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Edited by
Mariano J Aznar
and Mary E Footer

B L O O M S B U R Y

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Edited by

Mariano J Aznar
and
Mary E Footer



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SELECT PROCEEDINGS OF THE EUROPEAN SOCIETY OF INTERNATIONAL LAW

This is the fourth in the Series of Select Proceedings of the European Society of International Law (ESIL) featuring the most important and interesting papers presented at the Fifth Biennial Conference on 'Regionalism and International Law', organised by ESIL and the University of Valencia in 2012. As usual, the best papers from that conference have been re-written, edited and drawn together by the two editors to present a perspective on what is a flourishing forum for the discussion of new ideas and scholarship on international law.

Avant-Propos/Foreword

ANNE PETERS¹ ET LAURENCE BOISSON DE CHAZOURNES²

A l'invitation du Professeur Mariano J Aznar et de l'Université de Valence, la Société européenne de droit international (SEDI) a tenu sa cinquième Conférence biennale.

Cette Conférence a permis que l'année 2012 entre dans la mémoire collective de la SEDI comme *annus mirabilis* pour l'histoire du droit international, après 1492, année dans laquelle les rois Isabella et Fernando I ont réalisé la Reconquista de Granada et ont financé le voyage de Cristóbal Colón aux « Indes » ... Le thème de la Conférence était lié à la reconnaissance du fait que—pour le meilleur et pour le pire—l'Europe a historiquement été le centre du monde à partir de l'ère moderne, en créant différentes périphéries qui ont dû adopter la foi, l'organisation sociale et les systèmes juridiques européens. L'influence de l'Europe sur les autres continents est un fait historique qui méritait d'être revisité d'un point de vue juridique. L'une des idées de la Conférence était aussi d'évaluer les réactions, pour ainsi dire, des autres régions envers l'Europe et leurs approches du droit international.

L'Espagne—et à nouveau pour le meilleur et pour le pire—a eu une influence à l'échelon régional. Est-ce que le futur du droit international est « régional »—pour paraphraser le titre d'un article d'Anne-Marie Slaughter de 2006 (qui d'ailleurs portait le sous-titre : « The European way of international law »)? Et est-ce que ce régionalisme reflète l'évolution du droit international qui est usuellement relaté comme la propagation des règles développées dans les ordres internes des États européens depuis le XVI^{ème} siècle, un « droit public de l'Europe » (comme l'appelait Gabriel Bonnot de Mably en 1746) qui s'est après étendu sur d'autres continents, et enfin sur le globe entier ?

A travers des organisations régionales, des traités bilatéraux de libre-échange, les opérations régionales de maintien de la paix, des mécanismes de règlement de différends régionaux, le droit international peut sans doute acquérir une sorte de réalité et mise en œuvre effective. De ce point de vue, le régionalisme serait un progrès désirable, dépassant une focalisation excessive et étroite sur l'État national et évoluant dans la direction d'un système « plus » international. Toutefois, le régionalisme est aussi susceptible de menacer l'aspiration à un système universel de droit international, précisément parce que son succès pourrait résulter en la fragmentation du droit international. Chacun de ces deux points de vue antagonistes portent un grain de vérité en lui-même : l'idée d'un droit international régional peut former un pont

¹ Présidente de la SEDI, 2010–12.

² Présidente de la SEDI, 2012–14.

entre l'État souverain et le droit international, mais elle peut aussi être source de cloisonnement. Ce caractère ambivalent du régionalisme est l'une des raisons du choix par les organisateurs de ce thème fascinant pour la cinquième Conférence biennale de la SEDI.

Cette Conférence fut un grand succès, réunissant de très nombreux participants, universitaires et praticiens, provenant d'Europe et d'autres régions du monde. Le présent ouvrage compte une sélection des communications très stimulantes présentées lors de cette Conférence. Elles portent sur les facettes normatives, institutionnelles et juridictionnelles du phénomène régional dans l'ordre international, dans une perspective historique et contemporaine. Les débats et échanges furent riches et le présent ouvrage en est le reflet. Il témoigne également de la vitalité de la Société européenne de droit international en tant qu'espace de réflexion et d'échanges d'idées.

Nous exprimons notre profonde gratitude au Professeur Mariano J Aznar et à son équipe pour avoir organisé la cinquième Conférence biennale et pour avoir permis que les communications présentées puissent être accessibles dans un ouvrage. Nos remerciements vont également à la Professeure Mary Footer qui a co-dirigé cet ouvrage.

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Introduction

MARIANO J AZNAR* AND MARY E FOOTER†

THE QUESTION OF how regionalism is relevant to, and interacts with, international law lay at the heart of the fifth Biennial Conference of the European Society of International Law, held in Valencia, Spain, from 13 to 15 September 2012. Critical to that question were two others: ‘Why Regionalism?’—And does regionalism still matter in our global society?

