

**INTERNATIONAL LAW IN LATIN AMERICA OR LATIN AMERICAN
INTERNATIONAL LAW?
RISE, FALL, AND RETRIEVAL OF A TRADITION OF LEGAL
THINKING AND POLITICAL IMAGINATION**

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Introduction: International law in comparative perspective

Is there a distinctively Latin American way of understanding global public order? How have Latin American international lawyers reflected upon alternative global designs and their implications for the region? When posed in relation to contemporary Latin America, these questions become unexpectedly tricky, since the discipline of international law does not offer to international lawyers situated at the periphery adequate analytic tools for understanding the meaning and uses of international law in their own context.¹ Examining peripheral, regional, or national legal traditions, however, not only illuminates similarities and differences between alternative conceptualizations of the international world, but also helps to recognize structural constraints and unequal power relationships operating within the discipline of international law that might hamper efforts to imagine alternative visions of global order through the language of international law.²

This Article probes the ways in which Latin American international lawyers have used international law in light of their own particular context and within a constrained set of available legal, doctrinal, and historical materials. At the same time, as part of a counterbalancing and decentering critique of international law, the aim of this Article is to reinterpret these uses and practices as constituting a distinctively regional approach or tradition of international legal thinking.

However, using international law to examine current thinking in Latin America about global public order elicits additional difficulties, for it appears to be a methodological choice headed in the wrong direction. Latin American international lawyers generally have disengaged themselves from discussions about various forms of governance, deferring to other experts, fields of knowledge, or international politics the articulation of a definition of international order and its relationship to Latin America. This approach sharply contrasts with other periods of the discipline's trajectory in the region.³ As a heuristic entry point into the study of contemporary uses and practices of international law in Latin America, I examine a past, somehow forgotten disciplinary battle lasting from the 1880s to 1950s, during which legal professionals fought to affirm or

¹ I argue elsewhere that international law's own structure of ideas, historical narratives, professional sensibilities, and modes of argumentation have made international lawyers accept the idea of European origin and outward expansion of international law. Moreover, these elements have affected the practice of international law (that is, international adjudication and negotiations) and the shape of international institutions, as well as the symbolic realm, thereby reproducing the center-periphery relationship. See Arnulf Becker Lorca, *Mestizo International Law* 3 - 20 (Nov. 12, 2005) (unpublished S.J.D. dissertation, Harvard Law School) (on file with author).

² The use of comparative analysis requires recognizing that international law can have different meanings in various geopolitical locations. Therefore bracketing the discipline's construction of its own narrative of origin might constitute a productive heuristic to explore the Latin American tradition of international law. However, this Article eschews typical methodologies of comparative analysis, such as tracing patterns of influence, production and reception of legal consciousness, or transplantation of legal ideas into less prestigious jurisdictions, and the corresponding elaboration of maps of ensuing similarities and differences. Although such methodologies might have some descriptive value, they are insufficient to bring to surface the underlying professional inertias and power relations. Furthermore, comparative analysis distinguishes between knowledge and imitation and allocates the two hierarchically as well as along core and periphery.

³ For example, during the early days of independence, nineteenth-century Latin Americans wrote profusely about and discussed international law, as Latin American governments used international legal arguments to assert sovereign autonomy and to counter foreign intervention.

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negate the existence of a distinct Latin American international law. I also explore how this disciplinary dispute has been represented and treated in current Latin American legal scholarship. I argue that current depictions of this debate, which overemphasize its resolution and the cessation of professional divisions, erect a historical blind spot as to what happened to the discipline between the 1950s and 1970s. The strategic oblivion to this period in which the discipline experienced politicization and fragmentation is intrinsically connected to the nature of dominant contemporary practices.

This Article proposes the following periodization of international law's trajectory in Latin America: first, international law as an instrument in the process of nation building (1810s - 1880s); second, international law as part of the discursive creation of Latin America as well as a language for contesting its definition (1880s - 1950s); third, a period of professional radicalization and fragmentation (1950s - 1970s); and fourth, a period of professional depoliticization and irrelevance of international law as a discourse for thinking the region (1970s - 2000s).⁴ I show that international law played an important role from the 1880s to the 1950s in laying down one of the languages through which Latin Americans have discussed and contested their identity, politics, and place in the international world. On the one hand, the periods in which the international legal tradition has been harnessed to support, as well as to contest, divergent ideals about Latin America correspond to the moments of disciplinary relevance and disputation. On the other hand, the appeasement and translation of disciplinary contentions into doctrinal and institutional settlements signaled the shift in significance from international law toward other discourses, making the international legal tradition less appealing for imaging Latin America.

I. Rereading international law in Latin America

Looking for a tradition of international legal thinking in Latin America might be problematic. First, mainstream legal scholarship assumes international law to be a phenomenon of European origin that extended concurrently with Europe's expansion over the globe. Thus, authorship, schools of thought, and intellectual traditions necessarily point to a Eurocentric origin but when these categories are transposed to Latin America, they are reduced to reception, imitation, or at best, contribution to the discipline's legacy. Second, contemporary Latin American lawyers barely consider the existence of a Latin American mode of thinking about international law. Yet, roughly from the 1880s to the 1950s, a distinguished group of authors and texts fought over the affirmation or negation of a distinct Latin American international law. Current Latin American international legal scholarship either has forgotten about this debate or has formalized it into a

⁴ Unlike standard historical accounts that tie the development of international law to major events in international relations, *see, e.g.*, WILHELM GREWE, *EPOCHEN DER VOLKERRECHTSGESCHICHTE* [The Epochs of International Law] (Nomos Verlagsgesellschaft 1984), the proposed periodization, while not going so far as to assume the autonomy of international law from national, regional, and world politics, suggests focusing on the interplay between context and professional consciousness to grasp major trends in international lawyers' professional subjectivization. For an extended treatment of each period, *see supra* note 1.

standard account of institutional achievements and doctrinal contributions to the development of a universal international legal system.⁵

In the contemporary discipline, several overlapping narratives coexist as explanations of international law's trajectory in the region. The currently dominant a historical and universalistic narrative about international law describes a vision within existing contents, uses, and functions of international law, thereby foreclosing genealogical accounts of the law's regional distinctiveness. Another narrative involves particular accounts given by Latin American international lawyers about the history of international law in the region. This Article suggests a third narrative that emerges from the work produced by Latin American international lawyers between the 1880s and 1950s, in which lawyers, by fervently discussing the existence of a Latin American international law, not only mediated the tension between international law's universality and particularity but also articulated an idea of Latin America. Instead of privileging one of these narratives over the others, this Article intends to produce a fluid picture of the trajectory of international law in Latin America, a picture capable of grasping both its shortcomings and its transformative potential.

Regarding the issue of the Eurocentric construction of international law's history, I will bracket the problem of Western origin and instead stress the process of canon formation.⁶ The idea of Western origin itself is a reflection of the dominant international legal canon. Thus, in the context of this Article, a critique of Eurocentrism is neither a metaphysical dispute (contesting the West's ontology) nor a historical challenge (regarding the origin of international law), but an inquiry into the creation of the canon, the authority that it has evoked in Latin America, and its connection with the international political context where it reflects and reproduces underlying unequal power relations. Suspending the question of origin and its historic reality enables one to envisage Latin American international lawyers as historical agents engaged in cannibalistic consumption and digestion of the dominant international legal canon - for their own sake and peril. Only by first figuring out the routines of Latin American legal cannibalism will it be possible to contest the canon's purported purity and hierarchical ordering of knowledge and to assess its consequences.

⁵ Héctor Gros Espiell points out that the controversy about the existence of a Latin American international law, "which nowadays doesn't make sense anymore," was abandoned after 1950. Hector Gros Espiell, *La doctrine du Droit international en Amérique Latine avant la première conférence panaméricaine (Washington, 1889)* [*International Law Doctrine in Latin America before the First Panamerican Conference (Washington, 1889)*], 3 J. HIST. INT'L L. 1, 2 (2001) (Neth).

