The Interaction between International and Domestic Legal Orders: Framing the Debate according to the Post-Modern Condition of International Law

By Arthur Roberto Capella Giannattasio[*]

Abstract

The interaction between international and domestic legal systems underwent a deep structural change. By means of a literature review concerned with a critical approach of International Law, this Article presents three perspectives: Modern, Imperial Post-Modern, and Deconstructive Post-Modern. Traditional international law scholarship emphasizes the first and the second trends, while this Article presents the third. While the first frames these interactions on the monism-dualism debate, the second establishes an international law prevailing unconditionally over domestic law, international human rights. The third criticizes whether it is still proper to search for an *a priori* solution for this interaction. By rejecting global governance and the truly common law as alternatives to imperial post-modern international law, this Article emphasizes that legal analysis should identify, stimulate and reinforce the *a posteriori* customary normative spontaneity of multitude. This Article argues that a serious post-modern international law should be guided by a radical political drive of law, foster a deconstructive interaction of different—spatial, temporal or thematic—representations of law and reject traditional hierarchical solutions and any kind of previous, single and exclusive—national or international—authority between any legal order.

[*] Full-time Professor of Law - Mackenzie University (São Paulo, Brazil). PhD in International Law - University of São Paulo (São Paulo, Brazil).

A. Introduction

This Article discusses the interaction between international law and domestic law according to concurrent trends of international legal frameworks. Following an interdisciplinary approach of law—law and epistemology, law and politics—it argues that international law today is characterized by a post-modern condition which surmounted the classical solution—monism versus dualism—for the interaction between international law and domestic law, the main post-modern trend which deals with such an interaction—imperial international law—diverts international law from its role of being a legal toolbox for non-armed relations between different peoples and legal traditions, and, for this reason, a different path should be paved within a non *a priori* normative hierarchy and based on customary roots rather than rational pillars.

In this sense, this Article establishes a cross-disciplinary dialogue between international law and epistemology, and international law and political philosophy in order to discuss the limits and possibilities of contemporary legal structure of international relations. Although some recent and concrete examples are mentioned in this Article—such as the right to protect (RTP), international *quasi*-judicial and judicial bodies on human rights and the Tunisian proposal of an International Constitutional Court (ICoC)—this Article is based mainly on literature reviews.

In order to distinguish, epistemologically, a modern international law from a post-modern international law, this Article resorts to the diagnosis of the rise of a post-modern condition[1] and, at the same time, international legal scholarship that adapted this post-modern discourse.[2] The relation between international law and politics in this Article is established

[1] *See, e.g.*, PERRY ANDERSON, AS ORIGENS DA PÓS-MODERNIDADE (1999); ZYGMUNT BAUMAN, O MAL ESTAR DA PÓS-MODERNIDADE (1998); Andreas Huyssen, *Mapeando o Pós-Moderno*, *in* 15 PÓS-MODERNISMO E POLÍTICA (H. Hollanda ed., 1991); FEDERIC JAMESON, A CULTURA DO DINHEIRO—ENSAIOS SOBRE A GLOBALIZAÇÃO (2001); FREDERIC JAMESON, *Pós-Modernidade e Sociedade de Consumo*, *in* 12 NOVOS ESTUDOS CEBRAP 16 (1985); JEAN FRANCOIS LYOTARD, LA CONDITION POSTMODERNE (1979); JEAN FRANCOIS LYOTARD, O PÓS-MODERNO EXPLICADO ÀS CRIANÇAS (1999); Boaventura de Sousa Santos, *Um Discurso sobre as Ciências na Transição para uma Ciência Pós-Moderna*, *in* 2 ESTUDOS AVANÇADOS 46 (1988); BOAVENTURA DE SOUSA SANTOS, PELA MÃO DE ALICE–O SOCIAL E O POLÍTICO NA PÓS-MODERNIDADE (1997).

[2] *See, e.g.*, EDUARDO CARLOS BIANCA BITTAR, O DIREITO NA PÓS-MODERNIDADE (2005); EDUARDO CARLOS BIANCA BITTAR & GUILHERME ASSIS DE ALMEIDA, CURSO DE FILOSOFIA DO DIREITO (2006); PAOLO BORBA CASELLA, ABZ-ENSAIOS DIDÁTICOS (2009); Paolo Borba Casella, *Direito Internacional e Dignidade Humana*, *in* DIREITO INTERNACIONAL: HOMENAGEM A ADHERBAL MEIRA MATTOS 223 (Paolo Borba Casella & A. Ramos eds., 2009); PAOLO BORBA CASELLA, FUNDAMENTOS DO DIREITO INTERNACIONAL PÓS-MODERNO (2008); PAOLO BORBA CASELLA, LIVRO DOS ANCESTRAIS IMAGINADOS E OUTROS ENSAIOS PÓS-MODERNOS (2007); Andrew Clapham, *The Role of the Individual in International Law*, 21 EUR. J. INT'L L. 25 (2010); MIREILLE DELMAS-MARTY, POR UM DIREITO COMUM (2004); JOSE EDUARDO FARIA, O DIREITO NA ECONOMIA GLOBALIZADA (2004); Andreas Fischer-Lescano and Gunther Teubner, *Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law*, 25 MICH. J. INT'L L. 999 (2004); Fransesco Francioni, *International Human Rights in an Environmental Horizon*, 21 EURO. J. INT'L L. 41 (2010); Giorgio Gaja, *The Position of Individuals in International Law: An ILC Perspective*, 21 EURO. J. INT'L L. 11 (2010); Arthur Roberto Capella Giannattasio, *O Direito Internacional entre Dois Pós-Modernismos:*

according to the traditional narrative within political philosophy on the triple foundation of law—will, reason, or custom[3]—and extracts its main argument from political literature which emphasizes the positive aspects of rooting the foundation of law in immanent customary processes.[4]

