THIRD WORLD APPROACHES *to* INTERNATIONAL LAW *Review*

ANTONY ANGHIE ~ *Welcoming the TWAIL Review*

TWAILR EDITORIAL COLLECTIVE ~ *A Journal for a Community*

KARIN MICKELSON ~ *Hope in a TWAIL Register*

JAMES GATHII ~ *Africa and the Radical Origins of the Right to Development*

RAJSHREE CHANDRA ~ *The 'Moral Economy' of Cosmopolitan Commons*

FABIA VEÇOSO ~ *Resisting Intervention through Sovereign Debt*

PAULO BACCA ~ *The Double Bind & Reverse Side of the International Legal Order*

ALI HAMMOUDI ~ *The International Law of Informal Empire*

HAILEGABRIEL FEYISSA ~ *Non-European Imperialism & Europeanisation of Law*

TWAIL*Review*

01

Issue 1 / 2020

THIRD WORLD APPROACHES *to* INTERNATIONAL LAW *Review*

TWAIL Review ~ Issue 1 (2020) 74–92

Resisting Intervention through Sovereign Debt: A Redescription of the Drago Doctrine

Fabia Fernandes Carvalho Veçoso [*]

Abstract

This contribution redescribes the legal discussions on intervention and sovereign debt in the Americas, considering the 1902-3 Venezuelan blockade. It assesses the legal interpretation developed by the Argentine lawyer and diplomat Luis María Drago to oppose the forceful collection of public debt under international law. The focus on sovereign debt opens space for broader interrogations on the role of states in protecting common interests in a political community, and the ways in which armed interventions can be legally justified to that end. Geopolitical issues also come to the surface when discussing the Venezuelan blockade, as this event sheds light on a critical regional moment in Latin America. In light of European attempts to keep exerting hegemony over the region – or, in the case of late German imperialism, to properly become an influential power in Latin America – the United States started to interpret the Monroe Doctrine expansively, changing the required measures aimed at defending its interests in the region. International law and the legal discussions on the enforcement of pecuniary claims played a substantive role in this context, both in enabling hegemonic projects and in resisting them.

Key Words

sovereign debt; public bonds; non-intervention; Drago doctrine; Latin American regionalism

1 Introduction

In 1907, the inaugural issue of the American Journal of International Law (AJIL) published the diplomatic note sent in December 1902 by Luis María Drago, the Argentine minister of foreign relations, to Martín García Mérou, minister of the Argentine Republic in Washington. It discussed the country's position on the Venezuelan blockade.[1] Luis María Drago (1859-1921) was a lawyer and diplomat

[*] Postdoctoral Fellow, University of Melbourne. I want to thank Juan Pablo Scarfi for all comments and exchanges about Luis María Drago. I also thank Alba Lombardi and the team of the historical archive of the Ministry of Foreign Relations and Worship in Buenos Aires for the attentive support with the research on the Drago Doctrine during my visit to the archive in September 2018. All English translations are the author's except where otherwise noted.

[1] Luis María Drago, 'Argentine Republic: Ministry of Foreign Relations and Worship' (1907a) 1:1 *The American Journal of International Law,* Supplement: Official Documents, 1–6. The Ministry of Foreign Affairs in Argentina still carry out functions related to worship in the country to date. These functions are related to the colonial *Patronato* right that survived independence in Argentina. It's the president's right to nominate bishops and archbishops and to command relations with the Vatican. The 1853 Argentine constitution kept this right from colonial times, and despite the 1994 constitutional reforms on the powers of the Federal government to intervene in internal issues of the Catholic church in Argentina, as well as the constitutionalisation of international human rights treaties, the ministry still covers issues of worship. The Ministry's Secretariat of

who opposed the intervention by the United Kingdom, Germany and Italy to coercively collect public debt and other pecuniary claims owned by Venezuela to subjects of the European powers.

The legal issues related to the forcible collection of public debt had been on the spotlight in the field of international law since the 1902-3 blockade. Carlos Calvo (1822-1906), Argentine jurist and founding member of the *Institut de Droit International* circulated Drago's diplomatic note amongst the members of the *Institut* in April 1903, which generated debates on the use of force to recover contract claims under international law and disseminated Drago's views on the matter.[2] The compulsory collection of public debt was discussed during the Third Pan-American Conference in Rio de Janeiro (1906)[3] and the Second Hague Peace Conference (1907).[4] Moreover, the first annual meeting of the American Society of International Law, held in April 1907, had a session discussing whether the forcible collection of contract debts could be seen as fostering the interests of international justice and peace.[5]

Drago's legal position about the Venezuelan blockade became well known in international law as the Drago doctrine. He condemned the use of force to collect public debt, arguing that such an intervention would violate international law and the principle of sovereign equality between States. Accordingly:

> The acknowledgment of the debt, the payment of it in its entirety, can and must be made by the nation without diminution of its inherent rights as a sovereign entity, but the summary and immediate collection at a given moment, by means of force, would occasion nothing less than the ruin of the weakest nations, and the absorption of their governments, together with all the functions inherent in them, by the mighty of the earth.[6]

The purpose of this article is to explore the argumentative construction and the legal positioning of Drago concerning intervention and collection of debts under international law. The Drago doctrine is commonly referred to in the field under a

---

Worship holds the national registry of religious organisations and institutes of consecrated life. See Ministry of Foreign Affairs, International Trade and Worship Argentina, 'Secretariat for Worship' https://www.cancilleria.gob.ar/en/ministry-foreign-affairs-international-trade-and-worship/secretariat-worship (accessed 30 January 2020). For a historical exploration on the relationship between the state and the church in Argentina, see Ignacio Martínez, *Una nación para la Iglesia argentina. Construcción del Estado y jurisdicciones eclesiásticas en el siglo XIX* (Academia Nacional de la Historia, Buenos Aires, 2013). I thank Juan Pablo Scarfi for the exchanges about the *Patronato* right and for bringing this book to my attention.

[2] Luis María Drago, *La República Argentina y el Caso de Venezuela: Documentos, Juicios y Comentarios Relacionados con la Nota Pasada al Ministro Argentino en Washington* (Imprenta Y Casa Editora De Coni Hermanos, 1903) 16–56.

