

ARTÍCULOS

Science of international law and regional orders: A critical appraisal of Alejandro Alvarez and Carl Schmitt

La ciencia del derecho internacional y los órdenes regionales: Una valoración crítica de Alejandro Álvarez y Carl Schmitt

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ABSTRACT In this article, I deconstruct the legal science of Alejandro Alvarez —a Chilean jurist— and Carl Schmitt —a German constitutional and international law scholar— to represent the normative traces of the theoretical construct of regional international law. The article revisits Schmittian *grossräume* concept and Alvarez's American international law as empirical evidence of normative deliberations of regionalism's functionality in international law. It then concludes that both theories that hinge on the Monroe Doctrine have envisioned distinct patterns of regional international law: vertical-apologetic and horizontal-utopian. It finally elucidates the scientific relevance of revisiting their scholarship and provides an alternative viewing to the brute generalizations that depict regionalism as a challenge to the unity of international law.

KEYWORDS International Law, Monroe Doctrine, regionalism.

RESUMEN En este artículo, el autor analiza la ciencia jurídica de Alejandro Álvarez —un jurista chileno— y Carl Schmitt —un estudioso del derecho internacional y constitucional alemán— para determinar las huellas normativas de la construcción teórica del derecho internacional regional. El artículo revisa el concepto de *grossräume* de Schmitt y el derecho internacional americano de Álvarez como evidencia empírica de las deliberaciones normativas sobre la funcionalidad del regionalismo en el derecho internacional. Luego concluye que ambas teorías, las cuales giran en torno a la doctrina Monroe, han visualizado distintos patrones del derecho internacional regional: vertical-apologista y horizontal-utópico. Finalmente, dilucida la relevancia científica de revisar su erudición y proporciona una visión alternativa a las generalizaciones brutales que describen al regionalismo como un desafío a la unidad del derecho internacional.

PALABRAS CLAVES Derecho internacional, doctrina Monroe, regionalismo.

Introduction

In an article published in the Chinese Journal of International Law (CJIL), Michael Salter depicted the reconstruction of international legal order based on Schmittian *Grossraum* (greater-space) concept (Salter, 2012). Soon after, Martti Koskenniemi published a critical stance in the CJIL, lamenting that “whatever may have been Salter’s intention in celebrating the wisdom of this dead Nazi, there is certainly no reason to wish the resuscitation of the age-old idea that authority emerges from physical power, and that the only alternative for those who fall within its range is either to succumb or to be destroyed” (2013: 202). Salter’s counter letter was not long in coming, explaining how and through what limitations he elaborated his article (Salter, 2013).

This biography-centered narrative about Carl Schmitt’s scholarship, or a scholarly debate of how, to what extent, legal academia deals with controversial figures (Weiler, 2021; Sourgens, 2021) is solely the tipping point of the iceberg. It also reflects the scholarly skepticism towards regionalism as a challenge to the unity of international law, primarily if such regionalism is based on tactics to reinforce power politics through the normative language. Such a critique may be justified because “the discourse of international law has thus always been careful to denounce anything that could undermine the universality and unity of international law, and in so doing, has developed new ideas and mechanisms that can help to curb any risk of fragmentation, supposed or real” (Zouapet, 2021: 1). But such a rough stance on regionalism resembles Kelsenian monism, which, while acknowledging international law’s primary status, tossed aside the political situation in which it was proclaimed (Mirkine-Guetzévitch, 1934: 315). Such mismatch between theoretical observation and political reality is explanatory of why, in the later period, scholars have been reasonably open to discussing *Grossraum* not only as a theoretical construct but as an explanatory schema (Orford, 2021; Mälksoo, 2021: 795; Simonyan, 2023). Therefore, this article’s central query is to comprehend if regional international law should be rejected *in toto* or not. If it is not the case, what can be regionalism’s alternative viewing? In fact, clash between universalism and regionalism is in the backbone of the science of international law (Simonyan, 2023: 294-299). Yet this article revisits this old poser in a specific manner. It examines Carl Schmitt’s and Alejandro Alvarez’s scholarships to scrutinize the normative construct of regional international law in contemporary discussions. Such a comparison is accomplished on two grounds. Foremost, it strives to showcase that regional international law, although always containing political justification to restrain the principle of universality, has no single definition that supposes outright repudiation or endorsement. Scientific inquiry on

the nexus of international law and regionalism mandates case-by-case examination as the regional approach that aspires to exhibit ethnocultural particularism and deliver solutions that consider *sui generis* circumstances does not curb the unity of international law but boosts its effectiveness (Zouapet, 2021: 64-66). Second, even if scholars' pursuits may vary —when propagating a regional approach— they still mutually reinforce each other, if not substantially, at least at the methodological level, while demonstrating the background conditions that make a specific region particular in its approach to international law. Therefore, if differences in the political agendas of scholars are not acknowledged by an examiner, regional international law will be deemed a challenge and in need to be eliminated from the science of international law, irrespective of its form and its substantive relation to unity and universality. This article aims to prevent such generalization by separating scholarship of Alejandro Alvarez and Carl Schmitt on regional international law. This discussion provides a “realistic pursuit of universality” (Koskeniemi, 2017: 16), where regionalism is not regarded as a challenge to unity but a source of enrichment. However, this article's sole pursuit is not centering on this comparison to prevent faux generalizations.