A Ressignificação das Relações entre Direito Internacional e Direito Interno, 6 REVISTA ELETRÔNICA DE DIREITO INTERNACIONAL 42 (2010); ARTHUR ROBERTO CAPELLA GIANNATTASIO, DIREITO INTERNACIONAL PÚBLICO CONTEMPORÂNEO—FUNDAÇÕES POLÍTICAS: VONTADE, RAZÃO E COSTUME (2015); MICHAEL HARDT & ANTONIO NEGRI, EMPIRE (2000); Erik Jayme, *Direito International Privado e Cultura Pós-Moderna*, I CADERNOS DO PROGRAMA DE PÓS-GRADUAÇÃO EM DIREITO—PPGDIR/UFRGS 105 (2003); Erik Jayme, *Le Droit International Privé du Nouveau Millénaire: La Protection de la Personne Humaine face à la Globalisation*, 282 RECUEIL DES COURS DE L'ACADEMIE DE DROIT INTERNATIONAL 9 (2000); Erik Jayme, *Identité Culturelle et Intégration: Le Droit International Privé Postmoderne*, 251 RECUEIL DES COURS DE L'ACADEMIE DE DROIT INTERNATIONAL 9 (1995); Erik Jayme, *Visões para uma Teoria Pós-Moderna do Direito Comparado*, I CADERNOS DO PROGRAMA DE PÓS-GRADUAÇÃO EM DIREITO—PPGDIR/UFRGS 115 (2003); Catherine Kessedjian, *Codification du Droit Commercial International et Droit International Privé*, 300 RECUEIL DES COURS DE L'ACADEMIE DE DROIT INTERNATIONAL 79 (2002); Poul F. Kjaer, *Embeddedness through Networks: A Critical Appraisal of the Network Concept in the Oeuvre of Karl-Heinz Ladeur*, 10 GERMAN L.J. 483 (2009); Martti Koskenniemi, *The Fate of International Law: Between Technique and Politics*, 70 MOD. L. REV. 1 (2007); Karl-Heinz Ladeur, *European Law as Transnational Law—Europe Has to Be Conceived as an Heterarchical Network and Not as a Superstate!*, 10 GERMAN L.J. 1357 (2009); FLAVIA PIOVESAN, DIREITOS HUMANOS E JUSTIÇA INTERNACIONAL (2007); FLAVIA PIOVESAN, TEMAS DE DIREITOS HUMANOS (2003); GUNTHER TEUBNER, GLOBAL LAW WITHOUT A STATE (2006); Lars Viellechner, *The Network of Networks: Karl-Heinz Ladeur's Theory of Law and Globalization*, 10 GERMAN L.J. 515 (2009); Christian Tomuschat, *Human Rights and International Humanitarian Law*, 21 EURO. J. INT'L L. 15 (2010); ANTONIO AUGUSTO CANCADO TRINDADE, O DIREITO INTERNACIONAL EM UM MUNDO EM TRANSFORMAÇÃO (2002); Antonio Augusto Cin□adoTrindade, *International Law for Humankind: Towards a New Ius Gentium*, 317 RECUEIL DES COURS DE L'ACADEMIE DE DROIT INTERNATIONAL 9 (2005).

[3] *See, e.g.*, Ruy de Albuquerque, *Direito de Juristas—Direito de Estado*, 42 REVISTA DA FACULDADE DE DIREITO DA UNIVERSIDADE DE LISBOA 751 (2001); TOMAS DE AQUINO, SUMA TEOLÓGICA (1980); Arthur Roberto Capella Giannattasio, *Direito Internacional Público*, *supra* note 2; Arthur Roberto Capella Giannattasio, *A Opinio Iuris Sive Necessitatis: Do Elemento Subjetivo Consuetudinário à Intersubjetividade Jurídica*, *in* 575 DIREITO INTERNACIONAL: HOMENAGEM A ADHERBAL MEIRA MATTOS (Paolo Borba Casella & A. Ramos eds., 2009); Arthur Roberto Capella Giannattasio, *Permanência do Teológico-Político? Uma Análise do Pensamento Político do Materialismo Ateu de Holbach a partir de Claude Lefort*, 29 CADERNOS ESPINOSANOS 88 (2013); MICHEL DE MONTAIGNE, ENSAIOS (1972); Alain Pellet, *The Normative Dilemma: Will and Consent in International Law-Making*, 12 AUSTRALIAN Y.B. INT'L L. 22 (1988); Prosper Weil, *Towards Relative Normativity in International Law?*, 77 AM. J. INT'L L. 413 (1983).

[4] *See, e.g.*, Sérgio Cardoso, *Do Desejo à Vontade—A Constituição da Sociedade Política em Rousseau*, 6 DISCURSO 35 (1975); Sérgio Cardoso, *Villey e Starobinski: Duas Interpretações Exemplares sobre a Gênese dos Ensaios*, 33 KRITERION 9 (1992); Arthur Roberto Capella Giannattasio, *Direito Internacional Público*, *supra* note 2; Arthur Roberto Capella Giannattasio, *International Human Rights: A Dystopian Utopia*, 100 ARCHIV FÜR RECHTS—UND SOZIALPHILOSOPHIE 514 (2014); Arthur Roberto Capella Giannattasio, *Permanência, supra* note 3; Hardt & Negri, *supra* note 2; Georges Hubrecht, *Montaigne, Juriste*, *in* 239 IV[E] CENTENAIRE DE LA NAISSANCE DE MONTAIGNE 1533–1933 (Ville de Bordeaux ed., 1969); Etienne de la Boétie, *Discurso da Servidão Voluntária ou O Contra Um*, *in* DISCURSO DA SERVIDÃO VOLUNTÁRIA 11 (P. Clastres, Claude Lefort & M. Chauí eds., 1987); Laumonier, *Pensée de Montaigne*, *in* 163 IV CENTENAIRE DE LA NAISSANCE DE MONTAIGNE 1533–1933 (Ville de Bordeaux ed., 1969); Claude Lefort, *L'Europe: Civilisation Urbaine*, *in* LE TEMPS PRÉSENT 1001 (Claude Lefort ed., 2007); Claude Lefort, *Droit International, Droits de l'Homme et Politique'*, *in* LE TEMPS PRÉSENT 1019 (Claude Lefort ed., 2007); Claude Lefort, *O Nome de Um*, *in* DISCURSO DA SERVIDÃO VOLUNTÁRIA 125 (P. Clastres, Claude Lefort & M. Chauí eds., 1987); Claude Lefort, *Permanência do Teológico-Político?*, *in* PENSANDO O POLÍTICO–ENSAIOS SOBRE DEMOCRACIA, REVOLUÇÃO E LIBERDADE 133 (C. Lefort ed., 1991); MAURICE MERLEAU-PONTY, CONVERSAS—1948 (2004); MAURICE MERLEAU-PONTY, SENS ET NON-SENS (1996); M. MERLEAU-PONTY, SIGNES (1960); Montaigne, *supra* note 3; Jerome B. SCHNEEWIND, MONTAIGNE ON MORAL PHILOSOPHY

For this reason, this Article is divided in four parts. The first part discusses modern international law and its foundation on will, state's will, and presents general aspects of the monism-dualism approach of the interaction of international law and domestic law. The second part covers imperial post-modern international law and criticizes its peculiar solution of hypostasizing international law due to a rational foundation of an international human rights order. The third part presents the main alternatives to imperial post-modern international law—global governance and truly common law—and criticizes both based on the same arguments directed to imperial post-modern international law—rational foundation and previous hierarchy. The fourth part outlines a deconstructive post-modern international law based on custom and claims that this international legal order is closer to self-determination, as it hinders a possible institutional design which could favor an everlasting and unquestionable foundation of law, and neglects a previous and stable hierarchical preference for any legal order—either domestic law, or international law.

This Article argues that deconstructive post-modern international law extracts its normative force precisely from an internal and immanent movement of keeping a vacuum within. That is, of refusing any permanent *a priori* hierarchical relation between any legal orders. Its weakness is the basis of its own political virtue—being close to normative spontaneity.

