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## The Legality of Military Bases in Non-Self-Governing Territory: The Case of United States Bases in Puerto Rico

### Keywords

Rico, States, United Nations, Mandates

# **The Legality of Military Bases in Non-Self-Governing Territory: the Case of United States Bases in Puerto Rico**

JOHN QUIGLEY\*

## **I. INTRODUCTION**

A state administering a non-self-governing territory is obliged to act in the best interests of the local population. Since this norm emerged in the early twentieth century, regulation has not been uniform as to whether an administering state may establish military bases in the non-self-governing territory. An administering state that establishes military bases not to defend the non-self-governing territory, but for its own purposes, may violate its obligations to the non-self-governing territory.

Such bases can cause economic harm by diverting land and sea areas from traditional uses. They may involve the non-self-governing territory against its will in military conflicts with neighboring states. They may impair the non-self-governing territory's opportunity of achieving self-determination because the administering state may be reluctant to jeopardize its bases.

This article asks whether establishment of military bases in a non-self-governing territory is consistent with an administering state's obligations to the non-self-governing territory. It analyzes applicable customary law, developed largely through the League of Nations and United Nations. It examines United States military bases in Puerto Rico as a case study, to permit a more detailed examination of the question of whether bases are used for the administering state's benefit, and of the question of whether a territory is non-self-governing.

Finally, the article examines the state responsibility of an administering state that establishes unlawful military bases towards the people of a non-self-governing territory. Here it draws on the Puerto Rico case to explore the damage that may be caused to a non-self-governing territory by military bases.

## **II. QUESTION OF WHETHER MILITARY BASES VIOLATE THE RIGHTS OF THE POPULATION OF A NON-SELF-GOVERNING TERRITORY**

A state holding a non-self-governing territory must assist it in achiev-

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ing self-determination.<sup>1</sup> Until that occurs, the state must so administer the territory as to maximize the interests of the local population.<sup>2</sup> As a corollary, it may not exploit the territory for its own benefit.<sup>3</sup> An example of use for the benefit of the administering state is South Africa's intensive mining in Namibia, in an apparent effort to extract valuable minerals before granting Namibia independence. This action has been condemned as a violation of the rights of the people of a non-self-governing territory.<sup>4</sup>

#### A. The "Sacred Trust" Norm

Establishment of military bases to benefit the administering state may conflict with the right of the population of a non-self-governing territory to have it administered for its benefit. That right emerged in the late nineteenth century.<sup>5</sup> The European colonial states recognized an obligation to benefit colonized populations. Britain called it the "white man's burden,"<sup>6</sup> France the *mission civilatrice*. That obligation is reflected in an 1885 treaty regarding the Congo: "All the powers exercising rights of sovereignty or influence in the said territories agree to protect the indigenous populations and to ameliorate their moral and material conditions of existence."<sup>7</sup>

##### 1. League of Nations

This obligation was expanded and regulated by the League of Nations, which decided that states taking colonies from Turkey and Germany in World War I had no right to accept them as colonies.<sup>8</sup> The League determined that the international community carried an obligation to these territories, and that administering states bore a "sacred trust of civilization" to benefit the local population, and to aid it in achieving self-determination.

The League concretized this concept in a system it called "mandates":

To those colonies and territories which as a consequence of the late war have ceased to be under the sovereignty of the States which formerly governed them and which are inhabited by peoples not yet able to stand by themselves under the strenuous conditions of the modern

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

2. U.N. CHARTER, art. 73.

3. A. MARGALITH, *THE INTERNATIONAL MANDATES* 1 (1930).

4. G.A. Res. 37/233A, preambular para. 18, Dec. 20, 1982, 37 U.N. GAOR Supp. (No. 51) at 40, U.N. Doc. A/37/51 (1983) (Vote: 120-0-23).

5. A. MARGALITH, *supra* note 3, at 50-68.

6. R. ANAND, *NEW STATES AND INTERNATIONAL LAW* 27 (1972). The phrase is that of Rudyard Kipling.

7. General Act of the Conference of the Plenipotentiaries of Austria-Hungary, Belgium, Denmark, France, Germany, Great Britain, Italy, the Netherlands, Portugal, Russia, Spain, Sweden-Norway, and Turkey (and the United States) respecting the Congo, Feb. 26, 1885, art. 6, 165 (1885), *CONSOLIDATED TREATY SERIES* 485 (C. Parry ed. 1978).

8. A. MARGALITH, *supra* note 3, at 1-17.

world, there should be applied the principle that the well-being and development of such peoples form a sacred trust of civilization and that securities for the performance of this trust should be embodied in this Covenant.<sup>9</sup>

## 2. *American States*

A "sacred trust" norm emerged among the American states as well. The United States recognized that obligation towards Cuba, over which it acquired jurisdiction in 1898. The U.S. President said that the United States would "give aid and direction to its people to form a government for themselves."<sup>10</sup> The U.S. Supreme Court characterized Cuba as

territory held in trust for the inhabitants of Cuba to whom it rightfully belongs and to whose exclusive control it will be surrendered when a stable government shall have been established by their voluntary action.<sup>11</sup>

At the outset of World War II, the American states established an international commission to administer any European-held Western Hemisphere territory over which Germany might try to assume administration. They decided that such administration should be carried out "for the benefit of the region under administration, with a view to its welfare and progress." They included one specific guarantee of rights, obliging the prospective inter-state administration to "guarantee freedom of conscience and worship."<sup>12</sup>

## 3. *United Nations*

The United Nations Charter identifies pursuit of self-determination of peoples as a purpose of the Organization. It views the right to self-determination as necessary not only to protect peoples, but as well "to strengthen universal peace." The Charter takes the position that peace cannot be secure so long as peoples are deprived of their right to self-determination.<sup>13</sup>

Consonant with its emphasis on self-determination, the Charter expanded the applicability of the "sacred trust" norm. It applied it to all states administering non-self-governing territory. Article 73 provided:

Members of the United Nations which have or assume responsibilities

9. LEAGUE OF NATIONS COVENANT, art. 22, para. 1. 2 F. ISRAEL, *MAJOR PEACE TREATIES OF MODERN HISTORY 1648-1967* 1274, 1283 (1967).

10. *Quoted in* Neely v. Henkel, 180 U.S. 109, 120, 21 S.Ct. 302, 306, 45 L.Ed. 448, 455 (1901).

11. *Id.*

12. Convention on the Provisional Administration of European Colonies and Possessions in the Americas (Act of Havana), July 30, 1940, arts. 3-4, 56 Stat. 1273, T.S. No. 977, 161 U.N.T.S. 254, 3 Bevans 623. For diplomatic correspondence leading to adoption of the Convention, see 5 FOREIGN RELATIONS OF THE UNITED STATES: 1940 180-256 (1961).

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

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 peace and security established by the present Charter, the well-being of the inhabitants of these territories.<sup>14</sup>

As one method of enforcing the "sacred trust" obligation, the Charter established a system equivalent to the League's mandate system, which it called trusteeship. States were invited to place their non-self-governing territories under supervision of a Trusteeship Council.<sup>15</sup> The Charter required a "trustee" state

to promote the political, economic, social, and educational advance of the inhabitants of the trust territories, and their progressive development towards self-government or independence. . .<sup>16</sup>

States accepting trusteeship remained bound by their Article 73 "sacred trust" obligation.<sup>17</sup>

#### *B. Legality of Military Bases Under the "Sacred Trust" Norm*

Existence of a "sacred trust" norm raises the question of whether an administering state may use a non-self-governing territory to its military benefit.

##### *1. League of Nations Practice*

The League of Nations prohibited administering states from maintaining military bases in mandate territory. But it did not apply that principle consistently.

In resolving this issue, the League distinguished on the basis of whether a mandate territory was an "A," "B," or "C" mandate. The League designated as "B" and "C" mandates those it deemed less ready for independence than those it designated "A" mandates. "B" mandates were those in Central Africa. "C" mandates were Pacific Ocean territories, plus South West Africa. The only "A" mandates, those territories considered closest to independence, were Palestine and Syria.<sup>18</sup>

The Covenant mentioned military bases only with respect to "B" territories. It required the mandatory state to "prevent. . . establishment of fortifications or military and naval bases."<sup>19</sup> That language was evidently intended to apply as well to "C" territories, because the League's agreements with mandatory states regarding all "B" and "C" territories pro-

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14. U.N. CHARTER, art. 73.

15. U.N. CHARTER, art. 75.

16. U.N. CHARTER, art. 76(b).

17. *Yearbook of the United Nations: 1946-47*, at 570 (1947).

18. A. MARGALITH, *supra* note 3, at 82-83.

19. COVENANT, *supra* note 9, art. 22, para. 5.

hibited military bases.<sup>20</sup> For example, the League's agreement with New Zealand respecting German Samoa, a "C" mandate, provided: "[N]o military or naval bases shall be established or fortifications erected in the territory."<sup>21</sup> When Japan established fortifications in certain of its "C" territories in the Pacific Ocean, in violation of similar provisions, protests were made to the League's Mandates Commission.<sup>22</sup>

With "A" mandates, however, military bases were not prohibited. The League's agreement with Great Britain for Syria authorized military bases. This limited their purpose to local defense: "The Mandatory may maintain its troops in the said territory for its defence."<sup>23</sup>

The League's agreement with Great Britain for Palestine did not authorize military bases but included provisions that assumed British military activity in Palestine. An article limiting Britain's recruitment of local militia provided,

"Nothing in this article shall preclude the administration of Palestine from contributing to the cost of the maintenance of the forces of the Mandatory in Palestine. The Mandatory shall be entitled at all times to use the roads, railways and ports of Palestine for the movement of armed forces and the carriage of fuel and supplies."<sup>24</sup>

Britain established a naval base in Palestine at Haifa.<sup>25</sup> The League's exception regarding Palestine is likely attributable to Britain's strong interest in providing military protection for approaches to the Suez Canal.<sup>26</sup>

## 2. *United Nations Practice*

Practice under the United Nations Charter rejects the permissibility of military bases in a non-self-governing territory to benefit the administering state.

### a. *Charter Provisions*

The negotiating history of the Charter provisions on trusteeship shows an intent to prohibit such bases. Drafters rejected a proposal that administering states establish military bases only with Security Council approval. The concern underlying the proposal was that bases might be established for the benefit of the administering state.<sup>27</sup> It was argued in opposition to this proposal that supervision of trusteeship came under

20. Q. WRIGHT, *MANDATES UNDER THE LEAGUE OF NATIONS* 471 (1930).

21. Mandate for German Samoa, art. 4, in A. MARGALITH, *supra* note 3, at 211.

22. H. HALL, *MANDATES, DEPENDENCIES AND TRUSTEESHIP* 69, 210 (1948). Akzin, *The Palestine Mandate in Practice*, 25 *IOWA L. REV.* 32, 34 (1939).

