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HUMAN RIGHTS TALK . . . AND
SELF-DETERMINATION, TOO!

Manuel Rodríguez-Orellana*

I. IN THE BEGINNING THERE WAS BORGES

In one of our many conversations over the years, Professor Mary Ann Glendon, a comparatist by conviction, shared with me her interest in expanding her field of intellectual inquiry to international law, specifically, the human rights area. Inspired by Professor Glendon's example, as a law professor in the United States I had already availed myself of comparative legal analysis to introduce American students to the study of international law and institutions.

In fact, I even developed at Northeastern University—with the patient, decisive, and unobtrusive support of my former dean, Daniel J. Givelber—an experimental 12-credit course on International and Comparative Law from a human rights perspective.1 Mary Ann Glendon*

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* Secretary, North American Relations of the Puerto Rican Independence Party; Adjunct Professor of Law, School of Law of the Inter-American University of Puerto Rico; former Professor of Law, Northeastern University School of Law. A.B. The Johns Hopkins University 1970; M.A. Brown University 1972; J.D. Boston College Law School 1975; LL.M. Harvard Law School 1983.

don, from her office at Harvard Law School, provided the stimulus, wisdom, and enthusiastic advice which this endeavor required. Thus, I was not surprised when Kenlyn Flipse, the outgoing editor for this *Propter Honoris Respectum* edition of the Notre Dame Law Review wrote, in August 1997, that Professor Glendon was currently writing on international human rights.

Back in 1987, when I first sought her advice and support as an “outside” scholar for my Comparative and International Law project, I presented my plan through the metaphor of human rights as the *aleph* for a holistic approach to International and Family Law. I chose the *aleph*, not because of its standard meaning,\(^2\) but in reference to the short story by the erudite Argentinian writer, Jorge Luis Borges. The story told of a precise point on the nineteenth step of the basement stairs in a friend’s house in which all of the universe was simultaneously visible, “all of cosmic space, without reduction in size,” where “each thing . . . was infinite things” which could be clearly seen “from all points of the universe.”\(^3\) For Borges, that “gigantic instant” was one in which he saw “millions of atrocious or delightful acts.”\(^4\) It was a singularly amazing moment because everything “occupied the same point, without being superimposed or transparent.”\(^5\)

The slightly less grandiose approach I selected for my law school project worked to convince Professor Glendon to become an advisor, not because she might have believed me; in fact, she might have thought—as did Borges of his friend in the story—that I was “mad.” I suspected then that she accepted because Borges was the point of contact, slightly over a decade earlier, for the friendship which began when I first met her as my teacher at Boston College Law School during her course, “Law and Social Change: Family Law in Transition.” Notwithstanding the madness in my method, I surmised that she probably felt that her commitment to cross-disciplinary studies was some-

\(^1\) Webster’s New Universal Unabridged Dictionary, (2d ed. 1983).

\(^2\) “The first letter of the Hebrew alphabet, a neutral vowel: various diacritical marks determine its sound.”

\(^3\) JORGE L. BORGES, EL ALEPH 192 (Madrid 1997). The story appears in a collection of short stories of the same name, originally published in 1949. This Spanish edition corresponds to the one revised by Borges himself and published in Buenos Aires, Argentina, in 1974 (All translations from Spanish throughout this article are mine.).

\(^4\) Id. at 191–92.

\(^5\) Id. at 194.
how responsible for my insistence in my project, since her enthusiasm for a broader understanding of law and society was, like reading Borges, contagious and incurable.

Now, more than a decade after my Borges-inspired plea, I know. Mary Ann Glendon has confessed to being “hooked on comparative legal studies” for none of the “usual pragmatic justifications . . . . Whatever prompts one’s original step across the margins, what grips and holds people is one of the most powerful drives known to the human species: the unrestricted desire to know.”

As Mary Ann Glendon now promotes interest in human rights through her teaching and writing, one may expect richer vintages in the future from what she terms “the ‘aha’ experience—the major and minor flashes of understanding that seemingly pop into one’s mind out of nowhere.” Inevitably, my respect and admiration for her will deepen as she, in Borgian fashion, sails towards “the horizon of human knowledge [which] recedes as the mind approaches it.”

II. SHOOTING FROM THE MARGINS

Professor Glendon has written that cross-disciplinary scholarship carries “the risk of being regarded by one’s peers with indifference or a certain amount of suspicion” and, having “strayed across the margins of several fields, . . . [being] regarded as neither fish nor fowl.” She also knows “how scholars who began by writing across the margins can ultimately rewrite the page and relocate the margins”—all of which brings out the Borges that lurks within.

