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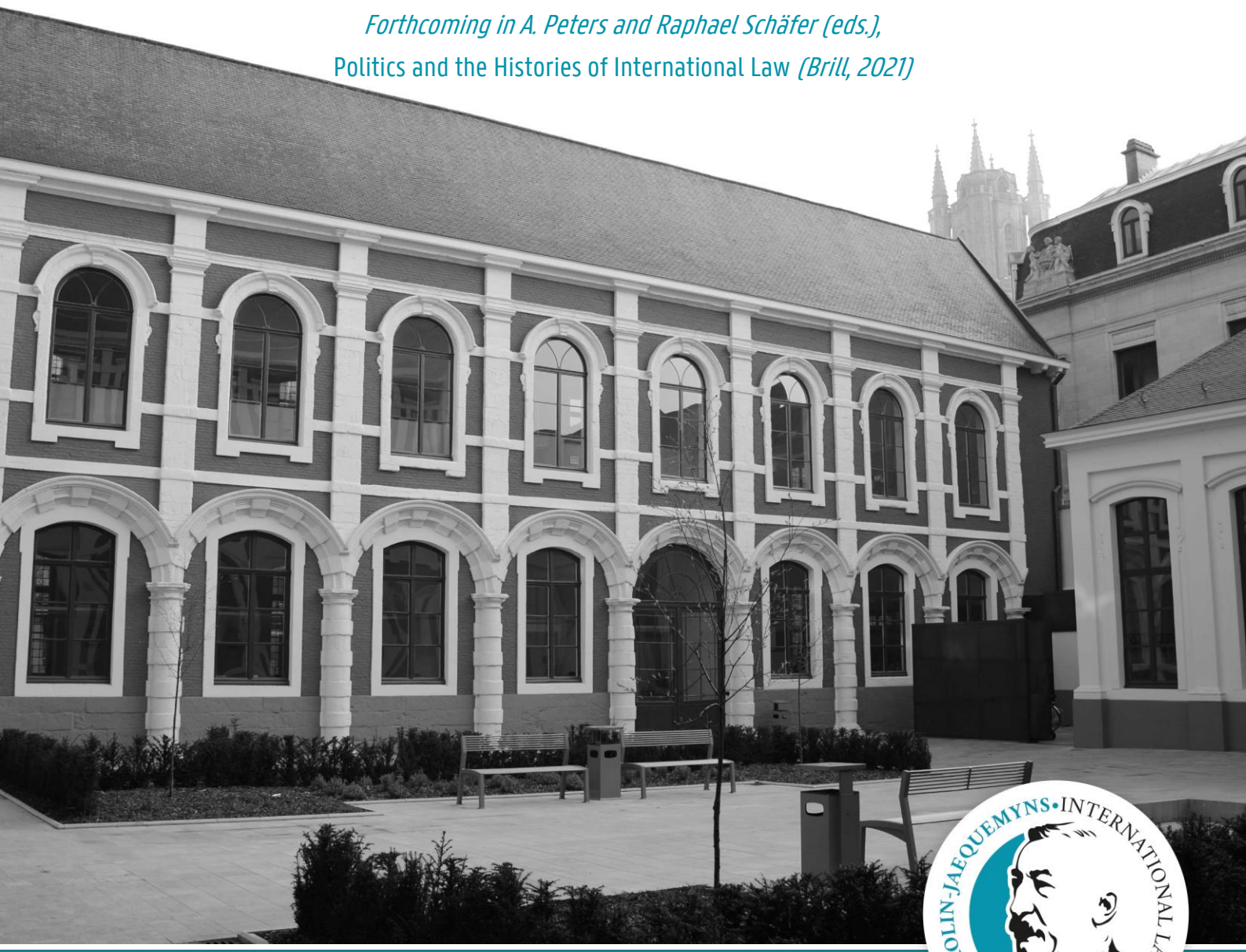

# MIXED CLAIMS COMMISSIONS IN LATIN AMERICA DURING THE 19TH AND 20TH CENTURIES

## *The development of international law in between Caudillos and Revolutions*

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# Mixed Claims Commissions in Latin America during the 19th and 20th Centuries

*The development of international law in between Caudillos and Revolutions*

*by José Gustavo Prieto Munoz*[1]

## Abstract

This chapter examines the impact of Latin America on the development of 'mixed claims commissions', adjudication bodies founded in an ad hoc fashion by international agreements. It argues that these bodies are best understood in the context of their development during periods of crisis in Latin American nations, the majority of which were presidential states. Armed conflicts and internal revolutions led to the rise of strong executives and legal conflicts over the property of foreigners. As new governments tried to restore the internal rule of law, they engaged with international adjudication. The first part of this chapter examines the notion of 'Latin America' in the history of international law. I take an internal perspective on the legitimation of public authority in Latin American countries, instead of the usual external geopolitical perspective, which sees the region as largely defined by its relations with the United States and Europe. The second part analyzes the concrete evolution of 'mixed claims commissions', examining the first wave of such bodies, especially the Venezuelan claims commissions established after Cipriano Castro's Revolution (1899-1908) in the 20th century.

