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Felipe Kern Moreira[1]

LAW AND POLITICS IN INTERNATIONAL RELATIONS: THE CASE STUDY OF THE HISTORICAL DEVELOPMENT OF THE INTERNATIONAL REGIME FOR THE LAW OF THE SEA

PODER E NORMAS NAS RELAÇÕES INTERNACIONAIS: O ESTUDO DE CASO DA FORMAÇÃO HISTÓRICA DO REGIME JURÍDICO INTERNACIONAL DO MAR

ABSTRACT:
This contribution aims to develop a case study about the relationship between law and politics concerned to the Law of the Sea. The research posses the following objectives: from (i) a theoretical framework of the international relations, envisoning the relations between law and international politics; (ii) to analyse the historical development of the international regime for the Law of the Sea as a case study.
KEYWORDS: international regimes; law of the sea; law and politics

RESUMO:
Este artigo possui por objetivo desenvolver um estudo de caso sobre a relação entre poder e normas relativa ao regime jurídico do mar. A pesquisa possui os seguintes objetivos: (i) a partir de uma perspectiva teórica das relações internacionais com foco na relação entre normas e poder, (ii) analisar a formação histórica do regime internacional do direito do mar na forma de um estudo de caso.
PALAVRAS-CHAVE: regime internacional; direito do mar; poder e normas

INTRODUCTION

The scientifical approach of the international community with diffuse values, which observes the cultural and evaluative differences of the different Nations, is a teleological exercise that seems to tend unavoidably towards a *hobbesian* rather than a *kantian* model of international relations. What exactly differentiates the politics as science from other sciences is that "political science is not only the science of what is, but of what should have to be" (CARR, 2001, 7) and the international law figures as an apparatus of excellence in the searching for the regulation of the relations between States. That means that:

> "the acceleration of the interdependence demonstrates, at the same time, the reduction of the autonomy of the States in the formulation of the inner politics and the necessity of the international construction of regimes that make possible the resolution of common problems" (AMARAL JÚNIOR, 2002, 7).

The relations between law and international politics present features not seldom problematic in the construction of an international regime[2]. The concern about this relation already was conscientiously questioned in 1939 - six years before the formal constitution of the UN - in the work of Edward Carr, when he sentenced that "law, as po-

[1] Professor associado da Universidade Federal do Rio Grande-FURG. felipe.kern@furg.br, http://orcid.org/0000-0002-5084-4987
[2] For a better comprehension of this article, the adopted instrumental concept of International Regimes proposed by Stephen D. Krasner is: "International Regimes are defined as principles, norms, rules, and decision-making procedures around which actor expectations converge in a given issue-area." (KRASNER, 1982, 185)

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litics, is a meeting point for ethics and power", but to say that "law it is more moral than politics is a fallacy" for "the utter authority of law derives from politics", demanding therefore "clear recognition of the balance of political forces that precede all law" (CARR, 2001, 230, 232, 233 and 248)[3]. Although some points of scarce reasonability in the work of Carr as to explain the dictatorship of great powers as a law of nature (CARR, 2001, 138)[4], it is well truth that the dynamics in the relationship between the nations, carried out in multilateral common forums, in little advanced to promote justice between people or to a lasting peace. In other words, if we consider that the international panorama of the beginning of this century is featured by a shock between USA and the Security Council with a impending threat of intervention in Iraq, we arrive to the conclusion that the international community, in some sense, still it does not possess efficient instruments of prevalence of the International law on the exercise of power.

The present article posses therefore the following objectives: from (i) a theoretical framework and political analysis of the international relations, envisoning the relations between law and international politics; (ii) to analyse the formation of the international regime for the Law of the Sea as a case study in the sense of a theory-informing case study, attributed by Alexander George based on Lijphart (GEORGE, 1982, 3).

1. LAW AND POLITICS IN THE INTERNATIONAL RELATIONS

Niccolò Machiavelli inaugurated the dissociation between politics and moral in the sense of an apologetic speech. The weakness of the catholic church in regard to the protestant reforms, added to a trend of centralization in the figure of the prince, made possible a further separation between moral incidence in the formulation of public politics. The thought of Machiavelli adopts a proper terminology, breacking with the scholastic matrix; for him, *virtú* means merit, talent, predicates, and *fortuna,* the luck, the chance. Most interesting it is the breaking of the first conceptualization where over virtue, ethical appreciation does not happen. Furthermore, the thought begins to be percolated by political and conceptual ambiguities, as for instance, when it speaks about "those who have made themselves princes at the will of atrocities", says that "this results of the good or bad use of cruelty" (MACHIAVELLI, 2001, 32) and concludes the line of thought making reference to the use of violence, subject this of extreme importance for international relations: "must that who occupies take to effect all the violence necessary and to practise it all at once not to have to renew it each day" (idem, 53). What is searched with this preambular presentation of the rupture between politics and ethics is not to emit a judgment of value, as the present dissociation possesss its explanatory roots but to search for the first events in terms of political speech on subjects that had started to be present in the decision circles and that still today find support in these initial formulations.