Borges had already reflected on the complications of a problem considered earlier by T.S. Eliot regarding the “historical sense” of an author compelled to write “with his own generation in his bones,” and the notion that all literature is imbued with a simultaneous order and existence. According to Arturo Echavarria, an eminent scholar from the University of Puerto Rico, for Eliot

[t]he existing order is complete before a new work arrives; for order to be preserved once the novel work is superimposed, all of the ex-

7 Id.
8 Id. at 971.
9 Id.
10 Id. at 972.
11 JORGE L. BORGES, El escritor argentino y la tradición (Discusión), in I OBRAS COMPLETAS 267 (1989).
isting order will be, even if slightly, altered; and in this fashion, a work of art's relationships, proportions, and values become readjusted with respect to the whole; and it is this readjustment of the system which serves as a foundation for the conformation between the new and the old.\(^{13}\)

For Borges, however, the network of relationships is compounded when trying to ascertain the existence of an autochthonous literary tradition. He ponders whether an autochthonous order already exists, or whether the writer must resort to a "foreign" order in which his work must be inserted,\(^{14}\) and he opts for the latter.

To Europeans, prior to the economic, legal, and political developments leading to current unification efforts, "European culture" was a foreign notion. It would have been deemed unessential for a European to possess a broad and detailed knowledge of the history, literature, and art of any country, other than his own, to be considered "cultured." This led Borges to say of Latin Americans, "We are the true Europeans."\(^{15}\)

Borges did not intend to demean the role of autochthonous populations in the development of the sociological distinctness of Latin American nations. He meant that, to be considered "cultured," Latin Americans would be required to possess a relatively detailed knowledge of the cultural codes of at least continental European countries, if not beyond.\(^{16}\) Thus Borges—writing from the margins of a European's culture—concludes that for Argentina (a metaphor for Latin America), "Our legacy is the universe."\(^{17}\)

### III. LAWYERING FROM THE MARGINS

Borges' *cri de coeur* from the cultural margins of Latin America reminds me of Mary Ann Glendon's endeavors in the legal profession. An impeccably trained lawyer and cultured legal scholar, she came out of the pages of classical legal education in the United States and Europe. Yet, for someone like Professor Glendon, "with her own generation in her bones," traditional law practice would be intellectually confining.\(^{18}\) Consequently, "hard core" subjects, like Property, Torts,

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\(^{14}\) *Id.* at 57.

\(^{15}\) *Id.* at 58 (describing conversation between Jorge L. Borges and Puerto Rican Borgian scholar, Arturo Echavarria).

\(^{16}\) *Id.* at 58–59.

\(^{17}\) "Nuestro patrimonio es el universo." BORGES, *supra* note 11, at 274.

\(^{18}\) Much of this shines through in her rational and passionate book on the law profession and the legal system in the United States, MARY ANN GLENDON, *A NATION*
Tax Law, Corporations, or Contracts—and she has taught them all—began to look more interesting when viewed from the margins of law practice through the keyhole of legal education. Moreover, her forays in comparative law have greatly contributed to changing the text of American legal scholarship and making it richer by relocating its margins.

Her work demonstrates what I like to call “off-center” scholarship which, having changed the text from the margins, becomes “innovative.” It provides impeccable evidence of an analytical but creative mind in search of ever more moments of “aha,” and this is undoubtedly the right time for an endless page-navigator like Professor Glen-don to seek again and to explore the new margins of human rights law.

IV. OLD RIGHTS AND NEW MARGINS

Human rights are as old as recorded history. Numerous philosophical and legal precedents can be found in the history of Western civilization—from the Babylonian Code of Hammurabi, through the Greeks, the Romans, and the Siete Partidas of Alfonso X of Spain, to the Irish Celtic Book of Aicill, the English Magna Carta, the European Enlightenment, the American, French, Mexican, and Russian Revolutions, and the international law treaties and covenants that have proliferated since the Second World War.


One ex-con facing an armed robbery charge, however, tried to revoke his choice [to have a volunteer from the bar association] when I showed up to represent him. He wanted a real lawyer, not some girl who was obviously just out of law school. He was very annoyed when the judge refused his request, and disappointed again when [a co-counsel] and I declined his invitation to represent him further after securing a not guilty verdict for him.

Id. at 62. “According to a Johns Hopkins University survey, lawyers are more than three times as likely to suffer from symptoms of depression as adults among the general population.” Id. at 87. “How did it come about that, within a decade [from her law school years] professional training, the scholarly quest for truth, and the law itself began to lose their appeal among law professors?” Id. at 198.

Among my personal favorites of her work are the eye-opening Rights Talk: The Impoverishment of Political Discourse (1991), and the first edition of her casebook with co-authors Michael Wallace Gordon and Christopher Osakwe, Comparative Legal Traditions (1985) because it dared explore the legal process and methods of a fledgling socialist legal tradition arising from the Bolschevik Revolution in Russia, in the midst of the Reagan years’ swan song of the “Evil Empire.”

Major law schools in the United States have offered courses and seminars on human rights law for approximately two decades. Casebooks and hornbooks on the subject have captured their corner of the market. International institutions like the Inter-American Commission of Human Rights and the European Commission of Human Rights handle ever more cases with varying degrees of compliance and success. Yet, in spite of this advancement, I would still characterize the field of human rights as ideal for Professor Glendon’s new endeavor from the margins.