Additionally, its underlying cause is to demonstrate that even if a legal scholar's biography matters —especially considering albeit slowly diminishing but fundamental importance of Article 38(d) of the ICJ Statute— (Helmersen, 2019: 524) to analyze the secondary sources, it remains a central preoccupation of the invisible college of international lawyers (Schachter, 1977). Yet, as the epistemic community of international lawyers is divided (Roberts, 2017), a national or regional epistemic community of international lawyers with a tendency toward nationalism and parochialism (Peters, 2017: 117-120) is not bound by the same ethical and moral standards as proposed by the Western academia, and make their choices based on ethical standard accepted in the milieu where they work. Therefore, cancelling Schmitt and scholars like him will not eliminate them from discussions of international law or, at best, will do so within the group of international lawyers that accept the ethical standard of a West-centered invisible college.

This article follows this structure: first, a short introduction to the Monroe Doctrine is presented as it has been the central preoccupation of Schmitt's and Alvarez's scholarships on regionalism. In the following parts, the article presents how Alejandro Alvarez and Carl Schmitt reconstruct regional international law in their scholarly writings. In the main, I describe and explain. In the other part, I compare and criticize. I begin the examination with the Schmittian *Grossraum* concept, even if this theoretical construct postdates Alvarez's American international law. By following this structure, I focus on the deflections of the power project of *Grossraum* concept more deeply before looking at what sort of international law could follow from American hemispheric thinking. When observing Carl Schmitt, Bendersky's seminal works (Bendersky, 2007 and 2017) on Schmitt's biography is referenced multiple times.

However, these references are not meant to justify the contentious, anti-semitic tenets of Schmittian scholarship. The instrumental purpose remains to elucidate what regionalism signifies for the science of international law and how to grasp it.

In the methodological sense, this article contributes not that much to the comparative international law framework on a substantive level but, rather, aims to highlight what international legal scholars should take into consideration when “identifying, analyzing, and explaining similarities and differences in how actors in different legal systems understand, interpret, apply, and approach international law” (Roberts and others, 2018: 6) especially in regional context. One of the central problematics of comparative international law, or its constructivist approach, is the reincarnation of old doctrines of power politics under the banner of comprehending local, national, or regional particularity. Such development differs from what Anthea Roberts and others envisaged when establishing this methodological framework. However, international legal scholars sometimes showcase epistemic nationalism (Peters, 2017: 117-120), which can go beyond understanding the particularities and contribute to promoting spatial fragmentation under comparative international law. This article aims to act as a panacea to that challenge by locating benign and hostile forms of regional international law.

Finally, I conclude what sort of regional international law both scholars propagate in their scholarly works and how contemporary scholarship can use these separate forms of theorization on regional international law.

The Monroe Doctrine and two approaches to regional international law: Schmitt and Alvarez

In the exigency of responding to Tsar Alexander’s 1821 *ukase* on the monopoly of the Russian American Company in the North Pacific (Modeste, 2020: 22-23), the Greek 1820s independence war (May, 1992), the 1822 Congress of Verona (Modeste, 2020: 30-31), the subsequent fall of Cadiz and restoration of Ferdinand’s throne over Spain, and resurgent interventions by the Holy Alliance to reinstate Spanish rule over newly independent Latin-American states (Pétin, 1900: 11-24), the US government shaped its revolutionary foreign policy in form of Monroe Doctrine. In practice, the sake of newly independent Latin-American states and US expansionist foreign policy in America was at risk of European intervention (Joy, 2003). In search of a panacea, President Monroe formulated a rejoinder to the 1823 British proposal on a joint declaration on the question of the independence of the Spanish colonies in the Americas (May, 1992: 190-240) and resistance against European intervention for the sake of acquisition of territories in the New World (Scruggs, 1902: 6). Considering the foreign policy situation but driven by domestic political interests, US Secretary of State John Adams formulated the prime outlook of the Monroe Doctrine that would dicta-

te the relationship between the New World and Old Europe for almost one and a half-centuries (May, 1992: 196-197). President Monroe's speech to Congress on December 2, 1823, formulated the central ideas of this doctrine (Seventh Annual Message). The content of the Doctrine is encapsulated in two main principles: non-colonization and non-intervention (Modeste, 2020: 39-47). The principle of non-colonization implied that the US declares the non-admissibility of any (re)colonization of the American continent in the future (Modeste, 2020: 39-42). The term colonization in the doctrine referred to "the occupation by migrants of a region which is not yet under the control of any civilized power, except that of the motherland" (Beaumarchais, 1898: 25-27). Non-intervention, successively, as a critical principle in the doctrine, contained a dual dimension. At first, intending to prevent European intervention in the internal affairs of American states, President Monroe sought to circumscribe the sovereign choices of the European colonizers to "[acquire] new [American colonies], transfer existing ones to third powers, or [attempt to] regain [colonies] or to reinstate colonial authority on any that had declared their independence" (Modeste, 2020: 42-43). Secondly, the doctrine drew an ideological line between the Eastern and Western hemispheres, and through articulating the incompatibility of European monarchism and American republicanism, it acknowledged the determination of the US government not to intervene in the internal affairs of the Old World (Modeste, 2020: 43-46).

