

PUBLIC INTERNATIONAL LAW: THE LAST FIVE DECADES

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Discussing public international law with respect to a given country requires consideration of topics related to two intertwined legal orders: that of the country itself and that of the international legal system. These topics, which are of necessity common to both legal orders, appear in what is problematic to one discipline: international constitutional law. The name of this discipline shows the importance of the hierarchically superior rules of domestic legal systems in the analysis of these topics. Utilizing the Constitutions promulgated in the past five decades as a base, this article will show the evolution of public international law in Brazil during five periods of development involving the lives of different constitutions: (1) 1940 to 1946; (2) 1946 to 1964; (3) 1964 to 1967; (4) 1967 to 1988; and (5) 1988 to the present.

I. PERIOD OF ABNORMALITY (1940-1946)

Abnormality, characteristic of this period in Brazilian history, occurred both domestically and internationally. The domestic area was abnormal because the Constitution of November 10, 1937, which was in force during this period, was not only vitiated in its origin, but often in its application. The international area was abnormal because of the Second World War.

The autocratically inspired 1937 Constitution was promulgated by President Getúlio Vargas under the allegation, among others, of a "state of apprehension created in the Country by Communist infiltration."¹ This Constitution dissolved the Chamber of Deputies and the Senate,² providing that elections were to be held after a plebiscite on the Constitution.³ This plebiscite was never held. While Congress was suspended, the President of the Republic had "the power to issue decree-laws on all matters within the legislative competence of the Federal Government."⁴ For

¹ Const. of 1937, Second Whereas Clause of the Preamble.

² *Id.*, art. 178.

³ *Id.*, arts. 185 and 187.

⁴ *Id.*, art. 180.

almost an entire decade, the President exercised this power, using it as a basis for making important decisions in the areas of both domestic and foreign policy.

Maintaining a tradition established by prior Constitutions, the 1937 Constitution contained provisions concerning international law. The 1937 Constitution, however, diverged from this tradition in two points. First, it did not require an attempt at arbitration before a declaration of war and failed to condemn any war of conquest. Second, it imposed an obligation on the States to "promote, within their sphere of competence, measures necessary to carry out commercial treaties concluded by the Federal Government."⁵ These, however, were minor points. The remaining provisions of international interest were inspired by prior republican Constitutions, even though in practice many were either suspended or not observed. Among these were provisions granting to the Federal Government powers to maintain relations with foreign States, to appoint members of the diplomatic and consular corps, to celebrate international treaties and conventions, to declare war and to make peace, to resolve national border conflicts definitively, and to organize external defense.⁶ The Federal Government also had exclusive powers to legislate on many other matters, including: the national borders with adjacent nations; foreign defense; naturalization; immigration and emigration; extradition; and foreign commerce.⁷

The President of the Republic was empowered to maintain relations with foreign States; to enter into, with legislative approval, international conventions and treaties, and also to have conventions and treaties become temporarily effective without Congressional approval "if advisable in the interests of the Country;" to declare war, upon authorization by the Legislature, and without any authorization in the case of foreign aggression or invasion; and finally, to make peace with Congressional approval.⁸ The Federal Supreme Court was granted original jurisdiction over cases involving foreign nations and the Federal or State Governments, extradition of criminals and recognition (*homologação*) of foreign judgments. It was also granted appellate jurisdiction over all lower court decisions contrary to the language of a treaty whose applicability had been drawn into question.⁹

In the early 1940s, the country remained neutral as to the armed conflict raging in Europe. General neutrality rules with elaborate details were set out in the circular attached to Decree-Law No. 1.561 of September 2, 1939.¹⁰ Such actions

⁵ *Id.*, art. 10.

⁶ *Id.*, art. 15 (I), (II), (III) & (IV).

⁷ *Id.*, art. 16 (I), (II), (III) & (VII).

⁸ *Id.* art. 74 (c), (d), (g), (h) & (n).

⁹ *Id.*, arts. 101 (I) (d), (f) and 101 (III) (a).

