a reaffirmation of the states' obligations under the Charter.[461]

Concerning the principle of self-determination, without any doubt, after it was included in the U.N. Charter, it has been elevated to a legal principle binding upon all states through majority and unanimous resolutions of the U.N. General Assembly. Moreover, the I.C.J., in its advisory opinions, the Human Rights Committee, in its General Comments, and the opinio juris have reaffirmed its legal, universal and binding character, emerging as a peremptory norm of international law.

THE ISSUE OF PRIORITIES AND THE PRESENT HUMAN RIGHTS TREND

If we analyze the policy promoted by the PDP, since its founding, for the achievement of social justice, along with the so called "totalitarian regimes" policies established by some "former-communist" countries for the achievement of the same economic and social goals, we can see that, while some totalitarian regimes gave priority to the development of social and cultural rights over the promotion and protection of civil and political rights (at the individual level), the

459. Oscar Schachter, *International Law in Theory and Practice,* Martinus Nijhoff Publisher, Netherlands, 1991.
460. Ibid.
461. Ibid.

government in Puerto Rico was doing almost the same, not only regarding some individual rights[462] (as the right to vote and be represented at the metropolitan capital, rights against political discrimination, and so on) but also the most sacred collective political right: the right to self-determination, as the minimum condition for democracy and the protection, respect and promotion of all other civil and political rights.

The leadership of the PDP has argued that the achievement of a certain degree of economic and social development was a priority. This argument sounds familiar; it is the same one that has been used by several authoritarian regimes, not only in some former-communist countries, but also in several new independent states that have emerged in Africa and other places in the world, to perpetuate some elite groups in power, whilst denying respect for individual rights. The pretext: A paramount attention given to economic, social and cultural development.

The contemporary position of the international community is that both "generations of rights" are equally important, and therefore, the development of one of them is impossible without the promotion and respect of the other.

Because of the incorporation of self-determination as an international law principle, within the scope of human rights, it is necessary to look beyond and comprehend which are, or should be, the main goals of all human rights instruments. According to some authors, the ultimate goal of these instruments is the protection and respect of "human dignity". Therefore, in order to understand the concept of "human dignity", it is necessary to understand the universal values upon which this concept has emerged as one of universal character.

These universal values can be divided in at least eight main sources from which all the so called civil and political rights, as well as the economic, social and cultural rights —including collective rights— come from.[463]

462. The lack of inclination of the leaders of the PDP to promote, not only the final decolonization of Puerto Rico, but also other individual rights, through the elimination of the program "Educational Division for the Community", which promoted democratic values, and the opposition of Luis Muñoz Marín to the creation of the "Civil Rights Commission". (See H. Wells, op. cit., at n. 13, pp. 314, 315-316). While the restriction of individual liberties has been the official practice of totalitarian regimes as a pretext for the achievement of economic and social justice, the situation in Puerto Rico has been characterized by the existence of an official and systematic political repression against individuals, based on their political beliefs, notwithstanding the "democratic" values safeguarded in both the U.S. and the Puerto Rican Constitution.

463. Although the definitions of these concepts and values have been taken from the analysis of several readings and lectures given by visiting professor Peter Takirambudde at the Raoul Wallenberg Institute, there are some analysis made in the present thesis regarding a comparison between these universal values and the traditional values of Puerto Rican society discussed by Henry Wells in "The Modernization of Puerto Rico", op. cit., n. 13. However, the conclusions and the extension of the scope of protection of the

These universal values are (a) power, (b) wealth, (c) physical and psychological well - being, (d) respect, (e) affection, (f) enlightenment, (g) skill, and (h) rectitude.[464]

As identified by Henry Wells, with regard to Puerto Rican traditional and modern values in his book "The Modernization of Puerto Rico", these basic universal values can be catalogued as deferential and benefit or welfare values. As deferential values, we can mention *respect, rectitude, affection* and *power*. On the other hand, *wealth, well-being, skill* and *enlightenment* can be considered as welfare or benefit values. In Puerto Rico, the government has concentrated mostly on the second group of values, whilst the former have suffered a deep deterioration not only at the individual level, but also at the collective one.