The ethical approach always was present in the philosophical speech and few times this was not associated with the formulation of norms of conduct. In this context, Immanuel Kant figures distinctively for two main reasons: (i) the formulation of the categorical imperative based on that they had looked to unify the racionalist speech of René Descartes and empirist one of David Hume, completely

[3] Carr is considered a "dissident" or even a "outsider" in relation to the English School of International Relations also by the fact that his approach does not have an influence from the internationalist legal thought of Hugo Grotius as happened after with Hedley Bull (cf. DUNNE, 1989). An emphasis in International Law under *grotian* auspicious became a characteristic of the English School of International Relations.

[4] Here is found as the background of Spinoza's philosophy that sustained Edward Carr's thought as well as a Victorian reminiscence from which the impartial researcher does not detach. The present critic refers to the use of an 'usque ad absurdum' argument in the sense of a hierarchical determinism of a nation system.

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separating ethics of a theological approach, even though this already had been looked by Aristotle in another way in more humanist basis; and (ii) the concern with War, key-subject of the approach of international relations, and the modeling of a project of 'perpetual peace' that would come to definitively influence the formulation of multilateral foruns such as Leage of Nations and the United Nations Organization. The maintenance of peace and the promotion of justice between the Nations possess, for Kant, a close link with the roman-germanic system of law and the international contractualism.

One of the most interesting arguments about the effective dissociation between international politics and ethics is the *wilsonian* thesis, after the Second World War, that had a great impact on the American elites. Its abissal failure in the maintenance of the worldwide peace provoked a reaction in relation to the moral-legalist proposal, in the scientifical community as well as in the American politics. This point is of capital importance if one considers the relation between hegemonic power and formation of international regimes. The reaction is perceivable in the work of Morguenthau, Gaddis and George F. Kennan that from the formulation of the American foreign policy, search the causal nexus of this paradox in international relations[5]. Morguenthau refers to the particular corruption of the political man as the genesis of the present discussion:

> "(…) there is no centralized autorithy beyond the mecanics of balance of power, which could impose actual limits upon the manifestations of its collective desire for domination" (MORGENTHAU, op. cit., 15).

The question of the relations between ethics and international politics, although not considered a prompt question in International Relations, deserved the attention of several authors[6] since, during the 90's, the issue re-emerged in surprising form through the question of the relation between democracy and human rights, that ends up giving margin to the formation of international courts not having been setteled however the question of the anteriority of ethics over power (MARTINS, 2001, 22).

As from the birthhood of international relations as an independent field of study, international law has been deeply present to the maintenance of international peace. The discredit attributed to law and the incredulity in the fulfilment of a framework of international norms was not exclusive to Carr; Hans Kelsen who figures as a positivist of *kantian* influence and defender of cosmopolitan projects of international relations, presented at his last Conferences in Harvard his unbelieving approaches about the vectors that had been taken by League of Nations that for him were detouched from the first intention (KELSEN, 1996, 50 and 187).

The not few times difficult dialogue between politics and international law also was explored by Hedley Bull that under the influence of Machiavelii, Hugo Grocius and Kant (BULL, 2002, XII) establishes that international rules must gradually "be made, comunicated, managed, interpreted, applied, legitimated, adapted and protected" (idem, 68-69). These topics present some controversies. In this sense, the international system[7] produces rules in multilateral forums, and

[5] About these ideas: GADDIS, John Lewis. On Moral Equivalency and Cold War History. Available at http://www.mtholyoke.edu/acad/intrel/ethics.htm; MORGENTHAU, Hans J. The Moral Blindness of Scientific Man. in: JERVIS, Robert ; ART, Robert C. (org.). International Politics: Enduring Concepts and Contemporary Issues. 4a ed.; CARR. Edward H. Vinte anos de Crise. 2a. edição. Chap. X: Direito e Mudança. Brasília: Editora Universidade de Brasília, Instituto de Pesquisa de Relações Internacionais; São Paulo: Imprensa Oficial do Estado de São Paulo, 2001.

[6] McELROY, Robert W. Morality and Foreign Policy: the role of ethics in international Affairs. Princeton, N.J.: Princeton University Press, 1992, pp. 3-56, 168-190; WELCH, David A. Can we think systematically about ethics and Statecraft. Ethics and International Affairs, Vol. 8, 1994, pp. 23-37; MALEY, William. Ethical Actors in Australian Foreign Policy: Political Parties, Pressure groups and Social Movements. In: KEAL, Paul. Ethics and Foreign Policy. St. Leonard, NSW: Allen & Unwin, 1992, pp. 81-97.

[7] In the sense attributed by Bull: "when two or more States have sufficient contact with each other, with sufficient reciprocal impact in their decisions, in a way that they (the States), at least to a certain point, behave as parts of a hole." (BULL, 2002, XIV-XV)

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these (rules) *are* communicated in a positivist form which brings up the question brought by the constructivism:

> "I am convinced that systematic treatment of rules and their properties is indispensable to any legal theory seeking to overcome positivist limits, including post positivists theories countered on discourse (...) I have in mind (referring to recent developments in language philosophy) the theory of speech acts, the relevance of which is immediately evident if we substitute 'speakers' by the 'authors' of the preceding discussion." (ONUF, 1989, 78 and 81)

Therefore, the rules need also to be managed so that they have effectiveness and here we find the international formation of the Secretariats or Agencies. In the interpretation related to the question of communicability, arise some of the problems facing the Courts or jurisdictional systems that are responsible for the application of the law. The legitimation is a current subject when understood that it is not only related to the norms but to the administrative agencies of a international regime as a whole. Finally, regarding the question of the adaptability and protection of the international rules, one does not enter in contradiction with the other; the first regards to the secular consuming, to the adaptation to new situations presented by the historical unfolding and the second is exactly the barrier against the extensive interpretation not associated to *spiritu legis*.

