INTERNATIONAL LAW - THE POST MODERN APPROACH TO THE CLASSICS AND THE NEW CHALLENGES

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Summary: Introduction: I. The classics and the post modern approach; II. International law between past and present; III. Is there a distinct system of Inter-American international law?; IV. The new challenges and the role of law in an international institutional and legal system; Final remark.

Introduction

> Une logique juridique et politique à l'oeuvre depuis 1945 dans le droit international contemporain qui fait de lui un droit international providence. C'est un droit qui intervient partout, et qui cherche à combler les deséquilibres économiques, sociaux, écologiques et sanitaires de la planète. Mais ce faisant, il suscite des attentes et contient des promesses, qu'il ne pourra peut-être pas tenir.
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> *Emmanuelle JOUANNET,* À quoi sert le droit international ? Le droit international providence du XXI[e] siècle *(2007)*[1]

THE SCOPE of this three-hour course in two sessions and four items is to provide a glimpse of the current state of international law, as it stands today, between the legacy of the past and the challenges, lying ahead. International law, like any other field of knowledge, cannot be properly understood without taking into account the proper methodological approach: in view of knowing and understanding what happens now, it may be both timely and necessary to focus on what happened before, in order to avoid the need to 'reinvent the wheel', at each new generation. Time plays a role in international law as in other area of knowledge.

The past has to be assessed, not as an end in itself, as just retrospective views will not help solve present issues and help pave the way for new challenges, in the future. It has to be considered as a legacy from which useful tools and guidelines may be drawn, to cope with the challenges lying ahead of us.

This is why this course references the 'post-modern approach': it becomes necessary in view of the fact that there is a substantial transformation of the entire institutional and legal international system under way.[2] The present system of

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[1] Emmanuelle JOUANNET, *À quoi sert le droit international ? Le droit international providence du XIX[e] siècle* (Revue belge de droit international, 2007/1, Bruxelles : Bruylant, p. 5-51) : « L'article propose donc de revenir sur les limites que l'on devrait fixer au droit international pour lui rendre sa véritable force. »

[2] I have extensively dealt with the issues related to the foundations of post-modern international law in P. B. CASELLA, **Fundamentos do direito internacional pós-moderno** (foreword by Hugo CAMINOS, São Paulo : Quartier Latin, 2008).

international law no longer fits into the former strictly inter-state system of so-called 'classic' international law, which was predominantly bilateral, and most focused on rules of mutual abstention, but is moving towards growing multilateral institutionalization – general and specialized international organizations cover most relevant areas of inter-state cooperation, under the heading of so called *parliamentary diplomacy* – featuring international law as an expanding universe, encompassing material cooperation, *with* acknowledgement of the individual as subject of international law, including the international protection of fundamental rights *and* the development of the international institutional and legal framework, putting limits to state sovereignty – as the *jus cogens* rules and *erga omnes* obligations in international law and relations do express.

Not everybody agrees on their existence or on their contents. This is an additional element of complexity for international law: the national views about what it is and how it should work do not always coincide. And, yet international law, as an institutional and legal system, should be a common tool for handling issues that concern both states and other agents in the international arena. In addition to differing national traditions, albeit all claim to be equally valid as 'international law', there are also differing political approaches, which can be traced by the differing foundations proposed as the basis for the system.

Thus, the combined effects of the emergence of the individual as a subject *plus* the progressive reduction of the discretionary performance of state prerogatives, as these tend to no longer go internationally unbound, entails the related consequential issues that may seem, and to a considerable extent are, new. Still, some inputs from the past may well deserve to be revisited. Understanding what international law has been can help us focus on what it can be *and* how it can be. It can also be useful to avoid a lot of the nonsense being said and written on what international law is not, and also allow us to save a lot of time, both in courses and publications in the area of international law.

As the world has changed, the post-modern approach simply tries to reckon with the impact of such changes, in an area such as international law. It is not an end in itself either, but is intended as a tool to help adapt the focus and the contents of international law to present world conditions.

I. The classics and the post-modern approach

> "In due course international legal scholars exhumed a number of early modern writers to share the glory with GROTIUS and ensconced them in a suitable mausoleum : the monumental Carnegie 'Classics of International Law' series (1911-1950). By reproducing and translating any work of any conceivable relevance to the field's origins (twenty-two in all), the series provides the field with a canon that is uncontested because it is substantially unread.' / "International legal scholars know that these fundamental texts are in the stacks of their research libraries, always available and ever undisturbed."

Nicholas ONUF, Tainted by contingency: retelling the story of international law *(2002)*[3]

1. IT IS an easy temptation to deny the past and to claim that those who came before us simply missed the point. Wait until we get there. We will get the job properly done! Things are not as simple as that, it will soon be found out.

No need to wait long to get full acknowledgment of the inanity of such an attitude: this is not only immature, but also unfair, both to the past contributions and towards today's audiences. Just read above. And, in this respect the above-quoted Mr. ONUF (2002),[4] is just an example. He can be claimed not to be a representative one, but that approach, unfortunately, does not seem to be an isolated case. There seem to be people if not honestly believing in such statements, that at least allow these statements to run unchecked.

It may seem needless to stress how much this approach seems to be more widespread than might seem acceptable. And this seems to run unchecked, at least within reach of United States legal and international relations scholars.

A.-M. SLAUGHTER (2000),[5] in accordance with what seems to be the usual American line, literally slaughters both the scope and the contents of international law, as she considers that "at least in the United States, it is virtually impossible to study law outside of its political context. Politics permeates law, even as law justifiably and necessarily holds itself apart. And in international law, perhaps even more than domestic law, the political, economic, and even cultural and social relations among states defines what must be regulated and what can be regulated."[6]

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[3] Nicholas ONUF, *Tainted by contingency : retelling the story of international law* (in **Reframing the international : law, culture, politics**, edited bt Richard FALK, Lester Edwin J. RUIZ and R. B. J. WALKER, New York : Routledge, 2002, chap. 1, pp. 26-45, quoted. p. 27).

[4] N. ONUF (op. cit., 2002, loc. cit.).

[5] Anne-Marie SLAUGHTER, **International law and international relations** (RCADI, 2000, t. 285, pp. 9-250, chap. I, 'the technology : principal theories of international relations', pp. 21-54, quoted. p. 21) : "Why have a course combining international law and international relations ? Surely the two are inextricably intertwined. Compliance with international commitments is a routine part of international relations, as Louis HENKIN famously proclaimed."

[6] A.-M. SLAUGHTER (op. cit., 2000, quoted. p. 21) : "As Hedley BULL puts it : 'International law can contribute to international order by stating the basic rules of coexistence among states only if these rules have some basis in the actual dealings of states with one another". Indeed if this were a course only in international law, we would spend a great deal of time trying to figure out whether international legal rules are nothing or something more than the codified political will of state actors in international relations."

Since international relations to a good extent deal with questions of mutual perceptions – how governments perceive the objectives of other governments – the legal contents may become and usually are secondary in the assessment of such perceptions. But then we are no longer dealing with international law, as it is mixed up with politics and international relations to that extent.

Again, it can be argued that the above quoted texts by Mr. ONUF and Ms. SLAUGHTER are just two examples. But these are mentioned not viewing these two individuals, as individuals, but as the expression of views that to a certain extent are acceptable as good coins, at least in the U.S., and therefore express risks and consequences for the understanding and application of international law, as it is currently lectured and understood in the U.S.

In my view, this is not consistent with international law as it was created and developed, over the last five hundred years. Initially international law was developed in Europe and since independence – late 18th for the U.S. and early 19th century, for (most of) the Spanish speaking countries and also Brazil – it became a European and also American institutional and legal system.

The international system has continued to grow steadily since it became European and American by the end of the first quarter of the 19th century, as a few interesting developments have been added to the original features, like the addition of new subjects of international law of entire continents in the Middle East – the Treaty of Paris, in 1856, added the Ottoman Empire at least partially as a member of the international community – and especially in Asia and Africa, which ensued the de-colonization process after World War II.

From 50 something, the international 'community' jumped to around 200 states, to which are to be added all the existing general and regional international organizations, and the non-governmental organizations of international relevance. But the main change in contemporary international law is its relation towards the individual, as expressed by both sides of the international personality of the individual, on the one hand, including the international protection of fundamental rights, and the international criminal responsibility of individuals on the other, featuring public international law and assessments by international criminal courts, like those featured by the Statute of Rome of 1998 – which some states obnoxiously seem more committed to work against than in favor of its growing acceptance, but represents a relevant step forward in the institutionalization of contemporary international law.

More than simple evidences of frequent mistakes – these two above-quoted authors, ONUF and SLAUGHTER, are not necessarily in bad faith; they may – as stated Humphrey BOGGARD in '*Casablanca'* – simply be "misinformed", i.e., in the precise sense and meaning that they may miss the point on international law, as such. I do not claim that they lack the required education, as the formation in international law properly understood, as it has to be both 'law' and

'international', simultaneously, as extending beyond their own backyard, in and with focus in the United States' view of America.

That international law should be both 'law' and 'international' may seem evident, but it is not so frequently observed. This is my conclusion, as Mr. ONUF sees international law "tainted by contingency" and that there may be substantially differing national views on what international law is and how it should be understood. For instance, Ms. SLAUGHTER, Harvard professor and board officer at the American Society of International Law, only cites English language sources in her 2000 Hague course and the vast majority of authorities she mentions are strictly American sources and references.

Maybe Mr. ONUF and at least some of his American colleagues should read and learn more about international law (beyond the local internal U.S. views thereof), and specialization notwithstanding, also about the history of ideas in the Western world in general. According to Harold BLOOM (2004),[7] before making similar statements as in fact, such an approach, more than simply committing a mistake, risks inducing other people in error: to end viewing the world the same way they seem to do. Assuming, as I did, they are acting in good faith.

One can make his/her own mistakes. The outcome is more serious,[8] however, when one induces other people in error even when not done on purpose. [9] This

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[7] Harold BLOOM, **Onde encontrar a sabedoria ?** (from the original **Where shall wisdom be found ?** © 2004, trad. José Roberto O'SHEA e revisão de Marta Miranda O'SHEA, Rio : Objetiva, 2005) states on "wisdom": that it results from a personal necessity and reflects the search of a knowledge that can render bearable the traumas of growing old, of recovering from grave illness, and from the loss of dear friends; see esp. part i, chap. 3, on "CERVANTES and SHAKESPEARE" (p. 96-138). At the time the Brazilian edition of **Where shall wisdom be found?** was published, H. BLOOM stated in an interview to the newspaper *O Estado de Sao Paulo*, as of 2 October 2005: "we, Americans, now governed by a fascist" – the advantage of a democracy, at least he could make such a statement, and after the damages done, to the world at large and to the U.S. in particular, during his double term (2000-2008), the BUSH years are now gone. The present administration seems to have been inaugurated under a more favorable approach towards international law, as President B. H. OBAMA stated in the first week of his term that the United States are bound to comply with international law: it remains to be assessed how 'international law' is understood and applied, but a better perspective on international law seems to rule in Washington since January 2009. See also H. BLOOM, **O cânone ocidental** (do original **The Western Canon**, © 1994, trad. Marcos SANTARRITA, Rio : Objetiva, 2001), although not always agreeing with his views.

[8] Allan BLOOM describes the process as the 'closing of the American mind'. See his **O declínio da cultura ocidental** (do original **The closing of the American mind**, © 1987, trad. João Alves dos SANTOS, São Paulo : Best Seller, 1989).

[9] Evangelos MOUTSOPOULOS, **Conformisme et déformation** (Paris : Vrin) draws the line between the two : one thing is to err, another to drive other people in error.

seems to be the case with many of his colleagues, not only American law professors,[10] but also by others, some of them abroad as well.

S. FREUD seemed to have anticipated this phenomenon when he described the discomfort (*Unbehagen*) in the civilization – or at least in a certain model and feature of civilization.[11] If the historic process announcing the end of a certain type of civilization is clear, the new paradigm seems yet to be structured, in the context of post-modernity.

2. It is high time to recover knowledge of, and ensure direct access to, the sources of international law. Classic authors, in international law, as in any other domain of knowledge, should not be kept apart, covered with dust and unread. The cynical definition of classics are those references that are revered and quoted, but not read. They are 'classics' because they state parameters deserving to be taken into account.

Try for yourself: read and discover that ever since the forerunners like the medieval and renaissance authors of treaties on war, such as Balthazar AYALA[12], Pierino BELLI[13] and Giovanni da LEGNANO[14] -- more or less anticipated issues

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[10] See Jacob DOLINGER, *Os Estados Unidos perante o direito internacional: a decadência jurídica de uma grande nação* (in the volume **Novas perspectivas do direito internacional contemporâneo : estudos em homenagem ao prof. Celso D. de Albuquerque MELLO**, Rio de Janeiro: Renovar, 2008, p. 83-134).

[11] Sigmund FREUD, **O mal estar na civilização** (from the German original **Das Unbehagen in der Kultur** (1930) [1929] "edição standard brasileira das obras psicológicas completas de Sigmund FREUD, com os comentários e notas de James STRACHEY, em colab. com Anna FREUD, assist. por Alix STRACHEY e Alan TYSON", vol. XXI **O futuro de uma ilusão - O mal estar na civilização e outros trabalhos (1927-1931)** translated from the German by José Octávio de Aguiar ABREU, rev. técnica de Walderedo Ismael de OLIVEIRA, Rio : Imago, 1ª ed. bras., 1974, pp. 73 ss., exclama, no final do cap. V, cit., p. 138) : "The present cultural state of the United States of America offers us a good opportunity to study the damages to civilization, that are to be afeared. I Will, however, avoid the temptation of going into a criticism of American civilization, as I do not intend to give the impression of using American methods myself."

[12] Balthazar AYALA, **De jure et officiis bellicis et disciplina militari** (edited by John Westlake. 2 vols. Washington, 1912. [No. 2 of the series.] Vol. I. photographic reproduction of the edition of 1582, with a portrait of Ayala, introduction by John Westlake, &c. xxvii+226 pages. Vol.11. translation of the text, by John Pawley Bate. xii+250 pages).

[13] Pierino BELLI, **De re militari et bello tractatus** (2 vols. Oxford, 1936. [No. 18 of the series.] Vol**.** I. photographic reproduction of the edition of 1563, with introduction by Arrigo Cavaglieri, and a portrait of Belli. 293+151 pages. Vol. II. translation of the text by Herbert C. Nutting, with a translation of the introduction, and indexes. 32a+viii+4ii pages).

[14] Giovanni da LEGNANO, **De bello, de repraesaliis et de duello** (edited by Sir T. Erskine Holland, Oxford, 1917. xxxiii+458 pages. [No. 8 of the series.] Collotype of the Bologna Manuscript of *circa* 1390, with an extended and revised text, introduction, list of

that remain timely in our very day. That they dealt with relevant questions, and some remain valid and deserve to be taken into account. For instance, what are the limits in war? Can any means be used provided success is reached?