23. Syria and the Lebanon, art. 2, in Q. WRIGHT, *supra* note 20, at 608. "Its" refers to "territory," meaning that Britain was forbidden to establish bases for its own purposes.

24. *PALESTINE CONST.*, art. 17, in Q. WRIGHT, *supra* note 20, at 603-604.

25. Akzin, *supra* note 22, at 34.

26. S. ZEBEL, *BALFOUR: A POLITICAL BIOGRAPHY* 240 (1973).

27. L. GOODRICH, E. HAMBRO & A. SIMONS, *CHARTER OF THE UNITED NATIONS: COMMENTARY AND DOCUMENTS* 513 (1969).

Security Council jurisdiction.<sup>28</sup> It was anticipated that the Security Council would ensure that administering states not establish military bases for their own benefit.

The final Charter language was silent on military bases. The intent was to permit military bases, but for two purposes only. The first was defense of the non-self-governing territory, since lack of fortifications in League of Nations mandate territories had facilitated Axis takeovers.<sup>29</sup> The second was participation in international peacekeeping, since non-self-governing territories were expected to participate in the peacekeeping envisaged by the Charter.<sup>30</sup>

The General Assembly has construed the Article 73 "sacred trust" norm to prohibit military bases established to benefit the administering state. It finds military bases inconsistent with the obligation to benefit the local population and to move a territory towards self-determination:

Member States shall oppose all military activities and arrangements by colonial and occupying Powers in the Territories under colonial and racist domination, as such activities and arrangements constitute an obstacle to the full implementation of the Declaration, and shall intensify their efforts with a view to securing the immediate and unconditional withdrawal from colonial Territories of military bases and installations of colonial Powers.<sup>31</sup>

*b. General Assembly Restrictions in Trusteeship Agreements.*

In agreements with states placing non-self-governing territories under trusteeship, the General Assembly has permitted military bases. However, the purpose is limited to: (1) defense of the non-self-governing territory; (2) participation in United Nations peacekeeping. The Assembly's trusteeship agreement with the United Kingdom for Tanganyika is typical. The United Kingdom was given the right,

to establish naval, military and air bases, to erect fortifications, to station and employ his own forces in Tanganyika and to take all such other measures as are in his opinion necessary for the defence of Tan-

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28. U.N. CHARTER, art. 83; R. RUSSELL, *A HISTORY OF THE UNITED NATIONS CHARTER: THE ROLE OF THE UNITED STATES 1940-1945*, 836 (1958).

29. H. HALL, *supra* note 22, at 68-69.

30. It was on this basis that the United Kingdom and Australia proposed that trustee States be permitted to station troops in trust territories. R. RUSSELL, *supra* note 28, at 836.

31. G.A. Res. 35/118, Annex: Plan of Action for the Full Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples, art. 9, Dec. 11, 1980, 35 U.N. GAOR Supp. (No. 48) at 21, U.N. Doc. A/35/48 (1981); *reprinted in* 1983 U.N.Y.B. 1057, (Vote: 120-6-20). *Cf.* G.A. Res. 41/405, para. 1, Oct. 31, 1986, *Advance Text of Resolutions and Decisions Adopted by the General Assembly at Its 41st Session from 16 September to 19 December 1987*, Press Release GA/7463, Jan. 12, 1987, at 559, *reported in* U.N. MONTHLY CHRON., Feb. 1987, at 130. (Vote: 124-13-15). The Special Committee on Decolonization has similarly characterized bases as an impediment to self-determination and called for their removal. *See, e.g.*, Resolution, paras. 11-12, Aug. 8, 1979, U.N. Doc. A/AC.109/584 (1979).



ganyika and for ensuring that the territory plays its part in the maintenance of international peace and security.<sup>32</sup>

Thus, the United Kingdom was not authorized to establish military bases for its own benefit.

### *c. General Assembly Criticism of Particular Bases*

The General Assembly has on several occasions criticized administering states for bases in non-self-governing territory. It has condemned South Africa for maintaining military bases in Namibia.<sup>33</sup> In 1960 it criticized Belgium for using bases in its trust territory of Ruanda-Urundi to send troops into the Congo. The Assembly called on Belgium "to refrain from using the Territory [Ruanda-Urundi—J.Q.] as a base, whether for internal or external purposes, for the accumulation of arms or armed forces not strictly required for the purpose of maintaining public order in the Territory."<sup>34</sup>

### *3. Conclusion as to Permissibility of Military Bases*

The "sacred trust" norm prohibits military bases for the benefit of an administering state in a non-self-governing territory. This prohibition precludes not only bases whose purpose is offensive but those designed for defense of the administering state. Bases even for defense of the administering state involve a use of the non-self-governing territory for a purpose that does not benefit the local population.

## III. QUESTION OF WHETHER BASES ARE DESIGNED TO BENEFIT THE ADMINISTERING STATE

If an administering state establishes military bases in a non-self-governing territory, it may assert that the aim is to defend that territory from attack. A base may serve both to defend that territory and to further interests of the administering state. This mixture of motives is illustrated by the United States bases in Puerto. The United States has acknowledged that its bases serve its own interests, though it views benefits flowing to Puerto Rico as well.

The United States has administered Puerto Rico since 1898.<sup>35</sup> It first

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32. Trusteeship Agreement for the Territory of Tanganyika, art. 5(c), 1947 U.N.Y.B. 193.

33. See, e.g., G.A. Res. 35/227A, para. 21, March 6, 1981, 35 U.N. GAOR Supp. (No. 48) at 40, U.N. Doc. A/35/48 (1981); reprinted in 1981 U.N.Y.B. 1149 ("strongly condemns South Africa for its ever-increasing military build-up in Namibia"). (Vote: 114-0-22). See also G.A. Res. 36/121A, 36 U.N. GAOR Supp. (No. 51) at 29, U.N. Doc. A/36/51 (1982); reprinted in 1981 U.N.Y.B. 1154 ("condemns South Africa for . . . the massive militarization of Namibia") (Vote: 120-0-27). On South Africa's military presence in Namibia, see I. DORE, *THE INTERNATIONAL MANDATE SYSTEM AND NAMIBIA* 168 (1985).

34. G.A. Res. 1579, 15 U.N. GAOR Supp. (No. 16) at 34, U.N. Doc. A/4684 (1961) (Vote: 61-9-23).

35. Treaty of Paris, Dec. 10, 1898, Spain-United States, 30 Stat. 1754, T.S. No. 343.

established military bases there in 1938, in a program of founding naval bases "for purposes of national defense" in various of its "territories and possessions."<sup>36</sup> In that year Congress appropriated \$30 million to construct air and naval bases in Puerto Rico.<sup>37</sup>

The United States governed Puerto Rico at that time through appointed governors. In 1939 President Roosevelt appointed an Admiral, William D. Leahy, to govern Puerto Rico, because of base construction plans.<sup>38</sup> No local authority had a role in the base-construction decision.

#### A. *Extent of Military Use of Puerto Rico*

In 1943 the U.S. Assistant Secretary of War characterized Puerto Rico as "largely a garrison."<sup>39</sup> Between 1939 and 1944 the United States Navy had acquired land for base construction on Vieques, an off-shore island of Puerto Rico. On the western end of the main island, it had built Borinquen Fields (later Ramey Air Base), and on the eastern end Roosevelt Roads Naval Base, which it equipped to accommodate the British fleet should Britain fall to Germany.<sup>40</sup> It had built another naval base in San Juan harbor.<sup>41</sup>

A naval ammunition depot on Vieques that the Navy had closed after World War II was re-activated following the United States' 1962 confrontation with Cuba over the stationing of Soviet missiles there.<sup>42</sup> By 1966 the U.S. Navy was using 44,249 acres in Puerto Rico.<sup>43</sup> The Roosevelt Roads base became one of the largest naval bases in the world<sup>44</sup> and "one of the most exclusive and sophisticated control centers for weapons training in the world."<sup>45</sup> It uses an "electromagnetic environment" for military training that extends into the ocean, covering 194,000 square miles that, according to the U.S. Navy, cannot be duplicated at any other location to which it has access.<sup>46</sup> Roosevelt Roads has docking facilities for United States nuclear-armed vessels, which it harbors there.

36. Pub. L. No. 528, sec. 10(a), 52 Stat. 401 (1938).

37. *THE PUERTO RICANS: A DOCUMENTARY HISTORY* 185 (K. Wagenheim ed. 1973). N.Y. Times, Nov. 12, 1939, at 43, col. 5 (on base construction).

38. *THE PUERTO RICANS* *supra* note 37, at 185. N.Y. Times, May 14, 1939, at 42, col. 4. N.Y. Times, June 7, 1939, at 2, col. 2.

39. *A Bill to Provide for the Withdrawal of U.S. Sovereignty Over the Island of Puerto Rico and for the Recognition of Its Independence, 1943: Hearings on S. 952 Before the Senate Comm. on Territories and Insular Affairs, 78th Cong., 1st Sess. 12 (1943)* (statement of John McCloy, Ass't Sec. of War).

40. R. CARR, *PUERTO RICO: A COLONIAL EXPERIMENT* 310 (1984).

41. *Hearings on S. 952, supra* note 39, at 15 (statement of Sen. Taft).

42. R. CARR, *supra* note 40, at 310-311.

43. United States-Puerto Rico Commission on the Status of Puerto Rico, *Inventory of Federal Agencies with Offices in Puerto Rico*, in *Status of Puerto Rico: Selected Background Studies* 947 (1966).

44. R. CARR, *supra* note 40, at 310.

45. *Id.* at 311 (citing U.S. Navy documents).

46. *Id.*

By the 1970s, the U.S. Navy had acquired title to 76% of Vieques Island, which is 20 miles long by four miles wide.<sup>47</sup> It upgraded its facilities there in the 1980s.<sup>48</sup>

While most U.S. military use of Puerto Rico is done by the Navy, its Army and Air Force have established smaller bases. The Army established there its Antilles Command in the late 1930s and by 1966 used 14,660 acres of land.<sup>49</sup>

The Air Force began operations in Puerto Rico in 1939. In 1952 it established there the 72nd Bomb Wing of its Strategic Air Command,<sup>50</sup> which came to use 4169 acres.<sup>51</sup> The Air Force withdrew the Command in the early 1970s but used its Puerto Rico bases for exercises in the 1980s.<sup>52</sup>

Because of the scope of United States military activity in Puerto Rico, the governor of Puerto Rico described it in 1982 as a "land super carrier."<sup>53</sup>

### *B. Defense of the Administering State*

Depending on its own military situation, an administering state may find it useful to employ bases in the non-self-governing territory for its own defense. This consideration has been prominent in U.S. military policy in Puerto Rico.