The limits of the International law, from the presented points, to which are attributed capital importance to be considered in its set, possess for Hedley Bull two causes, one of legal background and another one political (2002, 109): (i) the international law sanctifies the *status quo* without providing a legislative process for which its norms can be modified by general assent, thus provoking pressures so that the law is violated on behalf of justice, and; (ii) the function exerted in the maintenance of the international order by the special position of the great powers that when they give to this service makes it the price of a systematic injustice with relation to the rights of the lesser States, injustice which is incorporated to the UN Charter.

The reflection of Carr and Bull in certain sense is retaken by Slaughter, Tulumello and Wood when these verify that from the increasing proliferation of formal institutions of international cooperation, the International Relations theoreticians had turned their attention towards the inevitable judgly and regulatory character (legalized) of these, essential to its constitutional formation; which starts to be an area of international law studies. In a metaforical construction, the authors verified that these scholars - politicians and jurists - had started to see the same world from their office windows (SLAUGHTER; TULUMELLO; WOOD, 1998, 370). What Carr appreciated as dichotomy and contradiction Slaughter *et alia* evaluates as cooperation possibility, since for social practics the law in itself is incomplete and turns then this toward social sciences with looks of complement, for the regulation of the situations exactly reflected and analyzed by it.

However, today, there are those who understands what can be called new time in the history of the International law starting with the Augusto Pinochet case and the detention of Slobodan Milosevic, which does not lack of reason considering that one of the expressive voices against the establishment of International Criminal Court was the North American former Secretary of State Henry Kissinger, scholar of distinctive *realist* matrix, a trend that proclaims that the role of the international law is to be an instrument in the consolidation of an international order resultant of the power balance. What Kissinger leaves evidenced in an article published in the Foreign Affairs (July of 2001) it is that the International Criminal Court would have to be controlled by the Security Council of the United Nations as well as the International Court of Justice (FONSECA JR. G.; BELLI, B., 2002, 114ss).

The relationship between law and international politics in the formation and development of regimes seemed then to figure as an incessant se-

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arch for harmonization of competing rather then complementary concepts. In this sense, still in international frame, it can be verified that law and politics were rarely together in an appropriate and efficient form since one does not find applicable solutions for the challenges petitioned by the other and here we are *vis-a-vis* with one of the scientific challenges of 21st century in what refers to international politics. The enthusiasm for interdisciplinary between law and politics may also be understood as the product of intellectual dynamics within each discipline." (SLAUGHTER; TULUMELLO; WOOD, 1998, 371).

This way, it can be suggested that the *instrumentalization* of an international regime is one of the crucial points for the appropriate understanding of the present work. Considering that the formation of a regime can be detouched from its own concept, we can envision in its formation the following elements: (i) the actors; (ii) convergence of expectations and; (iii) a matter of common interest. It is considered therefore that the principles, norms and rules later are stipulated or assented and the proceedings of decision making processes are as much present in the formation as well as in the development of the regime but even though still are posterior to the other three elements.

From the suggested division, a great amount of cases can be analyzed in order to be realized that the *instrumentalisation* of the system is an watershed in the prevalence of norms, principles and equitable rules, democratic or not. The United Nations Organization is an excellent case study: Why, despite the ideals (issue-area) of a decentralized community of nations (actors), democratic and imbued of peace values (expectations convergence), the UN carried out a freezing of power, the inefficiency in the promotion of peace and, sometimes, the non-observance of its own constituent Chart?

It is clearly perceived that there is a difficult relation between the establishment of an international law - not understood here only in its face of legislative process, but of application of the norm that is the jurisdictional activity and efficiency that materializes in the concrete result of application of a sanction or in the repairing of damage -; and the development of a equitable, democratic and just international society. Although the organizational model of the United Nations Agencies, academicaly stipulated by Daniele Archibugi as the cosmopolitan model, thrived to combine elements of the piramidal (League of Nations and Holly Aliance) and diffuse (European Union, United States of America) models, there still does not exist a recognized international organization that effectively comes to assume a certain control of the political relations between the States (ARCHIBUGI, 1992, 314).

Hans Kelsen - recognized kantian and utopian - observed the centralization of a system initialy proposed as decentralized[8]; the International Court of Justice was at the mercy of the will of a superior agency - not eminently legal - that is the Security Council and completely politicized in consequence of its non independence[9].

The historic-legal formation and the implementation of an international regime for the Law of the Sea in much contribute for the recent prompt subjects of the relation between law and international politics, formation of a democratic and equitable system and even arrive to cast a light on the adoption of strategies and agenda formularization for more efficient foreign relations for the less privileged countries in the balance of world politics. The globalization can be catalytic factor of an inverse movement: instead of a common model, where a valutative proposal end up predominating over the entire system, the larger protagonism of the actors can come to predominate in the measu-

[8] For Hans Kelsen, to say that a certain group is subjected to an order is to say that it forms a community, in this case a Community of Nations as in opposition with the State, which is a centralized order instead of a decentralized one.