## Keywords

Rule of Law – populism – mixed claims commissions – Latin America – international law

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# 1 Introduction

The Jay Treaty of 19 November 1794, concluded between the United States and Great Britain, is frequently referred to as having created the first mixed commission: an international adjudicative body with the task to settle the differences between these two States. From that time up until 1938,[2] records attest to the existence of at least 409 adjudicative bodies with similar characteristics, created to resolve different kinds of international disputes. Among these, 193 bodies included a Latin American nation, one of the first known resulting in a treaty between Argentina and France of 1840.[3]

This means that, for over a century, almost half of all adjudicative process around the globe were related to Latin America. Accordingly, this region was keen to use international mechanisms to resolve its conflicts with foreigners. In this sense, it can also be inferred that, in the 19th and 20th centuries, the region served as a sort of 'laboratory' for international law. Here, the notion of laboratory implies that for brief periods of time there were sufficient levels of political agreement and financial resources to conduct a process of international adjudication. But time and resource constraints contributed to a process of 'trial and error'[4] experimentation with international law. For example, the rules that determine a state's responsibility for damages suffered by foreigners were developed during various cases adjudicated in Latin America[5]. In this context, there are still some questions worth addressing: What was the role that Latin American states played in the functioning of 'claims commissions' in the 19th and early 20th centuries? How did the internal political situation influence decisions and approaches taken by different claims commissions? How did the understanding and evaluation of these commissions change over time? Why does the influence of Latin Americans on claims commissions belong to the unwritten pages of the history of international law?

Questions about the history of international law in Latin America are usually answered from a geopolitical perspective that focuses on the influence that Europe and the United States had on the Latin-American region. While this geopolitical perspective is important, it tends to reduce the role of claims commissions to 'gun boat diplomacy', obscuring the internal dimensions of the countries involved and the contributions that Latin American citizens have made to the development of international law. Therefore, I address these questions by focusing on the internal

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[2] Information on the known cases cited in this chapter comes from Stuyt, Alexander M. *Survey of International Arbitrations 1794-1938* (Berlin: Springer-Science & Business Media, 1939) and Moore, John Bassett. *History and Digest of the International Arbitrations to Which the United States Has Been a Party* (Washington: Government Printing Office, 1898), two collections covering international jurisprudence from 1794 to 1902. From 1902 to the present day such jurisprudence can only be found across diverse books and papers.

[3] Stuyt, *Survey of International Arbitrations* 1939 (n. 1), p.31

[4] Viñuales, Jorge E. 'Experiments in International Adjudication – Past and Present', in *Experiments in International Adjudication: Historical Accounts*, eds. Ignacio Rasilla del Moral and Jorge E. Viñuales (Cambridge: Cambridge University Press, 2019), 11.

[5] See Greenman, Kathryn. 'Aliens in Latin America: Intervention, Arbitration and State Responsibility for Rebels', *Leiden Journal of International Law* 31(3) (2018), 617-639, 624; Koskenniemi, Martti. 'The Ideology of International Adjudication and the 1907 Hague Conference', in *Colloques/Workshop Series*, ed. Académie de droit international de la Haye (Leiden: Brill, 2008), 149.

political characteristics of the Latin American countries that engaged in the development of international law, as practiced by claims commissions, during the periods of relative political stability that occurred in the aftermath of armed conflicts, that is in between *caudillos* and revolutions. In concrete, I argue that when Latin American nations — the majority of which were presidential states which contributed to further concentration of power — experienced a crisis in the rule of law due to an armed conflict or internal revolution, strong executives emerged creating conflicts related to the property of foreigners. As new governments tried to restore the internal rule of law or sought political and financial resources to create a new type of autocracy, they tended to engage with international adjudication processes.

In this vein, the history of International Law in Latin America since the 19th century was written alongside the emergence of new independent states with presidential systems, strong leaders that become the political center of a country, usually referred to as *caudillos*,[6] and political instability in the form of revolutions. As pointed out by Pierson and Gil, some countries in the region, such as México, Guatemala, Paraguay and Venezuela, were governed by different forms of dictatorships for most of the 19th and 20th centuries.[7]

Among those Latin American states, Venezuela was particularly important for the development of international adjudication. In 1902, three European states — the United Kingdom, Germany and Italy — established a blockade in the Venezuelan ports as an attempt to resolve previous disputes between nationals of their countries and the state of Venezuela. As a result of the blockade, ten claims commissions were created between Venezuela and ten European countries in 1903.[8] While this period of history has been studied as an example of 'gun boat diplomacy', a closer look at the political situation in Venezuela shows how the conflict and later agreements resulted from the internal collapse of the rule of law and the emergence of Cipriano Castro, a leader that has been categorized as a 'caudillo' or an 'autocrat'.

The argument of this chapter runs as follows: Section 2 explores the notion of 'Latin America' in the history of international law, stressing the need to take an internal perspective on the legitimation of public authority rather than an external geopolitical perspective in which the region is largely defined by its relations with the United States and Europe. Section 3 analyzes and gives some context for understanding Latin American 'mixed claims commissions', separating them into two periods: early war-related commissions, and later commission arising in response to internal crises in the rule of law. Section 4 argues that more recent commissions were established in periods where Latin American nations experienced a crisis in the rule of law due to an internal revolution, as caudillos emerged creating conflicts related to the property of foreigners. When the caudillo needed political and financial resources to

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[6] See Carrancá y Trujillo, Raul. *La evolución política de Iberoamérica* (Madrid: Editorial Pérez, 1925), 181.
[7] Pierson, William Whatley and Federico G. Gil. *Governments of Latin America* (New York: McGraw-Hill, 1957), 135.
[8] Bray, Heather. 'Venezuelan Claims Commissions', in *Max Planck Encyclopedia of International Procedural Law*, ed. Hélène Ruiz Fabri (Oxford: Oxford University Press, 2018).

stay in power, or a new government was forming, they tended to engage with international adjudication processes. In particular, I analyze the case of the Venezuelan claims commissions established during the rule of Cipriano Castro's Revolution.