#### *1. Protection of Panama Canal*

In 1939 the U.S.-appointed governor of Puerto Rico called the bases "the keystone of our eastern defense."<sup>54</sup> A major purpose of bases then under construction was protection of the Panama Canal.<sup>55</sup> Stated President Franklin Roosevelt:

When the island [Puerto Rico] was brought under our flag, the Panama Canal had not yet been dug, and the airplane had not yet been invented. . . . When the present war became imminent, however, it was obvious that the chain of islands. . . formed a vast natural shield for the Panama Canal, suited in distance and conformation to the uses of the military plane. And of this island shield, Puerto Rico is the

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47. *Romero-Barceló v. Brown*, 643 F.2d 835, 837 (1st Cir. 1981), *rev'd*, 456 U.S. 305 (1982).

48. Lidin, *Navy's Signal Tower for Carib Upgraded*, San Juan Star, May 6, 1983, at 1, col. 1.

49. U.S.-Puerto Rico Commission, *supra* note 43, at 915.

50. Strategic Air Command, General Order No. 32, 1952, in U.S.-Puerto Rico Commission, *id.* at 914.

51. *Id.* at 915.

52. Turner, *Ramey Part of Response to Russians*, San Juan Star, Apr. 25, 1983, at 1, col. 2.

53. R. CARR, *supra* note 40, at 315 (quoting Feb. 1, 1982, speech of Gov. Romero-Barceló).

54. Gov. Blanton Winship (1934-1939), *quoted in* N.Y. Times, May 14, 1939, at 42, col.

4. See similar comments of Gen. George Marshall, N.Y. Times, May 15, 1939, at 3, col. 7.

55. The Puerto Ricans, *supra* note 37, at 185.

center.<sup>56</sup>

Puerto Rico became "an Atlantic Gibraltar for defense of the Panama Canal."<sup>57</sup>

## 2. *Protection of the Eastern Seaboard of the United States*

The U.S. Navy considers Puerto Rico vital for defense of the eastern United States.<sup>58</sup> This factor was cited by a United States federal judge to deny a requested injunction to suspend Navy exercises on Vieques Island in *Romero-Barceló v. Brown*.<sup>59</sup> The Governor of Puerto Rico, acting on behalf of Puerto Rico, had sued the U.S. Secretary of Defense, to stop exercises on and around Vieques Island, on the grounds of harm to the environment. Puerto Rico alleged violation of environmental protection statutes. U.S. District Judge Juan R. Torruella found that the Navy had violated such statutes but denied the injunction, citing the importance to the United States of the exercises. Judge Torruella said:

The Atlantic Fleet is responsible for providing naval forces throughout a geographic area that extends from as far north as the Arctic, to as far south as the Antarctic, as far east as Turkey and as far west as Mexico.<sup>60</sup>

Its most important function, Judge Torruella said, is to protect sea lanes used by U.S. vessels:

From an economic and defense standpoint, the United States is an island which must import 90% of its strategic materials over the sea lanes of the World. Petroleum is the single most important commodity moved by sea, the primary sources in the Atlantic seaboard being the Middle East, and secondarily, South America. These sea lanes are also of vital importance in allowing the United States to meet its international obligations with 41 of the 43 nations with which it has mutual defense treaties.<sup>61</sup>

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56. *An Act to Amend the Act to Provide a Civil Government for Puerto Rico, 1944: Hearings on S. 1407 Before the House Comm. on Insular Affairs, 78th Cong., 2d sess. 14-15* (letter of Pres. Franklin Roosevelt). Roosevelt's 1941-46 governor of Puerto Rico also saw Puerto Rico as protection against threats to the Panama Canal:

The source was Germany, the objective was the Panama Canal, and the direction was through the Caribbean island arc from Florida to Trinidad. In this arc Puerto Rico was central. Bases there were, in the strict sense, strategic and essential. Puerto Rico therefore had to be maintained as a controlled and, if possible, friendly base.

R. TUGWELL, *THE ART OF POLITICS* 150 (1958).

57. N.Y. Times, Apr. 3, 1943, at 7, col. 1.

58. R. CARR, *supra* note 40, at 310. Immediately after World War II and prior to the Cold War, some U.S. officials thought that Puerto Rico would no longer be necessary in U.S. military strategy. R. TUGWELL, *supra* note 56, at 150-151.

59. *Romero-Barceló v. Brown*, 478 F.Supp. 646 (D. P.R. 1979), *aff'd in part, vacated in part, remanded in part*, 643 F.2d 835 (1st Cir. 1981), *rev'd sub nom. Weinberger v. Romero-Barceló*, 456 U.S. 305, 102 S.Ct. 1798, 72 L.Ed.2d 91 (1982).

60. *Romero-Barceló v. Brown*, 478 F.Supp. at 708.

61. *Romero-Barceló v. Brown*, 478 F.Supp. at 707.

### C. *Military Training Exercises*

Because major military exercises disrupt civilian activity, a non-self-governing territory may provide a more convenient location than sites in the administering state, since citizens of the territory are less able effectively to object.

The U. S. Navy has used Puerto Rico for its own exercises and for N.A.T.O. exercises.<sup>62</sup> A U.S. military commander wrote of Vieques Island:

Actually the island is a part of Puerto Rico, but the U.S. Navy and Marine Corps had established something of a squatters right over it. They used it as a target area for the long guns of the Caribbean Fleet and as a place where the marines could practice their amphibious landings.<sup>63</sup>

The United States military finds Puerto Rico more appropriate for training than other available areas for military exercises using sophisticated weaponry:

The island of Vieques is the only place presently available wherein the Atlantic Fleet can conduct the full range of exercises under conditions similar to simulated combat. It is the only place which possesses the potential or existing capability to conduct combined exercises involving air-to-ground ordnances delivery, Marine amphibious assaults, anti-submarine warfare, surface-to-air missiles, close support bombardment, and electronic warfare; in short everything that a battle group would undertake to secure our sea lanes from interdiction by hostile forces.<sup>64</sup>

Judge Torruella, who made that finding, stated that "the continued use of Vieques by Defendant Navy for naval training activities is essential to the defense of the Nation."<sup>65</sup> He therefore denied the injunction requested by Puerto Rico:

[T]he injunctive relief sought would cause grievous, and perhaps irreparable harm, not only to Defendant Navy, but to the general welfare of this Nation. It is abundantly clear from the evidence in the record, as well as by our taking judicial notice of the present state of World affairs, that the training that takes place in Vieques is vital to the defense of the interests of the United States.<sup>66</sup>

On appeal in that case, the U.S. Supreme Court cited with approval this finding of fact.<sup>67</sup> Noting that the Navy had used Vieques Island for weapons training for many years, it concurred as to the unique utility of Vie-

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62. *Vieques Fishermen Fight Back* (interview with Carlos Zenon, President, Fishermen's Association of Vieques), 1 PUERTO RICAN JOURNAL OF HUMAN RIGHTS 16, 18 (no. 2, 1978).

63. W. HARRIS, PUERTO RICO'S FIGHTING 65TH U.S. INFANTRY 15 (1980).

64. *Romero-Barceló v. Brown*, 478 F.Supp. at 708.

65. *Id.*

66. *Id.* at 707.

67. *Weinberger v. Romero-Barceló*, 456 U.S. at 310.

ques Island for training exercises: "Currently all Atlantic Fleet vessels assigned to the Mediterranean Sea and the Indian Ocean are required to complete their training at Vieques because it permits a full range of exercises under conditions similar to combat."<sup>68</sup>

The United States military has used Puerto Rico not only for military training aimed at defense of the United States, but as well for training in intervention, taking advantage of Puerto Rico's situation as a Caribbean island. In the early 1980s the U.S. Atlantic Command conducted exercises in and around Puerto Rico to simulate the type of landing that it carried out in Grenada in 1983. The exercise was called Ocean Venture.<sup>69</sup> Its objective was to install a "government friendly to America" in a Caribbean island state that was "exporting terrorist activities to neighboring islands."<sup>70</sup> In its 1983 invasion of Grenada, the U.S. Navy assembled part of its assault force in Puerto Rico.<sup>71</sup> The U.N. Special Committee on Decolonization has expressed concern about U.S. use of military facilities in Puerto Rico as part of its Central America policy.<sup>72</sup>

#### IV. QUESTION OF WHETHER A TERRITORY IS SELF-GOVERNING

The question of whether a territory is self-governing may not be clear. An administering state's power with respect to military use of the territory is a factor relevant in answering that question. If an administering state has power of military use, that fact casts doubt on whether the territory is self-governing. This section uses Puerto Rico to examine the question of how it is determined whether a territory is non-self-governing.

When the United Nations established supervision over non-self-governing territories, the United States listed Puerto Rico as non-self-governing.<sup>73</sup> Beginning in 1946, it annually submitted to the United Nations information about Puerto Rico, as required by Article 73 of the United Nations Charter.<sup>74</sup> Submission of these reports constituted recognition by the United States that Puerto Rico was non-self-governing. The United

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68. *Id.* at 307.

69. Wash. Post, Oct. 23, 1983, at A24, col. 3. For a view that Ocean Venture 1981 was intended as practice for intervention in Grenada, see London Times, Nov. 7, 1983, at 5, col. 1. See also Quigley, *The United States Invasion of Grenada: Stranger than Fiction*, 18 INTER-AMERICAN L. R. 271, at 318-319 (1986-87).

70. C. SEARLE, *GRENADA: THE STRUGGLE AGAINST DESTABILIZATION* 37-38 (1983).

71. N.Y. Times, Oct. 26, 1983, at A1, col. 2.

72. *Resolution*, para. 5, Aug. 24, 1983, U.N. Doc. A/AC.109/751 (1983), reported in U.N. MONTHLY CHRONICLE, Jan. 1984, at 83 (Vote: 10-2-10) (links strengthening of the U.S. military apparatus in P.R. with U.S. policy in Central America).

73. 1946-1947 U.N.Y.B. 572. The listing had been requested by G.A. Res. 9, Feb. 9, 1946, *Resolutions Adopted by the General Assembly During the First Part of Its First Session from 10 January to 14 February 1946* 13, U.N. Doc. A/64 (1946).

74. *Resolutions Adopted by the General Assembly During the Second Part of Its First Session from 23 October to 15 December 1946*, G.A. Res. 66, preambular para. 2, U.N. Doc. A/64/Add.1, at 124 (1947). Axtmayer, *Non-Self-Governing Territories and the Constitutive Process of the United Nations: A General Analysis and the Case Study of Puerto Rico*, 45(3-4) REVISTA JURÍDICA DE LA UNIV. DE P.R. 211, 236 (1976).

States approved a 1946 General Assembly resolution that listed all non-self-governing territories held by member states. The resolution included Puerto Rico.<sup>75</sup> Thus, at that period the United States' position was that Puerto Rico was non-self-governing.

