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Alejandro Álvarez's Latin American Law: A Question of Identity

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Abstract
This essay focuses on Alejandro Álvarez's seminal article, 'Latin America and International Law', published in 1909 in the *American Journal of International Law*. Offering and in-depth analysis of the text, it foregrounds the strategic meaning of Álvarez's work in the light of the international politics of his day. It posits that, more than simply a diplomatic history of Latin American particularity, Álvarez presents the case for a different hemispheric international order, based on an 'American international law' extending to the United States. He draws primarily an Latin American Precedents – based on historical and stituational commonalities – to argue for a common public law. He then grafts an idiosyncratic interpretation of the Monroe Doctrine as the United States' main contribution to this common law, as well as the fact of US sponsorship of various Americas-wide conferences resulting in the ratification of regional treaties. Notably, and this is one of the main points of this is one of the main points of this essay, Álvarez elevates certain Latin American states as leaders in regional international law and capable agents of its enforcement across the hemisphere. In short, this essay advances the claim that Álvarez's project of pan-American law in effect entreats the United States to share its hegemony and wield its power in the region jointly with Latin America's 'better-constituted' states.

Key words
American international law; American public law; balance of power; 'better-constituted' states; hegemony; identitarian law; imperialism; Latin American law; imperialism; Latin American law; Monroe Doctrine; Pan-Americanism; Pan-American law; regional international law; Roosevelt Corollary

This essay focuses on Alejandro Álvarez's important article published in the *American Journal of International Law* (AJIL) in 1909, 'Latin America and International Law'.[1] The AJIL piece is significant because, among other things, it introduced Álvarez's thesis of an 'American international law' to publicists in the United States. The author himself travelled from his native Chile to present this paper at the third annual meeting of the American Society of International Law in Washington, DC.[2] In it he expressed the views of a Latin American jurist – an already eminent one[3] – on

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1. (1909) 3 AJIL 269. It was reprinted in book form as A. Álvarez, *American Problems in International Law* (1909) (containing an additional section not part of the AJIL article). Unless otherwise specified all references below to 'Álvarez, *supra* note 1' are to the article.
2. Editorial Comment, (1909) 3 AJIL 675 ('As indicative of the great interest Señor Álvarez takes in the scientific recognition of his thesis, it should be stated that he made the trip from Chile to Washington in order to attend the meeting of the Society.')
3. By 1909 Álvarez had numerous credentials to his name: Member of the Permanent Court of Arbitration at the Hague, Legal Advisor to the Ministry of Foreign Affairs of Chile, former Professor of Law at the University

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the subject of international law in an era of US expansionism to the south. This is the period following the Spanish–American War (1898), when Cuba and Puerto Rico were under US control, Panama seceded from Colombia (1903) under US influence, and the Dominican Republic's customs houses came into US hands (1905).

Álvarez divides his discussion into three periods, marking different stages in Latin American diplomatic history: the first is from 'independence and runs to the middle of the nineteenth century', the second is 'from the middle to the last third of the nineteenth century', and the third, 'beginning with the last third of the nineteenth century', lasts up to his present.[4] Within each period he portrays a Latin American position with respect to international law and, more specifically, with respect to its international relations. His account progresses from Latin American efforts at confederation and collective wariness of Europe, shared by the United States, in the first period; to the abandonment of confederation attempts, increased interaction with Europe, and resistance to US hegemony in the second period; and finally, in the last period, greater Latin American solidarity with the United States, with the latter taking the lead on regional issues, and a more hemispheric 'American' stance towards Europe.

Álvarez's article can surely be critiqued in different ways. It can be judged, for example, by reference to external measures such as alternative accounts of the history he relates or scholarly disagreements over the operative concepts he employs. One could question his characterization of, say, the Monroe Doctrine,[5] which is quite idiosyncratic, or take issue with his chosen periodization, or criticize his varying use of concepts of legal theory. His account of history moreover avoids much discussion of Latin American wars in the nineteenth century – acknowledging them mostly only in the footnotes – thus overemphasizing the solidarity of Latin states.

Rather than offering a critique of the types mentioned, this essay examines the text as an intervention in the US–Latin American international politics of his day, and it reads Álvarez principally in the context of his US audience, for whom the piece was originally written. It is a snapshot of his positions at the time and does not presume to represent his views later in life. Nonetheless, my claim is that Álvarez's article is more than just a diplomatic history of Latin America and the region's particular norms. It is an argument for a different hemispheric international order. Briefly put, Álvarez advances a system of shared leadership of the Americas by the United States and 'well-constituted' Latin states. He maintains the plausibility of this arrangement by claiming a common tradition of 'American' international law

of Chile, Graduate of the School of Political Sciences, and Doctor of Laws at the University of Paris. He was also a member of the American Society of International Law.

4. Álvarez, *supra* note 1, at 270–1. More precise dates are given by him in A. Álvarez, *Le droit international américain: son fondement – sa nature d'après l'histoire diplomatique des états du Nouveau Monde et leur vie politique et économique* (1910), 19–20; this is substantially the same work in French as 'Latin America and International Law', with some modification and additions, and marks the diplomatic history along these three same periods, but states them with more clarity than in the article. In the French version the periods are given as: 1824 (Latin American independence) to 1865 (the last Latin-American congress), 1865 to 1889 (the first Pan-American conference), and 1889 to his present. The Latin American congresses and Pan-American conferences will be discussed in more detail below.

5. See generally D. W. Dent, *The Legacy of the Monroe Doctrine: A Reference Guide to United States. Involvement in Latin America and the Caribbean* (1999).

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to guide and support shared norms and joint enforcement. This essay uncovers this programme within Álvarez's text. It analyses his arguments from the perspective of one defending and operationalizing his objectives. To be clear, Álvarez himself does not profess a programme or a strategy as such, and he – had he been confronted with this reading of his text – might very well have rejected certain parts. Assessing the degree of Álvarez's conscious intent or weighing his possibly multiple motivations is not my concern here – despite objectives quite evident in the text. A close reading better reveals Álvarez's larger geopolitical goals.

Furthermore, the objective of this essay is to analyse a specific feature of Álvarez's 'programme'. In particular, my focus is on Álvarez's use of the concept of Latin American law as part of his goal of Latin empowerment. His emphasis on legal identity categories is a prominent feature of his life's work.[6] Indeed, Álvarez is remembered primarily for his advocacy of a regional law of nations.[7] His 'American international law', including Latin America and the United States, is his main contribution to legal theory.[8] This essay continues that debate by considering his identity constructions not as representations of a certain kind of law, but rather as instrumental arguments. It is my contention that Álvarez, rather than aiming to reinforce a fixed content or an enduring recognition of the specificity of Latin American law, was more interested in supporting his programme of geopolitical influence for *certain* Latin American states. As is made clear later in this essay, his programme does not elevate all Latin states, just the better-governed ones. His construction of an identity-based law is the foundation he uses to achieve it. It is a means to an end, superseded once the objective is gained. Working within the strictures of his day, Álvarez argued for a more prominent role for Latin America in the creation and enforcement of international norms. Specifically, he urged the United States to share its hemispheric leadership with the stronger Latin states. Latin American international law is, for Álvarez, the southern hemisphere's contribution to his proposed joint enterprise of a broader 'American' regional law and its enforcement by the hemisphere's leading states.

The method pursued here is to juxtapose key passages of Álvarez's article in order to highlight and analyse his underlying programme, which is not immediately apparent on a standard reading on its face.[9] Long quotations are included to provide

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6. See, e.g., Álvarez, *supra* note 4.
7. J. Bassett Moore, 'Book Review: La Grande Guerre Européene et la Neutralité du Chili', (1917) 11 AJIL 230 ('the learned author [Álvarez] continuing to employ the nomenclature to which his name is somewhat distinctively associated, speaks of a "European International Law" and an "American International Law"'); A. T. Leonhard, 'Regional Particularism: The Views of the Latin American Judges on the International Court of Justice', (1967–8) 22 *University of Miami Law Review* 674, at 675 ('Perhaps the most influential and articulate of the Latin American judges who appeals to the hemispheric history of international law is Alejandro Álvarez. His persistence in interjecting the term 'American international law' in his individual and dissenting opinions. . .').
8. Some would argue that his work on 'New International Law' is equally prominent. See W. Samore, 'The New International Law of Alejandro Álvarez', (1958) 52 AJIL 41.
9. Inevitably, the author's choice of analysis of Álvarez's piece is reflective of his own framework within the context of the contemporary academic debates. Thus the author admittedly favours the features of Álvarez's work that correspond to such contemporary questions but which would have been viewed quite differently by an early-twentieth-century figure, in particular the examination of the use of identity categories within law and society as a mode of political empowerment. Focusing this lens on Álvarez's work is quite productive. And, indeed, his project was not so different from some more contemporary proposals for greater

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greater context. My objective, however, is to interrupt the stylistic crafting of his text, which serves to convince and reassure his readers, but which may obfuscate the structure of his argument. Thus, the order followed here – quite different from his narrative of international relations in three time periods – is to identify the issues Álvarez addresses, to trace his analysis of them, and to consider his prescriptive proposal. My contention is that, viewed in this way, one can better appreciate the intervention in US academic discourse that his article represents. It is beyond the scope of this short essay to examine how this programme coincides with or diverges from Álvarez's interventions in other academic debates in Chile or Europe, where he was a prominent protagonist. This essay also does not address how this particular programme compares with the ideas of other Latin American publicists or Chilean political actors at the time.[10] Clearly, these are fertile topics for further research, which this issue of the *Leiden Journal of International Law* greatly helps to stimulate.

