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**The Song Remains the Same**  
The United States' Fiduciary Duty to  
Puerto Rico as a Basis for Legal Responsibility

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# Summary

After more than a century of colonial subjugation by the United States, Puerto Rico's stunted development model has finally collapsed. As a result, the island is currently facing one of the worst economic crises in its history. Despite the United States' continued affirmation of its political dominance over Puerto Rico, it has largely placed the blame for the crisis on Puerto Ricans themselves, accusing the island of living beyond its means. This thesis looks to international human rights law in order to establish the United States' rightful role in the crisis in Puerto Rico. As a result, it asks the following questions: What are the specific requirements of the obligation to decolonize under international law? What economic obligations does political decolonization impose upon colonial Powers? Has the United States exercised its sovereignty over Puerto Rico in accordance with its international obligations? This thesis identifies U.S. policy in Puerto Rico as the true cause of the current situation, with the purpose of facilitating the application of strategies that will lead Puerto Rico out of its economic crisis and place it firmly on a path toward decolonization and self-determination. Under international law, the United States has an ongoing fiduciary duty to Puerto Rico pending the latter's full decolonization. This obligation requires that the United States act exclusively in the best interests of Puerto Rico and that it create the conditions on the island for self-government and independence. Contrary to its obligations, the United States has kept Puerto Rico in a position of colonial subordination and it has created conditions that have fostered economic dependence, all the while openly pursuing its own political and economic interests on the island. The findings of this thesis establish that the United States bears sovereign and causal responsibility for the crisis in Puerto Rico. As a result, the United States is liable under international law for the island's current state and it has a positive duty to intervene in order to protect the well-being and promote the best interests of Puerto Rico and its inhabitants.

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Mendoza, Argentina  
26 May 2016

# Abbreviations

<b>CARICOM</b>	Caribbean Community
<b>GDP</b>	Gross Domestic Product
<b>GNP</b>	Gross National Product
<b>ICJ</b>	International Court of Justice
<b>OAS</b>	Organization of American States
<b>PL447</b>	Public Law 447 of 1952
<b>PL600</b>	Public Law 600 of 1950
<b>PRFRA</b>	Puerto Rico Federal Relations Act
<b>UN</b>	United Nations
<b>UNESCO</b>	United Nations Educational, Scientific and Cultural Organization
<b>US</b>	United States
<b>WHO</b>	World Health Organization

Society is a very mysterious animal with many faces and hidden potentialities, and [...] it's extremely short-sighted to believe that the face society happens to be presenting to you at a given moment is its only true face. None of us know all the potentialities that slumber in the spirit of the population, or all the ways in which that population can surprise us when there is the right interplay of events, both visible and invisible.

Vaclav Havel<sup>1</sup>

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<sup>1</sup> *Disturbing the Peace* (Vintage Books, New York, 1991) p. 109.

# 1 Introduction

## 1.1 Background

Puerto Rico has remained politically subordinate to the United States of America since it was acquired through military conquest in 1898. At one time, the international community closely monitored the colonial relationship but this changed in 1953, after the island was rebranded as the ‘Commonwealth of Puerto Rico’, despite the fact that it retained all of its colonial attributes. Under the domestic legal framework of the United States, Puerto Rico is not an independent sovereign nor is it an integral part of the U.S. Rather, the United States enjoys proprietary ownership of the island. It is a possession. As a result, Puerto Rico does not exercise its own sovereignty, which lies exclusively with the U.S. government. The island does have some internal autonomy, but its local affairs are subject to a substantial degree of U.S. federal intervention. Furthermore, because of the vast powers that the U.S. government exercises over Puerto Rico, there is no area of governance that is under the exclusive competence of local authorities. Today, after several decades of operating within the restrictive framework of Commonwealth status, Puerto Rico’s development model is on life support and the island is facing one of the worst economic crises in its history.

Despite the island’s continuing colonial status, the U.S. government argues that Puerto Rico’s crisis is self-inflicted, arising largely out of the island’s mismanagement of its own economic affairs. The U.S. has thus cast itself as a bystander to the unfolding collapse, patiently debating whether it should intervene while ensuring that any proposed response does not encourage Puerto Rico’s perceived fiscal irresponsibility. The United States has consistently maintained that it is under no legal obligation to intervene in Puerto Rico. Rather, the discussion in the U.S. government has been framed in moral terms. In any case, it should be clear from a general standpoint that the United States has a role to play in response to the crisis. At the very least, because of what has been crudely but accurately referred to as Puerto Rico’s “politically castrated condition”, the United States holds the policy tools that a non-sovereign Puerto Rico needs access to in order to secure its economic recovery.<sup>2</sup> However, practical considerations aside, the United States has an ongoing legal commitment to Puerto Rico that extends much further. The source of this legal commitment is international human rights law, which continues to regulate the existing political relationship between the two entities.

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<sup>2</sup> J.R. Torruella, ‘Juan R. Torruella’s speech in the John Jay College of Criminal Justice’, *El Nuevo Día*, 24 April 2016, available at [www.elnuevodia.com/noticias/politica/nota/juanrtoruellasspeechinthejohnjaycollegeofcriminaljustice-2190500/](http://www.elnuevodia.com/noticias/politica/nota/juanrtoruellasspeechinthejohnjaycollegeofcriminaljustice-2190500/) (Last accessed: 12 May 2016). Transcript of conference given on 14 April 2016 at John Jay College, New York.

## 1.2 Purpose and structure

This thesis seeks to establish what the U.S. role should be in response to the crisis in Puerto Rico by looking at the United States' existing obligations under international law. In doing so, it addresses three relevant questions: What are the specific requirements of the obligation to decolonize under international law? What economic obligations does political decolonization impose upon colonial Powers? And lastly, has the United States exercised its sovereignty over Puerto Rico in accordance with its international obligations? The importance of this task lies in the need to determine exactly how the vast power that the United States exercises over Puerto Rico has affected the island's development. Ignoring the United States' role in getting Puerto Rico to this point will only lead to piecemeal responses that fail to consider the structural causes of the crisis and will thus ensure a continuation of the problem.

Under international law, States that are responsible for non-self-governing territories have a fiduciary duty to administer them in the best interests of the territories' inhabitants with a view toward the attainment of self-government and independence. These legal obligations significantly restrict and guide the conduct that the United States should adopt toward Puerto Rico up until the moment of decolonization.

The international obligations of the United States are essential in two respects with regard to the economic crisis. First, the U.S. ongoing fiduciary duty means that it is legally obligated to intervene in order to protect the best interests of Puerto Rico and place it on a stable path to decolonization. Second, the United States' past non-compliance with its obligations establishes causal responsibility, because Puerto Rico's economic problems are firmly rooted in the colonial structure of governance that has been imposed upon it for the last 118 years. As a result, this thesis concludes that the United States bears full legal responsibility for the crisis and is under an international obligation to intervene in a manner that ensures the well-being of the island's inhabitants.

With regard to structure, this thesis proceeds in the following manner. Chapter two provides a general history of Puerto Rico – United States relations, followed by a description of current political and economic conditions on the island. Chapter three examines the international legal framework that has been put in place to ensure decolonization. It analyses the nature of the legal obligation to decolonize, focusing on its fiduciary aspect. It also arrives at a working definition of the fiduciary duty and identifies several of its universal elements. Chapter four addresses preliminary questions regarding the applicability of the international legal framework to the case of Puerto Rico. It concludes that since Puerto Rico has not been legitimately decolonized, the United States' fiduciary duty to it is ongoing. Chapter five examines U.S. conduct toward Puerto Rico and its corresponding failure to meet the demands of its fiduciary duty. Finally, chapter six discusses

the basis of U.S. legal responsibility for the current crisis in Puerto Rico, arising out of non-compliance with its international legal obligations.

### **1.3 Delimitations**

A final word regarding the limitations of this investigation is necessary. By focusing on the bases of U.S. responsibility, this thesis does not take into account the actions of the Puerto Rican government that may have contributed to bringing about the present situation. This should not be interpreted as a blanket denial of Puerto Rico's potential responsibility. Neither is it intended to present the island as a passive actor in its own history or a helpless victim of U.S. interests. However, it is the express intention of this thesis to shed light on Puerto Rico's ongoing colonial status as the primary cause of the crisis. It is conceded that the Puerto Rican government may have acted in ways that exacerbated the crisis, but the diminished importance of these acts lies in the fact that they were undertaken within the legal, political and economic confines of an overarching colonial framework dominated by the United States. To be sure, any dialogue on how Puerto Rico may begin to move forward will have to address the actions of the local government, but they must be viewed from the proper perspective, as secondary and indirect contributing factors at most.

## 2 Historical overview

This chapter introduces the topic of Puerto Rico – United States relations. It briefly summarizes the main historical events that have influenced Puerto Rico’s political status, both internationally and within the domestic legal framework of the United States. Then, it moves on to a more current discussion of Puerto Rico’s place within the U.S. federal structure, as well as contemporary politics on the island. Lastly, the chapter contemplates Puerto Rico’s current economic crisis, describing some of its more profound features.

### 2.1 Puerto Rico – United States relations

The United States acquired sovereignty over Puerto Rico, Guam and the Philippines in 1898 via the Treaty of Paris, which formally put an end to the Spanish-American War. The treaty did not express what type of political relationship Puerto Rico and the United States would have. It merely stated that “[t]he civil rights and political status of the native inhabitants of the territories hereby ceded to the United States shall be determined by the Congress.”<sup>3</sup> The question of Puerto Rico’s status was ultimately settled by the Supreme Court of the United States, in a series of decisions known collectively as the *Insular Cases*.<sup>4</sup> In effect, these decisions legally sanctioned colonialism and allowed the United States to rule Puerto Rico as a possession.<sup>5</sup> Under the legal framework established by the Supreme Court, Puerto Rico was defined as an ‘unincorporated territory’ of the United States, over which Congress, the United States’ legislature, had ‘plenary powers’.<sup>6</sup> The source of Congress’ sweeping authority was a provision in the U.S. Constitution known as the ‘territorial clause’, which provided for the federal government’s exercise of power in U.S. territories.<sup>7</sup> As an unincorporated territory, Puerto Rico was not deemed an integral part of the United States, but it was also not a foreign country. Thus, in relation to the United States, Puerto Rico came to occupy a newly conceived, liminal space in-between being foreign and being domestic.<sup>8</sup> With this legal framework, the island was placed in a position of complete political subjugation, without any guarantees as to a final status.

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<sup>3</sup> Article IX, Treaty of Peace, U.S.-Spain, 10 December 1898, 30 Stat. 1754.

<sup>4</sup> C. Duffy Burnett, ‘A Note on the *Insular Cases*’, in C. Duffy Burnett and B. Marshall (eds.), *Foreign in a Domestic Sense: Puerto Rico, American Expansion, and the Constitution* (Duke University Press, Durham, 2001), pp. 389-390.

<sup>5</sup> C. Duffy Burnett and B. Marshall, ‘Between the Foreign and the Domestic: The Doctrine of Territorial Incorporation, Invented and Reinvented’, in C. Duffy Burnett and B. Marshall (eds.), *Foreign in a Domestic Sense: Puerto Rico, American Expansion, and the Constitution* (Duke University Press, Durham, 2001), p. 2.

<sup>6</sup> *Downes v. Bidwell*, 182 U.S. 244 (1901).

<sup>7</sup> Constitution of the United States of America, Article IV, section 3. The term ‘territories’ in U.S. constitutional terminology refers to lands that are owned by the United States but are not ‘states’ of the U.S. federal system.

<sup>8</sup> Duffy Burnett and Marshall, *supra* note 5, p. 16.

A distinctly significant phase in Puerto Rico – United States relations began in 1950, when Congress passed a law authorizing Puerto Rico to draft its own constitution.<sup>9</sup> Public Law 600, as it was commonly known, set in motion a process that culminated two years later with the establishment of a constitutional government in Puerto Rico. Thereafter, the island formally became known as the ‘Commonwealth of Puerto Rico’. As stated in its Preamble, PL600 was adopted “in the nature of a compact” between Puerto Rico and the United States.<sup>10</sup> In 1953, based on these developments, the U.S. petitioned the United Nations to remove Puerto Rico from its list of non-self-governing territories. After a series of contentious debates, during which the U.S. emphasized the bilateral nature of the new political relationship, the General Assembly passed Resolution 748 (VIII) stating that Puerto Rico had effectively exercised its right to self-determination and removing it from the U.N. list of non-self-governing territories.

The establishment of the Commonwealth of Puerto Rico coincided roughly with the island’s transition from an agricultural economy to an industrial one. Under U.S. guidance, Puerto Rico embarked on a large-scale industrialization program denominated ‘Operation Bootstrap’, which was based on the creation of an export-oriented manufacturing sector dependent on U.S. capital for financing.<sup>11</sup> The island sought to attract U.S. capital through a combination of federal and Puerto Rican tax exemptions, relatively low wages and free access to the U.S. market.<sup>12</sup> In the first two decades of this experiment, Puerto Rico’s economy grew rapidly and the island was enthusiastically touted by the United States as a model for capitalist economic development. By the 1970s however, the period of rapid expansion had ended and the economy began to falter. The U.S. policy response to the economic downturn was to significantly increase federal financial outlays to Puerto Rico and to institute additional tax incentives in order to maintain the island’s attractiveness to foreign investment. Under the federal legislation that created the new tax incentives, commonly referred to as ‘Section 936’, Puerto Rico became “the most profitable tax haven in the world”.<sup>13</sup> The significant amounts of foreign capital that flowed through the island because of Section 936 served to prop up the Puerto Rican economy for another two decades. This state of affairs lasted until 1996, when Congress instituted a ten-year phase out of Section 936 and left Puerto Rico without its main engine of

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<sup>9</sup> Public Law 600 of 1950 (‘An Act to Provide for the Organization of a Constitutional Government by the People of Puerto Rico’), 64 Stat. 319.

<sup>10</sup> *Ibid.*

<sup>11</sup> A.T. Quiñones Pérez and I.J. Seda Irizarry, ‘Wealth Extraction, Governmental Servitude, and Social Disintegration in Colonial Puerto Rico’, 15:4 *New Politics* (2016) p. 92.

‘Operation Bootstrap’ is an indirect translation of the Spanish name, ‘Operación Manos a la Obra’.

<sup>12</sup> C.J. Ayala and R. Bernabe, *Puerto Rico en el siglo Americano: su historia desde 1898* (Ediciones Callejón, San Juan, 2015) p. 257.

<sup>13</sup> E. Pantojas García, ‘Federal funds’ and the Puerto Rican economy: myths and realities’, 19:2 *Centro Journal* (2007) p. 216.

economic activity.<sup>14</sup> Due to the loss of public revenues following the repeal of Section 936, the Puerto Rican government began contracting massive amounts of debt in order to sustain its regular functions and continue to provide essential services to the population. From 2000 to 2014, Puerto Rico's public debt grew 195 per cent, from USD 24 billion to USD 72 billion.<sup>15</sup> In 2006, the final phase-out of Section 936 sparked an economic recession that has continued unabated to the present day.

## 2.2 Puerto Rico today

Since the creation of Commonwealth status, Puerto Rico has been increasingly inserted into the U.S. federal structure. Today, for many intents and purposes, Puerto Rico is treated as if it were a state of the U.S.<sup>16</sup> The U.S. federal government operates in Puerto Rico to a significant degree, exercising exclusive authority in areas such as currency, citizenship, immigration, bankruptcy, and military defence among others. Due to the powers conferred upon the U.S. federal government by the 'territorial clause' of the U.S. Constitution, there is no area of governance over which Puerto Rico has exclusive authority. Even in areas that the federal government has traditionally left to Puerto Rico, the island's authority is concurrent to federal power and must yield to it in case of conflict. The Governor of Puerto Rico is the island's highest-ranking elected official, but the U.S. President is legally the head of state. The federal judiciary also operates in Puerto Rico, constituting a parallel judicial system next to Commonwealth courts. Federal jurisprudence has been consistent in stating that the interpretation of Puerto Rican laws, including the Commonwealth's Constitution, is the task of the Supreme Court of Puerto Rico.<sup>17</sup> Nevertheless, federal courts can still adjudicate matters strictly pertaining to Puerto Rican law.<sup>18</sup> The supremacy of federal law means that any U.S. legislation will supersede Puerto Rican law, including the Constitution of Puerto Rico. Despite the significant impact that the U.S. federal government has in Puerto Rico, the island has only one non-voting representative at the federal level. The Resident Commissioner, elected in Puerto Rico by popular vote, is tasked with representing the interests of Puerto Rico in the U.S. House of Representatives. The

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<sup>14</sup> A.M. Martínez Orabona *et al.*, *Deuda pública, política fiscal y pobreza en Puerto Rico*, 4 April 2016, p. 19 (Report presented to the Interamerican Commission on Human Rights by the International Human Rights Clinic of the Interamerican University of Puerto Rico Faculty of Law, in conjunction with the Caribbean Institute on Human Rights), available in Spanish at <[www.derecho.inter.edu/inter/content/deuda-p%C3%ABblica-pol%C3%ADtica-fiscal-y-pobreza-en-puerto-rico](http://www.derecho.inter.edu/inter/content/deuda-p%C3%ABblica-pol%C3%ADtica-fiscal-y-pobreza-en-puerto-rico)> (Last accessed: 5 May 2016). *See also* Ayala and Bernabe, *supra* note 12, p. 379.

<sup>15</sup> S. Marxuach, 'Crónica del endeudamiento', *El Nuevo Día*, 3 February 2015, available in Spanish at <[www.elnuevodia.com/noticias/locales/nota/cronicadelendeudamiento-2002787/](http://www.elnuevodia.com/noticias/locales/nota/cronicadelendeudamiento-2002787/)> (Last accessed: 6 May 2016).

<sup>16</sup> E. Rivera Ramos, 'Puerto Rico: Autonomy or colonial subordination?', in Y. Ghai and S. Woodman (eds.), *Practising Self-Government: A Comparative Study of Autonomous Regions* (Cambridge University Press, Cambridge, 2013) p. 107.