The centrality-of-law culture inherited by Western civilization from the Romans is scaling back to a supporting role in today’s multipolar, multicivilizational world. According to Samuel P. Huntington, “culture and cultural identities... are shaping the patterns of cohesion, disintegration, and conflict in the post-Cold War world.” As Huntington points out:

A universal civilization requires universal power. Roman power created a near-universal civilization within the limited confines of the Classical world. Western power in the form of European colonialism in the nineteenth century and American hegemony in the twentieth century extended Western culture throughout much of the contemporary world. European colonialism is over; American hegemony is receding.

During the 1970s and 1980s, the world observed a “wave of transitions” from authoritarian to allegedly democratic political systems. According to Huntington:

These transitions and the collapse of the Soviet Union generated in the West, particularly in the United States, the belief that a global democratic revolution was under way and that in short order Western concepts of human rights and Western forms of political democracy would prevail throughout the world.

That such expectations have met with limited success should come as no surprise. The “rule of law” which Western civilization inherited from the Romans laid the basis for constitutionalism and the protection of human rights against the exercise of arbitrary power. Huntington refers to “civilizations” as ways of life which make “crucial

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22 Id. at 91.
23 But see Fareed Zakaria, The Rise of Illiberal Democracy, 76 FOREIGN AFF., Nov.-Dec. 1997, at 22 (discussing the tensions of democracy arising from the election of authoritarian regimes and Western concepts of constitutional liberalism).
24 HUNTINGTON, supra note 21, at 193.
distinctions among human groups concern[ing] their values, beliefs, institutions, and social structures, not their physical size, head shapes, and skin colors." He continues:

A civilization is thus the highest cultural grouping of people and the broadest level of cultural identity people have short of that which distinguishes humans from other species. . . .

. . . [C]ivilizations are mortal but also very long-lived; they evolve, adapt, and are the most enduring of human associations . . .

He identifies up to nine "civilizations" which share the stage in the post-Cold War world: Sinic (Chinese), Japanese, Hindu, Islamic, Western (a term which he admits is somewhat ethnocentric), Latin American, African, Orthodox, and Buddhist. Western civilization, which emerged in the eighth and ninth centuries, did not develop its unique sense and tradition of individual rights and liberties until the fourteenth or fifteenth centuries; nor did it achieve its "modernization" until the seventeenth and eighteenth centuries. "The West was the West long before it was modern." As Huntington states:

Modernization involves industrialization, urbanization, increasing levels of literacy, education, wealth, and social mobilization, and more complex and diversified occupational structures . . .[;] a revolutionary process comparable only to the shift from primitive to civilized societies. . . . As the first civilization to modernize, the West leads in the acquisition of the culture of modernity. . . .

It does not necessarily follow, however, that societies with modern cultures resemble each other more than societies with traditional cultures.

25 Id. at 42.
26 Id. at 43.
27 See id. at 26–27 (Map 1.3), 45–48.
28 Id. at 69. For a general discussion on "Modernization and Westernization," see id. at 56–78.
29 Id. at 68. Huntington's clarification of what "modernization" is not reminds me of an exchange I had in November 1997 with a visiting member of the New York State Assembly. He insisted that Puerto Rico was culturally "American" because he had visited the mountain town of Aguas Buenas hoping to find typical Puerto Rican culture, but he found a McDonald's fast food restaurant at the town's center. Huntington would have this to say:

The argument now that the spread of pop culture and consumer goods around the world represents the triumph of Western civilization trivializes Western culture. The essence of Western civilization is the Magna Carta not the Magna Mac. The fact that non-Westerners may bite into the latter has no implications for their accepting the former.
And he concludes: “Non-Western societies can modernize and have modernized without abandoning their own cultures and adopting wholesale Western values, institutions, and practices. . . . In fundamental ways, the world is becoming more modern and less Western.”

Thus, with receding European and American hegemony comes the erosion of Western culture, as modernized non-Western societies begin to reassert themselves in a post-Cold War world where “culture counts, and cultural identity is what is most meaningful to most people.”

From this perspective, then, the Western legal tradition, with its Romano-Germanic and Anglo-American law modalities, constitutes a small court, indeed, from which to attempt to judge or influence universal thought and behavior. This may account, in part, for the failure to “influence” human rights practice in China, which Huntington regards as “the capitulation of the United States on human rights issues with China and other Asian powers.”

Huntington's alleged “failure” of human rights in China occurs in a civilization separate and distinct from the Western legal tradition and value system. However, from Huntington’s Western viewpoint, a Chinese decision to go along with his views on how to act within a legal framework of human rights would be purportedly “normal” or “good,” even if such views were not generally shared by the Chinese people, and even if action in furtherance of a Western vision of human rights concepts created dissidence within China.

Regardless of one’s preferred outcome, the human rights problem that so bothers Huntington is in itself an example of how difficult escaping the text can be, even for one who brilliantly documents how Western values and traditions (of which human rights law is but a recent off-shoot) are still patently on the margins of the post-Cold War world. While Huntington himself points out the differences over human rights notions between the West and other civilizations manifest in the 1993 United Nations World Conference on Human Rights in Vienna, he misses the broader perspective which contemplation from the margins would have provided.