## 2 An internal perspective on the concept of 'Latin America' in the history of International Law

The term 'Latin America' was coined in the 19th century in France but has been used on the continent to resist interventions by the United States and Great Britan in the region[9] at least since 1856.[10] The term was employed to distinguish a group of countries belonging to a specific geographical region that share similar cultural-historical roots, but is worth mention that the notion of dividing conceptually "America" in two, was documented in the Webster's 1828 American Dictionary, wich divided the continent at the Darien Gap (Panama) in 'north' and 'south' America[11].

Most attempts to describe the role of this "Latin" America in the development of international law have taken an external perspective that tends to focus on its relations with Europe and the United States. For instance, Alejandro Alvarez, in his classic 1909 piece 'Latin America and International Law', defines Latin America as a region that first, shares 'constituent elements', that is, physical, ethnic and social characteristics and second, has been shaped by the influence of western nations.[12]

In this same vein, most 19th century accounts related to the notion of 'Latin America' in international law have been characterized by a constant tension between two narratives: On the one hand, 'particularism', which argues in one way or another for the existence of a distinguishable legal latinoamerican tradition in international law. On the other hand, 'universalism', which denies the existence of 'Latin American International Law' as a category distinct from international public law in the development of law. The debates reflecting these two competing narratives can be traced back to Argentina in 1882, when Vicente Quesada, a jurist and diplomat, published an article in *Nueva Revista*

[9] See Obregón, Liliana. 'Between Civilisation and Barbarism: Creole Interventions in International Law', *Third World Quarterly* 27(5) (2006), 815.
[10] This origin of the term is discussed by Gobat, Michel. 'The Invention of Latin America: A Transnational History of Anti-Imperialism, Democracy, and Race', *The American Historical Review* 118(5) (2013), 1345-1375.
[11] See Grandin, Greg. 'The Liberal Traditions in the Americas: Rights, Sovereignty, and the Origins of Liberal Multilateralism', *The American Historical Review* 117(1) (2012), 68, 80.
[12] See Alvarez, Alejandro. 'Latin America and International Law'. *American Journal of International Law* 3(2) (1909), 269-354.

*de Buenos Aires.* While speaking about the history of diplomacy, he referred to the notion of 'international latinoamerican law',[13] an idea that would lead to a series of arguments between supporters of these two narratives.[14]

However, neither of these perspectives can contribute much to the study of the phenomenon of claims comissions, which cannot per se be explained either by the 'universal' or 'particular' views that preoccupied international law professors at the time. Put in another way, the decisions taken by politicians in charge of Latin American nations regarding whether or not to enter into international adjudication processes such as claims comissions did not follow from any self-concept on the part of Latin America as a region, but were taken for concrete political reasons specific to each state. For this reason, it may be more useful to examine the claims commisions from an internal perspective, by trying to understand their political causes in a comparative historical public law framework, rather than attempting a reconstruction of Latin American history in international terms based only on its relations with Europe and the United States.

Here, I frame the concept 'Latin America' as describing a group of countries that, in addition to having similar cultural-historical roots, also share features in terms of their internal organization, legitimation of power and constitutional practice over more than 200 years as independent states. In this regard, the notion of 'Latin America', entails three common additional elements that are more or less present in each of the nations of this geographical region: (i) The existence of presidential systems (*presidensialismo*) as the dominant model to structure power; (ii) An emphasis on the sovereignty of the people (*el pueblo*), a concept linked more closely to social inequality than with national identity as a critical legitimator of authority; and (iii) the existence of continual transformative constitutional processes (*revoluciones*), which has resulted in the adoption of multiple constitutional texts in each country over the last 200 years.

First, over the last two centuries, the president has played a dominant role, a phenomenon known in the region as *presidencialismo,* which in many cases also leads to the emergence of a strong charismatic leader (*caudillo*). *Presidencialismo* is characterized by a constitutional architecture where the executive has a predominant position compared to the other branches of the state, and in practice or *de facto* the president is transformed into the political center of the state.[15] In addition, a presidential system may challenge the internal rule of law in a state, especially when the executive branch is led by a strong president or *caudillo.* The notion of caudillo is linked to a concentration

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[13] See Quesada, Vicente. 'Derecho International Latino-Americano', *Nueva Revista de Buenos Aires* 22(5) (1882), 15. See also Scarfi, Juan Pablo. 'La Emergencia de un Imaginario Latinoamericanista y Antiestadounidense del Orden Hemisférico: de la Unión Panamericana a la Unión Latinoamericana (1880-1913)', *Revista Complutense de Historia de América* 39 (2013), 81-104, 85; Scarfi, Juan Pablo. *The Hidden History of International Law in the Americas: Empire and Legal Networks* (Oxford: Oxford University Press, 2017).

[14] Becker Lorca, Arnulf. 'International Law in Latin America or Latin American International Law? Rise, Fall, and Retrieval of a Tradition of Legal Thinking and Political Imagination', *Harvard International Law Journal* 47(1) (2006), 299; Becker Lorca, Arnulf. *Mestizo International Law: A Global Intellectual History 1842 - 1933* (Cambridge: Cambridge University Press, 2014).

[15] Gros Espiell, Hector. 'El predominio del Poder Ejecutivo en America Latina', in *El Predominio del Poder Ejecutivo en Latinoamérica*, ed. Barquín Alvarez Manuel (Ciudad de Mexico: Universidad Nacional Autónoma México, 1977), 16.

of power that leads to autocracy and arbitrariness.[16] A caudillo generally emerges within a presidential state following a three-phase process: (a) capturing the imagination of the people in a given territory, (b) pursuing political domination, often including by force or self-proclaimed 'revolutions', and, finally, (c) consolidating her/his power by seeking unlimited rule.[17] While not every presidential state has generated *caudillos*, in the history of Latin America the two are in many cases closely related.