[3] James Brown Scott (ed.), *International Conferences of American States 1889-1928* (OUP, 1931) 135–136.

[4] Division of International Law of the Carnegie Endowment for International Peace under the supervision of James Brown Scott, *The Proceedings of the Hague Peace Conferences. Translation of the Official Texts; The Conference of 1907, Meetings of the First Commission, Volume 11* (OUP, 1921) 555–560.

[5] Crammond Kennedy, Amos S. Hershey, Theodore P. Ion, William Draper Lewis, W. W. Willoughby, Arthur K. Kuhn & Everett P. Wheeler, 'Is the forcible collection of contract debts in the interest of international justice and peace?' (1907) 1 *Proceedings of the American Society of International Law at Its Annual Meeting (1907-1917)* 100.

[6] Drago (1907a) 2.

'contributionist approach' that praises Latin American influence to create new norms and principles in international law.[7] This article departs from this approach. It offers a redescription of Drago's stance to assert the unlawful character of enforcing public debts under international law.[8] The objective is to shed light on the specificities of his argumentative practice and how Drago's legal interpretation can be seen as an attempt to address complex geopolitical issues in the American continent at the beginning of the twentieth century through a regional sensibility in international law.

Even being a well-known doctrine condemning the use of force to collect public debt, the details of Drago's legal views on sovereign debt are less explored by international lawyers today. A 'principled emphasis' attributed to his legal position prevents a detailed exploration of Drago's legal stance.[9] Moreover, since the early twentieth century, authors have asserted Drago's mistake on describing the legal issues at stake in the Venezuelan blockade as related to public bonds. According to these views, the 1902-3 blockade was related to the protection of interests of foreign subjects living in Venezuela at the time, challenging Drago's legal position on the unlawfulness of the use of force to collect public debt.[10]

Either a principled emphasis on the Drago doctrine or an alternative factual narrative of the Venezuelan blockade puts in the dark vital questions on the role of states in protecting common interests in a political community, and how armed interventions can be legally justified to that end. The Drago doctrine was an attempt 'to represent the possibility for weaker states to resist the force of great powers by means of law.'[11] Despite its limitations, Drago's views on sovereign debt open space for productive discussions on the different ways international law has been used to cope with geopolitical challenges, with particular attention to various forms of spatial ordering.

The issuance of public bonds constituted a starting point to the discussion of questions related to state contracts and whether international law could be posited as the legal basis for the obligations established by loan agreements between states and private creditors. Nevertheless, international legal practice and

[7] For a paradigmatic example, see Antônio Augusto Cançado Trindade, *The Contribution of Latin American Legal Doctrine to the Progressive Development of International Law* (Collected Courses of the Hague Academy of International Law, 2015) 376.

[8] On description as strategy, see Anne Orford, 'In Praise of Description' (2012) 25:3 *Leiden Journal of International Law* 609.

[9] Antônio Augusto Cançado Trindade, 'The Presence And Participation Of Latin America at The Second Hague Peace Conference of 1907' in Y. Daudet (ed.), *Topicality of the 1907 Hague conference, the second peace conference* (Leiden: Nijhoff, 2008) 51–84. An exception is Arnulf Becker Lorca's account on the Venezuelan blockade and the Drago doctrine. Arnulf Becker Lorca, *Mestizo International Law* (CUP, 2014) 144–158.

[10] Crammond Kennedy, 'The Drago Doctrine' (1907) 185:619 *The North American Review* 614.

[11] Becker Lorca (2014) 152.

doctrine on state contracts have focused on the field of foreign direct investment.[12] Important texts by Global South scholars challenging the internationalisation of state contracts have also concentrated on this field.[13]

Recent discussions on sovereign debt have focused on practical legal solutions to sovereign defaults, such as arbitration before the International Centre for Settlement of Investment Disputes[14], or the role of international law on an incremental approach to sovereign debt restructuring.[15] The historical analysis undertaken in this contribution does not intend to look at the past aiming to contribute to the legal discussions on how to address sovereign defaults today adequately, that is, looking at the past to find legal solutions to be transplanted to solve present problems. This contribution intends to explore the nuances of the position of the Argentine jurist on non-intervention.

The re-description of the Drago doctrine aims to 'to make sense of specific legal and political developments of their time, while exploring new and productive ways of making those developments comprehensible.'[16] In 'making visible what is precisely visible'[17], the details of Drago's views on intervention are explored as a way to make sense of the developments in the region at the beginning of the twentieth century, which allows grasping the political sensibilities at stake with the Venezuelan blockade. In Latin America today, we have a celebratory narrative that aims to shed light on the contributions of the region for the development of international law, putting in the dark the legal complexities related to the practice of international lawyers from the region.

Drago's legal arguments must be assessed in a context of the preponderance of the Monroe Doctrine, that is, a regional perspective dominated by the views of the United States about the American continent. Drago did not challenge this vision, nor did he seek to transform it. Drago seems to have

---

[12] Irmgard Marboe & August Reinisch, 'Contracts between States and Foreign Private Law Persons' (2011) *Max Planck Encyclopedia of Public International Law,* at 2-3.

[13] See for example, Chittharanjan. F. Amerasinghe, 'State Breaches of Contracts with Aliens and International Law' (1964) 58:4 *American Journal of International Law* 881, in which the author explicitly excludes public bonds from his analysis. See also Muthucumaraswamy Sornarajah, 'The Myth of International Contract Law' (1981) 15:3 *Journal of World Trade* 187, in which the author does not expressly discuss sovereign debt. For a recent overview on the legal issues related to the internationalisation of state contracts, see Jean Ho, 'Internationalisation and State contracts: are State contracts the future or the past?' in C. L. Lim (ed.), *Alternative Visions of the International Law on Foreign Investment: Essays in Honour of Muthucumaraswamy Sornarajah* (CUP, 2016). For a history of the internationalisation of state contracts in the first half of the twentieth century, that is, before the institutionalisation of the field of international investment law, see Andrea Leiter-Bockley, *Making the World Safe for Investment: the Protection of Foreign Property 1922-1959* (PhD thesis, Melbourne Law School and Vienna Law School, 2019).

[14] Michael Waibel, 'Opening Pandora's Box: Sovereign Bonds in International Arbitration' (2007) 101:4 *The American Journal of International Law* 711.