Since Puerto Rico was non-self-governing when the bases were founded, their establishment violated the United States' obligations as an administering state. This illegal situation could be corrected, at least for the future, however, if Puerto Rico were to achieve self-governing status and then to agree to the bases. A state has the right to permit other states to establish military bases.<sup>76</sup> While international law provides guidance in determining whether a territory is non-self-governing, application of the law to specific situations is hazardous.

#### A. 1950-52 Legislation on Puerto Rico's Status

The position of the United States is that it made Puerto Rico self-governing in 1952. This section examines that position. In 1953 the United States informed the United Nations that it would stop sending annual reports regarding Puerto Rico. It asserted that Puerto Rico was no longer non-self-governing.<sup>77</sup> The General Assembly discussed the United States communication and adopted by a narrow vote Resolution 748, in which it agreed with the United States' assertion that Puerto Rico had become self-governing.<sup>78</sup> It,

recognize[d] that. . .the people of the Commonwealth of Puerto Rico have been invested with attributes of political sovereignty which clearly identify the status of self-government attained by the Puerto Rican people as that of an autonomous political entity. . . ." and "consider[ed] that, due to these circumstances, the Declaration regarding Non-Self-Governing Territories and the provisions established under it in Chapter XI of the Charter [Article 73—J.Q.] can no longer be applied to the Commonwealth of Puerto Rico."<sup>79</sup>

The basis for the United States' assertion that Puerto Rico had become self-governing was that in 1950 the U. S. Congress adopted P.L. 600, authorizing the drafting in Puerto Rico of a constitution, to be ap-

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75. G.A. Res. 66, *supra* note 73.

76. See, e.g., Defense Agreement, art. 2, Sept. 26, 1953, Spain-United States, 4 U.S.T. 1895, 207 U.N.T.S. 83 (providing for U.S. military bases in Spain).

77. *Report of the Committee on Information from Non-Self-Governing Territories*, 8 U.N. GAOR Supp. (No. 15), U.N. Doc. A/2465 (1953). On events surrounding this submission, see García Muñiz, *Puerto Rico and the United States: The United Nations Role 1953-1975*, 53 REVISTA JURÍDICA DE LA UNIV. DE P.R. 1, at 13-18 (1984); and Axtmayer, *supra* note 74, at 238-46.

78. G.A. Res. 748, Nov. 27, 1953, 8 U.N. GAOR Supp. (No. 17) at 25, U.N. Doc. A/2630 (1953). Vote: 26-16-18. Leibowitz, *The Commonwealth of Puerto Rico: Trying to Gain Dignity and Maintain Culture*, 11 GA. J. INT'L & COMP. L. 211, at 278 (1981).

79. G.A. Res. 748, *supra* note 78, para. 5. On U.N. discussion leading to adoption of Res. 748, see García Muñiz, *supra* note 77, at 26-48.

proved by referendum there.<sup>80</sup> The constitution so drafted would be subject to the approval of the U.S. Congress.<sup>81</sup> A constitution was drafted by a constituent assembly. That constitution used the term "commonwealth" to describe Puerto Rico.<sup>82</sup> The constitution was approved by a referendum in Puerto Rico and then by the U.S. Congress, which, however, demanded certain changes as condition of its approval.<sup>83</sup>

States voting against Resolution 748 argued that the 1950-1952 changes left Puerto "non-self-governing" and that the 1952 referendum offered a choice only between the new proposed arrangement and the *status quo*, leaving no option of independence.<sup>84</sup>

They also cited the unlimited power of the U.S. government to legislate for Puerto Rico.<sup>85</sup> Despite adoption of the Puerto Rico Constitution, United States law retained an earlier provision that federal U.S. legislation applies in Puerto Rico.<sup>86</sup> There was no requirement that Puerto Rico accept existing or future federal legislation.<sup>87</sup>

### B. United Nations Standards for Self-Determination

A strong indication of the customary law standard is provided by criteria formulated by the General Assembly to determine whether a territory has attained self-determination. The Assembly has drawn up a list of factors.<sup>88</sup>

80. Pub. L. No. 81-600, July 3, 1950, 64 Stat. 319, 48 U.S.C. 731b, 731c (1950).

81. 48 U.S.C. 731d.

82. PUERTO RICO CONST. art. 1, sec. 1, re-produced as appendix in Magruder, *The Commonwealth Status of Puerto Rico*, 15 U. PRTT. L. REV. 1, 20-33 (1953).

83. H.R.J. Res. 567, 66 Stat. 327 (1952). For a fuller account of the 1950-1952 legislation and adoption of the Puerto Rico constitution, see W. REISMAN, *PUERTO RICO AND THE INTERNATIONAL PROCESS: NEW ROLES IN ASSOCIATION* 31-35 (1975); J. TORRUELLA, *THE SUPREME COURT AND PUERTO RICO: THE DOCTRINE OF SEPARATE AND UNEQUAL* 152-159 (1985); Magruder, *supra* note 82, at 1-33; Muñiz, *supra* note 77, at 8-9.

84. Leibowitz, *supra* note 78, at 278. See also Muñiz, *supra* note 77, at 41-43.

85. Leibowitz, *supra* note 78, at 278; Rodriguez-Orellana, *In Contemplation of Micronesia: The Prospects for the Decolonization of Puerto Rico Under International Law*, 18 U. MIAMI INTER-AM. L. R. 457, 460-461 (1987). Congress' power is limited in certain respects by the U.S. Constitution, as construed by the U.S. Supreme Court, *Harris v. Rosario*, 446 U.S. 651, 100 S.Ct. 1929, 64 L.Ed.2d 587 (1980), but that limitation is irrelevant for present purposes. The significant point is that the three branches of the U.S. government collectively hold plenary legislative power over Puerto Rico. On limitations imposed by the U.S. Supreme Court on the basis of the U.S. Constitution, see Laughlin, *The Burger Court and the United States Territories*, 36 U. FLA. L.R. 755-816 (1984).

86. 48 U.S.C. 734, construed in *Feliciano v. U.S.*, 297 F.Supp. 1356, 1361 (D. P.R. 1969).

87. *Caribow Corp. v. Occupational Safety and Health Review Commission*, 493 F.2d 1064, 1066 (1st Cir. 1974). W. REISMAN, *supra* note 83, at 36. Ortiz-Alvarez, *The Compact between Puerto Rico and the United States: Its Nature and Effects*, 24 REVISTA DE DERECHO PUERTORRIQUEÑO, nos. 91-92, 179, 258-259 (1984-85).

88. The factors appear in two resolutions: (1) G.A. Res. 742, Nov. 27, 1953, 8 U.N. GAOR Supp. (No. 17) at 21, U.N.Doc. A/2630 (1953); (2) G.A. Res. 1541, Dec. 15, 1960, 15 U.N. GAOR Supp. (No. 16) at 29, U.N. Doc. A/4684 (1960).



### 1. *Indigenous Legislation*

One factor is "enactment of laws for the Territory by an indigenous body."<sup>89</sup> While Puerto Rico enacts laws on many important topics,<sup>90</sup> it has less legislative power than is typical of entities in "free association."<sup>91</sup> U.S. courts have power to construe Puerto Rico's statutes, regardless of the construction given by the Supreme Court of Puerto Rico, if they find construction by the latter "inescapably wrong."<sup>92</sup> The U.S. Congress retained the power to change the law applicable in Puerto Rico.<sup>93</sup> Puerto Rico remains in United States law a "territory,"<sup>94</sup> and Congress has unlimited power to legislate for territories.<sup>95</sup>

89. G.A. Res. 742, *supra* note 88, Annex, Part II: Factors Indicative of the Attainment of Other Separate Systems of Self-Government, para. C(1). For agreement that it is Part II of Res. 742 that is applicable to Puerto Rico, *see* García Muñiz, *supra* note 77, at 49.

90. W. REISMAN, *supra* note 83, at 33-34.

91. Accord Axtmayer, *supra* note 74, at 246. Several U.N. member states so asserted in opposing the draft of G.A. Res. 748; García Muñiz, *supra* note 77, at 42, 49-50; Note, *Puerto Rico: Colony or Commonwealth?*, 6 N.Y.U. J. INT'L L. & POL. 115, 130-131 (1973). Berrios Martinez, *Self-Determination and Independence: The Case of Puerto Rico*, 67 PROC. AM. SOC. INT'L L. 11, 13-15 (1973). *Contra* W. REISMAN, *supra* note 83, at 49, 113 (that despite defects, status is one of "free associated state"). For analysis of relations between "associated states" and metropolitan states, *see* T. FRANCK, CONTROL OF SEA RESOURCES BY SEMI-AUTONOMOUS STATES 7-26 (1978). Unlike most such states, Puerto Rico does not, for example, have the right to establish an exclusive economic zone around its shore, that power being retained by the United States. *Id.* at 28-29.

92. *Fornaris v. Ridge Tool Co.*, 400 U.S. 41, 43, 91 S.Ct. 156, 157, 27 L.Ed.2d 174, 177 (1970).

93. Ortiz-Alvarez, *supra* note 87, at 258-259. R. CARR, *supra* note 40, at 83. J. TORRUELLA, *supra* note 83, at 167-195, 200.

94. *Torres v. Puerto Rico*, 442 U.S. 465, 469-470, 99 S.Ct. 2425, 2429, 61 L.Ed.2d 1, 7 (1979). *Harris v. Rosario*, 446 U.S. at 651, in which the Court stated: "Congress, which is empowered under the Territory Clause of the Constitution, U.S. CONST., art. IV, sec. 3, cl. 2, to 'make all needful Rules and Regulations respecting the Territory. . . belonging to the United States,' may treat Puerto Rico differently from States so long as there is a rational basis for its actions." The U.S. Supreme Court's treatment of Puerto Rico as a "territory" deprives of any force the *dictum* that Puerto Rico since 1952 is not a "territory." The District Court of Puerto Rico had stated: "[T]he Fifth Amendment of the Constitution of the United States is no longer applicable on the basis that Puerto Rico is a possession, dependency or territory subject to the plenary power of Congress. But it continues to be applicable to Puerto Rico as part of the compact referred to." *Mora v. Torres*, 113 F.Supp. 309, 319 (D. P.R. 1953), *aff'd on other grounds sub nom.* *Mora v. Mejias*, 206 F.2d 377 (1st Cir. 1953).