This essay thus consists of three parts. First, it highlights the forces against which Álvarez writes. Second, it analyses the construction of his identity-based law. And third, it draws some conclusions about Álvarez's project of international law. In short, Álvarez can be faulted for favouring the empowerment of stronger Latin states, in concert with the United States, over the rest. It is difficult to predict whether shared regional leadership would have led to greater empowerment of all Latin states and a more democratic hemisphere or to their opposite. Whether Álvarez's programme was clearly implausible, the best that could be hoped for, or politically regressive is a judgement left to the reader. In hindsight, we know it was not successful. But, then again, it is hard to imagine an international-law-based alternative that would have achieved all Álvarez's ambitious goals.

1. The forces against which Álvarez writes

On its face, Álvarez's article presents a didactic account of the contribution and relationship of Latin America to the field of international law. The region's crowning achievement, he argues, is the development of a distinct public law. Responding to particular problems and conditions, this 'American' international law modifies the 'unconditional and absolute character' of general – 'European' – international law.[11] Álvarez argues that 'To pretend that all the states that form the community of nations should be always governed by the same identical rules, would be equivalent to a denial of the right of groups of nations of special origin and geographical situation

empowerment through law. In any case, this essay provides a historical example of such a project and may serve an a source of reflection for identity scholars. Unfortunately, it is beyond the scope of this essay to contextualize these insights within the contemporary identity debates.

10. This essay does not characterize Álvarez's legal theory as positivist, sociological, or realist – although any of these descriptions may apply to a greater or lesser extent. Providing an overall description of Álvarez's lifelong work is beyond the scope of this essay and is only referenced as supporting points.

11. Álvarez, *supra* note 1, at 346–8. See also Álvarez, *American Problems in International Law*, *supra* note 1, at 99 (Álvarez notes that 'There is no attempt to establish two international law codes antagonistic to one another, but only to correct in actual practice the old dogma of absolutism and universality of all the rules which make up international law, and to supplement its provisions by a recognition and study of the special problems and conditions which up to this time have been ignored or at best little considered').

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to develop in conformity to their nature.'[12] His notion of a regional law of nations, it should be noted, was not uniformly accepted in Latin America and, in reality, was much disputed by his contemporaries.[13]

Indeed, from Álvarez's own text, it is hard to ignore the background against which he writes. The great challenge he faces in convincing his readers is suggested by the force of his opening line: 'The entry of Latin America into the community of nations is one of the most important facts in the history of civilization.'[14] Some readers might have agreed with him at the time, but only recently does this insight ring true.[15] Indeed, not much painstaking reading is required to discover the forces against which Álvarez aligns himself. More than a specific group of individuals – although undoubtedly there were such – it is a set of conceptions and policies with very real consequences. There are three salient forces which Álvarez rejects.

1.1. Negative conceptions of Latin America

First, Álvarez opposes a predominant conception of Latin America: the image of disordered national institutions and international affairs. Álvarez attributes much ill to the force of this conception:

> The above countries [Europe and the United States] in their relations with the Latins of America pursued a policy sometimes of armed intervention, in spite of the Monroe Doctrine, and at other times of protection of the interests of their citizens, adopting the procedure followed against the weaker states of Europe or semi-civilized countries – *a policy growing out of the unfavorable opinion held as to the character of the international affairs of these states, almost all of which were infected by institutional instability and even anarchy.* The United States, although feeling the solidarity of continental interests, judged Latin America in the same fashion as Europe and adopted a similar policy in this regard.[16]

Owing to this view, Álvarez insists, Europe and the United States unduly embrace and press the claims of their citizens against Latin American governments. The claims of aggrieved foreigners, just like the aggrieved citizens of a Latin American state, should normally be addressed by national courts. Instead, they are often resolved by resort to international action. Such action often violates international law. And, for Álvarez, it specifically violates American international law, discussed further below.

Álvarez lists the types of conflict that are common and the international actions most pursued. He classifies the conflicts as personal, financial, or political. Personal ones arise in response to injuries suffered by individual citizens of an international power due to internal commotion or civil war in Latin America. Financial conflicts refer to damage suffered by citizens of international powers, whether they be residents or non-residents in Latin America, due to expropriation, default on public debt, or civil or international wars. Finally, political conflict refers to the use of force

12. Álvarez, *supra* note 1, at 347.
13. See, e.g., Álvarez, *supra* note 4, at 268–70; see also Álvarez, *American Problems in International Law*, *supra* note 1, at 100–2.
14. Álvarez, *supra* note 1, at 269.
15. See A. Anghie, 'Francisco de Vitoria and the Colonial Origins of International Law', (1996) 5 (3) *Social and Legal Studies* (for different reasons notes the significance of the Americas to international law).
16. Álvarez, *supra* note 1, at 297–8 (emphasis added).

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against sovereign Latin states to force them to pay outstanding claims presented against them. The types of international action he finds offensive are unjust declarations of war, financial claims for damages on behalf of foreign citizens, diplomatic claims against Latin governments, and seizures and blockades of Latin American ports or customs houses.

Álvarez does not explain these illicit interventions in either *typical* idealist or realist fashion.[17] In other words, he does not include violations of Latin American sovereignty within a narrative of progressive improvement and lessening over time of these occurrences; nor does he explain them as the realities of a two-tiered system of international norms among powerful states and a differential standard vis-à-vis less powerful ones. Combining the two, he does not reject a differential approach, so long as it is motivated by broader policy on the part of powerful states.[18] He finds this to be not the case with respect to Latin America:

> Comparing the intervention of the great powers since 1810 in the affairs of the weaker states of Europe with those exercised by them in Latin America, we find that in the former case they were inspired by the dictates of broad policy, humanity, or religion, while in the latter *they acted with the sole purpose of assuring unduly for their citizens who came to those countries a specially privileged situation.*[19]

Álvarez maintains that mean economic interests of citizens of Europe and the United States have prevailed over international law. In cases of financial injury, remedies have often been pursued through the exercise of illegitimate diplomatic pressure and armed intervention. According to him, the image of Latin governments – incapable of preventing economic harm or of providing redress – explains it. It justifies the international law violations by powerful states. It is precisely these negative conceptions – used to justify intervention – that Álvarez sets out to confront.

1.2. Latin American dis-union

At the same time, Álvarez does not hesitate to criticize Latin Americans themselves for their compromised role within the international system. Specifically, he notes the level of institutional instability and anarchy characterizing a great many Latin states. Obviously, Álvarez does not counter the negative images of Latin America

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17. Regarding intellectual currents in the later nineteenth century in Latin America, see R. L. Woodward, Jr (ed.), *Positivism in Latin America, 1850–1900* (1971), x ('From 1861 to 1891 the Chilean government was ruled by men deeply influenced by positivist principles. The educational system that they developed reflected this influence and produced notable efforts to develop the economy and government of the nation along scientific lines'); ix ('As had the earlier liberals, these men had high expectations and they sought solution in the experience of western Europe and the United States, but unlike their predecessors, bitter lessons of chaos and anarchy had also made them respect the necessity of order and stability as a precondition for progress and liberty').
18. See commentary on his later work involving the 'New International Law' regarding the theoretical leanings of an older Álvarez: W. Samore, 'The New International Law of Alejandro Álvarez', (1958) 52 AJIL 41, at 54 ('Judge Álvarez is an idealist masquerading as a realist; a dreamer in realist's clothing'). The author does not presume to explain away inconsistencies or contradictions within Álvarez's text as amenable to simple and coherent explanation. Indeed, it is just such inconsistencies and contradictions that help to reveal the impetus of his work. Of course, Álvarez no doubt expounded and refined to a greater or lesser extent some of his more paradoxical constructions in other writings. Tracing all these ideas through his life's work is beyond the scope of this essay, but is much assisted by the other essays in this issue.
19. Álvarez, *supra* note 1, at 300 (emphasis added).

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with a blanket rejection of these characterizations. Rather, he differentiates among Latin states, and he lays much of the blame on the tenets on which post-independence union was pursued across the region.