[9] The fragility of sanction relative to norms is a gap in the international system, specially when considering the reality that no State is subject to Court decisions without previous and concomitant consent recognizing as obligatory jurisdiction only fifty nine and only one, the United Kingdom, is a integrant, considering the permanent members of the Security Council. Thus, there is a clear unevenness, politically speaking, in the constitution of a valid and efficient international legal system.

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re where in the *instrumentalisation* of the regime, the common interests on a diversity of matters of interest, follow the logic to be under the domain of who exactly want to argue them and to obey the normatized.

2. THE INTERNATIONAL REGIME FOR THE LAW OF THE SEA

Earth possesses about 71% of its surface covered by oceans; fact that alone demonstrates the priority of the liquid surface of the planet, leading to the conclusion that society is subject to expressive dependence of oceans for its well-being.

The value of the seas in international relations goes back to Thucydides, which in its work History of the Peloponnesian War recollects that after century 6th century BC, in the region of Sicily, the tyrants had started to use numerous fleets for war. It is inferred from the text of Thucydides that the use of great fleets was before for military rather than mercantile purposes and that the transition was gradual.

> "When navigation became more intense between the Helens, the Corinthians, using their fleet, had moved war against piracy, and offering a so important maritime market as much as the terrestrial one, had made their city extremely powerful thanks to the profits that they obtained." (TUCÍDIDES, 1999, 25)

Fishing certainly was one of the first marine resources to be used by man. The Food and Agriculture Organization of the United Nations (FAO) estimated that this activity - aquiculture - allow to reach a total worldwide production of 200 million tons. FAO has expressed concern with the effect of economic globalization, which by advocating the market as a controller of economic activities will be able to hinder States from making use of their control capacity on the marine resources. This includes all services related to the exploration and exploitation of oil and gas, tourism, maritime commerce, war and merchant navies, naval construction, fishing, maritime mineral exploration and exploitation, and telecommunications. It was estimated that these sectors directly put into motion one trillion dollars per year (LEITE, 1999, 9).

A second group of expressive sea resources is that of the ecological services related with marine ecosystems. The Report of the Independent World- Commission on the Oceans (IWCO), entitled *Ocean... our future* informed that this specific group of resources puts into motion approximately 22 trillion dollars in the year of 1994 (idem, ibidem). The discovery of manganese polimetalic nodules led to an international expectation that a wild commercial exploration of deep seabed would open in short term, what would lead to a frank advantage of countries retaining the necessary technology. The gradual knowledge about the oceans leads to the estimate that seabed contains 80% of the planet's minerals. Currently the commercial exploration of diverse minerals in shallow waters and interface coastal lands is ongoing, among which can be cited magnesium, bromine, heavy minerals and salt.

The historical approach for a correct understanding of the formation of an international regime for the Law of the Sea possesses its initial landmark in the first reflections made by Hugo Grocius. In this sense it has the link that permeates the present article, since one of the first formulations of international law (dismissing here from *ius gentium romanorum* that prevailed a little differentiated sense until the scholastic period) is exactly the 1609's book, *De Mare Liberum,* of Grocius, that had its origin in the defense of the Company of Occidental Indies of the Netherlands (BULL, 2002, p. 39)[10].

[10] Huigh Cornets de Groot (1583 - 1645) better know as *Hugo Grocius*, was a classic writer used as a reference for the transition from medieval law concepts to modern ones. Usually he is considered the father of modern international law. This reference is not relative to a creation idea but of exposition of the emerging practices of nation-states that put him in the position of a thinker with a practical and avant-garde conceptualization. The cited work of 1604 in reality is called *Commentary on the Law of Prize and Booty*. The majority of this work remained as manuscript and was only discovered in 1864. The 12th chapter was revised and published in 1609 with the title *Mare Liberum* (DERVORT, 1998, p. 13-14)

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In 20th century, there was a return to the discussion by the community of nations to codify international norms to mainly regulate the maximum limit of the territorial sea or areas that were subject to the sovereignty of a State in specific. In this sense both the Haia Conference for the Codification of the International Law of 1930 and the two first Conferences of the United Nations on the Law of the Sea carried out in 1958 and 1960 had been failed attempts (CASTRO, 1989, 13).

The gap generated by the lack of consensus in the two first Conferences for the international delimitation of the territorial sea limits and contiguous zone generated some tension between the countries that possessed different perspectives about these issues. A first international partisan division was given in contrary direction of the international logic of the period. Despite the bipolar disputes of the cold war, the United States of America, that had adopted three miles limit and the Soviet Union, that adopted twelve miles limit, agreed in three basic objectives: (i) to limit to twelve maritime miles the maximum extension of the territorial sea; (ii) to assure the freedom of navigation in international straits with less than twenty four miles of width and; (iii) to establish in this area a special fishing regime under the supervision of international technical agencies.

There was a clearly tenuous link between the detention of technology and the desire that the formation of an international regime for the Law of the Sea was predominantly constructed based on an agreement on the seas as an international area. Without the mediation of the States in very extensive limits of maritime territory, of course the countries that detained best research and exploration technology would have better and more effective economic chances in the use of international waters given its bigger extension and accessibility. In the same way, under a *realist* perspective, in the practical aspect of war, fleets would have a faster capacity to arrive at the coast of interest with a narrower territorial sea.