B. Searching for Hierarchy in Modern International Law: Inside, Outside, and State's Will

I. Elements of Modern International Law

The traditional narrative in international legal scholarship argues that modern international law based on state's will was established after the Peace of Westphalia in 1648.[5] Although

AND THE GOOD LIFE, *in* THE CAMBRIDGE COMPANION TO MONTAIGNE 207 (U. Langer ed., 2005); Raquel de Almeida Prado Jr., *Metamorfoses do Enunciado de Ficção (Nota sobre a Assinatura da Nouvelle Héloise)*, 5 ALMANAQUE—CADERNOS DE LITERATURA 38 (1977); ANDRE TOURNON, MONTAIGNE (2004); André Tournon, *Justice and the Law: On the Reverse Side of the Essays*, *in* THE CAMBRIDGE COMPANION TO MONTAIGNE 96 (Langer ed., 2005); Ziccardi, *Consuetudine (Diritto Internazionale)*, 9 ENCICLOPEDIA DEL DIRITTO (1961).

[5] *See, e.g.*, HILDEBRANDO ACCIOLY, GERARDO E. DO NASCIMIENTO E SILVA & PAOLO BORBA CASELLA, MANUAL DE DIREITO INTERNACIONAL PÚBLICO (2010); Ove Bring, *The Westphalian Peace Tradition in International Law: From jus ad bellum to jus contra bellum*, *in* ESSAYS IN HONOUR OF PROFESSOR L.C. GREEN, U.S. NAVAL WAR COLLEGE INTERNATIONAL LAW STUDIES 57 (M. Schmitt ed., 2000); Paolo Borba Casella, *Fundamentos e Perspectivas do Direito Internacional Pós-Moderno,* 101 REVISTA DA FACULDADE DE DIREITO DA UNIVERSIDADE DE SÃO PAULO 433 (2006); JOSE EDUARDO FARIA, O DIREITO NA ECONOMIA GLOBALIZADA (2004); LUIGI FERRAJOLI, A SOBERANIA NO MUNDO MODERNO (2007); Leo Gross, *The Peace of Westphalia, 1648-1948*, 42 AM. J.INT'L L. 20 (1948); Amos Shartle Hershey, *History of International Law Since the Peace of Westphalia*, 6 AM. J.INT'L L. 30 (1912); HENRY WHEATON AND COLEMAN PHILLIPSON, ELEMENTS OF INTERNATIONAL LAW (1916).

there is currently a strong criticism to this perspective,[6] this belief is the ground of a progress narrative in international law.[7] This still frames the table of categories of traditional international law studies and enables understanding of the interaction between domestic law and international law according to the binomial monism-dualism paradigm.

Will is regarded as the essence and the foundation of law, a monadic criteria which is founded in *voluntas*—an internal arrangement which is regarded as law due to the belief in the sovereign authority of the Prince, individual will, or of the people, general will. Law is regarded here as a contract, that is, as the outcome of a negotiation process between self-interested and self-determined parties. In this sense, international law is regarded as being forged according to states' desires—an explicit or implicit consent between the multilateral will of states.[8]

The establishment of will as the foundation of international law played an important role in international relations within a legal and political modern narrative environment.[9] State's will, Prince or people, would limit the range of legal orders within a self-determined single territory. It was not only a sign of independence against other states, but mainly against the Medieval political Augustinism.[10] In other words, it was also a breach concerning the imperial political and legal order sustained by the Papacy and the Holy Roman Empire. States

---

[6] *See, e.g.,* Stephane Beaulac, *The Westphalian Model in Defining International Law: Challenging the Myth*, 8 AUSTRALIAN J. LEGAL HIST. 181 (2004); PAOLO BORBA CASELLA, DIREITO INTERNACIONAL NO TEMPO MEDIEVAL E MODERNO ATÉ VITÓRIA (2012); Turan Kayaoglu, *Westphalian Eurocentrism in International Relations Theory*, 12 INT'L STUD. REV. 193 (2010); Randall Lesaffer, *The Westphalia Peace Treaties and the Development of the Tradition of Great European Peace Settlements prior to 1648*, 18 GROTIANA 71 (1997); Andreas Osiander, *Sovereignty, International Relations, and the Westphalian Myth*, 55 INT'L ORG. 251 (2001); BENNO TESCHKE, THE MYTH OF 1648: CLASS, GEOPOLITICS, AND THE MAKING IF MODERN INTERNATIONAL RELATIONS (2003).

[7] *See, e.g.*, Tilmann Altwicker & Oliver Diggelmann, *How is Progress Constructed in International Legal Scholarship?*, 25 EURO. J. INT'L L. 425 (2014); THOMAS SKOUTERIS, THE NOTION OF PROGRESS IN INTERNATIONAL LAW DISCOURSE (2010); Thomas Skouteris, *The Vocabulary of Progress in Interwar International Law: An Intellectual Portrait of Stelios Seferiades*, 16 EURO. J. INT'L L. 823 (2005); Nicholas Tsagourias, *Nicolas Politis' Initiatives to Outlaw War and Define Aggression, and the Narrative of Progress in International Law*, 23 EURO. J. INT'L L. 255 (2012).

[8] *See, e.g.*, Albuquerque, *supra* note 3; D. ANZILOTTI, CORSO DI DIRITTO INTERNAZIONALE (1923); Bring, *supra* note 5; WOLFGANG FRIEDMANN, THE CHANGING STRUCTURE OF INTERNATIONAL LAW (1964); Giannattasio, *Direito Internacional Público*, *supra* note 2; Geraldo Miniuci, *O Direito Internacional, O Projeto de Integração Europeia e a Crise na Zona do Euro: E Agora?*, 374 REVISTA JURÍDICA CONSULEX 34 (2012); EMER DE VATTEL, LES DROITS DES GENS (1758); Wheaton & Phillipson, *supra* note 5.

[9] *See* QUENTIN SKINNER, AS FUNDAÇÕES DO PENSAMENTO POLÍTICO MODERNO (2003).

[10] *See, e.g.*, HENRI-XAVIER ARQUILLIERE, L'AUGUSTINISME POLITIQUE—ESSAI SUR LA FORMATION DES THEORIES POLITIQUES DU MOYEN ÂGE (1955); William D. McCready, *Papal Plenitudo Potestatis and the Source of Temporal Authority in Late Medieval Papal Hierocratic Theory*, 48 SPECULUM 654 (1973).

were sovereign, that is, there should be no superior political or legal power over a state than the state's own political and legal power.[11]

Thus, being sovereign meant to have its own will, but not only that. It also meant to have its own capability to create and sustain a legal, political, social, and economic order within a territory freed from any intervention from outside—other states, the Papacy, the Holy Roman Empire.[12] Thus, international law was conceived as a legal toolbox to establish an institutional design for non-armed relations among peoples. These relations would be kept as non-armed as long as they respected the legal rules forged according to the will of states.[13] International law was a law of freedom, as its institutions were arranged to maintain a power vacuum in international relations smoothly filled by agreements based on a *pacta sunt servanda* principle.[14]

To what extent would this independence be sustained? Would there be any limit? It is precisely within this context and in accordance with the double purpose of keeping the vacuum and dealing with it, that the binomial monism-dualism tried to guide the interaction of international law and domestic law.