Primarily, Álvarez rejects overly idealistic and utopian goals of unification as well as the episodic character such efforts took: 'The idea of confederation pursued by all of them was dominant not only in the minds of the statesmen but also in the public opinion of the period.'[20] Specifically, the fear of reconquest by Spain or some other power propelled the notion of confederation. Various international conferences were held by several Latin states in order to implement this vision. Confederation, however, was never achieved.[21] Indeed, rather the contrary is true. For example, the Central American states began their independent life as a consolidated state but soon fell prey to fragmentation. By the late 1830s the Central American republics had gone their own way.[22]

Álvarez holds inapposite, post-independence institutions as responsible for this failure:

> The civil wars and the system of revolutionary leadership ('caudillaje'), the logical and almost inevitable consequence of the wars of independence, have posed enormous barriers to the progress of these countries to the height of prosperity to which they were called through their situation in a continent of undeveloped wealth. Although waged over problems of domestic politics, these wars had an international significance.[23]

In describing a newly independent Latin America, Álvarez's views are not unlike most mainstream historical accounts; that is, statehood resulted in political but not social change. Indeed, Álvarez cites the genesis of this distinction in the model of the US revolution: 'From the example of the United States, the Spanish-American statesmen perceived that the emancipation must be essentially political, not social, the sole aim being to break the bond of subjection that bound the colonies to the mother country.'[24] As to the roots of Latin independence, he credits multiple causes: the popular support found throughout colonial society, but mostly the political opportunity afforded by a debilitated Spain during Napoleon's occupation.

For Álvarez, the failure of confederation resulted from the mishandling of the concrete issues of the day. According to him, the problem lay less in the personal qualities of its leaders than in the transition to post-independence institutions.[25] Enlightened constitutional regimes, inspired by European intellectual currents, proved unachievable.[26] As such, internal turmoil led to intra-regional tension. This was exacerbated by 'the supersensitive spirit of national independence, the civil wars, the boundary disputes and the questions as to the navigation of rivers'.[27] Such questions challenged Latin governments throughout the period (and, in some cases, still do

20. Ibid., at 288.
21. Álvarez, *supra* note 1, at 283.
22. Ibid., at 289.
23. Ibid., at 290.
24. Ibid., at 272.
25. See also Álvarez, *supra* note 4, at 41–2 ('Ce qui leur a fait le plus de tort, c'est la brusque transition à un regime politique trop différent de l'ancien et pour lequel ils étaient d'autant moins préparés. . .').
26. Álvarez, *supra* note 1, at 273.
27. Ibid., at 289.

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today).[28] Their unsatisfactory resolution, according to Álvarez, impeded the consolidation of the otherwise fraternal feelings and solidarity of Latin states. Álvarez does not criticize Latin statesmen for pursuing greater union; rather, he criticizes them for failing to implement it in a practical way.

Much of Álvarez's article is devoted to reciting the many failed attempts at greater union by Latin America, from Simón Bolívar's seminal Congress of Panama in 1826 to efforts hosted by Chilean and Peruvian governments in 1858 and 1864 respectively. The ideals and aspirations for unification were best expressed at moments of external threat:

> this aspiration [for confederation] was most intensely manifested in times of danger and for that reason had always a passionate and lyric character. This circumstance, united to the philosophical education of the Latin mind and the facility which their independence gave them to lay down new rules in this matter as in Constitutional Law, brought about that the resolutions of these congresses on the subject of confederation were conceived in a strain altogether too idealistic and Utopian.[29]

Thus various treaties were signed but not ratified.[30] Only a few states participated at any one congress. Different states came to different congresses. And, repeatedly, immediate national interests trumped the larger goal of regional confederation. Álvarez does not particularly defend unstable Latin states. The leadership there clearly failed. He hastens to argue, however, that not all Latin governments are similarly reproachable. Some greatly advanced projects of confederation. Álvarez notes the differences within the region:

> It [confederation efforts] varied in intensity according to place and time. In fact, this tendency was stronger in the south than in the north of the continent; and in the southern portion, the confederation idea found readier support in the republics of the Pacific coast than in those of the Atlantic.[31]

Álvarez describes the expansive scope of confederation attempts. For some proponents it extended to both a common foreign and domestic policy. In any case, he explains that

> In regard to the reciprocal relations of the Spanish-American nations, their statesmen, and especially those of Chile in 1810, believed in the necessity of a confederation of the peoples of Spanish origin, which, while respecting the autonomy of each state, would not only protect them against the attacks of European countries, but also fix the course of domestic and foreign politics, harmonize their interests and obviate or settle all conflicts between them . . . This was not the only time when ideas of this character were expressed by statesmen of Chile.[32]

Considering his general argument, one might expect Álvarez to lament those instances where Chile's representatives rejected greater Latin union, favouring national interests instead. And yet Álvarez maintains in those cases that caution might well have been justified. For example, Chile vigorously opposed provisions

28. For example, continuing acrimony between Chile and Bolivia over the Acre region.
29. Álvarez, *supra* note 1, at, 288.
30. Ibid., at 283, 287.
31. Ibid., at 288.
32. Ibid., at 276, n. 6.

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for general international arbitration at the First Pan-American Conference held in Washington, DC, in 1889. The justification, Álvarez explains, was the treaty conference's politicization, which 'directly affected pending questions of the War of the Pacific [1879–84] in which Chile had a special interest'.[33] Chile also refused to endorse a commitment to obligatory arbitration and territorial integrity at the earlier Panama Congress of 1880, as a result of the contemporaneous conflict with its neighbours:

> The government of Chile, in view of the fact that the projected conference was intended principally to meddle in its foreign policy, not only refrained from ratifying the cited convention of 1880 and from participating in the Congress, but succeeded in prevailing upon several Latin states not to attend it.[34]

These moments, rather than part of the forces of Latin disunion which Álvarez generally rejects, become the source of his moderation with respect to the very principles he characterizes as American international law, discussed at greater length below.

1.3. The Monroe Doctrine as an expression of US hegemony

Finally, Álvarez opposes the view that the Monroe Doctrine is simply a statement of US hegemony in the western hemisphere.[35] Álvarez recognizes that this is the prevailing understanding of the doctrine, pronounced by US president James Monroe in 1823. The Roosevelt Corollary, added by Theodore Roosevelt in 1904, claiming the United States' role as 'international police power' in the region, served only to reinforce this perception.[36] In his article, however, Álvarez is bent on correcting this mistake:

> Publicists have not only failed to see the real origin and nature of the Doctrine, but have disfigured its true meaning. For the majority of persons, it is the basis of the policy of hegemony which the Unites States is developing on the American continent.[37]

Instead, he restates the Monroe Doctrine as a common Americas-wide principle of international law which proscribes European intervention within the western hemisphere:[38]

33. Ibid., at 328.
34. Ibid., at 302, n. 39 (Chile did not sign a final peace treaty with Bolivia, ending the War of the Pacific (1879–83), until 1904, which granted to the victorious Chile all occupied territory during the war). See also Álvarez, *supra* note 4, at 106.
35. The use of the terms 'hegemony' and 'imperialism' is intended to mirror the meanings ascribed to them by Álvarez and is discussed in further detail in this section. For a discussion of the Monroe Doctrine as perceived by an observer around the time of Álvarez's writing of this article, see J. F. Simmons, 'The Monroe Doctrine: Its Status', (1906–7) 5 *Michigan Law Review* 236 (arguing that the Monroe Doctrine is part of international law); see also A. Álvarez, *The Monroe Doctrine: Its Importance in the International Life of the States of the New World* (2003 [1924]).
36. Álvarez, *supra* note 35, at 497–8 (reproducing President Theodore Roosevelt's Fourth Annual Message to Congress, 6 December 1904, Álvarez refers to Theodore Roosevelt's policy, citing it among a list of policies of hegemony of the United States, and further stating on page 21 that 'the policy of hegemony does not go so far as to claim the right of assuming, at least directly, a protectorate over the countries of Latin America.'); see also C. Veeser, *A World Safe for Capitalism: Dollar Diplomacy and America's Rise to Global Power* (2002).
37. Álvarez, *supra* note 1, at 313.
38. This redefinition of the Monroe Doctrine has been referred to as 'the collectivization of the Monroe Doctrine', see Leonhard, *supra* note 7, at 676–7 ('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').

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> While this message [the Monroe Doctrine] did not have the object of making any immediate declaration of principles, still it expressed so clearly the situation of the New World with respect to the Old, and contained such an accurate synthetic statement of the aspirations and destinies of America as to become its political gospel.[39]

By way of proof, he points to a number of diplomatic instances in which the United States interceded to protect Latin American states from European intervention.[40] Interestingly, Álvarez does not mention the Roosevelt Corollary, even though he writes just five years after its pronouncement. At most, he makes an oblique reference to it in a footnote:

> For this reason the doctrine [the Monroe Doctrine] contained in these declarations has subsisted up to the present time, when it is being applied and interpreted, while other declarations made subsequently in various messages by other presidents of the United States and referring to important American affairs have been completely forgotten.[41]

Álvarez simply rejects the notion that the Monroe Doctrine's meaning is limited to hegemony. Instead, he distinguishes among three separate concepts: the Monroe Doctrine, imperialism, and US hegemony. The first he elevates to a principle of international law; the latter two are relegated to simply policies pursued by the United States. Even as US-specific policies, however, Álvarez does not denounce them. Rather, he allows that these policies may have a legitimate place. Thus, while he does distinguish the Monroe Doctrine from imperialist policies, he does not reject the latter policies. He merely challenges those who believe that the Monroe Doctrine is the statement of those policies.