Our programme outline on *Regionalism and International Law/Régionalisme et droit international* suggested that Europe—for better or for worse—has historically been at the centre of the world from the Modern era onwards, creating different spaces for the adoption of European faiths, social organisation and legal systems. Similarly, Europe’s influence on other continents called for a re-evaluation from a legal point of view. Thus, ‘feedback’ from other regions about Europe and the European approach to international law, if there is one, was important to us.

And there were other reasons for scrutinising the relationship between regionalism and international law, not least because it allowed us to revisit one of the leitmotifs of the Society, which is the unity and fragmentation of international law. Having already analysed this theme from a specialist, a theoretical and a judicial perspective in previous biennial conferences, a regional perspective was added to our research *acquis*.

Instead of adopting a ‘horizontal’ view in its analysis of regionalism, the fifth Biennial Conference examined regionalism to discern the existence of new centres and peripheries. The focus shifted from economic development to access to technology, from new generations of human rights to the immaterial concepts of groups and ethnicity, as well as taking into account other variables so as to foster new approaches to regionalism and its impact on international law. At Valencia there were eight fora and eight agorae, each with their unique approach, to examining the relationship between regionalism and international law.

The conference proceedings delve into many different aspects of *Regionalism and International Law*, beginning in Part I with *The History and Concept of Regionalism*. Louise Fawcett introduces the concept of regionalism and its historical evolution, prior to focusing on some regional aspects of peace operations, terrorism and weapons of mass destruction. Liliana Obregón provides us with a short history of Latin American law, with a sweep of events commencing in 1795 through to the contemporary era. Bernardo Sepúlveda-Amor gives his insightful comments on these

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two contributions, while Jean Salmon offers his reflections on the concept of regionalism and the separate notion of 'region'.

Part II examines *Regionalism and the Unity of International Law*. André de Hoogh provides a *tour d'horizon* of the topic from a positivist perspective, while Dirk Pulkowski dwells on notions of regionalism, international law as a unified legal order, and the challenge of regionalism to the unity of international law. Both chapters are critiqued by Mathis Forteau, before Philippa Webb closes this Part with her views on regional challenges to the law of state immunity.

Part III addresses the issue of *Regionalism, International Organisation and Integration*, with contributions from Jean-Marc Sorel on the problem of integration in international organisations, dependent upon whether they are universal or regional in character, while Santiago Villalpando examines the relationships between the UN Charter and regional organisations. Karel Wellens offers his comments on both contributions.

Part IV moves on to examine *Regionalism and Globalisation*. Ana Peyró Llopis portrays a world in which globalisation acts as a brake on the development of 'supranational' international law, and a global legal order is emerging, José Manuel Pureza reflects on the juxtaposition of new regionalism and the emergence of global constitutionalism, and Antonio Remiro Brotons offers his comments.

Part V focuses on *Allocating Interests: States' Legal Policies between Universalism and Regionalism*, with contributions by Anders Rönquist on the challenge for states of universal and regional cooperation, Daphne Shraga on the balance of power that has seemingly been struck in the different relationships between universalism and regionalism concerning human rights, international criminal justice and peace operations, and Dorothy Estrada-Tanck on the concept of human security and universal human rights in the context of undocumented migrants.

Part VI is devoted to *Regionalism, Peace and Security*, with contributions by Olivier Corten in which he questions the role of the African Union (AU) in seemingly removing itself from the UN Security Council's authority, and Ana Salinas de Frías who questions the extraterritorial application of the European Convention on Human Rights in matters of peace and security; both with comments by Mohamed Bennouna. This Part is completed by Juan Jorge Piernas López, who reflects on the specific role of the AU in South Sudan, while Alma Corina Borja Monroy examines regional practice before the International Criminal Court, based on the cases of Northern Uganda and Sudan.

Part VII offers us *Regional Integration: Some Perspectives on Trade, Investment and Development*, with a contribution by Irene Blázquez-Navarro on public interest in EU foreign investment policy after the Treaty of Lisbon; she is joined by Ousseni Illy, who examines African regional economic arrangements. Gabrielle Marceau comments on both chapters, with reference to the institutional setting for regional trade arrangements in the WTO—in principle and in practice. In concluding this Part, Nitish Monebhurrin provides us with an analysis of the contemporary notion of development in international investment law and overlooked regional realities.

Part VIII on *Regionalism and Human Rights* is introduced by Theodore Christakis, who examines the judicial activism of some regional human rights treaty bodies and state sovereignty, and whose contribution is commented on by Djamchid Momtaz.

Meanwhile Antonio Cançado Trinidad offers his thoughts on the regional system of human rights protection.

Finally, Part IX brings together *Universal and Regional Responses to the Environment and Our Common Heritage*, with a chapter by Géraud de Lassus St-Geniès on articulating universal and regional approaches to climate change, while a set of contributions from Yoshinobu Takei and Claudia Cinelli examine the potential for the convergence of the Polar regions and the delimitation process in the central Arctic, respectively.

