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INTRODUCTION TO THE SYMPOSIUM ON LATIN AMERICAN INTERNATIONAL LAW

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In the third volume of the *American Journal of International Law*, published in 1909, Chilean jurist Alejandro Álvarez first laid out his argument for the existence of a Latin American international law in English.[1] His objective, and the reason he chose to expound his ideas in *AJIL*, was to carve out a more prominent place for Latin America in the U.S.-led geopolitical order.[2] The article, subsequently turned into a book, became a manifesto not for a Latin American international law, but for a Pan-American international law—a regional legal order encompassing the Americas in their entirety, with the United States at the helm. Pan-Americanism has since consolidated into an influential and pervasive regional legal and political project, spawning key institutions and instruments, such as the 1933 Montevideo Convention, the Inter-American Development Bank, and the Organization of American States, among others. This symposium takes its inspiration from Álvarez's regional thinking to reopen the inquiry into Latin American international law. In our time, the dynamics of regionalism have been changing quickly, as U.S. hegemony is checked by growing Chinese influence and the rise of populist regimes. Several social movements, including Indigenous and environmental movements, have revealed the ways in which Pan-Americanism was not really "Pan" at all, but reflected the narrow interests of Latin American elites, mostly of creole ("criollo") background.[3] These movements question the hegemony of creole elites and the primacy of their interests in the realm of international law. These and other transformations make it timely to explore the question of both the existence and potential of regional projects and practices in a new geopolitical era. This symposium brings together a diverse group of Latin American scholars to critically reflect on these changes.

A Shifting Global Context

Among Latin Americans, ideas around regionalism have always been deeply contested. Álvarez's brand of Pan-Americanism sought to overcome other competing views of how best to construct the region under international law. In particular, he embraced the Monroe Doctrine, which (self-)appointed the United States as the regional peacekeeper and the shield against European intervention. Others were less sanguine about U.S. hegemony. Argentinean diplomat Luis María Drago, for example, coined the "Drago Doctrine," which challenged the use of "gun-boat diplomacy" or military coercion for the collection of debts. The Calvo doctrine, developed by Carlos Calvo, sought to curb foreign intervention by requiring foreign nationals to refrain from seeking diplomatic assistance from their home state, and to settle any disputes through the domestic laws and institutions of the host state. For Álvarez, the Monroe Doctrine was more favorable to the interests of American states, including Latin

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[1] Alejandro Álvarez, *Latin America and International Law*, 3 AJIL 269 (1909).

[2] Liliana Obregón, *Noted for Dissent: The International Life of Alejandro Álvarez*, 19 Leiden J. Int'l L. 983 (2006).

[3] Arnulf Becker Lorca, Mestizo International Law: A Global Intellectual History 1842–1933 (2018).

American states, because it was more effective than competing doctrines in preventing European states from regaining possession of American territory.

The aim of this symposium, however, is not to explore these different types of Americanisms and regionalisms that both states and scholars have advanced at different times in history. Many recent works have already done so.[4] Rather, the symposium turns our attention to a discrete, emerging sensibility in Latin American international legal thought and discourse—one that is more plural, autochthonous, and interconnected, and that stands in contrast to earlier debates about the proper role of U.S. power in the region. Indeed, the contributions in this symposium shift the debate on Latin American international law in two ways.

First, echoing Gregory Shaffer and Terence Halliday's transnational legal orders framework, the symposium examines how a more diverse group of actors and interests at both the national and subnational levels have begun leveraging international law for their own political projects in a way that transcends state-led foreign policy, and was unthinkable in the Álvarez era.[5] Some argue, for example, that judges, constitutional lawyers, and human rights lawyers are constructing a new regional constitutional practice, a *ius constitutionale commune* in Latin America. This is a practice that has emerged not in the top-down manner of the state-orchestrated regional projects of the twentieth century, but through rights litigation involving a transnational ecosystem of actors, such as non-governmental organizations, victim advocacy groups, and national courts, and using the language of law rather than diplomacy. Similarly, autochthonous social movements have harnessed the language of rights to create a new regional practice around legal pluralism. This is especially evident in the role of Indigenous rights advocates and the use of the International Labor Organization Convention No. 169 to ground the right of Indigenous peoples to free, prior, and informed consultation, among others.

Second, the symposium turns to the construction of regional law and institutions in our current moment of shifting geopolitical dynamics. As democracies face increasingly steep challenges, and different forms of authoritarianism assume power (including several varieties of populist regimes), and as the climate crisis becomes an ever more salient political issue, Latin American international law is currently under pressure in new ways.