¹⁰ These rules were modified by Decree-Laws 2.360 of Jy. 3, 1940 and 2.947 of Jan. 27, 1941, and complemented by Decree-Law No. 2.360 of Jy 3, 1940 and Decree-Law 2.986 of Jan. 15, 1941, with respect to merchant ships in territorial waters; Decree-Law 2.983 of Jan. 25, 1941, on the interming of belligerents; and Decree-Law No. 2.985 of Jan. 27, 1941, on the use of telecommunications equipment during war.

were not, in fact, expressions of the isolated policy of the Brazilian government, but were formulated in concert with the inter-American System. Thus, in accordance with the Code of Neutrality adopted by the American Republics in the Declaration of Panama on October 3, 1939, which declared the continental maritime area off limits to acts of war, the Brazilian government participated in collective American protests, such as those of December 23, 1939 and March 16, 1940, against the sinking of the ships "Admiral Graf Spee" and "Wakama" within that maritime area. Also, in accordance with the decision in the Second Consultative Meeting of the Foreign Ministers of the American Republics held in Havana, Brazil signed the Convention on Provisional Administration of European Colonies and Possessions in America on July 30, 1940.¹¹ The Brazilian government also participated in another action showing a united continental front: the rupture of diplomatic relations with Japan, Germany and Italy. According to a note dated January 28, 1942, in accordance with the resolution of the Third Meeting of the Foreign Ministers of the American Republics adopted that same day, the rupture was caused by the fact that "the first of those countries has committed aggression against, and the latter two have declared war upon, an American State." The sinking of five Brazilian ships transporting passengers (military and civilian) and merchandise in coastal trading, resulted in a note from the Government at Rio de Janeiro on August 21, 1942, directed to Germany and Italy, in which it recognized that a state of belligerence had been created between Brazil and those two countries. Decree No. 10.358 of August 31, 1942, declared a state of war throughout Brazil.

On the 6th and 8th of February, 1943 respectively, Brazil signed the Atlantic Charter and the United Nations Declaration. The following year, the Brazilian Expeditionary Force and the First Fighter Air Group saw combat in Europe. The Brazilian government gradually began to participate in joint actions of interest to the countries engaged in the struggle against the Axis. On November 9, 1943, Brazil signed the Convention for the United Nations Relief and Rehabilitation Administration (UNRRA).¹² Brazil ratified the Conventions on the International Monetary Fund and the Reconstruction and Development Fund, executed in Bretton Woods on July 22, 1944,¹³ as well as the Convention on International Civil Aviation, concluded in Chicago on December 7, 1944.¹⁴

Because of its role in World War II, Brazil met the requirements to participate in the United Nations Conference at San Francisco. Continuation of this conflict in the Pacific explains Decree No. 18.811 of June 6, 1945, which declared a state of war between Brazil and Japan. Brazil was a signatory to the United Nations Charter (June 26, 1945), whose ratification was deposited on September 21, 1946.¹⁵ Since then, Brazil has been an active participant in the United Nations

¹¹ Ratified on Nov. 26, 1940, deposited on Jan. 14, 1941, and promulgated on Mar. 14, 1941 by Decree No. 6.972.

¹² Promulgated by Decree No. 16.718 of Oct. 3, 1944.

¹³ Decree No. 21.177 of May 27, 1946.

¹⁴ Decree No. 21.713 of Aug. 27, 1946. Part II of this Convention created the International Civil Aviation Organization (ICAO).

and in its specialized agencies. Upon cessation of armed conflict in all military theaters of operation, the Brazilian government issued Decree No. 19.955 of November 16, 1945, suspending the state of war that had persisted for more than three years.

The profound abnormality of war period adversely affected the production of scholarly studies, even though the published lectures of Brás de Souza Arruda, entitled "The Structure of International Law," were a valuable contribution to the literature.¹⁶ In 1942, Roberto Piragibe de Fonseca, after drawing up a balance sheet of the "Brazilian contribution to doctrinal development of international law", concluded that it was "melancholy, not to say disheartening", in view of the small number of systematic expositions, even though they are "undeniably substantial treatments of the law of nations."¹⁷ Fortunately, shortly thereafter, Brazilian authors reacted. In 1943, two monographs on international law were published in Rio de Janeiro: *Gênese e Evolução da Neutralidade* (Genesis and Evolution of Neutrality) by Linneu de Albuquerque Mello and *Natureza Jurídica do Mar* (The Legal Nature of the Sea) by Breno Machado Vieira Cavalcanti. In that same year, *Um Conceito de Guerra no Direito Internacional* (The Concept of War in International Law) by Mario Pessoa was published in Recife. Two years later, Jorge Americano published *O Novo Fundamento do Direito Internacional e o seu Esteio na Consciência Universal* (The New Basis for International Law and its Grounding in the Universal Conscience) (Ed. Renascença, São Paulo).