[15] Juan Pablo Bohoslavsky & Matthias Goldmann (eds.), 'Special edition on sovereign debt' (2016) 41:2 *The Yale Journal of International Law* 1. See also the Symposium on Sovereign Debt published by Völkerrechtsblog (January 2017) https://voelkerrechtsblog.org/symposium/sovereign-debt/ (accessed 12 October 2020).

[16] Orford (2012) 622.

[17] Ibid, 617-618.

attempted to accommodate the United States' regional perspective to the more fragile position of the Latin American republics, without appropriately challenging the grammar of the Monroe Doctrine.[18] Importantly, Drago's stance towards the Monroe Doctrine was not the only position available to Latin American international lawyers at the beginning of the twentieth century. Stronger anti-imperialist legal views were emerging at that moment.[19]

The argument unfolds as follows. The next section will briefly present the main events of the Venezuelan blockade. The text follows with a focus on Drago's legal arguments regarding the various types of pecuniary claims in international law and the unique nature of the legal obligations related to sovereign debt. This contribution is based on Drago's doctrinal writings since the author published extensively on these issues and primary sources on the Drago doctrine available at the historical archive of the Argentine Ministry of Foreign Relations and Worship located in Buenos Aires. The article concludes with a few considerations about the limitations of the Drago doctrine.

2 Brief notes on the Venezuelan Blockade

The Venezuelan blockade has been consistently mentioned in historical accounts on the uses of international law in the American continent, and in international relations studies on intervention.[20] The United Kingdom, Germany, and Italy imposed a naval blockade upon Venezuela to force the country to settle pecuniary claims. These claims were related to damages suffered by European nationals in the context of internal strife in Venezuela.[21] Such damages originated from torts and breaches of contractual obligations, such as concession contracts celebrated between the Venezuelan government and nationals of the European powers. The claims also concerned the Venezuelan default in paying the service of its sovereign debt.[22] The United Kingdom and Germany organised a naval expedition in December 1902, and an ultimatum was sent to the Venezuelan president Cipriano

[18] Juan Pablo Scarfi, *The Hidden History of International Law in the Americas: Empire and Legal Networks* (OUP, 2017) 61.

[19] Juan Pablo Scarfi, 'Denaturalizing the Monroe Doctrine: The rise of Latin American legal anti-imperialism in the face of the modern US and hemispheric redefinition of the Monroe Doctrine' (2020) 33:3 *Leiden Journal of International Law* 541.

[20] Scarfi (2017); Becker Lorca (2014); J. L. Esquirol, 'Latin America' in Bardo Fassbender & Anne Peters (eds.), *The Oxford Handbook of the History of International Law* (OUP, 2012); Martha Finnemore, *The Purpose of Intervention: Changing Beliefs About the Use of Force* (Cornell University Press, 2003).

[21] Edwin M. Borchard, 'Basic Elements of Diplomatic Protection of Citizens Abroad' (1913) 7:3 *The American Journal of International Law* 497. For recent texts on alien protection, see Kathryn Greenman, 'Aliens in Latin America: Intervention, Arbitration and State Responsibility for Rebels' (2018) 31:3 *Leiden Journal of International Law* 617. Tzvika Alan Nissel, *A history of State Responsibility: the struggle for international standards (1870-1960)* (PhD thesis, University of Helsinki Law School, 2016).

[22] Luis María Drago, 'State Loans in Their Relation to International Policy' (1907b) 1:3 *American Journal of International Law* 692, at 692.

Castro (1858-1924), who ruled the country between 1899 and 1908. Italy joined afterwards.

With Castro's refusal to accept the European demands for payment, there were several European coercive actions along the Venezuelan coast.[23] On 9 December 1902, Venezuelan vessels were seized by European warships anchored at the Port of *La Guaira* and two Venezuelan ships were sunk, according to a memo sent by the Venezuelan Foreign Ministry to the Argentine Republic on 10 December.[24] Venezuela reported a new act of aggression in a note dated 15 December. Two days earlier, the Charybdis and Vineta cruisers bombarded the Fort *Solano* and a prison, both located in *Puerto Cabello*.[25] Finally, according to a memorandum sent to the Argentine Republic on 20 December, several Venezuelan ports were blocked by the British Vice Admiral Douglas on 18 December.[26]

The claims were eventually settled through arbitration, with the participation of the United States in handing on a Venezuelan request to the European intervening powers to arbitrate the pecuniary claims. The United Kingdom, Germany, and Italy accepted the Venezuelan offer but insisted that specific claims related to torts should be paid without discussion. The remaining claims related to foreign nationals from the three European countries, but also claims related to citizens from the United States, Belgium, France, Mexico, the Netherlands, Spain, Sweden, and Norway, were to be settled by mixed commissions. To guarantee these payments, Venezuela agreed to alienate thirty per cent of the customs revenues of the two ports of *La Guaira* and *Puerto Cabello*.[27]

Venezuela agreed to renegotiate its sovereign debt, 'with a view to the satisfaction of the claims of the Bondholders,' as stated in the protocols signed in February 1903 in Washington between Venezuela and the United Kingdom,[28] and between Venezuela and Italy.[29] Concerning the protocol signed between Germany and Venezuela, the Venezuelan government undertook to renegotiate the terms of the loan agreement contracted in 1896, which was entirely in the hands of German creditors. Venezuela was also obliged to renegotiate its total sovereign debt.[30]

---

[23] Samuel F. Bemis, *The Latin American Policy of the United States: An Historical Interpretation* (Harcourt, Brace and Company, 1943) 146.

[24] Archivo Historico de Cancilleria, *Doctrina de Drago, Volume I* (Argentinian Ministry of Foreign Relations and Worship, 1917) 17.

[25] Ibid, 18.

[26] Ibid, 19.

[27] Bemis (1943) 147.

[28] Cour permanente d'arbitrage, *Recueil des actes et protocoles concernant le litige entre L'Allemagne, L'Angleterre et L'Italie d'une part et le Vénézuela d'autre part, tribunal d'arbitrage constitué en vertu des protocoles signés à Washington, le 7 Mai 1903, entre les Puissances susmentionnées* (CPA, 1904) 10.

[29] Ibid, 14.

[30] Ibid, 6.