Within the Monroe Doctrine Álvarez identifies two novel principles of international law: the rejection of European intervention in the Americas resulting from international, balance-of-power politics, and the rejection of the doctrine of *terra nullius* as a basis for European occupation of American territory. Álvarez maintains that these two principles are upheld by all American states:

> whether the famous message of 1823 had been written or not, the principles contained in it would always have been sustained in the New World. In this sense, it may be said, and not without a certain amount of truth, that the Monroe Doctrine is neither *doctrine* nor *of Monroe*.[42]

He cites the long list of Latin American congresses throughout the nineteenth century – from the Congress of Panama to congresses in Chile and Peru – as supporting and reaffirming these twin principles. Furthermore, Álvarez claims that the Monroe Doctrine has been accepted by the Europeans despite their protestations. Specifically, he notes that

> The hegemony of the United States, as well as the Monroe Doctrine, has been attacked in Europe as lacking any basis in International Law. But the truth of the matter is that the leadership of the United States as well as the doctrine have been tacitly recognized

39. Álvarez, *supra* note 1, at 275.
40. Ibid., at 314–16.
41. Ibid., at 310, n. 54.
42. Ibid., at 311 (emphasis in original).

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> by the states of Europe, which have been the first to turn to the United States in conflicts with Latin-American states.[43]

In effect, he turns European acquiescence in US imperialism into exactly the same thing as support for the international law principles he claims for the Monroe Doctrine. He thus maintains the Doctrine's acceptance in Europe.

Of course, Álvarez must then turn to the questions of US imperialism and hegemony. Álvarez distinguishes the two. He is not opposed to imperialism per se, at least up to a certain point. He notes,

> It is another error of publicists to confuse the leadership of the United States with imperialism, or, at least, not to distinguish clearly between these ideas. The former has to do exclusively with the politics of the American continent, while *imperialism is the natural path followed today by all nations which have attained great military and economic progress, the end of which leads to the extension and development of commerce as well as political supremacy.*[44]

Concerning the events of his day, specifically US expansionism to the south, he is rather sanguine.[45] He categorizes territorial expansion as imperialist but not hegemonic. He believes that they are different phenomena:

> According to this [distinction], the extension of the frontier of the United States, embracing Texas, California, and Puerto Rico, is imperialistic in character and not the result of hegemony. The purpose of this study is not to show to what point imperialism destroys the principle of liberty and equality of all the states and how far this policy, which has exercised such a deep influence in the development of International Law, is justified.[46]

For Álvarez, objections by critics of American 'leadership' in the region are political claims. Imperialism, on the other hand, is simply economic development. In this way, he reconciles his position with those sympathetic to US expansionism. As such, Álvarez does not intervene in the AJIL for the purpose of reproaching North American colleagues for condoning US action with respect to Mexico, Cuba, Puerto Rico, or Panama – to the extent such colleagues supported such actions. He notes,

> It is not incumbent upon us to study that increase of territory which forms a part of the imperialistic policy of the United States, nor will we turn back to review those interstate relations in which, as we have seen, the United States adopted the attitude of Europe in looking down with disdain upon the new nations.[47]

Instead, Álvarez sets his sights on a different target, one which he describes as 'the hegemony of the United States'. Actions that fit into this category, for him, are 'anti-Monroe'. They are transgressions of the Americas-wide held principles of international law. These are instances in which the United States has acted to 'assert its material preponderance in the continent' albeit 'with the purpose of protecting

43. Ibid., at 318.
44. Ibid., at 317, n. 65.
45. Notably, describing the same events in the French version of this piece, his tone is much harsher. Álvarez describes US justifications for military action as pretexts for acts of violence which everyone recognizes. Álvarez, *supra* note 4, at 97–8. Cf. Álvarez, *supra* note 1, at 299.
46. Álvarez, *supra* note 1, at 317, n. 65.
47. Ibid., at 308.

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the states of America, . . . taken active part in all the international questions of these [Latin American] republics that it [the United States] believed to be of continental importance'.[48] Under this rubric, a number of instances of anti-Monroe action can be listed. Álvarez notes the US declaration of 1825 prohibiting among others the transfer of Cuba and Puerto Rico by Spain to another European power; the Clayton-Bulwer Treaty of 1850 admitting a European state into American affairs for the purpose of building an inter-oceanic canal; direct intervention in the formation of new states such as Cuba and Panama; and interference in the Anglo-Venezuelan boundary dispute of 1895 over British Guiana.[49]

These are clear instances of 'the hegemony of the United States' for Álvarez. As noted already, they are not intrinsic aspects of the Monroe Doctrine. Nor do they destroy for him the continuing importance and general acceptance of such doctrine within the region. Furthermore, even as to these blatant cases of the United States asserting its hegemony, Álvarez treads lightly. He portrays a relative acquiescence in this situation by Latin Americans. He explains it thus:

> If the states of Latin America do not look with great favor upon the policy indicated under the second heading [the United States' assertion of its material superiority], they at least do not condemn it, providing it be pursued with reason and all proper moderation.

One might expect more indignation on the part of Álvarez, consistent with his stance on hegemony. After all, these are the instances in which the United States directly interfered in the international relations of Latin American states and European countries. Considering his characterization of them as anti-Monroe, he seems far from strident. Instead, he informs his readers that

> these [Latin American] states not only do not reject it, but have sought and always will seek protection under it whenever it may operate to their benefit. But the circumstance that the United States has not always taken the lead with the necessary tact, has not at all times given its protection to the countries of America, and has held itself aloof with disdain from these republics until a late day, explains the dread they have felt of the hegemony of the Union, a fear fomented by the press and literature of Europe which represents the United States as preparing to absorb all America.[50]

Thus even US hegemony in the region – if more tactfully, consistently, and engagingly pursued – is not readily objectionable to him. To the contrary, Álvarez finds value in it for Latin American states, in furtherance of their relations with Europe. He affirms as much:

> Far from deserving absolute condemnation, as has been lightly said by certain publicists, it should be differently judged, as having been generally beneficial to America, as it has made this hemisphere respected by the countries of Europe in spite of the acts of intervention that have been carried out against it.[51]

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48. Ibid., at 314.
49. Ibid., at 316–17.
50. Ibid., at 317.
51. Ibid., at 319.

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In the end, Álvarez's characterization of diplomatic history is not inconsistent with his most summary of statements of the Monroe Doctrine. He boils it down to the idea that 'no one of the two continents may intermeddle in the affairs of the other'.[52] It is this point, really, that he raises to the level of a principle of American international law.

By way of summary thus far, Álvarez addresses three different points. He confronts both European and US conceptions of Latin states, justifying policies of intervention; he contends with the weaknesses of Latin American confederation; and he challenges the view that the Monroe Doctrine is merely a statement of US imperialism and hegemony.

2. Addressing the challenges through an identitarian law

2.1. Latin American law

Álvarez meets these three challenges with a proposal based in international law. He responds with his life-long honed idea of a regional identity of public law. Specifically, he begins his argument by making the case for a distinctive Latin American variety. His argument depends on the distinction between variability and universality in international law.[53] In a nutshell, he claims that upon observation of actual practices a variety of rules exist for any single issue of international relations.[54] While more conservative publicists of the era may have admitted to variability in certain instances, these situations, according to Álvarez, are circumscribed to differential rules applicable when 'it is about the relations of semi-civilized or savage peoples with civilized peoples'.[55] Álvarez rejects this proposition. He spends much of his life arguing in favour of the variability of international law at the regional level, which is still equally international law.

His position with respect to a regional law in the Americas is based on both its common sources and its common principles. Clearly, in Latin America there were various attempts at political unification after independence. Álvarez himself recites this history well. Throughout the nineteenth century a number of congresses were held with the aim of greater political union, a common stance towards Europe, and peace among Latin states.[56]

The first and most famous was the Congress of Panama in 1826, to which all the Latin states as well as the United States were invited. The two US representatives

52. Ibid., at 311.
53. See also Álvarez, *supra* note 4, at 259–77; A. Álvarez, *The Necessity of Unifying the Anglo-American and Latin-American Schools of International Law and of Creating a Pan-American School, in International Law and Related Subjects from the Point of View of the American Continent* (1922), 32–8.
54. Álvarez, *supra* note 4, at 9–10 ('L'étude du droit international doit donc être faite . . . d'après les faits et l'histoire de la diplomatie et des doctrines . . . pour ne s'inspirer que des données positives fournies par l'observation et par les sciences sociales').
55. Ibid., at 8.
56. See ibid., at 48 (the US House of Representatives objected to US participation because the Latin republics had abolished slavery and for fear that re-emphasizing the Monroe Doctrine would be seen as a provocation by Europe).