An auspicious event during this period was the launching of the *Boletim da Sociedade Brasileiro de Direito Internacional* (Bulletin of the Brazilian Society of International Law), whose first number covered the first six months of 1945. This publication, now called the *Boletim Brasileiro de Direito Internacional* (Brazilian Bulletin of International Law), is the most complete repository in Brazil of scholarship relating to the law of nations.

II. RETURN TO NORMALITY (1946-1964)

With the end of the Second World War and the subsequent triumph of the basic principles of the United Nations, a profound reformulation of the insupportable political conditions under the 1937 Constitution became unavoidable. The dictatorship of Getúlio Vargas was overthrown, and a new democratic constitution was promulgated on September 18, 1946.

Among the provisions of international interest in the 1946 Constitution was Article 4, whose original source was the French Constitution of 1791 and whose more proximate sources are the Brazilian Constitutions of 1891 and 1934, but which had been eliminated in the 1937 Constitution. Article 4 provided that Brazil would only resort to war if "recourse to arbitration or peaceful means of conflict

¹⁵ Decree No. 19.841 of Oct. 22, 1946.

¹⁶ "Estrutura do Direito Internacional," 36 *Revista de Direito de São Paulo* 471-601 (1941).

¹⁷ 16 *Ciencia Política* 117.

resolution regulated by an international security body" to which Brazil belonged was not available or had not been successful; further, "in no case" would Brazil engage in a "direct or indirect war of conquest, by itself or through an alliance with another State." The wording of this provision was improved in subsequent Constitutions.

The powers of the Federal Government generally followed those set out in the 1937 Constitution. Also preserved were prior provisions granting the President of the Republic and the National Congress the treaty power and the power to make peace and war.¹⁸ Among the exclusive powers of the Federal Senate, which were not granted in the 1937 Charter, were that of the approval, by secret vote, of "the choice of the heads of permanent diplomatic missions" and that of "authorizing foreign loans by States, the Federal District and Counties." The powers of the Federal Supreme Court were generally preserved, but certain innovations were made. The 1946 Constitution now correctly referred to foreign "States" and not to foreign "Nations".¹⁹ This same provision broadened the jurisdictional sphere of the Federal Supreme Court, granting it original jurisdiction not only over cases between foreign States and the Federal or State Governments, but also over cases between foreign States and the Federal District or Counties.

In the two decades during which the 1946 Constitution was in force, appreciable changes occurred in international relations that had immediate repercussions upon the Brazilian legal order. When the Second World War ended, Brazil adhered to the peace treaties celebrated at that time. Brazil approved the treaties celebrated in Paris on February 10, 1948 with Italy,²⁰ and in San Francisco on September 8, 1951, with Japan.²¹

As founding member of the United Nations, Brazil rapidly increased its activities in international organizations. Brazil adhered to the following Conventions: United Nations Educational, Scientific and Cultural Organization (UNESCO) of November 16, 1945;²² United Nations Privileges and Immunities of February 14, 1946;²³ and the World Meteorological Organization, signed in Washington on October 11, 1947.²⁴ Law No. 313 of July 30, 1948, authorized the Executive Branch to apply the General Agreement on Tariffs and Trade (GATT) temporarily. At that time, other governmental acts involving international organizations were modified. The President of the Republic ordered implementation of the Administrative Agreement signed in Rio de Janeiro on April 30, 1948, between Brazil and the Preparatory Commission of the International

¹⁸ Const. of 1946, arts. 87 (VII) & 66 (I).

¹⁹ *Id.*, art. 101 (I) (d).