⁶ In the field of literature, Walter Mignolo introduced the distinction between the vocational and epistemic aspects of canon formation, the former referring to the literary activity and cultural values held by members of a community bound by common texts and signifying practices, the latter designating the academic discipline and the literary field's protocols of description and explanation. See Walter D. Mignolo, *Canons a(nd) Cross-Cultural Boundaries (Or, Whose Canon Are We Talking About?)*, 12 *Poetics Today* 1 (1991). Accordingly, I will delve into the configuration of a Latin American vocational canon, that is, the processes through which a community of believers, such as Latin American international lawyers, hierarchically arranges ideas, texts, and authors in order to organize its discursive horizon and adapt and stabilize its practice in the face of internal and external pressures. I inquire elsewhere about the specific hurdles that the disciplinary aspects of canon formation impose on Latin American international lawyers. See *supra* note 1.

II. Conflicting remembrances about international law's past in contemporary Latin-American

This Part pursues a comparative reading of contemporary Latin American international law textbooks.⁷ The analysis shows a common thread in the depiction of international law and its trajectory in Latin America, as well as important intra-regional divergences in thinking about the region's relationship to international law.

The reason for concentrating on textbooks is twofold. First, each Latin American country has a number of international law textbooks that have consolidated their hold on Latin American international legal thinking through numerous editions and extensive use in teaching and legal counsel at national universities and foreign relations offices.⁸ Second, textbooks express the professional common sense, the popular and tacit understanding about international law in the region, building up a national lore. Also, monographs devoted specifically to the question of a Latin American international law are rare. Often they do no more than restate the history of Latin American international law for foreign audiences.⁹

Variety among Latin American textbooks might be explained by positioning them along a continuum between universalism and particularism and contrasting them with one another. Universalism signifies a conceptualization of international law that, as a matter of logical attribution, affirms the geographic, cultural, and substantive universality of a legal system that asserts a scope of application that is international. Particularism asserts that international law attains universality in history because it comprises multiple geographic and cultural origins, as well as sustained contributions that preserve the said diversity. Within this spectrum, I distinguish between two ideal typical modes of representing international law in

⁷ Ordered by country these textbooks are as follows: Argentina: JULIO BARBOZA, *DERECHO INTERNACIONAL PÚBLICO* [Public International Law] (Victor P. de Zavalía ed., 1999); L.A. PODESTÀ COSTA & JOSÉ MARÍA RUDA, *DERECHO INTERNACIONAL PÚBLICO* (5th ed. 1979); GUILLERMO R. MONCAYO ET AL., *DERECHO INTERNACIONAL PÚBLICO* (Victor P. de Zavalía ed., 1985). Brazil: CELSO D. DE ALBUQUERQUE MELLO, *CURSO DE DIREITO INTERNACIONAL PÚBLICO* [Public International Law Coursebook] (15th ed. 2004); G.E. DO NASCIMENTO E SILVA & HILDEBRANDO ACCIOLY, *MANUAL DE DIREITO INTERNACIONAL PÚBLICO* [Manual of Public International Law] (Paulo Borba Casella et al. eds., 15th ed. 2002). Chile: SANTIAGO BENADAVA, *DERECHO INTERNACIONAL PÚBLICO* (3d ed. 1989); HUGO LLANOS MANSILLA, *TEORIA Y PRACTICA DEL DERECHO INTERNACIONAL PÚBLICO* [THE THEORY AND PRACTICE OF PUBLIC INTERNATIONAL LAW] (2d ed. 1990). Colombia: ENRIQUE GAVIRIA LIEVANO, *DERECHO INTERNACIONAL PÚBLICO* (2d ed. 1985); MARCO GERARDO MONROY CABRA, *DERECHO INTERNACIONAL PÚBLICO* (4th ed. 1998). Mexico: CÉSAR SEPÚLVEDA, *DERECHO INTERNACIONAL* (23d ed. 2002); MODESTO SEARA VÁZQUEZ, *DERECHO INTERNACIONAL PÚBLICO* (17th ed. 1998). Panama: JULIO E. LINARES, *DERECHO INTERNACIONAL PÚBLICO* (2d ed. 1996). Paraguay: JUAN BAUTISTA RIVAROLA PAOLI, *DERECHO INTERNACIONAL PÚBLICO* (3d ed. 2000). Peru: FABIÁN NOVAK TALAVERA & LUIS GARCÍA-CORROCHANO MOYANO, *DERECHO INTERNACIONAL PÚBLICO: INTRODUCCION Y FUENTES* [PUBLIC INTERNATIONAL LAW: INTRODUCTION AND SOURCES] (2000). Uruguay: EDUARDO JIMÉNEZ DE ARÉCHAGA ET AL., *DERECHO INTERNACIONAL PÚBLICO* (2d ed. 1996). Venezuela: DANIEL GUERRA IÑIGUEZ, *DERECHO INTERNACIONAL PÚBLICO* (7th ed. 1988).

⁸ Mello's treatise has fifteen editions and Vázquez's has seventeen editions. See MELLO, *supra* note 7; SEARA VÁZQUEZ, *supra* note 7.

⁹ As Héctor Gros Espiell has summarized, contemporary works are intended to present and make widely known "the rich history of international law in Latin America . . . among the . . . non-Latin American public." Gros Espiell, *supra* note 5, at 1–2. See generally Julio A. Barberis, *Les règles spécifiques du droit international en Amérique latine* [Specific Rules of International Law in Latin America], 235 RECUEIL DES COURS D'ACADEMIE DE DROIT INTERNATIONAL 81 (1992) (Fr.).

contemporary Latin America – staunch universalism and particularistic contribution. I argue that these two modes, situated on the extremes, actually drift toward the center of the continuum.

At first sight, the two ideal types portray how the conflict about the existence of a Latin American international law sedimented into a distinction between international law's universalism and particularism and how this distinction operates as a formalized digression of the conflict. Lawyers on both sides deem their conceptualization of international law to be compelling on scientific – rather than political or personal – grounds, disavowing the connection between their disciplinary position and the resolution of the conflict between a negative and positive stance regarding the existence of Latin American international law. Thus, the universalistic and particularistic poles are residual scars of the resolution of the abovementioned debate.

On another level, the continuum also reflects dominant disciplinary sensibilities. The ways in which the debate about the possibility of a particularly Latin American international law is remembered, hidden, or forgotten – as a facile trajectory leading to the creation of the inter-American system, or as a turbulent period in the profession that has been overcome by the restoration of scientific moderation – brings to surface international lawyers' disposition and intuitions about the discipline's meaning and signification in Latin America.

A. Staunch universalism - leading toward abstract particularism

International law is the aggregate of rules governing the relationship between international subjects.¹⁰ In spite of the simplicity of this definition and the clear understanding of the discipline that ensues from this definition - that is, the scientific study of a clearly stated subject-matter - the Latin American international lawyers that follow staunch universalism are obsessed with faithfully articulating the idea of international law. A side effect of their quest for a true definition of international law is that they implicitly create a hierarchy of authoritative sources.

Despite their obsession with finding the true definition of international law, these Latin American international lawyers ultimately defer to the great European scholars on the contents of the definition. The Latin American textbooks' table of contents, as the outward manifestation of the idea of international law, echoes closely the core content of the great textbooks of the European tradition.¹¹ In the same vein, the textbooks' treatment of each topic turns out to be a pastiche of

¹⁰ For examples of works by universalist authors, see BARBOZA, BENADAVA, GUERRA IÑIGUEZ, LLANOS MANSILLA, MONCAYO ET AL., NOVAK TALAVERA & GARCIA-CORROCHANO MOYANO, PODESTA COSTA & RUDA, *supra* note 7.

¹¹ Whereas the recognition of influence works within the text through the use of direct quotation practices, the formation of the subject itself – namely the ordering of the themes constituting international law – operates as a mix of unrecognized influences. In particular, due to the emphasis given to the definition, existence, and history of international law, Latin American textbooks' structure shows a stronger presence of continental European, rather than Anglo-American, influence.

