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REGIONAL PARTICULARISM: THE VIEWS OF THE LATIN AMERICAN JUDGES ON THE INTERNATIONAL COURT OF JUSTICE

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I. INTRODUCTION

A hundred years before Grotius wrote his classic on international law, *De iure belli ac pacis,* Vitoria and Suarez had revived the concept of *jus gentium* to meet the exigencies of colonization of the New World. These two Spanish theologians appealed to the human conscience. Speaking of the significance of Vitoria's ideas with regard to international law, J. L. Brierly says:

> Vitoria's teaching marks an important expansion of international law into a world system; for it meant that a law which had its rise among the few princes of Christendom was not to be limited to them or to their relations with one another but was universally valid, founded as it was on a natural law applying equally to all men everywhere.[1]

The Latin American judges of the International Court of Justice cling to this Hispanic international legal tradition and attribute to it their unique awareness of keeping international law in stride with contemporary developments in international society. From 1946 to 1964 Latin Americans held four of the fifteen seats on the Court.

The discovery of the New World may be considered as comparable to problems connected with Antarctica and outer space. The growth of generally accepted custom today is further complicated by the difference "between Soviet doctrine and that of the Western countries . . . [giving] striking evidence of the absence of any community of law."[2] A lack of a community of law prompted Vitoria to turn to natural law and general consent:

> And, indeed, there are many things in this connection which issue from the law of nations, which, because it has a sufficient

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1. J. BRIERLY, THE LAW OF NATIONS (6th ed. 1963). The dates of the two Spanish theologians are Francisco de Vitoria (1480-1546), and Francisco Suarez (1548-1617).

2. CHARLES DE VISSCHER, THEORY AND REALITY IN PUBLIC INTERNATIONAL LAW 155 (P. Corbett transl. 1957).

> derivation from natural law, is clearly capable of conferring rights and creating obligations. And even if we grant that it is not always derived from natural law, yet there exists clearly enough a consensus of the greater part of the whole world, especially in behalf of the common good of all.[3]

The constant references to the writings of Vitoria and Suarez by the Latin American judges provide the first base for regional particularism; the second is provided in the affinity of nations in the Western Hemisphere.

II. American International Law

Perhaps the most influential and articulate of the Latin American judges who appeals to the hemispheric history of international law is Alejandro Alvarez. His persistence in interjecting the term "American international law" in his individual and dissenting opinions puts him among the jurists who argue for the existence of an ideal combination of the legal systems of Latin America and the United States. Regional particularism becomes a topic of debate in international jurisprudence because the supporters of universalism in international law deny the existence of "American international law" and other forms of particularism.

The term "Pan-Americanism" signifies an inclination toward cooperation among the nations of the Western Hemisphere. This sense of interconnection has been attributed to several factors including (1) isolation from European affairs; (2) a common history of revolution against colonial domination and a dedication to democracy; (3) close commercial relations with each other; and (4) inter-American cooperation for purposes of security and improvement of socio-economic conditions.[4] In 1948 at the Bogota Conference the Charter of the Organization of American States was adopted, thus institutionalizing a regional system which had been periodically functioning since 1826 when Simon Bolivar called the first Pan-American Conference. The close collaboration of the American states in matters of defense facilitated the establishment of the Organization of American States under Article 51 of the United Nations Charter as a regional system of self-defense. The integrative aspects of the organization have gone beyond defense into such areas as hemispheric economic, political, social and technical problems, and intellectual and cultural exchange.

The Inter-American conferences of the last century have dealt with many topics of international law, but have focused upon the fundamental rights and duties of states and governments, domestic jurisdiction, obligations of territorial jurisdiction, the regime of territorial waters, pacific

3. Francisco de Vitoria, Relectiones De Indis: The Catholic Conception of International Law 489-90 (J. Scott transl. 1934).

4. *See* J. Rippy, Globe and Hemisphere (1958); A. Whitaker, The Western Hemisphere Idea: Its Rise and Decline (1954).

settlement of international disputes, right of asylum, state responsibility, and arbitral procedure.[5] The declarations and resolutions of the Inter-American meetings express a regional emphasis and unique interpretation of these international law subjects. The existence of such precedents has led many Latin American jurists, most notably Alvarez, to assert that a body of American international law has been created by the declarations and resolutions of the Pan-American conferences, as well as by the writings of Latin American and United States legal scholars.