II. The Monism-Dualism Approach

The dualism presents the idea that there are no conflicts at all between both legal orders, as they are distinct legal systems that do not overlap. International law dealt with inter-state relations—multilateral will of states—and domestic law with intra-state matters—unilateral state's will. The monism conceives that international law and domestic law are one single legal order and, for that, antinomies would possibly derive from the clash of their rules. For some authors, monism required that international legal order should overrule domestic

[11] *See, e.g.*, PHILIP BOBBITT, THE SHIELD OF ACHILLES (2003); Bring, *supra* note 5; HEDLEY BULL, THE ANARCHICAL SOCIETY (1977); Ferrajoli, *supra* note 5; Friedmann, *supra* note 8; Miniuci, *supra* note 8; Mark W. Zacher, *The Territorial Integrity Norm: International Boundaries and the Use of Force*, 55 INT'L ORG. 215 (2001).

[12] *See, e.g.*, HANS BARON, THE CRISIS OF THE EARLY ITALIAN RENAISSANCE: CIVIC HUMANISM AND REPUBLICAN LIBERTY IN AN AGE OF CLASSICISM AND TYRANNY (1966); JUAN ANTONIO CARRILLO-SALCEDO, EL DERECHO INTERNACIONAL EN UN MUNDO EN CAMBIO (1985); N. MAQUIAVEL, COMENTÁRIOS SOBRE A PRIMEIRA DÉCADA DE TITO LÍVIO (2008); Nicolau Maquiavel, *Discurso sobre as Formas de Governo de Florença após a Morte do Jovem Lorenzo de Medici*, *in* MAQUIAVEL: DIÁLOGO SOBRE NOSSA LÍNGUA E DISCURSO SOBRE AS FORMAS DE GOVERNO DE FLORENÇA (H. Adverse ed., 2010); NICOLAU MAQUIAVEL, O PRÍNCIPE (2004).

[13] *See, e.g.*, HANS KELSEN, A PAZ PELO DIREITO (2011); HANS KELSEN, TEORIA GERAL DO DIREITO E DO ESTADO (2005); HANS KELSEN, TEORIA PURA DO DIREITO (2000).

[14] *See* Arthur Roberto Capella Giannattasio, *A Juridificação de Conflitos Políticos no Direito Internacional Público Contemporâneo: Uma Leitura da Paz pelo Direito de Hans Kelsen a partir do Pensamento Político de Claude Lefort*, 12 REVISTA DE DIREITO INTERNACIONAL 57 (2015).

legal order, whereas for other authors domestic norms should prevail over international ones. An intermediate position in monism states that a temporal set of criteria should be applied to solve such problems—the later time rule.[15]

The existence of two separate legal orders in dualism mirrored precisely the idea of an inside independence from outside—a distinction which arose from the limits of the territorial reach of a state's will. Monism was the perfect environment for the theoretical and practical struggles trying to modulate that independence from outside without completely disregarding the freedom recognized by modern international law.

The search for a single and stable solution for such a problem in international law derives from the influence of the modern discourse.[16] Indeed, this particular narrative is characterized by always looking for a fixed *a priori* hierarchy to solve social and scientific conflicts. Previous criteria should be clearly defined, recognized, and disclosed to lead to predictable and stable solutions. Modern discourse could be understood as a permanent search for certainty and security in social and scientific fields through publicly renowned and shared common criteria.[17]

Thus, the search for a unique and stable hierarchical criteria to deal in a predictable way with the interaction between international law and domestic law characterizes the modern condition of international law. If there was a division between inside and outside orders to legally ensure an international freedom for states' will, monism or dualism approaches are expressions of a modern drive looking for precise and secure limits for or against this freedom of domestic law regarding international law.

In this sense, a hierarchy between those orders should be previously defined by the modern international law narrative. This condition would enable predictable international relations: Either there is no conflict at all—dualism—or there is conflict—monism. If there is no conflict, it is due to an *a priori* preference given to the clear distinction between inside and outside orders. If there is conflict, either unilateral state's will—sovereignty—domestic law, or multilateral *pacta sunt servanda* (will of states) should prevail—international law. In the last case, hierarchy is previously assigned to only one legal order—domestic and unilateral will or international and multilateral will—while in the first case hierarchy is previously

---

[15] *See, e.g.*, Accioly, Nascimento e Silva & Casella, *supra* note 5; Paolo Borba Casella, *Protocolo de Madri sobre Registro Internacional de Marcas e sua Aplicação no Brasil*, 82 REVISTA DO TRIBUNAL REGIONAL FEDERAL DA TERCEIRA REGIÃO 1 (2007); Kelsen, *Teoria Geral*, *supra* note 13; Kelsen, *Teoria Pura, supra* note 13.

[16] *See* Skinner, *supra* note 9.

[17] *See, e.g.*, Bauman, *supra* note 1; Bittar, *supra* note 2; ALFREDO BOSI, DIALÉTICA DA COLONIZAÇÃO (2006); Hardt & Negri, *supra* note 2; Jameson, *A Cultura*, *supra* note 1; Jameson, *Pós-Modernidade*, *supra* note 1; Lyotard, *La Condition*, *supra* note 1; Lyotard, *O Pós-Moderno*, *supra* note 1; Merleau-Ponty, *Conversas supra* note 4; Santos, *Um Discurso*, *supra* note 1.

assigned to a broader outcome of state's will—the general will of preserving the circle of freedom of states via a stable division between inside and outside orders.

C. Establishing a Hierarchy in Post-Modern International Law: The One-side Imperial International Human Rights

I. Elements of the Imperial Post-Modern International Law

The rational foundation of law establishes reason as the touchstone of any legal order. Law is regarded here as a status, as its legal authority is extracted from some immutable rational criteria which creates a safe, absolute, universal and unconditionally valid order.[18] This perspective is based on the assumption that, as reason is the best criteria to define the conditions of possibility for a secure knowledge—pure reason—it should also ground a secure and fair legal order—practical reason.[19]

After World War II a new international law discourse flourished, namely, a discourse which gave international law the purpose and the duty of ensuring the survival of mankind. This international human rights narrative is based on rational axiological exigencies which frames in a new fashion the solution to the problem of the interaction between international and national legal orders.[20]

According to this idea, in order to enable a global respect to human rights, practical reason established an imperative that international law should always prevail worldwide over any dissenting domestic law—that is, a national legal order which might lead to human rights violations. A rational imperative justifies an unconditional and universal validity of this

---

[18] Albuquerque, *supra* note 3; Noberto Bobbio, *Consuetudine (Teoria Generale)*, 9 ENCICLOPEDIA DEL DIRITTO (1961); Giannattasio, *Direito Internacional Público*, *supra* note 2.

[19] *See* JURGEN HABERMAS, AGIR COMUNICATIVO E RAZÃO DESTRANSCENDENTALIZADA (2002); Jurgen Habermas, *Arquitetura Moderna e Pós-Moderna*, 18 NOVOS ESTUDOS CEBRAP 115 (1987); JURGEN HABERMAS, O DISCURSO FILOSÓFICO DA MODERNIDADE (2002); JURGEN HABERMAS, A ÉTICA DA DISCUSSÃO E A QUESTÃO DA VERDADE (2004); JURGEN HABERMAS, A INCLUSÃO DO OUTRO – ESTUDOS DE TEORIA POLÍTICA (2004); Jurgen Habermas, *Modernidade–Um Projeto Inacabado, in* 99 UM PONTO CEGO NO PROJETO MODERNO DE JÜRGEN HABERMAS (O. Arantes & P. Arantes eds., 1992); IMMANUEL KANT, CRÍTICA DA RAZÃO PURA (2012); Lyotard, *La Condition*, *supra* note 1.