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previous classic accounts of the subject by prestigious authors.¹² In both situations, the argumentative structures are the same. The Latin American lawyers deploy their legal reasoning in steps that intimate a hierarchically-ordered canon of scholarship. The weight given to the cited authors appears to depend exclusively on the author's professional reputation. However, because of the careful inclusion of authors representing each of the prestigious national legal traditions, it turns out that a hierarchy of countries or legal cultures is also a major determinative consideration in forming the canon.¹³

First, the main argument is presented through the works and ideas of the "great" English, French, and German scholars. Short quotations offered by the masters are then embellished with more precise content through comments provided by a "second echelon" of scholarship, usually occupied by Spanish authors.¹⁴ Finally, within the paragraphs dealing with the specifics of the issue at hand, the textbook author develops his own voice in a dialogue with other regional textbooks, but substantively (though not always admittedly) links his own views back to the authorities at the head of the canonical list in a reinterpretation through which his argument acquires a more pragmatic tone.¹⁵

The characteristically dispassionate location in which this type of Latin American international lawyer places himself - in direct contact and dialogue with those regarded as the genuine masters of the discipline - gives the narrative an extremely universalistic tone and leaves little room for regional history. If seen at all, Latin America is glimpsed through the eyes of the international plane. Thus, for instance, in a subchapter of a section dealing with international organizations, and usually after a description of the U.N. system, a textbook might reserve some pages for the "inter-American system."¹⁶ By the same token, international lawyers from the region rarely appear described as Latin American international lawyers,

¹² Beyond the introductory chapters, textbooks are more inclined to cite authors belonging to the British tradition. The relative absence of U.S. authors in Latin American textbooks, vis-à-vis other legal fields in the region, might be related to the U.S. history of interventionism and the slight impact that liberal internationalism has had in framing its foreign policy. Brazilian texts are in this regard exceptional and fall under the particularistic pole of the spectrum.

¹³ See, e.g., PODESTÁ COSTA & RUDA, *supra* note 7, at 26 (including quotations from the European scholars Hans Kelsen, Alfred Verdross, Georges Scelle, and Max Sorensen in the section on international law's grounding). Selection of authors from an assortment of prestigious countries produces a sense of universal acquaintance, but specific combinations of authors illustrate intra-regional particularity. For example, the presence of Italian authors is more frequent among Argentinean textbooks, and the presence of English authors is more frequent among Chilean textbooks of the Pinochet era. The inclusion of Argentinean and Brazilian authors in textbooks of smaller Latin American countries shows an intra-regional hierarchy of quotations. See generally textbooks from Colombia, Panama, Paraguay, Peru, and Venezuela, *supra* note 7.

¹⁴ See, e.g., BARBOZA, *supra* note 7, at 11 (referring to the comments of Pastor Ridruejo, a Spanish author, regarding the definition of international law given by Eric Suy, a French scholar).

¹⁵ See NOVAK TAVALLERA & GARCÍA-CORROCHANO MOYANO, *supra* note 7, at 32 (footnotes omitted). ("Nevertheless, we are inclined to define international law as the set of rules that regulates the relations between different legal subjects that form part of the international community, a definition that is shared by the majority of authors' doctrines").

¹⁶ See, e.g., BENADAVA, *supra* note 7, at 363 - 77 (treating the inter-American system in the book's last chapter); BARBOZA, *supra* note 7, at 576 - 80 (including the inter-American system within the chapter on collective security and after the exposition of the U.N. system); GUERRA IÑIGUEZ, *supra* note 7 (introducing, in the first chapters of his textbook, the idea of Latin American international law as a regional expression of universal international law, and leaving for the last four chapters, out of thirty-five, the analysis of Latin American doctrines and institutions).

their presence corresponding to their success in the international hierarchy of professional reputation.¹⁷

Considering the canons of professional hierarchy enacted in these textbooks, the continuum described above collapses into a circle. The peculiar modes of articulating universality renders the representation utterly particular. Stated differently, the singularities of the authors selected to form part of the canon at different positions along the established professional hierarchy make this professional style uniquely Latin American.¹⁸ In the same vein, it is not complete absence of things Latin American but their allocation throughout the textbook that sets up the universal tone. Whereas the particularistic version, examined below, rounds up a number of Latin American contributions to international law to correspond to a single regional perspective, the universalistic representation scatters them within the standard division of topics in classic textbooks or leaves them for the final chapters.¹⁹ The disconnect among these regional appearances in the narrative prevents any historical analysis and connected interpretation, making the Latin American approach to international law effectively fall out of the picture. It is not easy to figure out the politics of the universalistic representation since the perspective claimed by this type of international lawyer is not only universal but also scientific and neutral. Nevertheless, I argue later that the politics of depoliticization in the universalist view constitutes a response to professional conflicts that made international law a less plausible discourse to leveraging sociopolitical transformation or heterodox thinking in Latin America.

B. Particularistic contribution - leading to concrete universalism

On the other end of the spectrum, particularistic textbooks do not impugn international law for lacking universality. To the contrary, finding a series of multicultural contributions makes international law both universal and concrete. The ideal type of particularistic contribution has two variants, a naturalist and a secular construction of situated universality - accounts that do not collide because of their consecutive arrangement according to a narrative of historical progression.

¹⁷ Professional success is measured by the international lawyer's access to the professional organizations at the center, rather than to peripheral, professional organizations. *See, e.g.*, PODESTÁ COSTA & RUDA, *supra* note 7, at 35 n.17 (listing the Argentinean members of L'Institut de droit international).

¹⁸ Looking deeper than the acknowledged commitments toward the naturalist, positivist, and Grotian schools and the resultant quotation practices, the Latin American style might be characterized as a blend that allocates authors of the German tradition to the theoretical section (including not only Hans Kelsen, but also pre-World War II conservative international lawyers, such as Erich Kaufman, who are not typically present in textbooks published within other traditions), French international lawyers and legal thinkers, such as Leon Duguit, to sociolegal jurisprudence (to articulate the idea that international law has to renew itself to meet the challenges of interdependence), and British authors to the reading of international adjudication, while a stratum of Spanish scholars provides translations and explanations.

¹⁹ *See supra* note 16. *See also* DANIEL ANTOKOLETZ, TRATADO DE DERECHO INTERNACIONAL PÚBLICO [Treatise of Public International Law] 59 – 60 (5th ed. 1951) (“It is very doubtful that the fundamental rights of states (independence, juridical equality) have been of American origin and then incorporated to the universal international law”). This paragraph is extensively quoted in subsequent works in the region. *See generally* sources cited *supra* note 7. *See also* H.B. JACOBINI, A STUDY OF THE PHILOSOPHY OF INTERNATIONAL LAW AS SEEN IN THE WORKS OF LATIN AMERICAN WRITERS 131 (1954).

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In the naturalist mode, universality is a necessary attribute of the law of peoples. If, as a matter of definition, *ubi societas ibi ius* (“where there is society there is law”), the interaction between different peoples is not lawless but regulated by the natural principles of the law of peoples. Thus, a portrait of relationships between autonomous political entities during ancient times or belonging to non-Western civilizations as being regulated by norms analogous to or preceding modern international law becomes concrete evidence of universality.²⁰

Latin American textbooks of the naturalist variation give prominence to a pre-modern (and pre-Grotian) tradition. Unlike most classically Eurocentric textbooks that identify Westphalia as the discipline’s origin of international law, Latin American textbooks of the particularistic type include in their introductory sections careful accounts of the origins of the discipline, dating back to antiquity. Then, after a rather long list of epochs, Westphalia appears as just one of the many relevant periods of the history of international law.²¹ The particularistic narrative shows not only that the law of nations is much broader than Westphalia, but also that widening the storyline has consequences for the comprehension of the discipline.

Facing the dominant understanding of international law that assigns Latin Americans the role of spectators, practitioners of the naturalist variant seek to reverse this phenomenon by first clustering the markers that distinguish the Eurocentric international legal tradition and then, by contradistinction, erecting a parallel tradition that would point at alternative markers that bestow equal footing to Latin Americans. Accordingly, particularistic naturalists associate the belief in Westphalia as the origin of international law, the idea that Europe represents the initial “family of nations,” and the discipline’s bearing of a Protestant religious ethos with the contemporary dominant international legal tradition. This dominant canon of disciplinary images is paired by naturalist international lawyers with a supplementary set of associations that has the discovery of the New World as one of international law’s foundational moments, America as the continent where the universality of the law of nations was played out for the first time, and Spanish scholastic theologians as the discipline’s early authors that launched a tradition that lasts until today.

Although this historical narrative seems to recall a natural law kind of universalism, the central aim in these appropriations of a naturalist lineage by Latin American authors is to demand affiliation with a tradition offering them a valid disciplinary voice. Thus, the point at stake is less to be able to derive certain

²⁰ See, e.g., GAVIRIA LIEVANO, *supra* note 7, at xiv, 19 -26 (including, in the chapter about the history of international law, under the heading “Antiquity,” sections on India, Hebrews, China, Greece, and Rome).