A final legal question was referred to the Permanent Court of Arbitration at the Hague, and it was related to 'whether or not Italy, Germany, and Great-Britain are entitled to preferential or separate treatment in the payment of their claims against Venezuela.'[31] Without any substantive analysis about the legality of the naval blockade as a means of collecting debts under international law,[32] the court unanimously decided to give preferential treatment to the intervening powers in the payment of their claims against Venezuela.[33]

In March 1903, the Venezuelan Ministry of Foreign Affairs published the correspondence exchanged with the United States and other European legations to Caracas. These diplomatic exchanges covered pecuniary claims presented against Venezuela by Germany, the United Kingdom, Italy, the Netherlands, Belgium, and the United States, as well as the affairs of the steam-ship 'Ban Right' and the Patos Island, all between 1900 and 1903.[34] By decision of the Venezuelan president Cipriano Castro, upon the support of the Council of Ministers, these diplomatic exchanges had to be published to make the Congress and the entire republic know about the pecuniary claims:

> to give proof of the legal criteria, of the constitutional principles, and of the international doctrine to which the government complied throughout the correspondence followed with the Legations of Germany, Great Britain, Italy, Holland, Belgium and the United States.[35]

The 1903 volume came to light in the heat of the events related to the 1902-3 Venezuelan blockade. Its publication constituted an effort from the Venezuelan government to establish the relevant facts and the legal issues at stake in the context of the blockade. Earlier in August 1902, the Minister of Foreign Affairs Rafael López Baralt circulated a memorandum amongst friendly nations, which included Argentina, to justify the country's opposition to the German will to intervene in Venezuela. In a memo dated December 1901 sent to the United States Secretary of State, Germany presented the reasons that would pave the way for the decision to coercively collect public debt and other pecuniary claims owned by Venezuela to German nationals. The Venezuelan ministry attached the correspondence exchanged with the German legation to Caracas intending to demonstrate the unlawfulness of the German position under international law.[36] Despite the Venezuelan attempts to frame the narrative about the blockade, the

---

[31] Ibid, 19.

[32] Ibid, 110.

[33] Ibid, 112.

[34] Venezuela e Ministerio de Relaciones Exteriores, *Asuntos internacionales. Correspondencia del Ministerio de Relaciones Exteriores de los Estados Unidos de Venezuela con algunas de las legaciones acreditadas en la republica. 1900-1903* (Tip. J.M. Herrera Irigoyen & ca., 1903).

[35] Ibid, 3.

[36] Ibid, 5-11.

interpretation of the facts and the legal consequences related to the European intervention in the country remained contested.

It is worth noting that at the beginning of the twentieth century, different countries had already employed blockades as a strategy to intervene in the domestic issues of Latin American republics. From the fears of the *Libertadores* for the recolonisation of Latin American republics by European powers[37] to a highly-militarised society in the post-independence context in Spanish America, the Latin American region had become a space with constant challenges of political ordering.[38]

Throughout the nineteenth century, the region suffered a series of European interventions. To illustrate, in 1833, the United Kingdom occupied the *Malvinas* (Falkland) Islands.[39] France blockaded the Rio de la Plata in 1837[40] and intervened in Mexico in 1838[41] to collect debts related to injuries claimed by French nationals. In 1845 the United Kingdom and France blockaded the Rio de la Plata in the context of the Uruguayan civil war.[42] Later in 1862, Spain, France, and the United Kingdom agreed to intervene in Mexico, seizing Mexican ports and customs to guarantee the payment of financial obligations owed by the Latin American country.[43] Eventually, only France intervened in Mexico, establishing a monarchical government under the Archduke Maximilian of Austria, which lasted until 1867.[44] In 1861, Spain occupied Santo Domingo, withdrawing its intervention in 1865.[45] In this setting, the Venezuelan blockade did not constitute a novelty in the region.

Issues related to pecuniary claims – obligations related to alien protection and sovereign debt – can be presented as the immediate justification for the European blockade in the Latin American country. A productive approach to the

---

[37] As Simón Bolívar put on a letter written in 1825 about the Portuguese invasion of Chiquitos in Upper Peru: 'The emperor may, of course, have taken this action on his own, in which case there may be no consequences. Nevertheless, if the emperor has been in consultation with the Holy Alliance, then the matter is far more serious because the allies are too strong and have a vital interest in the destruction of the new American republics.' Simon Bolivar, Frederick Fornoff & David Bushnell, *El Libertador: Writings of Simon Bolivar* (Oxford University Press, 2003) 162. As explained by David Bushnell on his notes to this volume, the invasion of modern Bolivia was undertaken by a Brazilian regional commander 'without authorization from the emperor in Rio de Janeiro.' The mention to the emperor in Bolívar's letter acknowledges the Brazilian participation in the event, and the close connections between Brazil and Portugal at the time. Bolivar, Fornoff, and Bushnell (2003) 228.

[38] Tulio Halperin Donghi, *Historia Contemporanea de America Latina* (Alianza Editorial, 2005) 135–141. The author explains that these issues had parallels in Brazil, despite the fact that the independence of the former Portuguese colony did not happen through war.

[39] Ibid, 652.

[40] Ibid, 200.

[41] Ibid, 179.

[42] Ibid, 201.

[43] Ibid, 238.

[44] John Holladay Latané, *The United States and Latin America* (Doubleday, Page & Company, 1920) 193–237.

[45] Donghi (2005) 276-277.