At the end of 1967 the representative of Malta in the United Nations, Arvid Pardo, in a memorable decree, raised the idea that the seabed exploitation should be operated 'beyond the limits of national jurisdictions'; with other words, the proposal foresaw the announcement of this international area and its appeals as common heritage of mankind (idem, 25). But problems rose from the proposal of Maltese diplomat related to the delimitation of an international sea floor area not available to unilateral explorations. This brought up the immediate necessity of carrying out a Conference to negotiate norms about issues related to important economic interests such as the high-sea, continental shelf, territorial sea, contiguous zone and fisheries. The convocation for the referred Conference was issued by Resolution 2574-A, in December of 1969.

The bipolar logic of the cold war gave place to different strategic interests. On one side, the Latin-American countries start to form a coalition for the adoption of a two hundred maritime miles territorial sea limit, unilaterally stipulated by Argentina, in 1966, and Uruguay, in 1969. On the other hand, even considering that the issue was open to discussions in international forums, the United States of America, in 28 of June of 1980, gave a unilateral authorization, to its nationals to exploit resources in international waters. France, Federative Republic of Germany, Japan, Union of the Soviet Socialist Republics and United Kingdom followed this act in similar way (DUPUY; VIGNES, 1991, 42). This was the panorama of a balance of power that begun to predominate and to influence the formation of an international regime for the law of the sea.

Despite Latin America's economic and political weakness, a meeting carried out in Montevideo, on May 8 of 1970, by Argentina, Brazil, Chile, El Salvador, Equator, Nicaragua, Panama, Peru and Uruguay, represented by their diplomatic delegations, produced the Declaration of Montevideo. This document delineated basic principles for the law of the sea, amongst them, the sovereignty and exclusive jurisdiction on the adjacent sea to the coast, the continental shelf, and the subsoil within a limit of 200 miles. The Montevideo Conference

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figures as a cornerstone in the formation of the regime since a short time later, in Lima, the Montevideo Summit was joined by the delegations of Barbados, Bolivia, Colombia, Dominican Republic, Guatemala, Honduras, Jamaica, Mexico, Paraguay, Trinidad and Tobago and Venezuela. Firmed on eighth of August of 1970, the Declaration of Lima, that even though did not make the express mention to the two hundred miles, agreed that the States have the right to determine their limits of sovereignty based on their own geographic and geologic characteristics for rational use of resources. It should be pointed that the difficulty to build a more effective coalition due the participation of Bolivia and Paraguay, both States without a coast; was with no doubt an important aspect since this condition would be a decisive vector of posterior political dichotomies.

The coalitions shown in Montevideo represent an interesting strategy for international forum preparations and diplomatic negotiations of Latin American interests and that did not happen again with such great intensity in later negotiations. Although a great cohesion in the Latin block is perceptible, some conclude that "what prevailed were national interests and not solidarity" (CASTRO, 1989, 24), which would explain the reason why the same strategy was not used in other fields of joint interest. It should be added still that even though the idea of an international democracy while vote majority in worldwide Forums is not of all healthy, as majority is not equivalent to reasonability. It can be seen from the historical situation that a coalition strategy is a feasible instrument for the prevalence of interests of developing countries in an international context, especially considering the South Atlantic cooperation.

Within the concept that coastal States have the right to establish the width of their territorial sea up to twelve miles, however reserved the right of economic exclusiveness in a distance of up to two hundred miles, the greatest unanimity was accomplished through the Declaration of Santo Domingo in June of 1972. Composed by Barbados, Colombia, Costa Rica, El Salvador, Guatemala, Guyana, Haiti, Honduras, Jamaica, Mexico, Nicaragua, Panama, Dominican Republic, Trinidad and Tobago and Venezuela, the Declaration was signed during the III Conference for the Sea Law for precise limits for the exercise of sovereignty in the adjacent Continental Shelf. Concurrently, in 1973, the Organization of African Unity consolidated a position in relation to the 200 miles Exclusive Economic Zone, which did not occur by chance since the Afro-Asian Advisory Committee carried out in 1971 counted with the presence of observers from Argentina, Chile, Equator, and Peru that despite the regionalism had exerted political-strategic influence[11]. As Dupuy and Vignes summarize:

> "Ultimately as a result of the regional demands promoted by the Latin American and Afro-Asiatic nations, the 1982 Convention on the Law of the Sea would come to address regionalism from two perspectives" (1991, 53).

The preparatory movement for the III United Nations Conference for the Law of the Sea deserved attention of the United States of America. In February 14, 1975 the U.S. Treasury and the American Enterprise Institute promoted a Conference called 'The Law of the Sea: U.S. interests and alternatives' with the presence of several International Relation's scholars to discuss the subject that from the Latin American and African Declarations the matter was taking routes that would go against American interests. Of the conclusions of this Conference remain predictable statements such as "the task of Caracas may and to other sessions, at least officially defined, may be impossible" (AMACHER; SWEENEY, 1976, 133), what leads inexorably to the almost conclusive consideration that "(...) there are a number of other impediments to the conclusion of a satisfactory law of sea

[11] "It should be pointed out that very few African Countries participated in either of the two first UN Conferences on the Law of the Sea, since most of then still under colonial domination. In any case, with the accession to independence of the majority of African states in the early 1960s, which felt no veneration for the cannon-shot rule, the three-mile rule was doomed." (NJENGA, F. X. Exclusive Economic Zone and Africa, *apud* PONTECORVO, G., 1986, 129)

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treaty" (idem, ibidem). Of the reflections from the cited conference, a thought of concern is extracted with the way American interests (and of other countries with similar politics in relation to the matter) are being compromised from a balance of power that until then had not been inverted with so effective results.