Alvarez bases his theory of "American international law" on the synthesis of two separate legal traditions which are present in the Western Hemisphere—the Anglo-Saxon legal system of the United States, and the Latin legal system of the Latin American nations. Ideally, "American international law" combines the best points of the two systems. "American international law" had its beginning in the Monroe doctrine and the political hegemony of the United States over the hemisphere. Alvarez justifies both the Monroe Doctrine and its application as a source of "American international law":

> Hegemony, as well as the Monroe Doctrine, has been opposed as not having a solid base in international law. Both must be considered together since they are the known and respected lines of conduct of nations and in spite of the exceptions which have arisen, have received constant application, and have force at their disposition.[6]

Although to Alvarez the hegemony of the United States is objectionable, especially in connection with the frequent unilateral interventions of the "Big Stick" era, it has served to isolate the hemisphere from European politics.

Alvarez describes the Monroe Doctrine as the theoretical source of "American international law":

> In so far as American public international law is concerned it is contained in the three declarations of President Monroe—to maintain independence, no colonization, and no intervention of European powers in American countries. These principles synthesize the views of all the American states, not those of the United States alone, as has been erroneously believed.[7]

Thus the transition from unilateral to multilateral interpretation of the Monroe Doctrine has produced through a long history of Pan-American consultations a process which brought about the establishment of a body of distinctive American international law. This multilateral interpretation

5. These topics were selected from a list selected by the International Law Commission in 44 AM. J. INT'L L. 5-6 (1950).

6. A. ALVAREZ, LE DROIT INTERNATIONAL AMERICAIN 179 (1910).

7. A. ALVAREZ, INTERNATIONAL LAW AND RELATED SUBJECTS FROM THE POINT OF VIEW OF THE AMERICAN CONTINENT 37 (1922).

of the Monroe Doctrine by both the United States and Latin American countries is often referred to as the collectivization of the Monroe Doctrine.

Alvarez holds that almost the entire history of the Western Hemisphere is characterized by an absence of serious conflicts of interest such as those which were present in Europe. The test of solidarity is this peaceful and cooperative growth of the American nations. The immigrants who came to America relinquished their old ties based upon the international law principle of *jus sanguinis,* and became citizens of the new nations under the Pan-American espoused principle of *jus soli.* The geographically isolated situation of the Western Hemisphere allowed Latin American jurists to concentrate upon principles of international law which had special application to the region.

One would expect to observe differences among judges on international tribunals from various regions. The late Hersch Lauterpacht saw no obvious divergences between the Anglo-American and Continental jurists on the Court however, and did not admit the existence of a distinct American international law. He writes: "On no occasion has there taken place an alignment of the Anglo-American element on the bench against the judges trained in the Continental tradition."[8] Lauterpacht like many jurists from the United States and Britain considers the Latin American international lawyers to belong to the Continental tradition. It is likely that any distinction between Continental and Latin American international jurisprudence is overlooked because there is a feeling that the contributions of Latin Americans to the study of international law are not significant enough to merit such a distinction.

To the contrary, Alvarez and others recognize the existence of a European international law and the gradual formation of an Asian international law. In the *Colombian Peruvian Asylum* case he stated that the three continental systems of international law "are not subordinated to universal law, but correlated to it." He goes on to explain his position in the following passage:

> American international law has exercised a considerable influence over universal international law and has given it its peculiar character; many concepts or doctrines of American origin have achieved or tend to achieve universal acceptance and many concepts of a universal nature have, or tend to have, a special application in the New World. The influence of that has increased since the last war. The number and especially the quality of the institutions and principles which tend to be incorporated in new international law is truly impressive.[9]