95. "The Congress shall have Power to. . . make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States." U.S. CONSTITUTION, art. IV, sec. 3. construed in *Stainback v. Ho Hock Ke Lok Po*, 336 U.S. 368, 377-378 (1949) ("While . . . great respect is to be paid to the enactments of a territorial legislature by all courts . . . the position of the state [state of the United States—J.Q.] as sovereign over matters not ruled by the Constitution requires a deference to state legislative action beyond that required for the laws of a territory. A territory is subject to congressional regulation.") In light of that statement, which has never been repudiated by the Court, the view of the U.S. District Court in *Mora v. Mejias*, 115 F.Supp. 610, 612 (D. P.R. 1953) that "Puerto Rico is, under the terms of the compact, sovereign over matters not ruled by the Constitution of the United States," is incorrect.

As part of its plenary legislative power over Puerto Rico, the United States retains the exclusive right over military installations. This right was evident in *Romero-Barceló v. Brown*. Puerto Rico had no option for stopping damaging military exercises other than by suing in court, and then only by alleging environmental harm.<sup>96</sup> And even when it demonstrated violation of environmental legislation, the U.S. Supreme Court upheld the denial of an injunction.<sup>97</sup>

The United States' plenary rights over military use of Puerto Rico was demonstrated as well in *Feliciano v. United States*. In that case the District Court of Puerto Rico denied a requested injunction against the U.S. President's designation as a "defensive sea area" of a sea sector off Culebra, an offshore island of Puerto Rico.<sup>98</sup> The President had forbidden entrance into Culebra's territorial waters without authorization by the Navy.<sup>99</sup> Residents of Culebra sought the injunction to gain access without Navy authorization, asserting that Navy denials prevented them from earning a livelihood.<sup>100</sup>

The district court found the power of the United States to designate a "defensive sea area" unlimited by any power of the government of Puerto Rico. Even had Puerto Rico attempted legislatively to countermand the designation, it could not have done so.<sup>101</sup> The court found, moreover, that the U.S. Congress has no power to divest itself of the right to make military decisions affecting Puerto Rico, because of the Congress' power over U.S. territory:

[A]s long as Puerto Rico remains a part of the United States, it would probably be unconstitutional for Congress to allow Puerto Rico any say whatever over maritime regulations involving national defense.<sup>102</sup>

Puerto Rico has no voice in decisions regarding military operations in Puerto Rico, since it has no voting representation in the U.S. Congress that appropriates funds for the operations,<sup>103</sup> and no role in the electoral college that elects the president who carries them out.<sup>104</sup> Lack of Puerto Rico representation in Congress also relieves the Defense Department of pressure in Congress from Puerto Ricans whose lives are disrupted by military activities. The Navy has acknowledged that one reason it conducts weapons testing offshore from Puerto Rico is that Puerto Rico has

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96. 478 F.Supp at 707.

97. *Weinberger v. Romero-Barceló*, 456 U.S. at 305.

98. Executive Order No. 8684, Feb. 14, 1941, *Federal Register*, Feb. 18, 1941, at 1016.

99. *Id.*

100. *Feliciano v. U.S.*, 297 F.Supp. at 1356.

101. *Id.* at 1361.

102. *Id.* at 1362.

103. It has a "resident commissioner" who participates in Congress on a non-voting basis. 48 U.S.C. sec. 891, 5 U.S.C. sec. 2106. R. CARR, *supra* note 40, at 320-321.

104. U.S. CONST., art. II, sec. 1. Helfeld, *How Much of the United States Constitution and Statutes Are Applicable to the Commonwealth of Puerto Rico?*, in *Proceedings of the First Circuit Judicial Conference: Applicability of the United States Constitution and Federal Laws to the Commonwealth of Puerto Rico*, Nov. 4-6, 1985, 110 F. R. D. 449, at 475.

no representation in the United States Congress.<sup>105</sup>

## 2. *Indigenous Constitution*

"The associated territory should have the right to determine its internal constitution without outside interference," recites one of the General Assembly's criteria.<sup>106</sup> The U.S. Congress, as indicated above, demanded changes as condition of its approval.<sup>107</sup> Among them was addition of a provision to require that amendments conform to existing and future Congressional legislation on Puerto Rico.<sup>108</sup> The Puerto Rico assembly made the required changes and submitted them to a second referendum, which approved them.<sup>109</sup> Thus, amendments to the Puerto Rico Constitution must conform to whatever statutes Congress may enact on the Puerto Rico-U.S. relationship.<sup>110</sup>

Moreover, P.L. 600 gave Congress unlimited power to change Puerto Rico statutory or constitutional law by stating that "the statutory laws of the United States not locally inapplicable. . . shall have the same force and effect in Puerto Rico as in the United States."<sup>111</sup> The U.S. representative to the General Assembly's Fourth Committee told the Committee in 1953 that Puerto Rico's Constitution "stem[s] from their [the people of Puerto Rico—J.Q.] own authority."<sup>112</sup> In fact, it stemmed from the U.S. Congress. She further asserted that the Puerto Rico Constitution was a document "which only they [the people of Puerto Rico—J.Q.] can alter or amend."<sup>113</sup> But the Puerto Rico Constitution is overridden by contrary U.S. legislation.<sup>114</sup>

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105. R. CARR, *supra* note 40, at 313.

106. G.A. Res. 1541, *supra* note 88, Annex: Principle VII(b).

107. See *supra* note 83.

108. Pub. L. No. 477, 66 Stat. 327 (July 3, 1952).

109. W. REISMAN, *supra* note 83, at 33. R. CARR, *supra* note 40, at 79, 347. Reisman finds the factor of U.S. approval of the Puerto Rico Constitution insignificant as part of "a process in which there are two parties, for both of whom the contemplated relation must be voluntary. Surely the principal may state the *minima* it will demand in the organization of the associate." W. REISMAN, *supra* note 83, at 44-45.

110. García Muñoz, *supra* note 77, at 9. W. REISMAN, *supra* note 83, at 34. Amendments do not, however, require prior approval of the U.S. Congress. *Carrión v. Gonzalez*, 125 F.Supp. 819, 825-826 (U.S.D.C. D. P.R. 1954). Reisman ignores those limitations enumerated in the text apart from U.S. approval and concludes that the relationship was voluntary.

111. Act, sec. 9, 48 U.S.C. sec. 34. W. REISMAN, *supra* note 83, at 36.

112. Statement of Frances Bolton, U.S. representative, Fourth Committee, Nov. 3, 1953, 29 DEP'T ST. BULL. 804 (1953), summarized in 8 U.N. GAOR C.4 (350th mtg.) at 225, U.N. Doc. A/C.4/SER/350 (1953).

113. *Id.*

114. *U.S. v. Quinoñes*, 758 F.2d 40, 42-43 (1st Cir. 1985); *U.S. v. Pérez*, 465 F. Supp. 1284 (D. P.R. 1979). (In both cases, an accused, prosecuted in federal court, moved to suppress telephone conversation on grounds that the interception violated an anti-wiretap provision of the Puerto Rico Constitution. The interception was lawful under an Act of Congress. *Held*: the Act of Congress prevails. The conversation may be used in evidence even if, as the courts assumed, the interception violates the Puerto Rico Constitution.) In *Figueroa v. Puerto Rico*, 232 F.2d 615, 620 (1st Cir. 1956), the First Circuit stated that the people of

### 3. *Freedom to Modify Status*

Another factor established by the General Assembly is "the freedom of the population of a Territory which has associated itself with the metropolitan country to modify at any time this status through the expression of their will by democratic means."<sup>115</sup> Resolution 748 mentioned a "compact agreed upon with the United States of America."<sup>116</sup> A preambular clause indicates that the resolution was adopted

considering that the agreement reached by the United States of America and the Commonwealth of Puerto Rico . . . maintains the spiritual bonds between Puerto Rico and Latin America.<sup>117</sup>

As several United Nations members noted, however,<sup>118</sup> there was no "compact" in the sense of a bilateral agreement. P.L. 600, to be sure, recited that it was "adopted in the nature of a compact,"<sup>119</sup> and the Puerto Rico Constitution referred to the relationship as based on a "compact."<sup>120</sup> But neither term correctly characterized the post-1952 Puerto Rico-United States relationship.

The U.S. Congress adopted P.L. 600 and gave the voters in Puerto Rico a choice of approving or disapproving it on a take-it-or-leave-it basis. There was no agreement between Puerto Rico and the United States.<sup>121</sup> The absence of an agreement is further indicated by the fact that twice since 1952 bills have been introduced in the U.S. Congress to conclude such an agreement. Neither bill was adopted.<sup>122</sup>

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Puerto Rico were free to amend the Puerto Rico Constitution, if they were to decide to do so, to delete from it the right to trial by jury. While the Court was to that extent correct, the U.S. Congress has the right to require Puerto Rico to use trial by jury. Reisman construes Figueroa as holding that if an Act of Congress conflicts with the Puerto Rico Constitution, the Act would be "inapplicable." W. REISMAN, *supra* note 83, at 36. Figueroa does not so hold. Reisman construes to the same effect *Moreno Rios v. U.S.*, 256 F.2d 68 (1st Cir. 1958). *Moreno Rios* does not so hold either.

115. G.A. Res. 742, *supra* note 88, para. A(3). Similar language appears in G.A. Res. 1541, Annex: Principle VII(a), *supra* note 88.

116. G.A. Res. 748, *supra* note 78, para. 5.

117. *Id.*, preambular para. 5.

118. Leibowitz, *supra* note 78, at 278.

119. 48 U.S.C. sec. 731b.

120. COMMONWEALTH OF PUERTO RICO CONST., art. 1, sec. 1, in Magruder, *supra* note 82, at 21.

121. For a view that in Pub. L. No. 600 Congress ceded powers that it may not re-take, thereby making the law a "compact," see Ortiz-Alvarez, *The Compact between Puerto Rico and the United States: Its Nature and Effects*, REVISTA DE DERECHO PUERTORRIQUEÑO, nos. 91-92, at 185-287 (1984-85). For a position that Congress did not give up its legal power over Puerto Rico but created for itself a moral obligation not to intervene in Puerto Rican domestic affairs, see Helfeld, *Las Relaciones Constitucionales entre Puerto Rico y los Estados Unidos*, REVISTA DE DERECHO PUERTORRIQUEÑO, no. 93, at 297, 316 (1985); and to the same effect, see Helfeld, in *Proceedings of the First Circuit Judicial Conference*, *supra* note 104, at 465-466.