If we analyze all these values from a macr perspective rather than on an individual basis, it could be said that "respect", "power", "affection" and "rectitude" would be the minimum basis for the efficient and peaceful relations among nations. Moreover, without the fulfillment of these values, it would be impossible, or at least more difficult, to attain a degree of security and protection for the other values, not only as collective rights, but also at the individual level. It is at this stage that we can reaffirm the inalienable character of the right to self-determination as independence, the exercise of which is a necessary means to attain the respect of human and peoples dignity, through the eradication of all forms of foreign domination, colonialism and new forms of servitude.

As recognized by Kant, the rights of peoples regarding each other is to form their own States, rather than to be merged in one single State.[465]

individual rights for the final achievement of the respect for human dignity, at the macro level, ie., the right of peoples and nations to exist and to become independent, as a minimum of respect to their dignity, is an analysis made by this author, with credit to the most relevant provisions present at the *African Charter of Human and Peoples Rights,* strongly criticized by the Western countries. For a more comprehensive and extensive discussion of the concept of Universal Human Dignity, see Harold D. Lasswell & Myres S. Mc. Dougal, *Jurisprudence for a Free Society, Studies in Law, Science and Policy,* vol. II, New Haven Press, Martinus Nijhoff Publishers, Netherlands, 1992, pp. 725-786.

464. Ibid, pp. 738-739.

465. E. Kant, *Lo Bello y lo Sublime/La Paz Perpetua,* ("The Perpetual Peace"), 5th ed., Espasa Calpe S.A., Madrid, 1972, p. 108.

CONCLUSION

According to the present economic and political relations between Puerto Rico and the United States, the U.S. Supreme Court decisions and the U.N. G.A. Decolonization Committee resolutions (1972-1998), Puerto Rico is neither a Commonwealth nor a Free Associated State, but a non-incorporated territory of the United States with certain degree of autonomy and attributes of sovereignty -according to G.A. Res. 748 (VIII)- in local matters. Inspite of the recognition of international status in 1953, the U.S. government has been treating Puerto Rico under its Plenary Powers, ie., as one of the remaining traditional colonies of the 20th century[466]. Therefore, the territory of Puerto Rico should be officially treated as other countries in the list of Non-Self-Governing Territories and the U.S. presence in Puerto Rico declared illegal. The "precedents": New Caledonia in 1986 and Namibia in 1971.

Due to the exigencies of the principle of self-determination as a peremptory norm of internaional law, the respect of which is necessary for the promotion of economic, social and cultural development, and international peace and security, the international community and the U.S. government must not consider the present "commonwealth" political status and "statehood" as possible alternatives to be included in a real decolonization process. Moreover, there is a paramount responsibility of the international community, and mainly of the Decolonization Committee, to rule in their resolutions regarding Puerto Rico not only on the right of the People of Puerto Rico to self-determination and independence, but also under other particular circumstances of each alternative (as the cultural, economic and social impact of all the alternatives involved), before authorizing the inclusion of any of them in a plebiscite. While these alternatives will continue to be present in any discussion regarding the future decolonization of Puerto Rico, no final solution will be reached because of the inherent colonial, non-democratic and imperialistic implications of each of them. As it has been affirmed after the adoption of G.A. resolution 1514 (XV): "In the emancipation of a people from a dependent status, each of the alternatives has been equally acceptable to the negotiators when it has been interpreted to mean a form of independence".[467]

466. According to some scholars and specialists on public international law, peoples which until the present have been reduced to a "'non-dominant or *colonial condition*'" -terminology used by the Working Group on Indigenous Peoples in their definition of indigenous populations- include "Basques, Kurds, Abkazians, Bretons, Chechens, Tibetans, Timorese, *Puerto Ricans*, Northern Irish, Welsh, Tamils, Madam Arabs or Palestinians". Jeff J. Corntassel & Tomas Hopkins Primeau, *Indigenous "Sovereignty" and International Law: Revised Strategies for Pursuing "Self-Determination"*, 17 Human Rights Quarterly 343, (1995).

467. H. S. Johnson, op. cit., at n. 146.

Regarding "statehood", the U.S. government should be honest with the People of Puerto Rico, and express their refusal to accept Puerto Rico as a new member of the Union, based on both the economic and the ethnic or cultural implications of that choice, and the impact that it would have in the implementation of the U.S. foreign policy, due to the degree of representation that the Puerto Ricans would havein the U.S. Congress. As we have expressed previously, maybe other alternatives of integration based on mutual respect, like a confederative association, could be evaluated by both the U.S. government and the pro "statehood" movement, which at the same time could promote the economic, social and cultural development of Puerto Rico, without the constitutional, cultural and economic limitations that "statehood" implies.