Even if the principles articulated in the Monroe Doctrine have been regarded as mere deliberations of political thinking rather than a normative schema of international law (Beaumarchais, 1898: 57, 59), they have attracted the attention of different legal scholars (Stefanovici, 1935; Trelles, 1930; Tower, 1920; Beaumarchais, 1898). Nevertheless, only within Schmittian and Alvarezian legal frameworks does the scholarly sophistication of the Monroe Doctrine rise to a degree where genuine attempts to reconstruct international law in its Eurocentric, universalistic posture become feasible. On the legal-doctrinal level, the core idea of the message has received relatively uniform interpretation. Alvarez, as such, averred that "two classes of declaration may be distinguished in the message: the United States must not intervene or become involved in European affairs; the countries of the New World have acquired a right to independence, and the States of Europe must not establish colonies therein or intervene in their domestic or international affairs" (Alvarez, 1924: 7). Schmitt claimed that "the true, original Monroe Doctrine [...] contains three simple thoughts: independence of states in the Americas; non-colonization in this space; non-interference of extra-American powers in this space, coupled with non-interference of America in non-American space" (Schmitt, 2011a: 46). Being simple and straightforward, in reality the doctrine pronounced principles that are concise and unequivocal, and it is erroneous to maintain that these principles contemplated "to prevent European governments from enforcing any legitimate international obligations against the [Latin] American republics or embarrass European governments in their free and legitimate

administration of affairs in their pre-established American colonies” (Scruggs, 1902: 11). However, the quasi-legal nature of the doctrine, or more precisely, its political-ideological foundations, opened a wide array of potentialities for scholars to discordantly explicate the doctrine’s political-ideological kernel in line with own ideological, political, or academic affiliations. Upon such methodological flexibility, Alvarez constructed his American international law while Schmitt further generalized the doctrine for his own *Grossraum* order of international law. This resemblance between Alvarez and Schmitt is only a superficial one, and further analysis will ascertain that although both scholars accentuated the political stakes of Monroe doctrine, they devised distinct types of regional international law and a generalized approach to their scholarship without conceding the contrasts of their political agency is a challenge to the integrity of the science of international law.

The Monroe Doctrine, constitutionalist Carl Schmitt, and his *Grossraum* concept

Carl Schmitt (1888-1985) was a Nazi party member who yearned to be “appointed” *Kronjurist* of the Third Reich.¹ His 1933-1936 writings and organization of colloquia in 1936 on “German Jurisprudence in Struggle with the Jewish Spirit” are apparent representations of his anti-Semitism, albeit his Weimar writings were not classified as such (Bendersky, 2017: 137). Schmitt’s affiliation with the Nazi party banned the scholar from teaching in academia in post-1945 period (Bendersky, 2017: 274), and the prescriptive revocation of his scholarship on international law, at least by contemporary German legal scholars (Carty, 2001: 27). His academic output began to appear in English language legal literature in the 1990s, and gradually, his *Grossraum* concept has become a benchmark not only for discerning the history of international law of the Third Reich (Vagts, 1990: 689) but also for fathoming out contemporary developments of the post-Cold War legal order (Salter, 2012; Salter and Yin, 2014; Joerges and Ghaleigh, 2003).

Is there any justification that such a remnant of Nazi-era scholarship regained popularity in the post-1991 period? Should scholars disregard or continue to reuse this concept? The ontological conundrum of the concept of *Grossraum* is not stuck between glorification or condemnation of the wisdom of a “dead Nazi” but encapsulates the external whys and wherefores that explicate the up-to-date survival of this concept in the post-1991 order. The explanatory power of *Grossraum* is not embedded in Schmitt’s mystic personality but in our times, which are inherently Schmittian, making Schmitt’s alternative concept on the multipolar order of international law

1. It was the Jewish-Armenian political scientist Waldemar Gurian, who gave the *Kronjurist* title to Carl Schmitt.

more than an academic inquiry (Schmitt, 2006: 355). Politically, then, multipolarity and the new geopolitics that shape the international law of the current order are the driving forces that “reincarnate” this concept (Simonyan, 2023: 299-306). The ethical standard of cancelling it remains valid but weak against realist scholars’ assertions. Instrumentally, therefore, it requires a critical analysis for the sake of sterilizing it to prevent its poisonous effect over the entire field of academic inquiry on regional international law.

Survival of the concept of *Grossraum*

Grossraum concept served as a fundamental imputation for allegations against Carl Schmitt at the Nuremberg trials (Bendersky, 2007: 14, 24), where one of the main accusations was the link between Schmitt’s *Grossraum* concept and the expansionist policy of Hitler (Schmitt, 1987; 2007b). On April 3, 11, 21, and 29, 1947, investigator Kemper had four interrogations with Carl Schmitt. Schmitt, in his interrogations and later in his written response, claimed that his *Grossraum* concept represented merely a scholarly percipience written in a logbook of political developments (Schmitt, 1987: 98, 108). And yet it was the Nuremberg ruling that the defendant’s act “must not be too far removed from the time of decision and action”, which made Schmitt’s release possible; Bendersky claims that even without the ruling, Kemper would face difficulties in charging Schmitt based on the latter’s prorogation of the *Grossraum* concept (Bendersky, 2007: 32-33). Some scholars believe that “a major problem facing Kempner and his colleagues was that Schmitt’s theory had been strongly attacked by orthodox Nazi legal scholars precisely for its neglect of racial factors in favour of cultural formations in a context where the former were, of course, essential to authentic Nazi ideology” (Salter and others, 2013b: 109). Another scholarly group abstractly observe the scholarship of Carl Schmitt and claim that after successful demystification, Schmitt’s Weimar writings remain valid scholarship for many contemporary aspects of the social sciences (Posner and Vermeule, 2016). These accounts, however, seem not well-reasoned justifications for up-to-date survival of *grossraum* concept. It may be true that Nazi circles distrusted Schmitt, but it does not reflect that the *grossraum* is not an expansionist idea. Therefore, the reasons that make the survival of *grossraum* concept possible or explain its contemporary rehabilitation ought to be found elsewhere rather than in these delicate justifications.