²⁰ Legis. Decree No. 14 of Aug. 13, 1948.

²¹ Legis. Decree No. 29 of May 5, 1952; promulgated by Decree No. 30.948 of Je. 5, 1952.

²² Decree No. 22.024 of Nov. 5, 1946.

²³ Legis. Decree No. 4 of Feb. 13, 1948.

²⁴ Legis. Decree No. 11 of May 4, 1950; promulgated by Decree No. 28.074 of May 4, 1950.

Refugee Organization.²⁵ Brazil approved the protocol for the dissolution of the International Institute of Agriculture of Rome and the transfer of its functions to the United Nations Food and Agricultural Organization (FAO),²⁶ as well as the new Constitution of the International Labor Organization, adopted at the ILO Conference held in Montreal on October 9, 1946.²⁷ In 1957, the Statute of the International Atomic Energy Agency, signed at United Nations headquarters in New York on October 29, 1956 was promulgated in Brazil.²⁸ In 1957, Brazil adopted the International Telecommunications Convention, signed in Buenos Aires on December 22, 1952.²⁹ The creation of successive specialized agencies by the United Nations inspired the Convention on Privileges and Immunities of Specialized Agencies of the United Nations, adopted on November 21, 1947, by the UN General Assembly and approved by Brazil in 1959.³⁰

Within the Inter-American region, the Inter-American Mutual Aid Treaty, signed in Rio de Janeiro on September 2, 1947, grew in importance.³¹ On April 30, 1948, the Charter of the Organization of American States was signed, as well as the Inter-American Pact on Peaceful Solutions. On a geographically smaller scale, based upon the first sessions of CEPAL in 1948, and reflecting the progress of economic integration in Europe, the Treaty of Montevideo, establishing a free trade zone and instituting the Latin American Free Trade Association (LAFTA), was signed on February 1960.³²

Brazil adhered to two important conventions on individual and collective liability: the Convention for the Suppression and Prevention of the Crime of Genocide, signed in Paris on December 11, 1948;³³ and the Convention on Surface Damage Caused by Foreign Aircraft, signed in Rome on October 7, 1952.³⁴ Several important human rights conventions were approved: the Convention on the Status of Refugees, ratified on November 15, 1960, except for Articles 15 and 17 and the option for the provisions of Section B.1 of the First Article of the

²⁵ Decree No. 25.796 of Nov. 10, 1948.

²⁶ Legis. Decree No. 21 of Aug. 27, 1948.

²⁷ Decree No. 25.696 of Oct. 20, 1948.

²⁸ Decree No. 42.155 of Aug. 27, 1957.

²⁹ Legis. Decree No. 66 of Dec. 19, 1956; promulgated by Decree No. 41.949 of Aug. 2, 1957.

³⁰ Legis. Decree No. 10 of Sept. 14, 1959; promulgated by Decree No. 52.288 of Jy. 24, 1963. Two international Conventions concerning the activities of UNESCO are worth mentioning: Protection of Cultural Property in Case of Armed Conflict, signed at The Hague on May 14, 1954 and approved by Legis. Decree No. 32 of Aug. 14, 1956; and the Universal Copyright Convention, concluded in Geneva on October 6, 1952. Legis. Decree No. 12 of Sept. 30, 1959; promulgated by Decree No. 48.458 of Jy. 4, 1960.

³¹ Promulgated by Decree No. 25.660 of Oct. 13, 1948.

³² Promulgated by Decree No. 58.656 of May 24, 1961.

³³ Legis. Decree No. 2 of Apr. 11, 1951; promulgated by Decree No. 30.822 of May 6, 1952.

³⁴ Legis. Decree No. 15 of 1961; promulgated by Decree No. 52.019 of May 20, 1961.