On the other hand, the only alternative of the PDP to its proposed enhanced "commonwealth" is to follow the requirements of resolutions 742 (VIII) and 1541 (XV) concerning Free Association, an alternative that has been carefully considered already by the autonomist branch of that political party, but not by its leaders.[468] Another alternative would be the creation of a real commonwealth, as the ones established in the former British colonies, towards a subsequent emancipation through independence, as described previously.

The appeal for national liberation in Italy, between the seventeenth and eighteenth centuries -rather than the annexation process promoted initially by France- is the basis upon which lays the modern Principle of Self-Determination, directed to the liberation of dependent peoples, ie., Non-Self-Governing Territories.[469] From that moment, self-determination "...has continued to mean the right of subjugated peoples, as nations, to liberation".[470]

468. Without any doubt, the unwillingness of the leadership of the PDP to promote Free Association as a new formula of the present"commonwealth", is based on their belief that, due to the fear of most of the population of losing their federal economic benefits, a great number of voters would move to the pro-"statehood" sector. That is why, under our special circumstances, it is necessary to request from the international community their position towards the alternative of annexation regarding the case of Puerto Rico, and moreover, to request from the U.S. Congress to be honest with the People of Puerto Rico and with themselves, expressing finally if they would really grant "statehood" to Puerto Rico, in spite of the moral implications and the disadvantages that such alternative represents for both the People of Puerto Rico and the United States of America.

469. See H.S. Johnson, op. cit., at n. 146, p. 92.

470. Ibid, p. 95.

From the moral perspective, and according to the universal value of rectitude[471] as one basis for human dignity, the issue of Puerto Rico was analyzed by the Episcopal Conference of Catholic Bishops, simultaneously with the negotiation and consultative process of 1989-1990. In their declaration, it was clearly expressed that the fundamental character of the process was not to choose between one of the three traditional alternatives presented ("statehood", "commonwealth" or independence). Yet, the real task for the People of Puerto Rico is to develop a new Puerto Rican National Project for the new century. That project must enable the country to promote its development within the framework of a co-operative initiative based on the principle of national sovereignty, under which any kind of political, economic or cultural subordination under the authority of other State shall be excluded.[472]

Under the present relations, Puerto Rico has achieved a high level of relatre relative economic growth. As expressed by Erick Negrón:

> For more than two decades, the industrial incentive program known as Operation Bootstrap brought a remarkable increase in the living standards of the two thirds of the Puerto Rican population that did not move out of the island during that period. But times have changed and economic growth has stopped; once again one third of the Puerto Rican population is unable to find jobs.[473]

New alternatives for development could be found only without the limitations of the present "Puerto Rico Federal Relations Act", and exploring the possibilities of participating in the financial credits available from international organs, like the International Monetary Fund, the World Bank,[474] as well as participating in the United Nations Developing Programs and the Caribbean integration movement.

For the possibilities of development in an independent Puerto Rico, Erick G. Negrón Rivera has expressed that:

> Puerto Rico would be able to come into independence in far better shape than was the case for most of the former colonies that presently make up the developing world. As far as infrastructure (transportation, communications, energy production, etc.) and human capital are concerned, the island is substantially more advanced than any of the countries surrounding it and virtually any other

471. "The rectitude myth formulates a demand for everyone to acquire a sense of responsibility for acting through private and colective channels on behalf of a free society". Harold D. Lasswell & Myres S. McDougal, *Jurisprudence for a Free Society...*, op. cit, n. 463, p. 757.
472. J.M. García Passalacqua; C. Rivera Lugo, tomo II, op. cit., at n. 32, pp. 289-290, 380.
473. E. Negrón Rivera, supra at n. 6, p. 181.
474. J.M. García Passalacqua; C. Rivera Lugo, tomo II, op. cit., at n. 32, pp. 186, 192-193.

> country at its moment of independence. Although Puerto Rico has never been famous for its natural resources, it is known to have quantifiable mineral resources worthy of exploitation, and in recent years there have been strong signs of substancial oil reserves off the Puerto Rican shores. ...moreover, the island would be attaining independence at a time when non-reciprocity in tariff arrangements between developed and developing countries is becoming a common trade rule.[475]

Due to the present economic dependence on the U.S., and the lack of possibilities for economic development as a state of the United States[476] which would carry a big U.S. budget expenditure to extend all the federal economic and social benefits to the residents of Puerto Rico, some authors have pointed out of the danger of becoming a national ghetto, surviving mainly from federal financial aid and the U.S. welfare.[477] Indeed, Puerto Rico is not far away from it.