Schmitt only generalized the Monroe Doctrine (Koskenniemi, 2002: 415), which since its birth has always been qualified as equivocal. Schmitt’s arguments are so abstract or even ambiguous that Loewenstein represented as “wishy-washy general positions” (Bendersky, 2007: 11). Such abstraction mixed with “Germans’ lack [of] facility [to make] an easily managed, simple name out of a word so that people can agree without a great deal of difficulty” (Simons, 2016: 784) provided Schmitt linguistic

reservation to manipulate. The abstraction stockpiled for Schmitt leverages interpreting the concept according to needs, necessities, and situationality, including his own positionality. Such elusiveness also attracts academic interest among contemporaries, but which almost always contains a subjective addition by those interested in this concept. Some scholars minimize the relevance of the legal in this doctrine and use it for a political explanation (Mouffe, 2005), while others are interested in geopolitical application rather than the juridical ramifications (Pizzolo, 2023). Put differently, in between this theory's juridical meaning and the political reality, Schmitt provided a space for scholars to inject their own subjectivity, which scholars exploit while bringing political arguments.

Finally, Carl Schmitt claimed that “all law is ‘situational law’” (1985: 13). International law cannot escape such “situationality”. Whatever it may be, the opportunistic personality of Schmitt (Bendersky, 2017: 10) or his admiration of commissarial dictatorship, Schmitt's scholarship is associated with political situation. Accordingly, Schmitt claimed that “one has to pay attention to [legal concepts'] connection and combination with concrete, historical, and political situations” (2011b: 90). Thus, the explanatory power of *Grossraum* concept is linked to the specifics of time and circumstances (Orsi, 2021: 303-304). As noted by Edward Carr “power [is] a decisive factor in every political situation” (2016: 216). *Grossraum* theory, in this respect, not only locates power politics in specific terms but also normatively justifies the influence of power over political situations. In that regard, within Schmitt's thought, the political situation dictates international law and marks its justificative patterns with an apologetic fashion. Ulmen and Piccone (1987) somehow perceived all these points in their 1987 article, where they reasonably articulated the question “why Schmitt and why now?”. In changing political situations, scholars need an explanatory theory that can describe the crisis of order, and Schmitt and his scholarship in this respect are worthy of examination.

The main features of the *Grossraum* concept as a form of regional international law and its interrelation with universalism

Schmitt's theory of *grossräume* spatial orders first resurfaced in 1939 article (2011b). The article's main objective was to demonstrate the international legal system not from the viewpoint of a personally determined order but as a spatially concretized phenomenon (Schmitt, 2011b: 77). Schmitt, through his critique of the obsolescence of the conception of “state” recognized the *Tû-Tû* character of “territory” concept (Ross 1957: 821) and proposed the alternative spatiality (Schmitt, 2011b: 77).

Schmitt's intention with the *Grossraum* concept was to inject politically differentiated concrete spatial orders into an emerging liberal international law, eliminating any dissent in its path of homogeneity (Carty, 2001: 25). In this sense, Schmitt's *Gros-*

sraum concept has indeed been an attempt to revitalize a spatially oriented order similar to *Jus Publicum Europaeum*, but with a clear difference that that it would have a global reach (Mouffe, 2005: 249).

What Schmitt sought was not the ultimate transposition of doctrine to other territories but spatial utilization of the core idea of the Monroe Doctrine where a political idea prevails in the shape of certain, spatially radiated ideological ideas and principles within the ontology of *Freund und Feind* —friend and foe (Schmitt, 2011b: 87-88). In Schmitt's reconstruction of Central and Eastern European *Grossraum*, this political idea was the “right of protection for German national groups of foreign state citizenship” through “mutual respect for every nationhood [...] and rejection of all ideals of assimilation, absorption, and melting pots, “as opposed to the League of Nations’ minority protection based on the universalistic principle of liberal constitutionalism (Schmitt, 2011b: 96-101). According to Schmitt, the seemingly pure spatial order of *Grossraum* is not a mere quantitative term, the antithesis to *Kleinraum* but a change of conceptual field alternate the functionality of international law through qualitative meaning of “greater space” (Schmitt, 2011b: 118-119). Thus, space and political ideas interrelate so profoundly that “there are neither political ideas without space, nor spaces or spatial principles without ideas” (Schmitt, 2011b: 87).