The Vienna declaration contained no explicit endorsement of rights to freedom of speech, the press, assembly, and religion, making

Id. at 58. Evidently, my visitor friend confused “Puerto Rican culture” with “backwardness”; I have eaten sushi in New York and gallo pinto in Florida without confusing the United States with either Japan or Nicaragua.

30 Id. at 78.
31 Id. at 20.
32 Id. at 194 (labeling it “unconditional surrender” on the part of the United States).
it, according to him, weaker in many respects than the Universal Declaration of Human Rights of 1948. And wistful remarks by an American human rights supporter in Vienna reveal the problem which Western attitudes will have to overcome:

The international human rights regime of 1945 . . . is no more. American hegemony has eroded. Europe, even with the [unification] events of 1992, is little more than a peninsula. The world is now as Arab, Asian, and African as it is Western. Today the Universal Declaration of Human Rights and the International Covenants are less relevant to much of the planet than during the immediate post-World War II era.  

This tends to suggest that the European and U.S. modalities of human rights law are so focused on the text that they ignore the margins. The Universal Declaration of Human Rights and the corresponding International Covenants—to which the U.S. has been so slow to respond—probably were never quite so relevant to the non-Western parts of the planet, anyway. They were relevant in proportion to Western hegemony over the non-Western world. If Western hegemony has eroded, so must the presumed relevance of Western conceptions of human rights. Even then, divergent results in human rights cases in the West itself attest to the difficulty in developing a universalist conception of human rights law among constituent nations.  

33 Huntington, supra note 21, at 196 (quoting an unnamed American human rights supporter).

34 As of 1993, the United States, a major sponsor of the Universal Declaration of Human Rights of 1948, had consented to the ratification of only three major human rights agreements: (1) in 1989, the Convention on the Prevention and Punishment of the Crime of Genocide of 1946; (2) in 1990 (without implementing legislation), the U.N. Convention Against Torture; and (3) in 1992, the Convention on Civil and Political Rights.

The International Covenant on Civil and Political Rights of 1966 came into effect on March 23, 1976; the International Covenant on Economic, Social and Cultural Rights of 1966 came into effect a little earlier, on January 3, 1976, and has been ratified by over 130 nations. The United States, however, has not ratified the latter and ratified the former only recently, as noted above, with a number of Reservations, Understandings, and Declarations which subordinate the terms of this Covenant to U.S. domestic law. See 138 Cong. Rec. 4781, 4783 (1992).

The four decades preceding the disappearance of the Soviet Union developed a vision of international human rights law which reproduced the ideological conflict between the socialist and non-socialist camps:

Much too frequently the schism... between civil and political rights (CPRs) on one hand and economic, social and cultural rights (ESCRs) on the other, is associated with the tensions between liberal individual rights which protect liberty in its negative conception, and the socialist version of rights geared towards the collective welfare.36

With the disappearance of the Soviet Union, the issues along which civilizational lines continue to be dividing lines on human rights can no longer be measured by the old ideological yardsticks. The Vienna conference, however, demonstrated that human rights issues would nonetheless be conceptualized in terms of cultural relativism versus universality and (still) economic and social rights versus civil and political rights.37 Without the Soviet Union, the old dichotomies can no longer be attributed to enemies of the West, lest the West wish to recognize too many enemies on the other side of the cultural divide which sets its margins.

Are there nevertheless any reasonable expectations or hopes for greater success in universal application of human rights law in the post-Cold War era? In other words, is there a way to narrow the gap between “universality” and “cultural relativism” in order to provide a holistic approach to the understanding and implementation of CPRs and ESCRs? Specifically, is there an aleph—a perspective from the increasingly lower-level basement of Western hegemony—from which the law could set its eyes on “that secret and conjectural object, whose name men usurp, but which no man has gazed upon: the inconceivable universe,”38 to establish a human rights tradition, at least on this planet?

V. Jus Cogens

In international law, the concept of jus cogens refers to peremptory norms accepted and recognized by the international community from which no derogation is permitted, and which can only be modified by a subsequent norm of international law recognized as admitting no derogation.39 Furthermore, jus cogens presupposes an

36 Gorrín-Peralta, supra note 20, at 110.
37 Id.
38 BORGES, supra note 3, at 194.
international consensus powerful enough to invalidate rules upon which some states might wish to act.

While it has been contended that "there is no general agreement as to which rules have this character" and that the "full content of the category of *jus cogens* remains to be worked out" in practice and jurisprudence,\(^4\) certain examples are usually advanced to illustrate this notion. Prohibitions against slavery, piracy, torture, and genocide immediately come to mind.\(^4\) Even though universal agreement regarding these prohibitions seems self-evident, a closer look at specific conduct illustrates how, in their application, they are more likely to be the subject of divergent interpretations in the world's multi-civilizational and multipolar reality described by Huntington.