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never arrived. Representatives from Mexico, Colombia, Peru, and Central America attended, but only Colombia ratified the central treaty of confederation. Subsequent attempts were made by Mexico to reconvene the American states in 1831, 1838, and 1840, but such conferences were never held.[57] In 1847–8 another Latin American congress was held in Lima under fear of a rumoured Spanish attack. Representatives from the threatened nations of New Grenada (Colombia), Ecuador, Peru, Bolivia, and Chile attended and signed a pact of confederation, which, however, was never ratified.[58] In 1858 another treaty of confederation was negotiated in Santiago, Chile, attended by Chile, Peru, and Ecuador and later accepted by Guatemala, El Salvador, Costa Rica, and Mexico.[59] Contemporaneously Mexico, Guatemala, El Salvador, Costa Rica, New Grenada, Venezuela, and Peru signed in Washington a treaty of confederation similar to the one negotiated in Santiago in the same year.[60] One final important conference in this era was held in Lima in 1864–5, attended by Chile, Salvador, Venezuela, Colombia, Ecuador, Bolivia, and Peru, which also remained unratified.

All of these conventions involved primarily defensive alliances against European threats to territorial integrity. They also attempted to limit the discretion of Latin American states to cede, divide, or consolidate their territory – even voluntarily – without the assent of all allied states. Many also contained provisions for the mediation of disputes between parties. As mentioned already, however, none of these multilateral treaties ever became effective. They consisted of a top-down political process dependent on the national leadership of each state, which failed to follow through.

Álvarez notes the failure of these efforts. He is more optimistic, however, about law as the vehicle for consolidation.[61] He emphasizes the example of legal commonality signified by multilateral treaty negotiations as well as the stated aspirations of their drafters to codify further regional law – in contrast to the actual lack of ratification of these treaties. Redacting common principles of international law is an objective within some of these treaties, as a necessary step towards confederation.[62] Álvarez was a diligent promoter of these efforts.[63] And some projects of drafting common codes were attempted during the period.[64]

57. Álvarez, *supra* note 1, at 280; see also Álvarez, *supra* note 4, at 51.
58. Álvarez, *supra* note 1, at 280–1; see also Álvarez, *supra* note 4, at 55.
59. Álvarez, *supra* note 1, at 283–5.
60. Ibid., at 283.
61. Ibid., at 332 ('Of the conventions approved in this Conference, the one most worthy of note is that aiming at the codification of International Public and Private Law, because once carried out, it will be a great step toward the uniformity of international relations in America, while at the same time having a decisive influence on International Law').
62. See A. Álvarez, *La codificación del derecho internacional en Améríca. Imprensa Universitaria: Santiago de Chile* (1923).
63. See 'Book Reviews and Notes', (1924) 18 AJIL 871. Cf. D. J. Hill, 'The Second Peace Conference at the Hague', (1907) 1 AJIL 671, at 676 ('Many jurists have, however, opposed this idea, partly on the ground that no general code could be adopted to the use of all nations, but chiefly because they consider that it would arrest the spontaneous development of the rules of law that might otherwise be carried forward').
64. Álvarez, *supra* note 1, at 282, 301–3; Cf. J. H. Beale, 'Book Review: *Proyecto de Código de Derecho Internacional Privado* by Antonio Sánchez de Bustamente y Sirven. Imprenta "El Siglo XX" Havana (1925)', (1925–6) 39 *Harvard Law Review* 285. The reviewer notes the vast enterprise and skill of Bustamente (at the time judge at

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Álvarez's analysis – which is not uncharacteristic of much legal philosophy – highlights the pre-eminence of the sources of law and the context surrounding their development. As to sources, it was simple enough for him to point to the common origins of Latin American nations. There is no need to restate Latin American history here. Briefly put, Álvarez characterizes historical commonalities as establishing familial relationships on the one hand and as producing a solidarity of interests on the other. He also notes at several points the collective psychological similarity of its peoples:

> These aspirations [protection from attacks on their sovereignty and peace among Latin American states] and this hatred [towards all foreign domination], manifestations of one and the same psychological law, and necessary products of the factors and the influences we have just noted, are the source out of which sprang the whole life and evolution of Latin-American peoples . . . *and explain the attitude naturally assumed by them in the international community of nations.*[65]

Moreover, due in many ways to the commonality of treatment at the hands of Europe and the United States, Álvarez emphasizes the identity of priorities and concerns expressed by Latin American states. In the international public law arena, he highlights a number of common principles. First among priorities is territorial integrity: preserving the territory of Latin America from European reconquest. The proof is the topic's pre-eminence in the international congresses of Latin American states in the nineteenth century. While principles against European incursions, he claims, are firmly established in law, the same cannot be said for incursions by other American states:

> There has also been a desire on the part of some to proclaim as a principle of 'American' International Law the territorial integrity of the states of the New World exactly as they were when they freed themselves from Spanish dominion – nullifying, in consequence, territorial secessions and annexations. But this has been no more than a noble ideal, and has not been given any practical application in the diplomatic history of America.[66]

Notably, for him, American international law presents no real bar against territorial acquisition of American states by other American states.

Álvarez also highlights the support within Latin America for the arbitration of international disputes.[67] A number of Latin American states supported the notion of general and obligatory arbitration for all international disputes, as a way to avert invasion and war.[68] The particular appeal of this proposition is not hard to understand

the Permanent Court of International Justice) in redacting a common code of conflicts of law for all nations bridging common law and civil law traditions. He concludes, 'That he [Bustamente] has not succeeded proves that it cannot be done.'

65. Álvarez, *supra* note 1, at 273–4 (emphasis added).
66. Ibid., at 344.
67. Ibid., at 345 ('But the principle which they [Latin American states] have most extensively proclaimed and systematically practiced before its acceptance by Europe, is the employment of peaceful means to prevent or settle international conflicts'); see also A. S. de Bustamente y Sirven, 'The Permanent Court of International Justice', (Dec. 1924–June 1935) 9 *Minnesota Law Review* 122, at 126 (referring to the Court of Justice of Central America established in 1908: 'the first permanent Court of International Justice was a Latin American institution').
68. Álvarez, *supra* note 1, at 330 n. 82, 328 (such was the recommendation made at the First Pan-American Conference in 1889); see, e.g., A. G. de Lapradelle and Ellery C. Stowell, 'Latin America at the Hague Conference',

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in the light of the history of invasion of Latin America to collect public debts or simply to preserve the rights of European and US citizens. Neither the nineteenth-century Latin American congresses nor the later Pan-American conferences culminated in the ratification of a regional treaty on obligatory arbitration. In fact, at the Second Pan-American Conference in 1901 both the United States and Chile supported only voluntary arbitration. Álvarez notes that, at that conference, arbitration was emphasized due 'not only to the love of the principle itself, but also to the interest that certain countries had in bringing moral pressure to bear on Chile to secure the settlement by arbitration of the question pending between that country and Peru'.[69] As noted above, Chile opposed obligatory and general arbitration, because of the conflicts with its neighbours, and 'in view of the disproportionate importance that special interests had given to the question of arbitration in the two Pan-American Conferences, it was agreed to eliminate this topic from the programme of the Third Conference'.[70] The topic was eliminated from the regional agenda and deferred to the international setting of the Second Hague Peace Conference of 1907, which also ended in impasse on this topic, as noted below.

The twentieth century brought with it US leadership in hemispheric integration. The Pan-American conferences included the United States as a treaty partner in the formation of a regional international law. For Álvarez, these occasions (1889, 1901, 1906) signalled the historic continuation of the different and particular content to American law. These conventions, in contrast to earlier Latin American congresses, were ratified by a number of states.[71] Álvarez believed that it 'will also show to the countries of Europe the extent to which the New Continent has problems distinctively its own'.[72] Nonetheless, the differential international positions of the United States and Latin America were impossible to ignore. Álvarez does not overly emphasize these points in his article but acknowledges them:

> And as for the resolutions on subjects of Latin-American character, they have had for an object the prevention of certain abuses that the European countries commit against the Latin republics of this Continent.[73]

The Second Pan-American Conference in Mexico (1901–2) specifically attempted to address these abuses. The convention sought to limit the abuse of diplomatic channels by foreigners on American soil. While it established that foreigners had the same rights as citizens, at the same time American states had no responsibilities towards them in addition to those towards their own citizens. Thus European states should have no right to intervene in, invade, or occupy an American state on the

(1907–8) 17 *Yale Law Journal* 270. The authors describe Latin America's pre-eminence in supporting the principle of obligatory arbitration endorsed by the Hague Conferences of 1899 and 1907 – specifically, the treaty between Argentina and Chile in 1902 mandating arbitration – and the Second Pan-American Conference in Mexico City in 1902, when nine Latin states agreed to the same. Although only Mexico attended the first Hague Conference, a number of South and Central American states participated in the second Hague conference.

69. Álvarez, *supra* note 1, at 330.
70. Ibid., at 331.
71. Ibid., at 332.
72. Ibid., at 333.
73. Ibid., at 333.

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basis of some claim of one of its citizens. Interestingly enough, the United States did not subscribe to this treaty nor did it support Latin American national legislation to curtail abuses of diplomatic protection.[74] Clearly, Álvarez's 'Americanism' did not extend to the United States on this point. Nonetheless, he viewed this principle and its related doctrine of non-intervention as a bedrock norm of public law in Latin America.