Schmitt's *grossraum* concept also relates to *jus ad bellum*. *Grossraum*, according to Schmitt, is inherently robust in the ability of “bracketing of war”, which is the natural basis of every global legal order (Schmitt, 2006: 74) and its capacity to obtain it through non-universalistic ideas (Hooker, 2009: 140). This becomes possible primarily through the concept of the Reich that generates political ideas (Schmitt, 2011b: 101). Schmitt goes on: “*Reichs* in this sense are the leading and bearing powers whose political ideas radiate into a certain *Großraum* and which fundamentally exclude the interventions of spatially alien powers into its own *Großraum*” (Schmitt, 2011b: 101). Reich is to be understood differently from imperium because, whereas imperium has a universalistic, expansionist character, *Reich* is a non-universalistic, *völkisch* order, whose ultimate purpose is to secure the peaceful coexistence of nations within its boundaries (Schmitt, 2011b: 102). Thus, the aim of the Reich is not about going total but restriction of other universalistic ideas (Carty, 2001: 56). Meanwhile, the capacity of a *Reich* as a political entity is not that of classic sovereignty over the *Grossraum* but only spatial supremacy (Gattini, 2002: 60). Accordingly, emphasis on the concepts of Reich and *Grossraum* does not restrict the *grossräume* order of international law to being limited either between *Reichs* or within *grossräume*. Schmitt highlights four levels of legal relations:

a) between *Großräume* as wholes, b) between the leading *Reichs* of these *Großräume*, c) inter-popular relations inside of a *Großraum*, d) and finally —under the stipulation of the non-interference of spatially foreign powers— inter-popular relations between peoples of different *Großräume* (Schmitt, 2011b: 110).

In this functioning schema Schmitt, acting as a realist institutionalist (Zarmanian, 2006: 66), defines the legal status of the *Reich* territorially, close to the idea of sovereignty, yet other parts of *Grossraum* remained deprived from such status and can only interrelate on a people-to-people basis. Therefore, even if Schmitt separates the concept of sovereignty and *Reich*, he delimited national boundaries based on power projection. While lamenting that it would be faulty to project the existing conception of interstate international law over relations occurring between and inside *grossräume* (Schmitt, 2011b: 110), Schmitt does not reject the conception of the state in its entirety. In his earlier writings, he claimed that the “German theory of the state distinguishes between the concept of sovereignty and the concept of the state. What is gained by this distinction is that individual states may retain their status as states without being endowed with sovereignty” (Schmitt, 1985: 17). At the same time, “the *grossräume* remains a sphere of national independence”, which ultimately distinguishes it from the universalistic form of imperial domination (Schmitt, 2006: 22–23). The four types of relationship demonstrate a clear external-internal divide, and considering that the Schmittian concept of *Reich* is the central territorial unit that bans intervention, *Reich*’s external politics equates with that of *Grossraume*’s (Hooker, 2009: 137). Therefore, at the substantive level international law transforms into not inter-*Grossraum* law per se but *inter-Reich* one — a truly imperial project.

The abovementioned points all conclude that Schmitt’s *Grossraum* theory is a mix of political and legal ideas of constitutionalist Carl Schmitt. *Grossraum* type of regional international law is a challenge to the unity of international law. It is a reconstruction of international law *contra bonos mores et decorum*. Its substantive meaning restructures basic tenets of international law —sovereign equality, self-determination— to which contemporary legal scholars should be attentive when researching. The inquiry remains about how Schmitt saw the interrelation between *grossraum* order and the principle of universality because even if its substantive content can and should be challenged, it remains a benchmark for scrutinizing the interrelation between particularism and universality, especially in the emerging multipolar order.

Schmittian appreciation of the universality of international law

Grossraum order of international law was in harsh contradiction with universalistic principles that enable interventionism in international law (Schmitt, 2011b: 90). But what Schmitt propagated was not a rejection of the universality of international law as a coherent whole but opposition to the “*false* and *nihilistic* universalism” of liberal powers (Koskenniemi, 2015: 604). Therefore, his opposition was not against universality as a concept but against the depoliticized and neutralized nature of liberal ideologies without clear spatial boundaries (Koskenniemi, 2002: 427).

The idea of “the political” ultimately shaped the nature of world order which is a pluriverse rather than a universe (Schmitt, 2007a: 53). But this type of thinking, out of which emerges the *Grossraum* order, has a mandate to accomplish the necessity of ensuring different peoples “living together” (*Zusammenleben*) rather than eliminating universalist ideologies (Carty, 2001: 62). From this viewpoint, the Schmittian idea of *Grossraum* clearly manifested spatial boundaries, of which the Russian-German 1939 non-aggression pact was a clear exemplification (Carty, 2001: 43). Amid economic globalization, however, *Grossraum* still would have preserved its functional role to regulate commercial relations between different greater spaces (Schmitt, 2011b: 110).

Such a critique of liberal interventionism shows why Schmitt becomes so relevant in illiberal states that demarch against liberal universalism in the form of international rules-based order promotion (Dugard, 2023).

Alejandro Alvarez and his American regional international law

In his scholarly writings, Schmitt constantly referenced Chilean jurist Alejandro Alvarez (1868-1960) as the intellectual begetter of American international law (Schmitt, 2011b: 85; 2006: 229-230). Is there a common ground that unites Alvarez’s scholarship with that of Schmitt? The corporeality of some broadly defined parallelism between their legal rationales —on the role of politics and race in international law particularly— (Landauer, 2006: 974) does not substantiate the homogeneity of their theorizations. This chiefly stems from Alvarez’s inclinations to the French solidaristic school (Koskenniemi, 2002: 302-305) and his “propagandism” of Pan-Americanism (Scarfi, 2017: 176). Finally, Alvarez managed to disseminate his ideas as a judge at the ICJ,² and even though his legal reasoning has been conventionally defined as unorthodox, his endeavors to regionalize international law have been less controversially judged and even today remains a solid legal precedent to theorize contemporary international law (Chehtman and others, 2022). This, indeed, can be explanative as Latin-American scholars (especially French speaking ones), contrary to the Schmittian idea, did not act against liberal ideology but instead developed their deliberations on regional international law based on *Criollo* legal consciousness that had a self-civilizing mission to attain the same universals as that of European civilization (Obregón, 2006: 822-823). Brazilian jurist Sa Vianna, meanwhile, opposed such particularism by contending that not the common historical experience but apolitical legal principles and concepts ultimately shape international law (Sa Vianna, 1913). That said, the regional international law propagated by Alvarez may methodologically inspire Schmitt, but it remains a different form of particularism that requires context-specific examination.