The strong presidential state is considered to be a 'native species' of the American continent, much as parliamentary systems are typical for Europe.[18] This tradition started with the United States constitution in 1787 and later expanded to the south where it acquired particular characteristics.[19] In practical terms, the existence of presidential states has resulted in parliaments playing a marginal role when making important decisions.

Second, in 'Latin American' countries the primary factor in legitimizing power and the exercise of public authority is placing sovereignty in the people (*el pueblo*). Throughout the constitutional history of Latin America, this means vesting authority in the 'people' rather than in other concepts such as 'the nation'. This notion was also imported from US constitutionalism by both liberal and conservative goverments.[20] For instance, Article 39 of the Mexican Constitution of 1857 reads as follows:

> National sovereignty resides essentially and originally in the people. All public power emanates from the people and is instituted for their benefit. The people have at all times the inalienable right to alter or modify the form of their government.[21]

The text of this article was maintained in the Queretaro constitution of 1917, and similar formulations can be found across Latin American constitutional texts during the 19th century. To a lesser extent, there were some provisions in the region that reference the 'nation'[22] as the source of authority, such as the Venezuelean constituion of 1857. These two features — presidential states and the idea of 'the people' — taken from US constitutionalism took a particular turn in a region that, because of historical social inequalities, had left many people outside major

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[16] Salcedo-Bastardo, José Luis. *Historia fundamental de Venezuela* (Caracas: Universidad Central de Venezuela, 1970), 399-406.
[17] Carranca y Trujillo, Raul. *Panorama crítico de nuestra America*, quoted by Pierson, William W. and Federico G. Gil. *Governments of Latin America*, Mcgraw-Hill Series in Political Science (New York: McGraw-Hill, 1957), 139.
[18] Luiz Pinto Ferreira uses the term 'planta nativa' to describe this phenomenon in 'El Predominio del poder Ejecutivo en America Latina 'in Pablo Alegría, Alonso, Jorge Carpizo y José Luis Stein et al. *El Predominio del Poder Ejecutivo en Latinoamérica*, Serie B (13), Estudios Comparativos de Derecho Latinoamericano (México: Instituto de Investigaciones Jurídicas UNAM, 1977), 25-64.
[19] Ibid.
[20] Ibid.
[21] Art. 39 Constitución política de la República Mexicana 1857.
[22] Art. 2 Constitucion Politica del Estado de Venezuela 18 de abril de 1857.

political and social systems, such as education and health. In this context, populist narratives used by leaders seek to potray foreigners as one of the 'enemies' of the 'people'.

Once the justification for authority over the nation rests with the people and the executive branch is both legally and *de facto* stronger than the legislative branch, then the will of the president, without the proper checks and balances, is transformed into absolute will. Thus, presidents during this period became a sort of 'pater familias' of 'the people'; the 'primus solus' of the land.

In this context, international law and its agreements run the risk of being reduced to contracts and relations with other strong leaders 'primus solus', harking back to the Vattelian idea of international law from the 18th and 19th centuries[23]. The Vattelian idea implies the existence of a political setting or configuration for international law, where one nation possesses only one exclusive public authority over a defined territory which in turn can be engaged in agreements [the positive law of nations].[24] If a caudillo takes over the political system of the state, his personal conflicts with foreigners could cause conflicts that are relevant for international law.

Third, the sheer number of constitutional processes and constitutional texts has made it difficult to consolidate strong institutions in Latin American history. As a consequence, some branches of the state have experienced difficulties establishing legitimacy, which also explains the lack of equilibrium in the balance of power between the various branches of government – to the benefit of the executive branch. At the same time, the lack of strong institutions made it very difficult for the rule of law to withstand the emergence of strong leaders who tried to control the system. As a result, there have been many examples during political processes of self-proclaimed 'revolutions', which in the end amounted to a re-construction of elites and changes to constitutional texts.

For this reason, after more than 200 years of constitutional history, there is not a single constitution put in place during the 19th century that is still in force in its original form. This political instability should provide a guide to help track the moments when Latin America has been relevant to international law, as there is usually a period of political resistance after a '*revolución*' in one of the Latin American states. One example was the '*Revolucion Liberal Restauradora'* in Venezuela that brought Cipriano Castro to power. Castro mistreated foreigners leading to a disproportionate response from European nations who used force and introduced an embargo on shipments from Venezuelan ports. After this incident, the famous 'Drago Doctrine' was developed with the intention of preventing the use of force in the collection of debts.

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[23] For a development of international law from this perspective see Domingo, Rafael. 'Gaius, Vattel, and the New Global Law Paradigm', *European Journal of International Law* 22(3) (2011), 627, 637.
[24] Vattel, Emer de. *The Law of Nations or Principles of the Law of Nature Applied to the Conduct and Affairs of Nations and Sovereigns* (London: Clarke, 1811), lxvi.

In sum, throughout Latin American history we find a link between strong leaders in presidential systems, *'revoluciones'*, crises in the rule of law, and the abuse of individuals, both nationals and foreigners. The difference is that foreigners could ask for redress for grievances at the international level, creating tensions between their states of origin and the host state. In turn, because of adjudication in these conflicts, international law had the opportunity to develop itself as a discipline.

If claims comissions are seen under this prism, it may help us look beyond the geopolitical narrative of Latin American as a region of resistance to the imperial expansion of the 'west'. Alternatively, the recurrent use of 'claims commissions' indicates that different countries in the region were keen to use international mechanisms after a conflict was over or a caudillo had lost power and they either needed to negotiate with foreign states or a new government needed some political and financial stability to rule.