<sup>17</sup> *Ibid.*, p. 109.

<sup>18</sup> J. Trías Monge, *Puerto Rico: The Trials of the Oldest Colony in the World* (Yale University Press, New Haven, 1997) p. 162.

Commissioner has a voice, but he cannot vote on any proposed legislation.<sup>19</sup> Externally, the Puerto Rico has very limited participation in the international community, and all of it, including its observer status in the Caribbean Community (CARICOM) and its associate membership in the World Health Organisation (WHO), is subject to U.S. consent.<sup>20</sup> Puerto Rico is not a member of the United Nations (UN) nor of the Organization of American States (OAS). Efforts have been made to seek membership in the United Nations Educational, Scientific and Cultural Organization (UNESCO) but they have not prospered.<sup>21</sup>

The issue of Puerto Rico's political status continues to be the determining factor in Puerto Rican politics. The island's main political parties are organized around the three main status alternatives: the *Partido Popular Democrático* favours free association with the United States ('Commonwealth' or 'autonomy'), the *Partido Nuevo Progresista* favours integration into the United States ('statehood'), and the *Partido Independentista Puertorriqueño* favours independence. Support for these options has varied significantly over the past century.<sup>22</sup> Despite the highly polarized nature of the political debate in Puerto Rico, there is a general agreement that the status quo is unacceptable. This includes the *Partido Popular Democrático*, which while supporting Commonwealth status, has always sought more autonomous powers for Puerto Rico within the current political relationship. As recently as 2012, the people of Puerto Rico formally rejected the current political arrangement through a referendum held on the island.<sup>23</sup> The growing consensus that Puerto Rico has not meaningfully exercised its right to self-determination has also been recognized by the U.S. government, even though it has not taken any concrete steps to decolonize the island.<sup>24</sup>

Economically, Puerto Rico is currently in the midst of one of the worst recessions in its history.<sup>25</sup> The Puerto Rican economy has been contracting since 2006 and the island's public debt currently stands at around USD 72 billion.<sup>26</sup> In June 2015, Governor Alejandro García Padilla declared the public debt unpayable and asked for the United States' assistance in navigating the crisis.<sup>27</sup> Due to its close economic ties with the United States, Puerto Rico

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<sup>19</sup> Rivera Ramos, *supra* note 16, p. 107.

<sup>20</sup> *Ibid.*, p. 105.

<sup>21</sup> *Ibid.*

<sup>22</sup> *Ibid.*, p. 108.

<sup>23</sup> See Resolution of the 'Special Committee on the Situation with regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and People', A/AC.109/2015/L.6 (22 June 2015), available at <[www.un.org/ga/search/view\\_doc.asp?symbol=A/AC.109/2015/L.6](http://www.un.org/ga/search/view_doc.asp?symbol=A/AC.109/2015/L.6)> (Last accessed: 12 May 2016).

<sup>24</sup> Rivera Ramos, *supra* note 16, p. 106.

<sup>25</sup> Martínez Orabona *et al.*, *supra* note 14, p. 11.

<sup>26</sup> Quiñones Pérez and Seda Irizarry, *supra* note 11, p. 92.

<sup>27</sup> 'Mensaje del Gobernador Alejandro García Padilla sobre situación fiscal de Puerto Rico', *El Nuevo Día*, 29 June 2015, available in Spanish at <[www.elnuevodia.com/noticias/politica/nota/mensajedelgobernadoralejandrogarciapadillas-obresituacionfiscaldepuertorico-2066574/](http://www.elnuevodia.com/noticias/politica/nota/mensajedelgobernadoralejandrogarciapadillas-obresituacionfiscaldepuertorico-2066574/)> (Last accessed: 12 May 2016).

continues to be significantly dependent on financial outlays from the U.S. federal government. In 2012, Puerto Rico received USD 16 billion in federal transfer payments. However, it is important to note that the majority of this amount cannot rightly be considered “financial aid” as it corresponds to benefits that have accrued to individual Puerto Ricans such as social security pensions, veterans’ benefits or public health care. A further effect of the economic crisis has been a significant decrease in population as Puerto Ricans have migrated *en masse* to the United States. From 2010 to 2014, Puerto Rico’s population fell by almost 5 per cent.<sup>28</sup> It was recently reported that the current wave of migration is officially the largest in Puerto Rico’s history, surpassing the mass migration of the 1950s during Operation Bootstrap.<sup>29</sup> Finally, the current crisis must also be viewed in humanitarian terms. The austerity measures that the Puerto Rican government has instituted in order to deal with the economic crisis have resulted in the reduction of important services in education, health and security, which have severely affected the protection of human rights in Puerto Rico.<sup>30</sup>

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<sup>28</sup> ‘Puerto Rico pierde 177,392 personas en 51 meses’, *El Nuevo Día*, 28 January 2015, available in Spanish at

<[www.elnuevodia.com/noticias/locales/nota/puertoricopierde177392personasen51meses-2000606/](http://www.elnuevodia.com/noticias/locales/nota/puertoricopierde177392personasen51meses-2000606/)> (Last accessed: 6 May 2016).

<sup>29</sup> ‘Superada la migración boricua del 50’, *El Nuevo Día*, 1 May 2016, available in Spanish at <[www.elnuevodia.com/noticias/locales/nota/superadalamigracionboricuadel50-2193771/](http://www.elnuevodia.com/noticias/locales/nota/superadalamigracionboricuadel50-2193771/)> (Last accessed: 6 May 2016).

<sup>30</sup> See generally Martínez Orabona *et al.*, *supra* note 14.

# 3 International legal framework for decolonization

This chapter is concerned with the framework created by the international community in order to implement the right to self-determination. It identifies and examines the normative content of the legal entitlement to decolonization as a particularly well established aspect of the right to self-determination. It then goes on to describe critically the scope of the obligation to decolonize, specifically with regard to its dual nature as an obligation of result and of conduct. Having identified the fiduciary duty expressed in Article 73 of the U.N. Charter as an obligation of conduct, the chapter delineates the legal content of this obligation in order to begin answering the question of what specific obligations it may impose on the United States in the case of Puerto Rico.

## 3.1 Decolonization as an aspect of self-determination

The concept of self-determination has evolved within international law from a vague political principle into a legally justiciable right of peoples.<sup>31</sup> During this time, the scope of the right has gradually been broadened to apply in different contexts. Due to this and other factors, there is still some uncertainty as to the precise legal content of the right to self-determination as a whole.<sup>32</sup> Without a doubt, however, self-determination's most robust manifestation is as an anti-colonial standard. It is in this context, as a legal entitlement to decolonization, that self-determination has become securely rooted as a general principle of international law, and more importantly, *jus cogens*.<sup>33</sup>

The legal basis for a colonial peoples' right to external self-determination can be found in both treaty and customary law. These two sources evolved contemporaneously and influenced each other's development. As a result, the legal entitlement to decolonization operates concurrently under both sources of law, and their normative content is mostly the same.<sup>34</sup>

With regard to treaty law, the main provision is common Article 1 of the International Covenants on Human Rights. Article 1(1) expressly recognizes

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<sup>31</sup> A. Cassese, *Self-Determination of Peoples: A Legal Reappraisal* (Cambridge University Press, Cambridge, 1995) p. 65.

<sup>32</sup> M. Nowak, *U.N. Covenant on Civil and Political Rights. CCPR Commentary* (Engel, Kehl, 2005) p. 9.

<sup>33</sup> *Ibid.*, pp. 13-14; Cassese, *supra* note 31, pp. 319-320; H. Gros Espiell, *The Right to Self-determination: Implementation of United Nations Resolutions*, E/CN.4/Sub.2/405/Rev.1 (United Nations, New York, 1980) par. 70.

<sup>34</sup> Cassese, *supra* note 31, pp. 160-162.

the right to self-determination.<sup>35</sup> However, Article 1(3) is the key paragraph in terms of decolonization, dealing specifically with the administration of non-self-governing and trust territories:

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.<sup>36</sup>

Customary law, which coalesced around the same time the International Covenants were being drafted, responded to the growing international consensus that sought to delegitimize colonial rule.<sup>37</sup> Its normative content is largely embodied by three General Assembly resolutions.<sup>38</sup> They are Resolution 1514 (XV) of 14 December 1960, also known as the ‘Declaration on Granting Independence to Colonial Countries and Peoples’, Resolution 1541 (XV) of 15 December 1960, and Resolution 2625 (XXV) of 24 October 1970, also known as the ‘Declaration on Friendly Relations’. Resolution 1514 (XV), which pre-dates the International Covenants, likewise recognizes the right to self-determination.<sup>39</sup> It also obliges States to take immediate steps to transfer sovereignty to dependent territories and to comply with the relevant provisions of the Charter of the United Nations.<sup>40</sup> Thus, the right to external self-determination is guaranteed under both treaty and customary law.

It is also of great significance that both sources of law directly incorporate the relevant provisions of the U.N. Charter into the normative content of the right to self-determination. This makes the Charter an express source of international obligations with respect to decolonization.<sup>41</sup> Chapter XI of the U.N. Charter, consisting of Articles 73 and 74, is entitled ‘Declaration regarding Non-Self-Governing Territories’. Together with Chapter XII, which regulates the international trusteeship system, these two chapters make up the portion of the Charter dealing with dependent territories. Article 73 states as follows:

Members of the United Nations which have or assume responsibilities for the administration of territories whose peoples have not yet attained a full measure of self-government recognize the principle that the interests of the inhabitants of these territories are paramount, and accept as a sacred trust the obligation to promote to the utmost, within the system of international

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<sup>35</sup> Art. 1(1): “All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development”. *International Covenant on Civil and Political Rights*, 999 U.N.T.S. 171 (1966).

<sup>36</sup> *Ibid.*

<sup>37</sup> Cassese, *supra* note 31, p. 71.

<sup>38</sup> *Ibid.*

<sup>39</sup> General Assembly Resolution 1514 (XV), *Declaration on the granting of independence to colonial countries and peoples* (14 December 1960) par. 2.

<sup>40</sup> *Ibid.*, pars. 5, 7.

<sup>41</sup> Cassese, *supra* note 31, p. 58; U. Fastenrath, ‘Article 73’, in B. Simma, D.E. Khan, G. Nolte, and A. Paulus (eds.), *The Charter of the United Nations* (Oxford University Press, Oxford, 2012) p. 1832.

peace and security established by the present Charter, the well-being of the inhabitants of these territories, and, to this end:

- a. to ensure, with due respect for the culture of the peoples concerned, their political, economic, social, and educational advancement, their just treatment, and their protection against abuses;
- b. to develop self-government, to take due account of the political aspirations of the peoples, and to assist them in the progressive development of their free political institutions, according to the particular circumstances of each territory and its peoples and their varying stages of advancement;
- c. to further international peace and security;
- d. to promote constructive measures of development, to encourage research, and to co-operate with one another and, when and where appropriate, with specialized international bodies with a view to the practical achievement of the social, economic, and scientific purposes set forth in this article; and
- e. to transmit regularly to the Secretary-General for information purposes, subject to such limitation as security and constitutional considerations may require, statistical and other information of a technical nature relating to economic, social, and educational conditions in the territories for which they are respectively responsible other than those territories to which Chapters XII and XIII apply.

Article 73 employs the concept of a ‘sacred trust’, which is created between colonial Powers and non-self-governing territories. The concept has its roots in the old mandate system of the League of Nations and it continues to exist as essentially the same obligation with regard to non-self-governing and trust territories under the U.N. Charter.<sup>42</sup> Pursuant to Article 73, the colonial Power is tasked with the obligation of administering the dependent territory in the best interests of its inhabitants. The obligation entails, among other things, ensuring the inhabitants’ political, economic and social advancement; developing self-government in the dependent territory; promoting constructive measures of development; and assisting the inhabitants in developing free political institutions. In all, Article 73 obliges colonial Powers to put aside their own interests while administering their colonies and assist these territories in a way that they may achieve self-government and independence, which is the ultimate goal of the sacred trust.<sup>43</sup>

The content of this obligation evinces a clear fiduciary character, reminiscent of general institutions of trusteeship whereby one party has a duty to forego its own personal interests and act solely in the interests of another. Not surprisingly, the original manifestation of the ‘sacred trust’ under the mandate system of the League of Nations was derived from the institutions of ‘trust’

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<sup>42</sup> E.M. FitzGerald, ‘*Nauru v. Australia: A sacred trust betrayed?*’, 6 *Connecticut Journal of International Law* (1991) pp. 233-234.

<sup>43</sup> *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276*, I.C.J. Reports 1971, p. 31.

in Anglo-Saxon common law and ‘*tutelle*’ in French civil law.<sup>44</sup> In *Case Concerning East Timor*, the International Court of Justice explicitly affirmed the fiduciary character of Article 73 and stated that the responsibility conferred on colonial Powers was the same as that of a trustee.<sup>45</sup>

Another important characteristic of Article 73, as well as Chapters XI and XII in general, is the transitional nature of the framework that they establish. As previously stated, the ultimate objective of the ‘sacred trust’ is the achievement of self-government and independence. By imposing a fiduciary duty on colonial Powers that requires them to promote the interests of the dependent territories, the framework seeks to provide the latter with a “peaceful and orderly, but nevertheless certain” transition out of colonial status.<sup>46</sup> This transitional framework has implications for the sovereign title of colonial Powers over dependent territories. While Chapter XI does not invalidate prior sovereignty over a dependent territory, it significantly restricts the exercise of that sovereignty by imposing a far-reaching legal standard of conduct.<sup>47</sup> As Cassese explains:

“the gradual emergence of legal rules on self-determination, has led to the emergence of a set of legal obligations for those countries still enjoying sovereignty over colonial territories. These obligations [...] do not produce the immediate legal effect of rendering the legal title over colonial territories null and void. Rather, besides setting out a series of limitations and qualifications intended greatly to restrict sovereignty, they envisage a temporary legal regime that must of necessity lead to the eventual extinction of legal title. In a way, these obligations act as a sort of time-bomb: the holder of sovereign title has to fulfil them knowing that by this action it will eventually have to relinquish its title.”<sup>48</sup>

Cassese succinctly explains that under the current international framework, colonial Powers may no longer enjoy their sovereign title in perpetuity. Colonies are required to have an expiration date. Furthermore, it is insufficient that a colonial Power merely refrain from using its sovereignty for its own benefit. Rather, international law requires that colonial Powers take positive steps to employ their sovereignty strictly in furtherance of decolonization.

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<sup>44</sup> *International Status of South-West Africa*, I.C.J. Reports 1950, pp. 148-149 (separate opinion of Judge McNair). See also R.E. Reyes, ‘*Nauru v. Australia: The International Fiduciary Duty and the Settlement of Nauru’s Claims for Rehabilitation of its Phosphate Lands*’, 16 *New York Law School Journal of International and Comparative Law* (1996) pp. 38-39.

<sup>45</sup> *Case Concerning East Timor (Portugal v. Australia)*, I.C.J. Reports 1995, pp. 188-189 (dissenting opinion of Judge Weeramantry).

<sup>46</sup> FitzGerald, *supra* note 42, p. 236.

<sup>47</sup> J.R. Crawford, *The Creation of States in International Law* (Oxford University Press, Oxford, 2007), p. 615.

<sup>48</sup> Cassese, *supra* note 31, pp. 186-187.

## 3.2 Dual nature of the obligation to decolonize

The foregoing analysis into the nature of the decolonization aspect of the right to self-determination demonstrates that the corresponding obligation to decolonize is of a dual nature, involving a process and an outcome. On one hand, there is the obligation to allow colonial peoples to exercise self-determination, which is an obligation of result. On the other hand, there is an obligation to adopt a specific course of conduct in the pursuit of the former, which is an obligation of means. Undoubtedly, the two are closely related because the required conduct is geared toward obtaining the same result. If this were not the case, and decolonization consisted of merely granting peoples the right to self-determination, then the means by which colonial Powers arrived at that result would be irrelevant. In fact, if this were true, it would have sufficed simply to invalidate all claims of sovereign title over colonial peoples in order to achieve immediate decolonization. But this is not the case. While the ultimate objective of decolonization is peoples' exercise of their right to self-determination, colonial Powers are not free to determine how best to achieve this end. The international community has already determined what conduct is necessary, and as a result, it has imposed a fiduciary responsibility on colonial Powers under Article 73.

In terms of the required outcome of decolonization, the normative content of the obligation is relatively straightforward. Colonial peoples must attain a 'full measure of self-government' in order to extinguish their status as non-self-governing territories. Whereas Resolution 1514 (XV) identifies independence as the preferred option for decolonization, Resolution 1541 (XV) defines 'full self-government' as one of three alternatives: sovereign independence, free association with an independent state, or integration with an independent state.<sup>49</sup> This was reaffirmed by Resolution 2625 (XXV) and U.N. practice has generally supported the view that all three alternatives are legitimate forms of decolonization.<sup>50</sup> Moreover, Resolution 1541 (XV) establishes the key characteristics of each of these alternatives. In order to examine whether a dependent territory has achieved full self-government it is sufficient to compare the alternatives expressed in Resolution 1541 (XV) with the result attained in practice.

For its part, the obligation regarding the means of decolonization responds to the need to secure the required outcome, as well as ensuring its long-term viability. Self-determination is a complex right containing political, economic, social and cultural aspects.<sup>51</sup> All of these facets operate interdependently, meaning that the effective realization of this right requires

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<sup>49</sup> General Assembly Resolution 1541 (XV), *Principles which should guide Members in determining whether or not an obligation exists to transmit the information called for under Article 73e of the Charter* (15 December 1960) Principle VI.

<sup>50</sup> Crawford, *supra* note 47, p. 621.