Just to illustrate how timely they remain, to their views can be opposed the analysis of "war, aggression and self-defense" such as it is developed by Yoran DINSTEIN (1988, 2004)[15] or by Lori DAMROSCH *et al*. (1991) or by the same Lori DAMROSCH, in her Hague course (1997).[16] More than creating entirely new stuff, most of the intellectual work is a change on interpretation of reality.

Also, these war treaty authors more or less directly influenced subsequent ones, who progressively started dealing with what was to be later properly known as 'international law'. The issues related to the limits of the use of force remain timely and present in today's international law, notwithstanding the centuries elapsed since they wrote. The present-day scholarship has not substantially innovated on the topic, and the practice has not substantially improved either.

French authors, like GARDOT, will claim Jean BODIN[17] would deserve his place among the founding fathers of international law. One may agree with this statement or not. To the extent that BODIN put all the emphasis on the role of sovereignty,[18] is it debatable the extent that he can be considered an 'international' legal scholar?

Issues related to war, and its conduct, were to remain at the core of any subsequent international legal system: this is not otherwise within the United Nations framework, where limits to the unilateral use of force have been attempted since its inception. Keeping war and armed attacks under the control of

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authorities cited, &c, by Sir T. Erskine Holland, together with photograph of Legnano's Tomb. translation of the text, by J. L. Brierly. photographic reproduction of the first edition (1477).

[15] Yoran DINSTEIN, **Guerra, agressão e legítima defesa** (from the original **War, aggression and self-defence** © 1988, 3rd English ed., 2001, transl. by Mauro Raposo de MELLO, rev. by Guilherme de Assis ALMEIDA, Barueri : Manole, 3ª ed., 2004).

[16] Lori F. DAMROSCH & David J. SCHEFFER (ed. by), **Law and force in the new international order** (Boulder / Oxford : Westview Press, 1991) ; Lori Fisler DAMROSCH, at the Hague, **Enforcing international law through non-forcible measures** (RCADI – Collected Courses of the Academy of International Law, 1997, t. 269, pp. 9-250).

[17] Jean BODIN, **Les six livres de la République** (original edition Paris : Jacques Du Puys, 1576, 10th. ed., publshed in Lyon : Gabriel Cartier, 1593, reprinted 1594, Corpus des oeuvres de philosophie en langue française, Paris : Fayard, 1986, 6 vols.). A. GARDOT, lectured at the Hague, emphasizing the place Jean BODIN should have among founder of international law **Jean Bodin : sa place parmi les fondateurs du droit international** (RCADI, 1934, v. 50, pp. 545-748).

[18] J. BODIN (op. cit., 1576, ed. cit., esp. Book I, chapters VIII '*de la souveraineté*' and X '*des vrayes marques de souveraineté*'.

an international legal and institutional framework remains a crucial issue, to a certain extent still not fully settled.

3. Attempting to provide answers to these matters were of concern not only for the past, but belong to core issues, recurring in human nature, in its quest for a meaningful life, whether as individuals, socially and politically organized national groups, or institutional and legal devices for international life and relations of such national groups *and their citizens*.

The addition of the 'human' parameter to international law and relations is not as new as it might seem. This was already a matter of concern for international legal scholars, such as John WESTLAKE (1828-1913)[19] and Georges SCELLE (1878-1961), who went even further, when he wrote (1934)[20] that individuals are the only subjects of international law, and later (1948),[21] forwarded his thesis that: "international law in the most comprehensive understanding of the term is the legal order of the community of peoples or the universal society of men."[22]

Charles G. FENWICK (1948)[23] noted that the use of the term 'subject' deserves to be precise.[24].This is not always the case.[25]

4. The post-modern approach becomes necessary to cope with the need to adjust the old view of international law as a strictly interstate system, towards the present condition of the creation and the insertion of an international institutional and legal system in a multicultural world.[26] The acknowledgment of diversity of

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[19] According to John WESTLAKE, international law was defined as the science about what one state *and its subjects* can do or should do *vis-à-vis* other states *and their subjects*. See WESTLAKE's, **International law : Peace** ("foreword") and also Alexander PEARCE HIGGINS, **La contribution de quatre grands juristes britanniques au droit international** (RCADI – Collected Courses of the Academy of International Law, 1932, t. 40, pp. 1-86, 'John Westlake', pp. 23-43).

[20] Georges SCELLE, **Précis du droit des gens** (Paris : Sirey, 1934).

[21] Georges SCELLE, **Manuel de droit international public** (Paris : Sirey, 1948).

[22] G. SCELLE (op. cit., p. 4).

[23] Charles G. FENWICK, **International law** (New York : Appleton, Century, Crofts Inc., 1948).

[24] C. G. FENWICK (op. cit., 1948, p. 129) notes that " '*Subject'* as the term is used in general jurisprudence, are the persons to whom the law attributes rights and duties ; '*objects*' are the things in respect to which rights are held and duties imposed."

[25] C. G. FENWICK (op. cit., 1948, loc. cit.) "But many writers use the terms '*subjects*', '*persons*', '*international personality*' without careful distinctions, with the result that some writers may be cited on both sides of the controversy."

[26] There are extensive references available on the topic. See : Société française pour le droit international / Journée franco-allemande, **Droit international et diversité des cultures juridiques / International and diversity of legal cultures** (Paris : Pedone, 2008) ; René-Jean DUPUY (ed.), **The future of international law in a multicultural**

cultures as a valuable element for the construction of a truly international system is aptly pointed by C. KESSEDJIAN (2008).[27]

The issues of the individual in international law and the limits to the sovereignty of the state as a requirement to the very existence of an effective system of international law remain present and necessary to deal with.

5. Moving towards what would become international law properly, we then meet its grandparents, Francisco de VITORIA[28], Francisco SUAREZ[29] and Alberico GENTILI:[30] they had to face the questions of the day, but were also

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world / L'avenir du droit international dans un monde multiculturel (The Hague : Academy of International Law, workshop 1983, published 1984).

[27] Catherine KESSEDJIAN, *L'influence de la culture sur le droit international et ses développements* (in **Culture and international law**, ed. by Paul MEERTS, « this book is based on the annual conference From Peace to Justice 'Culture and International Law' held on 16 and 17 April 2007 », The Hague : Hague Academic Press, 2008, pp. 23-41, quoted 'conclusion', p. 41) : « Si nous acceptons l'idée que la diversité culturelle est désormais la valeur centrale des sociétés terriennes et de leurs inter-relations, alors les juristes doivent changer de perspective. Nous devons repenser la fragmentation comme une valeur et non comme une plaie. Nous devons accepter le pluralisme juridique, sans forcément abandonner toute idée de hiérarchie. »

[28] Francisco de VITÓRIA, **Political writings** (edited by Anthony PAGDEN e Jeremy LAWRANCE, "Cambridge texts in the history of political thought", Cambridge : UP, © 1991, 1st. publ., 1991) ; or also F. de VITÓRIA, **Leçons sur le pouvoir politique** (intr., trad. et notes par M. BARBIER, Paris : Vrin, 1980) ; or also, F. de VITÓRIA, **Obras : relectiones teológicas** (ed. crítica, versão espanhola, intr. geral Pe. Teófilo URDANOZ, Madri : BAC, 1960). The Mexican international lawyer A. GOMEZ ROBLEDO, in his Hague course, **Le *jus cogens* international : sa génèse, sa nature, ses fonctions** (RCADI, 1981, t. 172, pp. 9-217).

VICTORIA, Franciscus de, **Relectiones: De Indis and De jure belli** (Edited by Ernest NYS, Washington : Classics of International Law, 1917. 500 pages. vol. 7 of the series. Introduction by Ernest NYS, with translation by John Pawley BATE. Translation of the Text, by John Pawley BATE. Revised Text, with Prefatory Remarks, List of Errata, and Index of Authors Cited, by Herbert F. WRIGHT, and a Photographic Reproduction of Simon's Edition (1696).

In his lesson on civil power **De potestate civili** emphasized VICTORIA: "the law of nations is not just a pact or a convention among men, but has equally the force of law." (...) "Consequently, when dealing with serious questions, no country can deem itself unbound from the law of nations, as this is placed by the authority of the entire world".

[29] Francisco SUAREZ, **Selections from Three Works** (2 vols. Oxford, 1944. [No. 20 of the series.] Vol. I. photographic reproduction of the selections from the original editions, a List of errata, and a portrait of Suarez. xii-f 428 pages. Vol. II. English version of the texts, prepared by Gladys L. Williams, A. Brown and J. Waldron, with certain revisions by Henry Davis, S.J.; together with an Introduction by James Brown Scott, an Analytical Table of Contents, Indexes, and a Portrait of Suarez. lxxvi+915 pages).

[30] Alberico GENTILI, **De iure belli libri tres** (2 vols. Oxford, 1933. [No. 16 of the series.] Vol. I. A Photographic Reproduction of the Edition of 1612, a list of Errata, and a Photograph of a Statue to Gentili. x+viii+742 pages. Vol. II. A Translation of the Text, by John C. Rolfe, with an Introduction by Coleman Phillipson, and Indexes by John C. Rolfe.

paving the way for the subsequent evolution of the subject. The end of universalism that marked the medieval era, led them to attempt building concepts of internationalism.

Within roughly more than a century, counted from the publication of the **Relectiones theologicae** (1557) of Francisco de VITORIA, down to Samuel PUFENDORF's **De jure naturae et gentium** (1672),[31] were published the treaties of VAZQUEZ DE MENCHACA, B. AYALA, F. SUAREZ, A. GENTILI, Richard ZOUCH[32] and the works of the father of international law, Hugh GROTIUS.[33]

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li+vi+479 pages) ; A. GENTILI, **De legationibus libri tres** (2 vols. New York, 1924. [No. 12 of the series.] Vol. I. A Photographic Reproduction of the Edition of 1594, with an Introduction by Ernest Nys, and a List of Errata. 38a+xvi+233 pages. Vol**.** II. A Translation of the Text, by Gordon J. Laing, with translation (by E. H. Zeydel) of Introduction by Ernest Nys, and an Index of Authors Cited by Herbert F. Wright. 38a+x+208 pages) ; A. GENTILI, **Hispanicae advocationis libri duo** (2 vols. New York, 1921. [No. 9 of the series.] Vol. I. A Photographic Reproduction of the Edition of 1661, with an Introduction by Frank Frost Abbott, and a List of Errata. 44a-f xvi+274 pages. Vol. II. A Translation of the Text, by Frank Frost Abbott, with an Index of Authors by Arthur Williams. i2a+x+284 pages).

[31] Samuel PUFENDORF, **De officio hominis et civis juxta legem naturalem libri duo** (2 vols. New York, r927. [No. 10 of the series] Vol. I. photographic reproduction of the edition of 1682, with introduction by Walther Schücking, and List of errata. 30+XX+167 pages. Vol. II. translation of the text, by Frank Gardner Moore, with translation (by Herbert F. Wright) Introduction by Walther Schüicking, and Index by Herbert F. Wright. 26a+xii+i5o pages) ; S. PUFENDORF, **Elementorum jurisprudentiae universalis libri duo** (2 vols. [No. 15 of the series.] Oxford, 1931. Vol. I. photographic reproduction of the edition of 1672, with introduction by Hans Wehberg. xxvi+377 pages. Vol. II. translation of the text, by William Abbott Oldfather. translation of the introduction, by Edwin H. Zeydel. xxiii+304 pages, index) ; S. PUFENDORF, **De jure naturae et gentium libri octo** (2 vols. [No. 17 of the series.] Oxford, T934. Vol. I. photographic reproduction of the edition of 1688, with introduction by Walter Simons, a List of errata, the text of the quotations from Greek authors, and a portrait of Pufendorf. 66a+viii+1,002 pages. Vol**.** II. translation of the text, by C. H. and W. A. Oldfather, with translation of the introduction, List of Classical Authors and Translations, and Indexes. 64a+xii+1,465 pages).

[32] Richard ZOUCHE, **Juris et judicii fecialis, sive juris inter gentes, et quaestionum de eodem explicatio** (edited by Sir T. Erskine Holland. 2 vols. Washington, igir. [No. 1 of the series.] Vol. I. photographic reproduction of the First edition (1650), with introduction, list of errata, and table of authors, by Sir T. Erskine Holland, together with portrait of Zouche. xvi+ 204 pages. Vol. II. translation of the text, by J. L. Brierly. xvii+186 pages).

[33] Hugo GROTIUS, **De jure belli ac pacis libri tres** (2 vols. [No. 3 of the series.] Washington, 1913 Vol**.** I. photographic reproduction of the edition of 1646, with a portrait of Grotius. xxiv+663 pages. Vol. II. translation of the text, by Francis W. Kelsey, with the collaboration of Arthur E. R. Boak, Henry A. Sanders, Jesse S. Reeves, and Herbert F. Wright, with introduction by James Brown Scott. Oxford, 1925. xlvi+946 pages).

6. Down the road, not forgetting Samuel RACHEL,[34] international law was progressively structured as a proper system, and as such, is both framed and reflected in the works published by Cornelius van BYNKERSHOEK,[35] Christian von WOLFF,[36] and Emer de VATTEL.[37] The latter's relevant contribution to consolidation of classical international law, largely influenced the ideas of his time, and has been historically one of the most read authors in this field.[38]

Getting closer in time to us, G. F. von MARTENS started the so-called historical approach to international law. Von MARTENS has to be mentioned as an author and also as codifier of treaties and documents, as materials for the study and knowledge of international law.

7. Do get a glimpse beyond the most usual references and check the critical bibliography of international law (*bibliographie raisonnée du droit des gens*)

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[34] Samuel RACHEL, **De jure naturae et gentium dissertationes** (edited by Ludwig von Bar. 2 vols. Washington, 1916. [No. 5 of the series.] Vol. I. A Photographic Reproduction of the Edition of 1676, with portrait of Rachel, Introduction by Ludwig von Bar, and List of Errata. i6a+x+33S pages. Vol. II. A Translation of the Text, by John Pawley Bate, with Index of Authors Cited. i6a+iv-t-233 pages).

[35] Cornelius van BYNKERSHOEK, **De dominio maris** (I vol. New York, 1923. 108+81 pages. **[No.** 11 of the series.] Introduction by James Brown Scott. Translation of the Text, by Ralph Van Deman Magoffin. Photographic Reproduction of the Edition of 1744. Index of Authors Cited and a List of Errata in the t744 Edition, by Herbert F. Wright) ; C. van BYNKERSHOEK, **De foro legatorum (**"A Monograph on the Jurisdiction over Ambassadors" 1 vol. Oxford, 1946. [No. 21 of the series.] Introduction by Jan de Louter, photographic reproduction of the text of r 744, with a list of the errata occurring therein, translation of the text by Gordon J. Laing, and Indexes) ; C. van BYNKERSHOEK, **Quaestionum juris publici libri duo** (2 vols. [No. 14 of the series.] Oxford, 1930. Vol. I. A Photographic Reproduction of the Edition of 1737, with a portrait of van Bynkershoek. xxiv+417 pages. Vol. II. A Translation of the Text, by Tenney Frank, with an Introduction by J. de Louter. xlvi+304 pages, index).

