

10-1-1975

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Recommended Citation

H. B. Jacobini, *International Law in Latin America*, 7 U. Miami Inter-Am. L. Rev. 605 (1975)

Available at: <http://repository.law.miami.edu/umialr/vol7/iss3/5>

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NOTES

International Law In Latin America*

The law of nations or international law is a complex pattern of overlapping legal relationships among the nations, peoples, and transnational mechanisms of the world. Some of the entities included are highly advanced in every way, while others — including several in Latin America as well as many of the newer states — are technologically less well advanced. Among these entities states remain in a legally predominant role. It has been argued that as far as underdeveloped states are concerned, international law is in part a device by which the colonial societies are kept in line, and that once new states emerge, they seek important changes.¹ In another place, I have suggested that this is a rather doubtful picture, and that the new and underdeveloped states have in fact behaved in very much the same fashion as the other members of the community of nations.² If this last observation is essentially correct for the present moment in time, it is then in close conformity with the long historical development of international law in Latin America which shows a very close relationship to the development of that law in Europe and the United States.³

International Law and the Western World

A case is sometimes made for the theory that a regional society develops its own peculiar thrust in international law. In this connection, note will be taken later in the essay of the American school of international law. What is of more transcendent significance, however, is the fact that attitudes and thinking in Latin America regarding international law seem clearly to have run parallel to their counterparts elsewhere in the Western World. If issues and problems have been local or regional, main themes, thrusts, and general patterns have nevertheless been much more ecumenical. In terms of personnel, Latin Americans have performed as writers, pro-

*An early draft of this paper was prepared for a symposium on innovation in international law held in 1971 at the Villa Serbelloni in Bellagio, Italy.

fessors, advocates, and judges along with their colleagues from Europe, the United States, and elsewhere, and they have partaken of and contributed to the main stream. Such distinguished names as Alberdi, Calvo, Bello, Ulloa, Planas Suárez, Antokoletz, Bevilaqua, Accioly, Bustamante y Sirven and Pondestá Costa, serve to illustrate this point.⁴

But one should not lose sight of their presence in the vanguard of legal movements of Latin American legal thought and activity. A modern example is the influence of Latin America in the contemporary effort to expand the seaward jurisdiction of coastal states.⁵

Philosophical Thrusts

Publicists in international law since the Renaissance have commonly grounded their writings on philosophical underpinnings. These foundations have been of three main orientations: (1) naturalism; (2) positivism; and (3) the Grotian or eclectic combinations of the former two.⁶ Here, as in other matters, Latin American writers have paralleled their brethren on other continents. Nevertheless, most Latin American publicists have been philosophical eclectics though, perhaps surprisingly, leaning more toward positivism than toward naturalism. As one might suppose, moreover, the emphasis in their positivism (but still within an overall eclectic framework) has been greater in the twentieth than throughout the nineteenth century.⁷

It is of at least passing interest to ask whether these foundation philosophies are important in the day-to-day handling of legal issues, and it may be conjectured that, in all probability, they are not. Why then, one must ask, do they figure in most treatises? In the last analysis it appears that they are devices by which each writer seeks to fit juridical science into his own broad *weltanschauung*, but they are not, for the most part, mechanisms for precise determination of the law.

The New International Law and the Legal Personality of Man

In the area of modern international law there has been considerable emphasis on the individual man as a subject of international law.⁸ Here as elsewhere, Latin Americans have been close to scholars in other lands. In various ways, Latin American writers have acknowledged a growing trend in the direction of giving to man as an individual at least a modicum of such personality. But it is important to note that in the works of Juan Bautista Alberdi the theme had an early Latin American champion.⁹

One must recognize, however, that to carry this principle to its ultimate conclusion, would imply the restructuring of international society in a radical way. As among international legal writers generally, some Latin American scholars have taken this tack,¹⁰ but the number who have done so does not appear to be large.