<sup>51</sup> Gros Espiell, *supra* note 33, par. 46.

economic, social and cultural freedom as well as political freedom.<sup>52</sup> Continued subordination in any of these areas has significant potential to distort the political picture, which is why the right to self-determination needs to be exercised in an atmosphere of complete freedom.<sup>53</sup> In other words, the decolonization of a dependent territory in economic, social and cultural terms is equally as important as its political decolonization, not least because it creates the necessary conditions in which the latter can take place. As to the long-term viability of decolonization, if a dependent territory does not develop a solid economic foundation, for example, it is highly unlikely that political decolonization can prosper. It should also be emphasized that one of the underlying principles of the right to self-determination is the inherent dignity of human beings, and their corresponding entitlement to live in accordance with their own values and preferences.<sup>54</sup> This makes it incumbent upon the international community to prevent decolonization from becoming a hollow exercise, by ensuring to the greatest extent possible that colonial peoples are able to stand on their own.

A final point of clarification on the nature of the right to self-determination is necessary. On the surface, there is a seeming contradiction between Article 73's obligation to ensure political, economic, social, and educational advancement, and an important provision in Resolution 1514 (XV), which states that the "[i]nadequacy of political, economic, social or educational preparedness should never serve as a pretext for delaying independence".<sup>55</sup> It could be interpreted that the fiduciary duty under Article 73 requires some unspecified level of development, and therefore contradicts Resolution 1514 (XV). However, the two are compatible when one considers that the obligation of means is not a pre-condition to the obligation of result, but instead they are to be promoted together.<sup>56</sup> The underlying logic is that the obligation of means does not have an objective threshold of compliance. In other words, it does not exist independently of the corresponding obligation of result. It is instead a parallel obligation that persists regardless, until the obligation of result (*i.e.* full self-government) is attained. Hypothetically, if a colonial peoples were to demand their political independence, this would represent the exercise of self-determination and therefore the culmination of the obligation of result. Since both obligations share the same objective, the exercise of self-determination, then the attainment of independence by a colonial peoples would automatically extinguish the obligation of means. In sum, while colonial Powers have an express obligation to promote development, it is ultimately up to the owners of the right to self-determination to decide when to demand their political independence.

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<sup>52</sup> Gros Espiell, *supra* note 33, par. 113; A. Cristescu, *The Right to Self-determination: Historical and Current Development on the Basis of United Nations Instruments*, E/CN.4/Sub.2/404/Rev.1 (United Nations, New York, 1981) par. 343.

<sup>53</sup> Gros Espiell, *supra* note 33, par. 279.

<sup>54</sup> Cristescu, *supra* note 52, pars. 41, 221.

<sup>55</sup> Resolution 1514 (XV), *supra* note 39, par. 3.

<sup>56</sup> Crawford, *supra* note 47, p. 621.

### 3.3 Extent of the fiduciary duty

It has been established that under Article 73 a colonial Power has a fiduciary duty to the inhabitants of a non-self-governing territory, which will remain active during the territory's transition toward self-determination and independence. This fiduciary duty is a distinct legal obligation, which if breached by a State will incur responsibility. In order to consider the United States' performance of its fiduciary duty toward Puerto Rico, it is first necessary to delineate the precise contours of this obligation. By looking at the wording of Article 73, as well as relevant U.N. practice and general principles of international law, it is possible to arrive at a clear picture of the extent of the fiduciary duty.

As previously stated, the fiduciary duty of a State is defined in Article 73 as the obligation to ensure the well-being of the inhabitants of non-self-governing territories by promoting their best interests with a view toward the attainment of self-government and independence. The main characteristic of the fiduciary duty is that it is not a technical rule, but a broadly conceived obligation.<sup>57</sup> In effect, it is presented in Article 73 already boiled down to its essence, which is to create the necessary conditions for decolonization to take place. Thus, as a legal standard of conduct, it is not susceptible to being translated into a formulaic checklist of actions that a State must complete under any circumstances. At the level of specifics, compliance with Article 73 may ultimately take different forms depending on the context and particular circumstances in a dependent territory. Nonetheless, it would be incorrect to interpret the general nature of the fiduciary duty as vagueness. First, because the fundamental principle of the obligation is clearly defined. Second, because the fiduciary duty reflects the international community's consensus that decolonization and self-determination are in the best interests of all colonial peoples. Therefore, whatever concrete manifestations the conduct of a colonial Power may assume, it must always be reasonably oriented toward decolonization and self-determination.

Another important element to consider is how the fiduciary duty has been applied in practice by U.N. bodies. In *Namibia*, the International Court of Justice stated that the concepts expressed in Article 22 of the League Covenant, the precursor to Article 73, "were not static, but were by definition evolutionary" and had to be interpreted taking into account subsequent developments in law.<sup>58</sup> Therefore, U.N. practice is a useful indicator of what type of precise obligations the fiduciary duty might entail in specific circumstances.

As of yet, no major U.N. body has expressly defined the extent of the fiduciary duty. The closest that the international community has come was in

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<sup>57</sup> *South-West Africa* (J. McNair), *supra* note 44; Reyes, *supra* note 44, pp. 47, 53.

<sup>58</sup> *Namibia*, *supra* note 43, p. 31. *See also* Crawford, *supra* note 47, pp. 604-605. Crawford argues, with reference to the I.C.J.'s *Namibia* opinion, that the above is especially true of Article 73.

the I.C.J. case, *Certain Phosphate Lands in Nauru (Nauru v. Australia)*.<sup>59</sup> In 1989, Nauru filed suit alleging that Australia, as administering Power under the U.N. trusteeship system, had violated its fiduciary duty under Article 76 of the Charter. The Nauruan Government claimed that Australia's predominant motivation during the trusteeship period had been to secure cheap access to Nauru's phosphate deposits and this had determined Australia's general attitude as administering Power.<sup>60</sup> They argued that even though Nauruans had benefited economically from Australia's phosphate-mining activities, the income they received was only a minimal form of compensation and thus did not constitute economic advancement.<sup>61</sup> They further alleged that Australia's motivation was in conflict with its duty to promote the interests of Nauru and, as a result, it had "failed to make adequate and reasonable provision for the long-term needs of the Nauruan people".<sup>62</sup> In effect, Nauru was petitioning the Court find Australia in breach of its fiduciary responsibility. Australia argued, in pertinent part, that the ultimate objective of the trusteeship had been achieved when Nauru secured its independence, and that the obligations in Article 76 of the Charter, such as promoting the advancement of the inhabitants, were obligations of result in and of themselves so they did not require any specific conduct.<sup>63</sup> Ultimately, the case reached a settlement and the Court did not have the opportunity to express itself on the merits. Had it done so, it would likely have expounded on the precise extent of the fiduciary duty. Nonetheless, as Reyes suggests, the case is still informative because the settlement constitutes a tacit acknowledgement by Australia that its conduct was in breach of its fiduciary duty under international law.<sup>64</sup>

Another instance in which the extent of the fiduciary duty was in question were the numerous debates at the U.N. General Assembly concerning the activities of foreign economic interests in dependent territories. This issue was first discussed in relation to South West Africa (modern-day Namibia). During the discussions, both at plenary and committee-level, it was argued that the dominant position that foreign financial interests had obtained in the economic life of South West Africa constituted an obstacle to the country's development toward independence.<sup>65</sup> One of the main reasons for this was that the interests of the foreign companies and those of the inhabitants of South West Africa did not coincide, evidenced by the fact that a significant portion of the foreign companies' profits did not remain in the country.<sup>66</sup> In response, it was argued that these companies nonetheless made important

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<sup>59</sup> I.C.J. Reports 1992.

<sup>60</sup> *Application Instituting Proceedings (Nauru)*, 19 May 1989, pars. 269, 332-333, available at <[www.icj-cij.org/docket/files/80/6653.pdf](http://www.icj-cij.org/docket/files/80/6653.pdf)> (Last accessed: 12 May 2016).

<sup>61</sup> *Ibid.*, par. 391.

<sup>62</sup> *Ibid.*, par. 17.

<sup>63</sup> *Counter-Memorial of the Government of Australia*, 29 March 1993, pars. 285-291, available at <[www.icj-cij.org/docket/files/80/6665.pdf](http://www.icj-cij.org/docket/files/80/6665.pdf)> (Last accessed: 12 May 2016).

<sup>64</sup> Reyes, *supra* note 44, p. 32.

<sup>65</sup> United Nations Charter Repertory of Practice, 'Article 80', Supplement no. 3 (1959-1966) par. 164, available at <[legal.un.org/repertory/art80/english/rep\\_supp3\\_vol3-art80\\_e.pdf](http://legal.un.org/repertory/art80/english/rep_supp3_vol3-art80_e.pdf)> (Last accessed: 12 May 2016).

<sup>66</sup> *Ibid.*, par. 162.

contributions to the territory in the form of increased revenue and wage-paying jobs.<sup>67</sup> However, the majority was in agreement that these were not substantial contributions to the local economy and, in any case, they only provided benefits to a small sector of the population.<sup>68</sup> The U.N. General Assembly responded by formally condemning the policies of South Africa, the administering authority, in relation to the activities of foreign financial interests.<sup>69</sup> Similar pronouncements were made in General Assembly Resolutions 2107 (XX), 2189 (XXI) and 2288 (XXII) with regard to South West Africa, Southern Rhodesia and the Portuguese colonial territories.<sup>70</sup> All of these resolutions expressed that the subordination of local interests to those of foreign financial interests constituted a violation of the obligations assumed under Chapters XI and XII of the U.N. Charter.

The case of Nauru and the discussions on the activities of foreign economic interests in the General Assembly are examples of conduct that is not directed at the best interests of dependent territories and therefore constitutes violations of the fiduciary duty. In both cases, arguments to the contrary raised the issue that local inhabitants were benefiting economically from the activities in question. The fact that Australia did not rely on this argument but chose instead to reach a settlement, as well as the fact that the same arguments did not prevail in the context of foreign financial interests, suggests a recognition that the fiduciary duty represents something more than a mere economic benefit. This is consonant with the wording of Article 73, in the sense that economic advancement must reflect a cohesive policy of development toward self-determination and decolonization.

Overall, the General Assembly has taken an active role in the decolonization process, and in doing so, has made numerous recommendations to States as to what constitutes appropriate conduct under Article 73. For example, it has recognised that dependent territories' increased participation in all areas, through the attainment of effective decision-making authority, is an appropriate manifestation of the required development mentioned in Article 73.<sup>71</sup> In less combative situations than the ones mentioned in the previous paragraph, the General Assembly has recommended increased diversification

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<sup>67</sup> *Ibid.*, par. 166.

<sup>68</sup> *Ibid.*, par. 170.

<sup>69</sup> General Assembly Resolution 2074 (XX), *Question of South West Africa* (17 December 1965).

<sup>70</sup> General Assembly Resolution 2107 (XX), *Question of the Territories under Portuguese administration* (21 December 1965); General Assembly Resolution 2189 (XXI), *Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples* (13 December 1966); and General Assembly Resolution 2288 (XXII), *Activities of foreign economic and other interests which are impeding the implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples in Southern Rhodesia, South West Africa and Territories under Portuguese domination and in all other Territories under Colonial domination and efforts to eliminate colonialism, apartheid and racial discrimination in southern Africa* (7 December 1967).

<sup>71</sup> General Assembly Resolution 1468 (XIV), *Voluntary transmissions of information on political developments in Non-Self-Governing Territories* (12 December 1959) and General Assembly Resolution 1535 (XV), *Progress achieved in Non-Self-Governing territories* (15 December 1960).

in colonial economies that it considered were too narrowly focused<sup>72</sup> or were based primarily on fluctuating activities such as tourism, tax haven arrangements and land sales.<sup>73</sup> Furthermore, when discussing the aims of economic development in dependent territories, the General Assembly has employed phrases such as “viable and stable”<sup>74</sup>, “sustainability”<sup>75</sup>, “strengthening and diversification”<sup>76</sup>, “economic stability”<sup>77</sup> and “economic self-reliance”<sup>78</sup>. These phrases immediately bring to mind the concept of a ‘people able to stand on their own’. They also reflect the need to ensure an environment of complete freedom in order for political decolonization to take place. More importantly however, they indicate that there is some correlation between conduct and result within the scope of the fiduciary duty. In economic terms, the conduct required by Article 73 may be reasonably understood to result in economies that share the above-mentioned characteristics. Therefore, while the fiduciary duty is not explicitly result-oriented, there is at the very least a strong presumption that the required conduct should lead to an economy in a dependent territory that is viable, stable, self-reliant, etc.

A final element to consider is the concept of good faith, which is a general principle of international law.<sup>79</sup> This concept is not only applicable to decolonization in general terms, but it has been codified in a manner relevant to the present analysis. Both Article 2(2) of the U.N. Charter and General Assembly Resolution 2625 (XXV) tie the concept into the fiduciary duty by requiring that all States fulfil their Charter obligations in good faith. Consonant with the gap-filling function of general principles of international law, good faith further informs the legal standard of conduct under the

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<sup>72</sup> General Assembly Resolution 3156 (XXVIII), *Question of American Samoa, Gilbert and Ellice Islands, Guam, New Hebrides, Pitcairn, St. Helena, Seychelles and Solomon Islands* (14 December 1973) and General Assembly Resolution 3290 (XXIX), *Question of American Samoa, Guam, New Hebrides, Pitcairn, St. Helena and Solomon Islands* (13 December 1974).

<sup>73</sup> General Assembly Resolution 3157 (XXVIII), *Question of Bermuda, British Virgin Islands, Cayman Islands, Montserrat, Turks and Caicos Islands and United States Virgin Islands* (14 December 1973) and General Assembly Resolution 3289 (XXIX), *Question of Bermuda, British Virgin Islands, Cayman Islands, Montserrat, Turks and Caicos Islands and United States Virgin Islands* (13 December 1974).

<sup>74</sup> General Assembly Resolution 32/31, *Question of the United States Virgin Islands* (28 November 1977).

<sup>75</sup> General Assembly Resolution 70/102 A-B, *Questions of American Samoa, Anguilla, Bermuda, the British Virgin Islands, the Cayman Islands, Guam, Montserrat, Pitcairn, Saint Helena, the Turks and Caicos Islands and the United States Virgin Islands* (9 December 2015).

<sup>76</sup> General Assembly Resolution 55/144, *Questions of American Samoa, Anguilla, Bermuda, the British Virgin Islands, the Cayman Islands, Guam, Montserrat, Pitcairn, St. Helena, the Turks and Caicos Islands and the United States Virgin Islands* (8 December 2000).

<sup>77</sup> General Assembly Resolution 44/99, *Question of the United States Virgin Islands* (11 December 1989).

<sup>78</sup> General Assembly Resolution 40/56, *25th anniversary of the Declaration on the Granting of Independence to Colonial Countries and Peoples* (2 December 1985).

<sup>79</sup> I. Brownlie, *Principles of Public International Law* (Oxford University Press, Oxford, 2008) p. 19.

fiduciary duty by introducing moral elements into the legal analysis.<sup>80</sup> According to the principle of good faith, a general atmosphere of trust, fairness and respect should characterize the fiduciary relationship between States and dependent territories. This requires that States fulfil their fiduciary duty openly and honestly, and places an emphasis on the transparency of States' intentions.

When looking to the extent of the fiduciary duty as a whole, a good starting point is the definition suggested by Reyes:

At the very least, the fiduciary duty demands that the administering authority act in a way calculated to serve the best long-term political, social, and economic interests of the indigenous people, and leave the nation with a developed infrastructure and productive environment for the future. However, the fiduciary duty is not a technical rule, but a broad principle that is based on trust and confidence.<sup>81</sup>

While this definition is extremely useful, the analysis presented in this chapter makes it possible to go even further in identifying several universal elements of the obligation. These elements may be summarized as follows: (i) independent systems and structures, (ii) space to grow capability-wise, (iii) detachment, (iv) presumption of economic stability, and (v) atmosphere of trust and respect. First, States must ensure the creation of independent systems and structures of governance in dependent territories. This involves preserving a clear distinction between the two political entities and establishing demarcated areas of governance for each as a means of promoting operational self-reliance. Second, they must provide dependent territories with space to grow from a capability standpoint. Systems of partial self-government must not be static. Dependent territories must be allowed to expand into additional areas of competence as they acquire increased authority in decision-making processes. Third, States must practice detachment. They must adopt an increasingly supportive, and consequently less active, role in the life of dependent territories. One that inversely reflects the capability expansion of the dependent territory. In effect, this amounts to viewing sovereignty as a zero-sum proposition. Fourth, there is a presumption that some level of economic stability will be achieved in dependent territories. This is perceived as a natural result of the performance of the fiduciary duty. It should provide dependent territories with a reasonable amount of insulation from external shocks and/or pressures. Lastly, an atmosphere of trust and mutual respect should permeate the entire process. The relationship between States and dependent territories has to be one of equals, where both entities interact with each other from positions of dignity.

In addition to these individual elements, there are two final points worth considering. Crucially, the fiduciary duty imposes positive obligations on States. This means that it is insufficient merely to refrain from interfering in the internal governance of a dependent territory. States must pursue

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<sup>80</sup> R. Kolb, 'Principles as sources of international law (with special reference to good faith)', 53:1 *Netherlands International Law Review* (2006) p. 29.

<sup>81</sup> Reyes, *supra* note 44, p. 53.

constructive policies designed to create the necessary conditions for self-government and independence. They must also actively seek to remove obstacles in the way of continuing development. The second point is that this positive aspect of the fiduciary duty necessarily implies a cost to States. Under the current international legal framework, colonialism is no longer a net benefit to colonial Powers. Instead, it is a net loss requiring positive actions and the commitment of resources aimed at enabling a separate population to live according to their own values and aspirations.

## 4 Applicability of Article 73 to Puerto Rico – United States relations

Having set out the extent of the fiduciary duty contained in Article 73 of the U.N. Charter, the present chapter adopts a procedural focus in order to establish the continuing applicability of Article 73 to Puerto Rico – United States relations. It examines the relevance of General Assembly Resolution 748 (VIII) in light of subsequent events at the United Nations, as well as its general incompatibility with the international framework for decolonization. As a result, the chapter concludes that Resolution 748 (VIII) poses no obstacle to the continuing applicability of Article 73. Secondly, the chapter looks to the international legal definition of a full measure of self-government, as the determinant factor behind the application of Article 73. After examining the three major requirements of an arrangement of free association, it concludes that Puerto Rico does not meet the minimum objective guarantees and therefore continues to be a non-self-governing territory. Building on Puerto Rico's lack of a full measure of self-government, the chapter concludes affirmatively that the United States has a continuing fiduciary duty to Puerto Rico under international law.