On this same theme, Álvarez rejected the doctrine of a prominent Latin American publicist and expositor of American international practices. The Drago Doctrine, named after the Argentine minister of foreign affairs Dr Luis Drago who articulated it in 1902, maintained the policy that 'public debts cannot occasion armed intervention, much less the actual occupation of the territory of an American nation by a European power'.[75] It was advanced as an expression of Latin America's reaction – but specifically Argentina's – to just such action taken by Britain, Italy, and Germany against Venezuela in 1902, after prior consultation with the US government. The European powers seized the Venezuelan fleet, bombarded the cities of La Guaira, Puerto Cabello, and Maracaibo, and established a blockade of the Venezuelan coast in order to collect past due interest on Venezuelan government bonds, and other pecuniary claims.

Drago understood his doctrine as foremost a statement of policy of the Americas – although he did not exclude the possibility of its being, and even argued for its stature as, a general principle of law.[76] He viewed the Monroe Doctrine in much the same way, as primarily a foreign policy common to the Americas. Over the long term, the US government supported much of the substance of Drago's statement,[77] but its immediate response was more in line with the actions of its close ally, Britain: the United States limited its assertion of the Monroe Doctrine to territorial acquisitions by European powers and not retributive measures such as those exacted against Venezuela.[78]

Álvarez, for his part, felt that the Drago Doctrine 'examined from the purely doctrinal standpoint, was too absolute'.[79] He believed that armed intervention was justified against debtor states, assuming that all diplomatic measures had been exhausted, in cases of bad faith refusal to pay debts, negligent insolvency of the debtor state, and deliberate, or deliberately permitting, injuries to foreigners.[80] In

74. Álvarez, Le Droit Américain, 121.
75. See L. M. Drago, 'Les Emprunts d'Etat et leurs rapports avec la politique internationale,' (1907) xiv RGDIP; L. M. Drago, 'State Loans and their Relation to International Policy', (1907)1 AJIL 692, at 725; Álvarez, *supra* note 35, at 187–93 (reproducing Letter of Luis M. Drago, Minister of Foreign Relations of the Argentine Republic, to Mr. Mérou, Argentine Minister to the United States, 29 December 1902).
76. Drago, 'State Loans', *supra* note 75, at ('Its doctrine is in consequence before all and above all a statement of policy').
77. See Hill, *supra* note 63: 'the traditional practice of the United States has always been in conformity with this idea'. However, the United States did not support a common American declaration of this principle at the Pan-American Conference in Rio de Janeiro in 1906, preferring instead that it be taken up in conference with European creditor nations at the Second Hague Conference in 1907. No such declaration of the Drago Doctrine was announced at the Rio conference nor was Drago's position adopted at the Second Hague Conference.
78. See Drago, 'State Loans', *supra* note 75.
79. Álvarez, *supra* note 1, at 335, n. 85.
80. Ibid., at 335.

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all fairness, Álvarez was not the only eminent Latin American jurist to object to the Drago Doctrine. The Brazilian representative to the Second Hague Peace Conference in 1907 rejected it as well, not because he failed to find support for it in Latin America but because of legal and policy reasons.[81] Only Guatemala, Nicaragua, and Salvador joined Argentina in supporting this extension of the Monroe Doctrine. Mexico, Cuba, Haiti, and Chile supported the Brazilian position in favour of the narrower US proposition.[82]

In any case, Álvarez was critical of the Drago Doctrine both as a principle of law and as hemispheric policy. Álvarez's reaction is telling as regards his substantive stance vis-à-vis the principle of non-interference: the Drago Doctrine is an extension of the Monroe Doctrine and presumably in line with Álvarez's stated objectives.[83] Drago himself explained,

> Our thesis inspired by the spirit of unity among the nations of that continent thus came to have a scope and aim that were purely American. We enunciated it in connection with the conflict with Venezuela because Venezuela is a sister Republic and because, in the action that unfolded against her, there appeared to be reasons to suspect intentions much more subtle than those arising from a simple collection of debts.[84]

Drago believed that this concerted action against Venezuela was the beginning of a new colonial era for Europe in Latin America.

Álvarez also did not endorse the Tobar Doctrine.[85] This principle was first articulated in 1907 by the minister of foreign affairs of Ecuador, C. M. Tobar. It proposed a common American practice with respect to the recognition of governments.[86] Specifically, it stated the principle that American states should not recognize de facto governments resulting from revolutions or coups d'état. As such, it attempted to curb support for insurgencies, belligerencies, and attempts by other states to unseat an established government. The Tobar Doctrine never gained wide support because

81. For example, the commercial and not sovereign nature of public debt and because of its unsoundness as a matter of foreign investment policy. De Lapradelle and Stowell, *supra* note 68.
82. The United States' Porter Proposition was a watered-down version of the Drago statement which permitted the use of force in the collection of public debts based on contract, where the debtor state refused arbitration or refused to comply with an arbitral award. Ibid., at 275. Cf. J. B. Scott, 'The Work of the Second Hague Peace Conference', (1908) 2 AJIL 1, at 15, noting that Luis Drago endorsed the American proposition – while making a reservation in favour of his own articulation of the doctrine: 'This [the US version of the Drago Doctrine] was introduced by the American delegation, loyally and devotedly seconded by Dr. Drago, who has battled for the doctrine to which he has given his name. Without the support of Dr. Drago, it is doubtful if Latin America – for whose benefit it was introduced – would have voted for this very important doctrine.'
83. De Lapradelle and Stowell, *supra* note 68, at 275: 'the Drago Doctrine was not a simple application of the Monroe Doctrine, but an extension, and of such a nature as to cast discredit on the original doctrine'. The authors note the difference between Drago's first declaration of his doctrine in 1902 and the proposition he presented at the Second Hague Conference in 1907, which prohibited the use of force in any case of collection of public debt and extended the prohibition to the use of obligatory arbitration as well. As regards the latter, the authors claim that Drago went too far in the context of an international conference to promote arbitration; see Drago, 'State Loans', *supra* note 76. In his 1907 articulation of his doctrine, Drago distinguished between public contracts with private parties and public debt. He argued that the latter did not admit of a waiver of sovereign immunity.
84. Drago, 'State Loans', *supra* note 75, at 709.
85. See L. H. Woolsey, 'Editorial Comments: The Non-Recognition of the Chamorro Government in Nicaragua', (1926) 20 AJIL 545 ('Tobar proposed an agreement between Latin American countries not to recognize governments which arose from a revolution or a coup d'état').
86. The Tobar Doctrine was adopted by the republics of Central America by treaty in 1907 and 1923. Ibid.

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of fears of promoting intervention in the domestic affairs of sovereign states.[87] Of course, the opposite can be said as well: recognizing de facto governments prematurely or unwarrantedly is as much a form of intervention.[88] The United States was implicitly supportive of this doctrine for a time, although it was not a signatory to the Central American conventions that codified it.[89] Notably, a variation on the Tobar Doctrine is contained in the contemporary Organization of American States' Inter-American Democratic Charter (2001).[90] In any case, Álvarez did not embrace the Tobar Doctrine and instead found alternative statements of the principle of non-interference 'more acceptable, as they are less absolute, than those of Doctor Tobar'.[91] That is, he did not object to the Tobar Doctrine because of its propensity to compromise state sovereignty or its potential for undue interference in the affairs of one American state by another. Rather, he preferred a less bright line rule.

Once again, these positions are indicative of Álvarez's criteria for selecting the principles and doctrines of regional law. As such, it is less about the identity of regional practice or opinion and more about – in his view – the rule's pragmatic flexibility. Álvarez's reaction to the Drago and Tobar Doctrines is telling in terms of his particular use of the identity category of Latin American law. Rather than welcome the additional contribution by Drago to the ranks of Latin American specific law, and thus to his construction of a regional law, he rejects it. Additionally, rather than considering the regional basis or lack thereof for the Tobar Doctrine, he finds it too constraining. The category is thus less a marker of situational or geographic particularity than it is revealing of Álvarez's specific political project.

There are a number of other principles and norms of regional law that Álvarez articulates, both in the article under consideration here and in the numerous works throughout his lifetime. The objective of this essay is not to list them (although Álvarez's article does),[92] but merely to highlight the bases for these identity-based principles and the use he makes of such identity-based law. It is important to point out, however, that Álvarez does build a strong case for the particularity in emphasis of some Latin American international law: for example, the recognition of the doctrine of belligerency, the rejection of *res nullius* as applied to the New World, the elevation of the principle of the equality of states, and general arbitration to settle international disputes.[93]

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87. C. G. Fenwick, 'Editorial Comment: The Recognition of New Governments Instituted by Force', (1944) 38 AJIL 448, at 449 ('It is interesting to note that the Tobar Doctrine, which found expression in two treaties, has been generally attacked by other Latin American jurists, possibly because Señor Tobar recognized a right of intervention in this "indirect way" in the internal dissensions of the American states').
88. See P. Marshall Brown, 'Editorial Comment: The Recognition of New States and New Governments', (1936) 30 AJIL 689 ('This policy, which has been called the "Tobar Doctrine", and has been generally discredited and discarded, was clearly a departure from accepted principles and practices').
89. L. H. Woolsey, 'Editorial Comment: The Recognition of the Government of El Salvador', (1934) 28 AJIL 307 ('the United States had continued to follow this policy until the recognition of the Martínez government in El Salvador [1934]').
90. (2001) 40 ILM 1289 (participation in the OAS may be suspended due to an unconstitutional disruption of the constitutional regime, upon a 2/3 vote of the member states).
91. Álvarez, *supra* note 1, at 339.
92. Ibid., 349–52.
93. See also A. Álvarez, *International Law and Related Subjects from the Point of View of the American Continent* (1922).