[36] Christian von WOLFF, **Jus gentium methodo scientifica pertractatum** (2 vols. [No. 13 of the series.] Oxford, 1934. Vol. I. photographic reproduction of the edition of 1764, with introduction by Otfried Nippold, List of errata, and a portrait of Wolff, lvi+411 pages. Vol. II. translation of the text, by Joseph H. Drake, with Translation (by Francis J. Hemeit). Introduction by Otfried Nippold, and a portrait of Wolff, lii+565 pages).

[37] Emer de VATTEL, **Le droit des gens** (3 vols. Washington, **1916.** [No. **4 of** the series.] Vol. I. photographic reproduction of Books I and II of the First Edition (1758), with portrait of Vattel and Introduction by Albert de Lapradelle. lix+541 pages. Vol. II. photographic reproduction of Books III and IV of the First Edition (1758). xxiv-f 376 pages. Vol. III. translation of the text, by Charles G. Fenwick, with translation (by G. D. Gregory). Introduction by Albert de Lapradelle. lxxxviii+398 pages).

[38] VATTEL's contribution has been assessed by Emmanuelle JOUANNET, **Emer de Vattel et l'émergence doctrinale du droit international classique** (Paris : Pedone, 1998) showing the extent of the relevance of the contribution of VATTEL for the so-called "emergence of classical international law scholarship". See also Jean GRAVEN, **Le difficile progrès du règne de la paix internationale par le droit** (Paris : Pedone, 1970) for an assessment of VATTEL's ideas in the foreign policy of revolutionary France.

extending for fifty-odd pages at the end of the second volume of the 1858 edition of von MARTENS, **Précis du droit des gens moderne de l'Europe** (1788).[39] At the middle of the XIXth century a "critical bibliography" of international law extended for over fifty pages! American law professors had barely started to publish at the time, and yet international law already existed!

Discover less often quoted but not less relevant classical international law authors, such as Johann Wolfgang TEXTOR,[40] Jean-Jacques BURLAMAQUI,[41] and Johann Kaspar BUNTSCHLI.[42] The codification of international law had a relevant landmark with his work.

8. There are excellent international legal scholars of different nationalities, many of which were aware of the contribution of both the past and the contemporary authors, and quoted each other, in late nineteenth and early twentieth centuries. Just try some of them, like the Russian Fodor de MARTENS,[43] the American Henry WHEATON, the Scot James LORRIMER, the Englishmen John WESTLAKE and others.

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[39] Georg-Friedrich von MARTENS, **Précis du droit des gens moderne de l'Europe** (first version, initially published in Latin, 1785, first complete version published in French, 1788, « nouvelle édition revue, accompagnée des notes de PINHEIRO-FERREIRA, précédée d'une introduction et completée » par l'EXPOSITION DES DOCTRINES DES PUBLICISTES CONTEMPORAINS par M. C. VERGÉ, Paris : Guillaumin, 1858, vol. I : LVIII + 438 pages; vol. II : 456 pages).

[40] Johann Wolfgang TEXTOR, **Synopsis juris gentium** (edited by Ludwig von Bar. 2 vols. Washington, 1916. [No. 6 of the series.] Vol. I. photographic reproduction of the First edition (1680), with a portrait of Textor. introduction by Ludwig von Bar, and list of errata. 28a+vi+i48+i68 pages. Vol. II. translation of the text, by John Pawley Bate, translation of the introduction, and an Index of Authors Cited. 26a+v+34 pages).

[41] J. J. BURLAMAQUI, **Principes du droit naturel** (facsimilar edition following the Paris : Janet et Cotelle, 1821, edition, reprinted Caen : Centre de Philosophie poltique et juridique, 1989) : J. J. BURLAMAQUI, **Principes du droit politique** (facsimilar edition, following the Amsterdam : chez Zacharie Chatelain, 1751, edition, in 2 vols., reprinted Caen : Centre de Philosophie poltique et juridique, 1984, 2 vols.).

[42] Johann Kaspar BLUNTSCHLI, **Le droit international codifié** (1ère éd., 1869 ; 2^{e} éd., 1873 ; trad. de l'allemand par M. C. LARDY, Paris : Guillaumin, 3^{e} éd., 1881).

[43] Fiodor de MARTENS, **Traité de droit international** (originally published in Russian, 1882, French translation by Alfred LÉO, Paris : Librairie Marescq, , 3 vols., vol. I. partie générale, 1883, quoted p. 16, note 1) mentions that it is useful to remember when governments expressly state their commitment to international law, as, according to him, did the United States of America at the very moment of the declaration of independence (*au moment même de la déclaration de leur indépendance*) as well as Brazil, in 1820 (*sic*) for 1822, presumably and then further states : « En Angleterre, d'après BLACKSTONE, **Commentaries on the Laws of England** (liv. IV, ch. V) le droit international est considéré depuis longtemps comme faisant partie inséparable du droit anglais. Voir PHILLIMORE, **Commentaries** (1-76). »

Draw the list. You can go on a country by country basis,[44] but many relevant names may be missed.

9. No matter what some may argue and write, international law does not begin in the second half of the twentieth century. As distinguished an American international legal scholar as Henry WHEATON (1785-1848) was in his time and cultural context, he managed his classics and quoted from the main authors of the past – GROTIUS, VATTEL and others – he was published in London[45] and thereafter his **Elements du droit international** translated into French were published by Brockhaus, in Leipzig (third edition, 1858, in two volumes). Globalization does not start only in the second half of the XXth. century either!

No matter what the so-called realists in both international law and relations may claim as foundation to their theories, they do miss the point. Are they simply misinformed or acting in conformity with a purpose? As they seem to proliferate in the U.S. and abroad, the danger of thinking that all international legal scholarship, before the present generation of American law professors was simply non-existent, becomes more widespread,. The forerunners do not seem to deserve to be extensively quoted. A few mentions will occur sometimes just in a footnote. VITORIA turns up, although he lectured in the first half of the sixteenth century. So why not also mid eighteenth century VATTEL, who was precisely dealing with some of the same issues, albeit he published his book in French in 1758. Not by chance same have been republished ever since.

10. Check around for yourself and discover that arrogance and stupidity can be almost limitless. This self-sufficient attitude can be simultaneously arrogant and stupid, to the point of denying the relevance of the contribution of other

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[44] Among XIXth century international legal scholars, you may find out that you may enjoy reading, on a rather sketchy Western-focused, country basis : Carlos CALVO (Argentina) ; Henri BONFILS, Frantz DESPAGNET, Chrétien PIÉDELIÈVRE and PRADIER-FODÉRÉ (France) ; J. L. KLUBBER, A. W. HEFFTER, Franz von HOLTZENDORFF (Germany) ; William Edward HALL, Thomas Erskine HOLLAND, James LORIMER, Robert PHILLMORE, John WESTLAKE, Travers TWISS (Great Britain) ; CARNAZZA-AMARI, Pasquale FIORE (Italy) ; Silvestre PINHEIRO FERREIRA (Portugal) ; Fodor de MARTENS (Russia) ; Johann Kaspar BLUNTSCHLI, Alphonse RIVIER (Switzerland) ; Charles CHENEY HYDE, DUDLEY-FIELD, Henry HALLECK, James KENT, John Bassett MOORE, Francis WHARTON, Henry WHEATON, Marjorie M. WHITEMAN, Theodore WOOLSEY (United States of America) ; Andrés BELLO (Venezuela).

[45] Henry WHEATON, **Elements of International Law** (Classics of International Law [No. 19 of the series.] Oxford, 1936. xliv+642 pages. "Literal Reproduction of the Edition of 1866 by Richard Henry DANA Jr., with Notes, an Introduction, and Sketch of the Life of DANA by George Grafton WILSON, together with List of Cases Cited, Indexes, and Bibliography.

authors, from other generations and nationalities.[46] You do not need to be surrounded by wasteland in order to put your contribution in evidence.

At the present stage of international law it would seem both useless and counterproductive to attempt to deny the past and the legacy thereof, in order to reinvent the wheel every time a new issue turns up to be faced and regulated by international law.

The usual 'modern' approach tended to deny the past and present itself as the ultimate achievement and the reference to be taken into account. This is dated by the present reality and the complexity of its unfoldings.

11. The proposed 'post-modern' approach would take the past into account, and assess (honestly and openly) its contribution . There are new issues, and these may require new tools,, but the dialogue with the sources may be more than simply a learning exercise: it may be useful to get to the point, and may help shorten the way, in the effort to cope with the new challenges facing international law in the present century and beyond.

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[46] From late XIXth to the XXth century the list, gets impressive, even if just a few names are to be quoted, also on a country basis : Julio BARBERIS, Julio BARBOZA, Antonio BOGGIANO, Hugo CAMINOS, Ernesto J. REY CARO (Argentina) ; James CRAWFORD (Australia) ; Alfred von VERDROSS, Hans KELSEN, Ignaz SEIDL-HOHENVELDERN, Karl ZEMANEK (Austria) ; Albéric ROLIN, Charles de VISSCHER, Jean SALMON (Belgium) ; Lafayette RODRIGUES PEREIRA, M. A. de Souza SÁ VIANNA, Epitácio PESSOA, Clóvis BEVILÁQUA, Rodrigo OCTÁVIO, Raul PEDERNEIRAS, Luiz de FARO Junior, C. A. DUNSHEE de ABRANCHES, Ilmar PENNA MARINHO, José SETTE CÂMARA, Gerson Britto de MELLO BOSON, Celso D. de Albuquerque MELLO, A. A. CANCADO TRINDADE, Vicente MAROTTA RANGEL, Adherbal MEIRA MATTOS (Brazil) ; Boutros BOUTROS-GHALI, Ibrahim SHIHATA, Abdullah EL-ERIAN, M. Kamal YASSEEN (Egypt); Suzanne BASTID, René-Jean DUPUY, Pierre-Marie DUPUY, Paul FAUCHILLE, Charles ROUSSEAU, Georges SCELLE, Marcel SIBERT, Hubert THIERRY, Michel VIRALLY (France) ; Franz von LISZT, Th. NIEMEYER, Karl STRUPP, Walter SCHÜCKING, Wilhelm WENGLER, Rudolf BERNHARDT, Christian TOMUSCHAT, Georg RESS, Rüdiger WOLFRUM, Jochen Abr. FROWEIN (Germany); Jan SPIROPOULOS, Nicolas POLITIS, Constantine EUSTATHIADES, Emmanuel ROUCOUNNAS (Greece) ; Shabtai ROSENNE, Yoram DINSTEIN (Israel) ; Giulio DIENA, Dionisio ANZILOTTI, SANTI ROMANO, Roberto AGO, Rolando QUADRI, Prospero FEDOZZI, Riccardo MONACO, Giuseppe SPERDUTI, Benedetto CONFORTI, Francesco CAPOTORTI, Antonio CASSESE (Italy) ; Shigeru ODA (Japan) ; Manfred LACHS, K. SKUBISZEWSKI (Poland) ; Grigory TUNKIN (Russia) ; C. BARCIA TRELLES, Antonio TRUYOL Y SERRA, J. A. PASTOR RIDRUEJO, Mamuel DIEZ de VELASCO, J. A. CARRILLO SALCEDO, J. M. CASTRO RYAL (Spain) ; P. GUGGENHEIM (Switzerland) ; Ian BROWNLIE, Robert JENNINGS, Arnold McNAIR, Alexander PEARCE HIGGINS, Lassa Frances Lawrence OPPENHEIM, Hersch LAUTERPACHT, Malcolm N. SHAW (United Kingdom).

The post-modern approach may also help lower the tension between past and present, as the dialogue flows from the ancient sources towards the outstanding challenges. It is advisable in order to better assess the needs and the outcome: it does not have to deny the forerunners, and dump them out. Enough with such short-sightedness. Dialoguing with the sources – the 'classics' – can be considerably more useful and effective, in order to face and cope with new issues. And this is under way.

II. International law between past and present

> Il est déraisonnable de la part d'hommes dont l'esprit est fixé seulement sur le présent de sous-estimer l'influence durable du droit international.
>
> *Alexander PEARCE HIGGINS* (1932)[47]

12. NO MATTER what has been said and done, the contribution of the classics – be it in international law, or other areas of knowledge – deserves to be taken into account. A 'classic' is acknowledged as such – if and when acknowledged – for having been able to overcome the current day issues and get a glimpse beyond that. It focuses on a wider approach, and also one that can last. That's why PLATO and other philosophers are republished and deserve to be read and meditated. Other thinkers, in other areas of knowledge also deserve to be read and meditated; as the point goes, herein, for the so-called 'classics' of international law.

No favor is done. They deserve to be read not just because they are old but because they have not only dealt with the questions of their times and contexts, but have been able to face issues that, to a considerable extent, remain present and relevant. They are classics because they are also necessary and present in our times. And they can be useful for us to handle issues that we have to cope with.

13. Civilization, as a process, is built on canons, and these extend from the fundamental issues, down to comity rules.[48] Two warnings are to be made: avoid simply taking the Western standard as the only possible expression of

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[47] Alexander PEARCE HIGGINS, **La contribution de quatre grands juristes britanniques au droit international** (RCADI – Collected Courses of the Academy of International Law, 1932, t. 40, pp. 1-86, p. 63) : "Cette influence a, souvent dans le passé, été tranquillement ignorée ou brutalement écartée, mais aucun état ne s'est risqué à déclarer qu'il n'en tenait pas compte."

[48] Norbert ELIAS emphasizes civilization as a process, in his **La civilisation des moeurs** (originally published in German, **Über den Prozess der Zivilisation** © 1969, translated into French by Pierre KAMNITZER, Paris : Calmann-Lévy, © 1973, reprinted. 1999).

international law.[49] Although its parameters can be updated, they do not need to be reinvented by each generation.

The original pattern was not bad: the classics were not ignored in the original approach to international law. Each new generation took hold of the works of the predecessors and worked with them..

14. There was a sense of continuity, and on-going dialogue: what had been done before could be useful to pave the way for the present needs and prepare for what was expected to come. Knowledge flows, and can be shared.

The image of the dwarfs seated on the shoulders of giants, inherited from Middle Age scholars was not deprived of sense: choosing a reliable giant to sit on his shoulders might allow a new author to reach a further sight of what was going on.

15. In both England and the United States, international law was considered to be 'part of the law of the land'. The conceptual validity of the theory of incorporation can be argued, but the expression was reflected in both court practice and the legal scholarly approach.

BLACKSTONE was reflecting a consolidated view, by the time he wrote in his **Commentaries on the Laws of England** (1765-1769) that "the law of nations – each time is raised a question concerning its competence – is adopted here, to the largest extent, as an integral part of the national legal system."[50]

16. Along the XVIIIth century and the first half of the XIXth century, the development of classic international law in the Anglo-American context, in accordance with the concept of BLACKSTONE, was carried on by several generations and dominated by theories of natural law. Such theories were adopted into national law, first directly, due to the influence of the main authors of the

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[49] Norbert ELIAS, **La civilisation des moeurs** (première partie, 'culture et civilisation', cap. i, pp. 11-51, cit. pp. 11-14) : "quand on examine la fonction générale de la notion de 'civilisation', quand on recherche l'élément permettant de qualifier telles attitudes ou actions humaines de 'civilisées', on découvre d'abord quelque chose de très simple : l'expression de la conscience occidentale, on pourrait dire le sentiment national occidental. En effet le terme résume l'avance que la société occidentale des deux ou trois derniers siècles croit avoir prise sur les siècles précédents et sur les sociétés contemporaines plus 'primitives'. C'est par ce même terme que la société occidentale tente de caractériser ce qui la singularise, ce dont elle est fière : le développement de *sa* technique, *ses* règles de savoir-vivre, l'évolution de *sa* connaissance scientifique et de *sa* vision du monde, et beaucoup d'autres choses de ce genre."