Convention;³⁵ the Convention on the Political Rights of Women, signed in New York in 1963;³⁶ ILO Convention 95 of 1949 for the Protection of Wages,³⁷ and ILO Convention 98 of 1949 on the Rights of Organizing and Collective Bargaining.³⁸

Sensitive to the pattern of its first proclamations, the Brazilian Government declared the continental shelf "an integral part of national territory."³⁹ In August of 1950, the Agreement on the Regulation of Whaling, signed in Washington on December 2, 1946, went into effect in Brazil.⁴⁰

Brazilian scholarship on international law flourished. The various textbooks published during this period included: Mario Pessoa, *O Direito Internacional Moderno* (Modern International Law) (Rio de Janeiro 1947); Luiz Faro Jr., *Manual de Direito Internacional Público* (Manual of Public International Law) (Rio de Janeiro 1951); and Hildebrando Accioly, *Manual de Direito Internacional Público* (Manual of Public International Law) (Saraiva São Paulo 1957). In 1956, Accioly also published the second edition of his three-volume *Tratado de Direito Internacional Público* (Treatise on Public International Law) (2d ed. Imprensa Nacional 1956). Other publications were: Gerson Brito Mello Bosa, *Curso de Direito Internacional Público* (Course on Public International Law) (Belo Horizonte 1958); Nelson Ferreira da Luz, *Introdução ao Direito Internacional Público* (Introduction to Public International Law) (São Paulo 1963); and Bráz de Souza Arruda, *Estrutura de Direito Internacional* (The Structure of Public International Law) (Revista da FADUSP 1963, pp. 32-92). This author had earlier published his *Curso de Direito Internacional: Na era atômica* (Course on International Law: The Atomic Age) (Guaira Curitiba undated). Gilda Russomano collected several of her writings in *Estudos de Direito Internacional* (Studies on International Law) (José Konfino, Rio de Janeiro 1956).

The impact of changes occurring after the Second World War influenced the book by Ilmar Penna Marinho, *Características Essenciais do Novo Direito Internacional* (Essential Characteristics of New International Law) (Rio de Janeiro 1947). This author also wrote a treatise on Nationality, whose first volume deals with the International Law of Nationality.⁴¹ The questions of the development and influence of newly independent states was highlighted by Haroldo Valladão's work, published in that same city by José Olympio in 1961, *Democratização e Socialização do Direito Internacional* (Democratization and Socialization of International Law). In view of these changes, the problem of human rights within

³⁵ Decree No. 50.215 of Jan. 28, 1961.

³⁶ Decree No. 53.476 of Sept. 17, 1963.

³⁷ Decree No. 41.721 of Je. 25, 1957.

³⁸ Decree No. 33.196 of Je. 29, 1953.

³⁹ Decree No. 28.840 of Nov. 8, 1950.

⁴⁰ Decree No. 28.524 of Aug. 18, 1950.

⁴¹ Ilmar Penna Marinho, *Tratado sobre a Nacionalidade* (Imprensa Nacional, Rio de Janeiro 1956).

the international context was the focus of a study by José Soder, *Direitos do Homem* (The Rights of Man) (Cia. Editora Nacional: São Paulo, 1960) and a thesis by Gerson de Brito Mello Boson entitled *O Homem como Sujeito do Direito Internacional* (Man as a Subject in International Law) (Belo Horizonte, 1951).

Among the various topics dealt with at this time, international treaties seemed to predominate, starting with the book by José Sette Câmara, *The Ratification of International Treaties*, published in 1949 in Toronto by The Ontario Publishing Company, Ltd. The thesis submitted to become a member of the faculty (*livre docência*) to the University of São Paulo by Vicente Marotta Rangel dealt with the conflict between the United Nations Charter and other international agreements.⁴² João Hermes Pereira de Araujo published a book on the procedural aspects of international acts in Brazil in 1958.⁴³

Worthy of note was the course offered in 1959 at the Academy of International Law in the Hague by Hildebrando Accioly on General Principles of International Liability.⁴⁴ The law of diplomacy was the subject of two-volume treatise by Rubens Ferreira de Mello.⁴⁵ The same author also published in Rio de Janeiro in 1946 *Dicionário de Direito Internacional Público* (Dictionary of Public International Law).