Venezuelan case includes the broader issue related to the new geopolitical configuration associated with the growing hegemony of the United States in the Americas[46] and the related substantive re-interpretations of the Monroe Doctrine that occurred early in the twentieth century.[47]

In his message to the US Congress on 2 December 1823, President James Monroe declared as a principle of US foreign policy the defence of republicanism in the Americas. In light of the independence of former Spanish and Portuguese colonies, the Monroe Doctrine stated the non-colonisation principle, abstention from European wars, and exclusion of Europe from the affairs of the American continent.[48] The doctrine put together ideas of anti-colonialism and imperialism, as it established limits to European intervention in the continent, but also determined that any intervention from a non-American country would affect US security concerns.[49]

The doctrine was later subjected to re-interpretation. The Roosevelt Corollary, established by President Theodore Roosevelt in 1904, stated that the US would not accept European interventions to collect debt in the Americas. Roosevelt transformed the Monroe Doctrine 'from a defensive, verbal opposition to new European colonisation in the Americas into an aggressive, military right of the United States to intervene in the affairs of any nation that appeared too instable to withstand a European attack.'[50]

Importantly, Drago's legal position about the blockade reflected his concerns about the weaker position of Latin American republics. Nevertheless, there is a need to put Drago in conversation with broader intellectual discussions about 'the possibilities and problems of applying the concept of modernity to Latin America' to understand his engagement with the region adequately.[51] From the end of the nineteenth century to the first decades of the twentieth century, modernity was understood by intellectuals in the region as a transplant. European civilisation was seen as more developed and advanced and should be transferred into Latin America not just by the import of institutions. Europeans should also migrate to Latin America to change the features of the local population, which would assure the desired progress.[52] European scientific racism was imported in Latin America and had different articulations in different countries – from replacing the

[46] Ibid, 283–85.

[47] Scarfi (2017) 59.

[48] Bemis (1943) 62–63.

[49] Scarfi (2017) 63.

[50] Alan McPherson, *A Short History of U.S. Interventions in Latin America and the Caribbean* (Wiley-Blackwell, 2016) 47.

[51] Sérgio Costa, 'The research on modernity in Latin America: Lineages and dilemmas' (2019) 67 *Current Sociology* 838, at 842.

[52] Ibid.

Indigenous population by European immigrants in Argentina, to a mixture of races in the case of Brazil.[53]

The circulation of ideas in the region from the anthropologist Franz Boas in the 1930s started to transform this context of biological determinism, also generating new research about modernity. Latin America would be seen as a distinctive region, being impossible to import and reproduce European civilisation merely. Accordingly, modernity would be 'the result of a process of a societal (self-)transformation capable of reconstructing (European) modernity in the region.'[54] From transplant, modernity would be self-transformation. But Europe would still be the horizon for Latin American self-transformation.

These ideas help us to understand Drago's sensibility towards what he called the weaker nations of Latin America. Drago produced his views on international law when ideas of transplant and biological determinism informed the understanding of modernity in Latin America. Liliana Obregón offers a similar analysis when exploring the 'creole legal consciousness' of Latin American international lawyers in the period.[55]

3 The Drago Doctrine: Sovereign Debt *versus* Alien Protection

In a text published in 1962, Desmond Christopher Martin Platt, a professor of Latin American history at St. Antony's College at the University of Oxford, proposed a re-interpretation of the Venezuelan blockade. Taking into account documents of the British Foreign Office, Platt was categorical in asserting that the blockade was not a war of bondholders:

> The popular impression that the blockade was imposed on behalf of the bondholders – fostered, as it was, by the emphasis given to this insignificant episode by the Argentine publicist, Dr. Drago, as an illustration of his thesis that forcible intervention in questions of public debt was denied by international law – has hardened into a historical 'fact', and it is more than time that the whole affair was put into its proper perspective.[56]

For the author, the Venezuelan blockade was not exceptional, and the forceful collection of debts should be viewed as legitimate under international law. Platt focused his argument on claims related to alien protection.[57] Accordingly, the low popularity of Germany, the Drago doctrine, the discussions on pecuniary claims

---

[53] Ibid.

[54] Ibid, 843.

[55] Liliana Obregón, 'Completing civilization: Creole consciousness and international law in nineteenth-century Latin America' in Anne Orford (ed.), *International Law and its Others* (Cambridge University Press, 2006) 247–264.

[56] Desmond C. M. Platt, 'The allied coercion of Venezuela, 1902-3 - A reassessment' (1962) 15:4 *Inter-American Economic Affairs* 3, at 3–4.

[57] Ibid, 11–12.

held at the Third Pan-American Conference in Rio de Janeiro (1906) and the Second Hague Peace Conference (1907), as well as an emotional interpretation of the Monroe Doctrine, would all have created the conditions for the propagation of the mythical or exceptional character of the Venezuelan blockade.[58]

Platt's interpretation helps explore the Drago doctrine in this section of the text. The nature of the pecuniary obligations at stake in the Venezuelan blockade and the way these obligations are described make a substantive difference in the legal conclusions reached about the appropriate forms of debt collection. In other words, it is a matter of justifying a particular kind of debt collection through the use of international law.

Platt and Drago have different ways to articulate the nature of the pecuniary claims at stake in the Venezuelan blockade. The authors also have various analyses about the legal consequences that emerge from defaulted obligations. Platt's argument is strategic in focusing only on alien protection obligations, not including the Venezuelan sovereign debt. When Platt claimed that the blockade was not a 'bondholder war,' he removed the sovereign debt issue from the event. Platt's re-interpretation paved the way to legally justify the use of force by European intervening powers: 'the legitimate coercion of a State, following its persistent and uncompromising denial of the rights of aliens as guaranteed by international law.'[59]

My purpose in this section of the text is to show how a lawyer like Drago used the vocabulary of international law to carry out an alternative legal interpretation when considering Platt's views on the blockade, focusing on pecuniary claims related to the Venezuelan sovereign debt. Drago's legal thesis is also strategic. By focusing on public bonds, the Argentine jurist asserted the impossibility of using force to collect public debts, seeking to benefit Latin American states. In other words, in the case of sovereign debt, what is at stake is the sovereignty of a state under international law. Based on the principle of sovereign equality, Drago's view did not allow a sovereign entity to use coercion to force another equally sovereign body to comply with pecuniary obligations related to sovereign debt.

Before analysing the details of Drago's legal interpretation, it is worth emphasising the importance of the vocabulary of international law either to justify or to criticise the European intervening powers in the case of the Venezuelan blockade. The blockade was not just a demonstration of power, something disconnected from the debates about its legality. Arguments against and in favour of the blockade were both international legal arguments.[60] This observation shows

---

[58] Ibid, 27–28.

[59] Ibid, 4.