[50] BLACKSTONE, **Commentaries on the Laws of England** (1765-1769, vol. IV, p. 67).

natural law current, PUFENDORF, BARBEYRAC and BURLAMAQUI, and also indirectly, by eclectic authors such as VATTEL.[51]

Later on, during the XIXth century, the Anglo-American practice of international law growingly set aside the features of natural law, and progressively adopted as a parameter the observance of custom, as sanctioned by state practice, and accompanied by the acknowledgment of the consent of the state towards that specific issue.[52]

17. In the United States, according to E. DICKINSON (1932), international law was viewed as necessarily a subdivision of internal national law in the XVIIIth century, as both systems were considered to support each other in their respective areas based on the unchanging principles of natural justice. Throughout the XIXth century, due to changes in the prevailing concepts of law and the limits imposed on the judicial methods, the doctrine of incorporation was applied in more modest proportions.[53]

The classics in international law, as in other areas of knowledge, may be deemed to be such because they are revered but left unread. This is the cynical definition of classics: authors quoted, but not read. At least they are not read in the text. Maybe acquaintance with them is reached – if any at all – from excerpts; from syllabuses, from quotations in case-books.

18. But the classics include the works connected with the history and development of international law, as is the case under review. Why were they republished? Because it was deemed to be useful, when this was undertaken by the Carnegie Institution of Washington in 1906, at the suggestion of one

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[51] Edwin D. DICKINSON, **L'interprétation et l'application du droit international dans les pays anglo-américains** (RCADI, 1932, t. 40, pp. 305-395, chapter II 'le processus régional dans les tribunaux anglo-américains', pp. 328349, quoted p. 336) : « L'influence des théoriciens du droit naturel fur encore manifeste pendant toute la première partie du XIX^{e} siècle, aujourd'hui même on ne peut se dispenser d'analyser leur contribution si l'on veut comprendre pleinement la doctrine de l'incorporation. »

[52] E. D. DICKINSON (op. cit., 1932, ch. 2, quoted p. 344) : « Parmi les sources du droit international au XVIII^{e} siècle les écrits des principaux publicistes constituèrent réellement la plus importante. Ce fur principalement dans leurs traités que le droit naturel et le droit des gens firent l'objet d'une présentation doctrinale. Au XIX^{e} siècle on eu recours de plus en plus à une accumulation de précedents rélatifs aux usages et à la pratique. Les traités ne furent plus consultés en tant que présentant l'exposé des principes naturels, mais en tant que susceptibles de fournir un résumé de la coutume. »

[53] E. D. DICKINSON (op. cit., 1932, ch. 2, quoted p. 344) : « Elle prit un caractère analogue à celui de la doctrine anglo-américaine moderne qui sert de base au droit international privé. Sous sa forme moderne, elle se bornatit à spécifier que le droit national gouvernant les questions de droit international devait être tirée, en l'absence d'un texte légal, d'une décision administrative ou d'un précedent judiciaire applicables, des principes généraux du droit international que l'on pourrait considérer comme ayant reçu, expréssement ou implicitement, l'adhésion du pays. »

outstanding American international legal scholar, James Brown SCOTT, then Solicitor for the Department of State. Under his supervision as General Editor the series was published. In 1917, the project was transferred to the Carnegie Endowment for International Peace and the publication of the series is being continued by the Endowment's Division of International Law.

The justification for the republication was clearly assessed and sighted by the Editors: "the Classics were undertaken principally on account of the difficulty of procuring the texts in convenient form for scientific study. The text of each author in a language other than English is reproduced photographically, so as to lay the source before the reader without the mistakes which creep into a newly printed text, and is accompanied by an English version made expressly for the series by a competent translator. An introduction is prefixed to each work, giving the necessary biographical details concerning its author and stating the importance of the text and its place in international law. Tables of errata in the original are added when necessary, and notes to clear up doubts and ambiguities or to correct mistakes in the text are supplied."

19. The strategy was clearly stated: as knowledge is power, access to the sources was required. Managing properly the main authors of the past in international law made sense for a country then starting to look beyond its own backyard,[54] moving towards a more present foreign policy at European and world levels.

At the time the First World War ended, Woodrow WILSON, a professor of international law, was the president of the United States.[55] His ideas may have been influential to the formation of the League of Nations, but the turn of national politics prevented the United States from joining it.

20. In view of the foregoing, not willing to attribute 'good' faith to one entire people and 'bad' faith to another – as George ORWELL warned, people should

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[54] Not only echo but direct impact of: *"poor Mexico, so far from God and so close to the United States"*

[55] The importance of scholarly contributions to the national interpretation and application of international, prior to the **Restatement of Laws**, should be mentioned also by the works by Charles CHENEY HYDE, **International law : chiefly as interpreted and applied by the United States** (1922, 2 vols.) and the monumental work done by judge John Bassett MOORE, **A Digest of International Law, as embodied in Diplomatic Discussions, Treaties and other International Agreements, International Awards, the Decisions of Municipal Courts, and the writings of Jurists, and especially in Documents, published and unpublished, issued by Presidents and Secretaries of State of the United States, the Opinion of Attorneys-General, and the Decisions of Courts, Federal and State** (1906, 8 vols.) ; Francis WHARTON's **A Digest of the International Law of the United States** (Washington : Government Printing Office, 1886, 3 vols.) ; Green H. HACKWORTH, **Digest of international law** (Washington, 1940-1944, 3 vols) ; Marjorie M. WHITEMAN, **Digest of international law** (Washington, since 1963, several volumes published).

not be treated by herds and be classified as ants or other animals, labeled according to the human perspective of same, as 'useful' or not – let us consider one aspect that might help understand the differing approaches towards international law between Brazil and the United States, for example.[56]

21. A glimpse of History may be helpful for us to improve our view on the topic. Whereas Brazil was formed and acquired its identity within a continuity of change, as an independent country in an unique case in the Americas, by succession of the son of the King of Portugal, JOAO VI, who became the emperor of Brazil, PEDRO IV of Portugal, our PEDRO I in Brazil, and has strived to achieve its insertion in the international scene of the time, through strenuous international negotiations, as on the one hand the intended wife of PEDRO I was the Habsburg princess Leopoldine,[57] who became the First Empress of Brazil, and mother of the second Emperor PEDRO II, who reigned 1840-1889.[58]

LEOPOLDINE was chosen to establish the link of European monarchy with the new world. The application of the principle stretched from Austria to the, at the time, remote Brazil".[59] The scope of METTERNICH was to save monarchy both in Portugal and in Brazil, and the political influence of Austria would be decisive for both Nations.[60]

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[56] The same Edwin D. DICKINSON (op. cit., 1932, p. 310, note 1 to same page) warned he would avoid entering into the controversy whether there is or not a specifically Inter-American regional system of international law. He mentioned on the subject, in favor, the Chilean ALVAREZ, and, against such a conception, the Brazilian SÁ VIANNA, as well as FAUCHILLE's **Traité de droit international public** (Paris : A. Rouseau, 4 vols. 1921-1926). Again DICKINSON (op. cit., 1932, p. 311) : « La contribution du processus régional au développement du droit international se trouve limitée par son incapacité foncière à atteindre un haut degré de perfection. »

[57] Ezekiel Stanley RAMIREZ, **As relações entre a Áustria e o Brasil 1815-1889** (tradução e notas de Américo Jacobina LACOMBE, São Paulo : Nacional, col. Brasiliana, vol. 337, 1968) notes that Austrian princesses were educated having in mind to relinquish personal desires in order to fulfill the interests of the state.

[58] **FALAS DO TRONO** ("desde o ano de 1823 até o ano de 1889, acompanhados dos respetivos votos de graça da Câmara temporária, e de diferentes informações e esclarecimentos sobre todas as sessões extraordinárias, adiamentos, dissoluções, sessões secretas e fusões com um quadro das épocas e motivos que deram lugar à reunião das duas câmaras e competente histórico", prefácio de Pedro CALMON, São Paulo : Melhoramentos, 1977).

[59] E. S. RAMIREZ (op. cit., 1968, 'introdução', pp. 1-3, cit. p. 3) : « Deve-se creditar a D. LEOPOLDINA não se terem limitado as relações às questões políticas, mas se terem estendido às relações culturais. A filha do imperador da Áustria, com tato e coragem, com instinto maternal e nimbada de tristeza, ganhou a confiança do povo brasileiro.

[60] Trecho final de carta manuscrita de D. LEOPOLDINA ao imperador FRANCISCO I, de 6 de abril de 1823 : "Só me resta desejar que v., meu querido pai, seja nosso amigo e aliado. E seria para meu marido e para mim um dos dias mais felizes se tivéssemos disso certeza. Se, contra os meus desejos, se der o contrário, v. poderá ficar

22. Also the recognition of the independence of Brazil was negotiated already before it took place, on 7 September 1822, and such negotiation lasted until agreement was reached by the Treaty of Lisbon, of August 1825. Thus Brazil, from its inception as an independent country, was framed as continuity with change. This is a feature to be kept in mind.

On the other hand, the United States of America were formed as a reaction to Europe, and to British rule. The 'national' identity was framed in opposition to the formerly implanted European roots.

23. The MONROE doctrine,[61] as stated in December 1823,[62] and further developed thereafter, was an attempt at hegemony in the continent, of course, and also a statement towards Europe, a command to stay away.

This was further developed by the U.S. President ROOSEVELT, in 1904: "Brutal evil or the lack of capacity of control that result in the dwindling of ties that feature civilized society, may, in the end, require intervention of a civilized nation, and the United States are not to ignore its duties in the Western hemisphere."[63]

This is the "big stick" rule: the countries of Latin America are fully aware of its contents and practice. Out of around 160 U.S. interventions abroad, those in countries of Latin America account for more than half of the total, in less than two hundred years.

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certo, meu querido pai, de que serei sempre brasileira de coração, porque assim o exige o meu dever como mulher e como mãe e minha gratidão que devo manifestar a um bom povo que nos sustentou quando todos os outros poderes nos abandonaram" *Familienarchiv. Familienkorrespondenz*, pasta 308 (cit. E. S. RAMIREZ, op. cit., p. 29 e a seguir, p. 30) e comenta : "O Brasil havia também conseguido sua independência por via revolucionária ; mas o *libertador* do Brasil não era um homem das classes inferiores ou burguês. Era o próprio regente, membro da família real portuguesa, fundador da nova dinastia no Brasil."

[61] See, for instance : S. PLANAS-SUAREZ, **L'extension de la doctrine de Monroe en Amérique du Sud** (RCADI, 1924, t. 5, pp. 267-366) ; Dexter PERKINS, **A history of the Monroe doctrine** (Boston : Little Brown, 1955) ; P. B. POTTER, **Le développement de l'organisation internationale** (1815-1914) (RCADI, 1938, t. 64, pp. 71-156).

[62] The same Edwin D. DICKINSON (op. cit., 1932, p. 319) : « Bien que la doctrine de MONRÖE n'ait été elle-même qu'une declaration de politique nationale, qui, par la suite, a reçu une sorte de consécration internationale, il n'est pas douteux qu'elle n'ait exercé une influence sur l'interprétation et l'application du droit internaitonal dans les pays occidentaux. »

[63] John B. MOORE, **Principles of American diplomacy** (p. 262) ; Theodore S. WOOLSEY, **American Foreign Policy** (p. 75) ; Edwin M. BORCHARD, **Diplomatic protection** (p. 14).

Manuel de OLIVEIRA LIMA (1907)[64] admitted that "the DRAGO Doctrine could offer practical aspects, as guidance to the action of statesmen in the new world."[65] It came to a clearer expression as the *big stick* (or "cacetão", as named, in Portuguese, by OLIVEIRA LIMA).

24. Thus, it could be understandable to consider the ensuing differing approaches by the two countries, in view of the legacy of the European forefathers. Both cases did and do still have considerable input coming from other, non-European, sources, as well, but this is not my point here. In view of understanding the transfer and the ulterior development of international law in Brazil and the U.S., focus here is made on the relations of each of the two with Europe.

In my view, international legal scholars in both countries can have access to what is going on in Europe and elsewhere. There are libraries and there are infinite additional electronic ways and means to have access to non-national sources on international law.

25. Thus, denial or lack of acknowledgment of the contribution of authors from other countries would not be due to the impossibility of having access to them. The reason may not be that these are not obtainable. But, perhaps, the lack of willingness to obtain them

This may be illustrated by a short continental overview of the formation and development of international law in the Americas.

III. Is there a distinct Inter-American System of International Law

> le modes d'application régionale trahiront ou même accuseront nettement l'influence de la tradition historique. Sans parti pris conscient, un principe géneral de droit international donnera lieu à des interprétaions ou à des applications divergentes suivant qu'il sera envisagé par une nation ancienne ou jeune, chez un peuple de tradtion monarchique ou, au contraire, fidèle à un idéal démocratique, dans tel pays où l'unité a été achetée au prix de luttes violentes, ou dans tel autre dont le territoire n'a jamais été envahi.

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[64] Manuel de OLIVEIRA LIMA (1867-1928), in the foreword to his book on **Pan-americanismo** (originally published Rio : Garnier, 1907 ; introductory study by Washington Luís PEREIRA DE SOUSA Neto, presentation by Luís VIANA Filho, Brasília / Rio : Senado / Casa de Rui Barbosa, 1980), as a series of articles published from 1903 to 1907, collected by the author in book form).

[65] OLIVEIRA LIMA (op. cit., ed. cit., pp. 107-108) : "Nessa doutrina, o grande historiador e diplomata, que foi ao mesmo tempo um estudioso do direito das gentes, encontrava, consorciando-a com a de MONROE, além de um símbolo da fusão moral do mundo anglo-saxônico e latino, um movimento de impedimento não só de ocupações, mas, também de simples violações dos territórios independentes da América."

Edwin D. DICKINSON (1932)[66]

26. By the time most of the former colonies in the Americas became independent some were progressively inserted in the so-far predominantly European system of international law and relations. The emergence of a Pan-American or an *Inter-American system* did not entirely change the nature of the former, but brought new elements into the international system, as a whole. In my view, such specific features notwithstanding, it is not enough to feature a distinct regional system.