Flogging someone—especially an American—in a public square in Singapore may be considered torture in the United States, while poisoning someone to death in front of a limited audience (the death penalty by lethal injection) may not be so regarded. The notion of slavery may be abhorrent, yet owning an island in the Pacific whose native inhabitants are "permanently employed" as servants—even in decent living conditions—has been depicted as glamorous on the *Lifestyles of the Rich and Famous*.

The International Law Commission, while refraining from giving examples of rules of *jus cogens*, has actually suggested that the observance of human rights itself may be part of this corpus of non-derogable international law norms.\(^4\) However, the divergent interpretations mentioned above suffice to show that to include all human rights as part of *jus cogens* may be overextending the concept. Neither corporal punishment in Singapore, nor the death penalty in the United States, nor the extravagant opulence of the rich and famous can muster sufficient juridical consensus to qualify as abhorrent acts admitting of no derogation.

**VI. Self-Determination**

The concept of self-determination may appear more abstract than some of the prohibitions against specific acts like torture or slavery. However, the former's universally understood meaning may

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\(^4\) See Id.

\(^4\) Seen in an American program broadcast several times through cable television in Puerto Rico on "E" network in 1997.

\(^4\) See Oppenheim's International Law, supra note 40, at 7–8.
bring it closer to universal acceptance in practice and application in the post-Cold War world than the latter. In fact, there is a relative consensus at present to include self-determination as a basic human right, part of *jus cogens*. Understanding why this is so may shed some light into a process which would expand the universal appeal for the incorporation and practice of human rights law as part of *jus cogens* in a multi-civilizational world:

Self-determination is the legitimating myth for modern nation-states. Despite its radical implications for restructuring international political authority, the doctrine of self-determination has functioned primarily to facilitate the breakup of colonial empires and to validate the norm of popular consent in the disposition of the territory. As the era of decolonization draws to a close, leaving in its wake an increasingly pluralistic and interdependent world, the right to self-determination is certain to be invoked in a variety of new situations.

Self-determination mandates that peoples everywhere should, on the basis of equality, have the power to determine how to govern themselves—that is, the right of nations to be constitutionally independent. "Inadequacy of political, economic, social or educational preparedness"—value terms normally employed by those who would object to a colony's self-determination and independence—"should never serve as a pretext for delaying independence." And, as stated above, "all peoples always have the right, in full freedom, to


46 The interdependence of peoples has been advanced as an argument to down-grade the importance of political independence in today's world. However, the notion of independence has to be placed in context as much as the notion of interdependence. See *ALAN JAMES, SOVEREIGN STATEHOOD: THE BASIS OF INTERNATIONAL SOCIETY* 25, 177–79 (Paul Wilkinson ed., 1986). See also *I.K. MINTA, THE LOME CONVENTION: A CASE STUDY OF NORTH-SOUTH RELATIONS*, 37 (1979) (unpublished thesis, Harvard University):

The "age of interdependence" is here, but there have surely been other ages of interdependence, such as the interdependence of colonies and mother countries, and hegemonic powers and client states. [One could add, masters and slaves!] The *fact* of interdependence does not justify the terms . . . .

determine, when and as they wish, their internal and external political status."\(^{48}\)

International law has also recognized that in certain cases a full measure of self-government may be attained through free association or through integration with another state.\(^{49}\) Free association prescribes a delegation of functions of sovereignty while retaining the right to end the association unilaterally. Integration requires "equality" with the rest of the population of the state with which integration takes place. Even then a paramount right of secession arises "when the associational right of a group to determine its political existence conflicts with an existing state's right of noninterference, . . . so long as that right of exercise of self-determination does not abridge the rights of other groups to self-determination."\(^{50}\)

The principle of self-determination traces its legal origin in the West to the concepts of nationality and democracy which evolved primarily in Europe. It first appeared as a political principle after the First World War. Despite Woodrow Wilson's efforts to include it in the Covenant of the League of Nations, self-determination was not yet considered a legal principle. However, it is said to have influenced various provisions, including the establishment of the Mandates system—a sophisticated coordination of the spoils of war—under Article 22 of the Covenant.\(^{51}\)


\(^{51}\) See Shaw, supra note 50, at 177. There were in all fifteen mandated territories under the Mandate system. Those in the Middle East became independent states, and others in Africa and the Pacific (except for South West Africa) were transferred to the United Nations trusteeship system after the Second World War. Under both the Mandates and the Trusteeship systems, sovereignty was vested in the people of the territory, but exercised by the administering power presumably to promote "the well-being and development" of the peoples and their eventual self-government or independence. Henkin, supra note 40, at 296–97.
The Aaland Islands case—probably the last event of any significance before the Second World War with regard to this principle—again reinforced the notion of self-determination as a political, although not yet as a legal principle. This case, which provided minority guarantees for the Swedish inhabitants of an island which eventually became part of Finland, placed self-determination on track towards becoming part of international law.