8. H. LAUTERPACHT, THE DEVELOPMENT OF INTERNATIONAL LAW BY THE INTERNATIONAL COURT 128 (1958).

9. Colombian-Peruvian Asylum Case, [1950] I.C.J. 266 at 294 (dissenting opinion).

In considering Alvarez' statement, emphasis should be placed on two terms; namely, the "New World" and "new international law."[10] It would seem that the use of the name "New World" is completely outdated. Alvarez uses the expression "New World" to strengthen his argument for an American international law, manifesting a special insight on the part of Latin Americans who are attempting to cope with challenges facing contemporary international law, in much the same fashion as did Vitoria and Suarez. He holds that the international environment has undergone sweeping changes due to the world wars, the development of trade, industry, and communications, and the creation of international and regional organizations. Perhaps the most influential element of change is the moral force of international public opinion. Never before in the history of mankind has the body of international law been exposed to so many pressures.[11]

For a long time Alvarez had been building up a theory of "the new international law" in his writings, but he did not clearly formulate the theory until he became a member of the International Court of Justice. The core of his theory is divided into two components: a negative requisite of the limitation of sovereignty of nations, and a positive requirement of the responsible participation of states in constructing a solid international community. The real test of the theory is the success or failure of international organization. Thus the main concern of Alvarez' discussion of the new international law is the United Nations and its organs, especially the International Court of Justice.

Judge Alvarez has given special attention to the Court's dual task of deciding cases according to established international law and of developing international law by adapting it to the changes in international society. Thus the constructive role of the Court includes both modification of existing law and the creation of new law. In his dissenting opinion in the case of the Reservations to the Convention on Genocide, Alvarez wrote the following:

> As a result of the great changes in international life that have taken place since the last social cataclysm, it is necessary that the Court should determine the present state of law in each case which is brought before it and, when needed, act constructively in this respect . . . ; it is at liberty to develop international law, and indeed to create law, if that is necessary, for it is impossible to define exactly where the development of this law ends and its creation begins.[12]

Thus, according to Alvarez, the new international law is an outgrowth of a regional attitude toward the development of international law.

10. *Novus Mundus* or "New World" was used by Vitoria and Suarez in their writings.

11. A. ALVAREZ, *supra* note 7.

12. Advisory Opinion on Reservations to the Convention on Genocide, [1949] I.C.J. Reports 50.

It is necessary to scrutinize Alvarez' opinions on the matter of regional particularism because he submits a theory which goes far beyond the general expression of regionalism on the part of the other Latin American judges.[13] As far back as 1910 he published a book entitled *Le Droit International Americain.*[14] As a member of the Court he is permitted to show how his ideas on international law differ from those of the judges of other nationalities.

While Alvarez stands out when the problem of regionalism versus universalism arises before the Court, it would be well at this point to turn to the opinions of other Latin American judges concerning the same matter. On at least two occasions in his individual opinions the Argentine judge Lucio Moreno Quintana refers to a hemispheric system of international law. Inasmuch as territorial disputes have been prevalent throughout the history of Latin America, Judge Moreno Quintana in the case involving a boundary controversy between Cambodia and Thailand dissented and turned to a regional interpretation of the points of law: "In American international law questions of territorial sovereignty have, for historical reasons, a place of cardinal importance. That is why I could not, as a representative of a legal system, depart from it."[15] In the case of *Honduras v. Nicaragua,* he made the following declaration:

> As a representative on this Court of a Spanish-American legal system and confronted with a dispute between two Spanish-American States, I believe that the legal questions which are of particular concern to them should have been dealt with in the first place.[16]

These two statements are evidence of assertions of individuality through an appeal in the content of the law of an area. They show a firm belief in the existence of such law, and a conviction that it can have universal applicability.

Judge Azevedo while commenting on the *Haya de la Torre* case takes a different tack in that he excludes the United States from the region. It is quite apparent that the United States has not gone along with Latin Americans in giving a great amount of flexibility to rules on diplomatic asylum; Azevedo stated:

> Diplomatic asylum is a striking example of the necessity of taking into account—in the creation or adaptation of rules of restricted territorial scope—of geographical, historical and politi-

13. Samore, *The New International Law of Alejandro Alvarez,* 52 AM. J. INT'L L. 41-54 (1958).

14. A. ALVAREZ, LE DROIT INTERNATIONAL AMERICAIN, *supra* note 6.

15. Case concerning the Temple of Preah Vihear (Cambodia v. Thailand), [1962] I.C.J. 6.

16. Case concerning the Arbitral Award made by the King of Spain on 23 December 1906, [1960] I.C.J. 192.

> cal circumstances which are peculiar to the region concerned—in this case the twenty nations of Latin America.[17]

The statement undermines Alvarez' premise that the Monroe Doctrine is the foundation of American international law. This position throws the United States back into the category of Anglo-American jurisprudence.