III. SECOND PERIOD OF ABNORMALITY (1964-1967)

After the successful coup d'état of 1964, the leaders of the military and civil movement proclaimed that "the victorious revolution" invested itself with "the exercise of the constituent power." This revolution, "represented by the Commanders-in-Chief of the three Armed Forces", decided to retain the 1946 Constitution, limiting themselves to "modifying it only in respect to the powers of the President of the Republic"; they also retained the National Congress, "with certain reservations upon its powers" contained in Institutional Act 1.⁴⁶ "Constitutional or legal guarantees of life appointments or tenure" were "suspended for six months."⁴⁷ Under the terms of Institutional Act 2, of October 27, 1965, which modified, *inter alia*, Articles 94, 98, 103 and 105 of the 1946 Constitution, the Judiciary was increased by the addition of federal judges, who were granted jurisdiction, among others, to "hear and decide, in first instance, cases between foreign States and persons domiciled in Brazil; cases based upon a treaty or a contract by the Federal Government with a foreign State or an international

⁴² *Do Conflito entre a Carta das Nações Unidas e os Demais Acordos Internacionais* (Saraiva: São Paulo 1954).

⁴³ *A Processualística dos Atos Internacionais no Brasil* (Ministério das Relações Exteriores: Rio 1958).

⁴⁴ "Principes Généraux de la Responsabilité Internationale d'après la Doctrine et la Jurisprudence," 96 *Recueil des Cours* 353-439 (1959-I).

⁴⁵ *Tratado de Direito Diplomático* (Editora Clássica Livraria: Rio 1948).

⁴⁶ Preamble to Institutional Act No. 1 of Apr. 9, 1964.

⁴⁷ *Id.*, art. 7.

organization; and crimes that are the subject of a treaty or an international convention." (art. 105, § 3). Otherwise, the jurisdiction of the Federal Supreme Court and the Federal Court of Appeals were maintained.

Among the international acts that came into effect in this period, one should mention the Rules and Recommendations appearing in Exhibit 9 to the Convention on International Civil Aviation (5th edition), which provided for the facilitation of carriage by air;⁴⁸ the Single Convention on Narcotic Drugs,⁴⁹ the Convention concerning the international exchange of publications, adopted by the UNESCO General Conference at Paris on December 3, 1958;⁵⁰ the Vienna Convention on Diplomatic Relations of April 18, 1961;⁵¹ the Accord on the Privileges and Immunities of LAFTA;⁵² the Treaty Banning Nuclear Weapons Tests in the Atmosphere, in Outer Space and under Water;⁵³ and the Basic Agreement on Technical Assistance with the UN, its Specialized Agencies and the International Atomic Energy Agency.⁵⁴

In the inter-American field, one should mention the Caracas Conventions on Diplomatic Asylum and Territorial Asylum, both dated March 28, 1954;⁵⁵ and the American Treaty on Peaceful Solutions (the Bogota Pact), dated April 30, 1948.⁵⁶ Based upon a Resolution of the 10th Consultative Meeting of Foreign Ministers, Legislative Decree 38 of May 20, 1965 authorized the President of the Republic to send armed forces contingents to the Dominican Republic, which in fact occurred soon thereafter.

In the field of human rights, Brazil adhered to the Convention on Slavery, signed in Geneva on September 25, 1926 and amended by the Protocol and opened for signature in New York on December 7, 1953; as well as the Supplementary Convention on the Abolition of Slavery, of the Slave Trade and of Institutions and Practices Similar to Slavery, adopted in Geneva on September 7, 1956.⁵⁷ Various international labor conventions were incorporated into Brazilian law: No. 22 on hiring of seamen; No. 97 on migrant workers; No. 103 on maternity assistance; No. 104 on the abolition of penal sanctions for breach of work contracts by indigenous workers; No. 105 on abolition of forced labor; No. 106 on weekly rest days in

⁴⁸ Promulgated by Decree No. 54.203 of Aug. 24, 1964.

⁴⁹ Promulgated by Decree No. 54.216 of Aug. 27, 1964.

⁵⁰ Promulgated by Decree No. 54.291 of Sept. 16, 1964.

⁵¹ Promulgated by Decree No. 56.435 of Je. 8, 1965.

⁵² Promulgated by Decree No. 57.784 of Feb. 11, 1966.

⁵³ Promulgated by Decree No. 58.256 of Apr. 26, 1966.