475. Regarding human capacity, for 1982, "Puerto Rico's population of 3.2 million included 6,500 engineers, 1,800 agronomers, 5,500 medical doctors, 1,000 dentists, 1,100 public accountants, 450 architects, 5,000 electricians, 6,500 lawyers, and 150,000 university students. Taken from Rubén Berríos Martínez, *La Independencia de Puerto Rico, Razón y Lucha*, 1983 as cited by E. Negrón, supra, at n. 6, pp. 172-173, footnote #157.
Furthermore, concerning natural resources, "there are seven known deposits of nickel in the western coast of the island, which may contain about $4 billion worth of nickel at 1979 prices. Associated with nickel are found cobalt, iron and chromium. ...Copper deposits have been located in the mountainous interior. Associated with copper are found gold, silver, molibdenum and sulfur. A study done by the Puerto Rican government (1974) in relation to the combined value of Puerto Rico's proven reserves of copper, gold, silver, and sulfuric acid, estimated those reserves to be worth $ 4.85 billion (Prices used for the estimate: Copper-$0.85 lb., Gold-$200 oz., Silver-$5.50 oz., Acid-$20 ton.). See Morales Cardona as cited by E. Negrón Rivera, *ibid,* p. 173.
Other minerals such as manganese, cobalt, nickel and copper have also being reported to exist under the seabed of the economic zones of Puerto Rico. See id. citing from *Statehood and the Equal Footing Doctrine: The Case of Puerto Rican Seabed Rights,* 88 Yale Law Journal 825, at 826 (1979). However, as it is showen in Puerto Rican newspapers during the last year, strong opposition has arisen due to the possible environmental impact that the extraction of copper and gold would imply.
As far as oil is concerned, sources from the government of Puerto Rico have calculated potential reserves at 4 billion barrels ($55 billion in 1979 oil prices)... These deposits could yield an estimated 200,000 barrels of oil per day, an amount sufficient to supply the island's daily consumption of 110,000 barrels". See Morales Cardona; *Statehood and the Equal Footing Doctrine...;* and *Petroleum Potential of Puerto Rico*, Oil & Gas Journal, Dec. 19, 1983, at 113-120, all of them as cited by E. Negrón Rivera, id.
Although Puerto Rico is situated as an upper middle income country (at tables #10 and 30 of the World Development Report by the World Bank -1994-), the per capita income of the Island is less than half of the per capita income in the poorest state of the U.S., Mississippi. See J.M. García Passalacqua; C. Rivera Lugo, op. cit., at n. 32, t. II, p. 81.
476. Ibid
477. Ibid, tomo II, p. 6. See also R. Berríos Martínez, supra, at n. 142.

An interesting aspect of the evolution of the case of Puerto Rico before the Decolonization Committee is that, in its resolutions, the Committee has always reaffirmed the necessity of enabling the People of Puerto Rico to exercise their right to self-determination *and* independence, according to General Assembly resolution 1514 (XV). Notwithstanding the general practice of conducting plebiscites according to the alternatives present in resolutions 742 (VIII) —since 1960, at 1541 (XV)—, the resolutions of the Decolonization Committee concerning the case of Puerto Rico have never expressly mentioned the applicability of these latter resolutions to the P.R. national case. Maybe the Committee has been forgetting that resolution 1541 (XV) exists, or perhaps this body does not consider it necessary to make direct reference to its applicability to the case of Puerto Rico. Nevertheless, if some valid reason exists to remedy such an important omission, it is the danger of integration in the Puerto Rican context, due to the dubious validity of the peoples' consent to annexation.[478]

On the other hand, as stressed by professor Carlos I. Gorrín Peralta, the same doctrine of the insular cases which served for the colonization and expansionist purposes of the United States, also provides for the solution of the colonial rule of these territories, considering that the U.S. " '... right to acquire territory involves the right to govern and *dispose* of it' "[479] In the same context, the sovereign powers of a state include its authority to surrender or withdraw sovereignty over part of its territory and, furthermore, "the political departments of the federal government are entrusted with the power 'to determine the status of a foreign nation and to recognize it as a sovereign or non-sovereign.' "[480]