In the same case the dissenting opinion of Judge Caicedo Castilla, which does not mention the United States but at the same time uses the phrase "American international law," complicates the issue. He explains it this way:

> An obvious conclusion may be drawn from the preceding considerations: in studying the problems of diplomatic asylum and in reaching a decision, account must be taken of the Latin American spirit and environment, as well as of the special interpretation of American international law regarding asylum, which is very different from the European interpretation.[18]

Obviously Caicedo Castilla was speaking of an environment of political instability discernable in Latin America. This would automatically preclude the United States jurists from having the same sensitivity about diplomatic asylum for political leaders.

Although the United States has not aligned itself with Latin American states on the matter of diplomatic asylum, Alvarez in the *Haya de la Torre* case insisted upon explaining his theory of the blend of North and South American international law, he finally wrote: "American international law has its sub-divisions, such as, for instance, Latin American international law or the law of the Latin Republics of the New World which is not binding upon the United States."[19]

Whether this is a satisfactory explanation is doubted by many commentators on this highly controversial case. John A. Houston says that "the net effect of the various judgments of the Court in this case has been to weaken the claim of the Latin Americans that they possess a regional system of international law which has evolved in response to regional needs."[20]

A final example of a defense of regional particularism may be seen in the separate opinion of Judge Alfaro. This entails a discussion of estoppel in the Cambodian-Thailand dispute. Estoppel is defined in the opinion as a principle "which holds one who, by word or conduct willfully causes another to believe in the existence of a certain state of things, and induces him to act on the strength of that belief, as precluded from averring against that party a different state of things as existing at the same

17. Colombian-Peruvian Asylum Case, [1950] I.C.J. 266.
18. *Id* at 359 (dissenting opinion).
19. *Id.* at 294 (dissenting opinion).
20. J. HOUSTON, LATIN AMERICA AND THE UNITED STATES 160 (1956).

time."[21] Alfaro calls estoppel an Anglo-American legal concept which is only applicable in international law in certain situations. He maintained that in the *Cambodia v. Thailand* case a more suitable principle would have been found in Spanish jurisprudence: "Spanish jurists, showing an objective criterion, call it 'doctrina de los actos propios.' "[22] Thus Alfaro puts forth a much broader view of estoppel than that of Anglo-Saxon jurists. As in the asylum case, Alfaro's opinion reflects a general tendency of the Latin Americans to give more flexibility to law.

The Latin American judges of the World Court, both permanent and *ad hoc,* have a record of delivering more dissenting and individual opinions than have other judges.[23] They also contend that they represent a completely unique school of thought. This is apparently not recognized by jurists from other nations. "American international law" is deemed a meaningless phrase, but the Latin Americans will not withdraw from the insistence that such a system of law is a reality.

It is possible to find discussions of Latin American contributions to international law in writings in that field of study. For example, many textbooks devote space to a discussion of such topics as the Calvo, Estrada and Drago doctrines, respectively. Other subjects included in these writings are special interpretations of asylum and of nonintervention. In the field of private international law the Bustamente Code without doubt is generally held to be an important contribution. One publicist writes:

> Obviously, the division into Schools of thought is laid not on perpendicular, but horizontal lines. This means that the dividing lines do not separate "National" doctrines from one another along the States' borders, placing scholars of various nations in the same several groups of theorists throughout the world.[24]

Regionalism is very rarely brought up in writings in the field. The author just quoted mentions "national doctrines" but does not tackle the problem of regional particularism.

III. Political Instability

An explanation for the incoherence of the theory of "American international law" may be seen in the relationship between political instability and the principles of regional particularism. The rules of international law governing political asylum, intervention, and recognition of governments assume importance among regional legalists by reason of the fact that these rules are pertinent in times of political upheaval in the Western Hemisphere. The three most widely-known theories of regional

21. Case concerning the Temple of Preah Vihear (Cambodia v. Thailand), [1962] I.C.J. 6.

22. *Id.* at 39.

23. *See* J. Syatauw, Decisions of the International Court of Justice (1962).