The American strategy starts to be clear, given the economic interests in polimetalic nodules and the strategic-military dexterity in what refers to the right of passage, clearly expressed in the thought of one of the lecturers:

> "Indeed, if the provisions will be deep-seabed regime are too offensive to the developed nations in an era of resource scarcity, to their governments may simply ignore the treaty and encourage to their firms to go ahead with consortia arrangements providing for reciprocal recognitions of the mining claims of others. (...) No government would lightly risk the humiliation of having its challenges you straits transit resisted by the naval powers acting in concert." (idem, 129)

It is important to point out that a certain *tout court* pessimism about the American external politics during the Seventies and in 1979 and the two or three subsequent years. During this period the Americans and their allies watch consternated the sandinist revolution in Nicaragua, the falling of the Xa, the humiliation of the invasion of the U.S. Embassy in Tehran and the capture of hostages, the intervention of Soviet troops in Afghanistan as well as, in economic context, a cambial instability and an inflationary factor given to the military expenditures in Vietnam and the Oil shock in 1973-74. The factors above mentioned deserve attention when we consider that in the USA external politics agenda formularization not enough attention was given - or perhaps prioritize - the articulation of a more efficient bargain system in the negotiations that had preceded the III Conference for the Law of the Sea. Thus, they would establish an international regime in formation driven by high economic and military interests and that did not directly take care of its interests, as had occurred in other areas.

2.1. The third UN Conference on the Law of the Sea: law and politics in the formation of an international regime

The third United Nations Conference on the Law of the Sea consisted in "one of the longest, most complex and wide spreading processes of international negotiation of all times" (CASTRO, 1989, 35). Oran Young also mentions a slowness and difficulty of consensus in the process *in focus*:

> "In some cases, the process of reaching agreement is long and drawn out. It took eight years, for instance, to negotiate the 1982 United Nations Convention on the Law of the Sea, and ensuing problems prevented the convention from come into force until 1994." (YOUNG, O. 1994, 82)

The third Conference represented in a certain way the balance of negotiation of three distinct groups: the traditionalists represented by the United States of America, the Soviet Union, the United Kingdom and Japan; the zoonists represented by Latin and African countries and; finally, an also expressive group of geographically disfavored countries (in its majority Mediterranean States) or without the coast. This last group, even though a *tertio genus* in the discussions - as it lacked in fact in its attributions of the access to the proper substance to be treated – was expressive as it gathered fifty four countries - including the two Germanies, Bolivia, Zaire, Burundi and Singapore – lead by Austria.

The group of the zoonist countries occupied a central position in the process and the texts from the Saint Domingo Declaration and the Organization of the African Unit had served as a basis for the making of the Convention project. The text of the Convention merged a series of subjects directly related to the central subject of the territorial Sea and Exclusive Economic Zone as the question of the marine floors, fisheries, the environmental

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pollution, and navigation. To be highlighted in the negotiations was the establishment of an International Seabed Authority and of an International Tribunal for the Law of the Sea[12], this with headquarters in Hamburg, Germany, and that one in Kingston, Jamaica. The decisions of the Conference were conducted under the principle of the consensus and given the political multiplicity to which was subjected the corollary of the diplomatic negotiations; the number of informal negotiations, anonymous documents and non-papers was outstanding (CASTRO, 1989, 51.).

It remained of the diplomatic negotiations the establishment of a Territorial Sea of twelve miles and up to 200 miles of Exclusive Economic Zone being still arguable from a geomorphologic study of the Continental Shelf that the limit can be extended up to 350 miles. During the institutionalization of the regime, relevant aspects such as of the initiative of Kissinger, then U.S. Secretary of State, must be highlighted. It consisted of establishing a competing jurisdiction, or a parallel system between the Enterprise, which would be the official institution to survey the ocean floor and give concessions for the exploration and exploitation of seabed, then called 'Area'. The American strategy ended up concentrating in a certain attribution of imprecision to the concept of jurisdiction that can be found in the 'parallel system' and in the application of the terminology "common heritage of the mankind" to the Area. In this sense, the delegation of Brazil gave definitive contribution in so called then "the paradise of the interpretative complexities" as explained by Galindo (2006) to express the strategy of some countries. In the first paragraph of article 58, it did not remain clear if in the Exclusive Economic Zone, the law determined by the coastal country or the law for the High Seas would be followed. Brazil registered its interpretation in the sense that the disposals of the article would not authorize military maneuvers of other states in this zone, in particular, the ones that implied use of weapons and explosives. Interesting to observe and to conclude about this episode is that even after the normative elaboration of rules, the regime continues in frank expansion and institutionalization through the hermeneutic exercise of interpretation of the norms.