²¹ See SEARA VÁZQUEZ, *supra* note 7, at 44 (“In the nineteenth-century the study of international law began with the treaties of Westphalia of 1648. Now we know . . . that some international institutions, such as treaties, arbitration, diplomatic missions, extradition, protection of foreigners, etc., were not unknown to ancient peoples”).

principles of law from the nature of the relationship between peoples than to depict different peoples as bounded by the same law.²²

Traditional histories of international law recount the progression from naturalism to positivism - a progression that generated a parallel transformation in the comprehension of international law's universality. Within an international legal system that not only includes specific positive rules and principles but also moves toward the establishment of international institutions, the meaning of universality changes to depend ultimately on the concrete contributions of different states (functioning as proxies for cultural diversity) to the materialization of those rules and international organizations.

Unlike the naturalist approach, the secular approach roughly accepts the classic account of international law's Westphalian origin, but locates the vertex of the discipline's development in a later historical period: during either the period in which international law incorporated positive norms (late nineteenth century) or the period in which it achieved institutional form (early twentieth century). It turns out that to the eyes of the secular-particularistic international lawyer, the development of both rules and institutions had Latin America at the center. The emancipation of Latin America was the inspiration and starting point for the crystallization of customary international norms that recognized sovereign autonomy for civilized peoples beyond Europe. Specifically, under the rubric of "the American contribution," textbooks list particular international rules with a Latin American origin.²³ Furthermore, the process of codification of international law pursued in the region since the first American Conferences also had an impact on the development of international law, for these regional projects of codification were used as models for international conferences on codification. Particularist textbooks outline in an extremely formal way each of the American Conferences, adding a paragraph about the decisions adopted and describing the achievements that led to the creation of the Organization of American States ("OAS") and the inter-American system. They then also devote a considerable number of pages to illustrate the formal structure of the OAS. In this regard, these textbooks highlight the Latin American contribution to international law, as the founders of other regional organizations, as well as the League of Nations and the United Nations, had the Latin American experience in mind.²⁴

²² For example, there is no scholastic approach to tackle contemporary problems, such as the fragmentation of international law or the regulation of high sea fisheries, nor is Francisco de Vitoria able to cross the textbook's threshold dividing the historical-introductory part from the doctrinal sections. The influence of naturalist international lawyers such as Alfred Verdross or Charles de Visscher is not particularly strong, and there is a substantial difference between international lawyers and conservative (naturalist) jurists in domestic settings.

²³ The standard list includes the *uti possidetis* rule, *see, e.g.*, MELLO, *supra* note 7, at 191; the right to asylum, *see, e.g.*, NASCIMENTO E SILVA & ACCIOLY, *supra* note 7, at 78; non-intervention, *see, e.g.*, MONROY CABRA, *supra* note 7, at 205; the Calvo Clause, *see, e.g.*, SEPÚLVEDA, *supra* note 7, at 247 - 48; the Tobar doctrine, *see, e.g.*, SEPÚLVEDA, *supra* note 7, at 269; the Estrada doctrine, *see, e.g.*, SEPÚLVEDA, *supra* note 7, at 269 - 71.

²⁴ *See, e.g.*, SEPÚLVEDA, *supra* note 7, at 347 - 377. "Contribution" is a genre itself in Latin American international legal scholarship. *See, e.g.*, José Joaquín Caicedo Castilla, *Contribución de América del Derecho Internacional: Realizaciones del Comité Jurídico Interamericano [The American Contribution to the Development of International Law: the Achievements of the Inter-American Juridical Committee]*, in TERCER CURSO DE DERECHO INTERNACIONAL ORGANIZADO POR EL COMITÉ JURÍDICO INTERAMERICANO 13 (Comité Jurídico Interamericano 1976); Hugo Caminos, *The Latin American Contribution to International Law*, 80 AM. SOC'Y INT'L L. PROC. 157 (1986); Marcelo G. Kohen, *La contribución de América Latina al desarrollo*

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If the previous paragraphs provide a credible description of an interpretative scenario that Latin Americans have staged for discerning their own place within the traditional Eurocentric narrative of international law's history, they also reveal the central role the idea of Latin America occupies in the mental landscape of international lawyers adopting the secular-particularistic representation. The recurrence of Latin America as a point of entry to the consideration of a number of topics and problems (in contrast to non-Latin American textbooks, which would not include the region) embodies the internalizing and filtering of the international legal discourse laid out from outside the region. On the one hand, this recurrence conveys the idea that Latin America is not simply a part, but an essential component of the discipline, for it reaffirms its claim of universality.²⁵ On the other hand, it tempers Latin American international lawyers' disposition toward the discipline. Quite apart from rejecting the international legal tradition or denouncing its Eurocentrism, the idea of contribution maintains for Latin American lawyers the yearnings for participation in a truly cosmopolitan "invisible college of international lawyers."²⁶

The particularistic adjustments made by Latin Americans to the standard European narrative represent international law in natural harmony with a watered-down regionalist perspective. From this standpoint, the discussion about the existence of a Latin American approach to international law, set forth earlier, loses most meaning. The period of disputation from the 1880s to 1950s that tackled this problem either is completely absent or has been replaced by an account of the rules, institutions, or doctrinal formulations into which the debate settled.

C. Scholarly counterpoint

To paint a clearer picture of the dominant understanding of international law in Latin America, this section contrasts the image contained in textbooks, discussed above, with contemporary scholarly pieces specifically devoted to the history of international law in the region. As one might expect, the specificity of

progresivo del Derecho Internacional en materia territorial [The Latin American Contribution to the Progressive Development of International Law on Matters of Territory], 17 ANUARIO DE DERECHO INTERNACIONAL 57 (2001); J.M. Yepes, *La Contribution de l'Amérique Latine au développement du droit international public et privé [The Contribution of Latin America to the Development of Public and Private International Law]*, 32 RECUEIL DES COURS D'ACADÉMIE DE DROIT INTERNATIONAL 697, 691 - 709 (1930) (Fr.) [hereinafter Yepes, *La Contribution*].

²⁵ Within the particularistic representation of universality, the variation among textbooks is not large, for the approach, almost by definition, responds only to local specificity. For example, Brazilians date the foundation of American international law to the 1750 Treaty of Madrid that set the colonial limits between Portugal and Spain. See MELLO, *supra* note 7, at 191; NASCIMENTO E SILVA & ACCIOLY, *supra* note 7, at 78. Central American manuals link Central-Americanism to part of the Latin-Americanist movement. See LINARES, *supra* note 7, at 57.

²⁶ See generally Oscar Schachter, *The Invisible College of International Lawyers*, 72 NW. U. L. REV. 217 (1977-1978). Contemporary Latin American lawyers' self-identification with the universal-European tradition makes them look wary of, and thus absent from, third-world critiques of international law. See, e.g., Antony Anghie & B.S. Chimni, *Third World Approaches to International Law and Individual Responsibility in Internal Conflicts*, 2 CHINESE J. INT'L L. 77, 79 n.5 (2003) (mentioning only Alejandro Alvarez — who belonged to the period of professional contestation and was the main articulator of the idea of a Latin American international law — among Latin Americans who have been close to a Third World Approach to International Law (TWAAIL) perspective).

these scholarly articles means that their historical account of international law in the region is more detailed than accounts presented in an average textbook. Whereas textbooks' implicit representation of international law in Latin America typically conveys a sense of regional solidarity, monographs provide a technical description of the distinctive problems, comprising not only regional fraternity but also intra-regional conflicts,²⁷ that have led the region to develop particular international rules and doctrines.²⁸ These monographs maintain further that intra-regional conflicts, as well as domestic political instability,²⁹ were the starting point for the development of Latin American legal doctrines.