[60] To illustrate, see Platt's explicit position on this point: 'There can be no doubt that, in international law, diplomatic, and, if necessary, forcible intervention was entirely legitimate in the following cases, for all of

us how international law, despite its formal standards for the competent elaboration of legal reasoning, can be used in the context of the most diverse political projects.[61] This is the indeterminate character of international law, not in terms of semantic ambivalence, but a more fundamental sense. International law remains undetermined even in cases where there is no semantic ambiguity since it is a vocabulary based on contradictory premises that seek to regulate future situations in a scenario of disagreement between the preferences of the actors involved. International law thus emerges from a political process in which participants have conflicting priorities and little clarity about how to turn such priorities into rules for regulating a given issue.[62]

Based on the assumption that international law does not have a dimension of objectivity, I do not seek to assert that Platt's interpretation should be viewed as incorrect, and Drago's legal views should be seen as the correct way to deal with the blockade. Both stances articulate the vocabulary of international law competently.

Nonetheless, it is essential to note that there are different political sensibilities at play. As stated by Martha Finnemore, divergent understandings on the relationship between sovereignty and contractual obligations, and divergent understandings regarding the legitimate use of force are at stake in the Venezuelan blockade.[63] The Drago doctrine will seek to advance a Latin American sensibility for non-intervention, a legally articulated strategy given the asymmetric context between Latin American countries on the one side, and European countries and the United States on the other. Such an approach comprises a dimension of spatial ordering, a particular regional sensibility.

The Argentine Ministry of Foreign Affairs initiated the documentation on the Drago doctrine with the memorandum sent on 12 August 1902 by the Minister of Foreign Affairs of Venezuela to friendly nations, including Argentina.[64] This Venezuelan document mentioned the German memo transmitted by the United States State Department to the US Congress in December 1901. As already mentioned, it asserted the German justifications for future intervention in Venezuela.

---

which Venezuela provided several examples – unjustifiable arrest and detention of British subjects, ill-treatment by Government officials, personal losses in civil disturbances where caused without adequate excuse by Government forces, illegal impressment in the army (i.e. against the rights secured to British subjects by treaty), destruction of British vessels and disproportionate sentences passed on them by local tribunals, seizure of British vessels on the high seas, and the maltreatment of British subjects on violated British territory.' Platt (1962) 11.

61 Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (CUP, 2005) 563–564.

62 Ibid, 590.

63 Finnemore (2003) 25.

64 Archivo Historico de Cancilleria (1917).

It is beyond the scope of this contribution to determine who's the idea was to effect a naval blockade in the Venezuelan coast to collect debts – whether Germany or the United Kingdom or the two countries jointly. I do not intend to search for historical truth in assessing the Drago doctrine. I aim to explore how international law was directly involved in this event from the outset. The memorandum sent by Venezuela to Argentina, in light of the news of the German plans of coercive action, opposed the use of force based on an international legal argument: 'The letter from the German Ambassador cannot be considered as it is contrary to the maxim of strict equality that international law advocates as a principle of harmony between the cultured states of the earth.'[65] Venezuela justified its position based on the argument of sovereign equality and independence. In other words, in light of the German request to unilaterally define the amounts and the form of payment of these pecuniary claims, Venezuela affirmed that it was necessary to bring such claims to domestic jurisdiction to preserve the sovereign character of the Venezuelan nation.[66]

Drago's legal argument to invalidate the use of force to collect debts explored the principle of sovereign equality among States under international law. As already mentioned, the protocols signed in Washington in February 1903 between Venezuela and each European intervening power presented different classes of pecuniary claims. There were debts related to damages suffered by nationals of the European countries and their property, for which Venezuela promptly agreed to proceed with payment. Claims arose from contractual obligations and, finally, there were obligations related to sovereign debt. Drago also structured his legal argumentation by considering the existence of several classes of pecuniary obligations, exploring in a more theoretical manner the nature of each of these obligations and the legal consequences in cases of breach.

The typology proposed by Drago was based on the recognition of claims arising from unlawful acts of a government or its nationals (tort claims) and pecuniary obligations of contractual origin, considering contracts concluded between citizens of one country and foreign governments.[67] The innovative nature of Drago's argument was to shed light on essential differences between pecuniary obligations of contractual origin. To the author, there are contractual obligations of a purely private character, in which the sovereign entity acts as a private actor, and there are contractual obligations that have relation to the sovereign power of a state itself.[68]

---

[65] Ibid, 3.

[66] Ibid, 4.

[67] Drago (1907b) 693.

[68] Ibid, 694-695.

The Argentine jurist emphasised the focus of the diplomatic note of 29 December 1902 on contractual obligations related to state sovereignty, that is, his discussion about the use of force for debt collection in international law would be limited to bond-related obligations of sovereign debt. To justify the existence of a particular contractual pecuniary obligation, Drago used the familiar distinction between acts *de iure gestioni* and act *de iure imperii*, distinguishing between different forms of state action. The first related to private law contracts and the latter to public loans.[69]

Concerning obligations under private law contracts, the state cannot use the argument of sovereignty as an excuse for non-compliance with its obligation. In the case of default of this type of obligation, the private person has all rights to take the matter forward for settlement under the terms established in the contract, whether in domestic courts, administrative commissions or before another dispute settlement body.[70] In cases of sovereign debt default, there is no need to refer to diplomatic protection, nor judicial proceedings before courts or tribunals. In the case of acts *de iure imperii*, there is no competent court or tribunal that can settle the default of this particular type of pecuniary obligation.[71] In this setting, it is not possible to speak of denial of justice, since jurisdictional arrangements for the settlement of controversies are not available for cases of sovereign debt default.[72]

Drago asserted that sovereign powers have certain privileges inherent to the very function of sovereignty. Still, he did not hold that sovereignty can be used as an excuse for any default.[73] However, the state can agree to enter into a jurisdictional arrangement to settle sovereign debt defaults. In this hypothesis, the author emphasised that default cases should be investigated based on due process and with attention to the fulfilment of all necessary formalities. Accordingly, if there is sovereign authorisation to discuss a sovereign debt default before a court or other dispute resolution body, it is required to carry out an ordinary procedure to prove the default fully. Therefore, such sovereign authorisation cannot be seen as an authorisation for the summary execution of decisions without a robust

[69] Ibid, 695-696. To Chittharanjan Amerasinghe, this was not a familiar distinction to common law systems, being a vague and difficult to justify criterion for state responsibility. 'The distinction has been used by European continental jurisdictions and to a certain extent by U.S. courts in the law of sovereign immunity to determine whether a foreign sovereign is entitled to immunity from suit and has taken the form of distinguishing between acts *iure gestionis* and acts *iure imperii.* But they have experienced difficulty in applying it to particular situations and, indeed, the answers that the courts of the different countries have arrived at in similar situations have been conflicting… Moreover, it must be remembered that this distinction has not been accepted by common law jurisdictions.' Amerasinghe (1964) 884.