122. (1) H.R. 5945, Fernós-Murray bill, 1959. R. CARR, *supra* note 40, at 82-84. (2) *Puerto Rican Compact: Hearing On the compact of Permanent Union between Puerto Rico*

A U.S. representative, endeavoring to convince the U. N. Committee on Information from Non-Self Governing Territories that Puerto Rico was self-governing, had told the Committee that a "compact" had been concluded: "A compact, as you know, is far stronger than a treaty. A treaty usually can be denounced by either side, whereas a compact cannot be denounced by either party unless it has the permission of the other."<sup>123</sup> Another U.S. representative had told the Fourth Committee that the United States and Puerto Rico had "a compact of a bilateral nature whose terms may be changed only by common consent."<sup>124</sup>

The U.S. representative to the General Assembly told that body of a commitment by the U.S. President that "if, at any time, the Legislative Assembly of Puerto Rico adopts a resolution in favor of more complete or even absolute independence, he will immediately thereafter recommend to Congress that such independence be granted."<sup>125</sup> No commitment was made on behalf of the Congress; the intent behind the statement was to lead Assembly delegates to believe that introduction of such a bill by the President would result in favorable legislation. Thus, the statement, while not false, was misleading.<sup>126</sup>

#### 4. *Free Expression of Opinion as to Status*

Related to the freedom to modify status is another factor: "the opinion of the population of the Territory, freely expressed by informed and democratic process, as to the status or change in status which they desire."<sup>127</sup> International supervision of status referenda has been deemed necessary to guarantee fairness in ascertainment of opinion.<sup>128</sup>

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and the United States Before the Senate Comm. on Interior and Insular Affairs, 94th Cong., 1st sess. 47-87 (1975). Leibowitz, *supra* note 78, at 247-248.

123. Statement of Mason Sears, U.S. representative to U.N. Committee on Information from Non-Self-Governing Territories, Aug. 28, 1953, 29 DEP'T ST. BULL. 392 (1953), *quoted in* Mora v. Mejias, 115 F.Supp. 610, 612 (1953).

124. Statement of Bolton, *supra* note 112.

125. Statement of Henry Cabot Lodge, U.S. Representative to U.N. General Assembly, Nov. 27, 1953, 29 DEP'T ST. BULL. 841 (1953), *summarized in* 8 U.N. GAOR (459th mtg.) para. 66, U.N. Doc. A/PV.459 (1953).

126. Reisman construes the statement as importing an obligation on the President, binding under international law. W. REISMAN, *supra* note 83, at 45. Reisman misconstrues it in the way the U.S. delegation apparently intended it to be misconstrued, stating that "President Eisenhower's 1953 communication to the General Assembly made express, despite equivocation, that Puerto Ricans could go their own way if and when they wanted to." *Id.* at 118. The statement is also misconstrued as importing an agreement to grant independence by R. TUGWELL, *supra* note 56, at 148, and by Crawford, who cites it for the proposition that "Puerto Rico has been regarded by the United States Government since 1952 as entitled to opt for a different status—either complete independence or integration with the United States." J. CRAWFORD, *THE CREATION OF STATES IN INTERNATIONAL LAW* 372 (1979).

127. G.A. Res. 742, *supra* note 88, para. A(1).

128. *Puerto Rico: Colony or Commonwealth*, *supra* note 91, at 130-131. See, e.g., plebiscites organized by U.N. in Northern Cameroons and Southern Cameroons to determine future status, mentioned in Case Concerning the Northern Cameroons (Cameroon v. U.K.), Preliminary Objections, Dec. 2, 1963, 1963 I.C.J. 15, 23. Practice has also been for the Gen-

In Puerto Rico, the 1952 referendum was not internationally supervised and did not include options involving less connection to the United States than the one that carried a majority. The absence of international supervision has been characterized as "only a formal flaw, since there appears to be no substantial criticism of the quality of the referendum conducted."<sup>129</sup> However, without international supervision one cannot be certain that possible defects were uncovered.

In 1967, the United States conducted in Puerto Rico a plebiscite on status, also not internationally supervised. That plebiscite offered three options: independence, *status quo*, or statehood (as a state of the United States); 425,081 voted for the *status quo*, 273,315 for statehood, and 4204 for independence.<sup>130</sup>

It is questionable whether the 1967 plebiscite represents "the opinion of the population . . . freely expressed," since: (1) there was no international supervision;<sup>131</sup> (2) the United States had not promised to abide by the most popular choice, which must have made voting for "independence" seem a wasted vote;<sup>132</sup> (3) expression of opinion is not free so long as Puerto Rico is occupied by a large U.S. military force, viewed as an intimidating factor;<sup>133</sup> (4) no option of true "free association" was on the ballot, since the *status quo* fell short of "free association."<sup>134</sup>

Pro-independence forces boycotted the plebiscite,<sup>135</sup> arguing that the United States must first transfer power to local authority, so that the people could choose status without the pressure of U.S. presence.<sup>136</sup> The Federal Bureau of Investigation, considering most of the pro-independence groups "subversive," tried to undermine this boycott by disrupting these groups.<sup>137</sup> The boycott nonetheless apparently achieved some suc-

eral Assembly to approve the plebiscite after determining that it was fairly conducted. *Id.*

129. W. REISMAN, *supra* note 83, at 44.

130. N.Y. Times, July 24, 1967, at A1, col. 1.

131. See, e.g., plebiscite conducted under United Nations observation in Palau in 1986 to decide on future status. U.N. MONTHLY CHRONICLE, at 93, (April 1986).

132. Berrios Martinez, *supra* note 91, at 15. "[B]efore the Puerto Ricans can possibly take a significant constitutional initiative, they must be given explicit and detailed guarantees about the possible political responses from Washington in the event particular options are chosen." Cabranes, in *Proceedings of the First Circuit Judicial Conference*, *supra* note 104, at 484.

133. R. CARR, *supra* note 40, at 314. Martinez, *supra* note 91, at 15.

134. Muñiz, *supra* note 77, at 62. R. CARR, *supra* note 40, at 88.

135. N.Y. Times, July 24, 1967, at A1, col. 1.

136. Muñiz, *supra* note 77, at 63. Withey, *Puerto Rico and the United Nations 1977*, 1 PUERTO RICAN JOURNAL OF HUMAN RIGHTS 12, 14 (1977). R. CARR, *supra* note 40, at 89.

137. Berrios Martinez, *supra* note 91, at 15. Gautier Mayoral, *La Elevación del Caso de Puerto Rico ante la Asamblea General de las Naciones Unidas en la Decada Actual*, 45 REVISTA DEL COLEGIO DE ABOGADOS DE P.R. 69, 77 (1984). See, e.g., F.B.I. memorandum describing a plan, based on information that an official of one pro-independence group had called an official of another pro-independence group "a coward," to compose and send a flyer to members of the Movement for the Independence of Puerto Rico, the Puerto Rican Socialist League, and the Nationalist Party of Puerto Rico stating, "You have two weeks to prove or retract your statement that [name deleted in version released] is a coward." The

cess, as 34% of eligible voters did not cast ballots.<sup>138</sup> That represented a 30% higher abstention rate than in general elections in Puerto Rico.<sup>139</sup> The F.B.I. efforts cast further doubt on whether the plebiscite represented a free expression of opinion.

On the basis of the 1967 plebiscite, the United States moved in the U.N. Special Committee on Decolonization, which by then had taken up the question of whether Puerto Rico remained non-self-governing, to remove Puerto Rico from its agenda. But the Special Committee postponed indefinitely a vote on that motion, apparently disagreeing with the U.S. position that the plebiscite had provided an adequate opportunity for Puerto Rico to determine its status.<sup>140</sup>

### C. United Nations Re-Consideration of Puerto Rico's Status

In the 1970s, the United Nations' Special Committee on Decolonization has characterized Puerto Rico in terms that suggest non-self-governing status.<sup>141</sup> In 1972 it "recogniz[ed] the inalienable right of the people of Puerto Rico to self-determination and independence."<sup>142</sup> The General Assembly approved the work of the Committee, an action that endorsed the Committee's finding on Puerto Rico.<sup>143</sup> In 1973 the Special Committee

request[ed] the Government of the United States of America to refrain from taking any measures which might obstruct the full and free exercise by the people of their inalienable right to self-determination and independence.<sup>144</sup>

The General Assembly again approved the report.<sup>145</sup>

In 1978 the Special Committee "[a]ffirm[ed] that self-determination by the people of Puerto Rico in a democratic process should be exercised

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memorandum recited: "it is believed this flyer will further the conflict between the groups there by diverting their energies from the issue of the upcoming plebiscite." Memorandum, June 16, 1967, to F.B.I. Director, from Special Agent in Charge [of the F.B.I.], San Juan [Puerto Rico], re "Groups Seeking Independence for Puerto Rico, Counterintelligence Program (Subversive Control Section)," in *Scholarly Resources*, (Wilmington, Delaware), *Cointelpro: The Counterintelligence Program of the F.B.I.* (microfilm), File No. 105-93124, Nationalist Groups, Reel 1 (1978).

138. Total number of eligible voters was 1,067,000. *N.Y. Times*, July 24, 1967, at A1, col. 1.

139. *Id.* at A18, col. 1.

140. Gautier Mayoral, *supra* note 137, at 77.

141. Leibowitz, *supra* note 78, at 278-279. Axtmayer, *supra* note 74, at 252-253.

142. Aug. 28, 1972, U.N. Doc. A/AC.109/419 (1972) (Vote: 12-0-10).

143. G.A. Res. 2908, para. 3 (Nov. 2, 1972), 27 U.N. GAOR Supp. (No. 30) at 2, U.N. Doc. A/8730 (1973) (Vote: 99-5-23). Withey, *supra* note 136, at 14-15; Muñiz, *supra* note 77, at 146-147. "Approval of the Special Committee's report signifies approval of its determinations and recommendations." *Puerto Rico: Colony or Commonwealth*, *supra* note 91, at 120.

144. Resolution, Aug. 30, 1973, U.N. Doc. A/AC.109/438 (1973) (Vote: 12-2-9). *See also* García Muñiz, *supra* note 77, at 128-129; Withey, *supra* note 136, at 15.

145. G.A. Res. 3163, art. 2, Dec. 14, 1973, 28 U.N. GAOR Supp. (No. 30) at 5, U.N. Doc. A/9030 (1974) (Vote: 104-5-19).

through mechanisms freely selected by the Puerto Rican people in complete and full sovereignty."<sup>146</sup> In 1982 it

reaffirm[ed] the inalienable right of the people of Puerto Rico to self-determination and independence and urged once again the Government of the United States to adopt all necessary measures for the full and effective transfer of all sovereign powers to the people of Puerto Rico.<sup>147</sup>

In 1985 it expressed the hope that Puerto Rico might exercise its right to self-determination and independence "without hindrance" and "with the express recognition of the people's sovereignty and full political equality."<sup>148</sup>

The Special Committee in 1981 asked the General Assembly to "examine the question of Puerto Rico,"<sup>149</sup> but the Assembly declined, following objection by the United States<sup>150</sup> that included threats of economic assistance cuts to member states.<sup>151</sup>

#### *D. Conclusion as to Status of Puerto Rico*

The 1950-52 legislation effected no fundamental change in the Puerto Rico-United States relationship. It increased Puerto Rico's control over internal affairs "within the established colonial system."<sup>152</sup>

146. Resolution, para. 3 (Sept. 12, 1978), U.N. Doc. A/AC.109/574 (1978). Vote: 10-0-12. In 1979 the Special Committee, referring back to the resolutions cited in the text "[n]ot[ed] with preoccupation that so far the Government of the United States has not taken any concrete steps to comply with the mandate of the above-mentioned resolutions with respect to Puerto Rico, including, *inter alia*, the complete transfer of all powers to the people of the said Territory, and urge[d] that concrete measures be taken in that direction without further delay." Resolution, para. 2, Aug. 15, 1979, U.N. Doc. A/AC.109/589 (1979) (Vote: 11-0-12).