On the whole, however, monographs convey a picture similar to the popular understanding present in the textbooks at the particularistic pole, for both forms of scholarship share the assertion of contribution as the definitive trait of Latin American international law. Nevertheless, monographs conceptualize contributions as technical devices, placing emphasis on the work and expertise of Latin American international lawyers who set out to reformulate the universal international legal scheme in order to resolve particular regional problems. Minor divergences between textbooks and monographs become greater when it comes to the depiction of the discipline's history. Textbooks present the past as the repository of cumulative achievements, whereas monographs portray a break between a disciplinary past traversed by disputation and a present defined by scientific serenity.³⁰ Therefore, the idea of a purely Latin American approach appears to have been an overstatement laid bare by the 1950s when the regionalist position lost its bearings.³¹ Interestingly, for monographs, it was not the passage of time and contextual changes that made them lose sight of Latin American international law, but the abstract review of its tenets that made the regionalist position retroactively flawed. Yet, they do not totally dismiss the particularistic pretense, for Latin Americans have to preserve the claim of privileged access to a specialized knowledge about international law in Latin America that offers them a place in the international legal profession. Rather than pursue an assertion of regionalist difference, contemporary practitioners desire recognition as international lawyers from Latin America, which is in part achieved through reconciliation and hence reinsertion of the Latin-Americanist approach into the

²⁷ See, e.g., Barberis *supra* note 9, at 130 (arguing that territorial conflicts between Latin American nations resulted in the use of the *uti possidetis* rule to resolve boundary delimitations. See also Gros Espiell, *supra* note 5, at 11 (portraying Latin American solidarity as a legal principle, specifically the recognition that an attack or aggression to any American state constitutes an attack or aggression to all).

²⁸ It is not that textbooks altogether deny the existence of these intra-regional conflicts, but that their meaning is changed by relocating them in the section on the history of boundaries of the textbook's respective country, thus keeping the distinctively Latin-Americanist flavor.

²⁹ Therefore, diplomatic asylum crystallized into regional custom. See, e.g., GUERRA IÑIGUEZ, *supra* note 7, at 588 - 598.

³⁰ See BARBERIS, *supra* note 9, at 95. ("Yet a calm and objective analysis of this controversy, undeniably facilitated by the retreat of many decades and the recent studies in the theory of language, makes apparent that, to a great extent, the polemic does not present logical contradictions"). Barberis also uses the insights of analytic jurisprudence to support the rejection of the particularistic perspective. *Id. passim*.

³¹ Gros Espiell thus centers his analysis on the history of international law in the region prior to the Pan-American Conferences (that is, before 1889), not only because of the subsequent engulfing of the Pan-American movement by the United States, but also because this stage preceded the debate about the existence of a Latin American international law. Gros Espiell, *supra* note 5, at 2 and *passim*.

universalistic ideal of international law.³² While the reasons for which contemporary international lawyers uphold the overcoming of the regionalist approach still ultimately reintroduce many regionalist propositions, there is wide agreement among legal historians about the need to reject the faulty intrusion of politics and the ensuing division of the profession. The next section offers some interpretations of the role of discontinuity and the avoidance of politics in understanding the meaning of contemporary international law in Latin America.

D. Interpreting the sedimentation of professional debate and conflict

The comparative analysis of textbooks in the proposed continuum shows the presence of a regional legal tradition. Latin American textbooks present themselves as a contributing part, and not just a mere replication, of the broader international legal tradition. Foreign authors and doctrines are internalized through the erection of a disciplinary canon understood to belong to the discipline of international law as a whole - because of either faith in its scientific universality or conviction that Latin American contributions have made the discipline international.³³ The distinctiveness of the Latin American canon consists in its responding less to time lags in the reception of ideas or to the epistemological shallowness of its national academic environments than to regional strategies (that is, universalistic versus particularistic) to assert its belonging to the international legal tradition. Latin America shares a tradition in the sense that it has established, through sustained intra-regional disciplinary dialogue and controversy, a common canon of authors and ideas.

The above comparison of textbooks also identifies a patterned divergence among them, namely, a correlation between the universalistic and particularistic poles of the spectrum and intra-regional sociopolitical differences. In general, the farther south a country is in the continent, the closer the country's textbooks are to the universalistic pole. Conversely, Mexican³⁴ and Brazilian³⁵ textbooks display a strong particularistic voice, not only stressing Latin American contributions in general, but also giving a special and extended treatment to the historic and political underpinnings of Latin American international law.

Particularities in the trajectories of different countries throughout the shift from the periods of professional debate and politicization to the periods of backlash and depoliticization may explain this patterned divergence. The weakening of the international legal discourse and the impulse to dislocate a regional legal tradition - perceived to be left-leaning - were the strongest in the

³² See Barberis, *supra* note 9, at 226. Barberis argues that the expression "Latin American international law" is currently devoid of content because through a process of generalization, regional norms have been incorporated into universal international law. However, immediately after discarding the regional particularity of rules, he lists contributions that preserve regional pride but curb professional extremism. For example, he includes a section reviewing the Latin American contribution to the development of the Law of the Seas. *Id.* at 210-211.

³³ See NOVAK TAVALERA & GARCÍA-CORROCHANO MOYANO, *supra* note 7, at 16 ("In presenting this volume, we are conscious of the challenge . . . but we proceed with the determination to make a contribution that follows the course of the acknowledged international juridical tradition of our country).

³⁴ See, e.g., SEPÚLVEDA, *supra* note 7.

³⁵ See, e.g., MELLO, *supra* note 7.

countries that experienced right-wing dictatorships during the 1970s and 1980s. In the southern cone in particular, these developments, and attendant reshufflings in the hierarchy of discourses – for example, the steady replacement of law by economics – resulted in interpretations of international law tending toward the universalistic pole, purging the elements that corresponded to the particularistic end of the spectrum.³⁶ Consequently, international law was emptied of regionalism and particularism as expressions of what was perceived to be a pernicious, left-leaning politicization of the discipline.

Although differences are unmistakable, certain shared assumptions come into view upon consideration of the entire spectrum of beliefs and approaches. As noted, the debate about the existence of a Latin American international law is synthesized in textbooks in a disciplinary manner that dispenses with complexity in favor of the simplicity of a cumulative recounting of authors and ideas. Given that textbooks convey an idea of the present as the natural result of historical progression, disruptions in the cumulative process fall outside the picture, resulting in the blocking out of radical differences, recognized by the aforementioned monographs, between two periods in the professional trajectory of the discipline of international law in Latin America: the 1880s - 1950s period of disciplinary debate and the current period in which the discipline has reached a stabilized state. Textbooks and monographs do, however, share a similar time gap in the construction of the image of present-day international law. Neither addresses why, between the period of professional debate and its gradual demise, professional settlement displaced conflict; nor do the textbooks and monographs have much to say about when and how the disciplinary change occurred. They additionally ignore what happened to the profession in between the two periods, namely, the phase of professional radicalization and fragmentation.

The 1960s and 1970s were decades of sociopolitical agitation in Latin America, a period of important political developments that at once greatly affected the Latin American legal profession and drew much inspiration from it. The hypothesis is that international law formed part of the broader intellectual movement and political project that emerged in Latin America between the 1950s and the 1970s, a project variably identified with the foundation of the Economic Commission for Latin America (“ECLA”), dependency theory, liberation theology and philosophy, and the adoption of developmental strategies based on import substitution-industrialization.³⁷ As the product of a regional consciousness,

³⁶ See, for example, the change in Chilean textbooks after the 1973 military intervention reflecting the cleansing of the Latin American approach. Compare ERNESTO BARROS JARPA, *MANUAL DE DERECHO INTERNACIONAL PÚBLICO* [Manual of Public International Law] 54-55 (Editorial Jurídica de Chile, 3rd ed. 1964) (1955) (including a discussion of the Americanist movement and Alvarez’s American International Law) and Benadava, *supra* note 7, at 375 – 77 (including a refutation of Alvarez) with SANTIAGO BENADAVA, *DERECHO INTERNACIONAL PÚBLICO* (5th ed. 1997) (omitting the section dealing with Alvarez).