What lay beneath financial conflicts with foreigners were weak moments in the rule of law in Latin America that affected both nationals and foreigners. After the internal crisis in the rule of law was overcome, new governments embraced solutions for disputes with foreigners using international adjudication. Therefore, in the 19th and early 20th centuries, there was never a clear 'Latin American approach' to creating claims commissions. However, these conflicts provided an opportunity for the development of peremptory norms of international law, such as the prohibition on war as a means to solve disputes.

## 3 Claims Commissions in Latin America in the 19th century

Since the Jay Treaty between the USA and Great Britain in 1794, the term 'mixed commission' (*commission mixte*) has been used to describe a type of judicial body involved in ad hoc bilateral inter-State dispute settlements.[25] The term 'mixed claims commissions' (or just 'claims commissions') more specifically references a type of body founded in an ad hoc fashion on the basis of international agreements with the goal of 'settling claims which have arisen between citizens of different States, between citizens of one State and the other State, or between the States themselves in formal and final proceedings'[26].

This conceptualization allows us to differentiate such bodies from similar ones, such as the 'compensation commissions' which did not emerge until the second half of the 20th century. The main distinguishing characteristic of 'compensation commissions' is that their legal basis is other than the will of the parties involved. For instance, the

[25] Boisson de Chazournes, Laurence and Danio Campanelli. 'Mixed Commissions', in *Max Planck Encyclopedia of Public International Law*, ed. Rüdiger Wolfrum (Oxford: Oxford University Press, 2006), para. 1.
[26] Dolzer, Rudolf. 'Mixed Claims Commissions', in *Max Planck Encyclopedia of Public International Law*, ed. Rüdiger Wolfrum (Oxford: Oxford University Press, 2011), para. 1.

United Nations Compensation Commission of 1991 was a subsidiary organ of the Security Council that processed claims for losses suffered during the Iraq-Kuwait War.[27]

On the other hand, the term 'arbitral mixed commissions' or 'Mixed Arbitral Tribunals' has also been used to refer to specific bodies composed of an even number of adjudicators appointed by the States that are party to the dispute – the difference being that if a resolution cannot be reached in a specific case, a final decision will be taken by an arbitrator or a 'neutral umpire.'[28] This term was used to refer to adjudicative bodies created to process the enormous litigation born out of World War I or as a mean to compensate the harmful effects caused by the war measures during that period[29].

Taking into account that the difference between the claims commission or arbitral is whether or not there is a 'neutral umpire', here I use the term 'claims commission' to refer to both the 'mixed' and 'arbitral' types, as long as their legal basis is the consent of the parties of an international agreement.

After the Jay Treaty, from 1794 to 1938, there were at least 409 known claims commissions. However, there was no central register for these earlier cases, making an historical analysis difficult. Most of the information available comes from private collections, notably, Herstlet's collection on Great Britain's treaties (1841),[30] Henri La Fontaine's *Pasicrisie Internationale* (1902)[31], John B. Moore's *History and digest of the international arbitrations (1898)*,[32] and the more complete collection of Alexander Stuy's *Survey of International Arbitrations (1939)*.[33]

Among these 409 cases, 193 were decided by Latin American commissions — here I use the term to describe a body where at least one of the States involved was a country from the Latin American region. These commissions were set up to resolve all types of disputes, but most were principally concerned with compensating foreigners for loss of property, categorized later, in the 20th century, as 'investment'[34]. Among these Latin American cases, it is possible to distinguish between two clusters of claims commissions: those that arose in the aftermath of armed

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[27] See Mensah, Thomas A. 'United Nations Compensation Commission (UNCC)', in *Max Planck Encyclopedia of Public International Law*, ed. Rüdiger Wolfrum (Oxford: Oxford University Press, 2011).
[28] Campanelli, 'Mixed Commissions' 2006 (n. 25).
[29] Carabiber, Charles. *Les juridictions internationales de droit privé de l'arbitrage international à l'expérience des tribunaux arbitraux mixtes et à l'institution de juridictions internationales permanentes de droit privé* (Neuchâtel: de la Baconnière 1947) 161
[30] Hertslet, Lewis. *A Complete Collection of the Treaties and Conventions and Reciprocal Regulations at Present Subsisting between Great Britain and Foreign Powers and of the Laws, Decrees, Orders in Council* (London: Butterworth, 1827).
[31] La Fontaine, Henri. *Pasicrisie internationale 1794 – 1900 histoire documentaire des arbitrages internationaux* (Leiden: Martinus Nijhoff, 1997).
[32] Moore, *Digest of the International Arbitrations* 1898 (n. 1).
[33] Stuyt, *Survey of International Arbitration* 1939 (n. 1).
[34] See also Leiter, Andrea. 'The Silent Impact of the 1917 Revolutions on International Investment Law and What It Tells us about Reforming the System', *ESIL Reflections* 6(10) (2017).

conflicts, usually related to wars of independence; and a second cluster that handled cases related to internal crises in the rule of law in new nations.

First, like the commissions created by the Jay Treaty, the first Latin-American commissions in the 19th century were related to wars of independence and the subsequent armed conflicts that arose between new nations fighting over territories. Out of 193 Latin-American commissions, at least 26 exclusively involved boundary disputes between countries in the region, while many others were related to damages suffered by European or US nationals that occurred during hostilities. One of the armed conflicts that provoked this type of adjudicative mechanism was the *Saltpeter War* (*Guerra del Guano y el Salitre*)[35] between Chile, Peru and Bolivia. The fact that not only was a commission set up between the warring parties, but several others comprising Chile and other nations such as Belgium and Great Britain were also established,[36] shows that there was political will to settle disputes with foreigners in the aftermath of hostilities.