The Second World War unleashed waves of decolonization which made deeper consideration of this principle inevitable. Accordingly, the "self-determination of peoples" was among the purposes and principles on which the Charter of the United Nations (1945) was based, as well as the Charter's basis for post-War international economic and social co-operation. While not every statement of political principle in the Charter creates legal obligations, the inclusion of self-determination—especially in the context of the Charter's statement of purposes—placed it in a privileged position for subsequent interpretations regarding its legal meaning and consequences.

The U.N. Charter is a multilateral treaty, and the United Nations, created by that Charter, provided the scenario for subsequent state practice. Spurred by the decolonization waves which have taken place since 1945, self-determination evolved from political principle to legal norm out of two classical sources of international law: treaty and custom.

Resolution 1514 (XV), overwhelmingly approved by the U.N. General Assembly in 1960, became the authoritative legal statement on decolonization and self-determination. In the first two resolatory paragraphs, it stressed that:

All Trust territories have allegedly achieved independence or self-government within another state. The last to do so were the Strategic Trust Territories of Micronesia: the Republic of the Marshall Islands, the Federated States of Micronesia, and more recently the Republic of Palau.

While the United States can hardly be said to have strictly adhered to "the well-being and development" of the people of the islands of Bikini, Enewetak, Rongelap, and Utrik in the Marshall Islands, which were mercilessly used for nuclear testing, the Compact of Free Association did provide for some damage relief for the inhabitants. See Rodriguez-Orellana, supra note 49, at 479-80, n.122.


54 \textit{See} U.N. \textit{CHARTER} art. 1, para. 2.

55 \textit{See} U.N. \textit{CHARTER} art. 55.

56 G.A. Res. 1514, supra note 47 (a consensus resolution adopted 89-0, with only 9 abstentions, one of which was the United States).
1. The subjection of peoples to alien subjugation, domination and exploitation constitutes a denial of fundamental human rights, is contrary to the Charter of the United Nations and is an impediment to the promotion of world peace and co-operation.

2. All peoples have the right to self-determination; by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.  

In 1975, the International Court of Justice (ICJ) ruled that this and other resolutions of the U.N. General Assembly constituted an authoritative interpretation implementing Articles 1 and 55 of the U.N. Charter:

General Assembly resolution 1514 (XV) provided the basis for the process of decolonization. . . . It is complemented in certain of its aspects by General Assembly resolution 1541 (XV). . . . At the same time, certain of its provisions give effect to the essential feature of the right of self-determination as established in resolution 1514 (XV).  

Although judicial discussion of this matter has been infrequent, a recent decision of the International Court of Justice reaffirmed the right of self-determination. In *East Timor (Portugal v. Australia)*, the ICJ declared that “Portugal’s assertion that the right of peoples to self-determination, as it evolved from the Charter and from United Nations practice, as an *erga omnes* character, is irreproachable.” It further stated that self-determination is “one of the essential principles of contemporary international law.”

Consonant with Resolution 1514 (XV), in 1966 the General Assembly adopted the Covenant on Economic, Social and Cultural Rights and the Covenant on Civil and Political Rights. In both, an identical first article declares, in part: “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.”

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57 *Id.* at 68.


60 1995 I.C.J. 90 (June 30).

61 *Id.* at 102.

62 *Id.*

On August 1, 1975, after two years of discussions, delegates of thirty-five participating states, including all of Western Europe and the United States, signed the Final Act of Helsinki.\(^4\) The Final Act dealt primarily with questions of international security and state relations. Although this document would establish that the method for post-War territorial settlement of Europe was ostensibly of a political nature, and therefore not to be regarded as a binding treaty, its impact on developments in Europe "has far exceeded the impact of most legally binding treaties."\(^5\)

The Final Act adopted a declaration of principles for participating states, which included "Respect for Human Rights and Fundamental Freedoms" and "Equal Rights and Self-determination of Peoples."\(^6\) The latter principle states that "participating States will respect the equal rights of peoples and their right to self-determination, acting at all times in conformity with the purposes and principles of the Charter of the United Nations and with the relevant norms of international law."\(^7\) It adds:

By virtue of the principle of equal rights and self-determination of peoples, all peoples *always* have the right, in full freedom, to determine, when and as they wish, their internal and external political status, without external interference, and to pursue as they wish their political, economic, social and cultural development.\(^8\)

If the 1993 Vienna Conference was a disappointment to Western observers regarding human rights,\(^9\) the reason may be attributed to the Western, particularly the United States', attitude towards that "essential principle of contemporary international law."\(^10\) Self-determination is not only part of customary and treaty law, but also a fundamental human right. Because it served the interests of so many culturally diverse nations which have continued to embrace it since the heyday of decolonization, the development of self-determination law has become part of *jus cogens* and, as noted in the case of secession,\(^11\) it "is capable of developing further so as to apply to sovereign states in various ways."\(^12\)

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\(^{44}\) Final Act (Helsinki), *supra* note 48.

\(^{55}\) \textit{Shaw}, *supra* note 50, at 282.