³⁷ The literature dealing with this intellectual tradition is enormous, though it might be worth noting its regional character. For example, intellectuals working around ECLA and involved in the inception of dependency theory included, among others, Argentinean economist Raúl Prebisch, Brazilian economist Celso Furtado as well as Brazilian sociologist Fernando H. Cardoso, and Chilean sociologist Enzo Faletto. For an illustration of the connection between these intellectual-political trends and the regional international legal tradition, see HERNÁN SANTA CRUZ, *COOPERAR O PERECER* [Cooperate or Perish] 58 (1984). Santa Cruz was the architect of the creation of an institution that, while part of the United Nations, was also particularly devoted to

this intellectual-political movement conveniently offered a diagnosis of the problems faced by Latin America - rooted in its economic, intellectual, and political dependency on the world system - and a strategy to overcome them through regional integration and national developmentalism. Within this broad intellectual movement, international law, of necessity, played a vital role in the translation of policies into legal regimes, such as the nationalization of natural resources through expropriation. The discipline also provided a discourse for institutional embodiment of the ideal of economic integration, as the Latin American Association of Integration and Andean Pact attest. Finally, international law provided a repertoire of experiences and ideas to help advance the regionalist agenda.³⁸

The story of the emergence of this regional consciousness and of international law's role in it is precisely what the discipline's common sensical understanding seeks to evade. Under this competing account, the explicit attempt to confine the scope of the conflict within the profession to the deep historical past - the resolution of the discussion about the existence and inexistence of an American international law occurring in the early twentieth century - is a tactic of ignoring professional strife occurring closer in time to the shaping of contemporary practices.³⁹ Thus, the avoidance of politics is a reaction both to the intrusion of professional struggle, not within the obscure historical meadows of international law, but into a process of fashioning a regional consciousness. This avoidance is also a reaction to the fracture among elites that the intrusion caused and to the subsequently violent resolution of internal divisions.

The subjectivization of international lawyers has been historically shaped by the disciplinary discontinuity set forth throughout the 1970s period of political backlash. Consequently, professional identities came to be defined by technical expertise. While such identities are appealing to some, they are uninteresting to the newer generations, which choose to either remove themselves from the field or see international law as a necessary gateway to enter subfields of greater progressive potential, such as international human rights, environmental rights, and indigenous rights. However, even these subfields are colonized by international law's apolitical ethos, thus giving rise to familiar experiences of

studying Latin America's economic development. He specifically points to the existence of a Latin American international law as the intellectual heritage that supported the foundation of ECLA as well as regionalist integration and international projects of cooperation in general. *Id.* at 58 - 59.

³⁸ See, e.g., Edmundo Vargas, *LA NACIONALIZACIÓN DEL COBRE Y EL DERECHO INTERNACIONAL*, 6 - 10 (Universidad Católica de Chile Centro de Estudios de Planificación Nacional ed., 1973); see also, Juan Carlos Puig, *El caso de la International Petroleum Company [The Case of the International Petroleum Company]*, in *DE LA DEPENDENCIA A LA LIBERACIÓN, POLÍTICA EXTERIOR DE AMÉRICA LATINA [FROM DEPENDENCE TO LIBERATION: THE FOREIGN POLICY OF LATIN AMERICA]* 11, 27 - 31 (Ediciones La Bastilla ed., 1973); Leopoldo González Aguayo, *LA NACIONALIZACIÓN DE BIENES EXTRANJEROS EN AMÉRICA LATINA [THE NATIONALIZATION OF FOREIGN PROPERTY IN LATIN AMERICA]*, at 6 - 9 and *passim* (Universidad Nacional Autónoma de México ed., 1969).

³⁹ Furthermore, instead of treating the role of international law in relation to actual historical struggles past or present, authors offer highly abstract depictions to explain the defeat of the regionalist perspective: "[I]nternal confrontations . . . and the absence of a Latin-American doctrine of international law, that without a non-conformist spirit, objectively considered the new circumstances to support [a Latin American approach] and the fact that Latin American congresses and agreements... did not achieve the establishment of concrete and operative norms, as Europeans did in Westphalia." JIMÉNEZ DE ARÉCHAGA, *supra* note 7, at 54.

frustration. Older generations, on the other hand, do not experience to the same extent the discipline's transformations. While mainstream international lawyers have internalized depoliticization, other international lawyers ponder with dismay the discipline's vanished relevance. A review of Mello's forwards to the fifteen editions of his international law textbook illustrates the profession's trajectory and the anxieties that it elicits. Mello started out resolutely, declaring the principles as highly as the expectations that he laid out for the discipline.⁴⁰ Mello's grandiose optimism of the 1960s fades away by the 2000s when he not only includes a joke about international lawyers' irrelevance,⁴¹ but also writes a somber and desperate note in the foreword of the last edition before his death.⁴²

As developed further below, international legal scholarship and practice between the 1880s and the 1950s directly confronted issues of diplomatic significance as lawyers exercised their judgment in the face of highly charged and divisive international relations conflicts, including not only distant world issues such as World War I and II, but also the hegemonic rise of the United States (intervention), as well as intra-regional problems, such as integration and asylum, that went beyond boundary disputes. Politics currently operates as a filter for the selection of subjects within international law. Contemporary texts strain to include regional politics, making a discussion of Nicaragua's contras, Contadora, or Pinochet less comfortable than a reference to the disintegration of Yugoslavia or humanitarian interventions in Africa. The avoidance of politics has its own costs. First, professionals traumatized by conflict limit their aspirations to technical mastering. Moreover, the depoliticization lessens the practitioners' expectations in the international legal discourse's potential. The Latin American legal tradition, in thus losing any appeal it once had for thinking, imagining, or articulating yearnings for sociopolitical transformation, becomes neoliberalism's handmaiden for implementing economic orthodoxy.

III. The politics of a legal tradition

Part II traced the repressed past in contemporary Latin American legal scholarship as a means of probing the assumptions underlying the construction of legal doctrine today. It argued that the understating of previous moments of professional contestation through the creation of a historical narrative of cumulative progress, and the blocking out of the terms and circumstances of the discipline's appeasement shape the current international legal discourse in Latin

⁴⁰ The preface to the 1967 version states: "International law is of interest not merely to the specialist but to all. It has to be repeated that all political, economic, social and cultural life has been internationalized, and international law is the instrument of this process. International law has to be transformed into an instrument to fight against underdevelopment. It needs to transform itself in an international law of development." Mello, *supra* note 7, at 17.

⁴¹ "The major Brazilian international law specialist, Cançado Trindade... told me a story that has to be reproduced. A man travels in a balloon. The weather is bad. He is lost. Weather gets better, he sees a person in a square and asks: 'Where am I?' 'In a balloon.' 'Are you an international lawyer?' 'How did you guess?' 'Your answer was precise and accurate, but absolutely useless!'" *Id.* at 43.

⁴² Mello affirms: "International law in a unipolar society is transformed into an instrument of domination." *Id.* at 47. He adds: "[M]y happiness is to be already at the end [of my life] and I have the intention of seeing nothing else." *Id.* at 48.

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America. This Part explores the period of professional contestation on the basis of which regional legal discourse was radicalized.

Between the 1880s and 1950s, an impressive number of Latin American international lawyers engaged in a long, sustained, and intense discussion about the existence of a distinctive international law for the region.⁴³ Instead of producing yet another description of what has come to be dubbed American international law, this Article tries to bring to light the conditions of possibility that allowed international law to develop into a discourse for imagining the region; it also tries to bring to light where, in response to this development, division among elites surfaced.⁴⁴

The nineteenth-century project of consolidating independence in the new Latin American states had law and legal scholarship at its center, for the endeavor not only involved establishing the right institutions for the young independent nations, but also symbolized broader allegiances with the liberal ideals of progress and civilization generated by the independence movement.⁴⁵ International law proved critical in providing Latin American politicians with a discourse to bolster the claim of sovereign autonomy for the new nations, and the attainment of international legal autonomy emerged as a prized benchmark for civilization. Liliana Obregon's ground-breaking study of nineteenth-century Latin American international legal scholarship shows how early international lawyers shared a *Criollo* legal consciousness.⁴⁶

From the standpoint of figuring out how and why these early appropriations of international law provided such a fertile language for persistent ruminations on