⁵⁴ Promulgated by Decree No. 59.298 of Apr. 23, 1966.

⁵⁵ Approved by Legislative Decree No. 34 of Aug. 12, 1964; promulgated by Decree No. 55.929 of Apr. 14, 1965.

⁵⁶ Promulgated by Decree No. 57.785 of Feb. 11, 1966.

⁵⁷ Promulgated by Decree No. 58.563 of Je. 1, 1966.

commerce and offices; No. 107 on indigenous and tribal populations; No. 108 on national identity cards for seamen; No. 110 on working conditions of farm employees; and No. 113 on medical examinations for fishermen.⁵⁸

As to legal doctrine published during this period, one should note the continuation of studies on human rights, on diplomatic law and on international treaties. In 1964, C. A. Dunshee de Abranches published an important book entitled on *Proteção Internacional dos Direitos Humanos* (International Protection of Human Rights) (Freitas Bastos: Rio 1964). In that same year, M. Franchini-Nett published *Diplomacia: Instrumento da Ordem Internacional* (Diplomacy: Instrument of International Order) (Rio 1964). Also published in the same year was a book by Oliveira Litrento entitled *O Princípio da Auto Determinação dos Povos* (The Principle of Self-Determination of Peoples) (Freitas Bastos: Rio 1964). Similarly, scholarship in the area of international conventions continued, as exemplified by Celso Albuquerque Mello's study, *Ratificação do Tratados* (Ratification of Treaties) (Freitas Bastos: Rio 1966).

The first United Nations Conference on the Law of the Sea served as the basis for publication of studies relating to the two Conventions there concluded. The thesis for faculty membership (livre docência) of Celso Albuquerque Mello dealt with *Plataforma Continental: Principais Aspectos* (The Continental Shelf: Principal Aspects) (Freitas Bastos: Rio 1966), whereas the thesis for full professorship of Vicente Marotta Rangel at the University of São Paulo focused upon *Natureza Jurídica e Delimitação do Mar Territorial* (The Legal Nature and Limits of the Territorial Sea) (RT: São Paulo 1966).

The book by C.A. Dunshee de Abranches on *Espaço Exterior e Responsabilidade Internacional* (Outer Space and International Liability) (Freitas Bastos: Rio 1964) is a reflection of the era of astronauts begun in 1957. Published in São Paulo by the *Revista dos Tribunais* in that same year was the thesis by José Dalmo F. Belfort de Mattos, submitted in the competitive examination for full professorship at the Law School of the Pontifical Catholic University of São Paulo, which dealt with *Conceito Cristão de Guerra* (The Christian Concept of War). The thesis submitted by C.A. Dunshee de Abranches for full professorship at the State University of Rio de Janeiro was entitled *Proscrição das Armas Nucleares* (Banning of Nuclear Weapons) (Freitas Bastos: Rio 1964).

IV. AUTOCRATIC TENDENCY (1967-1988)

In accordance with Institutional Act 4, of December 7, 1966, the National Congress met in extraordinary session on December 12 of that year and January 24 of the following year, to discuss, to vote and to promulgate the "Draft Constitution submitted by the President of the Republic". The Constitution of January 24, 1967 was, in turn, revoked by Constitutional Amendment No. 1 of October 17, 1969. Although both Constitutions (the first more than the second) reflected the autocratic tendency prevailing during that period, they retained provisions of

⁵⁸ These Conventions were all promulgated on July 14, 1966, by Decrees No. 58.817 through 58.827.

international interest, integrating prior Constitutions. Since the 1969 changes did not directly affect provisions related to international law, we shall refer, throughout, to either the 1967 Constitution or the 1969 Constitutional Amendment.