\(^{66}\) Final Act (Helsinki), *supra* note 48, at 80–81.

\(^{77}\) \textit{Id}. at 81.

\(^{88}\) \textit{Id}. (emphasis added).

\(^{99}\) See \textit{Huntington}, *supra* notes 32–33 and accompanying text.

\(^{100}\) East Timor (Portugal v. Australia), 1995 I.C.J. 90 at 102 (June 30).

\(^{111}\) See *supra* note 50 and accompanying text.

\(^{122}\) \textit{Shaw}, *supra* note 50, at 182.
Now that Professor Glendon is again exploring new margins, I have very good reason to believe that she will show all of us that human rights talk about comparative law and self-determination, too. For one thing, international law is not unknown to her. Ten years ago, she wrote to a former colleague of mine:

Although I am a comparatist, rather than an international law specialist, I have increasingly come to believe that these two fields cannot continue to be artificially separated from one another. The future of international legal studies lies with persons who . . . are at ease both with the study of foreign law and with what has traditionally been called public international law.\(^73\)

Her unquiet heart and my irksome persistence regarding Puerto Rico’s right to self-determination exposed her to what back then appeared, to American legal scholars, like “evolving international law” which placed the political status of my country “uncomfortably close to that of a colony.”\(^74\) Moreover, Puerto Rico’s unresolved status will increasingly make an encounter with the legal principle of self-determination unavoidable for Americans.\(^75\)

The U.S. government’s official position on Puerto Rico was circulated in a “Non-Paper on Puerto Rico” to members of the United Nations Decolonization Committee in June 1997.\(^76\) Reiterating the U.S. position since 1953, the “Non-Paper” stated:

\(^73\) Letter from Mary Ann Glendon, Learned Hand Professor of Law, Harvard University, to Robert W. Haldring, Hadley Professor of Law and Chairman of the Faculty Tenure Committee, Northeastern University School of Law (December 5, 1988) (copy on file with author).

\(^74\) Id.

\(^75\) The literature on Puerto Rico’s relationship with the United States is voluminous, indeed. However, four recent publications on the subject are noteworthy. For a superb contemporary political analysis of Puerto Rico’s right to independence, see Rubén Berrios Martínez, *Puerto Rico’s Decolonization*, 76 FOREIGN AFF. Nov.–Dec. 1997, at 100. For a constitutional and historical synthesis of much of the previous and scholarly work by the former Chief Justice of the Supreme Court of Puerto Rico and a principal architect of Puerto Rico’s failed commonwealth status, see TRIÁS MONGE, supra note 49. A provocative analysis of Puerto Rico’s 1993 non-binding status referendum is provided by García Passalacqua, *The 1993 Plebiscite in Puerto Rico: A First Step to Decolonization*, 93 CURRENT HIST. 103 (1994). And for an informative historical and political account of twentieth century developments, see RONALD FERNANDEZ, *The Disenchanted Island: Puerto Rico and the United States in the Twentieth Century* (1992).

\(^76\) A copy of a three-page typewritten document with the heading, United States of America, NON-PAPER ON PUERTO RICO (no date affixed), was also made avail-
In 1953, the UN General Assembly recognized that the people of Puerto Rico had effectively exercised their right to self-determination and achieved a new constitutional status in a mutually agreed association with the United States which made them an autonomous political entity. Resolution 748 (VIII) determined that the Declaration Regarding Non-Self-Governing Territories\(^7\) could no longer be applied to Puerto Rico and that the United States should cease transmitting information on Puerto Rico under Article 73(e) of the Charter, removing Puerto Rico from the list of non-self-governing territories.\(^7\)

This position was always at odds with the congressional intent behind the 1950 legislation which authorized the territory of Puerto Rico to draft a constitution for its local government administration, subject to the approval of Congress.\(^7\) The accompanying reports on the bill stated:

The bill under consideration would not change Puerto Rico's fundamental political, social, and economic relationship to the United States . . . [and the] sections of the [previously existing] organic act which section 5 of the bill would repeal are the provisions of the act concerned primarily with the organization of the local executive, legislative, and judicial branches of the government of Puerto Rico and other matters of purely local concern.\(^8\)

The United States government, however, appears to recognize that a changed world configuration requires a change in policy. In what may be the first official admission of U.S. colonialism, a major congressional committee considering Puerto Rico status legislation reported that the existing Puerto Rico Federal Relations Act "was for the creation of a form of local constitutional self-government, which represented progress toward, but did not fulfill or satisfy, U.N. criteria for full self-government constituting completion of the decolonization process."\(^8\) The Report on the bill under consideration,\(^8\) filed in Congress the same month as the Non-Paper at the U.N., argued that "the

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\(^7\) This referenced declaration should not be confused with U.N. General Assembly Res. 1514 (XV) of 1960, approved seven years later as the authoritative United Nations interpretation of self-determination law, under the title Declaration on the Granting of Independence to Colonial Countries and Peoples, see supra note 47 and accompanying text.