### 4.1 Significance of Resolution 748 (VIII)

The United Nations removed Puerto Rico from its list of non-self-governing territories by way of General Assembly Resolution 748 (VIII) of 27 November 1953. After a series of contentious debates, Resolution 748 (VIII) was approved by a vote of 26 to 16, with 18 abstentions.<sup>82</sup> It marked the first time the United Nations formally considered an arrangement of free association.<sup>83</sup> Resolution 748 (VIII) concluded that due to Puerto Rico's newly created Commonwealth status, Chapter XI of the Charter no longer applied to it. The General Assembly's decision was based on the understanding that Puerto Rico and the United States had entered into a "mutually agreed association" that ended the island's prior colonial status by transforming it into an "autonomous political entity".<sup>84</sup> Curiously, however, this decision was reached without an examination on the merits of Puerto Rico's new status.<sup>85</sup> Earlier that same day, the General Assembly had approved Resolution 742 (VIII), the precursor to Resolution 1541 (XV), which listed the factors to be considered when deciding whether a territory

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<sup>82</sup> Trías Monge, *supra* note 18, p. 124.

<sup>83</sup> Crawford, *supra* note 47, p. 626.

<sup>84</sup> General Assembly Resolution 748 (VIII), *Cessation of the transmission of information under Article 73e of the Charter in respect of Puerto Rico* (27 November 1953) pars. 3,5.

<sup>85</sup> H. García Muñiz, 'Puerto Rico and the United States: The United Nations Role 1953-1975', 53 *Revista Jurídica de la Universidad de Puerto Rico* (1984) p. 59.

had achieved a full measure of self-government.<sup>86</sup> Yet Resolution 748 (VIII) did not allude to the factors listed in Resolution 742 (VIII). The most plausible explanation for this is the political nature of the voting process in the General Assembly, in which the United States enjoys considerable power and influence.<sup>87</sup> Also decisive were the assurances given by the United States as to the bilateral nature of the agreement with Puerto Rico, in order to gain the favour of some nations that were not convinced of Puerto Rico's new status.<sup>88</sup>

As things stand, Resolution 748 (VIII) has never been expressly revoked by the General Assembly, but subsequent events at the United Nations have eroded its validity considerably. In 1966, the Special Committee on the Situation with regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples (Decolonization Committee) turned its attention to Puerto Rico for the first time, resolving that it would consider the question during its following session.<sup>89</sup> Over U.S. opposition, the General Assembly approved this decision when it adopted the Decolonization Committee's report for that year.<sup>90</sup> In 1971, at the behest of Cuba, there was a failed attempt to introduce the question of Puerto Rico into the agenda of the General Assembly.<sup>91</sup> The following year, the Decolonization Committee adopted what would become the first of many resolutions "reaffirming the inalienable right of the peoples of Puerto Rico to self-determination and independence in conformity with General Assembly resolution 1514 (XV)".<sup>92</sup> In 1981, the Decolonization Committee's resolution called on the General Assembly to consider the case of Puerto Rico as a separate item on its agenda.<sup>93</sup> As a result, another plenary vote was held on whether to reconsider the question of Puerto Rico. It was defeated by a vote of 70 to 30, with 43 abstentions.<sup>94</sup> The result was attributed to the herculean diplomatic efforts deployed by the United States and was considered its most important diplomatic success of that year.<sup>95</sup> Since 2000, the Decolonization Committee has adopted numerous resolutions reaffirming Puerto Rico's right to self-determination and independence, and calling on the General Assembly to consider the question of Puerto Rico.<sup>96</sup> As these examples show, Resolution 748 (VIII) has not been the final word on Puerto Rico. The Decolonization Committee's continued monitoring of the situation with the General Assembly's approval, as well as its numerous unequivocally worded resolutions, stand in stark contrast to Resolution 748 (VIII).

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<sup>86</sup> General Assembly Resolution 742 (VIII), *Factors which should be taken into account in deciding whether a Territory is or is not a Territory whose people have not yet attained a full measure of self-government* (27 November 1953).

<sup>87</sup> S. Hillebrink, *Political Decolonization and Self-Determination: The Case of the Netherlands Antilles and Aruba* (Doctoral thesis, Leiden University, 2007) p. 121; R. Carr, *Puerto Rico: A Colonial Experiment* (New York University Press, New York, 1984) p. 364.

<sup>88</sup> Ayala and Bernabe, *supra* note 12, p. 248; Trías Monge, *supra* note 18, pp. 123-124.

<sup>89</sup> Hillebrink, *supra* note 87, p. 113.

<sup>90</sup> General Assembly Resolution 2189 (XXI), *supra* note 70, par. 4.

<sup>91</sup> García Muñiz, *supra* note 85, p. 106.

<sup>92</sup> Decolonization Committee Resolution, A/AC.109/419 (28 August 1972).

<sup>93</sup> Decolonization Committee Resolution, A/AC.109/677 (20 August 1981).

<sup>94</sup> Trías Monge, *supra* note 18, p. 139.

<sup>95</sup> *Ibid.*, pp. 139-140.

<sup>96</sup> Decolonization Committee Resolution, A/AC.109/2000/24 (12 July 2000).

Subsequent events aside, Resolution 748 (VIII) did have the practical effect of removing Puerto Rico from the U.N.'s list of non-self-governing territories. However, it would be incorrect to conclude that this also extinguished the United States' fiduciary duty to the island. The wording of Article 73 is clear; it applies to States responsible for territories without a full measure of self-government. The determinant factor as to the applicability of Article 73 is then whether the territory in question has attained full self-government or not. In other words, whether it has been legitimately decolonized. This is consistent with the dual nature of the obligation to decolonize. In sum, as long as the colonial status of a territory persists, the State will always have a fiduciary obligation to act in the interests of the territory and to create the conditions for decolonization.

Ultimately, the determination on whether a territory has attained a full measure of self-government depends on objective factors. At the time Resolution 748 (VIII) was adopted, those factors were listed in Resolution 742 (VIII), which had been approved earlier the very same day. If Puerto Rico did not meet the objective criteria established in Resolution 742 (VIII), then under international law it continued being one of the territories addressed by Article 73. The statements in Resolution 748 (VIII) cannot make the opposite true. Otherwise, that would amount to giving the General Assembly arbitrary power to exempt States from complying with Article 73. As a result, the effect of Resolution 748 (VIII) could not have been to make Puerto Rico fully self-governing under international law if that were in contradiction with the island's objective reality. The resolution's only practical effects were to relieve the United States from its reporting requirements under Article 73(e) and to remove Puerto Rico from the U.N.'s list of non-self-governing territories. However, Puerto Rico's removal is of no legal consequence because the list is not constitutive of the right to decolonization. It is merely an agenda of political action for the United Nations. Thus, the determinant question as to the continuing applicability of Article 73 is strictly whether Puerto Rico has attained a full measure of self-government.

## 4.2 Puerto Rico's measure of self-government

There is an established consensus that Puerto Rico's relationship with the United States continues to be of a colonial nature under Commonwealth status.<sup>97</sup> This sentiment has only grown stronger after recent events on the island and in Washington D.C. Regardless, Puerto Rico's lack of full self-

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<sup>97</sup> See e.g., Trías Monge, *supra* note 18; E. Rivera Ramos, *American Colonialism in Puerto Rico: The Judicial and Social Legacy* (Wiener, Princeton, 2009); P.A. Malavet, *America's Colony: The Political and Cultural Conflict Between the United States and Puerto Rico* (New York University Press, New York, 2004); R. Grosfoguel, *Colonial Subjects: Puerto Ricans in a Global Perspective* (University of California Press, Berkeley, 2003); J.R. Torruella, 'Ruling America's Colonies: The *Insular Cases*', 32:57 *Yale Law & Policy Review* (2013) pp. 57-95; J.A. Cabranes, 'Puerto Rico: Out of the Colonial Closet', 33 *Foreign Policy* (1979) pp. 66-91.

government can be ascertained by evaluating how its current political situation measures up to the objective international standards for decolonization.

International law recognizes three alternatives for achieving a full measure of self-government: independence, free association or integration with another State.<sup>98</sup> Of these, the only possibility for Puerto Rico's Commonwealth status is that of free association, since Puerto Rico is clearly not an independent State nor is it an integral part of the United States. Resolutions 742 (VIII) and 1541 (XV) coincide on the three basic characteristics that a political arrangement must have in order to be considered a free association.<sup>99</sup> First, the population of the associated territory must possess the right to modify the terms of the association at any time. Second, the associated territory must enjoy internal self-government without outside interference. With regard to this factor, Crawford has specified that it requires not only "substantial powers of internal self-government" for the associated State, but also the relinquishment of any "substantial discretions to intervene" by the former colonial Power.<sup>100</sup> Lastly, it must be the result of a free, voluntary and informed choice by the people of the associated territory.

Before applying these factors to Puerto Rico, it is necessary to make a preliminary point. It has been argued by some that Puerto Rico's current political status could also be considered valid under Resolution 2625 (XXV), which supplements the three established alternatives with the phrase, "or any other political status freely determined by a people".<sup>101</sup> The reasoning behind this argument is generally that this so-called 'fourth option' more adequately reflects the modern world and the individualized political relationships that exist within it.<sup>102</sup> However, this argument is an attempt to create a need where there is none. By characterizing the framework under Resolution 1541 (XV) as excessively rigid, it ignores the wide spectrum of arrangements that can comfortably be accommodated under free association.<sup>103</sup> Moreover, a comparison of free association and the fourth option demonstrates that they both require a freely determined status, but crucially, free association additionally requires that people retain the freedom to modify that status and enjoy internal self-government without outside interference. The different requirements indicate that the fourth option seeks to validate arrangements where the population has 'forfeited' their right to modify the arrangement and has 'consented' to substantial interference in their local governmental affairs.

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<sup>98</sup> Resolution 1541 (XV), *supra* note 49, Principle VI; *Western Sahara*, I.C.J. Reports 1975, p. 32.

<sup>99</sup> Resolution 742 (VIII), *supra* note 86, Annex, Second Part; Resolution 1541 (XV), *supra* note 49, Principle VII. *See also* J.R. Macdonald, 'Termination of the Strategic Trusteeship: Free Association, the United Nations and International Law', 7 *Brooklyn Journal of International Law* (1981) p. 241.

<sup>100</sup> Crawford, *supra* note 47, pp. 632-633.

<sup>101</sup> *See for example* J.J. Rúa Jovet, 'The Fourth Option: Modern Self-Determination of Peoples and the Possibilities of U.S. Federalism', 49 *Revista de Derecho Puertorriqueño* (2010) pp. 163-217.

<sup>102</sup> *Ibid.*, p. 167.

<sup>103</sup> Crawford, *supra* note 47, p. 636.

Ayala and Bernabe have referred to this as the “subjective perspective of colonialism”, whereby any restrictions on sovereignty are considered non-colonial, no matter how severe, if they can be said to have been consented to by the population.<sup>104</sup> This is precisely what Resolution 1541 (XV) and its precursor sought to prevent by establishing a “minimum amount of internationally guaranteed freedom” in order to protect colonies from being exploited under the guise of consent.<sup>105</sup> In sum, far from reflecting the political diversity of the modern world, this interpretation of the fourth option looks backward in an attempt to validate systems of political subordination that have been roundly rejected by the international community.

If anything, the fourth option might apply to Puerto Rico under a different interpretation that is more in tune with the general objectives of decolonization. The international legal framework of self-determination leaves open the contradictory possibility that colonial peoples may voluntarily choose something less than a full measure of self-government. This presents the problem of how to deal with a situation where a colonial peoples’ expressed desire, which is the essence of self-determination, is not compatible with the ultimate objective of that right. Crawford suggests that this state of affairs would fall under the fourth option, which could never be viewed as a full measure of self-government but should instead be seen as an intermediate stage in the development toward self-determination.<sup>106</sup> In that sense, the fourth option does not have the finality of the three established alternatives. It is merely the acknowledgment of an interim stage in the decolonization process where a colonial peoples have expressed a desire to retain their dependent status.<sup>107</sup> However, since it does not represent a full measure of self-government, under the fourth option the obligations of the colonial Power continue to apply until complete decolonization is achieved.<sup>108</sup> Therefore, if Puerto Rico’s current political status is seen as a legal manifestation of the fourth option then the United States undoubtedly has a continuing fiduciary responsibility to the island under Article 73.

Nonetheless, the international community has traditionally identified Puerto Rico’s Commonwealth status as a form of free association.<sup>109</sup> The United States’ expressions during the U.N. debates in 1953 went a long way toward fortifying that perception. In order to address the persistent scepticism within the U.N. regarding Puerto Rico’s Commonwealth status, Frances P. Bolton, U.S. delegate to the Fourth Committee, made the following statement:

It would be wrong, however, to hold that [...] the creation of the Commonwealth of Puerto Rico does not signify a fundamental change in the status of Puerto Rico. The previous status of Puerto Rico was that of a

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<sup>104</sup> Ayala and Bernabe, *supra* note 12, p. 247. *For example see* Rúa Jovet, *supra* note 101, p. 167. (“True popular consent itself to an arrangement is evidence of its non-colonial nature.”)

<sup>105</sup> Hillebrink, *supra* note 87, p. 44.

<sup>106</sup> Crawford, *supra* note 47, pp. 636-637.

<sup>107</sup> *Ibid.*

<sup>108</sup> *Ibid.* See also Hillebrink, *supra* note 87, p. 50.

<sup>109</sup> Crawford, *supra* note 47, p. 626.

territory subject to the full authority of the Congress of the United States in all governmental matters. The previous constitution of Puerto Rico was in fact a law of the Congress of the United States, which we called an Organic Act. Only Congress could amend the Organic Act of Puerto Rico. The present status of Puerto Rico is that of a people with a constitution of their own adoption, stemming from their own authority, which only they can alter or amend. The relationships previously established by a law of the Congress, which only Congress could amend, have now become provisions of a compact of a bilateral nature whose terms may be changed only by common consent.<sup>110</sup>

As important as this and other U.S. assurances were to securing a favourable vote in the General Assembly, they were not forthcoming expressions of policy but instead, “carefully worded acts of obfuscation” designed to end the international supervision of Puerto Rico – United States relations.<sup>111</sup> In effect, the United States told the General Assembly what it wanted to hear, but it never intended for Commonwealth status to alter the external political relationship between itself and Puerto Rico.<sup>112</sup> As a result, it is incorrect to assert that after the U.N. debates in 1953, the United States “reversed course” on this issue.<sup>113</sup> Domestically, the U.S. position has always been that Puerto Rico is a territorial possession of the United States, whose sovereignty rests exclusively with the U.S. government.<sup>114</sup>

#### **4.2.1 Freedom to modify political status**

In a case currently pending before the Supreme Court of the United States, *Commonwealth of Puerto Rico v. Luis Sánchez Valle, et al.*, the executive branch of the U.S. government has recently reaffirmed the nature of the Puerto Rico – United States relationship.<sup>115</sup> According to it, Puerto Rico did not acquire any sovereignty with the advent of Commonwealth status.<sup>116</sup> Sovereignty over Puerto Rico continues to reside exclusively with Congress pursuant to the ‘territorial clause’ of the U.S. Constitution.<sup>117</sup> Moreover, the U.S. government claims that the authority to draft a constitution did not emanate from the people of Puerto Rico, but rather from a grant of Congress

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<sup>110</sup> Trías Monge, *supra* note 18, p. 123.

<sup>111</sup> Malavet, *supra* note 97, p. 45. On the role the assurances played in the voting outcome, see Trías Monge, *supra* note 18, p. 122; Ayala and Bernabe, *supra* note 12, p. 248. The United States also relied heavily on its political influence within the General Assembly. *Supra* note 87.

<sup>112</sup> See D.M. Helfeld, ‘The Historical Prelude to the Constitution of the Commonwealth of Puerto Rico’, 21 *Revista Jurídica de la Universidad de Puerto Rico* (1952) pp. 135-154.

<sup>113</sup> This was a charge made recently by the Governor of Puerto Rico, Alejandro García Padilla, in a letter to the Secretary-General of the U.N., Ban Ki-Moon, 26 December 2015, available at <[blog.constitutioncenter.org/wp-content/uploads/2015/12/PRico-governor-letter-to-UN.pdf](http://blog.constitutioncenter.org/wp-content/uploads/2015/12/PRico-governor-letter-to-UN.pdf)> (Last accessed: 24 April 2016).

<sup>114</sup> Trías Monge, *supra* note 18, p. 162.

<sup>115</sup> *Brief for the United States as Amicus Curiae Supporting Respondents*, 23 December 2015, *Commonwealth of Puerto Rico v. Luis M. Sánchez Valle, et al.*, U.S. Supreme Court, case no. 15-108, available at <[www.scotusblog.com/case-files/cases/puerto-rico-v-sanchez-valle/](http://www.scotusblog.com/case-files/cases/puerto-rico-v-sanchez-valle/)> (Last accessed: 24 April 2016).

<sup>116</sup> *Ibid.*, p. 21.

<sup>117</sup> *Ibid.*

that was never intended to be an irrevocable cession of its sovereignty.<sup>118</sup> As a result, Puerto Rico's current degree of internal autonomy, including the Constitution of Puerto Rico itself, may be revoked or modified unilaterally by Congress at any point in time.<sup>119</sup> Under this legal framework, Puerto Rico cannot alter the almost unrestricted power that the United States exercises over it.