One of the first mention of a Latin-American commission agreement can be found in the treaty between Brazil and Great Britain of 1829, which dealt with the capture of British ships in Brazilian waters.[37] This commission was designed to be composed of 4 members, 2 selected by each of the parties to solve disputes within a period of 8 months. Given its institutional design, decisions needed to be taken by a majority of commissioners and, if a majority was not possible, they needed to send communications to their respective sovereigns. However, there is no further information on this commission.

Later, the claims commission between Argentina and France in 1840 became the first to record that it had been created in order to decide claims remaining after France imposed a blockade on the ports of the Province of Buenos Aires.[38] This claims commission was established in a treaty between France and the Buenos Aires Province.[39] This treaty was signed on 29 October 1840 on board a French military ship (the *Boulnaise)*, setting the tone for the content of the treaty, which was really a capitulation to French interests, involving the recognition of responsibility for a grave

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[35] For a complete account of the conflict, see Lopez, Jacinto. *Historia de la Guerra del Guano y el Salitre* (Lopez: Editorial Milla Batres, 1979).

[36] Bolivia- Chile, Commission, 1884; c) Belgium- Chile, Commission, Award 1884 in favour of Chile, Belgium claims rejected; d) Austria-Hungary - Chile, Commission, Settlement by Protocol Santiago, 1887; e) Argentine Republic - Chile, Edward VII, King of Great Britain and Ireland Arbitrator, Award 1902, Accepted by both parties. A Delimitation Commission was appointed to mark out the frontier; f) Argentine Republic - Chile, Commission, Settlement by verbal process, 1899; g) Bolivia - Chile, British Minister at Santiago, 1900.

[37] Agreement between Great Britain and Brazil, relative to the settlement of British claims, signed at Rio de Janeiro, 5 May 1829. Império do Brasil Memorandum entered into between Lord Ponsonhy and the Brazilian Government, relative to the Capture of British ships in 1826 and 1827. See La Fontaine, Henri. *Pasicrisie Internationale 1794-1900* (The Hage: Brill, 1997), 91; Stuyt, *Survey of International Arbitrations* 1939 (n. 1), 30.

[38] Stuyt, *Survey of International Arbitrations* 1939 (n. 1), 36.

[39] The treaty was signed by the Commander of the French forces, Rene Armand de Mackau, and the Foreign Affairs Minister for the Province, Felipe Arana. See Varela, Florencio. *Sobre la Convencion de 29 de Octubre de 1840 Desarrollo y Desenlace de la Cuestión Francesa en El Rio De La Plata*. (Montevideo: Imprenta de la Caridad, 1840), i.

mistreatment of French nationals by locals. The result was the draft of an article where Argentina undertook responsibility for its actions and accepted that the French would retain control in the choice of an arbitrator if disputes between the representative commissioners could not be resolved.[40]

The fact that the treaty was signed inside the very same naval ship that was participating in the blockade might suggest that this commission simply used force to pressure the Buenos Aires government of Juan Manuel de Rosas. However, other documents point in the direction of a genuine intention on the side of the French to pursue 'justice' due to the mistreatment of French nationals during Rosas' internal struggles for power with other Argentine provinces. French interests were more specifically summarized in a letter signed by the French Consul in Montevideo on 22 February 1839, months before the Treaty was signed. In the last years of the 19th century, after the Chilean commissions related to the Saltpeter War, and thereafter, in the beginning of the 20th century, most of the conflicts over independence, including those arising over boundary disputes among the same Latin-American nations, had been settled. From this period onwards, the creation of claims commissions was more strongly related to crises in the internal rule of law. Thus, in this period, political and constitutional instability becomes a guide to help track the moments when Latin America was relevant to international law.

## 4 Crises in the Rule of Law and Claims Commissions in the 20th Century

The 20th century saw remarkable progress in adjudications, starting with the claims commissions of Venezuela and continuing with those in Mexico. In the case of Venezuela10 different commissions were established in 1903 with Germany, Great Britain, Italy, France, the United States, Belgium, Spain, Mexico, Sweden-Norway, and the Netherlands.[41]

The Venezuelan commissions were usually explained using a geopolitical narrative.[42] In that perspective, the commissions were presented as the conclusion of a geopolitical chess game between the US and European nations that lead first to the blockade of Venezuelan ports and later to the establishment of the commissions.[43] While this

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[40] Author's translation from the original, Varela, *La Convencion de 29 de Octubre de 1840* 1840 (n. 38), ii.

[41] 1) Protocol between Great Britain and Venezuela for the Settlement of British Claims etc., signed at Washington, 13 February 1903; 2) Protocol between Italy and Venezuela for the Settlement of Italian Claims, signed at Washington, 13 February 1903; 3) Protocol between the United States and Venezuela for the Arbitration of Claims, signed at Washington, 17 February 1903 (1903) IX RIAA 115; 4) Protocol between Mexico and Venezuela for the Arbitration of Claims, signed at Washington, 26 February 1903 (1903) X RIAA 694; 5) Protocol between France and Venezuela for the Arbitration of Claims, signed at Washington, 27 February 1903 (1903) X RIAA 6; 6) Protocol between the Netherlands and Venezuela for the Arbitration of Claims, signed at Washington, 28 February 1903 (1903) X RIAA 709; 7) Protocol between Belgium and Venezuela for the Arbitration of Claims, signed at Washington, 7 March 1903 (1903) IX RIAA 321; 8) Protocol respecting the Arbitration of Claims between Sweden and Norway and Venezuela, signed at Washington, 10 March 1903 (1903) X RIAA 763; 9) Protocol between Spain and Venezuela for the Arbitration of Claims, signed at Washington, 2 April 1903 (1903) X RIAA 737; 10) Protocol between Germany and Venezuela for the Arbitration of German Claims, signed at Washington, 7 May 1903. See also Bray, 'Venezuelan Claims Commissions' 2018 (n. 7) para 2.