478. See Manuel Rodríguez-Orellana, *The Context of Relations Between the United States and Puerto Rico: Politics as Usual?*, p. 212. Conference Papers Presented: *A Time to Change*, op. cit, at n. 444, where the author stated that "... there are also giants, like Martin Luther King, Jr., who always understood that *majority opinions never justify oppression, injustice or immoral subservience in society*". (emphasis added). See also U.N. G.A. Doc. A/AC. 109/PV. 1157, 13 agosto 1979 (Español), where Mr. Hernández Vargas stated that, by omission, the Decolonization Committee rejects the alternative of integration as a solution for the Puerto Rico's political status. Although these statements were made in 1978-79, the Committee has not included the alternative of integration in all its resolutions from 1972 until 1991. Moreover, the right to self-determination and independence has been reafirmed in the 1998 Decolonization Committee resolution, concerning P.R.
In one case, the UN did not recognize the right of the majority of an accepted self-determination unit to have the decisive say. The Cypriot Greek majority of Cyprus wanted integration with Greece, but in the interest of peace and, in order to safeguard the rights of the Cypriot Turkish minority, the UN favoured making Cyprus one *independent* unit... in 1960". See L. Hannikainen, op. cit., at n. 194, p. 378.
479. *De Lima v. Bidwell*, 132 U.S. 1, p. 196 as cited by C. Gorrín Peralta, supra, at n. 25, p. 53.
480. See R. Serrano Geyls, op. cit., at n. 62, pp. 439-440, as cited by C. Gorrín Peralta, ibid.

Within this constitutional analysis, any decision of the U.S. to enable the People of Puerto Rico to become independent without holding a plebiscite would be completely valid. Moreover, it would be also in accordance with General Assembly resolution 1514 (XV) and 1541 (XV) -which does not require any specific procedures for the granting of independence- and with all the resolutions of the Decolonization Committee regarding Puerto Rico asking for the implementation of the Declaration. The same can't be said about integration. Furthermore, as we have stressed before, after the adoption of the CCPR, the interpretation given to Article 1 (3), as concerning Non-Self-Governing and Trust Territories has been *to grant the relevant peoples their independence.*

After all this dissertation, the conclusion is obvious: Until now, the People of Puerto Rico have not been able to fully exercise their right to self-determination, despite their complience with all the requirements to be considered a PEOPLE under the scope of resolution 1514 (XV), and common Art. 1 of the I.C.C.P.R and I.C.E.S.C.R. Hence, if the U.S. Congress is not willing to define and accept alternatives of "integration" and/or free association upon the basis of equality, democracy, sovereignty[481] and respect for Puerto Rican language, culture, and separate identity[482], and provide means to promote the economic and social development of Puerto Rico then, it has the legal and moral obligation to open the doors of negotiation towards an independent Puerto Rico. This is a historical opportunity to honor the decolonization decade, while giving an example to the rest of the world. After all, we should not forget that the right to self-determination has been considered by the international community of states as a pre-condition without which the promotion, protection and respect of all individual and collective rights would be impossible to attain, due to the interdependable character of all human rights generations. This is strongly supported by the *Vienna Declaration and Programme of Action of 1993.*

481. See reference made to it by U.N. Decolonization Committee resolution of September 12, 1978, para. 6, U.N. Gen. Ass., Offic. Doc. A/AC.109/574, as cited by J.J. Alvarez, op. cit., at n. 1, p. 210.
482. See Ibid, Decolonization Committee resolutions with regard to Puerto Rico of August 24, 1983; August 14, 1986; August 11, 1987; August 17, 1988; August 18, 1989, among others.

As a final remark, the right to be integrated, "statehood" or annexation, if accepted as a "right" under the decolonization principles, is a "right" that depends on the willingness of the metropoli or administrative power to accept it, as we have showen. There is no international principle that can force a sovereign state to accept other nations as part of their political entity.

In the event that Puerto Rico would vote for "statehood" in a future plebiscite, there is no international obligation for the United States to accept such a decision. However, notwithstanding the position assumed by a metropoli, the right to independence has to be granted always as an inalienable right. That is why thousands of peoples have died fighting for *"Freedom"*, not only as freedom to choose, but as independence.

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