2. Alejandro Alvarez was a judge at the International Court of Justice from 1946-1955.

The Monroe Doctrine and Alvarez's American international law

Alvarez —follower of French legal solidarism movement— foregrounded the transformative shifts that have occurred throughout the history of international law and attempted to reconstruct international law in terms that could fit international circumstances (Alvarez, 1947: 472).³ He demonstrated how statist individualism —inherent to pre-nineteenth century international law— gradually became obsolete under international social interdependence (Alvarez, 1947: 474). Leaning on a historically oriented international legal philosophy, which enables the existence of multiple international legal regimes in different places (Landauer, 2006: 969), he claimed that “the norms of international law are logically only the product of the milieu in which a state's development occurs” (Alvarez, 1907: 395). Only within this region-specific environment, regional (American) international law could engage with different *sui generis* questions that the European tradition of international law hardly could cope with. Such an environment-oriented mindset required Alvarez to examine international law in convergence with a bunch of social phenomena; economic, psychological, social, and, more importantly, political (Samore, 1958: 42). In a separate opinion on the Corfu Channel case, rejecting Kelsenian pure law theory, he claimed:

Jurists, imbued with traditional law, have regarded international law as being of a strictly juridical character; they only consider what they describe as *pure law*, to the entire exclusion of politics as something alien to law. But pure law does not exist, law is the result of social life and evolves with it; in other words, it is, to a large extent, the effect of politics —especially of a collective kind— as practiced by the States.⁴

According to Alvarez, upon that political basis, the separation of the New World and Old Europe occurred, generating diametrically different conditions for constructing international law in both hemispheres. When in the Old World, acute nationalism and trade protectionism hindered any solidarity between great powers, in Latin America, the absence of such conditions enabled the emergence of international (practically Creole) solidarity out of which coordinated and communal responses to purely regional *sui generis* is feasible, whereas, in heterogeneously organized European space, collective appreciation is subordinated to great powers' nationalistic behaviour (Alvarez, 1924: 29).

The New World on becoming independent adopted in political matters, without previous agreement, different principles that were quite opposed to those dominating the old World, especially the republican, constitutional, democratic, liberal and

3. Anglo-Iranian Oil Co. (*United Kingdom v. Iran*), dissenting Opinion of Judge Alvarez (1952: 124).

4. Corfu Channel Case, separate opinion by Judge Alvarez (1949: 29).

equal regime and this constitutes what may be called American constitutional law (Alvarez, 1924: 26).

Precisely, this political divergence also remodeled the international scene to a degree where Latin-American states needed to protest or reject principles inherent to European international law that were not in conformity with their political stance towards many questions (Alvarez, 1924: 5). Under these background conditions, the regional solidarity was reconstructed the Monroe Doctrine as a continental legal principle (Alvarez, 1911: 38).

Alvarez considered that Monroe's 1823 message contained two types of declaration: "The first relates to the political independence of the New World; the second exclusively to the personal policy that the United States proposes to follow with regard to Europe" (Alvarez, 1910: 134-135). Within this first part of the declaration, Alvarez believed that by gaining independence, Latin-American states could not be conquered or reconquered by any European power, the European states could not intervene in the New World to impose their governmental system, and European countries are deprived of the right of colonization in the American continent (Alvarez, 1910: 135-136). To this first declaration, Alvarez then adds two extensions which formulate the US opposition to European countries' rights to acquire any country of Latin America as a protectorate and "the more or less permanent occupation by a European State, even as the result of war, of any portion whatsoever of the American continent" (Alvarez, 1924: 17-18). These ideas formed the healthy core of the Monroe Doctrine, forming the foundations of American international law approved by all Latin-American states, even before the proclamation by President Monroe. This common continental core of the Monroe Doctrine thus secured a multilateral interpretation, making the doctrine a collective rather than unilateral (Leonhard, 1968: 676-677).

The significance is different for the second part of the doctrine which encapsulates US foreign policy as "i) respect for European colonies in America, [and] ii) [proclaim] non-intervention of the United States in European affairs, unless they constitute a threat to their interests" (Alvarez, 1910: 136). This part of the doctrine according to Alvarez does not represent the collective aspirations of the American continent and thus should be eliminated from American International law (Alvarez, 1910: 137-138).

Even if Alvarez represented how the political closeness of American states made the Monroe Doctrine a regionally radiated political idea, he did not proclaim any hostility towards Europe (Alvarez, 1907: 398). Therefore, within this solidarist mindset "Alvarez refrained from identifying his enemy" (Koskenniemi, 2002: 305). Alvarez's rejection of pure theory has consequently not been directed to preservation of "the political" in the Americas as was the case for Schmitt's propagation of East European German *Grossraum*. Alvarez aimed solely to demonstrate the differences in conditions that give birth to regional variations of international law. Were conditions

existent for a universal and even liberal international law, Alvarez's international solidarity would reconstruct international law accordingly.