[70] Drago (1907b) 694.

[71] 'These bonds constitute, in effect, an exceptional class of obligations, not to be confused with any other. They are issued by virtue of the sovereign power of the state, as is its currency, they are authorized by legislation and do not present any of the general characteristics of the contracts of private law, since there is no person specified in whose favor the obligations are incurred, payment being promised always to the bearer without discrimination.' Ibid, 695.

[72] Ibid, 695-696.

[73] Ibid, 700.

process of evidence collection and discussion. Drago did not expressly mention the situation of Venezuela and the protocols signed with the European powers for the settlement of pecuniary claims after the blockade in February 1903. However, it seems to be clear that he had in mind a critique of the fact that Venezuela had assumed general responsibility for specific pecuniary claims presented by Germany, the United Kingdom and Italy without an ordinary procedure to confirm the default. Article 1 of the protocols concluded between Venezuela and each European intervening power established such a procedure.[74]

In discussing the *sui generis* character of contractual obligations related to public bonds, Drago asserted that the use of force by a sovereign entity against another sovereign entity could be justified only in cases of self-defence.[75] It is worth mentioning here the narrower character of the Drago doctrine when compared to the formulation proposed by Carlos Calvo on the enforcement of pecuniary claims. Drago's legal position against the use of force to collect debts in international law is limited to public debt. In contrast, Calvo had a broader view condemning either diplomatic or armed intervention as a lawful measure to enforce any pecuniary claim in international law.[76] In this setting, Calvo's legal position against the use of force encompassed all three classes of pecuniary obligations as defined by Drago.

Drago had a critical argument about the common interests of members of political communities and how state action could be justified to protect such interests. He compared the bondholder to the individual who invests money by acquiring shares of a foreign private company. In cases of default, the bondholder has losses comparable to those suffered by an individual who invested in a foreign company that went bankrupt. The significant difference lies in the legal consequences that can be deduced from each situation. How to allow diplomatic protection or even the use of force to protect the interests of bondholders and not to do the same in the cases of shareholders of foreign private companies? In both cases, it is an economic activity undertaken by nationals in a foreign political community. What is at stake here is which interests of the members of the political community deserve state protection and under what justifications:

> If, as is evident, the private mercantile misfortunes of subjects in foreign countries do not compromise the existence or the happiness or the ultimate development of the community to which they belong, or impose upon it any duty of protection, how could a war be justified because these subjects, instead of contracting with individuals, contracted with governments, perhaps in the hope of greater profit?[77]

---

[74] Cour permanente d'arbitrage (1904).

[75] Drago (1907b) 701.

[76] Amos S. Hershey, 'The Calvo and Drago Doctrines' (1907) 1:1 *The American Journal of International Law* 26.

[77] Drago (1907b) 701.

In other words, for Drago, the use of force is not justified for the protection of nationals of a political community by the mere fact that they have acquired foreign sovereign debt bonds. If a state does not protect its nationals because of their economic activity as shareholders of foreign companies – as diplomatic protection does not apply for damages suffered by citizens investing in foreign private companies – what reasons would justify the protection of the interests of bondholders? Drago further questioned the motives for admitting that the political community to which the bondholders belong should bear the risks involved in acquiring foreign public bonds if diplomatic protection or even the use of force would be allowed to protect the bondholders' interests. Drago's interrogations were based on the fact that the benefits of acquiring public bonds lie only in the hands of bondholders.[78]

The state protection of the members of the political community's interests also relates to the nationality of the holder of the public bond. Drago argued that there is no guarantee that the bondholder is a national of the state that forcefully collects debt in default. As public bonds are transferable securities, such bonds circulate widely in the financial markets, being transmitted without further formalities. There would be no guarantee that state intervention is effectively defending the interests of its nationals – as public bonds could be transferred to foreign individuals. Finally, Drago also questioned the extent to which the speculative performance of bondholders should merit state protection.[79]

Such questions are not merely rhetorical and relate to fundamental issues to justify state action to protect the interests of members of a political community. Which interests deserve state protection, and which ones do not? How can a state legally justify such protection? These are sensitive political issues whose answers are not given a priori. At stake in the context of the Venezuelan blockade are the adequate legal justifications for state action aiming to redeem the losses suffered by nationals beyond the borders of the domestic political community. Importantly, at the turn of the twentieth century, such legal justifications were the subject of intense debate. At that time, without an explicit prohibition of the use of force in international law, the field was open to contested answers on the legality of forceful enforcement of debts. Drago had a strategic position in this context, seeking to make unlawful the coercive action for collecting sovereign debt in default under international law. Such an interpretation sought to protect Latin American countries in their asymmetrical relations with the powers of the time.

It is in this sense that one can speak of Drago's defence of non-intervention as a form of regional sensibility. His is a legal debate that includes a form of spatial ordering because the Drago doctrine sought to avoid the domination of the

[78] Ibid, 701-702.

[79] Ibid, 702-703.

weakest countries in Latin America by the European powers. In the case of the Venezuelan blockade, Drago's main concern was with interventions of a financial nature.[80] Drago justified Argentina's support for Venezuela as an action inspired by the spirit of unity among the nations of the continent and qualified the Drago doctrine as a doctrine of purely American scope and purpose.[81] For the author, Argentina would not have acted in the same way if the countries in question were Tunisia or Turkey, because issues related to the Venezuelan blockade were political matters specific to the Americas.