24. M. Korowicz, Introduction to International Law 109 (1959).

particularism, the Calvo, Estrada, and Drago doctrines, are related to political disorders in Latin America.

The Calvo doctrine calls for adherence on the part of a resident foreigner to the principle of local remedies, that is, the use of only local courts in seeking justice rather than requesting his home government to make a diplomatic claim.[25] The unsettled political atmosphere of the late nineteenth and early twentieth centuries brought about intervention by foreign governments on behalf of their citizens.[26] The Calvo Clause, a special provision written in treaties, statutes, constitutions, and agreements with foreigners, attempted to prevent the diplomatic claims of foreign nations.

The Calvo Clause is an illustration of an extreme position going beyond the limits of universal international law. When the Calvo Clause is interpreted strictly, it could preclude all recourse to diplomatic claim for the purpose of enforcing rights and is thus a departure from established rules of international claims. One publicist explains that "it would be tragic indeed if the nations of this hemisphere were to be recorded as the advocates of a creed which can only operate to the prejudice of the entire international community and to the everlasting discredit of the Pan American movement."[27]

In 1930 the Mexican Foreign Minister Genaro Estrada stated that recognition of a government is automatic and that withholding of recognition of a new government is an intrusion in the internal matters of a state. The official proclamation states:

> The Mexican Government is issuing no declaration in the sense of grants of recognition, since that nation considers that such a course is an insulting practice and one which, in addition to the fact that it offends the sovereignty of other nations, implies that judgment of some sort may be passed upon the internal affairs of those nations by other governments.[28]

The Estrada Doctrine directly attacks the United States policy of withholding recognition of several governments in Mexico.

Regardless of the specific events leading to the declaration, it represents an attitude among Latin American states of intolerance for the subjective test for recognizing the legitimacy of a new government.[29] It is a sound argument that objects to the use of non-recognition as a sanction, but the Estrada Doctrine is another example of Latin American reaction

25. *See* D. SHEA, THE CALVO CLAUSE: A PROBLEM OF INTER-AMERICAN AND INTERNATIONAL LAW AND DIPLOMACY (1955).

26. *Id.* at 10.

27. Freeman, *Recent Aspects of the Calvo Doctrine and the Challenge to International Law*, 50 AM. J. INT'L L. 147 (1960).

28. *Estrada Doctrine of Recognition*, 25 AM. J. INT'L L. 203 (1931).

29. C. FENWICK, INTERNATIONAL LAW 171 (3d ed. 1948).

to the foreign policies of the more powerful nations. By reason of its radicalism, the doctrine has found no wide acceptance by scholars of international law.

In 1902 Great Britain, Germany and Italy set up a blockade of the Venezuelan coast in order to compel that nation to meet payment of its debts. Dr. Luis M. Drago, then Argentine Foreign Minister, advanced a concept which subsequently came to bear his name. Drago declared that there can be no "oppression of peoples of this continent because an unfortunate financial situation may compel some one of them to postpone the fulfillment of its promises."[30] Although the Roosevelt Corollary to the Monroe Doctrine had the same aim as the Drago Doctrine (that of barring European intervention) Dr. Drago rejected Roosevelt's interpretation. Drago denounced the United States' assumption of the role of custodian of the Western Hemisphere: "The Monroe Doctrine is in fact a formula of independence. It imposes no dominion and no superiority. Much less does it establish protectorates or relation of superior to inferior."[31]

IV. Economic Underdevelopment

When Dr. Drago charged the United States with attempting to establish through the Monroe Doctrine a "relation of superior to inferior" with Latin America, he expressed the assertive character that is found in so many rules of regional particularism.[32] The protectiveness of rules of regional particularism is derived not only from political instability, but also from the economic inferiority of Latin America.

From a politically and economically weak position in international society, Hispanic-American lawyers recite broad principles of international law, such as non-intervention and non-aggression. To the observer outside of Latin America this reiteration of principles may seem to be nothing more than further evidence of the prolixity of the Latin Americans.