\(^8\) NON-PAPER ON PUERTO RICO, supra note 76.
discrepancy between the subsequent interpretation of information provided to the U.N. by the U.S. in 1953 about Puerto Rico's new constitutional status and the reality of Puerto Rico's status under the U.S. federal political system has been the result of a misunderstanding."

It further clarified that:

As a consequence of how international standards regarding decolonization have evolved since 1953, and in view of how the political branches of the Federal Government and the courts have implemented and interpreted the "compact" for local self-government under PRFRA, the United States has recognized that Puerto Rico did not achieve full self-government in 1952.

The Report concludes that "Puerto Rico's decolonization process has not been completed as a matter of international or domestic law."

While the world was perceived as two opposing camps, the United States could get away with holding colonial possessions. United States hegemony ensured that no major embarrassment would take place at the United Nations. Surely colonialism was wrong, but it could be rationalized in terms of strategic security in the context of the Cold War. Surely, the leader of the "free world" could be forgiven a colonial indiscretion so long as the colonial subjects were well-fed and civil and political rights abuses were handled discreetly by local and U.S. authorities, while world opinion was assertively persuaded to look the other way.

82 H.R. 856, overwhelmingly approved by the House Committee on Resources (44-1), passed the floor of the U.S. House of Representatives on March 4, 1998, after more than ten hours of debate, by a vote of 209 to 208. As of the time of this writing, one "workshop" on Puerto Rico's status had been held by the Senate Committee on Energy and Natural Resources, and two more had been announced before any formal committee action in the spring of 1998.


84 Id. at 19. Implementation of the current commonwealth arrangement under PRFRA occurred in 1952.

85 Id. at 20.


87 A wide-spread government practice of keeping dossiers on persons suspected of being "subversives" by virtue of anticolonial or pro-independence advocacy in Puerto Rico for more than 30 years was denounced by the Puerto Rican Independence Party in 1986. The practice was theoretically discontinued after extensive litigation amply documenting it in Noriega Rodríguez v. Hernández Colón, 122 D.P.R. 650 (1988) and 130 D.P.R. ___ (1992).

For a superb historical account documenting political persecution and other civil and political rights abuses against the pro-independence forces from the late 1940s to the late 1950s, see IVONNE ACOSTA, LA MORDAZA (1987).
I have argued elsewhere in favor of Puerto Rico's independence from the United States. My point here is that, with the demise of the Soviet Union, U.S. failure to comply with Puerto Rico's right to decolonization one hundred years after its military occupation of the island, and the slow progress in coming to terms with self-determination as the most basic of human rights in international relations, is symptomatic of the obstacles that must be overcome. In order to break out of the frozen mind-frame of its weakening Cold War hegemony, the United States must begin to approach the new multiculti- tational reality which Huntington describes by crossing the margins of cultures in the post-Cold War world through deeper understanding and a willingness to let self-determination law develop elsewhere by complying with it at home. A first step is letting go of Puerto Rico.

VIII. BACK TO THE BASEMENT

Arrogance and ignorance usually travel as stowaways in the ship of history. In the history of the United States, the arrogance of colonial rule has escorted its ignorance of people's rights to self-determination in the hundred-year voyage to the harbor of the 21st century. Professor Glendon has recognized in Puerto Rico's case "a situation which unfortunately is almost invisible to most of us." The comparatist in her has seen how U.S. neglect of self-determination as a human right has fed parochial attitudes in U.S. scholarship. "Those of us who specialize in foreign law," she has written, "tend to ignore Puerto Rico because we do not think of it as another 'country'; on the other hand it escapes the notice of those who focus on domestic law because it is not a state." On a broader scale, she warns:


89 Glendon, Letter, supra note 73.

90 Id.
In the current brisk international traffic in ideas about rights, Americans avail themselves less than they should, and less than many other peoples do, of opportunities to reflect on their own controversies in light of the experiences of others. Courts and legal scholars in many other liberal democracies are quite knowledgeable and sophisticated in their use of American and other legal materials. The same cannot be said about their counterparts in the United States, who all too often maintain a posture of indifference, disdainful as it is ignorant, towards the approaches of other nations to our shared economic, social, and environmental dilemmas.\footnote{Gleandon, Rights Talk, supra note 19, at 158.}

Comparative law, as Professor Glendon's work suggests, should begin to facilitate a deeper understanding of how other nations are faring under evolving realities of self-determination. With trade expansion in a global economy, the study of human rights law from an international and comparative perspective should help the United States emulate Borges' approach in becoming "the other." While for Latin Americans, it was necessary to become the "true Europeans,"\footnote{See supra note 15 and accompanying text.} modernization has made it necessary for the multipolar world spawned by the exercise of self-determination to become the "true Americans," in the spirit of the 1776 Declaration of Independence.

If Mary Ann Glendon's new direction helps move the United States along its own course of self-determination to relocate the margins of its receding hegemony, American legal scholarship may be one basement step closer to catching a glimpse of its own \textit{aleph}. 