If the attempts at a Pan-American system seemed to become dated by the early XXth century, in view of growing differences perceived between Latin and non-Latin Americans, some specific features may nevertheless be raised, especially as regards a Brazilian tradition[67] in international law[68] that quite often is neglected or is simply not recorded.[69]

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[66] Edwin D. DICKINSON, **L'interprétation et l'application du droit international dans les pays anglo-américains** (RCADI, 1932, t. 40, pp. 305-395, quoted pp. 311-312, and thereafter, p. 313) : « Ces quelques examples de l'infinie variété des éléments d'une tradition historique nationale indiquent la nature des forces qui agissent incessamment sur l'interprétation et l'application du droit international par les organismes nationaux.» (...) « Ainsi, l'accès à la mer, les moyens de communication, les ressources naturelles et même le climat ou la nature du relief pourront contribuer à expliquer une interprétation nationale ou régionale du droit international. »

[67] Jacob DOLINGER and Keith ROSENN (editors), **A panorama of Brazilian Law** (Miami / Rio : Univ. of Miami North-South Center / Ed. Esplanada, 1992).

[68] Specifically on public international law developments in Brazil, see for instance Vicente Marotta RANGEL, *Public international law : the last five decades* (in **A panorama of Brazilian Law**, edited by Jacob DOLINGER and Keith ROSENN, Miami / Rio : Univ. of Miami North-South Center / Ed. Esplanada, 1992, pp. 287-308); see also the historical overview by V. M. RANGEL, *Introdução aos princípios do direito internacional contemporâneo de A. A. CANÇADO TRINDADE* (dated São Paulo, october 1980, in Antonio Augusto Cançado TRINDADE, **Princípios do direito internacional contemporâneo**, Brasília : Ed. UnB, 1981, pp. v-xiv), and my own *Direito internacional nas Arcadas* (lecture opening the academic year 2009 at the São Paulo University Law School).

[69] H. B. JACOBINI, **A study of the philosophy of international law as seen in works of Latin American writers** (The Hague : Martinus Nijhoff, 1954). If JACOBINI may present an adequate picture of the Spanish speaking authors on international law, in the Americas, he certainly does not justice to the Brazilian authors, as from the entire set of international law professors of the 19th century, having published on the subject, only MENEZES DE DRUMMOND is shortly quoted as a disciple of Pedro Autran da MATTA E ALBUQUERQUE, both are misspelled, as they are mentioned with broken quoted names, and then JACOBINI moves on to review the contribution of Lafayette RODRIGUES PEREIRA, **Principles**, published in the beginning of the 20th century.

27. The first authors in international law in the Americas after independence seem to ignore any element specifically American,[70] as is the case with the Venezuelan Andrés BELLO (1781-1865), **Princípios de derecho de gentes** (1832),[71] and the Argentinian Ramón FERREIRA in his **Lecciones de derecho internacional** (1861).[72]

At the same time, in Brazil, two Law Schools were created by an Imperial decree of 11 August 1827, one located in São Paulo, still operating in the very same (rebuilt) location, and the other, initially located in Olinda, later moved to Recife. Each school had the succession of professors in charge of the chair for Law of Nations, later named International Law.

28. In São Paulo, the first law professor in Brazil appointed by Emperor PEDRO I in August 1827, was a professor of international law.[73] In accordance with the views of the time, José Maria Avelar BROTERO, who held the chair for Law of Nations for 44 years, published his **Princípios de direito natural** (1829)[74], and **Questões sobre presas marítimas (**1836,[75] second edition, 1863[76]).

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[70] See William Rex CRAWFORD, **A century of Latin American Thought** (Cambridge, Ma. : Harvard U.P., 1944) ; Phanor J. EDER, **A comparative survey of Anglo-American and Latin American Law** (New York : N.Y. Univ. Press, 1950) ; H. B. JACOBINI, **A study of the philosophy of international law as seen in works of Latin American writers** (The Hague : M. Nijhoff, 1954, p. 37) : "The influence of European publicists on Latin American writers has been enormous ; at the same time, particularistic trends are much in evidence".

[71] Andrés BELLO, **Princípios de derecho de gentes** (completed in 1832, 1st. ed. 1833 ; 2nd. ed., 1844, with changes ; the 3rd. ed., 1864, and the following were published as **Princípios de derecho internacional**, in **Obras completas de Andrés BELLO**, vol X, Santiago de Chile : Impr. Pedro G. Ramirez, 1885).

[72] Ramón FERREIRA, **Lecciones de derecho internacional** (Paraná : Imprenta Nacional, 1861).

[73] The chair was originally named "Church law, diplomatic law and law of nations" (*direito eclesiástico, diplomático e das gentes*), which turned into "international law" by the turn of the century. A separate chair for private international law was added by the end of the First World War, and a third chair, for International Trade Law was added in the early 1990's. These three chairs and altogether a dozen lecturers having at least a doctor degree in international are organized as a Department, within the University of São Paulo Law School, which became the Department of International and Comparative Law as of 2008.

[74] **Princípios de direito natural** "compilados por José Maria Avellar BROTERO, lente do primeiro anno do curso jurídico de São Paulo" (Rio de Janeiro : Typographia Imperial Nacional, 1829).

[75] **Questões sobre presas marítimas**, "oferecidas ao cidadão Rafael Tobias de AGUIAR, pelo autor J. M. A. BROTERO" (São Paulo : Typographia de Costa Silveira, 1836) declaras the scope of the study "fazer publicar uma pequena obra com o título – Questões sobre presas marítimas – fruto de algum trabalho, e que julgo servirá para dar algumas idéias àqueles que tem de julgar e defender objetos tão interessantes. / A benevolência de V.E. relevará a falta de estilo, e os erros da doutrina; doutrina assaz

Addressing "his readers", he states: "I am going to deal with positive law, and therefore it is my desire and duty to show what treaties, statements and other diplomatic pieces, exist on the present topic; the laws, regulations and provisions, of different Nations on their law; which decisions from the courts of influent Nations, and the uses and customs, that form the Law of Nations, tacitly agreed or voluntary." He claimed to "follow the method of KLÜBER – *dogmatic-historic* – explaining his topics with *facts, with real cases*. Recourse is made to the absolute Law of Nations, when the case is doubtful, or when conventions and custom do not concur. I despise the opinions of the old writers (those that were within my reach), only taking arguments from Roman law or following particular opinions, ensuing from local uses or party affiliations."[77]

Although AVELLAR BROTERO claimed to follow positive law, he had previously published his **Princípios de direito natural** (1829)[78] only incidentally dealing with matters that could be labeled as international law. His work stirred

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espinhosa e bem pouco conhecida entre nós. Não tendo eu ao meu alcance senão os meus próprios livros, heide por força cair em omissões."

[76] **Questões sobre presas marítimas**, por José Maria de Avellar BROTERO ("segunda edição augmentada", São Paulo : Typographia – imparcial – de J. R. de Azevedo Marques, 1863), notes in the 'prólogo' : "Conheço que este meu trabalho é imperfeito, e muito sinto que nesta segunda edição ficasse com tantos erros, resta-me a esperança que os homens competentes hão de ter indulgência com tais defeitos, e só censurar a doutrina e nesta parte peço-lhes severidade, pois pedir considerações seria ter em pouco a ciência e o meu dever. / Este livro não é uma obra de teorias ou doutrinas especulativas; é um compêndio de fatos e princípios do Direito Marítimo admitido pelas nações civilizadas. / Da primeira edição suprimi tudo quanto me pareceu fora da matéria, aumentei porém muita doutrina que faltava. / Cito os escritores, de que tenho notícia, que publicaram suas obras depois da minha primeira edição – 1836. / Nesta segunda edição procurei ser útil aos meus Escolares, no estudo do Direito das Gentes, e não olhei, nem me lembrei, que o meu trabalho pudesse ser estimado pela elegância e pureza de linguagem". Exemplar da Biblioteca da FDUSP.

[77] J. M. A. BROTERO, **Questões sobre presas marítimas** (1836, "aos leitores", sem número de página) : "Muitas vezes, na confusão dos pareceres dos JJ. entre si contraditórios eu me animo a dar a minha opinião. A legislação pátria é citada nos lugares competentes. Muito desejava alegar os julgamentos dos nossos tribunais, mas não estava ao meu alcance poder satisfazer o meu desejo. / Eu conheço que o meu trabalho está bem longe da perfeição e conheço que ele está muito longe de poder conseguir o seu fim : conheço e confesso que não tive à mão nem a legislação das Nações do norte da Europa, nem muitos bons autores que tem tratado desta matéria, e que eu devia consultar; mas minha consciência está convencida de que esta minha pequena obra sempre há de prestar alguma utilidade aos meus escolares, e ao público. Julgo que a matéria é muito interessante, e que por esta razão o governo, e os sábios, não me deixarão continuar a transmitir na aula minhas opiniões à mocidade, uma vez que elas sejam falsas. O governo me advertirá e os sábios me esclarecerão, com suas luzes, por meio da imprensa". Como se vê, adotava redação diversa da que figura na segunda edição (1863).

[78] **Princípios de direito natural** "compilados por José Maria Avellar BROTERO, lente do primeiro anno do curso jurídico de São Paulo" (Rio de Janeiro : Typographia Imperial Nacional, 1829). Exemplar da Biblioteca da FDUSP.

such a controversy that the Chamber of Deputies forbade the use of the book in the country Law Schools.[79] It could be argued in his favor that such work was an attempt to recover the tradition of the founding fathers of international law, building international law as a system upon the foundations of a system of natural law.

BROTERO also published his **Princípios de direito público universal : analyse de alguns paragraphos de WATTEL** (São Paulo, 1837, 80 p.)[80] and his **Philosophia do direito constitucional** (São Paulo, 1868, 166 p.).[81]

29. Alongside, at the Olinda-Recife sister institution, Lourenço José RIBEIRO and Pedro Autran da MATTA E ALBUQUERQUE (1827-1881), conducted the lecturing on the Law of Nations. The latter, along with other

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[79] J. M. Avellar BROTERO would thus have published the first work of international law in Latin America, if we consider his **Princípios de direito natural** (1829).

[80] Miguel REALE (1955, editado 1956, 1962 e 1976, cit., nota 17) : "Cs. AVELAR BROTERO – **Questões sobre presas marítimas**, da qual se tiraram duas edições, uma em 1836 e a outra em 1863, esta com acréscimos. Além deste livro e dos **Princípios**, mais dois foram, com segurança, por ele publicados : **Princípios de direito universal**, folheto de 80 páginas, aparecido anônimo em 1837, conforme declaração do autor em seu "livro-mestre" (Cs. Traços Biográficos, cit., p. 75) e mais um drama político intitulado **Tumulto do povo em Évora**, de 102 páginas, publicado também em São Paulo. Por outro lado, BROTERO não chegou a publicar os anunciados **Princípios históricos compilados para servir de preliminares ao Compendio de direito natural e direito público**. É possível que só haja existido apostilas. SACRAMENTO BLAKE em seu **Dicionário Bibliográfico Brasileiro**, alude a mais dois trabalhos : **Filosofia do direito constitucional** (São Paulo, 1868, 166 p.) e **Os três primeiros parágrafos de VATTEL – Direito das gentes, liv. I, cap. 1. Princípios de direito público universal ou filosofia do direito constitucional**, dividido em 20 lições. Creio que esta obra não seja senão o folheto de 80 páginas, acima referido, que também é anônimo, abrangendo número idêntico de páginas e de lições. Há na Biblioteca da Faculdade um exemplar com a dedicatória de AVELAR BROTERO de próprio punho, com estes dizeres: 'Oferecido à Biblioteca pelo A.' O título dessa edição de 1842 já é diverso, **Filosofia do direito constitucional**, embora no subtítulo se encontrem as referências a VATTEL. Terá havido nova edição dessa obra, ampliada para 116 páginas, em 1868, como afirma SACRAMENTO BLAKE ? É o que não pude averiguar."

[81] (Conselheiro) José Maria de Avellar BROTERO, **A filosofia do direito constitucional** (da "introdução" de José Afonso da SILVA, São Paulo : Malheiros, 2007, pp. 18-19) : "Merece especial destaque este volume, que temos em mãos, **A filosofia do direito constitucional** (São Paulo, 1842). Miguel REALE acredita que seja este a reprodução daquele folheto de 80 páginas, publicado em 1837. Pode ser, mas talvez reformulado e ampliado. Vale a pena ler e examinar este texto sobre a filosofia do direito constitucional, que apresenta surpresa agradável para o constitucionalismo brasileiro, ainda que ele não seja sobre direito constitucional positivo, pois não se refere à Constituição do Império."

handbooks,[82] as he lectured law for over five decades, published his **Elementos de direito das gentes segundo a doutrina dos escritores modernos** (1851). Two other courses were published by law lecturers of the Recife school: Antonio de Vasconcellos MENEZES DE DRUMMOND, **Preleções de direito internacional** (1867) and by João Silveira de SOUZA his **Lições elementares do direito das gentes** (1889).

During the second half of the XIXth century, Carlos Vidal de Oliveira FREITAS published his **Elementos de direito internacional marítimo**, whereas another Brazilian, Antonio Pereira PINTO, deserves to be mentioned separately.

30. The Brazilian Antonio Pereira PINTO developed his four-volume study of international law based on the effective treaty and practice of the country in matters related to the subject of international law – in line with the historical approach of G. F. von MARTENS, it could be argued – published his **Aponamentos para o direito internacional** (1864)[83], and pointed out the main function of international law, to regulate and solve conflicts among states of openly unequal power.[84] "Jurisprudence that tends to establish the fraternity among peoples in the universe, binding same with the tiés of trade, industry and

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[82] Pedro Autran da MATTA E ALBUQUERQUE, **Elementos de economia política** , **Elementos de direito natural** , **Elementos de direito público universal**.

[83] A. Pereira PINTO, **Apontamentos para o direito internacional ou Coleção completa dos tratados celebrados pelo Brasil com diferentes nações estrangeiras** (Rio de Janeiro : F. L. Pinto & Cia. Livreiros e Editores, 1864-1869, in 4 volumes ; new edition, with presentation by I. ABI-ACKEL, and foreword by A. A. CANÇADO TRINDADE, Brasília : Ministério da Justiça / UnB, 1980, vol. I, 'aos leitores', pp. 1-2) : "é lícito todavia ponderar que, achando-se esparsos os tratados que temos celebrado com diferentes potências estrangeiras e outros inéditos, a reunião deles em um só corpo, acompanhada de sucintas apreciações históricas, como o fizemos, da transcrição de documentos hoje raros, e da legislação peculiar às convenções mais importantes, deve, sem controvérsia, aproveitar àqueles que intentarem escrever o direito internacional brasileiro. E assaz compensados seremos dos labores desta tarefa, se para a edificação daquele grandioso edifício servir de pequeno seixo o nosso insignificante trabalho."