This position is nothing more in essence than a realization that if individual men were to become the primary persons or subjects of international law, and thereby replace the state in that role, the traditional thrust of nation-state sovereignty would have been automatically replaced by a higher sovereignty. Hence a system of world government is postulated. Regionally, the carrying into effect of this posture would result merely in larger regional sovereignties, but in either case a fundamental alteration of the locus of sovereignty is indicated.

The practical realization of the political fruits of such a philosophical position has been less than encouraging on either a world-wide or on a regional basis in Latin America.

Despite much discussion of a Latin American regional ethos,¹¹ there has been little meaningful evidence of movement within Latin America toward regional unification of a really significant sort.¹² Whatever one may think of the slowness with which Europe has progressed in that direction, it appears clear that significant legal developments have taken place in Western Europe and that increasingly close knit regional institutions have been developed including the creation of an active European court.¹³ In Latin America, there has been nothing of this last sort at all except the ill-fated Central American Court of Justice referred to in a footnote above.¹⁴ Recent commentary has urged creation both of a new Central American court¹⁵ and of a Pan-American court,¹⁶ but nothing more concrete has transpired.

Legal writings in the tradition of the "New International Law" must be viewed either (1) as exhortations, or (2) as descriptive legal formalizations — the legal end products of political realities. In Latin America they are perhaps even more pointedly the former than elsewhere. On the other hand, in the writings of Alejandro Alvarez, and particularly in his judicial decisions, the increasing interdependence within the modern world takes on for him very great meaning and significance. Although it may conceivably prove to be the harbinger of tomorrow's reality, Judge Alvarez' emphasis on what he views as the all-powerful role of the General Assembly has an unreal quality about it.¹⁷

Nevertheless, if the behavior of the Western Hemisphere is viewed as an index of beliefs and attitudes, the new international law in that area must be again categorized as primarily exhortatory.

The American School of International Law

Within the Latin American literature on the law of nations, the concept of an American school is well marked. In essence it reflects the view of Alejandro Alvarez that there is within the New World a unique juridical ethos which constitutes a regional system of international law.¹⁸

The concept has been dignified largely by the quantity which Alvarez himself has written about it, and by the relatively slight response which it has evoked. Initially, the concept was contested on the dual grounds, (1) that it did not in fact encompass a significant number of factors unique to the New World, and (2) that it was basically in violation of the broader reality of the universality of international law.¹⁹

More recently there has been relatively little concern with it.²⁰ For the most part, where Latin American writers have considered the concept at all, they have merely acknowledged the presence of some peculiarly American problems requiring special solutions, but little more.²¹ It would be logical to assume that the Latin American regional system—the Organization of American States—would play a part in the American school.²² However, it does not appear to have been nearly as significant a part of the consideration of this matter as might have been expected.²³ In essence the American school in Latin America is far more spiritual than empirical.

It is not amiss to suggest, however, that regional problems and solutions have appeared to assume an increasing role in international affairs. Perhaps on the political level, this is a response to—or escape from—the seeming impossibility of achieving a necessary measure of world-wide cooperation. It is also a reflection of the view—probably correct—that many problems are essentially regional or local, and dealing with them on a world-wide level only serves to magnify their impact and their threat to world peace.²⁴ Reflecting in part the limited success of the regional settlement of disputes, but perhaps resulting more meaningfully from the mere fact that states in close physical or other proximity to one another may develop similar responses to uniquely local problems, regional systems of law can, at least figuratively, be said to have emerged. What is not clear about all this is whether these are really significantly

different, or whether their uniqueness is minor and more illusory than real. Is there, for example, a Moslem system of international law? Is there a Soviet or Marxist system embracing the Eastern European block of states or a broader Marxist community? Can one perceive a European system or perhaps an Atlantic community with its own unique international law? By inference is there an Asian system, a Theravada system, a Christian system, or an African system?²⁵ The adage *ubi societas ibi jus* invites one to try to deduce that each of these communities, if indeed they are communities, might produce a legal regime. This is not the appropriate place to explore these possibilities in detail, but it is significant that several of these groupings have been said to have produced such systems of law, and logically all *might* have done so.