[20] *See* Bittar & Almeida, *supra* note 2; Casella, *Direito Internacional*, *supra* note 2; Casella, *Fundamentos*, *supra* note 2; Giannattasio, *O Direito Internacional*, *supra* note 2; Giannattasio, *Direito Internacional Público*, *supra* note 2; Giannattasio, *supra* note 4; CELSO LAFER, A RECONSTRUÇÃO DOS DIREITOS HUMANOS (1991); Piovesan, *Direitos Humanos*, *supra* note 2; Piovesan, *Temas*, *supra* note 2; Trindade, *O Direito Internacional*, *supra* note 2; Trindade, *International Law*, *supra* note 2.

international legal order in spite of any state will—unilateral or multilateral.[21] Rather, this international legal order would prevail even against it (*jus cogens*).[22]

This post-modern international law is also named as an imperial international order, as it pushes to a progressive adherence of every other national legal order to the unifying international discourse of democracy and human rights. As the last utopia for the survival of mankind, no national legal order or institutional design should stand if there is a disregard of international rule of law based on the above mentioned teleological reason.[23]

The global presence of this international legal order in national orders can be clearly noticed nowadays, as almost no state in the world is immune to a possible legal and legitimate intervention of an empire via armed interventions, force of violence, or through *quasi*-judicial and judicial bodies—normative force.

As a new legal ground for a just war, RTP holds a strong potential to suffice as a legal argument to authorize armed interventions in one state or region in the name of democracy and human rights: Afghanistan, Boko Haram, Congo, Crimea, Iraq, ISIS, and former Yugoslavia. Based on Articles 39, 41, 42 and 51 of the UN Charter in 1945 or on Article I of the UN Convention on the Prevention and Punishment of the Crime of Genocide in 1948, some states and international organizations have consecutively understood that they have the right to protect worldwide, via the use of force, human rights and democracy in regions in which they are being violated.[24]

This imperial international order does not operate only through the use of force. There are other legal institutions that are the basis of a subtler international surveillance and punishment logic of national legal systems. There are some notorious *quasi*-judicial bodies—such as the UN Human Rights Council, the former European Commission on Human Rights, and the Inter-American Commission on Human Rights—and judicial bodies—such as the International Criminal Court, the European Court on Human Rights, and the Inter-American Court of Human Rights—which are responsible for building a gentle discipline of national

---

[21] *See* Clapham, *supra* note 2; Francioni, *supra* note 2; Gaja, *supra* note 2; Jayme, *Direito International*, *supra* note 2; Jayme, *Le Droit*, *supra* note 2; Jayme, *Identité*, *supra* note 2; Jayme, *Visões*, *supra* note 2; Kessedjian, *supra* note 2; Tomuschat, *supra* note 2.

[22] *See* Pellet, *supra* note 3; João Grandino Rodas, *Jus Cogens*, 69 REVISTA DA FACULDADE DE DIREITO DA UNIVERSIDADE DE SÃO PAULO 125 (1974); Weil, *supra* note 3.

[23] *See* Hardt & Negri, *supra* note 2; SAMUEL MOYN, THE LAST UTOPIA, CAMBRIDGE (2010).

[24] *See* Hardt & Negri, *supra* note 2.

legal orders through the symbolic normative force of international law and its non-violent discourse.[25]

Following the same project of a gentle fertilization of domestic law through the non-violent normative force of international law, it is also worth mentioning the recent Tunisian proposal of an International Constitutional Court (ICoC). After the end of the so-called Arab Spring, former Tunisian President Mohamed Marzouki presented the idea before the UN General Assembly in 2012, 2013, and 2014. Its proposal is currently being debated by several legal scholars from different academic environments.[26]

Although ICoC's statute is still under discussion before being presented to the UN International Law Commission, the core idea of this project is to establish an international court competent to judge the constitutions and political regimes of any state in the world based on international rules of democracy and human rights. This would be just another international legal mechanism directed to control state's will and to drive national self-determination, inside, processes according to a homogenous international rule of Law, outside.

II. Criticism on the Imperial Post-Modern International Law

Although this trend does not advocate explicitly a homogenous legal regulation worldwide, domestic law would only be accepted as legitimate by international system if in close connection with a specific international rule of law—democracy and human rights. Therefore, there is a clear hierarchy in this trend, as international law would always prevail over any domestic law. Though not the same order, every domestic law would progressively be fertilized by international law.

Due to a foreseeably intense dialogue between inside and outside orders, characterized by a unilateral prevalence of outside over inside, some authors argue that this new world order

---

[25] *See, e.g.*, Hardt & Negri, *supra* note 2; Piovesan, *Direitos*, *supra* note 2; Piovesan, *Temas*, *supra* note 2; Trindade, *O Direito Internacional*, *supra* note 2; Trindade, *International Law*, *supra* note 2.

[26] *See, e.g.*, Sergio Ricardo Fernandes de Aquino & Machado Ribeiro, *Fundamentos para a Viabilidade do Tribunal Constitucional Internacional*, 24 INT'L STUD. L. EDUC. 7 (2016); Melo Bandeira, *Tribunal Constitucional Internacional—Auto de Ciência*, 41 NOTANDUM 7 (2016); Michele Carducci, *Tre Sfide per una Proposta Rivoluzionaria: la Corte Costituzionale Internazionale*, 24 INT'L STUD. L. EDUC. 15 (2016); Monique Chemillier-Gendreu, *Obliger les États à tenir Parole*, LE MONDE DIPLOMATIQUE 12 (2013); Paulo Ferreira da Cunha, *La Cour Constitutionelle Internationale (ICCo)—Une Idée qui fait son Chemin*, 38 NOTANDUM 21 (2015); Asma Ghachem, *Plaidoyer pour une Idée Tunisienne: l'Institution d'une Cour Constitutionnelle Internationale*, 24 INT'L STUD. L. EDUC. 43 (2016); Alessandra Silveira, *International Constitutional Court e Integração (Constitucional) Europeia*, 24 INT'L STUD. L. EDUC. 71 (2016); André Ramos Tavares, *The Role of an International Constitutional Court vis-à-vis the Inter-American Court of Human Rights and it's Democratic Principle*, 24 INT'L STUD. L. EDUC. 77 (2016).

is no longer based in this distinction. In this case, there would not be an outside or an inside, but solely a single side.[27] In spite of some cultural differences in each domestic law, the international rule of this imperial law would ensure the global permanence of at least one kind of institutional design: A design according to human rights and democracy.

One should note that, according to an epistemological perspective, this discourse corresponds exactly to the drive of modern narrative: The search for a single criterion to establish a stable and predictable hierarchy between different legal orders.[28] For this reason, it should not be regarded as a post-modern international law. Indeed, if one takes the post-modern condition seriously, no unique narrative should be assigned to create an immutable hierarchy responsible to support any kind of predictable and absolute order—scientific, social, legal, etc.[29]

By establishing a rational foundation of law, imperial international law seeks to banish the division of legal orders, in order to assure the unconditional prevalence of human rights and democracy within every single state worldwide. Thus, there is a clear hierarchy which guides the interaction between domestic law and international law. International law shall always prevail over domestic law whenever national rules violate international norms related to democracy and human rights.