[84] A. Pereira PINTO "introdução" ao primeiro volume (1864) dos **Apontamentos para o direito internacional** (ed. cit., Brasília, 1980, vol. i, 'introdução' pp. 3-4) : "E, se infelizmente essa jurisprudência não tem atingido toda a perfeição de que é suscetível, se o orgulho das grandes potências impele-as ainda a lançar mão dos remédios violentos para extorquirem dos povos fracos concessões humilhantes e vantajosas somente à sua avidez, se contra nosso próprio país tem sido cometidas enormes vexações por um dos estados mais poderosos da Europa, *apezar* dos tratados, ou *por causa* dos tratados, se em geral o Império não tem auferido grandes lucros com a celebração dos contratos internacionais, tais fatos nem abalam a doutrina que deixamos expendida, nem por motivo deles devemos confiar menos em que uma reação se há de ir operando, entre as nações cultas, ou para referearem os ímpetos belicosos de seus governos, apontando-lhes a trilha da discussão diplomática como oportuno e exclusivo recurso, para terminar as dissidências que acaso apareçam com estranhos países, ou para aconselhar-lhes que nos tratados com os estados de ordem menos importante guardem sempre a devida reciprocidade, não lhes impondo pactos leoninos que trazem ordinariamente em si o gérmen de futuras contestações."

the diffusion of all useful knowledge, having as its scope to settle the controversies among nations by means of calm and illustrated discussion, as one of the most beautiful conquests of human intelligence."[85]

31. Notwitstanding the name, the Argentine Carlos CALVO (1824-1893), who relied on vast diplomatic experience and extensive written work, in his **Derecho internacional teórico y prático de Europa y América** (1868, published in French, as **Le droit international théorique et pratique**, in 1872, and enlarged in subsequent editions)[86] did not adopt a specifically Inter-American approach to international law.

Such element will be, in turn, stressed by the Venezuelan Rafael Fernando SEIJAS, **El derecho internacional hispano-americano público y privado** (1884-5)[87]. Both SEIJAS and CALVO adopted strongly positivist approaches, and a traditional state centered view as to the subjects of international law.

The Mexican José H. RAMIREZ, **Código de los extranjeros: introducción al studio del derecho internacional desde los tiempos antiguos hasta nuestros dias** (1870)[88] does not completely abandon natural law, but is basically concerned with the more positivist elements. His conception of the persons or subjects of international law is traditional.

The Cuban Angel TREMOSA Y NADAL (1856-1899), **Nocciones de derecho internacional** (1896)[89] can be mentioned as writings emphasizing the

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[85] A. Pereira PINTO (op. cit., 1864, loc. cit.) : "Radicado, pois, esse pendor que se vai manifestando entre os países cultos para desenlaçarem pacificamente, pelos meios diplomáticos, e não pela espada do mais forte, as dissenções que surgem entre os povos e apertadas as suas relações de mútuo comércio e alianças pelo desenvolvimento do vapor e da eletricidade, não longínquos horizontes se devassam ao olho do observador perspicaz, nos quais se enxerga a lisonjeira época de uma tão perfeita e recíproca uniformidade de interesses internacionais, que não poderá ser violada, ainda pelos estados poderosos, sem total detrimento de sua prosperidade e grandeza. / E, pois, a aproximação dessa lisonjeira situação deve ser fervorosamente almejada por todos os homens generosos, por todos os estadistas e filantropos."

[86] Carlos CALVO, **Derecho internacional teórico y prático de Europa y América** (1868, 2 vols. ; published in French, as **Le droit international théorique et pratique**, 1872, enlarged in subsequent editions ; 4th. ed., 4 vols, 1887 ; Paris : Guillaumin et Cie., 6 vols. 1896).

[87] Rafael Fernando SEIJAS, **El derecho internacional hispano-americano público y privado** (Caracas : Imprenta de 'El Monitor', 6 vols., 1884-5).

[88] José H. RAMIREZ, **Código de los extranjeros : introducción al studio del derecho internacional desde los tiempos antiguos hasta nuestros dias** (Mexico : Imprenta de J. Escalante y Cia., 1870).

[89] Angel TREMOSA Y NADAL, **Nocciones de derecho internacional** (La Habana : 'La Australia', 1896) was a Cuban born First Lieutenant in the Spanish Army, who wrote his book, which was approved by the Spanish Crown, for his companions in arms.

positive aspects, along with the 'borderline work,' the translation into Spanish of the French Academician G. BOURDON-VIANE, **Compendio de derecho internacional público** (1897).[90]

32. In Brazil, Lafayette RODRIGUES PEREIRA (1834-1917), after graduating in São Paulo in 1857, was mostly active in Rio. In addition to his relevant contributions to civil law,[91] he published his **Princípios de direito internacional** (1902)[92] in two volumes.

For him, international law "comes to be the complex of principles which regulates the rights and obligations of the nations among themselves,"[93] and although stating that his book would deal with "positive law and not of philosophical law," he adds that "the philosophical element will not be forgotten" as he further considers same necessary to "explain the cause or the reason of a principle."

Thus, clearly, for 'Lafayette', as he is familiarly mentioned in Brazil, "there exists, certainly, above the positive international law an ideal law, which science conceives of as pure theory whether as an aggregate of metaphysical concepts of reason or as a high generalization of juridical facts."[94] Such natural or philosophical law has, according to him, a three-fold relation to international law: "it influences its formation, it furnishes elements for its comprehension, and it provides criteria for the criticism and the improvement" of the latter. The principle, *per se*, is not law. Consent is the means by which law is developed.[95]

'Lafayette' also emphasized the convenience of codifying private international law and to that effect prepared in 1912, a proposal for **International private law**, specifically considering the issue of party autonomy.[96] He had been commissioned by the Brazilian Foreign Minister Baron of RIO BRANCO to prepare this code of private international law, which was presented to the

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[90] G. BOURDON-VIANE, **Compendio de derecho internacional público** (Santiago de Chile : Impr. Mejia. 1897).

[91] Lafayette RODRIGUES PEREIRA, **Direito de família** (Rio de Janeiro, 1869 ; new edittion by José Bonifácio de ANDRADA E SILVA, 1930), **Direito das cousas** (Rio de Janeiro : Garnier, 1877).

[92] Lafayette RODRIGUES PEREIRA, **Princípios de direito internacional** (Rio de Janeiro : Jacintho Ribeiro dos Santos, 1902-3, 2 vols.).

[93] Lafayette R. PEREIRA (op. cit., 1902-3, vol. I, p. 2).

[94] Lafayette R. PEREIRA (op. cit., 1902-3, vol. I, p. 26).

[95] Lafayette R. PEREIRA (op. cit., 1902-3, vol. I, pp. 24-26) : "The principle which is not recognized by the procedure of the nations, nor admitted and accepted by their consent, does not have obligatory force for them in the external world, however just the reasons on which same is based may be".

[96] Nadia de ARAUJO, *The neglected 1912 proposal for International private law by Lafayette Rodrigues Pereira and the theory of party autonomy* (in **Dimensão internacional do direito : estudos em homenagem a G. E. do NASCIMENTO E SILVA**, ed. by Paulo B. CASELLA, São Paulo : LTr, 2000, pp. 21-32).

International Commission of Jurisconsults during the meeting held in Rio in 1912.[97]

World War I interrupted the negotiations and Lafayette's proposal was later superseded in the 1920's by the work of the Cuban Antonio SANCHEZ DE BUSTAMANTE, who monopolized the subject. In 1927, during the Inter-American 6th General meeting, the so-called BUSTAMANTE Code of private international law was adopted and came into force (1928).

33. The Guatemalan, José FLORES Y FLORES (1866-1908) wrote his **Extracto de derecho internacional** (1902)[98] for class use. International law is created by the coexistence of states, and the basis of the system of international law is the concept of the international community.

He does not seem to bother following BELLO and CALVO and also refers to the authority of the Spanish ORTOLAN, in connection with the sources of international law, classifying same under the triple heading of reason, custom and treaties. However, FLORES suggests that the practical application of the sources should be reversed in order and read treaties, custom and principles.[99]

34. The Brazilian contribution to the Second Hague Conference for Peace, in 1907, led Ruy BARBOSA, who insisted on the sovereign equality of states as the foundation for international law, to a prominent perception by his peers, and fostered the study of international law in the country. Albeit international law was not the center of his action, he stated his views on the matter in a conference held in Buenos Aires (1916)[100] were he warned against the degrading effect of force on justice, at a time (1907)[101] when there was pressing need for a clear alignment of

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[97] N. de ARAUJO (op. cit., 2000, in her 'conclusion', p. 31) : "Lafayette Rodrigues PEREIRA's conception of party autonomy, expressly permitted in his proposal, was indeed very advanced for its time and had to wait until today to achieve a new consensus on the matter in Latin America. It had to be gradually adopted in other countries and slowly be considered as a general principle of universal law until the Latin-American countries were finally aware of its importance".

[98] José FLORES Y FLORES, **Extracto de derecho internacional** (Guatemala : Tipografia Nacional, 1902).

[99] H. B. JACOBINI (op. cit., 1954, p. 80) notes on J. FLORES Y FLORES : "This contrast between the viewpoints of theoretical observation and practical application in such clear form is not often encountered".

[100] Ruy BARBOSA, *Problemas de direito internacional* (lecture held at the University of Buenos Aires Law School, as of 14 July 1916, originally published in London : J. Truscott & Son. Ltda., 1916, reprinted in Ruy BARBOSA, **A grande guerra**, Rio : Guanabara, 1932 ; also in Ruy BARBOSA, **Escritos e discursos seletos**, seleção, organização e notas de Virgínia C. de LACERDA, intr. geral Américo J. LACOMBE, João MANGABEIRA, Oswald de ANDRADE e Carlos CHIACCHIO, Rio : Aguilar, 1966, pp. 81-123).

[101] Ruy BARBOSA, *La nouvelle Cour permanente d'arbitrage* (speech given at the Second Conference for Peace, at the Hague, as of 9 October 1907, originally published in

states by the principles of international law and the legal equality of states, in order to avoid giving legitimacy to force, as last argument for international relations, whose ordering, according to the warning by Ruy BARBOSA, before the First World War, was to be made in accordance with force or with law, namely international law.

35. Among Argentines, Estanislao ZEBALLOS, Roque SAENZ PEÑA and Isidoro RUIZ MORENO will also be considered.

Less than could be expected by the title, Estanislao S. ZEBALLOS (1854-1923) wrote his **International law of Spanish America** (1893) as a statement of the Argentine view on the controversy with Brazil on the territory of *Misiones.*[102] It is a piece of advocacy, more than a general overview of the subject.

Roque SAENZ PEÑA, in his **Derecho público americano** (Buenos Aires, 1905), collected writings and speeches, which seem to echo the current conception of the 'European public law' (*jus europaeum*) of the time.

Isidoro RUIZ MORENO (1876-) published his **Lecciones de derecho internacional público** (1934-5) in three volumes.[103]

36. Another Brazilian, José MENDES (1861-1918), who held the chair for international law in São Paulo (1911-1918), published the works: **Ensaios de philosophia do direito** (São Paulo, 1905, 2 vols.), **Das servidões de caminho (Direito romano e pátrio)** (São Paulo: Duprat & Cia., 1906), **Direito internacional público** (São Paulo: Duprat & Cia., 1913).[104]

"Law is for the social body," stated José MENDES (1913).[105] "[L]ike the clothes for the individual: one and the other follow the development of the

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Mário de Lima BARBOSA, **Ruy Barbosa na política e na história**, Rio : Briguiet, 1916 ; also in Ruy BARBOSA, **Escritos e discursos seletos**, op. cit., Rio : Aguilar, 1966, pp. 71-81).

[102] On the border issues opposing Brazil and its neighbour countries in late 19th and early 20th century see P. B. CASELLA, **Direito internacional dos espaços** (2009, in print) especially, in chapter XXVII 'território brasileiro e direito internacional', reviewíng the border issues faced by Brazil : with Argentina (27.2), followed by chapter XXVIII, on 'fases de formação do território brasileiro : algumas lições de direito internacional', also for reference to other sources, in connection therewith.

[103] Isidoro RUIZ MORENO, **Lecciones de derecho internacional público** (Buenos Aires : El Ateneo, 1934-5, in three volumes).

[104] W. FERREIRA (op. cit., 1928, loc. cit.) menciona, inadvertidamente, 1915 como data da publicação do **Direito internacional público : preleções** do Dr. José MENDES "Professor ordinário da Faculdade de Direito de São Paulo".

[105] José MENDES, **Direito internacional público : prelecções** (São Paulo : Duprat & Comp., 1913, 'prefácio', datado de 15 de novembro de 1913) : "Este livro reflecte em synthese as minhas prelecções de direito internacional público, na Faculdade de direito de São Paulo. / Transumpto da explicação de todas as theses de meu programma, traz a

respective body. Each phase of the social evolution contains the previous one, with something added. The previous stages are summed up, in both evolutions," reaffirmed J. MENDES (1918).[106]

MENDES aptly considered the role of international law : "this branch of the legal tree in formation, adapted to the international society, CIVITAS MAXIMA, SOCIETAS SOCIETATUM, now also in formation" was pointed by him as crucial for "maintaining the balance of the respective spheres of state activity for the worldwide social body."[107]

37. An Inter-American approach to the subject could be useful. The question whether there is or not a specifically Inter-American system of international law, and what would be the content of same, has been fully developed (favorably) by the Chilean Alejandro ALVAREZ, **Le droit international américain: son fondement, sa nature** (1910)[108] and (against it) the Brazilian Manoel Augusto de Souza SÁ VIANNA, published his **Elementos de direito internacional** (1908)[109] and then his **De la non-existence d'un droit international américain** (1912).[110]

The contribution of Manoel Augusto de Souza SÁ VIANNA is focused on the mainstream: he does not view a specific system of international law as a valid contribution to the development of international law as an institutional and legal system:[111] "once freed the former European colonies in the Americas could not be prepared to inaugurate at once and with certainty (*inaugurer de suite et avec fermeté*) a system of principles of national public law having specific features, nor

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nomenclatura de todas as questões de mais destaque no assumpto, discutidas e resolvidas durante o curso. / Contém as linhas essenciaes dos institutos jurídico-mundiaes, sem descer a detalhes, consoante já aconselhavam os *Estatutos* da Universidade de Coimbra de 1772. / A linguagem é simples, conforme o salutar exemplo dos modernos expositores da matéria scientífica. Sciencia e rhetorica são coisas que se não attraem. ORNARI RES IPSA VETAT, CONTENTA DOCERI."

[106] José MENDES, *Relação entre o direito internacional público e o direito nacional nos países americanos* (18 RT 81 (1918)).

[107] J. MENDES (op. cit., 1913, 'prefácio' cit.) encerrava-o : "É, pois, um manual de estudantes. Escrevel-o custou-me grande somma de exforços, a que me não poupei, cônscio do intento de satisfazer a uma necessidade vivamente sentida e repetidamente manifestada por meus discípulos, a cujas mãos o entrego, certo de que farão delle um dos factores do progresso de nossa cultura jurídico-internacional."

[108] Alejandro ALVAREZ, **Le droit international américain – son fonfement – sa nature** : d'après l'histoire diplomatique des états du nouveau monde et de leur vie politique et économique (Paris : Pedone, 1910).

[109] Manoel Augusto de Souza SÁ VIANNA, **Elementos de direito internacional** (1908).

[110] M. A. de Souza SÁ VIANNA, **De la non-existence d'un droit international américain** (Rio de Janeiro : L. Figueredo, 1912).