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His Latin American international law is not unique. Álvarez accepts as much. If anything, he argues simply for the situational particularity of Latin America. The origins of the principles called upon, he readily concedes, are often nothing more than 'principles which could only with great difficulty be brought forth from their hiding-place in an isolated convention or the usage of some European state'.[94] The Latin American contribution in these cases is, thus, to dust them off and make use of them. This, however, is no mean feat. It constitutes the foundation for his entire claim of a Latin American public law. There are in addition some strictly *sui generis* examples of Latin American international law that he cites. Curiously enough, however, his prime example of such a case is the type of interaction required of Latin states as a result of 'the hegemony of the United States in the New World'.[95]

2.2. Pan-American law: a broader identity

In addition to the concept of a Latin American law, Álvarez introduces the notion of Pan-American law which, it turns out, is the main point of his article. Pan-Americanism adds the United States to the base of Latin Americanism and its corresponding law. At this point, the importance of the Monroe Doctrine within this larger identity category becomes evident. The leadership of the United States in organizing the Pan-American conferences in the early twentieth century is also brought into bold relief.

The ascendancy of Pan-Americanism at the turn of the century is contrasted with the decline of earlier Latin Americanism. Indeed, Álvarez announces that 'The Latin American solidarity (Latin-Americanism), in turn, has been restricted, losing its Utopian character and confining itself to those problems derived from or connected with the common origin of the constituent countries.' Rather than offering much potential impact in the international sphere, Álvarez views Latin Americanism as becoming instead a venue for intellectual and scientific co-operation.[96] In other words, rather than a source of binding principles for the region – which may or may not be universalized – the function of strictly Latin Americanism is refocused to one of mutual assistance.[97] One such example is the redaction of national legal codes common to all Latin states.

In its place, Pan-Americanism takes on pre-eminence for Álvarez.[98] And, again, within the category of Pan-Americanism the United States figures boldly:

94. Álvarez, *supra* note 1, at 269.
95. Ibid., 346.
96. A. Álvarez, 'Contributions of the Bureau of Comparative Law', (1916) 2 *American Bar Association Journal* 180, at 189.
97. The turn to extensive 'scientific' interrelations with the United States is in stark contrast to the first two periods Álvarez describes, in which almost all Latin American foreign relations were with Europe. See Álvarez, *supra* note 4, at 43.
98. J. B. Scott, 'The American Institute of International Law', (1912–13) 61 *University of Pennsylvania Law Review* 580 (Álvarez attempted to operationalize his ideas in the form of the American Institute of International Law co-founded by him in 1912: 'The idea originated with Mr. Alejandro Álvarez . . . in the course of an interview in Washington, D.C. in 1911 [with Scott, the editor of the AJIL] . . . They were discussing the relations that should, but unfortunately do not, exist among the nations of the Western Hemisphere, and it occurred to them that the field of international law furnished a common ground of contact').

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'Pan-Americanism counterbalances Pan-Saxonism, Pan-Latinism, and Spanish-Americanism, in the sense that both the United States and the Latin states of America feel themselves more closely bound to each other than to the other countries of their same respective origins.'[99] It is at this point that Álvarez's larger goal becomes evident. He wants the United States to share its hegemony with the more powerful Latin American states.[100] And Álvarez attempts to build a basis in law for such a relationship:

> In so far as concerns Pan-Americanism, the United States has realized that, in order that it should have a solid foundation, the holding of international conferences is not enough, but that it is necessary to destroy the distrust that the Latin states have of its policy in America, a distrust which is, furthermore, an imminent danger not only for the economic interests of that republic, but also for its foreign policy, which would be that of isolation on the continent.[101]

It is an objective that he characterizes as the existing policy of the concerned states and a description of the facts then occurring. Still, he must concede that it is mostly an aspirational claim:

> Although there are still obstacles in the way of the full development of Pan-Americanism, it is gaining ground rapidly, especially with the directing and intellectual class in the New World, and there is every ground for hope that within a very short time the term America may be recognized not merely as a geographical expression, but as the symbol of a New Continent of which the constituent states, free from antagonisms, are closely bound together, by interests of every kind.[102]

More specifically, Álvarez proposes that a group of nations within the hemisphere – and not the United States by itself – wield its influence and dominion over the rest.

Undoubtedly Álvarez was aware of the differences, as seen from abroad, with respect to the various Latin states and the tangible effect on international relations. Just two years prior to his AJIL article and in the same year he was appointed to the permanent Court of Arbitration, he had evidence enough. The Second Hague Peace Conference of 1907 failed to agree on a new, permanent international tribunal because of disagreement over the ranking of states in their judicial appointments to the proposed court.[103] The original proposal grouped all Latin American states in the fourth tier, below all European states no matter how small.[104] The US delegate to the Conference proposed that Argentina, Brazil, and Chile be ranked in the third

99. Álvarez, *supra* note 1, at 340.
100. See generally L. Obregón, 'The Colluding Worlds of the Lawyer, the Scholar and the Policymaker: A View of International Law from Latin America', (2005) 23 *Wisconsin International Law Journal* 145, at 158 ('They [Andrés Bello, Carlos Calvo, and Alejandro Álvarez] acknowledged the growing hegemony of the United States in the region and trying to strategically include, rather than antagonize, the country that would direct most Latin American nations' foreign policies in the twentieth century').
101. Álvarez, *supra* note 1, at 339.
102. Ibid., at 340.
103. Scott, *supra* note 82, at 26 ('The conference was unable to agree on the precise method of appointing the judges for the court').
104. De Lapradelle and Stowell, *supra* note 68, at 278.

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class, among European states of the rank of Denmark and Romania. Notably, the project for a standing tribunal was derailed for lack of agreement on this point.[105]

In any case Álvarez's objective might have seemed plausible at the time. Theodore Roosevelt himself may be seen to have suggested as much while defending his corollary to Monroe.[106] As Álvarez saw it at least,

> the United States desires, or at least shows itself not unwilling, that *the better constituted Latin states* should share with it, in proportion to their strength, the exercise of that hegemony in the matter of the safeguarding of the interests of the American continent. The hegemony would thus be modeled after the European 'balance of power' and would be extremely beneficial to America.[107]

One of the main benefits of such an arrangement, for Álvarez, is the role that such a group could have in enforcing international law.[108] And in this regard predominant among his concerns are the role of 'international police' then exercised by the United States with respect to Latin American states and the latter's pecuniary obligations to Europe: the very concern associated with the Roosevelt Corollary. An expanded hegemonic group of states, however, could relieve the United States of the burden of sole enforcer.[109]

Moreover, Álvarez notes that US hegemonic power has been mostly limited to policing neighbouring states. He notes,

> It may be said regarding the position of hegemony of the United States, that it has usually asserted itself in efforts to prevent civil wars in countries on the shores of the Gulf of Mexico . . . . As to the countries situated south of the equatorial line, the leadership of the United States has hardly ever been asserted, owing to the small interests the Union has in these regions, the difficulties of distance, *and the more perfect organization of the governments there, which has not made it necessary to interfere in their relations with foreign powers.*[110]

Presumably, it is these same better-constituted – and geographically distant – nations which need not fear and have not experienced US interference. It is these same nations that Álvarez advances as joint hemispheric leaders. He specifies which ones these are: 'Due to immigration, and to the advances made in culture, some of these countries, especially Chile, Brazil and Argentina, have attained a grade of increasing

105. Ibid. (the authors inform us that the Brazilian delegate rejected the US proposal and argued instead for the equality of states, which had the effect of ending negotiations).
106. See R. H. Collin, *Theodore Roosevelt's Caribbean: The Panama Canal, the Monroe Doctrine, and the Latin American Context* (1990), 411, 434–5: 'In suggesting that the already stable Latin American powers were co-guarantors of the new doctrine ("although as yet hardly consciously"), he made the Roosevelt Corollary part of the Pan-American movement.' The author also notes that, in a letter from Roosevelt to then Secretary of State John Hay restating the principle of the Roosevelt Corollary, 'Roosevelt closed his revealing letter with yet another advantage of Venezuelan intervention: "It will show those Dagos that they will have to behave decently." Roosevelt and Hay frequently referred to Latin Americans as Dagos, but only in private correspondence and conversation.'.
107. Álvarez, *supra* note 1, at 339 (emphasis added).
108. Ibid., at 324 n. 77. Álvarez approves (calling it 'a welcome innovation') of the 'guardianship' exercised by the United States over Cuba and Panama at the time, noting that, unlike European protectorates which are offensive to sovereignty and dignity, this 'tutelary system' does not offend the dignity and national spirit because only external and not internal sovereignty is curtailed.
109. Álvarez, *supra* note 1, at 339 n. 91.
110. Ibid., at 318–19 (emphasis added).