In essence, Alvarez postulated five main characteristics of American international law. These were (a) continental solidarity, (b) pacifism, idealism, and optimism, (c) respect for — and condemnation of violations of — law and international morality, (d) an American juridical conscience, and (e) an American moral conscience.²⁶ Initially one must question the extent to which these principles differ from those applicable to the international community at large.²⁷ Ultimately the question reduces to whether an area does or does not have a sufficient body of unique legal practice and tradition to warrant its being considered to have its own legal system. It appears that scholarship would benefit from an attempt to establish pertinent criteria of uniqueness and then to establish empirically whether such uniqueness does or does not in fact exist in these instances.²⁸ The inter-American system together with the American school of international law constitutes a case in point. Is there or is there not a sufficient body of unique procedure and tradition to justify its being considered as a separate regional system of international law?

In answering this question, it is doubtful whether a treaty entered into between a regional or a philosophical group of states is to be viewed as unique in itself if it merely mirrors other treaties of more general geographic or philosophical adherence. Nor can a body of regional treaties be viewed uncritically without close attention to analysis of the frequency with which such treaties are invoked. Nor can one merely count regional treaty titles without looking carefully at the states which have in fact acceded to each.²⁹

Unless one by-passes these considerations and views American international law in primarily a spiritual context, it is difficult to conclude

on the strength of existing research that a full-blown, distinct and consequently regional system of international law exists in the Western Hemisphere.

Law, Politics and Innovation

In Latin America, international law conforms to the principle that law is a formalized reflection of the political society from which it derives.³⁰ The vast area of Latin America is by and large composed of states which are closely related culturally, but which remain divided — indeed Balkanized — into self-conscious sovereign polities.³¹ Those polities relate to one another through the traditional avenues of diplomatic representation, and, in addition, through the machinery of the United Nations, and of the inter-American system, in much the same way that other states of the world relate to one another.

Within this complex it is sufficiently difficult to see major differences of thrust between writers of the nineteenth and the twentieth centuries. Whether one might envision significant deviations between relatively younger legal writers and relatively older contemporary legal writers appears dubious.³² Clearly there are current timely topics which would have been less likely three decades ago,³³ but even these do not appear to differ in fundamental character from earlier specialized accounts.³⁴ It may well be, as one author suggests in a related context, that within Latin America, methodological factors remain quite static,³⁵ or perhaps an explanation can be found in the mere fact of an essentially traditional political context. In this last connection, Thomas and Thomas observe that

... in the contemporary state of division of thought on the fundamentals of international law, the American states are without doubt in the camp of those nations which accept the traditional values as a basis for international law, as opposed to those nations which claim they are establishing a fresh foundation of international law upon standards incompatible with the standards of traditional international law.³⁶

This system is mirrored in essentially a traditional pattern of international legal ties and relationships within Latin America, and between American and non-American states. The law which this political complex reflects does not appear to be fundamentally unique.

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¹See e.g. Jorge Castañeda, "The Underdeveloped Nations and the Development of International Law," *International Organization*, Winter, 1961, pp. 38-48.

²*International Law: A Text*, (rev. ed.) Homewood, Illinois, Dorsey, 1968, pp. 366-8. (Hereafter cited as *Int. Law*.)

³See in H.B. Jacobini, *A Study of the Philosophy of International Law as Seen in Works of Latin American Writers* (The Hague: Martinus Nijhoff, 1954) p. 140 *et passim*, (hereinafter cited as *Phil. of Int. Law*.)

⁴The writings of these scholars together with numerous others, are reviewed *ibid*, *passim*.

⁵For a good brief summary see Charles L. Cochran "An Inter-American Approach to the Law of the Sea," *Naval War College Review*, (March-April, 1974) pp. 59-66.

⁶Perhaps the best single source in which this is detailed is Arthur Nussbaum, *A Concise History of the Law of Nations*, 2nd ed. (New York: Columbia University Press 1958). See also Jacobini, *Phil. of Int. Law*, especially pp. 12-37.