[111] SÁ VIANNA (op. cit., 1912, p. 8): "Il n'y a pas possibilité, pour les états de l'Amérique, d'adopter un ensemble de principes ou règles de Droit international, à propos duquel il ne soit pas possible un accord mondial."

one of national private law."[112] SÁ VIANNA pointed out that: "legal literature of entire Europe is familiar to all those that nurture legal letters, but nevertheless in both Spanish and Anglo-Saxon America the Portuguese language is unknown, the Spanish language is not less ignored in the Anglo-Saxon America and in both the Portuguese-speaking as well as in all South America, on the Atlantic side, the English language is not more spoken than German."[113] Knowledge of the English language has certainly become more widespread in both Spanish-speaking and Portuguese-speaking areas in the Americas throughout the century since SÁ VIANNA wrote, but except for immigrants, has knowledge of Spanish and Portuguese languages been improved in the English-speaking areas of the Americas?

38. In Brazil, at the same time, Epitácio PESSOA, later President of the Republic and also the first Brazilian judge at the Permanent Court of International Justice,[114] published in Rio his **Projeto de código de direito internacional público** (1911). Not for the impact in practice, but at least as an intellectual effort, his contribution deserves to be mentioned.

39. A contemporary Brazilian, Clóvis BEVILAQUA (1859-1944), an outstanding legal scholar, author of the Brazilian civil code (1916)[115] and relevant handbooks on civil law, law history and comparative law,[116] also published on private[117] and public international law.[118].He stated his views on the constitution

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[112] SÁ VIANNA (op. cit., 1912, p. 18, and p. 35): "Lorsque les nouveaux états eurent été reconnus, il ne s'opèra pas entre eux, comme on aurait pu le supposer, un mouvement de rapprochement ; ils restèrent tous en situation de véritable isolément."

[113] SÁ VIANNA (op. cit., 1912, p 36): "Les États de cette partie du continent ignorent le développement moral et le développement matériel de ceux du coté du Pacifique et vice-versa."

[114] Ruy BARBOSA was appointed, but died before taking office, in 1923.

[115] Clovis BEVILAQUA, **Projeto do Código civil brasileiro** – "organizado por ordem do Exmo. Sr. Dr. Epitácio PESSOA" (Rio de Janeiro : Imprensa Nacional, 1900) ; **Atas dos trabalhos da comissão revisora do projeto de código civil brasileiro** (Rio de Janeiro : Imprensa Nacional, 1901) ; **Em defesa do projeto do código civil brasileiro** (Rio de Janeiro : Francisco Alves, 1906)

[116] Clóvis BEVILAQUA, **O direito no Brasil : a sua feição particular, os seus grandes intérpretes** (Rio de Janeiro : Tipografia Bernard Frères, 1914) ; C. BEVILAQUA, **Lições de legislação comparada sobre o direito privado** (Recife : Tipografia de F. B. Boulitreau, 1893 ; 2ª ed., Salvador : J. L. F. Magalhães, 1897).

[117] Clóvis BEVILAQUA, **Direito internacional privado** (Salvador : Livraria Magalhães, 1906 ; 2nd. ed., Rio de Janeiro : Livr. Freitas Bastos, 1934) ; **Princípios elementares de direito internacional privado** (Salvador : Livraria Magalhães, 1906 ; 4th. ed., Rio : Freitas Bastos, 1944 ; reprinted as historical edition : Rio : Editora Rio, 1978).

[118] Clóvis BEVILAQUA, **Direito público internacional : a synthese dos princípios e a contribuição do Brasil** (Rio de Janeiro : Francisco Alves, 1911, 2 vols. ; 2nd. ed., Rio de Janeiro : Livr. Freitas Bastos, 1939) ; with collaboration of Gregório Thaumaturgo de AZEVEDO, BEVILAQUA published **Relações exteriores : alianças, guerras e tratados, limites do Brasil** (Rio de Janeiro : Imprensa Nacional, 1901)

of an international court and also his opinion (against) a specific international law for the continent **De la non-existence d'un droit international américain** (1916).[119]

While acting (1913-1934) as Legal consultant to the Ministry of Foreign Affairs in Brazil, BEVILAQUA gave a favorable opinion on the ratification by Brazil of the 1928 BRIAND-KELLOG Paris Pact on the outlawry of war (1934):[120] "I see no consideration, at the present state of political evolution, to oppose the adoption by Brazil of the proscription of war waged in a 'selfish and voluntary' way, to resume the words of BRIAND. With certainty, all Nations will reserve themselves the right to defend their territories, against a possible armed attack or invasion."[121]

40. Thereafter, in defense of the acceptance of such a specifically Inter-American system, the contribution of Franscisco José URRUTIA (1928)[122] and also José Maria YEPES, both Colombians, and following the denial thesis, the Argentine Daniel ANTOKOLETZ (1944)[123] and the Salvadorean Gustavo GUERRERO.[124]

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[119] C. BEVILAQUA, **De la non-existence d'un droit international américain** (Caracas : Tipografia Americana, 1916, offprint of the *Revista de Derecho y Legislación* by Dr. Alessandro PIETRI).

[120] Antonio Paulo Cachapuz de MEDEIROS (organização), **Pareceres dos consultores jurídicos do Itamaraty** : vol. II pareceres de Clóvis BEVILAQUA (1913-1934, pref. de Zuleika LINTZ, Brasília : Senado Federal, 2000).

[121] Clóvis BEVILAQUA, *Parecer de 8 de março de 1934* (« Pacto KELLOG ») (ed. cit., 2000, pp. 621-622) : "Aliás para que a renúncia da guerra seja eficaz, é necessário que também se reduzam os armamentos ao mínimo indispensável, e que as nações usem dos processos conducentes à segurança recíproca, à firmidão do regime da paz. É, porém, da mais alta conveniência dar esse passo importantíssimo, que o Pacto BRIAND-KELLOG traduz." BEVILAQUA added : "Quando fomos, há anos, convidados a aderir a esse Pacto, já firmado por diferentes governos, a Nação, melindrada, deu uma resposta algo displicente, pelo órgão do Ministro MANGABEIRA, que declarou não adiantar o Pacto ao que preceituava a nossa Constituição, art. 34, n. 11. Mas, agora, a situação internacional é outra, o movimento de adesão assumiu forma coletiva americana, e é de grande alcance para o nosso continente que o Brasil não hesite em dar forma definitiva à sua aceitação ao Pacto da paz."

[122] Francisco José URRUTIA, **Le continent américain et le droit international** (préf. de N. POLITIS, Paris : Rousseau, 1928).

[123] Daniel ANTOKOLETZ, **Derecho internacional público** (Buenos Aires, 1944, 3 vols.).

[124] Among available sources on the subject, various courses lectured at the Hague, such as : S. PLANAS SUAREZ, **L'extension de la doctrine de Monroe dans l'Amérique du Sud** (RCADI, 1924, t. 5, pp. 267-366) ; A. GUANI, **La solidarité internationale dans l'Amérique latine** (RCADI, 1925, t. 8, pp. 203-340) ; F.-J. URRUTIA, **La codification du droit international en Amérique** (RCADI, 1928, t. 22, pp. 81-236) ; J.-M. YEPES, **La contribution de l'Amérique latine au développement du droit international public et privé** (RCADI, 1930, t. 32, pp. 691-800) ; J.-M YEPES,

ANTOKOLETZ argued that there could be no Inter-American international law, as such, because the principles are the same in the Americas as in the rest of the world; the maximum he could admit was to mention International law in the Americas, not an Inter-American international law, and takes support in the arguments and authority of Carlos CALVO.

41. The Dutchman M. M. L. SAVELBERG (1946)[125] reviewed the Inter-American conventions, executed during the 6th Inter-American conference at La Habana, in 1928, and reaches the conclusion that these[126] do not feature a set of legal rules essentially different from those in force in general international relations, and that they could not be the basis for a codification of general international law, as it would be necessary to insert changes, which he himself suggests.[127] SAVELBERG claimed that only derogations to general international law rules through special regional rules could justify such a claim of an international law specific to the Western hemisphere, namely a variety in such form and essence that could justify talking about entirely different rules.[128]

42. After considerable excesses by the partisans of an 'Assertive Americanism', should be mentioned the 'Critical Americanism', in line with the objective evaluation of the principles of 'American international law' developed by the Argentine Juan Carlos PUIG (1952, 1954).[129] In his perspective can be admitted the existence of elements, specifically Inter-American, inserted in the entire system of International law, within which a regional sub-system would

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Les problèmes fondamentaux du droit des gens en Amérique (RCADI, 1934, t. 47, pp. 1-144) ; F. C. PONTES DE MIRANDA, **La conception du droit international privé d'après la doctrine et la pratique au Brésil** (RCADI, 1932, t. 39, pp. 551-678) ; Ruy BARBOSA, *Os conceitos modernos do Direito Intenacional* (conference in Buenos Aires, 1916; originally in Spanish, translated in Portuguese, with notes and introductory study by. Sérgio PACHÁ; Rio : Casa de Rui Barbosa, 1983) ; Clóvis BEVILÁQUA, **Direito Público Internacional: a synthese dos principios e a contribuição do Brasil** (Rio : Freitas Bastos, 1ª ed., 1910; 2ª. ed., 1939, 2 vols.) ; Manoel BONFIM, **O Brazil na América: caracterização da formação brasileira** (Rio : F. Alves, 1929) M. BONFIM, **A América Latina: males de origem** (Rio/Paris : H. Garnier, 1905).

[125] M. M. L. SAVELBERG, **Le problème du droit international américain** (La Haye, 1946).

[126] Namely the Inter-American conventions on treaties, on the legal status of foreigners, on diplomatic agents, on consular agents, on maritime neutrality, on asylum, and on rights and duties of states in case of civil war.

[127] M. M. L. SAVELBERG (op. cit., 1946, especially chapters X, pp. 306 ff. and XI, pp. 322 ff.).

[128] M. M. L. SAVELBERG (op. cit., 1946, p. 306).

[129] Juan Carlos PUIG, **Princípios de derecho internacional público americano** (prólogo del Prof. L. MORENO QUINTANA, Buenos Aires : Valério Abeledo, 1952) also published in French **Les principes du droit international public américain** (Paris, 1954).

have emerged.[130] In line with the negative thesis, refer to the Mexican Jorge CASTAÑEDA, **México y el orden internacional** (México, 1954), with a comprehensive synthesis of this issue, whereby he considers that since the inception of Pan-American conferences at the end of the XIXth century, there has been a move towards another conception due to the growing distance occurring between Anglo-Saxon America and Latin America, or Hispanic America,[131] due to both the situation of each one towards Europe, and the growing diversity of the respective social and economic situations. Consequently, the 'Pan-American community' has been deprived of sense and content, and there was the necessity to consider 'Latin American community' instead.

43. Another Brazilian, Braz de Souza ARRUDA (1895-?),[132] who was appointed full professor of public international law in 1925,[133] and held that chair for the following three decades, claimed to have been the first to deal with international air law in Brazil. His handbook was named "**international law in the atomic age**" (1945)[134] and it can be argued to what extent the name was deserved.[135] At the same time, Raul PEDERNEIRAS, who lectured for 45 years in Rio, published his **Direito internacional compendiado** (10th ed., 1953).[136]

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[130] Lafayette RODRIGUES PEREIRA, **Princípios de direito internacional** (Rio : Jacinto Ribeiro dos Santos Ed., 1903) ; José MENDES, **Direito internacional público : preleções** (São Paulo : Duprat & Comp., 1913).

[131] Rafael Fernando SEIJAS, **El derecho internacional hispano-americano** (Caracas : Imprenta de 'El Monitor', 6 vols., 1884).

[132] W. FERREIRA (op. cit., 1928, p. 124) a respeito de Braz de Souza ARRUDA : matriculou-se em 1912, bacharelou-se em 1916. Em 1917, prestou concurso e foi aprovado, por unanimidade de votos. Foi nomeado livre-docente, por portaria de 2 de maio de 1919, tomando posse na mesma data. Por decreto de 23 de junho de 1920, aprovado em novo concurso, foi nomeado professor substituto da segunda seção, tomando posse em 5 de julho, quando recebeu o grau de doutor.

[133] W. FERREIRA (op. cit., 1928, loc. cit.) : "É o mais jovem dos professores da Faculdade de Direito de São Paulo. / Operoso, tem publicado vários trabalhos jurídicos na *Revista da Faculdade de Direito de São Paulo*, vols. 21 e 22, e, em volume, editou as suas dissertações de concurso, em 1919."

[134] Braz de Souza ARRUDA, **Curso de direito internacional : na era atômica** (Curitiba – São Paulo – Rio : Ed. Guaíra Ltda., s/d – mas, no 'cavaco', pp. 5-11, refere ter completado "25 anos de cátedra em 1945!", cit. pp. 7-8) : "No volume 23 da revista da Faculdade vem o resumo das minhas prelecções de direito internacional, onde se vê que fui o primeiro a tratar entre nós do direito aéreo e da radiofonia, em suas projecções no campo do direito."

[135] In a book review G. E. do NASCIMENTO E SILVA published at the time B. S. ARRUDA **Curso de direito internacional : na era atômica** (Curitiba – São Paulo – Rio : Ed. Guaíra Ltda., s/d) was published, he mentioned that the book, albeit devoted to the international law of the atomic age predominantly quoted bibliographical references of the previous century.

[136] Raul PEDERNEIRAS, **Direito internacional compendiado** (Rio : Freitas Bastos, 8ª ed., 1944 ; 10ª ed., revista e aumentada por Oscar TENÓRIO, 1953).

44. The claim to a specific Latin American profile has not been clearly stated, and has proven difficult to handle.[137] As Cesar SEPULVEDA (1969, 1975)[138] points out, the matter of the 'sources of American international law' should be approached in a historical perspective.[139]

According to SEPULVEDA, "certain international rules have found a specific expression (*una expression particular*, *diferenciada*) in the Americas, although same do not change the existing general rules" and he provides the following examples: following art. 20 of the Inter-American Treaty of mutual assistance, the majority vote can impose a normative conduct on all would not find an equivalent in other regions, and also, he claimed, the duties imposed on the states in case of civil war, not comparable to any general rules of international law.[140]

45. At the same time it would seem at least curious to find non-intervention as a rule – the CALVO clause – considered as part of the so-called Inter-American system, as stated by C. SEPULVEDA:[141] it could be good if true. But this has not been observed.

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[137] Sebastián COX URREJOLA, **América latina : sujeto del derecho internacional** (Santiago : Edtrl. Jurídica de Chile, 1970).

[138] César SEPULVEDA, **Las fuentes del derecho internacional americano** : una encuesta sobre los métodos de creación de reglas internacionales en el hemisferio occidental (Mexico : Porrua, 1ª ed., 1969 ; 2ª ed., 1975).

[139] C. SEPULVEDA (op. cit., 2nd ed., 1975, chap. 1 'el problema de la determinación del derecho internacional americano', pp. 13-19, quoted p. 17) claimed that "certain international rules have found a specfic expression in the Americas, although same do not change the existing general rules".