The symposium explores the current era of decentered regional legal projects, introducing and critically engaging with some of Latin America's autochthonous ideas and practices concerning international law and diplomacy that do not necessarily revolve around traditional centers of power—or else do so in more complex, oblique ways. The symposium is animated by the normative impetus of finding regional projects that are broader-based, more plural, and inclusive than the elite Creole and U.S.-led projects of the past. Like Anne Orford, we believe that "bringing the concept of regional orders to the foreground can open up a new and timely set of questions about politics, representation, and the future of international law."[6] It can allow us to understand resistance, and the possibility of alternatives, to hegemonic regional projects. Lawyers, in this context, have a particularly prominent role to play in "the process of legitimizing the creation of greater spaces, state-blocs, and regional orders."[7]

A Myriad of Perspectives and Projects

Four of the essays highlight the way in which international law is no longer only essentially a Creole-led or top-down enterprise. A new configuration of non-state actors and social movements is playing an important role in

[4] *See, e.g.*, Juan Pablo Scarfi & David M.K. Sheinin, *Introduction*, *in* THE NEW PAN-AMERICANISM AND THE STRUCTURING OF INTER-AMERICAN RELATIONS (Juan Pablo Scarfi & David M.K. Sheinin eds., 2022); Liliana Obregón, *Between Civilisation and Barbarism: Creole Interventions in International Law*, 27 THIRD WORLD Q. 815 (2006).

[5] TERENCE C. HALLIDAY & GREGORY SHAFFER, TRANSNATIONAL LEGAL ORDERS (2015).

[6] Anne Orford, *Regional Orders, Geopolitics, and the Future of International Law*, 74 CURRENT LEGAL PROBS. 149 (2021).

[7] *Id.* at 194.

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reshaping law and institutions at the international level, using litigation, rights discourse, and other legal-political tactics to advance their claims. The final two essays touch on two challenges that distinguish the current context of international law, namely, the rise of authoritarian populism and the climate crisis.

Laura Betancur Restrepo of the Universidad de los Andes and Helena Alviar García of Sciences-Po Law School examine how actors in Colombia have engaged international law as they broker and implement the country's 2016 Peace Agreement, which put an end to a five-decade long armed conflict.[8] Their analysis emphasizes that international law did not provide a top-down prescription to local actors. Rather, local actors, such as judges, activists, and congressmembers were able to use international law arguments to advance their own agendas as they debated the peace process. The outcome was a transitional justice process highly attuned to international law norms and institutions, even as it was innovative, and even as it stretched those norms in new directions. The authors show how transitional justice norms are unsettled and resettled through domestic contestation using international law.

Jorge Contesse of Rutgers Law School, in turn, critically excavates the emergence of a common constitutional law of the Americas, a *ius constitutionale commune*.[9] This has not been a government-led project, but one that has emerged through dialogue between the Inter-American Court of Human Rights, domestic high courts, and litigants. Indeed, if there is one area of law that is uniquely Latin American international (and national) law, Contesse argues, common constitutional law is it. But he cautions against an overly rigid understanding of this dialogue as creating a binding body of law, with the Inter-American Court at its hierarchical head. Contesse advocates for national judicial systems to retain a significant level of autonomy, and for the Inter-American Court to exercise a degree of deference to national democratic decision-making.

Digging more deeply into the inter-American system, Micaela Alterio of the Instituto Tecnológico Autónomo de México turns our attention to debates over gender.[10] The inter-American human rights system has been on the frontlines of human rights jurisprudence in the realm of gender, violence against women, gay marriage, and reproductive rights in recent years. In March 2021, the Inter-American Court of Human Rights issued a groundbreaking judgment against Honduras, in which it found that "gender" and "sex" are distinct categories. The question in that case was whether the Inter-American Convention on the Prevention, Punishment, and Eradication of Violence against Women protected trans women. The Court interpreted the treaty progressively, finding that its purpose was to protect those whose gender was female, regardless of sex. As this is the first international court to do so, Alterio examines the deep divisions within Latin American feminism over the role of gender in human rights doctrine, celebrating the Inter-American Court for its understanding of human rights as an evolving doctrine that seeks to protect the most vulnerable.

John Anton Sánchez of the Universidad Intercultural Amawtay Wasi examines the push by Afro-descendent peoples of the Americas to claim a distinct status in international law.[11] Although international law recognizes Indigenous peoples and tribal peoples as having a distinct status with particular rights, he argues that these categories do not adequately encompass the experience and situation of the Afro-descendent peoples of Latin America and the Caribbean. On the other hand, international treaties that prohibit racial discrimination do not single out the experience of Afro-descendent peoples as having a distinct culture and claims to autonomy and prior consultation. Sánchez examines how Afro-descendant peoples are drawing on the experience of the International Labor Organization Convention No. 169, but that they are seeking to broaden its categories, in order to gain recognition using doctrines that better reflect their experiences and situations.