⁴³ The debate began when Almacio Alcortas publicly impugned Calvo for not recognizing the existence of American principles of international law in Calvo's 1880 international law treatise. Almacio Alcortas, *La Ciencia del Derecho Internacional* [The Science of International Law] 7 *NUEVA REVISTA DE BUENOS AIRES* 575 (1883). The disciplinary debate achieved regional scope, attracting attention from several scholars. See, e.g., Juan Carlos Puig, *PRINCIPIOS DE DERECHO INTERNACIONAL PUBLICO AMERICANO* [PRINCIPLES OF AMERICAN INTERNATIONAL LAW] 17 - 30 and *passim* (Valerio Abeledo ed., 1952) (Argentina); SÁ VIANNA, *infra* note 49 (Brazil); Alejandro Alvarez, *infra* note 48 (Chile); Yepes, *supra* note 24, at 696 - 714 (Colombia); J.M. Yepes, *Les problèmes fondamentaux du droit des gens en Amérique* [Fundamental Problems of the Law of Peoples in America], 43 *RECUEIL DES COURS D'ACADÉMIE DE DROIT INTERNATIONAL* 5, 5 - 16 (1933) (Fr.) [hereinafter Yepes, *Les problèmes*]; Francisco García Amador, *The Academic Discussion Concerning the Existence of an American International Law* (1944) (unpublished M.A. thesis, Harvard Law School) (on file with the Harvard Law School Library) (Cuba); CÉSAR SEPÚLVEDA, *LAS FUENTES DEL DERECHO INTERNACIONAL AMERICANO: UNA ENCUESTA SOBRE LOS MÉTODOS DE CREACIÓN DE REGLAS INTERNACIONALES EN EL HEMISFERIO OCCIDENTAL* [THE SOURCES OF AMERICAN INTERNATIONAL LAW: A SURVEY OF THE METHODS TO CREATE INTERNATIONAL LEGAL RULES IN THE WESTERN HEMISPHERE] 13 - 19 (2d ed. 1975) (Mexico); FRANCISCO TUDELA Y VARELA, *EL DERECHO INTERNACIONAL AMERICANO* [AMERICAN INTERNATIONAL LAW] 4 - 19 (1900) (Peru). For an analysis of the debate and its relationship to Latin America's intellectual history, see Becker Lorca, *supra* note 1, at 83 - 91.

⁴⁴ Daniel Antokoletz distinguishes three rounds of debates: Alcortas vs. Calvo (1880s); Alvarez vs. Sá Vianna (1920s); and Alvarez vs. Antokoletz (1950s). ANTOKOLETZ, *supra* note 19, at 53 - 62. This storyline depicting the defeat of the particularistic view became a classic and has been reproduced, especially by authors of universalistic convictions. For a list of universalist authors, see *supra* note 10.

⁴⁵ Emancipation, itself an expression of regional fraternity, became for particularistic international lawyers the basis for the emergence of American international law. See ALEJANDRO ALVAREZ, *LE DROIT INTERNATIONAL AMERICAIN* [AMERICAN INTERNATIONAL LAW] (1910); Yepes, *La Contribution*, *supra* note 24 and Yepes, *Les problèmes*, *supra* note 43, at 1-143.

⁴⁶ Liliana Obregón, *Completing Civilization: Nineteenth Century Criollo Interventions in International Law* (2002) (unpublished S.J.D. dissertation, Harvard Law School) (on file with Harvard Law School Library), at 18 - 32.

the meaning of Latin America, the series of Latin American and Pan-American intergovernmental, scientific, and codification conferences offers merely a starting point. The textbooks' routine of mere enumeration of conferences, their achievements, and their failures seems to miss the point. Providing empirical corroboration of historical facts is not at the root of international lawyers' conflicting views. To the contrary, participants in the debate about the existence of a Latin American international law share a basic consensus as to what kind of events to grant historical signification in determining the course of international law in Latin America. Broadly speaking, these include emancipation itself and the diplomatic intercourse between American nations that independence inaugurated. Divergence takes hold at the moment of fitting series of disparate events into alternative grids of signification that mirror the tension between competing models of Latin American consciousness. Hence, beneath the debate about the existence or inexistence of a Latin American international law lies the tension between discordant worldviews held by Latin American elites.⁴⁷

Seemingly factual and exclusively legal incidents acquire special meaning as symbols in a parallel struggle for the definition of the dominant Latin American consciousness. Thus, emancipation is described either in a celebratory mode -- "[t]he entry of Latin America into the community of nations is one of the most important facts in the history of civilization"⁴⁸ -- or in a negative one:

What we object to as manifestly contrary to the historical truth as we have overwhelmingly proven, and as abhorrent to international law's character, is that these new states, during the arduous period of their formation, in an environment of internal and external wars, isolated from each other, barely admitted into the community of nations, having their national public and private law still in formation, might have constituted an international law for the continent.⁴⁹

The international-legal embodiment of this general opposition between alternative regional consciousness manifests itself in two parallel modes of understanding law and legal theory, regional and international power relations, professional projects and lifestyles, institutional politics, and general ideas of politics and culture.

Therefore, favoring the existence of Latin American international law, which I call the regionalist disposition, meant endorsing an anti-formalist legal sensibility coupled with positivist political ideas and integrationist aspirations, all to be articulated by a strong Latin American scientific community composed of

⁴⁷ Consequently, the conflict over the existence of a Latin American international law might be coupled with the oscillation in the region's intellectual history between cultural identity and modernization. For an analysis of Latin American intellectual history (although one that does not consider international law), see EDUARDO DEVÉS VALDÉS, *EL PENSAMIENTO LATINOAMERICANO EN EL SIGLO XX: ENTRE LA MODERNIZACIÓN Y LA IDENTIDAD, DEL ARIEL DE RODÓ A LA CEPAL (1900 - 1950)* [TWENTIETH CENTURY LATIN AMERICAN THOUGHT: BETWEEN MODERNIZATION AND IDENTITY, FROM RODÓ'S *ARIEL* TO *ECLA* (1900 - 1950)] 15 - 21 and *passim* (2000). See also JORGE LARRAÍN, *IDENTITY AND MODERNITY IN LATIN AMERICA* 12 - 42 and *passim* (2000).

⁴⁸ Alejandro Alvarez, *Latin America and International Law*, 3 AM. J. INT'L L. 269, 269 (1909).

⁴⁹ SÁ VIANNA, *DE LA NON EXISTENCE D'UN DROIT INTERNATIONAL AMÉRICAIN* [About the Nonexistence of an American International Law] 60 - 61 (1912).

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well-connected, cosmopolitan international lawyers organized around regional institutional projects. By comparison, affirming the inexistence of a Latin American international law was the necessary upshot of favoring the universality of international law, defined by a formalist legal sensibility that was skeptical of regional integration, unconvinced by the advantages of introducing regional fragmentation to the international system, and had an agenda to pursue within professional circles as opposed to regional political institutions. I identify this latter perspective with a universalistic sensibility.

To affirm the existence of a Latin American international law meant to subscribe to a particular definition of law and to embrace a unique reality in the Americas. Thus, rather than remaining rooted in logical attributes, the particularistic sensibility conceives international law as an expression of the psychological consciousness of peoples, and international lawyers as the peoples' conscience.⁵⁰ Although the entire range of resolutions from the Latin American and Pan-American conferences did not result in ratified treaties, the conferences have led to outcomes far more meaningful and profound than a mere set of international norms. These outcomes are more in line with the meanings that the particularistic sensibility ascribes to international law. Alvarez identifies three such results:

[T]hey make known the international political psychology of the states of America, that is to say, the problems which most particularly concern those states and the means they judge best suited for their solution... [T]hese conferences have contributed powerfully to the development and foundation on correct principles of an *American consciousness*... [R]esolutions... are rules of International Law in the making, for they prepare and accentuate public opinion on the subject of which they treat.⁵¹

Social, psychological, and geographical circumstances bestow life to law. These elements coalesce in the Americas to found a shared sense of regional solidarity on which American international law is based. Legal anti-formalism of this sort is opposed by a formalist legal understanding that conceptualizes international law as a set of legal rules governing international relations. To confer centrality to rules as international law's definitive form of expression means that regional distinctiveness has to be understood as the presence of rules that, in relation to their source or substance, have a regional component. Regional distinctiveness becomes an oxymoron because the nature of an international legal system prescribes a universal scope; a regional rule necessarily entails the fragmentation of the system. In the words of Carlos Calvo: "The international

⁵⁰ "[T]he states of the new world formed a group together with the attributes that are of their own. They have, in effect, a psychology, that is, a spirit, a sentiment, and a mentality, that is common to them. They notably have a sentiment of continental moral solidarism, of fraternity; they have a juridical consciousness of their own; they are pacific, infatuated by justice, idealist, but without falling into utopia." Alejandro Alvarez, *Le Développement du Droit des Gens dans le Nouveau Monde [The Development of the Law of Peoples in the New World]*, 25 TRANSACTIONS OF THE GROTIUS SOCIETY 169, 169 (1940). For an articulation of this professional sensibility at the center, see MARTTI KOSKENNIEMI, *GENTLE CIVILIZAR OF NATIONS: THE RISE AND FALL OF INTERNATIONAL LAW 1870-1960* (2004).