At present, the structure of the political relationship between Puerto Rico and the United States is governed by a collection of U.S. laws, not a separate association agreement. These laws are the Constitution of the United States, the Puerto Rico Federal Relations Act, Public Law 600 of 1950 and Public Law 447 of 1952. Since Puerto Rico cannot amend U.S. federal legislation, it has no way of altering its political relationship without the express consent of the United States. In contrast to Puerto Rico, both the Federated States of Micronesia and the Republic of the Marshall Islands are countries that have entered into free association with the United States through the adoption of separate association agreements. These agreements are bilateral treaties that set out in binding form the terms of the association. They were negotiated by the parties involved and they include formal mechanisms for the unilateral termination of the agreement by any of the parties.<sup>120</sup>

Puerto Rico also cannot alter its relationship to the United States through the expansion of its own Constitution. Theoretically, since a government's power emanates from the people, it should be possible for Puerto Rico to increase its scope of authority under the Constitution into any or all areas of governance that the United States currently controls. This could be a legitimate means of contesting U.S. sovereignty. However, the existing domestic legal framework specifically precludes this possibility. Through Public Law 600 of 1950, the United States authorized Puerto Rico to draft its own Constitution, but the law also stipulated that the Constitution would need to be finally approved by Congress. In Public Law 447 of 1952, Congress gave its final approval to the Constitution subject to certain amendments. One of these was a clause stating that any future constitutional amendments made by the people of Puerto Rico would have to be compatible with the Constitution of the United States, the Puerto Rico Federal Relations Act, PL600 and PL447.<sup>121</sup> In this fashion, Congress handcuffed the Constitution of Puerto Rico to the existing structure of the political relationship and effectively limited it to the internal sphere. By placing these limits on constitutional action, Congress ensured that its sovereignty could not be threatened by Puerto Rican self-government. As a result, the Constitution

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<sup>118</sup> *Ibid.*, pp. 22, 26.

<sup>119</sup> *Ibid.*, pp. 24-25. See also Report by the President's Task Force on Puerto Rico's Status (December 2007) p. 5. ("Congress may continue the current commonwealth system indefinitely, but it necessarily retains the constitutional authority to revise or revoke the powers of self-government currently exercised by the government of Puerto Rico."), available at <[www.justice.gov/archive/opa/docs/2007-report-by-the-president-task-force-on-puerto-rico-status.pdf](http://www.justice.gov/archive/opa/docs/2007-report-by-the-president-task-force-on-puerto-rico-status.pdf)> (Last accessed: 12 May 2016).

<sup>120</sup> 48 U.S.C. § 1901(d); C.I. Keitner and W.M. Reisman, 'Free Association: The United States Experience', 39 *Texas International Law Journal* (2004) p. 52.

<sup>121</sup> Constitution of the Commonwealth of Puerto Rico, Article VII, section 3.

does not provide Puerto Rico with legal authority to alter its political relationship to the United States in any way.<sup>122</sup>

## **4.2.2 Internal self-government**

As previously stated, Puerto Rico was not entirely free to determine its internal structure because PL600 authorized Congress to give its final approval to the Constitution. The approval was not limited to verifying that Puerto Rico had complied with the terms of PL600. Instead, Congress made significant amendments to the Constitution of Puerto Rico, such as the aforementioned limitation on any future amendments in Article VII, section 3. Congress also eliminated a provision regarding the progressive realization of several social, economic and cultural rights, including the right to work, the right to an adequate standard of living and the rights of mothers and children to special care and assistance, among others.<sup>123</sup> Suksi has commented on the significance of Congress' final approval of Puerto Rico's Constitution, saying that this requirement renders the Constitution as much a creation of Congress as it is of Puerto Rico.<sup>124</sup> Whether one agrees with Suksi or not, Congress' authoritative role throughout the process evidences a degree of intervention that places serious doubts on any claims of Puerto Rico's effective internal self-government.

Nonetheless, following the approval of the Constitution, the United States retained its legal authority to intervene in the affairs of the island. Prior to Commonwealth status, Puerto Rico was governed under a federal Organic Act, which established the island's internal structure as well as its external relationship to the United States. After the entry into force of the Constitution, the provisions of the Organic Act relating to the internal structure of government were repealed, but the remaining provisions continued in effect and were renamed the Puerto Rico Federal Relations Act (PRFRA).<sup>125</sup> Currently, the PRFRA is one of the major sources of federal authority in Puerto Rico.<sup>126</sup> Under Section 9 of the PRFRA, federal law applies automatically to Puerto Rico with the exception of internal revenue laws or any law deemed locally inapplicable.<sup>127</sup> This broad power to intervene in Puerto Rico's internal affairs through legislation is virtually unlimited and it does not require the consent of the Puerto Rican government prior to the application of federal law.<sup>128</sup>

In the decades following the creation of Commonwealth status, the United States has firmly incorporated Puerto Rico into its federal system of

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<sup>122</sup> J.I. Colón Ríos, 'Reconstruir a Puerto Rico', 67 *Revista del Colegio de Abogados de Puerto Rico* (2006) p. 22.

<sup>123</sup> Trías Monge, *supra* note 18, pp. 116-117.

<sup>124</sup> M. Suksi, *Sub-State Governance through Territorial Autonomy: A Comparative Study in Constitutional Law of Powers, Procedures and Institutions* (Springer, Heidelberg, 2011) p. 178.

<sup>125</sup> 48 U.S.C. §§ 731-916. See Rivera Ramos, *supra* note 16, p. 102.

<sup>126</sup> Keitner and Reisman, *supra* note 120, pp. 21-22.

<sup>127</sup> 48 U.S.C. § 734.

<sup>128</sup> Keitner and Reisman, *supra* note 120, p. 24; Suksi, *supra* note 124, p. 181.

government. Today, federal government agencies and courts exist and operate side-by-side with Puerto Rico's governing institutions.<sup>129</sup> In cases of conflict between Puerto Rico and federal law, the latter prevails as established by the 'supremacy clause' of the U.S. federal Constitution.<sup>130</sup> The 'supremacy clause' is especially significant to Puerto Rico, because unlike the individual states of the Union, it has no exclusive areas of government over which it is sovereign. Due to the wide latitude of power that the U.S. government holds over the island, Puerto Rico only exercises concurrent jurisdiction over its internal affairs, with the added caveat that federal law will always trump laws adopted by the Puerto Rican people.<sup>131</sup> This last point means that any federal legal provision supersedes even Puerto Rico's Constitution.<sup>132</sup> Perhaps the most extreme example of this is with respect to the death penalty, which was specifically prohibited by the Constitution of Puerto Rico.<sup>133</sup> Controversially, on several occasions the death penalty has been sought in federal court in Puerto Rico pursuant to federal law.<sup>134</sup> In all of those cases, Puerto Rican juries have rejected capital punishment. Because of the debate surrounding the application of the death penalty in Puerto Rico by federal authorities, it has been said that the rights guaranteed in the Constitution of Puerto Rico limit the actions of the Puerto Rican government, not the U.S. government.<sup>135</sup>

In practice, the U.S. government's intervention in Puerto Rican affairs is substantial. Owing to the almost unrestricted scope of federal legislation applicable to Puerto Rico, the United States plays a significant part in the everyday life of the island. Today, federal law in Puerto Rico regulates issues such as citizenship, currency, communications, labour relations, the environment, commerce, finance, bankruptcy, health, social welfare, etc.<sup>136</sup> Moreover, the island has no authority to determine what degree of U.S. federal intervention is acceptable to it. As a result, the Puerto Rico – United States relationship does not fit the general mould of 'internal/external' distribution of powers that characterize free association arrangements.

### **4.2.3 Free, voluntary and informed choice**

In two referendums celebrated during the process that led to the creation of the Commonwealth of Puerto Rico, the island's residents first accepted the terms of PL600 and later approved the Constitution before it was sent to Congress.<sup>137</sup> Given that the terms of Commonwealth status do not provide Puerto Rico with the minimum objective guarantees required by international

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<sup>129</sup> Rivera Ramos, *supra* note 16, p. 106.

<sup>130</sup> Constitution of the United States of America, Article VI, clause 2.

<sup>131</sup> Suksi, *supra* note 124, p. 372.

<sup>132</sup> Trías Monge, *supra* note 18, p. 162; Suksi, *supra* note 124, p. 380.

<sup>133</sup> Constitution of the Commonwealth of Puerto Rico, Article II, section 7.

<sup>134</sup> Federal Death Penalty Act of 1994, 18 U.S.C. §§ 3591-3598.

<sup>135</sup> Rivera Ramos, *supra* note 16, p. 102.

<sup>136</sup> Rivera Ramos, *supra* note 97, p. 13.

<sup>137</sup> J. Trías Monge, 'Plenary Power and the Principle of Liberty: An Alternative View of the Political Condition of Puerto Rico', 68 *Revista Jurídica de la Universidad de Puerto Rico* (1999) p. 10. Congress' amendments to the Constitution were not approved via popular referendum, but by the delegates of the constitutional convention in Puerto Rico.

law, no degree of consent could have validated the present arrangement.<sup>138</sup> Nonetheless, there are other reasons for questioning the people of Puerto Rico's decision to accept the terms of PL600.

The first is the lack of any real options or choice. At that time, critics of PL600 pointed out that it did not represent any real change, and argued that it was an attempt to legitimize the current colonial relationship under the guise of an agreement between equals.<sup>139</sup> It has already been shown that the United States never intended for Commonwealth status to alter the existing political relationship, and this is further supported by the paucity of choice presented in PL600. Puerto Rico was not given the opportunity to accept or reject the existing relationship; it was only offered the possibility of attaining a greater measure of self-government within the existing framework of political subordination. This did not comply with Resolution 742 (VIII), which stated that in order to ensure freedom of choice, free association had to be one of "several possibilities, including independence".<sup>140</sup> Furthermore, under the terms of PL600, it is questionable whether Puerto Rico had a real choice at all. Colón Ríos has suggested that consent and coercion become indistinguishable in this context, because the choice between an undemocratic alternative (*i.e.* the colonial status quo) and anything else is no choice at all.<sup>141</sup> In other words, the choice being offered to Puerto Rico all but assured the result, so it cannot be interpreted as a validation of the existing political relationship.

Another doubt concerns the extent to which Puerto Rico's consent was sufficiently informed. For specific reasons, the Puerto Rico and United States governments never concretely defined Commonwealth status.<sup>142</sup> The United States' aim was to get the arrangement certified by the United Nations as non-colonial, while at the same time being able to maintain its control over the island.<sup>143</sup> On the other hand, the Puerto Rican political leadership, having recognized that the United States was not willing to relinquish its sovereignty over the island, viewed PL600 as an opportunity to subtly obtain a non-colonial status from the United States without direct confrontation.<sup>144</sup> Therefore, the shifting nature of Commonwealth's meaning was being promoted by both governments, which for different reasons, stood to gain from keeping Puerto Rico's political status as vague as possible.<sup>145</sup> In order

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<sup>138</sup> Trías Monge, *supra* note 18, p. 162. ("[T]he consent extended by the Puerto Rican people in 1950 when accepting Law 600 in a referendum is overbroad. Consent to the unrestricted application to Puerto Rico of all federal laws, past and future, does not thereby erase the colonial nature of such an arrangement.")

<sup>139</sup> Ayala and Bernabe, *supra* note 12, p. 241.

<sup>140</sup> Resolution 742 (VIII), *supra* note 86, Annex, Second Part, A(2). As to the lack of freedom of choice, see A. Guevara, 'Puerto Rico: Manifestations of Colonialism', 26 *Revista Jurídica de la Universidad Interamericana de Puerto Rico* (1992) pp. 275, 288, as referenced in L.E. Medina, 'An Unsatisfactory Case of Self-determination: Resolving Puerto Rico's Political Status', 33 *Fordham International Law Journal* (2010) p. 1067.

<sup>141</sup> Colón Ríos, *supra* note 122, n. 98.

<sup>142</sup> Ayala and Bernabe, *supra* note 12, p. 235.

<sup>143</sup> *Ibid.*, p. 236.

<sup>144</sup> *Ibid.*, pp. 235-236.

<sup>145</sup> Helfeld, *supra* note 112, p. 313; Ayala and Bernabe, *supra* note 12, p. 236.

to ensure the voters' approval of PL600, Puerto Rican authorities campaigned in favour of the law, but they did not tell Puerto Ricans the truth about what was being agreed to politically.<sup>146</sup> They misled the public by stating that PL600 signified the end of colonialism and would establish a bilateral compact between the two governments. While at the same time, they reassured U.S. authorities that PL600 would in no way alter Puerto Rico's political relationship to the United States.<sup>147</sup> The people of Puerto Rico did indeed consent to something that, as explained to them, was indicative of free association, but this was not the reality of Commonwealth status.

### 4.3 Concluding thoughts

Commonwealth status granted Puerto Rico a greater degree of self-government, but ultimately left it within the larger framework of colonial subordination. Under this arrangement, the United States has allowed Puerto Rico the authority to govern within an area bounded by the lines of federal power, with two caveats. First, that the United States may arbitrarily move the lines of federal power further in or out irrespective of Puerto Rico's opinion. And second, that while the area beyond the established limits of Puerto Rican self-government is exclusive to federal power, the opposite is not true. Essentially, Puerto Rico is subject to a substantial amount of federal intervention in its internal sphere, and it also lives under the constant threat that whatever areas it does effectively manage may be rescinded at any point in time. This is an arrangement that creates no guarantees for the people of Puerto Rico in terms of being able to freely determine their political status or pursue their economic, social and cultural development. It is a form of self-government that is devoid of any real substance, and therefore it is not a legitimate form of decolonization.

Conceptually, Commonwealth status also runs afoul of the principles underlying decolonization. As a peoples under international law, Puerto Rico enjoys a right to exercise its sovereignty.<sup>148</sup> In accordance with this principle, sovereignty in a free association agreement should flow from Puerto Rico outward, depending on which of its inherent powers it is willing to entrust to another State. However, under the current arrangement sovereignty over Puerto Rico rests with the United States and, in fact, does not flow outward at all. Even though the United States has conceded the island some internal autonomy, it is still the exclusive holder of sovereignty over Puerto Rico.<sup>149</sup>

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<sup>146</sup> V. Géigel Polanco, 'La Ley de Relaciones Federales y el Estado Político de Puerto Rico', 23 *Revista del Colegio de Abogados de Puerto Rico* (1962) pp. 71, 75, as cited in L.Y. Flores Rodríguez, '¿Soberanía o soberano engaño?: La libre asociación como alternativa descolonizadora', 74 *Revista Jurídica de la Universidad de Puerto Rico* (2005) p. 343.

<sup>147</sup> *Ibid.*, p. 71.

<sup>148</sup> Resolution 1514 (XV), *supra* note 39, Preamble.

<sup>149</sup> *U.S. Amicus Brief (Sánchez Valle)*, *supra* note 115, p. 8. ("The United States did not cede its sovereignty over Puerto Rico [...] The ultimate source of sovereign power in Puerto Rico thus remains the United States.")

Until very recently, supporters of Commonwealth status have traditionally pointed out that during the entire lifespan of this framework, the United States had never actually reduced the scope of self-government it had granted to the island.<sup>150</sup> This was submitted as proof that even though legally Congress still had plenary powers over the island, the reality was in fact much closer to a bilateral agreement. However, this argument has recently become academic. In response to the economic crisis facing Puerto Rico, Congress is discussing legislation that will create a federally appointed ‘oversight board’.<sup>151</sup> This entity will supersede the Puerto Rican government and will be charged with overseeing and exercising final authority on matters pertaining to the internal self-governance of the island.<sup>152</sup> Furthermore, the U.S. government will appoint the members of the oversight board, thus returning Puerto Rico to the overtly colonial position of being directly ruled from the metropolis.<sup>153</sup> The proposed implementation of an oversight board to control the island’s internal affairs has shattered the myth that Puerto Rico’s degree of self-government was in practice irrevocable. In the process, it has also highlighted the colonial structure of Commonwealth status.

In conclusion, Puerto Rico continues to be a colony of the United States. The present arrangement does not meet the minimum guarantees of free association under the relevant General Assembly resolutions. Nor can it be argued that, at the very least, it complies with the general principles underlying decolonization. This leaves Resolution 748 (VIII) in a precarious position. It is possible that it could be considered implicitly revoked, because subsequent actions and expressions of the United States have demonstrated that it manipulated the General Assembly in furtherance of its personal interests. In any case, what is clear is that Resolution 748 (VIII) cannot excuse the United States from complying with its obligations under Article 73 of the U.N. Charter. Since Puerto Rico is still by definition a non-self-governing territory, the United States has a continuing fiduciary duty that it must comply with until Puerto Rico’s decolonization is complete.

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<sup>150</sup> See e.g., D.M. Helfeld, ‘Understanding United States-Puerto Rico Constitutional and Statutory Relations through Multidimensional Analysis’, 82 *Revista Jurídica de la Universidad de Puerto Rico* (2013) and G. Lawson and R.D. Sloane, ‘The Constitutionality of Decolonization by Associated Statehood: Puerto Rico’s Legal Status Reconsidered’, 50 *Boston College Law Review* (2009).

<sup>151</sup> H.R. 4900, ‘*Puerto Rico Oversight, Management, and Economic Stability Act*’, 12 April 2016, available at <[www.congress.gov/bill/114th-congress/house-bill/4900/text](http://www.congress.gov/bill/114th-congress/house-bill/4900/text)> (Last accessed: 13 May 2016).

<sup>152</sup> J.A. Delgado, ‘*Poder absoluto para la junta federal de control fiscal*’, *El Nuevo Día*, 26 March 2016, available in Spanish at <[www.elnuevodia.com/noticias/politica/nota/poderabsolutoparalajunafederaldecontrolfisca1-2178841/](http://www.elnuevodia.com/noticias/politica/nota/poderabsolutoparalajunafederaldecontrolfisca1-2178841/)> (Last accessed: 12 May 2016).

<sup>153</sup> *Ibid.*

## 5 United States' violation of its fiduciary duty

Having established the extent of the fiduciary duty under Article 73 and having confirmed its continuing application in the case of Puerto Rico, this chapter is concerned with applying the normative requirements of Article 73 to the present political relationship between Puerto Rico and the United States. The chapter focuses on three main areas of conduct where the United States is in breach of its fiduciary obligation. Namely, its failure to promote the political advancement of Puerto Rico, its failure to promote the economic advancement of Puerto Rico and its failure to act in good faith. Through a historical analysis of U.S. actions, with a focus on its main motivations, the chapter concludes that the United States is in violation of international law with respect to Puerto Rico.