Through collectivization of the Monroe Doctrine, Alvarez rejected all scholarly appreciation of the Monroe doctrine as a simple transfer from European interventionism to that of the US (Alvarez, 1910: 146), although maintaining that alongside the Monroe Doctrine, the US had developed its own policy of hegemony (Alvarez, 1910: 179-180; Alvarez, 1911: 39-40). This policy of hegemony, however is neither recognized by tribunals, scholars, or public opinion nor becomes part of continental legal consciousness (Alvarez, 1912: 97). In that regard, although all Latin-American countries endorsed the maintenance and application of the Monroe Doctrine by the US, they generally rejected latter's hegemonic policies in the American continent (Alvarez, 1910: 147-154). The same qualification goes for the US policy of imperialism, which neither forms part of the collective Monroe Doctrine nor, subsequently, American international law (Alvarez, 1910: 175; Alvarez, 1911: 39-40). Henceforth, Alvarez's appreciation of the Doctrine remains purely continental and communal. In this sense, Alvarez, separated his project from imperialism, which Schmitt propagate through his *grossraum* theory.

How exactly Alvarez assessed the relationship between states should be measured in relation to his understanding of social interdependence. Although that social interdependence brings the end of absolute sovereignty on the international scene, it still does not permanently abolish the independence (sovereignty) and equality of states but solely makes corrections to establish harmony between these concepts and the general interest of states (Samore, 1958: 43). Alvarez's appreciation of the Doctrine thus goes hand in hand with President Cleveland's claim that "the Monroe Doctrine finds its recognition in those principles of international law which are based upon the theory that every nation shall have its rights protected and it's just claims enforced" (Alvarez, 1924: 87). Such appreciation the doctrine was therefore an attempt to promote multilateralism, sovereign equality, and autonomy to a higher degree than the international law of that time could provide (Scarfi, 2017: 47). He believed in the idea that "international equality and fraternity in their practical manifestation are also American in origin because they were practiced in an era when in Europe one confused equality with the virtue of the 'balance of powers', and when fraternity did not exist" (Landauer, 2006: 972).

It is visible that by declining to include hegemony and imperialism in American international law and by proclaiming the sovereign equality of all American states, Alvarez firmly rejected attachment of his American international law to the concept of the *Reich*. Indeed, he praised the importance of the US as a spatial guarantor of the Monroe Doctrine, but he also believed that any American country that has capabilities could act as a hegemon for preservation of the continental doctrine (Alvarez, 1910: 183-184). In that logic, even if a spatially organized region needs an actual power

to preserve the political idea, power distribution is shared one rather than hegemonic as Schmittian *grossraum*. This is a methodological contrast between regional international law propagated by Schmitt and Alvarez. Although they both understood that regional international law is intrinsically attached to the power category, they methodologically symbolized the functionality of power in different terms. For Alvarez, Pan-Americanism was the true manifestation of continentalism and solidarity encapsulated in the Monroe that could counter US interventionism and unilateralism (Scarfi, 2017: 47), while for Schmitt that was power of the Third Reich. Thus, Alvarez opposed cases when the US as a *Reich* intervened arbitrarily within the American continent, and his reaction to US foreign policy choices in several instances demonstrated that he attempted to minimize violent US interventionism on the American continent (Scarfi, 2017: 61-62). In the Fifth Pan-American Conference held in Santiago de Chile (1923), he claimed: “No State may intervene in the external or internal affairs of another American State, against its own will. The only interference that these could exert is amicable and conciliatory, without any character of imposition (Scarfi, 2017: 96-97)”.

Even if Alvarez favorably reacted to the Platt amendment which “institutionalized in bilateral and constitutional terms US tutelage and the right to intervention over Cuba —and the Hay—Bunau-Varilla Treaty (“which ceded and guaranteed part of the territory of [Panama] and certain titles of its sovereignty to the United States”) (Scarfi, 2017: 10), there was some ad-hocism in those approvals. This reconstruction further Americanized the concept of intervention, and as another Latin-American jurist Yepes claimed, Latin-American countries approved collective rather than individual intervention because the former does not contradict the equality of states and state sovereignty (Yepes, 1930: 748). Therefore, continental solidarity becomes characteristic of Alvarezian appreciation of regional international law. Under such type of observation, not imperialistic power but solidarity becomes the founding step of regionalism, which ipso facto does not challenge the unity of international law but enriches it through *de lege ferenda* propositions by scholars who are more familiar with local customs, culture, and history. The crisis that international law currently goes through, therefore, makes Alvarezian regional international law a pivotal case against fetishized claims on the universal nature of international law that is characteristic to post-1991 international law.⁵

Alvarezian appreciation of the universality of international law

Latin-American legal scholarship affirms that there is no opposition between universal and particular international law (Yepes, 1935: 5). Alvarez’s appreciation of Ame-

5. «Regional International law», in Max Planck’s Encyclopedias of International Law.