In this sense, in the name of a rational teleological unique and stable criteria—survival of mankind—imperial international law seems to justify, globally, setting aside the differences of legal orders and recognizing the universal *a priori* preference for—a certain perspective of—human rights and democracy embedded in international legal rules. The establishment of such a predictable rational solution is derived precisely from a modern perspective of law as the source of stability and certainty. An indisputable hierarchy of one homogeneous order over another is an explicit contradiction with post-modern condition. For this reason, this imperial international law should not be identified with post-modernism.

Even so, if one resorts to recent international legal scholarship, they will notice that a great number of authors[30] calls this drive as a post-modern genetic code of present international

---

[27] *See, e.g.*, Bittar & Almeida, *supra* note 2; Casella, *Direito Internacional*, *supra* note 2; Casella, *Fundamentos*, *supra* note 2; Hardt & Negri, *supra* note 2; Piovesan, *Direitos*, *supra* note 2; Piovesan, *Temas*, *supra* note 2; Trindade, *O Direito*, *supra* note 2; Trindade, *International*, *supra* note 2.

[28] *See, e.g.*, Bauman, *supra* note 1; Bosi, *supra* note 17; Habermas, *Agir*, *supra* note 19; Habermas, *Arquitetura, supra* note 19; Habermas, *O Discurso*, *supra* note 19; Habermas, *A Ética*, *supra* note 19; Habermas, *Modernidade*, *supra* note 19; Hardt & Negri, *supra* note 2; Merleau-Ponty, *Conversas*, *supra* note 4.

[29] *See, e.g.*, Bauman, *supra* note 1; Bosi, *supra* note 17; Hardt & Negri, *supra* note 2; Jameson, *A Cultura*, *supra* note 1; Jameson, *Pós-Modernidade*, *supra* note 1; Lyotard, *La Condition*, *supra* note 1; Lyotard, *O Pós-Moderno*, *supra* note 1; Santos, *Um Discurso*, *supra* note 1.

[30] *See supra* note 2 and accompanying text.

law. Thus, although it is not correct to name this international law movement as a post-modern order, mainstream literature has normalized this concept in this specific sense. Thus, conscious of this conceptual inadequacy from current international legal scholarship, this Article presented this trend as imperial post-modern international law.

D. The Alternatives to Imperial International Law and its Limits: The Modern Condition of Global Governance and Truly Common Law

The current alternatives for this Imperial international order—global governance and truly common law—are also challenged by the presence of modern narratives. They are also wrongly identified as post-modern models of contemporary international law, even though they share a modern discourse of establishing *a priori* hierarchies to guide, within a predictable pace, the interaction of domestic law and international law.

I. A Global Governance Beyond the State: A Rational Network of Networks

Global governance assumes that contemporary rules with transnational range are no longer based on only state premises.[31] Although international law still influences political, economic, cultural, and social relations worldwide, there are also legal rules which are originated beyond state, but which have the same global influence.

These rules compose the so-called global law without—and even against—state paradigm. Some of the networks of legal regulation are divided in specific thematic legal regimes—trade, health, finance, sports, etc. A few of these networks were built by non-state actors. For example, international organizations—WHO, WTO, IMF, World Bank Group, etcetera—international forums—Basel Committee, etcetera—or private transnational enterprises—Apple, Sony, etc.—or organizations—FIFA, etc. Other networks are holders of a normative force not based on the state's will or other traditional enforcement mechanisms, such as systemic coherence within a rational regulation of a specific subject.

The modern narrative of global governance lies precisely in two aspects: The establishment of a rational criteria which previously defines a hierarchical preference for a non-state legal order and the construction of a new kind of inside-outside thematic distinction based on rational systemic premises.

[31] *See, e.g.*, JOHN BRAITHWAITE & PETER DRAHOS, GLOBAL BUSINESS REGULATION (2000); Faria, *supra* note 2; J. FARIA, DIREITO E CONJUNTURA (2008); Fischer-Lescano & Teubner, *supra* note 2; Giannattasio, *O Direito Internacional*, *supra* note 2; Giannattasio, *Direito Internacional Público, supra* note 2; Kjaer, *supra* note 2; Koskenniemi, *supra* note 2; Ladeur, *supra* note 2; Salem Hikmat Nasser, *Direito Global em Pedaços: Fragmentação, Regimes e Pluralismo*, 12 REVISTA DE DIREITO INTERNACIONAL 98 (2015); Teubner, *supra* note 2; Viellechner, *supra* note 2.

Indeed, in the first case, technical and thematic reasons justify the prevalence of specialized global legal regulations over general national legal rules—that is, to the detriment of legal outcomes from national political self-determination processes—democratic deficit of global governance.[32] In the last case, territorial distinction of national legal orders is replaced by a thematic fragmentation of systemic legal regulations that hardly connect with each other during normative production or normative enforcement, Global Law in pieces.[33]

The first aspect points to the presence of a modern concern of defining a single and *a priori* criteria to solve permanent conflicts—global law always prevails. The second aspect simply shows that the modern inside-outside logic persists in global governance, different regulating systems, and challenges legal scholars to build institutional solutions to reconnect these deeply specialized systems. They must question which global law will prevail: Environmental, health, financial, etcetera.

II. A Truly Common Law and its Rational Hierarchical Premises

Some of these modern elements can also be found in the truly common law proposal.[34] This project shares the diagnosis that there is no longer a clear distinction between inside and outside domains of legal orders. Not only are there no more territorial distinctions—national, regional, and international—but also no evident division of legal orders based on time or subjects of regulation. Such dedifferentiation derived from a contemporary recognition that law no longer has rigid milestones imagined and imposed by modern narratives.

Even so, the truly common law project still calls for a certain kind of order, as it deals with the idea of rule of law. In the name of minimal predictability within a foreseeable legal order, there should be a legal system to permeate the connection of all national orders within space, time and subject—and, for the purposes of this text, the interaction between domestic law and international law.

This legal system would be the truly common law, a worldwide common legal regime characterized by connecting those dedifferentiated legal regimes by being open to plural perspectives in such a chaotic regulation environment. This new legal system would rise "from the bottom." It would not follow a "top down" logic to avoid the unification of any

[32] *See, e.g.*, Faria, *supra* note 2; Faria, *supra* note 31; Fischer-Lescano & Teubner, *supra* note 2; Giannattasio, *O Direito Internacional*, *supra* note 2; Giannattasio, *Direito Internacional Público, supra* note 2; Kjaer, *supra* note 2; Ladeur, *supra* note 2; Teubner, *supra* note 2; Viellechner, *supra* note 2.

[33] *See, e.g.*, Faria, *supra* note 2; Faria, *supra* note 31; Fischer-Lescano & Teubner, *supra* note 2; Koskenniemi, *supra* note 2*;* Nasser, *supra* note 31*;* Teubner, *supra* note 2.