The 2012 ESIL Biennial Conference was held under the Presidency of Honour of Her Majesty the Queen Sofia of Spain, organised by the Universitat de Valencia and the *Centro de Estudios de Derecho internacional y de Relaciones internacionales* (CEDRI), and sponsored by the *Confédération Suisse*, the Universitat Jaume I of Castellón, the Spanish Ministry of Economy, the Regional Government of Valencia, the Fine Arts Museum of Valencia, Broseta LLP and Éditions Bruylant.

July 2015

Part I

The History and Concept of Regionalism

Regionalism: From Concept to Contemporary Practice

LOUISE FAWCETT*

I. INTRODUCTION

THE GROWTH OF regionalism, expressed as formal regional organisation, has received a great deal of scholarly attention since the Second World War. From its early days, regionalism has been much debated, and alternatively praised for its potential and criticised for its ill-defined nature and limited capacity. However, by the start of the twenty-first century, if not earlier, regionalism was well established in the vocabulary of international relations scholars and practitioners, such that it would be hard to imagine a world without it. Moreover, regionalism has become an integral part of the multilateral architecture, a position set out in the UN Charter and more recently emphasised in the European Union's Security Strategy, adopted in 2003:

In a world of global threats, global markets and global media, our security and prosperity increasingly depend on an effective multilateral system. The development of a stronger international society, well-functioning international institutions and a rule-based international order is our objective.¹

Though the European experience has been central to the story of regionalism, both history and contemporary practice show that this is not the only example to draw upon. South American states were early advocates of regionalism, following their independence in the nineteenth century; by the latter part of that century, South American regionalism was fused with a wider pan-Americanism. The twentieth century saw the emergence of the flagship regionalisms of the European Community (later the European Union) and the North Atlantic Treaty Organization—models which were widely imitated elsewhere. In the twenty-first century, African states under the umbrella of the African Union foster ever more elaborate integrative schemes and have been path-breakers. An example of this is their adoption of the

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¹ European Union, 'A Secure Europe in a Better World', European Security Strategy (Brussels, 12 December 2003) 9.

principle of 'Responsibility to Protect', which was embodied in article 4(h) of the Constitutive Act of the African Union² (even before its final adoption in the United Nations World Summit Outcome Document of 2005).³ More recently, organisations in the Middle East, despite their sovereignty-loving charters, appear to have followed suit, embracing interventionist policies in response to the events of the so-called 'Arab Spring'. Worldwide, leading states are active in the promotion of regionalism, and most states in most parts of the world are members of multiple regional organisations.

Regional organisations are treaty- and charter-based, giving them formal status in international law. This status is enhanced—critically—through the recognition and status accorded to regional organisations by the United Nations and other multilateral organisations such as the World Trade Organization. It will be a particular concern of this chapter to track the evolution and complex features of this relationship.

However, regional organisations also derive legitimacy through the articulation and implementation of distinctive regional norms and practices. The Arab League, for example, derives legitimacy through its very 'Arabness', drawing on a rich common culture and history. The states of Southeast Asia are known for their articulation of what has been called the 'ASEAN way', which is a consensus-based approach based upon strict observance of sovereignty.⁴ Today the ASEAN way has become the 'Asian way', extending the idea to a broader and still developing concept of East Asian regionalism.⁵

Though the advent of 'new regionalisms', particularly since the end of the Cold War, has seen the expansion and revision of the early idea of regionalism to include new organisations, actors and issue areas,⁶ the original concept of regionalism: that of the policies and practices of state-based permanent organisations, with membership confined to a limited geographical area, retains extraordinary importance. This is demonstrated not only by the continuing development and complexity of existing organisations and their constitutional arrangements, but by the take-up of the concept by new and emerging powers, for which regionalism is seen increasingly as an important policy tool and a demonstration of their influence on the regional, but also global stage. China's approach to regionalism is illustrative in this respect (once a sceptic, but now an active player in a number of regional fora like the ASEAN Regional Forum (ARF) or Shanghai Cooperation Organization (SCO)). Consider also tiny Qatar's recent role in influencing regional responses to the Arab Spring uprisings that started late in 2010, through the Gulf Cooperation Council. Given regionalism's growing importance and multidimensionality, it is an appropriate moment to review the history and concept of this phenomenon in world politics,

² Constitutive Act of the African Union (adopted 11 July 2000, entered into force 26 May 2001) 2158 UNTS 3, art 4(h).

³ UNGA Res 60/1 (24 October 2005) UN Doc A/RES/60/1, paras 138–39.

⁴ A Acharya, *Constructing a Security Community in South East Asia: ASEAN and the Problem of Regional Order*, 2nd edn (New York, Routledge, 2009).

⁵ R Stubbs, 'ASEAN Plus Three: Emerging East Asian Regionalism' (2002) XLII/3 *Asian Survey* 453–54.

⁶ See generally, B Hettne, A Inotai and O Sunkel (eds), *Studies in the New Regionalism*, Vols I–V (London, Macmillan, 1999–2001); L Fawcett and A Hurrell, *Regionalism in World Politics: Regional Organizations and International Order* (Oxford, Oxford University Press, 1995) 1–4.