⁷Jacobini, *Phil. of Int. Law*; pp. 139-40 *et passim*.

⁸See e.g., George Manner, "The Object Theory of the Individual in International Law," *American Journal of International Law*, Vol. 46, No. 3 July 1952 pp. 428-449; Philip C. Jessup, *A Modern Law of Nations* (New York: MacMillan, 1948); H. Lauterpacht, *International Law and Human Rights* (New York: Praeger, 1950); see also M. Moskowitz, *The Politics and Dynamics of Human Rights* (Dobbs Ferry: Oceana, 1968).

⁹Juan Bautista Alberdi, *El Crimen de la Guerra* (Buenos Aires: La Cultura Argentina, 1915), p. 70 *et passim*.

¹⁰See e.g., Jorge Americano, *The New Foundation of International Law* (New York: MacMillan, 1947). For a systematic summary of such scholars see Jacobini, *Phil. of Int. Law*, pp. 67-72 and 104-19.

¹¹A considerable number of books and articles by Alejandro Alvarez have expressed this view. His best known work is probably *Le Droit international américain son fondement sa nature* (Paris: Pedone, 1910). This question will be considered below.

¹²There is of course the Organization of American States which in its present and earlier forms has been a persistent part of the inter-American scene. The extent of its accomplishments seems quite debatable. There have also been some unifying thrusts in Central America where an international court existed from 1908 to 1917. See J. Eyma, *La Cour de justice centre-américaine* (Paris: Sagot, 1928). Other efforts include the structuring of a new charter for the Organization of Central American States in 1962 which entered into force in 1965. See Salo Engel "The new ODECA," *American Journal of International Law*, October 1966, pp. 806-9.

¹³W. Feld, *The Court of the European Communities: New Dimension in International Adjudication* (The Hague: Martinus Nijhoff, 1964).

¹⁴See *supra* note 12.

¹⁵See comment in Engel, *op. cit.*, p. 807 (n. 5).

¹⁶Diego Uribe Vargas, *Panamericanismo Democrático* (Bogotá: Antares, 1958), especially pp. 305-28. See also reference in C. N. Ronning, *Law and Politics in Inter-American Diplomacy* (N.Y.: Wiley, 1963), *passim*.

¹⁷See William Samore "The New International Law of Alejandro Alvarez," *American Journal of International Law*, January 1958, pp. 41-54.

¹⁸Alvarez, *ibid.* For a partial list of his writings see Jacobini, *Phil. of Int. Law*, pp. 143 and 150, and for discussion of the concept see pp. 121-36.

¹⁹Manoel Alvarado de Souza Sá Vianna, *De la Non-existence d'un droit international Américain* (Rio de Janeiro; Figuredo, 1912); and Daniel Antokoletz, *Tratado de Derecho Internacional Público*, 1 (Buenos Aires: Bernabe, 1944) pp. 315-28.

²⁰See, however, the very balanced account in César Sepúlveda. *Las Fuentes del derecho internacional americano*, Mexico, Editorial Porrúa, S.A., 1969; also Uribe Vargas, *op. cit.*, pp. 137-74 *et passim* where there is considerable reference to the inter-American system and its impact on America's concepts of international law. For a negative view, see Max Hocheleitner, *Derecho Internacional Público* (Buenos Aires: Editorial Depalma, 1952). pp. 101-3.

²¹See e.g. Eduardo L. Bidau, *Derecho Internacional Público I* (Buenos Aires Valerio Abeledo, 1924), p. 11; see summary in Jacobini, *Phil. of Int. Law*, pp. 132-3.

²²There are several works on the subject, but one which is particularly pertinent to this study is A.V.W. Thomas and A.J. Thomas, Jr. *The Organization of American States* (Dallas: Southern Methodist University Press, 1963). (Hereafter cited as *Org. Am. St.*). For a classic article see Charles G. Fenwick "The Inter-American Regional System: Fifty Years of Progress" *American Journal of International Law* Vol. 50, No. 1 (January, 1956) pp. 18-31. For a good short treatment and interpretation see William R. Garner, "The Politics of Containment in the Pan American Policies of the United States" *Specialia* #1 (June, 1969), pp. 57-61.