[42] See Castellanos, Rafael & Fundación para el Rescate del Acervo Documental, V. (1982). Documentos britanicos relacionados con el bloqueo de las costas venezolanas Caracas, 11-15 **is this a book? Yes**

[43] See Ibid., 10-11.

perspective is widely described in the literature,[44] it can also hide internal factors that also contributed to the conflict and the nature of the work of the commissions.

A closer look at the internal political causes of these developments shows a strong relationship between periods of weak rule of law and subsequent engagement with international adjudication. In the case of Venezuela, a revolution took Cipriano Castro to power from 1899 to 1908. Castro was a general who used strong anti-imperialist rhetoric, and continually compared himself with Simon Bolivar, the hero of independence. Castro favored integration with other Latin American nations and fell perfectly into the category of a *caudillo.* Many accounts acknowledge the role of Castro in the events that lead to the blockade, usually referred to as 'mistreatment' of foreigners.

However, the situation in Venezuela during those years involved more than mistreatment of foreigners; it represented the collapse of the rule of law in Venezuela. This included the elimination of limits to public power through legal reforms, disrespect for private property in general, the closure of universities, and the persecution of dissent. To sum up, the moral and economic decay of Venezuela.[45]

In other words, Castro's Venezuela exhibited several of the elements needed for the consolidation of power and common to Latin America described in the previous section. First, a strong executive branch that was both legally and *de facto* stronger than the legislative branch transformed the will of Castro into a quasi-divine mandate that made him the *'pater familias'* that at the end would lead Venezuela to confront European nations. Second, the transformative constitutional process that resulted in the enactment of a new constitution (*Constitucion de los Estados Unidos de Venezuela 1901*) followed the presidentialist tradition of the region. Third, it adopted the notion that legitimation of authority lies in the concept of the 'people', a concept expressly included in the 1901 constitution (*Artículo 21.- La Soberanía reside esencialmente en el pueblo*). This also included rhetoric portraying foreigners as the 'enemy' of the people, especially during the blockade in 1902.

In this scenario, many violations of rights of individuals occurred during Castro's rule. The difference was that foreigners could redress grievances and infringements of their rights within the institution of diplomatic protection, that lead to creation of the 10 Commissions. In total, those commissions decided upon 885 individual claims[46], a case load that provided an opportunity for the development of international law as a discipline.

For example, one of the most important cases decided during this time was the Orinoco Shipping and Trading Company (*Orinoco Shipping*), a corporation incorporated in Great Britain but owned almost entirely by citizens of the

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[44] See Bray, 'Venezuelan Claims Commissions' 2018 (n. 7); Castellanos (n. 41), 11-15; Salcedo-Bastardo, *Historia fundamental de Venezuela* 1970 (n. 15); Scarfi, *International Law in the Americas* 2017 (n. 12).
[45] Salcedo-Bastardo, *Historia fundamental de Venezuela* 1970 (n. 15) 542-552.
[46] Cases obtained from the account in Ralston, Jackson H., *Venezuelan Arbitrations of 1903* (Washington: Government Printing Office, 1904).

United States. *Orinoco Shipping* had been awarded navigation privileges on the Orinoco river by previous Venezuelan governments. However, Castro's regime cancelled via decrees[47] both their monopoly on the river and the contractual rights of the company. The case was later adjudicated by a claims commission[48].

In the *Orinoco Shipping* claim, the decision was submitted to the designated umpire, Harry Barge, who dismissed several claims by the company and ordered the payment of a discrete sum. This decision, despite being agreed on in the original Protocol as 'final', became a topic of discussion and diplomatic issue by the United States until the year 1909 when Castro's rule ended, and General Juan Vicente Gomez was left in charge of the Government. Furthermore, in this year Gomez delegated his foreign affair minister to negotiate a second Protocol, one that submitted umpire Barge's decision to a second international tribunal, an arbitral body composed of three arbitrators from the Permanent Court of Arbitration in the Hague.[49]

The arbitral tribunal rendered an award on 25 October 1910,[50] increasing the amount originally granted as compensation. The second case of the *Orinoco Shipping* allowed for the development of two important procedural advances in international law. First, it introduced a prohibition (article IV of Protocol 1909) on nationals of the interested parties being members of the arbitral tribunal and other members of the Court appearing as counsel for either nation, thereby reinforcing the objectivity of the tribunal. Second, for the first time, a judgment of an international tribunal was 'annulled and revised' by a second international tribunal on exceptional grounds of 'essential error'.[51] Until this award, any decision taken by a claims commission was considered to be final; the *Orinoco Shipping* case started along the path of institutionalizing setting aside proceedings, a path that would lead to some of the current alternatives, such as the ad-hoc ICSID annulment committees.

The *Orinoco Shipping* is just an example of the hundreds of claims adjudicated by the Venezuelan Commissions, were lawyers were confronted with multiple legal questions, with little time for answer, and scarce financial resources to allocate. However, if these efforts are perceived within the crisis of the rule of law in the Venezuelan state, the commissions were not only a mere continuation of 'gunboat diplomacy' as it is usually portrait within geopolitical accounts, but a space — a true laboratory for lawyers — for the development of international law. There are at least two reasons for this claim: The considerable number of cases that composed the universe of claims

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[47] Decree, 5 October 1900, Venezuelan government destroys the monopoly created in favor of *Orinoco Shipping Co December 14, 1901* and terminated contractual benefits.

[48] Article 1, Protocol Mixed Claims Commission United States-Venezuela (1903).