[140] C. SEPULVEDA (op. cit., 2ª ed., 1975, p. 18) *verbatim* : "los preceptos que constituirían el derecho internacional americano difieren de las reglas generales en cuanto al ámbito de su aplicación, en cuanto a los sujetos a los que se dirige y en cuanto a las fuentes que lo crean. Se trata de una rama que influye en el 'metabolismo' del derecho internacional general, comunicándole frescura y vitalidad. De otro lado, la designación posee valor científico, pues proporciona un área perfecta para estudio e investigación, y un repositorio abundante de normas y de instituciones."

[141] C. SEPULVEDA (op. cit., 2ª ed., 1975, cap. 7 'las doctrinas americanas y su influencia en la formación de normas', pp. 71-84, quoted pp. 78-79) *verbatim* : "Vino a cristalizar, tras de no poca pugna, en una regla esencial de convivencia interamericana, que arma todo el sistema regional, y que aparece en el catalogo de los derechos y deberes de las repúblicas americanas, y que expresa : 'Ningun estado o grupo de estados tiene el derecho de intervenir directa o indirectamente, y sea cual fuere el motivo, en los asuntos internos o externos de cualquier otro. El principio anterior excluye no solamente la fuerza armada sino cualquier otra forma de ingerencia o de tendencia atentatoria de la personalidad del estado, de los elementos políticos, económicos y culturales que lo constituyen."

Others talk about theory and practice of intervention, like E. C. STOWELL (1932),[142] where non-intervention is presented as a core issue of the whole system of international law: "it is useless to deny the legitimacy of force used to redress a tort, and obtain compensation, when such had been refused in violation of the law."[143]

46. The issue of legitimacy is a hard topic to cover in other fields as in international law. Therefore the valid effort made by Thomas M. FRANCK (1990)[144] deserves to be quoted, albeit not always agreement with him: "In the international system, rules usually are not enforced yet they are mostly obeyed. Lacking support from a coercive power comparable to that which provides backing for the laws of a nation, the rules of the international community nevertheless elicit much compliance on the part of sovereign states. Why do powerful nations obey powerless rules? That is the object of this excursion into power: more precisely, the power which rules exert on states, both the weak and more remarkably the strong."[145] From there he moves on to state "the irrelevance of law and non-law," thereby leading to the acknowledgment of 'legitimacy as a matter of degree.'[146] From there on, one would tend to consider his focus much more on power and not on law.

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[142] Ellery C. STOWELL, at the time professor of international law at the American University in Washington, had earned his doctor degree (1909) at the Law School of the University of Paris, lectured at The Hague on **La théorie et la pratique de l'intervetion** (RCADI, 1932, t. 40, pp. 87-151).

[143] E. C. STOWELL (op. cit., 1932, p. 99 and p. 101) : « Il est vain de nier la légitimité de la force employée pour obtenir réparation, quand cette réparation a été réfusée en violation du droit. » What is stressed by STOWELL is the need to observe the procedures to render the use of force if not 'legitimate', at least 'legal', in conformity with the procedures established, in accordance with international law « dans le droit international, comme en d'autres droits, on s'aperçoit que les règles de procedure constituent le cadre dans lequel se forme et se développe le fond du droit. »

[144] Thomas M. FRANCK, **The power of legitimacy among Nations** (New York / Oxford : Oxford Univ. Press, 1990).

[145] T. M. FRANCK (op. cit., 1990, 'Prelude : Why a quest for legitimacy ?', pp. 3-26, quoted p. 3, and p. 26) concludes his quest with three remarks : "*First*, if there is such a variable as legitimacy, it is most likely to be found in its unalloyed state exactly where we are looking, that is, in the international arena. *Second*, legitimacy exerts a pull to compliance which is powered by the quality of the rule or of the rule making institution and not by coercive authority. It exerts a claim to compliance in the voluntarist mode. *Third*, since the compliance pull of various rules and institutions varies widely, it follows that if legitimacy is a determinant of the strength of a rule's compliance pull, then legitimacy, too, must be a matter of degree."

[146] T. M. FRANCK (op. cit., 1990, '2 The irrelevance of law and non-law', pp. 27-40 ; '3 Legitimacy a matter of degree', pp. 41-49).

Thomas M. FRANCK, in his study on "fairness in international law and institutions" (1995, 2002),[147] devoted efforts to connect "legitimacy and fairness"[148] to "equity as fairness"[149] in order to conclude regarding equity: "Far from being contentless, equity is developing into an important redeeming aspect of the international legal system." After dumping law out with power politics, it becomes necessary to redress: "there are good reasons for introducing elements of justice into legal discourse and process." He further notes: "fairness discourse which aims to temper the imperative of legitimacy with that of justice serves not to undermine but to redeem the law."[150]

47. Mixing law and power politics together seems to be a rather frequent feature with American international lawyers. But then, we are no longer dealing with international law properly understood and it becomes rather difficult, if not altogether impossible, to compare things that are substantially dissimilar. International law and politics are two different realms, albeit frequently connected in practice.

According to C. Neale RONNING (1963),[151] "the vision of an America regulated by its own unique legal order arose with the achievement of independence. It has inspired, amused, interested and frustrated countless writers and statesmen ever since."[152] If, on the one hand, he considers, "the desire to bring order and predictability into Inter-American relations has been the progenitor of this assortment of 'organizations'," and on the other "efforts directed towards this end, their successes and failures, have taken place within a complex of economic, political and social forces. The preservation of a measure of order and predictability in the immediate feature will be no less complicated."[153]

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[147] Thomas M. FRANCK, **Fairness in international law and institutions** (Oxford : Univ. Press, 1995, reprinted 2002, quoted p. 22) : Legitimacy as process fairness and distributive justice as moral fairness are different aspects of fairness.

[148] T. M. FRANCK (op. cit., 1995, reprinted 2002, chapter 2 'fairness and legitimacy', pp. 25-46).

[149] T. M. FRANCK (op. cit., 1995, reprinted 2002, chapter 3 'equity as fairness', pp. 47-80, quoted p. 79).

[150] T. M. FRANCK (op. cit., 1995, reprinted 2002, loc. cit.)

[151] C. Neale RONNING, **Law and Politics in Inter-American Diplomacy** (New York and London : John Wiley & Sons, 1963).

[152] C. Neale RONNING (op. cit., 1963, 'chapter one. introduction', p. 1-5, quoted p. 1): "Rudimentary bits and pieces of such a legal order began to develop as the states in this hemisphere sent out to formalize various aspects of their mutual relations. By the middle of the present century a substantial but uncoordinated and confusing pattern had emerged."

[153] C. N. RONNING (op. cit., 1963, 'chapter one. introduction', p. 1-5, quoted p. 5).

48. To what extent can be featured a regional system has been more recently reviewed by Julio A. BARBERIS (1992),[154] going back to the first half of the 19th century, in the Latin-American context. Notwithstanding his mastery of the subject and of international law in general, the outcome is convincing to the point that one agrees with the premise that there is such a thing as a regional sub-system of international law.

This is an assumption that many Spanish speaking Latin American international legal scholars may seem willing to accept, with some minor variations as to its extent and content. In my own view, most Brazilian international lawyers will be less willing to accept an equivalent statement.

Over the last decades[155] there has been extensive debate on the relations and interactions between regional and universal spheres of action of law and international relations. This would lead us too far from the intended approach.

IV. The new challenges and the role of international law as an institutional and regulatory system

> In order to develop international law as a science, in order to give it as law the dominion of the world, what matters is to create the international material, the international substance, the international life, that is to say the union of the nations into a vast body of so many heads of states, governed by a thought, by an opinion, by a universal and common judge. The law will come by itself as the law of life of this body.

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[154] J. BARBERIS, **Les règles spécifiques du droit international en Amérique latine** (RCADI, 1992, t. 235, pp. 81-230).

[155] On the topic, among extensive available bibliographical sources : Sergio ALESSANDRINI and Giorgio SACERDOTI, **Regionalismo economico e sistema globale degli scambi (**Milano : Giuffrè, 1994) ; Bela BALASSA, **The theory of economic integration** (London : Allen & Unwin, 1962) ; Demetrio BOERSNER, **Relaciones internacionales de América Latina: breve história** (Caracas : Edtrl. Nueva Sociedad, 4th.. ed., 1990) ; Luis R. CÁCERES, **Integración económica y sub-desarrollo en Centroamérica** (México : FCE, 1980) ; José J. CAICEDO CASTILLA, ***El panamericanismo*** (Buenos Aires : Depalma, 1961) ; P. B. CASELLA, *Ampliação da União Européia : a Europa central se integra* (in **O novo direito internacional : estudos em homenagem a Erik JAYME**, ed. by C. L. MARQUES & N. de ARAUJO, Rio : Renovar, 2005, pp. 723-743) ; P. B. CASELLA & R. E. SANCHEZ (coord.), **Quem tem medo da ALCA ? desafios e perspectivas para o Brasil** (foreword by. J. G. RODAS, Belo Horizonte : Del Rey, 2005) ; P. B. CASELLA & R. E. SANCHEZ (eds.), **Cooperação judiciária internacional** (Rio : Renovar, 2002) ; P. B. CASELLA, *Quadrilateral perspective on integration in the Americas – a view for the Mercosur and Brazil* (in **The Evolution of Free Trade in the Americas / L'évolution du libre-échange dans les Amériques**, ed. by L. PERRET, Montréal : Wilson and Lafleur, 1999, pp. 125-155).

Juan BAUTISTA ALBERDI (1810-1884)[156]

49. INTERNATIONAL LAW as an institutional and regulatory system has a role to play in the contemporary world. The perception, albeit nor entirely new,[157] is becoming necessary in order to avoid disruption.[158] Among the main issues to be faced by international law, as an institutional and legal system, is the insertion of the individual as a subject of international law, and putting limits on war, and the use of force in general and also putting limits to the sovereignty of states, in favor of the common interest.

International law has come to stay: there are no better alternatives to a growingly complex structure that needs to be regulated internationally. No country can manage world issues unilaterally. This has been tried and failed, both in the more remote and in the more recent past.

50. Not going very far in the past, just take some current examples, from today's reality: the European Union, the United States and the BRIC countries. Enough to illustrate the point.

The EU is an economic giant and a political dwarf. As long as integrated Europe remains focused on internal issues, and its foreign policy as fragmentary as it now is, there is little to be expected for the world at large.

The US has misguided its moral authority, acquired as a fighter for freedom during the Second World War and shortly thereafter. There are lessons to be learned from this recent past.

The lowest points were the 'dark ages' that marked the BUSH Jr. Years (2000-2008). The negative balance of the BUSH administration will require decades to be washed away. But the useful lesson is clearly enough stated to be learned: 'unilateralism' is doomed, the 'imperial' approach is over and done, and works no longer. The pretended claim to 'right or wrong my country' is totally dated.

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156 Juan BAUTISTA ALBERDI, **El crimen de la guerra** (Buenos Aires : La cultura argentina, 1915, p. 92).

157 J. BAUTISTA ALBERDI, **El crimen de la guerra** (Escritos póstumos de J. B. ALBERDI, Buenos Aires : Imprenta Europea, Moreno y Defensa, tomo II, 1895, p. 157) : "the favorite persons of international law are states ; but as these are composed of men, the person of the man is not foreign to international law. / Not only the states are members of humanity as society, but the individuals of which the states are composed. / In the last analysis the individual man is the elemental unity of all human associations ; and all law, though it be collective and general, is ultimately resolved in a law of man."

158 J. BAUTISTA ALBERDI (op. cit., 1915 edition, p. 75) notes : "the law which is used for natural law in order to regulate the relations of man to man within the nation, is one and the same as that which regulates the relations of nation to nation."

51. Sandra VOOS (2000)[159] analyses the so-called "New Haven School" of international law and shows the risks ensuing from the acceptance of such features and levels of 'politics' into international law as an institutional and legal system. Most of what they do seems hard to fit into international law that remains both 'law' and 'international'.

In her view, "Myres S. McDOUGAL and the doctrine of international law he founded with Harold D. LASSWELL and that was continued by W. Michael REISSMAN, in many aspects stay in fundamental contrast to the traditional conceptions of public international law."[160]

52. The rest of the world will simply not keep in waiting for such misdemeanors. Just among other examples, China and the other BRIC countries are growingly bringing new hues to the international scene.

The outcome is simple: no country can handle the world; this was not feasible before, and even less can this seem to be the case today. A growingly complex and interdependent world is not prone to accept unilaterally imposed standards and measures even when same could be justified and justifiable. This can simply not work that way.

If the unilateral use of force and the imposition of the views held by the stronger states seem less and less acceptable, this has not *per se* brought the corresponding development of the institutional framework and devices for implementation of the multilaterally held approaches to international needs and the corresponding international settlements. The process is under way, but the shortcomings may often seem more visible and remain – not innocently – more in evidence than the achievements towards fuller implementation of the required international institutional and legal framework for the world at large. And improvements do not seem to be in view, in the near future.

Final remark

53. INTERNATIONAL LAW HAS come to stay, no matter some people like it or not. As an institutional and regulatory system, it will be more and more necessary in a growingly interdependent world.

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[159] Sandra VOOS, **Die Schule von New Haven : Darstellung und Kritik einer amerikanischen Völkerrechtslehre** (Berlin : Duncker & Humblot, 2000).

[160] S. VOOS (op. cit., 2000, "Einleitung", p. 15-16, quoted p. 15) : „Diese ist eher positivistisch geprägt im Sinne einer Orientierung an vorgegebenen Normen zur Lösung von Rechtsfragen und einer grundsätzlichen Trennung zwischen geltendem Recht einerseits und Werten andererseits. Dementsprechend rief in den 50er Jahren an der Yale Law School entstandene Schule von New Haven heftige Gegenreaktionen hervor, die teilweise bis heute andauern."

It is nevertheless necessary to agree on what it is in order to possibly agree on how it should work. Therefore, the focus was brought to the foundations of international law and extended into its development in a historical perspective, not as an end in itself. This was not intended as a study on the history of international law and institutions but more so on the contents and scope thereof as a regulatory system of both interstate relations and the personal relations of individuals, including foreign elements, in accordance with the traditional approaches to public and private international law. But, in addition thereto, more and more contents emerge and are necessarily to be regulated by international law in the contemporary world.

Having first focused on the common basis and the concurrent developments in three of the main traditions in the continent[161] – the lines stemming from England into an Anglo-American conception, the Portuguese into a Brazilian and from Spain to the Spanish speaking countries in the continent[162] – the perception of what is shared and what divides us could be more clearly viewed and properly understood.

The new challenges lying ahead are enormous. In order to coordinate common action, common needs, common scopes, the emergence of the individual as subject of international law, the international protection of fundamental rights, the common heritage of mankind, the common concern of mankind, all these aspects entail the need to have international law as the tool apt to cope with such needs and challenges.

[161] It would be interesting to review the possible extent other traditions, involved at continental level, are also to be taken into account, as to whether and to what extent Dutch, French and English international law schools may have developed into autochthonous formulations of international law, such as for instance, in the Guyanas and the Caribbean.

[162] Counting the Americas as one or two continents, just one, and this is only a minor evidence, among so many others, of some of these ‘cultural’ differences.