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development and prosperity which places them near the level of the best constituted states of Europe.'[111]

What he offers to the United States is greater legitimacy in the wielding of hegemony. Indeed, he finds the greatest flaw in US hegemonic policies not in their inequality or in their effect, but rather in their vulnerability to political attack:

> if this hegemony is not more burdensome than the European 'balance of power', its application possesses this one defect, however – that, being exercised by a single country [the United States] it is not subject to proper control. Consequently it will never have the prestige and moral weight that is enjoyed by the former.[112]

It does not seem that Álvarez is actually much opposed to balance-of-power politics at all. He views the United States' role as not unlike that of a European power:

> The hegemony of the United States, above all, according to the significance it has in the third division [presumably, according to Álvarez's own periodization], is comparable to the system of 'balance of power' which was exercised in Europe by the Great Powers, though the two notions are by no means to be confounded.[113]

He is just opposed to such a system when conducted from across the Atlantic. In his view, a more completely American pole – in which the United States and powerful Latin states rule – should be part of the balance.[114]

And, in case Pan-Americanism may seem too high a price to pay for the United States, he has some reassuring words. In particular, observers in the United States may be reluctant to strengthen ties of solidarity and commitment to Latin states.[115] First, they may be seen to come at the expense of attenuating the United States' strong ties to Europe. Second, they may be seen by some as compromising US interests by vouching in some way for irresponsible Latin governments. On both fronts, Álvarez anticipates his critics. His Pan-Americanism does not 'oppose in any way the solidarity and increasing growth of common interests between the states of the New World and those of the Old'.[116] Additionally, as to the potential concern of US entanglements, he makes room for the view that 'neither do these concepts imply

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111. Ibid., at 322.
112. Ibid., at 320.
113. Ibid., at 319.
114. Ibid., at 338–9 (Álvarez emphasizes that Latin America's emphasis on obligatory international arbitration does not mean a policy of utter pacifism and that 'they seek to increase their army and navy and consider themselves obliged to adopt, although with less intensity than the European states, the policy of armed peace').
115. In a paper delivered at the Second Pan-American Scientific Congress in Washington, DC, in 1916 at which Álvarez was present, the Hon. Robert Ludlow Fowler responds sparingly in the affirmative to the question presented in the title of his talk: 'Is there an American Public Law that can be differentiated from that of other continents?' The paper was published as R. L. Fowler, 'American Public Law', (1915–16) 2 *Fordham Law Review* 111. In it, Fowler makes little reference to international law, focusing instead on US constitutional history, and makes no reference to Latin America at all, except for the resolution passed at the First Pan-American Conference (1890) in Washington, DC, in support of international arbitration to resolve conflicting claims to territory. Fowler endorses the American particularity thesis on the issue of binding arbitration, the best example of which, he claims, is the Supreme Court of the United States' jurisdiction over disputes among the several states (in the United States) and between the federal government and particular states (of the United States): 'The fact that the public law of America contains elements, or norms, which look to the pacification of the world, perhaps differentiates it at the present time from the public law of other continents' (ibid., at 130).
116. Álvarez, *supra* note 1, at 341.

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the existence of any absolute solidarity between the countries of America, especially from the standpoint of foreign policy, and, above all for the support of a state that causes international complications because of its improper proceedings'.[117] Thus, for the critics of Pan-Americanism – especially US critics – Álvarez reassures them that it will not lead to diminished relations with European allies nor to compromising positions with Latin governments.

3. Álvarez's project

Presented in this way, the instrumental use of Latin American law in Álvarez's project is more easily perceived. The weight of his overall argument is based on the substantiability of this notion. And, indeed, while questionable as a concept, some case may be made for the particularity of public international norms in the region. Admittedly, Latin American international law is subject to all the criticisms, for example, that it is not really unique to Latin America or that its concepts are not original. Álvarez himself concedes as much. Still, there is a potentially constructed category of norms more solidly embraced within Latin America than elsewhere, or a set of agreements made possible among states in the region that are not attainable universally. It is the *relative* solidity of this claim that supports Álvarez's argument.

It is not the case that proving the substantive content of this regional law – at the Latin American level – is his ultimate objective, though. Instead, his aim is to show the substantiality of an American international law which includes the United States.[118] To do this, he mostly bootstraps the argument from his case for a Latin American law. That is, the argument for a Pan-American law is mostly built on the Latin precedents. Thus it is clear why the Monroe Doctrine is such an important factor for Álvarez.[119] It takes pride of place in his broader regional law because it brings in the United States. Of course, to situate it in that honoured place he has to redefine its commonly accepted meaning. He has to undo the widely prevailing understanding that it is simply a statement of US hegemony and completely ignore the plain wording of the Roosevelt Corollary. And to accomplish this feat he engages in some fancy footwork. He distinguishes between the international principle behind the Monroe Doctrine and imperialism and US hegemony. It is only the first that he raises to the level of a principle of international law. For him, imperialism is merely economic development. And hegemony is international leadership, which in the case of the United States has been awkwardly executed. His prescriptive proposal attempts to remedy such poor execution. In the final analysis, we come to see that

117. Ibid., at 341.
118. Álvarez continued to maintain this position much later in his life, despite having to concede some differences. See Leonhard, *supra* note 7, at 680: 'Although the United States has not aligned itself with Latin American states on the matter of diplomatic asylum, Álvarez in the Haya de la Torre case [1950] 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 . . . which is not binding upon the United States."'
119. See also Álvarez, *supra* note 4, at 40.

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Álvarez is not really opposed to any of these policies if they are jointly pursued with other American states.

In any case, other than the Monroe Doctrine, the US contribution to a regional international law lies, in Álvarez's eyes, in its sponsorship of Pan-American conferences at the turn of the century. Still, he must admit that a singularly important concern to Latin America – stopping the abuse of diplomatic protection by foreigners – was not supported by the United States. The United States did not sign the convention (the Second Pan-American Conference) at which the delegation of Chile, no less, presented language to prohibit recourse to diplomatic channels without prior exhaustion of remedies in national tribunals and solely in extreme cases of denial of justice or unwarranted delay.

In addition, Álvarez excludes from his category of regional international law (Pan-American or simply American international law) what he views as overly absolute doctrines. He rejects the Drago Doctrine as either superfluous because it is already covered by the Monroe Doctrine or too absolute because, he believes, there are some cases in which armed intervention is justified to collect public debts or address injury to foreigners. Álvarez also disagrees with the Tobar Doctrine as too absolute. Thus the purported primary objective of non-intervention as the basis of the American regional international law is revealed as not the primary objective at all. Nor is the identity of the publicists or their purported representation of Latin American norms determinative.

Indeed, the principles of Pan-American law are crafted around the larger geopolitical project, specifically the project of leadership of the Americas by the United States and 'well-constituted' Latin states. Álvarez's pragmatism with respect to these concepts establishes the legal doctrines needed to maintain order and direct policy in the region.[120] His American international law provides a foundation against European interference. His proposed defensive 'confederation' is not based on political alliance but on legal identity. From a certain perspective it is less ambitious and more practical. At the same time, it provides the means for enforcing regional law against Europe and enforcing American norms inside the region. The prominent role he assigns to certain Latin states rebuts negative conceptions of Latin America, by noting the differences among such states. Finally, a group of American states – rather than solely the United States – offers greater legitimacy for regional enforcement action.

4. CONCLUSION

It is not surprising that Álvarez would have been influenced by the ideas of his day. Although not the focus of this essay, scientific positivism was much in vogue in Latin America at the turn of the twentieth century. The catchphrase of this school of thought was 'order and progress', the words inscribed on the Brazilian flag. Its main tenet was that progress and development required scientific methods of statecraft and well-ordered societies, even at the expense of broader democracy.

120. See Woodward, *supra* note 17.

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A number of governments during this period espoused this political philosophy. Álvarez's concept of international governance and the vehicle for its achievement, as expressed in his article, similarly privileges order. A predominant feature of his Pan-Americanism is, in fact, its basis as a source of law and its legitimacy in enforcing the legal order.

There is no need to be acontextually critical, and that is not my intention here. Álvarez's was a calculated project of Latin American empowerment within the strictures of his day. The specificity or identity he associates with law in the region has less to do with substantive or cultural particularity. Rather, it provides the scaffolding for constructing a relationship with the United States. Obviously that relationship cannot be based on common cultural origins or the same level of development across North and South America. Instead, Álvarez builds on a purported commonality of law. Such commonality, of course, is the discursive construction or the argument he advances.

Álvarez's aim is regional governance by a group of nations, among them the more stable Latin states. It is not a project in the service of implementing ideal equality for all states or the eradication of all foreign interference in Latin America. Still, it is no doubt as much as he could have practically hoped for. Even judging by today's geopolitics, hegemony-sharing – much less anything near international democracy – is an elusive goal.

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