rican international law is an example of this kind. *Prima facie*, Alvarez's appraisal of American international law need not be treated within the conundrum that segregates particularism and universality. Conversely to that conjecture, Alvarez's vindication is embedded in the truism that the existence of regionally varied international law exclusively endeavors to diminish the enduring absolutism in universal international law, which hinders proper treatment of *sui generis* questions subject to region-specific conditions (Alvarez and Rowe, 1909: 217; Alvarez, 1912: 264-265). He did not oppose every possibility of universal international law; instead, he lamented that universality as a quality is purposeless and does not possess total capacity to regulate the life of international society, which is essentially regional and fragmented (Alvarez, 1910: 264). Alvarez clearly did not reject the universal nature of international society, but stressed that entities forming part of international society are different in different places, which legitimized the needs to differentiate the application of international norms according to differences among the entities and conditions that surround them (Alvarez, 1912: 56-57). By entities, he recognizes not only nation-states as a true subject of international law but also "continents, groups of States, races, minorities, international associations, international persons, and in some cases the individual" (Alvarez, 1947: 477). Therefore, he contended:

To not go to an extreme in seeking universality for all juridical rules. In many matters, this universality is neither possible nor desirable. There must then be a diagram of rules: certain rules shall be universal, that is to say, applicable to all nations; others shall be general, that is to say, followed by most nations, but not by all; others continental, others regional, others according to schools, and, finally, others shall be special, that is to say, applicable to two or more Nations (Alvarez, 1929: 47).

Schematically, the existence of different international legal regimes functions in three layers: i) each region has its own norms that regulate its own *sui generis* questions; ii) then, on matters of universal significance, universal codification is required; iii) while for questions that are specific to a specific region but also of universal significance consultation is required (Alvarez, 1912: 202). Concomitantly, Alvarez considered that purely regional international law depends solely on conditions and, therefore, can disappear by eliminating those conditions (Alvarez, 1912: 195). Thus American international law is not hermetic and egoistic but open to benefit universal international law (Alvarez, 1924: 31).

For Alvarez, the universality of international law is synonymized with European international law (Alvarez, 1910: 261-262). But his opposition did not necessarily target the European tradition of international law, but the fact that European international law was the law of great power politics (Alvarez, 1912: 57). Therefore, the charges of which regional international law —namely, its relation to power category— is accused, Alvarez tries to contain through examining particularism. Within his conti-

mental-American doctrines, Alvarez saw a possibility to bring more international solidarity to international law-making where states would possess rights to reconstruct and codify international law that had suited to their needs rather than unilateral will (Alvarez, 1912: 143).

Alvarez's cognizance of the universality of international law also persisted in the post 1945 world order. In his dissenting opinion in the *Asylum* case, Alvarez claims:

It has been maintained during the hearing that American international law-and consequently other international continental systems of law must be subordinated to universal international law, and Article 52 of the United Nations Charter has been invoked in support of this view. Such a statement is not accurate. Article 52 in question refers only to regional agreements relating to the maintenance of peace and not to continental systems of law. Such systems of law are not *subordinate* to universal international law but *correlated* to it. Universal international law thus finds itself today within the framework of continental and regional law.⁶

It is visible that both Schmitt and Alvarez viewed the universality of international law with suspicion. However, whereas Schmitt's suspicion—especially as to the nihilism of the universal liberal world order—was corrected through power projection of the *Reich*, Alvarez's suspicion against the absolutism of universality was meant to counter great power politics while also recognizing the role of regional culture, history and customs.

Comparative conclusion on Alvarez's and Schmitt's interpretation of the Monroe Doctrine and two approaches to regional international law

The comparative analysis of Schmitt and Alvarez shows how differently both scholars interpreted a single doctrine stemming from different ideological and professional affiliations. Thus, based on one doctrine, it is possible to speak of two types of regional international law: i) vertical regional international law that follows ascending justificatory patterns, and ii) horizontal regional international law that legitimizes its existence through a descending justificatory scheme.

Schmittian *Grossraum* concept is a type of vertical regional international law where the core meaning of a regional-political idea is attached primarily to the concept of *Reich*. Within such a conceptual chain, there is no sovereign equality between protectorates and a *Reich*. As Schmitt speaks in this regard, "*Reichs*, are the real 'creators' of international law" (Schmitt, 2011b: 112). In Koskenniemi's typology, Schmitt's arguments have followed an ascending justificative scheme subject to the *Reich's* main interests and motivations, thus apologetic (Koskenniemi, 2006: 59-60). Although it

6. *Asylum (Colombia v. Peru)*, dissenting Opinion by Judge Alvarez (1950: 32).

contains an explanatory power, such theorization remains highly problematic when used for prescriptive purposes.

In contrast, Alvarez's regional (American) international law followed descending patterns of justification subject to American continental solidarity, thus utopian and horizontal in essence (Koskenniemi, 2006: 59-60). This benign form of regional international law, thus, persists in being a normative construct to tackle region-specific *sui generis* issues. What is a practical value of such comparison in the contemporary world order? It is widely believed that "what one needs to know is not *how much* did law affect a given decision, but *how*" (Chayes, 1974: 5). After all, an "evil law" can also be part of the legal process (Lukina, 2022). By revisiting the old theories of *grossraum* and American international law, this article aimed to prevent generalized opposition to regional international law. Many issues —Ukraine-Russia, Israeli-Palestinian conflicts, South China sea dispute— require a deep familiarity with regional customs, and complete disregard of regional particularities will nullify any durable solution if all norms of international law are considered *sub specie aeternitatis*.

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