### 5.1 Failure to promote Puerto Rico's political advancement

Puerto Rico's continuing colonial status has already been discussed in detail in the previous chapter. For purposes of this section, however, it is necessary to emphasize the static nature of the political relationship between Puerto Rico and the United States. Puerto Rico's colonial status within the U.S. domestic legal framework has remained unchanged for more than a century. In 1901, the Supreme Court of the United States defined Puerto Rico as an unincorporated territory, subject to the plenary powers of Congress.<sup>154</sup> As recently as December 2015, the U.S. federal government has reaffirmed unequivocally that this is still the case.<sup>155</sup> In the intervening century, the United States' mind-set has consistently been that it is under no obligation to transfer its sovereign powers. The autonomy it has ceded to the island has been a concession, and not the result of any international obligation. Puerto Rico is still just as vulnerable to the whims of the United States as it was at the beginning of the twentieth century. The only difference being that the United States previously recognized the relationship as 'colonial', but now that term is no longer used due to the stigma it carries. In reality, Congress has failed to put real power in the hands of the people of Puerto Rico. In response to the pressure created during the post-war decolonization movement, the United States reacted by ceding some internal autonomy to the island but it never relinquished its power to intervene. The political relationship has been created entirely on U.S. terms and under the express understanding that no part of it is permanent. Therefore, there has been no meaningful political advancement in Puerto Rico under Commonwealth status. The island is merely playing at internal governance.

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<sup>154</sup> *Downes v. Bidwell*, *supra* note 6.

<sup>155</sup> *U.S. Amicus Brief (Sánchez Valle)*, *supra* note 115.

Furthermore, Commonwealth status has been frozen in time since its creation in 1952. In the ensuing sixty plus years there have been no further developments in Puerto Rican self-government. This is not due to a lack of political will on the part of the United States, but rather its active resistance to calls for political advancement and decolonization in Puerto Rico. Even though the island's inhabitants remain divided as to their ultimate status preference, there is a long-established consensus that the present situation is unacceptable. Notwithstanding, the U.S. has resisted calls for greater political freedoms. With regard to independence, the United States has actively repressed this political movement through intimidation and violence.<sup>156</sup> Overall, U.S. actions have unduly influenced Puerto Rico's natural development by skewing and further polarizing the political picture. On this issue it is worth quoting Trías Monge at length:

“The playing field was never made level. If Puerto Rico wanted independence or full autonomy in association with the United States, or just increased powers of self-government, it was supposed to pay back in the hard currency of injustice. Existing levels of assistance were possible only under a continued state of subjection; higher levels were attainable only under statehood. The ironical twist was that, although statehood was never envisaged as a viable alternative in American policy toward Puerto Rico in the course of most of the twentieth century, it was thereby encouraged indirectly, and to a degree unconsciously, by overt hostility toward independence for most of that time and by glacial indifference to the possibilities of enhancing Commonwealth status.

Such an unexpected consequence of neglect in formulating a clear policy toward Puerto Rico has unwittingly distorted the status picture since the 1960s by indirectly helping statehood adherents to argue that statehood is the only sure way to enjoy increased federal assistance and that to vote for any other status option is to vote against a better standard of living.”<sup>157</sup>

As part of its desire to keep Puerto Rico under its political control, the United States made the ‘costs’ of achieving independence or even greater self-government extremely high. In the meantime, it continued to integrate Puerto Rico into the U.S. federal structure. The United States insisted that any move away from U.S. sovereignty would necessarily signify a severance of ties and an end to U.S. ‘assistance’. To the extent that Puerto Rico has been interwoven into the U.S. federal structure, any immediate cutting of ties would have severe consequences.

The United States has not created the conditions for the political advancement of Puerto Rico. Its decisions have been motivated by a sincere belief that the U.S. federal government, and not the island's inhabitants, is the rightful

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<sup>156</sup> M. Navarro, ‘New Light on Old F.B.I. Fight; Decades of Surveillance of Puerto Rican Groups’, *New York Times*, 28 November 2003, available at <[www.nytimes.com/2003/11/28/nyregion/new-light-on-old-fbi-fight-decades-of-surveillance-of-puerto-rican-groups.html?pagewanted=all](http://www.nytimes.com/2003/11/28/nyregion/new-light-on-old-fbi-fight-decades-of-surveillance-of-puerto-rican-groups.html?pagewanted=all)> (Last accessed: 11 May 2016). See also I. Acosta Lespier, *La Mordaza* (Editorial Edil, San Juan, 2008); R. Bosque Pérez and J.J. Colón Morera (eds.), *Las carpetas: persecución política y derechos civiles en Puerto Rico* (Centro para la Investigación y Promoción de los Derechos Civiles, Río Piedras, 1997).

<sup>157</sup> Trías Monge, *supra* note 18, p. 172.

protagonist in Puerto Rico. Even though the U.S. has recognized Puerto Rico's right to self-determination, it views this as little more than a nominal choice that the island's inhabitants will eventually have to make. In the meantime, the United States continues to assert its authority to define the parameters of Puerto Rico's status debate, including the available alternatives, as well as its authority to approve or deny any decision by Puerto Ricans as to a final status.<sup>158</sup>

Lastly, it is worth mentioning two recent events related to the economic crisis that demonstrate Puerto Rico's lack of political advancement under U.S. sovereignty. Aside from the *Sánchez Valle* case mentioned in chapter four, *Puerto Rico v. Franklin California Tax-Free Trust, et al.* is another case currently pending resolution before the Supreme Court of the United States.<sup>159</sup> The controversy is the result of the Puerto Rican government's attempts to create a bankruptcy mechanism for the island in order to restructure its public debt. Under U.S. federal law, individual states may authorize their public utilities to seek bankruptcy protection, but conversely, this mechanism is denied to Puerto Rico. Due to Congress' refusal to extend this right to the island, the Puerto Rican legislature took the initiative of passing a law creating its own local bankruptcy mechanism.<sup>160</sup> Upon the approval of the law, the actions of the Puerto Rican government were immediately challenged in U.S. federal court by the island's creditors. The lower courts declared Puerto Rico's law unconstitutional. They held that the power to authorize bankruptcy does not belong to Puerto Rico but to the U.S. federal government, notwithstanding the fact that Puerto Rico's actions were necessitated by the U.S. Congress' refusal to intervene. The local bankruptcy law constitutes Puerto Rico's appreciation of the specific tools it requires in order to navigate the economic crisis. This action is wholly compatible with the exercise of self-determination, and as recently affirmed by the international community, debt restructuring is a specific power that lies well within a sovereign State's rights.<sup>161</sup> Nonetheless, instead of supporting Puerto Rico's freely determined choice regarding its economic development, the United States opted to assert its political dominance over the island.

The second event is the debate taking place in Congress regarding the creation of a federal oversight board with jurisdiction over Puerto Rico. As previously stated, Congress is currently discussing legislation that would establish a

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<sup>158</sup> Rivera Ramos, *supra* note 97, p. 244. With regard to the U.S. claim that it must approve Puerto Rico's independence, see Report by the President's Task Force on Puerto Rico's Status (December 2007), *supra* note 119, p. 7. ("Congress thus may determine whether and under what conditions a territory may receive independence and may regulate those conditions until the point of independence.")

<sup>159</sup> U.S. Supreme Court, case no. 15-233.

<sup>160</sup> Act No. 71 of 28 June 2014, '*Ley para el Cumplimiento con las Deudas y para la Recuperación de las Corporaciones Públicas de Puerto Rico*', available in Spanish at <[www.lexjuris.com/lexlex/Leyes2014/lexl2014071.htm](http://www.lexjuris.com/lexlex/Leyes2014/lexl2014071.htm)> (Last accessed: 8 June 2016).

<sup>161</sup> See General Assembly Resolution 69/319, *Basic Principles on Sovereign Debt Restructuring Processes* (10 September 2015) par. 1. ("A Sovereign State has the right, in the exercise of its discretion, to design its macroeconomic policy, including restructuring its sovereign debt, which should not be frustrated or impeded by any abusive measures.")

federally appointed oversight board, which would supersede Puerto Rico's elected government and greatly reduce the scope of its internal autonomy.<sup>162</sup> Overall, it is telling that the legal authority invoked for this act of U.S. federal power over Puerto Rico continues to be the 'territorial clause' of the U.S. Constitution.<sup>163</sup> The United States' continued insistence on the colonial power structure indicates that Puerto Rico has not advanced politically in any significant way under U.S. sovereignty. As to the specifics of the proposed legislation, in its current form some examples include the oversight board's power to impose broad criteria on Puerto Rico's government for developing fiscal plans and budgets and the authority to invalidate those budgets if they do not comply.<sup>164</sup> It would have the power to block laws enacted by the Puerto Rican legislature if it understands that they conflict with the board-approved fiscal plans for the island.<sup>165</sup> The board would also need to approve any agreements reached between the Puerto Rican government and its creditors.<sup>166</sup> Finally, the legislation would open up environmentally protected land in Puerto Rico to private development.<sup>167</sup>

## 5.2 Failure to promote Puerto Rico's economic advancement

According to United Nations' practice regarding decolonization, the economic advancement of Puerto Rico should have resulted in a stable and self-reliant local economy, which would in turn strengthen the island's long-term prospects for self-government and independence. However, Puerto Rico's current reality is very different. Its economy remains closely linked to that of the United States, and it is heavily dependent on external financial resources.<sup>168</sup> The reason for this is that instead of promoting the economic advancement of Puerto Rico, the United States has consistently placed its own interests before those of the island's inhabitants.<sup>169</sup> At times, this has meant consciously making policy choices that were detrimental to Puerto Rico, but at other times, the U.S. has simply been indifferent to the economic consequences that its actions have had on the island.<sup>170</sup> In any case, under U.S. sovereignty Puerto Rico has become "a model of extreme capitalist wealth extraction", where U.S. corporations reap over USD 30 billion in profits annually.<sup>171</sup> Despite the substantial amount of wealth that is generated

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<sup>162</sup> H.R. 4900, *supra* note 151.

<sup>163</sup> *Ibid.*, Sec. 101(a)(3).

<sup>164</sup> *Ibid.*, Sections 201-204.

<sup>165</sup> *Ibid.*, Section 204.

<sup>166</sup> *Ibid.*, Section 207.

<sup>167</sup> *Ibid.* Section 405.

<sup>168</sup> Torruella, *supra* note 97, p. 84; D.L. Dick, 'U.S. Tax Imperialism in Puerto Rico', 65 *American University Law Review* (2015), pp. 51-52.

<sup>169</sup> Dick, *supra* note 168, pp. 9-10.

<sup>170</sup> *Ibid.*

<sup>171</sup> Quiñones Pérez and Irizarry Seda, *supra* note 11, p. 97.

on the island, over 46 per cent of its population still lives below the poverty level.<sup>172</sup>

Puerto Rico's current economic model dates back to the 1950s and a program of mass industrialization entitled 'Operation Bootstrap'. During this process, the island was transformed from an agricultural economy into an export-oriented manufacturing centre dominated by foreign capital.<sup>173</sup> However, the main characteristics of this strategy were put in place long before. In 1900, the advent of free trade between Puerto Rico and the United States ushered in an era of U.S. corporate dominance over the local agricultural economy.<sup>174</sup> The United States actively encouraged this state of affairs by reducing taxation on U.S. corporations operating in Puerto Rico and by promoting the island's extensive reliance on U.S. capital.<sup>175</sup> A further trend that was established during this time was Puerto Rico's increasing reliance on goods imported from the United States.<sup>176</sup> Operation Bootstrap was a strong reaffirmation of prior U.S. economic policy, which increased dependence on U.S. foreign capital through 'industrialization by invitation'.<sup>177</sup>

During the initial phase of Puerto Rico's industrialization, the main interests of the United States were twofold. First, as mentioned, were U.S. corporate interests. The primary role reserved for U.S. foreign capital ensured that the global competitiveness of U.S. corporations would be strengthened and the U.S. economy along with it.<sup>178</sup> But the United States also had what Grosfoguel has labelled a 'symbolic' interest in Puerto Rico.<sup>179</sup> As the Cold War era dawned, Puerto Rico was to become a development experiment, which the United States intended to parade as a successful capitalist development model for the Third World in order to combat Soviet influence.<sup>180</sup> As a result, the United States was only interested in achieving rapid growth in Puerto Rico and was not concerned with identifying the policies that would best serve the island in the long run. A development model based on the formation of local capital and a balanced focus on internal and external markets would have led to a more stable and self-reliant economy, but would have taken too long from the U.S. point of view.<sup>181</sup> Initially, U.S. symbolic interest was well served by Operation Bootstrap. During the first two decades of the industrialization experiment, the so-called 'golden period', Puerto Rico experienced rates of economic growth at a yearly average of 6

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<sup>172</sup> Puerto Rico Fact Sheet, Government Development Bank for Puerto Rico, March 2016, available at <[www.gdb-pur.com/economy/documents/PREconomicFactSheet-March2016.pdf](http://www.gdb-pur.com/economy/documents/PREconomicFactSheet-March2016.pdf)> (Last accessed: 6 May 2016).

<sup>173</sup> Quiñones Pérez and Irizarry Seda, *supra* note 11, p. 92.

<sup>174</sup> Ayala and Bernabe, *supra* note 12, p. 57.

<sup>175</sup> *Ibid.*, p. 63; Dick, *supra* note 168, pp. 51-52.

<sup>176</sup> Ayala and Bernabe, *supra* note 12, p. 57.

<sup>177</sup> R. Aldrich and J. Connell, *The Last Colonies* (Cambridge University Press, Cambridge, 1998) p. 74.

<sup>178</sup> Dick, *supra* note 168, p. 54.

<sup>179</sup> Grosfoguel, *supra* note 97, p. 46.

<sup>180</sup> *Ibid.*

<sup>181</sup> J.L. Dietz, 'Puerto Rico in the 1970s and 1980s: Crisis of the Development Model', 16:2 *Journal of Economic Issues* (1982) p. 498.

per cent.<sup>182</sup> Furthermore, the United States could also point to significant improvements in Puerto Ricans' quality of life thanks to developments in general infrastructure and the provision of government services.<sup>183</sup> Nonetheless, although to outward appearances it seemed that the island as a whole was prospering, the majority of benefits were accruing to the foreign investors who owned the local factors of production, and rapid economic growth obscured the reality of a system that was never designed to stand on its own.

The global economic downturn of the mid-1970s signalled the end for Operation Bootstrap's golden period, and laid bare the structural problems of Puerto Rico's economic model. Faced with a deep economic recession, it became evident that Puerto Rico's colonial economy could not survive on its own without major restructuring.<sup>184</sup> However, by then the Cold War was in full swing and it would have been highly damaging to the United States to admit to a failed development strategy. Therefore, the U.S. opted to enact a series of patchwork measures in order to prolong the life of the 'industrialization by invitation' strategy and to maintain the illusion of Puerto Rico's economic success.<sup>185</sup> First, the U.S. government significantly increased federal transfer payments to individuals in Puerto Rico, particularly in the form of food subsidies.<sup>186</sup> Second, the United States instituted legal reforms offering greater tax incentives in order to maintain Puerto Rico's attractiveness to U.S. foreign capital. This amendment, Section 936 of the U.S. tax code, exempted U.S. corporations on the island from paying federal taxes when transferring their profits from Puerto Rico to the United States. This measure revitalized the amount of foreign capital flowing through Puerto Rico, but did nothing to address the dearth of local capital and ownership in the Puerto Rican economy. Furthermore, Section 936 allowed U.S. capital such freedom of movement that it unintentionally turned Puerto Rico into a lucrative tax shelter for U.S. corporations, which soon began funnelling much of their overseas profits into the U.S. through Puerto Rico.<sup>187</sup> Thus, the United States responded to the crisis of the 1970s by fostering more economic dependence on the island. U.S. capital was attracted in ever greater numbers, leading to its increasing ownership of the Puerto Rican economy. Furthermore, the United States substantially expanded its financial outlays to individuals in order to prevent social instability. These financial outlays created a "mirage of economic affluence" by allowing a standard of living that exceeded local income levels.<sup>188</sup> The result of these policies was that

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<sup>182</sup> Quiñones Pérez and Irizarry Seda, *supra* note 11, p. 93.

<sup>183</sup> Ayala and Bernabe, *supra* note 12, p. 260.

<sup>184</sup> *Ibid.*, p. 377.

<sup>185</sup> Grosfoguel, *supra* note 97, p. 59.

<sup>186</sup> Pantojas García, *supra* note 13, p. 208.

<sup>187</sup> Torruella, *supra* note 97, p. 84.

<sup>188</sup> J. A. Santiago, 'The Puerto Rican Economy: A Big Challenge Ahead', mimeograph, presented at a workshop at the Woodrow Wilson Intl. Centre for Scholars, Washington D.C., 16-18 April 1980 (*as quoted in* Dietz 1982, *supra* note 181, p. 502).

Puerto Rico's failed economic model was effectively propped up, as the island became a tax haven supported by federal funds.<sup>189</sup>

By the 1990s, the Cold War had ended and with it the United States' symbolic interest in Puerto Rico. In addition, U.S. corporate interests had taken a backseat to the well-being of the U.S. mainland economy, and the United States was looking for ways to obtain revenue from the large amounts of U.S. capital accumulated in Puerto Rico.<sup>190</sup> This led to the repeal of Section 936 by the U.S. Congress in 1996, which sent the Puerto Rican economy into a tailspin. The lack of any focus on domestic capital formation during the entire lifespan of Operation Bootstrap, meant that Puerto Rico was still dependent on special treatment from the United States. Thus, when the U.S. eliminated Puerto Rico's main instrument for attracting U.S. capital, the effects were severe.