147. Resolution, para. 1 (Aug. 4, 1982), U.N. Doc. A/AC.109/707 (1982) (Vote: 12-2-9). Identical language appears in Resolution, paras. 1-2, (Aug. 24, 1983), U.N. Doc. A/AC.109/751 (1983), *reported in* U.N. MONTHLY CHRONICLE, at 83 (Jan. 1984) (Vote: 10-2-10).

148. Resolution, para. 2 (Aug. 14, 1985), U.N. Doc. A/AC.109/844 (1985), *reported in* U.N. MONTHLY CHRONICLE, at 14 (July-Aug 1985) (Vote: 11-1-10).

149. Resolution, para. 3 (Aug. 20, 1981), U.N. Doc. A/AC.109/677 (1981), *reported in* 1981 U.N.Y.B. 1113-1114 (Vote: 11-2-11).

150. R. CARR, *supra* note 40, at 363. *Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples* (Nov. 20, 1981), U.N. Doc. A/36/L/20 (approval of Special Committee resolution that included request for General Assembly consideration of Puerto Rico question on understanding that Assembly would not examine Puerto Rico question). A vote against inclusion of Puerto Rico question on Assembly agenda was taken Sept. 24, 1982 (Vote: 70-30-43). 1982 U.N.Y.B. 1276; Wash. Post, Sept. 25, 1982, at A1, col. 2.

151. R. CARR, *supra* note 40, at 363. Wash. Post, Sept. 25, 1982, at A10, col. 1 (*quoting* U.S. Deputy Representative Kenneth Adelman that U.S. mission had indicated to states considering abstention that abstention "would be unfavorably met in bilateral relations and on Capitol Hill.")

152. Cabranes, *Puerto Rico: Colonialism as Constitutional Doctrine* (Book Review) 100 HARV. L. REV. 450, 460 (1986) (reviewing J. TORRUELLA, *THE SUPREME COURT AND PUERTO RICO: THE DOCTRINE OF SEPARATE AND UNEQUAL* (1985)). To the same effect, see Rodriguez-



The legislative history of P.L. 600 indicates an intent to retain in the U.S. Congress the power unilaterally to modify Puerto Rico's status.<sup>153</sup> The State Department told Congress that P.L. 600 would have "great value as a symbol" in response to "'colonialism' and 'imperialism' in anti-American propaganda."<sup>154</sup> The Secretary of the Interior, seeking to assure Congress that under P.L. 600 it would retain control over Puerto Rico, stated that it "would not change Puerto Rico's political, social, and economic relationship to the United States."<sup>155</sup>

"The island's basic political status has not changed since the turn of the century."<sup>156</sup> "No word other than 'colonialism,' " states one commentator regarding the United States and Puerto Rico, "describes the relationship between a powerful metropolitan state and an impoverished overseas dependency disenfranchised from the formal lawmaking processes that shape its people's daily lives."<sup>157</sup>

For Puerto Rico, "[i]nternal autonomy is restricted, especially in legislative and judicial matters."<sup>158</sup> Puerto Rico is "still subject to the laws and regulations adopted by the political branches of the national government before which they appear only as supplicants; and that national government retains virtually unlimited discretion to determine whether or how the island will fit into national policy."<sup>159</sup>

The fact that Puerto Rico remains non-self-governing means that the military use of Puerto Rico remains a violation of the United States' "sacred trust" obligation.

#### V. STATE RESPONSIBILITY OF AN ADMINISTERING STATE FOR UNLAWFUL MILITARY BASES IN A NON-SELF-GOVERNING TERRITORY

A variety of harms may befall a non-self-governing territory from military use of it by an administering state.

##### A. *Risk of Becoming a Military Target*

Military use of a non-self-governing territory makes that territory a

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Orellana, *supra* note 85, at 462-463.

153. TORRUELLA, *supra* note 83, at 155-159.

154. Letter to Chairman, Committee on Interior and Insular Affairs, U.S. Senate, from Jack K. McFall, Asst. Secretary of State (for the Secretary of State), Apr. 24, 1950, 81st Cong., 2d sess., reprinted in 1950 U.S. CODE CONG. SERVICE 2688, 2689.

155. Letter to Chairman, Committee on Interior and Insular Affairs, U.S. Senate, from Oscar L. Chapman, Secretary of the Interior, May 19, 1950, *id.* at 2685. For views to the same effect of other executive branch and Congressional sources, see Cabranes, *Puerto Rico and the Constitution*, in *Proceedings of the First Circuit Judicial Conference*, *supra* note 104, at 483.

156. Cabranes, *supra* note 152, at 461.

157. Cabranes, in *Proceedings of the First Circuit Judicial Conference*, *supra* note 104, at 480.

158. CRAWFORD, *supra* note 126, at 372.

159. Cabranes, *supra* note 152, at 461.

potential target in a military confrontation of the administering state with other states. Puerto Rico is particularly at risk because of the importance of the installations to defense of the United States.

The existence and moveability of nuclear weapons poses a special risk to non-self-governing territories. United States vessels with nuclear armaments dock in Puerto Rico. This makes Puerto Rico a potential nuclear target.<sup>160</sup> A 1967 treaty established a nuclear-free zone in Latin America and the Caribbean to keep the region free of nuclear war.<sup>161</sup> The treaty prohibits "receipt" or "possession" of nuclear weapons.<sup>162</sup>

### *B. Potential for Offensive Use*

Military bases subject a non-self-governing territory to the possibility that aggressive attacks may be launched against other states. Aggression was launched from Puerto Rican bases in 1983 against Grenada.<sup>163</sup> The General Assembly has asked administering states "not to involve those Territories in any offensive acts or interference against other States."<sup>164</sup> The Special Committee on Decolonization

deplor[ed] the decision of the United States to enlarge and reinforce its military installations in Puerto Rico and establish new facilities, as well as the increasing militarization of the United States National Guard in Puerto Rico and its participation in United-States sponsored manoeuvres in Central America.<sup>165</sup>

### *C. Displacement of Economic Activity and Population*

The General Assembly has "deprec[at]ed the continued alienation of land in colonial Territories for military installations."<sup>166</sup> Land use for bases has displaced residents and agriculture in Puerto Rico. The bases occupy 13% of Puerto Rico's arable land.<sup>167</sup> Many farmers have lost their livelihood; 60% the population has received food stamps in recent years.<sup>168</sup>

Objecting in 1948 to the establishment of bases on Vieques Island, U.S. Rep. Vito Marcantonio said:

160. R. CARR, *supra* note 40, at 314.

161. Treaty for the Prohibition of Nuclear Weapons in Latin America, (Treaty of Tlatelolco), Feb. 14, 1967, *entered into force* Dec. 31, 1979, 634 U.N.T.S. 281, *reprinted in* 6 ILM 521 (1967).

162. *Id.*, art. 1, sec. 1. The United States is a party to Additional Protocol I, which requires application of art. 1 of the Treaty in territories for which it is internationally responsible. Additional Protocol I, art. 1, T.I.A.S. No. 10147, 634 U.N.T.S. 361.

163. See *supra* note 71; Quigley, *supra* note 69, at 271-352.

164. G.A. Res. 41/405, *supra* note 31, para. 2.

165. Resolution, Aug. 24, 1983, *supra* note 147, para 5.

166. G.A. Res. 41/405, *supra* note 31, para. 11.

167. *Independencia*, Newsletter of the Puerto Rico Subcommittee, National Lawyers Guild, 1986, at 7.

168. R. CARR, *supra* note 40, at 215.

The United States is depopulating the Puerto Rican island of Vieques and turning it into a military training base. . . . Vieques is a fertile spot. . . . Despite the frantic opposition of the Puerto Ricans, the Navy has already ordered the complete evacuation of the inhabitants of Vieques by the early part of this year. This order will affect some 5,000 people and will cripple an agricultural economy which supported 4 sugar mills—producing 20,000 tons of sugar annually—and an extensive grazing industry. To the people of Puerto Rico who do not have nearly enough arable land to support their dense population the removal of Vieques as a source of agricultural products is a national calamity.<sup>169</sup>

Weapons firings on Vieques Island have removed most of its land area from productive agriculture. The U.S. Court of Appeals found that “[s]ince the mid 1940’s. . . the sugar cane industry [on Vieques Island] has declined to a point where it is of no current importance to the island.”<sup>170</sup> As a result, the Court stated, “the islanders now derive their livelihood from the same sources relied upon by their ancestors more than one hundred fifty years ago—fishing, subsistence farming and ranching.”<sup>171</sup>

#### *D. Disruption of Economic Activity*

In Puerto Rico, economic activity is hampered by military operations. The United States Navy operates its Atlantic Fleet Weapons Training Facility from Roosevelt Roads and from Vieques Island.<sup>172</sup> If its training, which employs an electromagnetic field, were conducted in the United States, the Navy acknowledges, it would interfere with television signals for many residents.<sup>173</sup>

The Navy typically conducts weapons firing 200 days per year.<sup>174</sup> The U.S. Supreme Court found that “[d]uring air-to-ground training. . . pilots sometimes miss land-based targets, and ordnance falls into the sea. That is, accidental bombings of the navigable waters and, occasionally, intentional bombings of water targets occur.”<sup>175</sup>

That training has engendered local protest because of disruption to economic activities, particularly fishing.<sup>176</sup> Protests were directed at disruption caused by weapons exercises, as mentioned, on Culebra Island.<sup>177</sup>

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169. 94 CONG. REC. 9283 (1948). On previous economic activity on Vieques, *see also* *Vieques Fishermen*, *supra* note 62, at 20.

170. *Romero-Barceló v. Brown*, 643 F.2d at 838.

171. *Id.*

172. *Id.* at 838-839.

173. R. CARR, *supra* note 40 at 311 (citing his interview with Chief of Staff, Roosevelt Roads Naval Base). On the electronic warfare range, *see also* *Romero-Barceló v. Brown*, 643 F.2d at 839.

174. *Romero-Barceló v. Brown*, 643 F.2d at 839.

175. *Weinberger v. Romero-Barceló*, 456 U.S. at 307.