²³*Cf.* however, material in Uribe Vargas, *op. cit.*, *passim*.

²⁴Hans Morgenthau, *Politics Among Nations*, 4th ed., (New York: Knopf, 1967), p. 194 *et passim*.

²⁵Soviet, Islamic, Western European and Latin American legal communities have been the subject of commentary, and there may be others with which this writer is not familiar. Critical analysis and careful research in such matters would, it is believed, be as useful as well as an interesting exercise.

²⁶See A. Alvarez, *El Continente Americano y el Nuevo Orden Social e Internacional* (Presentado al consejo directivo del Instituto Americano de Derecho Internacional, c. 1940), p. 21; see review in Jacobini *Phil. of Int. Law*, pp. 128-9.

²⁷For an assessment concluding that relatively little difference in fact obtains, see Thomas and Thomas, *Org. Am. St.*, especially pp. 190-7 and 405-10, and Jorge Castañeda, "Pan Americanism and Regionalism: A Mexican View," *International Organization*, Vol. 10 (1956), pp. 373-89.

²⁸For an analysis of three thrusts, the Calvo Doctrine, non-intervention and asylum, all of which have been significantly husbanded by Latin Americans, but which are not restricted to Latin America see D.R. Shea, *The Calvo Clause* (Minneapolis: University of Minnesota Press, 1955); and A.V.W. Thomas and A.J. Thomas, Jr., *Non-Interventions The Law and Its Import in the Americas* (Dallas: Southern Methodist University Press, 1956). Also Ronning, *op. cit.*, especially pp. 63-88 and 89-105.

²⁹See Status of Inter-American Treaties and Conventions (Revised to December, 1973). Serie sobre Tratados No. 5 (Washington, O.A.S., 1973). A few treaties have received unanimous approval; but out of a total of about 130, only about 40% have been ratified by half or more of the O.A.S. membership.

³⁰In the opinion of the present writer, Alvarez's greatest contribution is his stressing of this point. See Alvarez, *Después de la Guerra* (Buenos Aires: Imprenta

de la Universidad, 1943), p. 288 *et passim*. See also Jacobini, *Int. Law*, pp. 11-12, 371-2 *et passim*. For a brief description of the concept see the author's "Political Theory of Law" in Joseph Dunner *Dictionary of Political Science* (New York: Philosophical Library, 1964), p. 418.

³¹For an interesting account of a regional problem in the Americas, see Georg Maier, "Ecuadorian-Peruvian Boundary Dispute," *American Journal of International Law*, January 1969, pp. 28-46. This article shows by inference both the common cultural origins of the area and the essentially general patterns of the international law which is applied.

³²Cf. Uribe Vargas, *op. cit.* with the earlier work, J. M. Yepes, *Philosophie du panaméricanisme et organisation de la paix* (Neuchâtel: Editions de la Baconnière, 1945).

³³*El Pensamiento Jurídico de México en el Derecho Internacional* (México, D. F.: Librería de Manuel Porrúa, 1960); Alfonso García Robles *El Tratado de Tlatelolco* (El Colegio de México, 1967). Otmaro Silva, *Desarrollo Económico y Derecho Internacional* (Caracas: Prensas Venezolanas de Editorial Arte, 1965); also the work of a Spanish writer published in Mexico and subsequently in an English edition in the United States, Modesto Seara Vázquez, *Cosmic International Law* (Detroit: Wayne State University Press, 1965).

³⁴See for example Simon Planas-Suárez *El Asilo Diplomático* (Buenos Aires: La Imprenta Lopez, 1953.) Although this particular work is relatively recent, its author has published extensively since 1901.

³⁵Arpad von Lazar. *Latin American Politics: A Primer* (Boston: Allyn and Bacon, Inc., 1971,) p. 6.

³⁶Thomas & Thomas, *Org. Am. St.*, p. 197.