[8] Laura Betancur-Restrepo & Helena Alviar-García, *International Law and Transitional Justice: Exploring Some Challenges Through the Colombian Case*, 116 AJIL UNBOUND 302 (2022).

[9] Jorge Contesse, *Human Rights as Latin America's Transnational Law*, 116 AJIL UNBOUND 313 (2022).

[10] Ana Micaela Alterio, *Latin American Feminists, Gender, and the Binary System of Human Rights Protection*, 116 AJIL UNBOUND 323 (2022).

[11] John Herlyn Antón Sánchez, *Latin American International Law and Afro-Descendant Peoples*, 116 AJIL UNBOUND 334 (2022).

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Marcela Prieto Rudolphy of the University of Southern California Gould School of Law turns our attention to populism and its vexed relationship with multilateral projects and international law more broadly.[12] She argues that, contrary to many mainstream perceptions, Latin America's populist presidents are largely cosmopolitans: they turn to multilateralism; they create new international organizations; and they engage with transnational civil society networks in order to advance their interests and political ideologies abroad. Even as Hugo Chávez was withdrawing from international treaties, he was also creating new regional and subregional orders, and his denunciation of the American Convention on Human Rights in 2012 drew heavily on human rights law and rule of law principles to criticize the Organization of American States human rights bodies. Prieto Rudolphy suggests that we need new conceptual tools to truly appraise how the new generation of populist leaders in the region is using and reshaping international law.

The final essay returns our attention to the top-down international law of the executive branch and international organizations, showing the new forms it can take in the face of contemporary challenges.[13] Beatriz García de Oliveria of Western Sydney University and Laurent Pauwels of the University of Sydney argue that regional organizations, such as the OAS, are well-poised to play an important role on the environmental front. Specifically, they argue that the OAS should begin to set standards and assist Latin American countries in developing legal frameworks to control forest risk commodities for both national and international markets. This enhanced role would be particularly salient given the important place of the Amazon forest in biodiversity and carbon sequestration.

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The symposium cannot possibly provide a full account of the regional projects that have emerged in recent years, nor does it claim to explore all the geopolitical shifts that are reshaping international law in the region. Such a project would be too ambitious for a symposium.[14] Yet the essays taken together point to an emerging sensibility in the project of Latin American international law—one that is decentered, more eclectic, and far more inclusive. Moving forward, this project requires that we continue to explore the conditions that allow these bottom-up projects to succeed and assess the kinds of impact they are having in and beyond the region. At the same time, the essays also highlight important continuities: the OAS and its inter-American human rights system loom large in five of the six essays. The essays show that the OAS is providing a framework for innovation in the construction of new Latin American international law projects, and in fashioning responses to current challenges, such as the climate crisis. This is particularly interesting because the OAS is arguably a prime example of the Pan-Americanism of an earlier time: the United States plays an oversized role within the OAS, which sits in Washington D.C., yet the United States refuses to ratify the American Convention and submit to the jurisdiction of the Inter-American Court.

This general trend in Latin American international law is therefore defined not so much by a complete departure from Alejandro Álvarez's Pan-Americanist project, as by a critical engagement with its underlying assumptions and values, and the emergence of a miscellany of regional and sub-regional ideas and initiatives that draw from or co-exist alongside it.

The symposium also marks an important milestone for international law in the United States: for the first time, *AJIL Unbound* publishes work in a foreign language. We are honored to be part of a project discussing the work of Latin American international lawyers on this global stage. And yet, celebrating this milestone of opening *AJIL*

[12] Marcela Prieto Rudolphy, *Populism's Antagonism to International Law: Lessons from Latin America*, 116 AJIL Unbound 346 (2022).

[13] Beatriz García & Laurent Pauwels, *The Promise of Cooperation in Latin America: Building Deforestation-Free Supply Chains*, 116 AJIL Unbound 360 (2022).

[14] *But see* Latin American International Law (Alejandro Chehtman, Alexandra Huneeus & Sergio Puig eds., forthcoming).

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Unbound to Spanish-speakers broadly should not obscure how elusive the goal of full inclusion remains. Spanish is not the language spoken by everyone in Latin America. In fact, it is the language imposed by the colonial power, just as Portuguese is in Brazil—and French, Dutch, and English in other parts of Latin America and the Caribbean. Many aboriginal languages are spoken by a vast number of people through the region, including Quechua, Náhuatl, Guaraní, Aymara, Mayan, Wayuu, Mapundungún, Talian, Hunsrik, and Zapotec, to name but a few. Writing in Spanish is therefore still a very long way from giving a voice, in their own language, to a large number of Latin Americans, and most importantly to those who are more vulnerable, and who have been the biggest victims of the harms perpetrated through international law and diplomacy. It is just a first step, small but non-negligible, toward a necessarily broader conversation.

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