[34] *See* Delmas-Marty, *supra* note 2.

legal order through a previous preference for a specific legal regime within a specific territory, time or subject of regulation.

Although this project identifies this normative chaos, it still looks for a previous order and, in this sense, it follows a modern narrative. The hierarchy here is not given by a specific legal order in space—national, regional or international—in time—last in time rule or *lex posteriori* principle—or in subject—specific field of regulation—because all of them are intertwined.

The hierarchy of truly common law is not an *a priori* choice for a specific legal regime. Rather, it is an *a priori* preference for a clearly established rational interpretation principle—double set of keys—that should be applied in concrete situations. In such moments, a legal authority—for instance, a court—should deal with issues concerning the interaction or conflict between these legal orders—such as domestic law and international law—and decide, based on the above-mentioned principle, which one should prevail.

This double set of keys advocates that, in those concrete clashes of legal orders, the authority should take into account two rational principles and apply them jointly: proportionality and the ethical primacy of human rights. Although the prevalence of human rights remained as the core guiding principle of the interaction of any legal order, the principle of proportionality would give a greater compatibility of this legal solution to the "bottom origins" of law and would hinder a legal unification of orders.

It is also possible to envisage a modern narrative within this truly common law project due to the following reasons. First, it seeks a slight order to solve any possible conflicts within such interactions with a minimum predictability. Second, this solution is based on a hierarchical choice originated from an official authority—the top—that would rationally interpret the normative processes from the "bottom." Third, this predictable—although not rigid—order would be rooted in reason: The coherence of those two rational principles—proportionality and human rights—would choose a legal order. Finally, there is a previous commitment to at least one kind of rules those originated from human rights.

In other words, although there is no previous preference for a specific legal order in space, time, or subject, order and predictability would still be sought by means of an *a priori* preference given to reason and human rights and their organizational virtues. This prevalence of one order, domestic or international, would be defined casually by "top" official authorities who would seek to make these interactions proportionally compatible. Nevertheless, always taking into account the prevalence of one specific kind of legal rule—human rights. For this reason, a modern narrative of international law also characterizes the truly common law.

E. The Customary Foundation of Deconstructive Post-Modern International Law: The Institutional Certainty of Legal Uncertainty

I. Elements of Deconstructive Post-Modern International Law

The customary foundation of law emphasizes that legal order pictures anthropological diversity and mirrors its unstable normative outcomes. Law is regarded as *consuetudo*, a sociological normative action that establishes a legal norm through the common recognition of what is usually defined as holding a legal normative force.[35] Law is referred to as society's immanent structure and is spontaneously defined by a mutable joint normative action according to what is traditionally observed due to an anthropological sense of legal authority, *opinio juris sive necessitatis*.[36]

The foundation of international law is typically a set criteria that reveals the limits of modern narratives and opens to a serious post-modern perception of international legal order.

Modern international law is always concerned with the establishment of a previously defined hierarchy according to a single normative criteria—will or reason—clear distinctions—inside-outside in space, time, and subjects—and a stable and predictable order. Deconstructive post-modern international law works within a different parameter: It makes legal theory aware that "we have never been Modern."[37] That is to say, every certainty with which Modernism tried to guide society and its institutional designs have never had any sense at all.

In other words, Post-Modernism states that Modernism was detached from reality. First, they were all artificial milestones that were created to reduce the world's complexity and allow a minimum control over the unpredictable—transcendence. Second, it is the foundation of several attempts of creating a hierarchical organization of society via the establishment of a single, exclusive, and unilateral set of criteria—stability—to serve as the basis of a unidimensional legal order which rejects minorities and any kind of unaccepted difference—homogeneity—and the creation and reproduction of a domination logic—hegemony.[38]

---

[35] *See, e.g.*, Cardoso, *Do Desejo*, *supra* note 4; Cardoso, *Villey, supra* note 4; Giannattasio, *Permanência, supra* note 3; Hardt & Negri, *supra* note 2; Hubrecht, *supra* note 4; La Boétie, *supra* note 4; Laumonier, *supra* note 4; Lefort, *Droit, supra* note 4; Lefort, *L'Europe, supra* note 4; Lefort, *Permanência, supra* note 4; Montaigne, *supra* note 3; Schneewind, *supra* note 4; Prado Jr., *supra* note 4; Tournon, *Justice*, *supra* note 4; Ziccardi, *supra* note 4.

[36] *See* Giannattasio, *Direito Internacional Público*, *supra* note 2; Giannattasio, *International*, *supra* note 4; Giannattasio, *A Opinio*, *supra* note 3.

[37] *See* BRUNO LATOUR, JAMAIS FOMOS MODERNOS (1994).

[38] *See, e.g.*, Bauman, *supra* note 1; Bosi, *supra* note 17; Lyotard, *La Condition*, *supra* note 1; Lyotard, *O Pós-Moderno*, *supra* note 1; Merleau-Ponty, *Conversas*, *supra* note 4; Santos, *Um Discurso*, *supra* note 1.

Thus, Post-Modernism makes legal theory aware that law should remember its customary foundation and reattach itself to immanent anthropological diversity. It means that, in lieu of trying to create an institutional design aiming stability, homogeneity and hegemony, legal orders should be strong enough to reject any previous hierarchical choice and to remain open for the rise of several other organizational criteria and representations of legal phenomenon.

In other words, Post-Modernism emphasizes that deconstructive international law should be institutionally open for non-hierarchical solutions and for the rise and fall—within time, space, and subject—of new and old legal criteria to solve issues concerning the definition of law and the interaction of legal orders.

In this sense, no official authority should decide in the name of anyone which order should prevail and nothing could be established as holding an *a priori* hierarchy over anything. The solution is defined spontaneously by society as an endless multitude of *a posteriori* legal possibilities which refuses any unilateral and unidimensional domination order. Thus, it is no longer advisable trying to formulate an *a priori* solution for the interaction between any kind of legal orders or to assign someone or something the exclusive hierarchical authority to solve this issue. The only certainty in this post-modern condition is the certainty of uncertainty.[39]

II. Dealing with the Interaction of Legal Orders: The Political Solution of International Institutional Designs

Deconstructive post-modern international law perceives the international legal order as relying in the autonomous and spontaneous customary normative process of each society. The plural and unstable definition in time, space, and subject of what will hold the *opinio juris sive necessitatis* aura should be regarded as the touchstone of international law and as the guide to define which order should prevail in case of conflict. In other words, custom and its uncontrollable outcomes should be the basis of an international law framework.

In this sense, legal analysis should be driven to identify, stimulate, and reinforce the *a posteriori* customary normative spontaneity of multitude in contemporary global order. The interaction between domestic law and international law should not be driven by any kind of stable rules, but rather by this unstoppable clash of legal traditions within the non-violent and a non-hierarchical language of international law. It is unimportant if there is more than

[39] *See, e.g.*, Michel Foucault, *Qu'est-ce qu'un Auteur?*, *in* DITS ET ÉCRITS: 1954–1969 789 (Michel Foucault ed., 1994); Giannattasio, *Direito Internacional Público*, *supra* note 2; Giannattasio, *International*, *supra* note 4; Merleau-Ponty, *Conversas*, *supra* note 4; Merleau-Ponty, *Sens*, *supra* note 4; Merleau-Ponty, *Signes, supra* note 4.

one legal order in terms of space, time, or subject: All of them should work one alongside the other and guide the normative solution side-by-side.