One Latin American statesman when questioned about certain principles of international law stated: "I think the expressions of non-aggression and of respect for the territorial integrity and sovereignty of nations are very beautiful and perhaps deserve their elucidation, but as far as their ability to have what we might call moral containment, I wonder at the efficacy."[33] The Latin American went on to say that "for us, the smaller nations, those principles are even more important for the larger nations that have and can rely on other means to defend themselves and

30. L. Drago, Foreign Relations of the United States 4 (1903).
31. *Id.* at 51.
32. *Id.*
33. Velazquez, *Some Legal Aspects of the Colonial Problem in Latin America,* 360 Annals 119 (1965).

their policies."[34] The new African and Asian states affirm almost the identical principles supported in Latin America.[35]

On the protection of foreign owned property and the issue of compensation for expropriated private property, Latin American states have difficulties in meeting the demands of capital-exporting countries for a minimum standard of treatment for foreigners. "The controversy is now dominated by the conflict of interest that arises between the protection of the economic investment made by nationals of the capital-exporting countries, and the interest of the developing states in acquiring control over their natural resources and economic development at the lowest possible cost."[36]

In summary, regional particularism comes in part from the enunciation of rules and principles of international law by Latin American jurists in order to maintain the special interests of an economically and politically weak area of the world.

V. EFFECT OF LEGAL EDUCATION IN LATIN AMERICA

From a comparison of legal education in Latin America with that of the Anglo-American or common law tradition, two outstanding differences are immediately apparent. The first difference is the study of the important legal codes of Latin American countries.[37] Codification does not play so crucial a part in legal education in common law countries. The case approach, on the other hand, has not commended itself to law schools in Latin America.

Secondly, in jurisprudence Latin American scholarship has remained close to the natural law of Stoic-Thomistic philosophy while in the United States natural law theories are not as dominant.[38] The methods employed by law faculties in the United States are viewed in Latin America as "materialistic and positivistic."[39] It is certainly true that natural law philosophy finds a place in the origins of both the English common law and the civil law traditions. As to the point in history when the two traditions become separate in their basic philosophies, one writer has submitted:

> That basis was obscured by the rash of codification which took place in Europe in the seventeenth, eighteenth, and nineteenth

34. *Id.*

35. *See, e.g.*, Guha Roy, *Is the Law of Responsibility of States for Injuries to Aliens a Part of Universal International Law?*, 55 AM. J. INT'L L. 863-91 (1961).

36. W. FRIEDMANN, THE CHANGING STRUCTURE OF INTERNATIONAL LAW 180 (1964).

37. *See* Lawson, *A Common Law Lawyer Looks at Codification*, 2 INTER-AM. L. REV. (Revista Juridica Interamericana) 1-6 (1960).

38. Mayda, *Problems of Legal Education in Latin America*, 12 J. LEGAL ED. 416 (1959-60).

39. Brown, *Recent Significant Trends in Legal Education in the Americas*, 3 INTER-AM. L. REV. (Revista Juridica Interamericana) 57 (1961).

> centuries, and reduced the European judiciary to a condition of dependence upon the executive and legislative branches of government. Positivism had previously raised its head in the English common law world beginning with the sixteenth century.[40]

The universalists insist that the phrase "American international law" is self-contradictory. They maintain that an American international law cannot exist apart from universal international law. H. B. Jacobini points out that the debate over "American international law" is largely terminological and that "virtually all of the writers agree that there exists an element of continental solidarity which includes a few peculiarly American rules, practices, and problems, and that America has contributed much to international law in general."[41] Thus one might describe the concept of a body of American international law as the unique contributions of the Western Hemisphere to general international law. Even Alvarez admits this when he says that "certain jurists have sought to call this complex the 'peculiarities of international law in America.' This is merely a question of terminology."[42] Nevertheless, debate continues on the existence or non-existence of hemispheric particularism in international law. Whatever the derivations of regional particularism may be, one would expect that Latin American judges who are members of an international tribunal would be proper spokesmen for their legal system.

40. *Id.* at 61.

41. H. JACOBINI, A STUDY OF THE PHILOSOPHY OF INTERNATIONAL LAW AS SEEN IN WORKS OF LATIN AMERICAN WRITERS 155 (1954). *See also* C. SEPULVEDA, CURSO DE DERECHO INTERNACIONAL PUBLICO 273-75 (1964).

42. Colombian-Peruvian Asylum Case, [1950] I.C.J. 266 at 294 (dissenting opinion of Alvarez).