3. FINAL CONSIDERATIONS

A common project of regulation of international politics – as the international regime for the seas - ends not answering to circumstantial demands of a multiplicity of countries. The unicity of a normative body was in fact fundamental for the formation of the nation-state, which ended in the identification between state and norm, particularly by positivist theories. On the other hand, when thinking about answers to the formation of an international normative-regulating structure, unicity begins to be an inverse criterion. Teubner explicitly considers in a consistent form the necessity of a differentiated formulation of international legal body in his paper "Global Bukowina: Legal Pluralism in the World Society":

> "A worldwide unity of the law, however, would become threat to legal culture. For legal evolution, the problem will be how to make sure that a sufficient variety of legal sources exists in a global unified law. We may even anticipate conscious attempts to institutionalize legal variation – for example, at regional levels." (TEUBNER, 1997, 8)[13]

[12] The International Tribunal for the Law of the Sea-ITLOS had a provisory headquarters since 1996 but only acquired a permanent one in 2001. Germany spent 60 million Marks with the headquarters construction, which had five thousand square meters. The twenty-one judges of the ITLOS were nominated by the former UN General Secretary *Boutros Ghali.* Its task is to mediate conflicts relative to exploration, research, and maritime traffic. The judges meet normally twice a year in Hamburg. The only one with permanent residence is the President of the Tribunal.

[13] The text also contains other approaches such as: (i) the existence of international politic actors that overtake the frontier logic of State-Nations ("invisible social networks") and; (ii) the reasoning that the generalist legislating bodies will become less important with globalization and that the "global law" is produced in a self-organized process of structural coupling.

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The structuring process of an international regime has been matter of privileged reflection by political scientists since in this issue it is possible to find a model of wide range of relations and intense interactivity between law and international politics. The search for a democratic and equitable model of international regimes must consist of an ideal not attached to utopia and much less subject one to the answers offered for the realists, utilitarists and cognotivists.

The constructivist approach therefore, that although manages to enclose a considerable parcel of the phenomenology of the international relations, and with this does not consist in a theory or meta-theory, collaborates with (i) the analysis of the present subjects in the sense of the systematic treatment of the rules (ONUF, 1989, 78) that are no longer understood by this 'school' in terms of positivist norms but rather as a result from the legitimacy of several claims:

> "It might be identified with the possessive individual, the rational state, the national community, the scientific man, the consciousness of the proletariat, the fall of family, the feminine voice, the general will, imperatives of mankind, the west, structuralism's kantian, 'consciousness without a knowing subject', the universal pragmatics of Habermas's 'ideal speech situation'." (ONUF, 1989, 41)

Other perspective can be found in Slaughter that although does not agree with a lack of regulation carried out in multilateral forums (SLAUGHTER, 1997, 26) relates the interaction between norm making and exercise of power as an act of connivance, featured – according to Slaughter – by the managerialism.

> "Managerialism begins with the premise that states have a propensity to comply with their international commitments. This propensity stems from three factors. First, because international legal rules are largely endogenous, an assumption of rational behavior predicts that States have an interest in compliance with rules. Second, compliance is efficient from internal, decisional perspective. Once a complex bureaucracy is directed to comply, explicit calculation of costs and benefits for every decision is itself costly. The agreement may also create a domestic bureaucracy with a vested interest in compliance. Third, extend norms induce a sense of obligation in states to comply with legal understandings. This sense of obligation, managerialists argue, is empirically self – evident in state behavior, particularly in time and energy… that States devote to preparing, negotiating and monitoring treaty obligations." (SLAUGHTER, 2002, 5-6)

If the connivance with the international norms results of the exercise of power and therefore is not a *continuum* that implies in disobedience, on the other hand, the ability of law and of the international institutions to command the international politics is enormously limited. Consequently, asseverates the author, if the connivance is empirically demonstrable, theoretically understandable and managed deliberately then the motivation for the role of law and international institutions to conquer the global order is strong. While the understanding of *Onuf* is more in the direction of understanding the phenomena and of a new conceptual approach, Slaughter sees the prominence of the exercise of power a motivation for a greater institutional and legal proceeding. Onuf approaches the 'whole' proposing a systematic treatment and Slaughter deals with the relation between the parts, distinctly differentiating them.

Finally, the critics made by Oran Young and the proposal of an alternative model deserves the attention of foreign politics agents. The institutional bargain contraposing to the structural power, the possibility of transnational alliances, the presence of a

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multiplicity of actors, the prevalence of the ideas of consensus in contraposition to the majority vote and the notion of an integrative negotiation in contraposition to the distributive (YOUNG, 1994, 98ss) are feasible proposals. Precisely, a case study as the formation of a regime for the law of the sea indicates that the form of conduction of international politics can offer alternative ways of multilateral negotiations taken to end by the international community of nation-states.

4. REFERENCES

AMACHER, R. C.; SWEENEY, R. J. (org.). *The Law of the Sea: U.S. interests and alternatives*. Washington: American Enterprise Institute for Public Policy Research, 1976.

AMARAL JÚNIOR, A. O Modelo Hobbesiano e as Relações Internacionais. In: *Carta Internacional*, São Paulo, no. 112, 2002, pp. 7-10.