176. R. CARR, *supra* note 40, at 311-313. *Vieques Fishermen*, *supra* note 62, at 16-23.

177. Rousseau, *Chronique des Faits Internationaux*, 75 REVUE GÉNÉRALE DE DROIT INTERNATIONAL PUBLIC 465, 521-523 (1971). *See also supra* note 100.

In 1975 the Navy stopped the firings on Culebra Island.<sup>178</sup>

According to Carlos Zenon, President of the Vieques Fishermen's Association, which has been prominent in protests, these exercises "destroy fish and fishing equipment. Our lives are in constant danger, due to unexploded bombs in the water."<sup>179</sup> Many Vieques fishermen had to quit fishing: "we have to go to the Food Stamp lines."<sup>180</sup> The United Nations Special Committee on Decolonization

demand[ed] that the armed forces of the United States terminate permanently their operations in the island municipality of Vieques, thus allowing the people of that island to live in peace in their own land and to enjoy fully the results of the exploitation for their benefit of the natural resources in the land and sea of the island municipality.<sup>181</sup>

#### *E. Damage to the Environment*

Base use may damage the environment. Judge Torruella found (and the U.S. Supreme Court did not question) that the Navy had violated environmental protection laws in its weapons firing on Vieques Island.<sup>182</sup> The Court of Appeals ordered issuance of an injunction to the Navy to cease these violations until it obtained statutorily-required permits.<sup>183</sup> The Court of Appeals found that the Navy had, before firing weapons around Vieques Island, failed to secure a biological opinion on the impact on various endangered species, including pelicans, turtles, and manatees.<sup>184</sup>

#### *F. Possible Benefits to the Non-Self-Governing Territory*

Even if an administering state uses a non-self-governing territory for military purposes of its own, benefit may accrue to the non-self-governing territory. The United States' military use of Puerto Rico provides employment for Puerto Ricans. Judge Torruella said, in explaining the importance of keeping sea lanes open, that "the ability to maintain free sea lanes to and from the Mainland [of the United States] would seem of some interest to the residents of this Commonwealth."<sup>185</sup> The governor of Puerto Rico said in 1982 that the Roosevelt Roads base "boosts island

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178. Rousseau, *Chronique des Faits Internationaux*, in 78 REVUE GÉNÉRALE DE DROIT INTERNATIONAL PUBLIC 1096, 1183 (1974). *Vieques Fishermen*, *supra* note 62, at 22. See also *Romero-Barceló v. Brown*, 643 F.2d at 839.

179. *Vieques Fishermen*, *supra* note 62, at 17. See also *id.* at 18. Zenon was a plaintiff in suit accompanying that of *Romero-Barceló v. Brown*, 478 F.Supp. at 650.

180. *Vieques Fishermen*, *supra* note 62, at 18.

181. Resolution, para. 6, Aug. 15, 1979, U.N. Doc. A/AC.109/589 (1979).

182. *Weinberger v. Romero-Barceló*, 456 U.S. at 309-310.

183. *Romero-Barceló v. Brown*, 643 F.2d at 837.

184. *Id.* at 857. The U.S. Supreme Court reversed, finding that the district court had discretion to refuse an injunction, even in the face of statutory violations. *Weinberger v. Romero-Barceló*, 456 U.S. at 311.

185. *Romero-Barceló v. Brown*, 478 F.Supp. at 707, n. 119.

security.”<sup>186</sup> Where an administering state operates military bases for its own benefit, however, benefits to the non-self-governing territory are incidental. The administering state is using the non-self-governing territory for its own purposes.

*G. Bases as an Impediment to Self-Determination*

Military use of a non-self-governing territory may affect the administering state's promotion of self-determination. The General Assembly, as noted, characterizes military bases as an “obstacle” to self-determination.<sup>187</sup> The military significance of Puerto Rico influences United States policy as to its status.<sup>188</sup> In 1943 the Puerto Rico legislature asked for a referendum on independence:

The colonial system of government ought to be totally and definitely abolished in Puerto Rico, and the form of this definite political status ought to be democratically decided through the free vote of the people themselves.<sup>189</sup>

A bill was introduced in the U.S. Senate to grant independence; but it stipulated that the United States was to maintain the right to its bases.<sup>190</sup> One senator stated that Puerto Rico must, as a condition of independence, give guarantees “as to military and naval installations and means of egress and ingress.”<sup>191</sup> The Navy Department opposed independence without guarantees for “retention of naval and military and air bases and reservations by the United States and for such expansion of naval and military and air facilities as may be required in the future for hemisphere defense.”<sup>192</sup>

Objecting to independence, the War Department stated: “For military reasons, we believe that would be unwise.”<sup>193</sup> One senator opposed independence even with guarantees:

I can understand a certain amount of autonomy, but I cannot understand how you can reconcile complete independence of the Island with the effective and necessary use of Puerto Rico for a military control of the Caribbean.<sup>194</sup>

The United States' hostile relationship with Cuba has solidified its position that it must keep Puerto Rico as a military outpost.<sup>195</sup> Antici-

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186. R. CARR, *supra* note 40, at 315 (quoting Feb. 1, 1982, speech of Gov. Romero-Barceló).

187. *See supra* note 31.

188. R. CARR, *supra* note 40, at 311.

189. N.Y. Times, Feb. 11, 1943, at 6, col. 4. THE PUERTO RICANS, *supra* note 37, at 190.

190. N.Y. Times, Apr. 3, 1943, at 7, col. 1.

191. *Hearings on S. 952, supra* note 39, at 20 (statement of Senator Bone).

192. *Id.* at 41-42 (statement of Capt. Paul Foster, Navy Dept.).

193. *Id.* at 10 (statement of John McCloy, Asst. Secretary of War).

194. *Id.* at 15 (statement of Senator Taft).

195. R. CARR, *supra* note 40, at 310.

pated removal of United States bases from Panama in the year 2000 heightened the perception that Puerto Rico is important in United States military strategy: "the U.S. military's growing interest in Puerto Rico stems from the pending removal of U.S. military operations in the Canal Zone."<sup>196</sup> Finally, the increasing sophistication of weaponry has rendered Puerto Rico useful, as indicated, as a test firing site.<sup>197</sup>

Bases are a sector not controlled by nascent self-governing institutions. Whatever portion of a non-self-governing territory is devoted to military use is outside the reach of those institutions.

Bases may skew the economy to the extent that whatever self-governing authority emerges may find it difficult to administer the domestic economy.<sup>198</sup> Finally, the presence of a significant military apparatus may intimidate the people of a non-self-governing territory in expressing their opinions on territorial status.

#### H. *Obligation to Make Restitution and Compensation*

Military use of a non-self-governing territory violates the rights of the people of that territory, giving rise to state responsibility.<sup>199</sup> The standard for state responsibility is that an administering state must restore the *status quo* before the breach and, to the extent this is not possible, compensate for harm.<sup>200</sup> A "people," even one that has not achieved self-determination, can carry rights and bear obligations under international law.<sup>201</sup> In Puerto Rico, the United States is obliged to remove its bases, return the land to its owners, and compensate for damage to individuals.<sup>202</sup> Compensation should be sufficient to make farmers, fishingpeople,

196. Lidin, *Navy's Signal Tower for Carib Upgraded*, San Juan Star, May 6, 1983, at 1, col. 1. Reisman questioned the military importance of Puerto Rico to the United States, W. REISMAN, *supra* note 83, at 118, as did former Secretary of State Henry Kissinger, *quoted in* Friedman, *P.R. Not Vital to Security of U.S., Kissinger Says*, San Juan Star, March 16, 1981, at 3, col. 3.

197. See *supra* note 63.

198. See, e.g., the situation in South Vietnam after 1975, where previous dependency of the economy on the U.S. military made economic management difficult. J. QUIGLEY, *Vietnam's First Modern Penal Code* 9 N.Y. LAW SCHOOL J. INT'L. & COMP. L. (1988).

199. On state responsibility, see generally C. EAGLETON, *THE RESPONSIBILITY OF STATES IN INTERNATIONAL LAW* (1928); I. BROWNLIE, *SYSTEM OF THE LAW OF NATIONS—STATE RESPONSIBILITY PART I* (1983); Draft Articles on State Responsibility, in *Report of the International Law Commission to the General Assembly*, 35 U.N. GAOR, Supp. (No. 10), at 59, U.N. Doc. A/35/10 (1980), reprinted in 2 Y.B. INT'L L. COMM. 30, U.N. Doc. A/CN.4/SER.A/1980/Add.1, part 2 (1980); Quigley, *Complicity in International Law: A New Direction in the Law of State Responsibility*, 57 BRIT. Y.B. INT'L L. 77-131 (1986).

200. C. EAGLETON, *supra* note 199, at 182. Case Concerning the Factory at Chorzów (Claim for Indemnity) (Merits) (Germany v. Poland), 1928 P.C.I.J. ser. A No. 13, at 47 (Judgement of Sept. 13), reprinted in 1 M. Hudson, *WORLD COURT REPORTS* 578, at 677-678 (1922-26).

201. Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970) (Request for Advisory Opinion), 1971 I.C.J. 31, para. 52.

202. See resolution of the Puerto Rican Bar Association making these three points.

and others whole for their losses. Fixing monetary compensation for damage to the environment will be difficult.

### *I. Procedure for Effectuating Restitution and Compensation*

Were the United States to grant Puerto Rico self-governing status, as it is also obliged to do under international law, then it could negotiate with a Puerto Rican government for continued military use. It could negotiate return of land and compensation to individuals. Third-party arbitration might provide a method of evaluating claims.

The mechanism would vary depending on the form of self-determination chosen by the people of Puerto Rico—whether integration into the United States, a status of free association, or independence. Without attainment by Puerto Rico of self-determination, no entity can represent it vis-à-vis the United States.

So long as a territory remains non-self-governing, its only protection comes from United Nations supervision over the administering state. With Puerto Rico, as indicated, the Special Committee on Decolonization has noted problems created by United States military bases. But the General Assembly has not addressed the issue of those bases. The United States has been able to prevent the Assembly from exercising supervision.<sup>203</sup>

## VI. CONCLUSION

The “sacred trust” norm protects the right of a people to achieve self-determination. Military bases for an administering state’s benefit in a non-self-governing territory may cause significant hardship and may prevent a people from achieving self-determination.

A non-self-governing people is unable to protect itself from an administering state. The international community must take seriously its obligation of supervision over administering states, to ensure that military bases do not cause present harm and that they do not jeopardize achievement of self-determination.

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Colegio de Abogados de Puerto Rico, Comisión para el Estudio del Sistema Constitucional de Puerto Rico, *Informe de 1980 para el Comité de Descolonización de las Naciones Unidas*, Aug. 15, 1980, in 47 *Revista del Colegio de Abogados de P.R.* 281 (1986).

203. See *supra* note 150.