[49] Protocol of an Agreement between the United States of America and the United States of Venezuela for the Decision and Adjustment of Certain Claims (1909).

[50] *Orinoco Steamship Company Case United States of America v. Venezuela*, Award of the Tribunal, (1910).

[51] Dennis, W. Cullen. 'The Orinoco Steamship Company Case before the Hague Tribunal', *American Journal of International Law* 5(1) (1911), 36.

that had to be adjudicated; and the formation of a legal community that run the commission, which was composed in great number by Latin American lawyers whose contribution has been erased from the accounts of the region.

First, the Commissions had a legal capacity conferred by their foundational treaties to determine 'whether an injury took place' or whether a 'seizure was wrongful'[52]. If the considerable number of claims is taken into account (885) it means that the jurisdiction of the commissions could be compared to a sort of self-contained judicial branch which had to define its own procedural rules and standards of revision in a very short time during 1903. Second, the adjudication process was not executed only by a European state, but in reality, was the common effort of an international community of lawyers that was composed also by many Latin Americans. To be concrete, at least 14 individuals from the region participated in the functioning of the commissions, either as secretaries or commissioners itself.[53] This group of lawyers have been forgotten from any account of the contribution of Latin Americans to the development of international law.

Those two elements are absent from geopolitical accounts of history that stress the imperialist background of the creation of the commission. Acknowledging the internal collapse of the rule of law in countries like Venezuela in 1902, implies accepting part of the historical responsibility of these nations for violating the individual rights of locals and foreigners, as well as their inability to create functional states that protected their own citizens. Second, it renders the contribution of Latin Americans to the development of international law — from within the system, not only in the form of resistance — nearly invisible.

## 5 Conclusion

Looking back, the period of Castro's rule generated conflicts that later, during the process of adjudication, became a space for the creation of new developments in international law. On the one hand, this led to the idea of forbidding war as a mechanism for solving disputes between nations, the Drago doctrine. On the other hand, it allowed for other significant developments, such as revisions of international judgments by other international tribunals and rules regarding the impartiality of adjudicators.

These pages in the history of international law are usually portrayed within a narrative of 'Latin American resistance' to the imperial expansion of United States and European powers in the region[54]. However, the constant

[52] Art III. Protocol between Great Britain and Venezuela (n. 41).
[53] F. Arroyo-Parejo, Agent in 5 Commissions; Carlos F. Grisanti, Commissioner in 3 Commissions; Delicio Abzueta, Secretary in 2 Commissions; J. Padròn- Ustariz, Secretary in 2 Commssion; Emilio de las Casas, Secretary in 2 Commission; Segundo Antonio Mendoza, Secretary in 2 Commisions; José de Jesùs Paul, Commissioner in 2 Commission; Jose Vicente Iribarren, Commissioner in 2 Commissions; Nicomedes Zuluaga, Commissioner in 2 Commissions; Pedro Vicente Azpurùa Commissioner in 2 Commissions; José I. Arnal, Agent and Assistant Agent in 2 Commissions; Eduardo Calcaño-Sanabria, Secretary in 1 Commission; F. N. Guzmán Alfaro, Commissioner in 1 Comission; Luis Julio Blanco, Secretary in 1 Commission.
[54] Castellanos, Rafael & Fundación para el Rescate del Acervo Documental, V. (n. 41).

recourse (at least 193 times) to claims commissions and the recognition of arbitration in constitutional texts, such as the Castrist constitution of 1901, point in a different direction: Political factors — *caudillos*, populist discourses and constitutional changes — generated several moments in Latin American history where the power of the state became concentrated in one person, increasing the likelihood of conflicts with foreigners. These deficiencies in the internal rule of law in Latin American and the need for Latin American states to reactivate their economies together provided an opportunity to create provisional institutions that could adjudicate previous conflicts.

These developments in the history of the region are usually overlooked in narratives that focus on the imperial expansion of western states. Such narratives are constructed in one of three ways: First, by portraying Latin American individuals that were involved in the creation or functioning of a claim commission as 'traitors'. Second, by softening the real impact that certain individuals had on the collapse of internal institutions in Latin American states. Finally, by simply removing any reference to the contributions made by Latin American commissioners to the development of International Law.

By contrast, if the development of claims commissions is studied from a perspective that goes beyond this vision of Latin America as a space for the expansion of western imperial powers, it is possible to recognize the contribution of the region to the development of international law adjudication during periods of relative political stability in between caudillos and revolutions. When Latin American nations, the majority of which were presidential states, experienced a crisis in the rule of law, strong executives emerged creating conflicts related to the property of foreigners. As new governments tried to sustain their economies, they engaged with international law in an effort to increase the flow of capital into the region.[55]

The narrative that constructs a notion of 'Latin America' based on its resistance to imperialism has been used to transfer blame to the region for its inability to create functional states for more than two hundred years. In contrast, the study of claims commissions from the internal perspective of the rule of law provides two advantages. On the one hand, it allows us to see the specific contribution of individuals to the construction of international law through the drafting and functioning of claims commissions. On the other, it allows us to gain a better understanding of the concept of 'Latin America' in international law in the 19th and 20th centuries, as a hybrid historical construction between the tensions of particularism and universalism.

[55] One of the few reflections in the literature in that sense can be found in Nissel, Tzvika Alan. *History of State Responsibility: The Struggle for International Standards (1870-1960)* (Helsinki: University of Helsinki, Doctoral Dissertation, 2016), cited in Greenman, Kathryn. 'Aliens in Latin America: Intervention, Arbitration and State Responsibility for Rebels', *Leiden Journal of International Law* 31(3) (2018), 626.

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