⁵¹ Álvarez, *supra* note 48, at 336.

law that governs the relationship of civilized peoples does not admit distinctions, nor supremacy of any sort, and this is the rule that prevails in my work.”⁵²

The incommensurability between the two perspectives regarding the existence of Latin American international law is manifest not only in the theoretical definition of law and the reality that each definition carves out, but also in the way the theoretical positioning is linked to alternative conceptions of politics and the drawing of the boundary between law and politics. The legal anti-formalist component in the regionalist sensibility blurs the distinction between law and politics by conceiving both as expression of the psychology of American peoples. Moreover, the resulting emphasis on national interdependence and ensuing continental solidarities makes the regionalist sensibility prone to evading agonal politics. For instance, the particularistic sensibility construes the Monroe Doctrine to exemplify a common continental Pan-American solidarity.⁵³

The universalist sensibility, on the other hand, sharply distinguishes law from politics because universal international rules, enacted and abided by the whole international community, set the limit for international politics. According to this approach, the Monroe Doctrine is neither a legal rule nor a good principle for Latin America, because it has not passed through the formal requirements that produce international norms and because it responds to the political hegemonic impulse of the United States. Pursuing regional distinctiveness is bad international politics for Latin America:

It is advisable for the American nations to be represented on the world stage, not as subjects of a regime of exception that they themselves have created, but rather as states with the right to the same treatment as the European powers, with the same rights and duties as the rest of the advanced states of the world, without prejudice with respect to making treaties of continental scope.⁵⁴

Finally, the association between the two professional sensibilities and a distinct preference for one of them in the realm of international politics can also be translated into the language of domestic politics. The particularistic sensibility represented an effort to transpose and at the same time nationalize the modernist

⁵² Carlos Calvo, *Polèmica Calvo-Alcorta [The Calvo-Alcorta Polemic]*, 8 NUESTRA REVISTA DE BUENOS AIRES, 629, 631 (1883). Since then, lawyers sharing a universalistic sensibility have rejected the particularistic view on logical grounds. For instance, Sá Vianna argues (against Alejandro Alvarez) that there is an incongruence in deriving an international law from the specificity of the continent’s problems. He argues: “[i]t seems that the expression [American international law] — a set of American problems or of subject-matters important but to that hemisphere — defines absolutely nothing; all authors, in effect, each time they have to define the science of international law, they consider it as a body of law [Droit], a set of principles, of laws, rules and juridical precepts, but never as a set of problems and its subject-matters, which are far from being considered the object over which law makes feel its impact.” VIANNA, *supra* note 49, at 12. For a contemporary version of this type of critique see JIMÉNEZ DE ARÉCHAGA ET AL., *supra* note 7, at 55: “The vast polemic is sustained in repeated paralogs, because a correct reasoning avoids it for good. If by international law we refer to the set of legal rules governing the relationship among all states, this set of rules can only be one and does not admit another adjective than ‘general’ (or universal).”

⁵³ ALEXANDRE ALVAREZ, *LE DROIT INTERNATIONAL AMÉRICAIN [American International Law]* 145-84 (A. Pedone ed., 1910).

⁵⁴ ANTOKOLETZ, *supra* note 19, at 62-63.

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liberal agenda set forth since the emancipation movement.⁵⁵ Through the language of Latin American international law, the goal of overcoming pre-modern colonial legacies was reasserted in the domestic context by international lawyers who also played the role of intellectuals or politicians. Conversely, the arguments against the regional approach amassed by those who subscribed to the universalistic sensibility were harnessed to support conservative policies at the domestic level.

The general tension between conflicting theories of law and divergent views of international politics in the region also had an equivalent expression in professional projects that were articulated from or linked to particular institutional settings and resources. During the period of disciplinary debate, from the 1880s to the 1950s, international lawyers of both sensibilities occupied the mainstream and the counterpoint, seeking institutional support within the region and in relation to the profession in general.⁵⁶ Differences between lifestyle and everyday politics on the one hand, and larger definitions of politics and culture on the other, played a role in the emergence of international lawyers who, as socially constituted actors confronting specific historical conjunctures, spoke dissimilar and conflicting professional languages.⁵⁷

IV. Conclusion: The politics and inertia of the Latin American tradition

Although this Article looks at the distinctive modes of articulating international law's meaning in the Latin American context, it does not intend, by its rereading of past professional practices as constituting a tradition, to indicate a culturalist reification of locality. What constituted the regional tradition of international law in Latin America was not simply the particularities of place, but the sustained and patterned modes in which Latin Americans disagreed about strategies of international legal appropriation. This is not to say that international law provides a blank slate to be filled by infinite alternative uses and meanings. To the contrary, Latin Americans have faced constraints and unseen costs in their long commitment to international law as the law of the international community.⁵⁸

A Latin American tradition is meant to refer to the presence of sustained conflict over the definition, meanings, and significance of international law, as well as of divergence as to its deployment to deal with problems faced by the region. This Article mapped out three narrative threads or ways to reflect upon the past and distinctiveness of international law in Latin America. The first two -- the popular representation contained in contemporary international law textbooks and the scholarly, detailed accounts present in contemporary monographs devoted to the history of international law in the region -- offer a story of cumulative

⁵⁵ See, e.g., Yepes, *La Contribution*, *supra* note 24, at 700.

⁵⁶ See Becker Lorca, *supra* note 1, at 90 - 95, for an analysis of the professional disputes in various institutional and professional American Scientific Conferences and Conferences of Codification, and the founding of The Inter-American Committee of Jurists.

⁵⁷ Generally speaking, particularist international lawyers shared a Latin-Americanist, left-leaning, modernist, and secular identity; universalists a nationalist, conservative, traditionalist, and Catholic identity.

⁵⁸ In general, both universalists and particularists endorse a Eurocentric project of law, culture, and development for Latin America, reinforcing their elite status and detachment from subordinate classes and their political articulation.

progress and proud participation of the region in the discipline's accomplishments. The glorious mood coexists, however, with a feeling of professional bafflement as to the unforeseen consequences that the resolution of internal division among Latin American international lawyers yielded. That is, fissures appear at certain points of the narrative showing moments of disruption in the discipline's trajectory, as well as showing the urge to minimize the scope and impact of that disruption. Within the confines of the discipline, the story attributing the conclusion of the debate about the existence of a Latin American international law to a professional appeasement achieved through the cooling off of passion under the spell of scientific neutrality has been a plausible representation of the past for newer generations of international lawyers. The third narrative, hidden and forgotten by the first two, provides another picture of the Latin American international legal discipline. This final story tells of a process that did not simply involve the developing of a position regarding the existence of a regional international law, but expressed a tension between two different professional sensibilities, which I have labeled regionalist (or particularist) and universalist. By the end of the 1950s, the particularistic sensibility was harnessed to the Latin American national-developmental project, resulting in the abandonment of the explicit discussion of, and reliance on, the existence of a regional international law for the development of other professional projects, such as providing legal justification for the nationalization of national resources, expropriation in general, and regional schemes of integration. It is precisely this radicalization of the particularistic sensibility that has fallen out of sight in the first two accounts -- narratives that have mainly been uttered by lawyers who shared universalistic sensibilities and joined the tremendous backlash against Latin American developmentalism in the period following the 1970s - 1980s.

The contemporary production of a narrative of professional appeasement at the cost of depoliticization makes the Latin American discipline of international law irrelevant. That power and relevance have moved away from Latin American international lawyers does not mean that the residual traces of international law in the region are deprived of power. Depoliticization does not mean absence of politics. Likewise, the inability to intervene in the construction of the meanings of international law as practiced does not preclude the discourse's operation as a regime of truth. In other words, international law plays a default role in sustaining the hegemonic meanings framed by the universalist counterattack, by obliterating the profession's involvement in those changes, and by removing responsibility for their explanation to the extralegal sphere of politics.

Reappraising the Latin American tradition provides an insight into the current politics of the region and the international legal profession, as well as an opportunity to regain the discipline's politics and relevance, for the obliterated past is still at hand to be retrieved in the name of new professional projects.