These questions relate to Drago's critique of financial interventions as used by the more powerful states to obstruct the civilisational process of the nations of the Western Hemisphere.[82] The author extrapolated the legal debate on the use of force to collect public debts under international law to include geopolitical issues related to the maintenance of the sovereignty and independence of Latin American nations.[83] The author expressly stated that financial interventions, not only in Latin America but in general, are always carried out against weaker states to colonise the territory or as expansionist imperial projects.[84]

It is at this point in his argument that Drago manifested his support for the Monroe Doctrine. As a formula for independence, the Monroe Doctrine would not imply the United States dominance to or superiority over other countries of the continent. Even though it was proclaimed as an American doctrine focused on the United States peace and security, the Monroe Doctrine would have been incorporated by the countries of South America to guarantee the inner well-being and tranquility of the Latin American republics. As a moral endeavour among all the nations of the American continent, the Monroe Doctrine would have strength even without being based on formal treaties or alliances.[85]

Drago criticised the action of the European intervening powers in the case of the Venezuelan blockade as a case of violation of the doctrine since the acts of aggression perpetrated against the Latin American country involved the occupation of the Venezuelan territory, something that would be contrary to the

---

[80] 'The act of coercion attempted against Venezuela seemed consequently to be the beginning of the hostilities predicated against America. The public debt apparently served as a pretext for that action and forcible recovery could only be effective by the disembarking of troops and the occupation of the ports and customs. The Argentine Republic protested. 'The easiest means,' it said, 'of acquisition and of the supplanting of the local authorities by European governments is precisely that of financial interventions as can be proven with abundant illustrations." Ibid, 708.

[81] Ibid, 709.

[82] Ibid.

[83] 'From this point of view we add that even in case financial interventions could be justified legally and theoretically (which is far from being true) and constituted a legitimate means for the protection of subjects abroad we should maintain that they cannot be executed in South America. The principle proclaimed presents in this circumscribed form a new phase that is eminently diplomatic and absolutely independent of its legal intent and signification.' Ibid, 710.

[84] Ibid, 712.

[85] Ibid, 714.

Doctrine Monroe.[86] However, the author did not seem to accept the reformulation of doctrine with the Roosevelt Corollary fully. In commenting on the United States intervention in Santo Domingo in 1905, while acknowledging its success in removing European intervention, the author acknowledged that the sovereignty of Santo Domingo was impaired in this context.[87]

The Drago doctrine was presented as a political statement of last resort. Even if its legal theory-basis about non-intervention would not be accepted, and acts of coercion could be seen as lawful, the author affirmed that armed intervention for debt collection could not be applied in South America. The character of subordination and conquest of interventions would be something that the traditional policy of the American continent, the Monroe Doctrine, would not allow.[88]

4 Final Remarks

This article aimed to explore Drago's argumentative construction and legal positioning on the forceful collection of debts under international law. The detailed redescription of the Drago doctrine allows us to understand the ways in which a specific Latin American regional sensibility was articulated through legal debates related to sovereign debt. This contribution ends with a few considerations about the limitations of the Drago doctrine.

This text does not constitute a celebratory narrative of the Drago doctrine. His position on non-intervention has significant limitations that must be acknowledged. Drago did not generally contest the use of force under international law but used the principle of sovereign equality as an argument to invalidate coercive actions for the collection of public debt. His arguments were limited to pecuniary obligations related to public bonds, without questioning the use of force to collect debts related to alien protection. The Drago doctrine had no universal scope, and its application was restricted to the American continent. Importantly, his stance reproduced the civilising standard in vogue at the time, without problematising it.[89] In this setting, it is an argument with essential nuances, which allows for a fundamental interrogation about its anti-hegemonic character. In other words, it is possible to interrogate to what extent the Drago doctrine can be seen as a full movement of Latin American resistance to interventions in the region.

While it is possible to see the Drago doctrine as an effort to highlight the anti-colonial aspect of the Monroe Doctrine, one can discuss the consequences of

[86] Ibid, 718-720.

[87] Ibid, 720-722.

[88] Ibid, 725-726.

[89] Becker Lorca (2014) 177–178.

Drago's commitment to this United States policy.[90] Accordingly, Drago's broader political concerns informing his stance on non-intervention have to do with the weaker position of Latin American republics in light of European interventions. To Drago, an extended 'scope of the Monroe Doctrine from a national principle to a continental policy of nonintervention'[91] would allow for a safer space for the Latin American nations.

At the same time Drago longs for the protection of the weaker Latin American countries, using the anti-colonialism of the Monroe Doctrine as a shield against European interventions, his doctrine seems to pave the way for the United States leadership in the region.[92] In this setting, it is possible to highlight the limits of Drago's regional sensibility as it opens space for US imperialism in the American continent. His idea of a continental form of multilateralism does not challenge the grammar of the Monroe Doctrine, accepting the role of the United States in protecting Latin American nations. To what extent did the Drago doctrine and its perspective of spatial ordering constitute a robust project in terms of resistance to interventions by the great powers in Latin America?

As I mentioned earlier, supporting the Monroe Doctrine was not the only stance available to international lawyers from Latin America at the beginning of the twentieth century. Contemporary voices in Argentina denounced the US protection embedded in the Monroe Doctrine as hegemony and interventionism.[93]

Assessing the limitations of the Drago doctrine in the context of its enunciation in the early twentieth century opens space for reflecting upon the potentialities involved in the ways in which the Drago doctrine circulated in different settings in time and space. This research opens space to think not just about Drago himself, but also to consider how the Drago doctrine circulated across time and space and was reinterpreted by other jurists in the region.

Thus, even with limitations, the Drago doctrine makes room for a Latin American sensibility in international law that seeks to carry out, through the articulation of legal arguments, political projects that dialogue with the interests of Latin American countries. This Latin American sensibility in international law has been the subject of transmission and re-interpretation in different contexts in time and space. A detailed redescription of the Drago doctrine may be the first step to a more rigorous effort towards mapping regional political projects in international law.

~

[90] Scarfi (2017) 70-71.

[91] Ibid, 71.

[92] Ibid.

[93] Juan Pablo Scarfi, 'La emergencia de un imaginario latinoamericanista y antiestadounidense del orden hemisférico: de la Unión Panamericana a la Unión Latinoamericana (1880-1913)' (2013) 39 *Revista Complutense de Historia de América* 81.

THIRD WORLD APPROACHES *to* INTERNATIONAL LAW *Review*

Front cover image:
CAMILA SOATA, *Ocupar e resistir 1* (2017)

TWAIL Review Issue 1
Published November 2020 ~ Windsor, Canada

www.twailr.com
editors@twailr.com
submissions@twailr.com
twitter: @TWAILReview
facebook: @twailr