How does international law foster this customary normative process within the post-modern condition without attempting to establish hierarchy, stability, homogeneity, and hegemony? How could international law guide the interaction of legal orders to be according to an unstable and unpredictable—yet immanent—logic? The core argument of this Article is that international legal order should focus in establishing institutional designs sensitive to politics—the free path of a free life.[40]

Politics is not regarded here as a diplomatic matter or as negotiation processes. Rather, politics is regarded as a public way of life created by legal institutional designs. That is, the enigmatic institutional architecture that enables different traditions and cultural perspectives to coexist in a harmonic—yet neither peaceful, nor armed—common life via the language of a political Law: Plurality, tension, vacuum, and immanence.[41]

As a political law, deconstructive post-modern international law should be regarded as a law whose role is to ground a political life. That is, whose institutions should be arranged in a specific design in order to ensure the establishment of a coexistence regime between different legal, social, economic, and religious traditions in international relations. International Law is regarded here not simply as rules of conduct, but as elementary structures for a common public life of different traditions. This legal structure is an institutional dressing of a society's *mise en forme* (political choice), which, at the same time, is the tool that is used to institute a political dynamics customized to normative sociological processes of international life.[42]

This political international law should be emptied of any unilateral and hegemonic cultural tradition and reject any attempt to establish a single and homogenous set of criteria to build

---

[40] *See, e.g.*, SérgioCardoso, *Por que República? Notas sobre o Ideário Democrático e Republicano, in* RETORNO AO REPUBLICANISMO 45 (Sérgio Cardoso ed., 2004); Sérgio Cardoso, *Que República? Notas sobre a Tradição do Governo Misto, in* PENSAR A REPÚBLICA 27 (N. Bignotto ed., 2002); Giannattasio, *Direito Internacional Público, supra* note 2; Giannattasio, *International*, *supra* note 4; Huyssen, *Mapeando*, *supra* note 1; FRANCIS WOLFF, ARISTÓTELES E A POLÍTICA (1999).

[41] *See, e.g.*, Giannattasio, *A Juridificacão*, *supra* note 14; Arthur Roberto Capella Giannattasio, *Justiça, Política e Direitos Humanos: As Instituições Jurídicas e a Manutenção do Justo Meio na Esfera Pública*, *in* JUSTIÇA E DIREITO 308 (M. Carvalho, M. Nascimento & T. Weber eds., 2015); Giannattasio, *Permanência*, *supra* note 3; CLAUDE LEFORT, ÉLEMENTS D'UNE CRITIQUE DE LA BUREAUCRATIE (1979); Claude Lefort, *Foyers du Républicanisme*, *in* ÉCRIRE—À L'ÉPREUVE DU POLITIQUE 181 (Claude Lefort ed., 1992); Claude Lefort, *Machiavel et la verità effetuale*, *in* ÉCRIRE—À L'ÉPREUVE DU POLITIQUE 141 (Claude Lefort ed., 1992); Lefort, *O Nome*, *supra* note 4; Lefort, *Permanência*, *supra* note 4; CLAUDE LEFORT, LE TRAVAIL DE L'OEUVRE MACHIAVEL (1986); JEAN PIERRE VERNANT, AS ORIGENS DO PENSAMENTO GREGO (1981).

[42] *See, e.g.*, Giannattasio, *A Juridificacão*, *supra* note 14; Giannattasio, *Justiça*, *supra* note 41; Giannattasio, *Permanência*, *supra* note 3.

its own legal framework. In other words, a political international legal order based on shifting customary processes should be aware that its own institutions must be structures open to broader interactions of legal traditions—local, national, regional, international, old and new—from any subject, refuse an *a priori* preference for any of them, reject the rise of previous hierarchies in terms of space, time, subject, and authority, and give also effective voice to other non-formal and spontaneous authorities which might deepen this customary process.

Attaching itself to custom, refusing some exclusive and previous criteria to arrange the international legal framework—law-conduct—and rejecting rigid hierarchies between legal regimes, legal traditions, and legal authorities, this—law-structure—political international law should be able to accomplish the post-modern condition of international law. This means that deconstructive post-modern international law should be the basic toolbox of formal and informal international political arenas in which are entitled to take part, not only subjects of international law—states and international organizations—or traditional international actors—transnational enterprises and international NGOs—but also other kinds of politically-interested communities.

Thus, if international legal order seeks to be closer to immanent customary normative processes and work as a deconstructive toolbox of *a priori* hierarchies according to a serious post-modern condition, it must be radically open in political terms to plural and unstable normative process of the multitude.[43] This also means that its institutional design should foster this condition in every international political arena and include politically, without reservations of any kind, every legal tradition or legal alternative.[44]

F. Conclusion

This Article discussed the relationship between international law and domestic law based on an interdisciplinary approach of law—law and epistemology, law and politics. It presented three concurrent trends of international legal frameworks: Modern, imperial post-modern and deconstructive post-modern.

The main argument of this Article is that the current post-modern condition presents limits to the solution given either by modern international law—monism *versus* dualism—or by the imperial international law and its so-called post-modern alternative—global governance and truly common Law. The main problem of each of these trends is that all of them deal with such an interaction according to a modern perspective of establishing a previous preference for a criterion or a legal order based on a hierarchical logic, which is grounded in

[43] *See* Hardt & Negri, *supra* note 2.

[44] *See, e.g.*, Giannattasio, *Direito Internacional Público*, *supra* note 2; Giannattasio, *International*, *supra* note 4; Giannattasio*, A Juridificacão*, *supra* note 14; Giannattasio, *Justiça, supra* note 41; Koskenniemi, *supra* note 2.

a belief in the virtues of finding an unilateral, single, and exclusive normative criterion—will or reason.

For this reason, a new international legal institutional design should be imagined to take Post-Modernism seriously: A deconstructive post-modern international law. This radically post-modern international law perspective would be based on unstable customary processes and, for that, would remain open to promote the encounter and the institutional conflict of different legal traditions and representations of law.

Its virtue and its normative force would be extracted from its radical political orientation. It should refrain from formulating an *a priori* solution for the interaction between the Domestic Law and International Law and try to identify, stimulate, and reinforce the *a posteriori* customary normative spontaneity of multitude in contemporary global order. In other words, its institutional framework should be designed to refuse *a priori* normative hierarchies of any kind—space, time, subject, authorities—and be open to the clash of different customary roots originated from every kind of legal tradition or legal alternative.

This means, finally, that, according to a deconstructive post-modern international law, the interaction of different legal orders, domestic and international, should be solved within a radical political dynamic and taking into account traditional subjects of international law—states and international organizations—usual international actors—transnational enterprises and international NGOs—and other politically-interested communities.

It is precisely from this radical openness to politics—plurality, tension, vacuum, and immanence—that deconstructive post-modern international law will be able to extract its normative force. That is, from the virtue of politics and from its critical refusal of any permanent *a priori* hierarchical relation between any kind of legal order.