ARCHIBUGI, D. Models of International Organization in Perpetual Peace Project. In: *Review of International Studies*, vol. 18, 1992, pp. 295 - 317.

BULL, Hedley. *A Sociedade Anárquica.* Brasília: Editora Universidade de Brasília, Instituto de Pesquisa em Relações Internacionais; São Paulo: Imprensa Oficial do Estado de São Paulo, 2002.

CARR, E. *Vinte anos de Crise: 1919 - 1939. Uma Introdução ao Estudo das Relações Internacionais*. 2a. edição. Brasília: Editora Universidade de Brasília, Instituto de Pesquisa de Relações Internacionais; São Paulo: Imprensa Oficial do Estado de São Paulo, 2001.

CASTRO, L. A. de A. *O Brasil e o Novo Direito do Mar: Mar Territorial e Zona Econômica Exclusiva*. Brasília: Fundação Alexandre Gusmão, 1989.

DERVORT, Thomas R. Van. *International Law and Organization - an introduction.* California: Sage Publications, Inc., 1998.

DUNNE, Tim. *Inventing International Society: a history of the English Scholl*. London: Macmillan, 1989.

DUPUY, R.-J.; VIGNES, D. *A Handbook on the New Law of the Sea*. Vol. 1. Dordrecht: Martinus Nijhoff Publishers, 1991.

FONSECA JR., G.; BELLI, B. Política e Direito nas Relações Internacionais: A consolidação da justiça internacional. In: *Política Externa*, Brasília, Vol. 10, nr. 04, 2002, pp. 114-132.

GADDIS, John Lewis. *On Moral Equivalency and Cold War History.* Available at: https://www.jstor.org/stable/41415873?seq=1#page_scan_tab_contents. Acessed in 03/05/2018.

GALINDO, George Rodrigo Bandeira. 'Quem diz humanidade, pretende enganar?': internacionalistas e os usos da noção de patrimônio comum da humanidade aplicada aos fundos marinhos (1967-1994). *Tese apresentada ao Curso de Pós-Graduação em Relações Internacionais.* Brasília: Instituto de Relações Internacionais, Universidade de Brasília, 2006. pp. 342 ss.

GEORGE, Alexander L. *Case Studies and Theory Development*. Presented to the second Annual Symposium on Information Processing in Organizations, Carnegie-Mellon University, october, 15-16, 1982.

KANT, Immanuel. *À Paz Perpétua*. São Paulo: L&PM Editora, 1989.

KELSEN, Hans. *Derecho y Paz en las Relaciones Internacionales***.** Mexico: Fondo de Cultura Econômica, 1996.

KRASNER, S. Structural causes and regime consequences: regimes as intervening variables. In: *Internacional Organization*, no. 36, 2, 1982, pp.185-207.

LEITE, N. A. *O Atlântico Sul e os interesses brasileiros*. Rio de Janeiro. Monografia para obtenção de diploma do Curso de Altos Estudos de Política e Estratégia. Escola Superior de Guerra, 1999.

MACHIAVELLI, Niccolò di Bernardo dei. *O Príncipe.* Porto Alegre: L&PM, 2001.

MARTINS, Estevão de Rezende. Ética e Relações

ISSN 2357-7975

Internacionais. In: *Revista Brasileira de Política Internacional*. Brasília: Instituto Brasileiro de Relações Internacionais. Ano 44, nr. 2, 2001, pp. 5-25.

MORGENTHAU, Hans J. The Moral Blindness of Scientific Man. In: JERVIS, Robert ; ART, Robert C. (org.). *Internacional Politics: Enduring Concepts and Contemporary Issues.* 4a ed., 1996.

ONUF, Nicolas Greenwood. *World of our Making: Rules and Rule in Social Theory and Internacional Relations*. Columbia: University of South Carolina Press, 1989.

PONTECORVO, G. (org.). 1986*. The New Order of the Oceans: The advent of a Managed Environment*. New York: Columbia University Press, 1986.

ROSENAU, James N. *The Scientific Study of Foreign Policy.* London: The Free Press, 1971.

SLAUGHTER, Anne-Marie. A Verdadeira Nova Ordem Mundial. Foreign Affairs - Edição Brasileira. *Gazeta Mercantil*. 12 de setembro de 1997, p. 25.

SLAUGHTER, Anne-Marie; RAUSTIALA, Kal. Internacional Law, Internacional Relations and compliance. In: CARLNAES, Walter; RISSE, Thomas; SIMMONS, Beth (eds.). *Handbook of Internacional Relations*, Sage Publications Ltd., 2002. Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=347260. Accessed in 03/05/2018.

SLAUGHTER, A.-M.; TULUMELLO, A.; WOOD, S. International Law and International Relations Theory: A New Generation of Interdisciplinary Scholarship. In: *American Journal of International Law*, vol. 92, 1998, pp. 367 - 397.

TEUBNER, G. (org.). Global Bukowina: Legal pluralism in the world society. In: TEUBNER, G..(org.). *Global Law without a State*. Darmouth Publishing Co. Ltd. Aldershot, 1997. pp. 3-28.

TUCÍDIDES. *História da Guerra do Peloponeso*. 3a. edição. Brasília: Editora da Unb, 1999.

YOUNG, Oran. *International Governance*. Ithaca: Cornell University Press, 1983

ISSN 2357-7975