The main problem with the United States' economic development strategy for Puerto Rico over the last sixty plus years is that it was never devised to meet the island's needs. Instead of focusing on the long-term economic interests of Puerto Rico, the United States was interested only in growth for growth's sake. As measured by gross domestic product (GDP), the island's initial growth rate was indeed impressive. However, the growing gap between GDP and gross national product (GNP), which grew from 7 per cent in 1975 to 37 per cent in 2000, evidenced that the Puerto Rican economy was becoming increasingly externally owned.<sup>191</sup> The negative effects that this had were papered over by federal financial transfers to individuals, which had what Pantojas García has referred to as a "cushioning effect".<sup>192</sup> The result is that, instead of accumulating sustainable gains, Puerto Rico became a conduit for U.S. corporate wealth to pass through.<sup>193</sup> After over a century of economic development under U.S. sovereignty, Puerto Rico continues to be significantly dependent on external financial resources. While the improvements to the quality of life in Puerto Rico during this period cannot be denied, neither can the fact that these were all incidental to U.S. interests. It is extremely likely, that had the United States complied with its fiduciary duty, Puerto Ricans would have benefited much more from this political relationship. In sum, under Article 73, economic development in Puerto Rico should have been aimed at fostering a stable, self-reliant economy that would

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<sup>189</sup> Quiñones Pérez and Irizarry Seda, *supra* note 11, p. 93. While Puerto Rico continues to be heavily dependent on federal transfers, it is misleading to state that Puerto Rico 'lives off' of U.S. aid. In fact, the majority of individual transfer payments today respond to accrued benefits such as social security pensions, veterans' benefits and public health care. For a thorough analysis of this issue, see Pantojas García *supra* note 13.

<sup>190</sup> Dick, *supra* note 168, p. 68.

<sup>191</sup> Pantojas García, *supra* note 13, p. 218. GDP represents the total economic output of the economy while GNP represents the portion of that total which belongs to locally owned factors of production. The GDP/GNP gap then represents the share of total economic production that belongs to external investors and thus 'leaves' the economy in the form of profits, etc.

<sup>192</sup> *Ibid.*, pp. 218-219.

<sup>193</sup> Torruella, *supra* note 2.

have positively contributed to Puerto Rico's progressive development toward self-government and independence.

### 5.3 Failure to act in good faith

Any discussion on the issue of good faith must begin by pointing out that the United States does not recognize that it has a continuing fiduciary duty to Puerto Rico under international law. Since 1953, the U.S. position has consistently been that Puerto Rico's removal from the U.N. list of non-self-governing territories ended any specific obligations the United States had toward the island under the U.N. Charter. Subsequent attempts to review the matter in international forums have been resisted by the United States, arguing that after the adoption of Resolution 748 (VIII) the issue of Puerto Rico became an internal matter of U.S. domestic policy.<sup>194</sup> However, as established earlier, Resolution 748 (VIII) was the result of conscious misrepresentations made by U.S. delegates to the United Nations. Contemporary sources demonstrate that there was a consensus in the U.S. government that Commonwealth status would not change the political relationship between Puerto Rico and the United States.<sup>195</sup> Nonetheless, the United States lied to the United Nations in order to obtain its desired objective. Since 1953, the United States has never again supported the position it took before the U.N. After Puerto Rico was removed from the list of non-self-governing territories, the United States continued to assert that the island had no sovereignty of its own and that the internal autonomy it was granted could be revoked by the U.S. at any moment. Thus, the fact that the United States does not currently recognize its fiduciary duty to Puerto Rico is not the result of an honest difference in legal interpretation. The United States knowingly disguised Puerto Rico's colonial status as free association, while simultaneously employing a strategy of "chicanery and arm-twisting" in order to obtain an endorsement from the international community.<sup>196</sup>

Furthermore, the United States has consistently refused to enter into any frank discussions with Puerto Rico regarding the island's colonial status. It maintains that pursuant to its plenary powers under the 'territorial clause' of the U.S. Constitution, it can continue the current situation in perpetuity. That said, in recent decades the United States has adopted the politically correct position of recognizing Puerto Rico's right to self-determination, but without any serious commitment to decolonize the island.<sup>197</sup> While there is a long-standing consensus in Puerto Rico rejecting the status quo, the situation recently took an important turn. In November 2012, a status plebiscite was celebrated together with the Puerto Rican general elections. The first question in the plebiscite asked whether voters were satisfied with Puerto Rico's current status, and a majority voted that the island's present situation was unsatisfactory. The results of the second question, regarding possible status

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<sup>194</sup> Trías Monge, *supra* note 18, p. 163.

<sup>195</sup> Helfeld, *supra* note 112.

<sup>196</sup> Torruella, *supra* note 2.

<sup>197</sup> Trías Monge, *supra* note 18, p. 161.

options, have been controversial but they evidence that Puerto Rico remains divided as to status preferences. Nonetheless, what is important to take away from the 2012 plebiscite is that, through an informed and democratic process, Puerto Ricans expressed that they do not consent to the island's current status. Following the results of the plebiscite, the U.S. Congress celebrated hearings on the matter and recognized that Puerto Rico had rejected Commonwealth status.<sup>198</sup> As a result, it is now patently clear that the United States' continuing refusal to decolonize Puerto Rico is in violation of the expressed will of the Puerto Rican people.

## 5.4 Concluding thoughts

It is useful to examine the U.S. conduct in light of the individual elements of the fiduciary duty previously identified in chapter three, in support of the conclusion that the United States has breached its international obligation to Puerto Rico. First, U.S. policy has not fostered the creation of independent systems and structures, but has actually impeded it. The island continues to be politically subordinated to the U.S. federal government and U.S. intervention in the daily life of Puerto Ricans, through the application of federal law, is significant. Economically, Puerto Rico is overwhelmingly dependent on U.S. financial outlays. Because Puerto Rico is treated like a state of the union for many purposes, the two systems of government are substantially intertwined, to the point where a sudden severance of economic ties would be chaotic for Puerto Rico. Moreover, in its recent statements to the Supreme Court, the U.S. government argued that Puerto Rico is not sovereign and the island's government "owes its existence wholly to the United States".<sup>199</sup> Second, the United States has not permitted the possibility for Puerto Rico to grow into additional areas of governance. Since the inception of Commonwealth status, Puerto Rico has been campaigning for greater powers and a revision of the current relationship but has been consistently denied the opportunity. The United States has arrested Puerto Rico's political advancement. Likewise, the economic relationship between the two countries has been consistent throughout the entire period of U.S. control. Recent initiatives by the Puerto Rican government to secure the mechanisms it needs in order to face the economic crisis have been revoked by the United States in favour of preserving the status quo. Third, since the United States has not transferred sovereignty to Puerto Rico, it has not sufficiently detached itself from the governance of the island. Instead of seeking to diminish its role in Puerto Rican daily life, the United States continues to exercise control as the exclusive holder of Puerto Rican

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<sup>198</sup> See Letter from U.S. Senators Ron Wyden and Lisa Murkowski to Puerto Rico's Resident Commissioner, Pedro Pierluisi, 13 December 2013. ("Your testimony, and that of the other party presidents at the hearing, confirmed the results of the first question on the November ballot: a majority of Puerto Ricans do not support the current relationship with the United States.") available at [pierluisi.house.gov/sites/pierluisi.house.gov/files/12.13.13%20Letter%20to%20Pierluisi%20from%20Chair%20and%20Ranking%20Member%20of%20Senate%20ENR%20Committee.pdf](http://pierluisi.house.gov/sites/pierluisi.house.gov/files/12.13.13%20Letter%20to%20Pierluisi%20from%20Chair%20and%20Ranking%20Member%20of%20Senate%20ENR%20Committee.pdf) (Last accessed: 4 May 2016).

<sup>199</sup> *U.S. Amicus Brief (Sánchez Valle)*, *supra* note 115, p. 16.

sovereignty. Its policies thus far have been designed to maintain the existing power structure and the United States' role as the protagonist in Puerto Rico. Fourth, the instability of the present situation is undeniable. Puerto Rico is undergoing an economic crisis of significant proportions. Its economy is heavily dependent on external income and it lives under the constant threat of being stripped of its political power, which is an imminent possibility as a result of the federal oversight board currently being discussed in Congress. Finally, the United States' lack of good faith has negated the possibility of the two entities discussing their political relationship as equals. Far from there being an atmosphere of trust and respect, Puerto Rico has struggled to take whatever it can get politically, and the United States has refused to commit to any final outcome of the status issue. The island is in a political relationship that it does not condone in its present colonial manifestation, but the United States consistently refuses to treat Puerto Rico as its equal.

# 6 United States and the crisis in Puerto Rico

In relation to the crisis in Puerto Rico, U.S. non-compliance with its fiduciary duty has had two important effects. First, the United States has continued to exercise complete sovereignty over the island. Second, its policies have created the conditions that brought about the present situation. This chapter examines those two effects with a view toward determining U.S. liability. It begins by looking at U.S. sovereignty in Puerto Rico and the inherent responsibility that it entails. Secondly, it analyses the manner in which U.S. policy was the main cause of Puerto Rico's economic crisis. The chapter concludes that U.S. actions, along with Puerto Rico's continuing colonial status, confer full legal responsibility on the United States for the current state of the Puerto Rican economy.

## 6.1 United States as the exclusive holder of sovereignty

As the economic crisis in Puerto Rico has unfolded, the U.S. government has debated whether to intervene and in what manner. Up to now, most efforts have been directed at the creation of a federal oversight board, which as explained earlier, would supersede the authority of Puerto Rico's elected government. The justification for this is that in the United States, the crisis is largely portrayed as the result of Puerto Rico's fiscal irresponsibility. Some sectors of the U.S. government that are sympathetic to Puerto Rico's plight have invoked a moral imperative of the United States, based on the fact that Puerto Ricans are U.S. citizens.<sup>200</sup> Others have expounded on this by implying that federal assistance is 'deserved' or has been 'earned' because of Puerto Ricans' service record in the U.S. armed forces.<sup>201</sup> In any case, as the recent debates demonstrate, the United States' position is that it is under no legal obligation to intervene in Puerto Rico. However, this is contrary to its continuing exercise of exclusive sovereignty, which has far-reaching implications concerning its legal obligations to the island.

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<sup>200</sup> See e.g., 'House Democrats Call on House Republicans to Begin Bipartisan Negotiations on Puerto Rico', Press release by Natural Resources Committee Democrats, 24 February 2016, available at <[www.democrats-naturalresources.house.gov/media/press-releases/house-democrats-call-on-house-republicans-to-begin-bipartisan-negotiations-on-puerto-rico](http://www.democrats-naturalresources.house.gov/media/press-releases/house-democrats-call-on-house-republicans-to-begin-bipartisan-negotiations-on-puerto-rico)> (Last accessed: 8 June 2016).

<sup>201</sup> See e.g., recent statements by U.S. Senator Robert Menendez with regard to Senate Bill 2675: "Mr. President [of the Senate], I rise to be a voice for the 3.5 million American citizens living in Puerto Rico, the 200,000 Puerto Ricans who have served in our Armed Forces in every conflict since World War I, and the 20,000 who currently wear the uniform and put their lives on the line for our country." 14 March 2016, available at <[www.congress.gov/congressional-record/2016/3/14/senate-section/article/S1464-1](http://www.congress.gov/congressional-record/2016/3/14/senate-section/article/S1464-1)> (Last accessed: 8 June 2016).

It is an established principle in international law that a sovereign State has the responsibility to protect and ensure the well-being of all persons within its territory.<sup>202</sup> Even though Puerto Rico does not constitute an integral part of the United States, it is still within the latter's ultimate sphere of sovereignty. In fact, the legal framework created by the United States in the early twentieth century was intended specifically to maintain the island politically separate while at the same time completely within the U.S. domain.<sup>203</sup> As admitted by the federal government, this distinguishes Puerto Rico from the individual states of the U.S. federation, because the states share sovereign powers with the U.S. federal government but Puerto Rico does not.<sup>204</sup> Thus, the United States' claim that it is under no obligation to intervene in Puerto Rico may only be based on the problematic assumption that sovereignty over the island can be decoupled from the inherent ultimate responsibility that it carries.<sup>205</sup> This is to say, the U.S. position requires an acceptance of the idea that with the creation of Commonwealth status, the United States kept its sovereignty over the island intact while transferring its corresponding 'sovereign responsibility' to Puerto Rico.

Unsurprisingly, the above claim flies in the face of the United States' fiduciary duty, as well as United Nations' decolonization practice. In 1962, the General Assembly faced similar issues in the case of Southern Rhodesia, modern-day Zimbabwe, as it tried to get the United Kingdom to intervene in its colony in compliance with its obligations under Article 73.<sup>206</sup> The United Kingdom argued that Southern Rhodesia was a self-governing colony, which enjoyed enough self-government to have achieved a 'twilight status' in between independence and dependence. Furthermore, the U.K. argued that even though it was the sovereign in Southern Rhodesia and could legally intervene in the affairs of the country if it so desired, it had an unwritten policy of not legislating for its self-governing colonies. The General Assembly rejected these arguments. It countered that the internal relationship between the U.K. and Southern Rhodesia was irrelevant because Resolution 1541 (XV) only recognizes two types of territories, those with a full measure of self-government and those without. International law does not recognize an intermediate, twilight status. The General Assembly also dismissed the U.K.'s unwritten policy of non-intervention, stating that international law only recognizes the right of the sovereign to legislate for its colonies, regardless of any informal agreements as to how this right might be applied. Crucially, the General Assembly concluded that since the U.K. was the holder of sovereignty, it retained ultimate responsibility over Southern Rhodesia and

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<sup>202</sup> A. Peters, 'Humanity as the A and  $\Omega$  of Sovereignty', 20:3 *European Journal of International Law* (2009) pp. 522-527.

<sup>203</sup> Duffy Burnett and Marshall, *supra* note 5, p. 10.

<sup>204</sup> *U.S. Amicus Brief (Sánchez Valle)*, *supra* note 115, pp. 21-27.

<sup>205</sup> This point was raised very recently in the specific context of Puerto Rico's debt, in a pending publication. See A. Acevedo Vilá, 'With Plenary Powers comes Plenary Responsibility; Puerto Rico's Economic Fiscal Crisis and the United States'. ("If Puerto Rico has no sovereignty, then, who is responsible for its 'sovereign debt'?").

<sup>206</sup> United Nations Charter Repertory of Practice, 'Article 73', Supplement no. 3 (1959-1966) pars. 130-188, available at <[legal.un.org/repertory/art73/english/rep\\_supp3\\_vol3-art73\\_e.pdf](http://legal.un.org/repertory/art73/english/rep_supp3_vol3-art73_e.pdf)> (Last accessed: 12 May 2016).

could not abandon this responsibility while the latter remained a colony. Thus, the lessons regarding the indivisibility of sovereignty and sovereign responsibility are clear.

## 6.2 Causal role of U.S. economic policy

In any event, the most important effect of U.S. non-compliance with its fiduciary duty was that it created the conditions that inevitably led Puerto Rico to the present state of affairs. During more than a century of colonial domination in Puerto Rico, the United States has played an active role in creating and later cementing the conditions that brought about the present crisis.<sup>207</sup> Nevertheless, in order to adequately understand the United States' role, it is necessary to look to economic theory.

Puerto Rico's industrialization process was inspired by W.A. Lewis' development model ('Lewis model'), which was highly influential in the emerging field of developmental economics during the mid-twentieth century.<sup>208</sup> The Lewis model was designed to guide developing countries into a stage of advanced capitalism by means of industrialization and domestic capital formation.<sup>209</sup> It is based on the binary conception of developing economies, consisting of a 'subsistence sector' (agriculture) and a 'capitalist sector' (industry). The basic premise is that a developing country can easily pair its cheap surplus labour from the subsistence sector with foreign capital in order to fuel the growth of its capitalist sector. The Lewis model anticipated a standard progression of events. First, there would be a 'take-off' period, where foreign capital would ignite growth that would in turn remain relatively consistent. Eventually however, there would come a point in which all surplus labour had been absorbed, signifying the end of low wages and thus the decline of the country's attractiveness to foreign capital. This is known as the "Lewis turning point".<sup>210</sup> It is a critical point in the development process, where the 'take-off' period has reached its limit and the country must shift its strategy in order to continue economic growth or otherwise face recession. According to Lewis, since the turning point was a predictable event, the key to navigating it successfully was to have secured the creation of sufficient

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<sup>207</sup> Torruella, *supra* note 2. ("Puerto Rico's colonial condition continues to dictate the fate of the Island and its inhabitants today. Any attempt to divest or bypass this denigrating status as the cause for its present predicament is at best delusive. It is the forerunner, underlying cause, and current catalyst of the economic debacle in which Puerto Rico finds itself, for it has enabled, if not promoted, significant and ongoing economic exploitation by American capital to the detriment of Puerto Rico and its citizens -- since day one."). See also Dick, *supra* note 168, pp. 8-9; Quiñones Pérez and Irizarry Seda, *supra* note 11, p. 93; Ayala and Bernabe, *supra* note 12; Trías Monge, *supra* note 18.

<sup>208</sup> R. Islam, 'Has Development and Employment Through Labor-Intensive Industrialization Become History?', in K. Basu and R. Kanbur (eds.), *Arguments for a Better World: Essays in Honor of Amartya Sen, Volume 2: Society, Institutions, and Development* (Oxford University Press, Oxford, 2008) p. 388.

<sup>209</sup> W.A. Lewis, 'Economic Development with Unlimited Supplies of Labour', 22:2 *Manchester School* (1954) pp. 139-191.

<sup>210</sup> Islam, *supra* note 208, p. 388.

domestic capital during the ‘take-off’ period.<sup>211</sup> The availability of domestic capital, which could be readily reinvested in the local capitalist sector, would ensure continued growth independent of foreign investment.

In the case of Puerto Rico, specific parallels can be drawn with the Lewis model. Puerto Rico’s golden age of economic growth, from the 1950s to the 1970s, was nothing other than its take-off period, financed almost exclusively by foreign U.S. capital. The economic recession of the mid-1970s then, was Puerto Rico’s turning point. The main problem with Puerto Rico’s development, from the point of view of the Lewis model, was that there was no domestic capital formation during the take-off period. U.S. corporations were allowed to create enclaves of production, in which raw materials were shipped in and finished products and profits were shipped out, leaving very little in the local economy in the form of taxes or otherwise.<sup>212</sup> In theory, an industrial sector that is integrated to the economy will stimulate domestic capital formation by providing local revenues that may gradually be invested and reinvested in domestic production. The result would be an emergent domestic capital class, with an increasing share of ownership in the local factors of production. Strict adherence to the Lewis model would have made the Puerto Rican economy more self-reliant and would have provided it with the tools to overcome the inevitable turning point. As it happened in the 1970s, the lack of foresight and long-term planning meant that Puerto Rico had no alternative but to continue its dependence on foreign capital.<sup>213</sup> This was worsened by another deviation from the Lewis model, which was the almost complete abandonment of the agricultural sector. Under the Lewis model, continued industrialization is dependent on its simultaneous growth with agricultural production, otherwise the necessary importation of food will decrease profits.<sup>214</sup> At present, Puerto Rico’s lack of self-reliance extends to agricultural production as the island imports roughly 85 per cent of the food it consumes.<sup>215</sup> Needless to say, this statistic is alarming for a host of reasons unrelated to industrial development.

The application of the Lewis model in order to explain Puerto Rico’s failed development should not be dismissed as speculation. There are a number of Asian countries that embarked on this path at the same time as Puerto Rico and were able to successfully navigate the Lewis turning point. Both Padín and Dietz attribute this divergence to the Asian countries’ successful accumulation of domestic capital during their take-off periods.<sup>216</sup> According

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<sup>211</sup> Lewis, *supra* note 209, pp. 151-152. See also J.A. Padín, ‘Puerto Rico in the Post War: Liberalized Development Banking and the Fall of the ‘Fifth Tiger’’, 31:2 *World Development* (2003) p. 288.

<sup>212</sup> Ayala and Bernabe, *supra* note 12, p. 270.

<sup>213</sup> Dick, *supra* note 168, p. 54; Ayala and Bernabe, *supra* note 12, pp. 279-280.

<sup>214</sup> Lewis, *supra* note 209, p. 173.

<sup>215</sup> ‘*Expertos alertan sobre la inseguridad alimentaria en Puerto Rico*’, *El Nuevo Día*, 24 September 2014, available in Spanish at <[www.elnuevodia.com/noticias/locales/nota/expertosalertansobrelainseguridadalimentariaenpuertorico-1860885/](http://www.elnuevodia.com/noticias/locales/nota/expertosalertansobrelainseguridadalimentariaenpuertorico-1860885/)> (Last accessed: 16 May 2016).

<sup>216</sup> Padín, *supra* note 211, p. 288; J.L. Dietz, *Puerto Rico: Negotiating Development and Change* (Lynne Rienner Publishers, Boulder, 2003) as referenced in O. Sotomayor,

to Dietz, Asian economies began fostering the growth of domestic capital by focusing on relatively simple areas in which domestic production could replace imports.<sup>217</sup> They then gradually built on this in order to increase participation by engaging in other more advanced opportunities of import and export substitution.<sup>218</sup> The adjustments to economic policy afforded stability and self-sufficiency to those Asian countries, allowing them to successfully overcome the Lewis turning point and continue their economic growth for several decades.<sup>219</sup>

In sharp contrast to those Asian economies, Puerto Rico emerged from the Lewis turning point without enough domestic capital to substitute for foreign investment. The island was still entirely dependent on external capital but could no longer offer the incentive of relatively cheap wages.<sup>220</sup> Thus, what ensued in Puerto Rico was a 'race to the bottom', attracting foreign investment through U.S. and local tax incentives that were increasingly generous. This behaviour had a self-perpetuating effect in Puerto Rico, as fewer and fewer links with the local economy cemented Puerto Rico's dependent status as a conduit for foreign capital to pass through.<sup>221</sup> During this time there continued to be little in the way of sustainable economic gains, which might have led to domestic capital formation and increased local ownership in the economy. Finally, the United States' lack of a long-term strategy for the island's economic advancement was complemented with increased federal transfer payments to individuals, designed to prevent social instability by alleviating the more disastrous effects of U.S. economic policy in Puerto Rico.<sup>222</sup>

As previously stated, Puerto Rico's economic development has been driven largely by the immediate interests of the United States. However, the fiduciary obligation that the United States has to Puerto Rico under Article 73 is in direct conflict with its own interests. Had the United States implemented a program to foster domestic ownership of the economy and sustainable growth in Puerto Rico, it would have forsaken billions of dollars in potential profits for U.S. corporations. Equally important, the United States would have had to accept a slower, but more realistic, version of capitalist development instead of the 'economic miracle' it was advertising Puerto Rico as. The lack of long-term planning in U.S. economic policy for Puerto Rico suggests that economic dependence was more of a welcome consequence than an explicit goal. Nonetheless, it is not mere conjecture to state that economic dependence in Puerto Rico might have been an immediate goal of U.S.

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'Development and Income Distribution: The Case of Puerto Rico', 32:8 *World Development* (2004) p. 1403.

<sup>217</sup> Dietz 2003, as referenced in Sotomayor, *supra* note 216.

<sup>218</sup> *Ibid.*

<sup>219</sup> Padín, *supra* note 211, p. 288.

<sup>220</sup> *Ibid.*

<sup>221</sup> Torruella, *supra* note 2.

<sup>222</sup> Pantojas García, *supra* note 13, p. 220.

economic policy at one time or another. This charge has also been levied against the United States in the case of Micronesia.<sup>223</sup>

Another important example of the United States' active role in fostering the current conditions in Puerto Rico is that which sparked the immediate chain of events leading to the crisis, the elimination of Section 936. The United States repealed this piece of its legislation in an effort to obtain higher tax revenues from U.S. corporations. In doing so, it was aware that it would be eliminating Puerto Rico's main engine of economic activity but took no measures to remedy this. As previously explained, this was the immediate reason that Puerto Rico was left with insufficient revenues and was forced to take on massive amounts of debt in order to continue providing services to its population.

At this point, it is important to make a brief digression and consider the issue of Puerto Rico's own role in bringing about the crisis. A widely held opinion in certain sectors of the U.S. government is that Puerto Rico's crisis is self-inflicted due to decades of fiscal irresponsibility and of living beyond its means.<sup>224</sup> However, the present analysis has shown that the driving force behind Puerto Rico's current crisis is the United States' flawed economic policy toward the island. Self-interest has dominated a U.S. policy approach that has created but one avenue for possible development in Puerto Rico, and even within that avenue, it has greatly restricted the tools that Puerto Rico has had access to in order to pursue its social and economic well-being. Having said that, it may still be argued that Puerto Rico's political class has been responsible for exacerbating the crisis, or at least, of inadequately mitigating its effects.<sup>225</sup> This factor must certainly be considered when devising responses and ways out of the current situation. But the actions of the Puerto Rican government were not decisive in bringing about the crisis, and to mistake them for the principle cause is to miss the big picture, thus ensuring that any remedy will be insufficient and incomplete.<sup>226</sup>

### 6.3 Concluding thoughts

The United States' non-compliance with its international fiduciary duty has led directly to the crisis in Puerto Rico. The United States created the colonial framework and the flawed conditions for development that made the current situation inevitable. Within the developmental model that it applied to the island, the United States primarily responded to its own interests. Puerto Rico's colonial subordination left it politically unable to pursue other avenues

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<sup>223</sup> T.J. Gaffaney, 'Linking Colonization and Decolonization in Micronesia', 18:2 *Pacific Studies* (1995) p. 40.

<sup>224</sup> M.C. Jalonick, 'House Republicans are preparing legislation that would create a new oversight board to help Puerto Rico control its finances, a move to help the territory with \$70 billion in debt', *U.S. News & World Report*, 25 March 2016, available at <[www.usnews.com/news/politics/articles/2016-03-25/republican-bill-would-create-oversight-board-for-puerto-rico](http://www.usnews.com/news/politics/articles/2016-03-25/republican-bill-would-create-oversight-board-for-puerto-rico)> (Last accessed: 12 May 2016).

<sup>225</sup> Martínez Orabona *et al.*, *supra* note 14, pp. 22-31.

<sup>226</sup> Torruella, *supra* note 2.

of development. The island was entirely dependent on special treatment from the United States and it was unable to seek alternatives outside of the political relationship in order to secure its long-term needs. Finally, after taking away the island's economic engine, the United States stood by as the foreseeable consequences of that decision unfolded. Economic success is not guaranteed under any development model because it is impossible to anticipate all of the problems that may arise. But when the problems within a system, whether political or economic, are not only foreseeable but purposely sought, the State must be held responsible. In sum, the United States' breach of its fiduciary duty to Puerto Rico, along with its continuing role as exclusive sovereign, mean that it bears full and complete legal responsibility for the current economic conditions in Puerto Rico.

## 7 Conclusion

This thesis has examined the fiduciary obligation that States have to non-self-governing territories under international law, as a means of determining the United States' role in relation to the crisis unfolding in Puerto Rico. The process has been guided by the following questions: What are the specific requirements of the obligation to decolonize under international law? What economic obligations does political decolonization impose upon colonial Powers? Has the United States exercised its sovereignty over Puerto Rico in accordance with its international obligations?

With regard to the first two questions, it was established that the fiduciary duty is an obligation of conduct that is intimately tied to Puerto Rico's legal entitlement to decolonization. As such, it requires the United States to act in the best interests of Puerto Rico, with a view toward self-government and independence, when determining policy for the island. The performance of its fiduciary duty does not guarantee the United States any benefit toward its own interests. Quite the contrary, it implies a cost. The obligation requires positive acts and the expense of resources aimed at furthering the political, economic and social development of Puerto Rico.

The ultimate goal of the fiduciary duty is to create conditions that will lead to self-government and independence. This requires the United States to promote independent systems and structures of governance in Puerto Rico. It must also ensure that as the island's political, economic and social development advances, it affords Puerto Rico the opportunity to attain increased powers of governance while simultaneously reducing its own role in the island's affairs. The fiduciary duty also requires that this be done transparently and honestly, with the United States and Puerto Rico engaging each other from positions of dignity and equality. Lastly, the fiduciary duty imposes positive economic obligations on the United States, requiring it to adopt policies that will lead to a stable and self-reliant economic environment in Puerto Rico, destined to strengthen its prospects for political independence.

This investigation also demonstrated that the United States' fiduciary duty to Puerto Rico is ongoing. Despite the island's removal from the U.N. list of non-self-governing territories, its current status fails to meet the objective standards of decolonization established by the international community. Commonwealth status did not afford Puerto Rico the opportunity to reject the terms of its colonial relationship nor the ability to modify those terms in the future. It also kept Puerto Rico's internal sphere of governance under the control of the United States. Because of this, Commonwealth status does not meet the demands of free association. The lack of a full measure of self-government is the determining factor in the continuing applicability of the United States' fiduciary duty to Puerto Rico.

With respect to the third and final question, this thesis evaluated U.S. past and present performance of its fiduciary duty and found that it has failed to comply with the required standard of conduct. The United States' efforts have impeded Puerto Rico's political advancement by maintaining the island in a position of colonial subordination against its expressed will. The U.S. has also failed to promote Puerto Rico's economic advancement, instead fostering conditions of dependence and instability. Thirdly, the United States has exhibited a lack of good faith in fulfilling its fiduciary duty to Puerto Rico. It has consciously preserved Puerto Rico's colonial status in violation of international law. It has used Puerto Rico to further its own political and economic interests, much to the detriment of the island's well-being. It has also steadfastly ignored Puerto Rico's calls for change of the colonial relationship.

As to the ultimate issue of the United States' role, this thesis has demonstrated that the U.S. bears sovereign and causal responsibility for the events on the island. By choosing to remain the exclusive holder of sovereignty in Puerto Rico, in violation of international law, the United States is unconditionally responsible for the well-being of the island's inhabitants. Sovereign responsibility boasts a general quality, meaning that it applies regardless whether the events were caused by the United States or whether they were foreseeable. In and of itself, sovereign responsibility entails a legal obligation to intervene in the crisis in order to provide adequate remedies. More importantly however, the United States bears causal responsibility because it fostered the conditions that led directly to the crisis. U.S. economic policy ignored the blueprint dictated by international law, opting instead to steer Puerto Rico toward U.S. interests and away from self-government and independence. Furthermore, it kept Puerto Rico trapped in a position of colonial subordination, effectively ensuring that the island had no other alternative within the established framework but to follow the development path favoured by the United States. The predictable result of all of this was a weak and dependent economy that inevitably led to a fiscal crisis. The United States' causal responsibility likewise entails a legal obligation to intervene, for the purpose of remedying the harmful effects of its actions. Therefore, the United States' sovereign and causal responsibility render it liable under international law for the crisis in Puerto Rico.

The importance of holding the United States accountable for its actions lies in the need to guarantee Puerto Rico's meaningful exercise of its right to self-determination. The international community has entrusted the United States with the 'sacred' duty of ensuring Puerto Rico's path to decolonization. However, the U.S. has violated its international obligations, as well as the object and purpose of the U.N. Charter, by maintaining Puerto Rico under a colonial framework and acting primarily in furtherance of its own interests. It is clear that the United States has not taken its solemn commitment to Puerto Rico seriously.

There is no way out of the present situation, other than to address the structural problem of Puerto Rico's colonial status. As alluded to in the thesis

title, Puerto Rico's colonial relationship to the United States' remains as established as ever. Today, the U.S. continues to assert its self-appointed role as the ultimate decision-maker in Puerto Rico, even as it denies the island the specific remedies that it is urgently asking for.

Going forward, the United States must assume its responsibility for Puerto Rico's crisis. It must take immediate measures to stabilize the island's economy and begin to reverse the disastrous effects of its prior policies. In the longer-term, it must comply with its fiduciary duty and put Puerto Rico squarely on a path to political decolonization, economic stability and self-reliance. For example, the United States should initiate a decolonization process in compliance with the freely expressed desires of the Puerto Rican people. In conjunction with this, the United States must reduce the political costs of the different status alternatives as much as possible. In the case of independence, since the United States has substantially integrated the island into the U.S. federal system, political separation must not be imagined as a sudden severance of ties, but rather as a gradual process that takes into consideration the long-term viability of an independent Puerto Rico. In the case of free association and integration, the United States must decide, in accordance with its own right to self-determination, whether it is willing to entertain these options and exactly under what conditions. In any case, the United States must help rebuild Puerto Rico's economy on a solid basis, reducing dependence on foreign capital and promoting local growth. Equally important, it must engage Puerto Rico honestly on the question of the island's final status. Whether Puerto Rico ultimately chooses independence or not is irrespective of the United States' fiduciary duty, which nonetheless requires it to facilitate the path toward political decolonization to the best of its ability. The United States must recognize that it is not its place to grant self-determination to Puerto Rico, but that it has a clear legal obligation to create conditions in which the island's inhabitants may adequately exercise what is their inalienable right.

# Epilogue

In his book *Basic Rights*, Henry Shue defines a ‘right’ as providing its owner with a rational basis to make justified demands on others.<sup>227</sup> He contends that because they are by definition justified, it is not only desirable but necessary that those demands are made.<sup>228</sup> Delving deeper into the importance of this idea, Shue argues that insisting upon the observance of one’s rights is closely related to the concept of human dignity.<sup>229</sup> In support of this, he quotes Feinberg:

“Rights are not mere gifts or favors, motivated by love or pity, for which gratitude is the sole fitting response. A right is something that can be demanded or insisted upon without embarrassment or shame. When that to which one has a right is not forthcoming, the appropriate reaction is indignation; when it is duly given there is no reason for gratitude, since it is simply one’s own or one’s due that one received. A world with claim-rights is one in which all persons, as actual or potential claimants, are dignified objects of respect, both in their own eyes and in the view of others. No amount of love or compassion, or obedience to higher authority, or noblesse oblige, can substitute for those values.”<sup>230</sup>

Puerto Rico, as a collective self-determining entity, must insist on the observance of its rights. Because of the dominant position that the United States has reserved for itself in Puerto Rico, claiming the right to self-determination and decolonization requires a direct challenge to U.S. sovereignty. *The only way out of the present colonial situation, lies in Puerto Ricans conducting themselves as a peoples with the right to independence.* Puerto Rico’s self-determination is not for the United States to decide. The island must insist on its right to set the terms of the discussion regarding its political status. This does not rule out the possibility of some form of political association with the United States going forward, but any potential agreement must be the product of a decision between sovereign equals. This is the only way to ensure that it will be truly non-colonial.

Regarding the economic crisis, it is imperative that Puerto Rico take the initiative in tracing a path forward. Instead of waiting for Congress or the U.S. Supreme Court to decide what the island’s future holds, it is up to Puerto Ricans to demand for themselves the political space necessary to attend to their affairs. This means identifying concrete solutions to the present crisis and acting unilaterally if necessary, in defiance of the established colonial structure. Crucially, Puerto Rico must insist that the United States assume its rightful responsibility for the current state of affairs on the island. As a corollary to this, it must determine exactly what type of support it requires

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<sup>227</sup> H. Shue, *Basic Rights: Subsistence, Affluence, and U.S. Foreign Policy* (Princeton University Press, Princeton, 1980) p. 13.

<sup>228</sup> *Ibid.*, p. 14.

<sup>229</sup> *Ibid.*

<sup>230</sup> J. Feinberg, *Social Philosophy* (Prentice Hall, Englewood Cliffs, 1973) pp. 58-59 as quoted in Shue, *supra* note 227, pp. 14-15.

from the United States and demand that the U.S. comply with this role in accordance with its ongoing fiduciary duty. If the United States should refuse to assume its responsibility for the current crisis, Puerto Rico might respond by re-engaging the international community on the issue of its political status, so that the latter may assist the island in making its justified demands.

Self-determination is literally a unilateral, un-transferable act. It is something that no one else can provide to the right-holder. As the current crisis has shown, Puerto Rico cannot afford to wait quietly until the United States finally decides to decolonize the island. Neither is the answer to continue sending impassioned pleas for help to the U.S. government, implying that it is Puerto Rico's only hope for survival. Puerto Rico's only hope for survival is itself. It must confront the United States, insist that the U.S. comply with its fiduciary duty, and gain control over its own destiny.

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