The 1967 Constitution modified Article 4 of the 1946 Constitution, changing the wording of Article 7 to provide, in a technically more precise manner, that international conflicts should be "resolved through direct negotiations, arbitration and other peaceful means, with the cooperation of the international organizations of which Brazil is a member." The sole paragraph of Article 7 banned "wars of conquest." Few changes were made to the powers of the Executive and Legislative Branches, with the exception of adding the term "international acts" after the traditional phrase "international treaties and conventions." Thus, the 1967 Constitution gave exclusive power to the National Congress to "make definitive resolutions on international treaties, conventions and acts celebrated by the President of the Republic."⁵⁹ It gave exclusive power to the President of the Republic to "celebrate international treaties, conventions and acts, *ad referendum* the National Congress."⁶⁰ The wording of the 1946 Constitution was preserved intact with respect to the specific power of the Federal Senate in relation to the heads of permanent diplomatic missions, and modified in relation to foreign loans. The power of the Federal Senate was no longer restricted to these loans, but was broadened to include "foreign transactions or agreements."⁶¹ Under the 1969 Constitutional Amendment Articles 47(I), 83(VIII) and 45(II) became Articles 44(I), 81(X) and 42(IV), respectively. This last provision, however, modified the corresponding provision of the prior Constitution (art. 45-II) by adding that in the case of foreign loans, transactions or agreements, "the Federal Executive Branch should be consulted."

The 1967 Constitution reaffirmed the original jurisdiction of the Federal Supreme Court to judge extradition requests by a foreign State, and to ratify foreign judgments.⁶² It continued to provide for appellate jurisdiction when the lower court decision, either at the original or appellate level, refused to give effect to a treaty or declared a treaty to be unconstitutional.⁶³ But the Constitution made some changes. The original jurisdiction of the Federal Supreme Court was expanded to include cases in which international organizations and territories are parties.⁶⁴ Excluded, however, from the Supreme Court's original jurisdiction were

⁵⁹ Const. of 1967, art. 47 (I).

⁶⁰ *Id.* at art. 83 (VIII).

⁶¹ *Id.* at art. 45 (II).

⁶² Const. of 1967, art. 114 (I) (g). Note that Articles 114, 119 and 117 correspond to Articles 119, 125 and 122, respectively, of the 1969 Constitutional Amendment.

⁶³ *Id.* at art. 114 (III) (a) and (b).

⁶⁴ The original jurisdiction was extended to cases in which foreign States or an *international organization* as parties, on one side, and not only the Federal Government, the States and the Federal District, but also *Territories* as parties on the other side. *Id.* at art. 114 (I) (c).

cases where the counties are parties. Decisions at the first instance in a case between, on the one hand, a County or a person domiciled or resident in Brazil, and on the other hand a foreign State or international organization, became the province of federal district courts, which were also given power to judge cases based on a treaty or contract of the Federal Government with a foreign State or international organization.⁶⁵ They were also granted power to judge certain specified crimes occasionally affecting international law: (a) those covered by an international treaty or convention whenever the commission thereof began within Brazil and the result occurred abroad, or vice versa; (b) those committed on board ships or aircraft (except for military vessels); and (c) those involving the illegal entry or aliens or their remaining in Brazil. The enforcement of foreign judgments was to be carried out by the federal courts after a homologation order, and letters rogatory were to be complied with by them after the *exequatur* order.⁶⁶ The Federal Court of Appeals (TFR) was given appellate jurisdiction over cases decided by the district courts.⁶⁷

During this period, the pace of incorporation of international agreements relating to international organizations into Brazilian law did not diminish: witness the International Hydrographic Organization, Convention signed in Monaco on May 3, 1967;⁶⁸ the World Intellectual Property Organization (WIPO), Convention signed in Stockholm on July 14, 1967;⁶⁹ the International Cotton Institute Convention, opened to signature in Washington on January 17, 1966;⁷⁰ the International Telecommunications Satellite Organization (Intelsat), agreement signed in Washington on August 20, 1971;⁷¹ the United Nations Industrial Development Organization (UNIDO) Convention concluded in Vienna on April 8, 1979;⁷² and the International Maritime Satellite Telecommunications Organization (INMARSAT), Convention concluded in London on September 7, 1967, with its Protocol.⁷³

The roster of governmental acts concerning international organizations further includes Decrees Nos. 60.172 of February 1, 1967 and 62.980 of July 12, 1968, relating to the application of economic and political sanctions against Southern Rhodesia, in accordance with the respective terms of United Nations Security Council Resolutions 232 (1966) and 253 (1968); as well as Decree No.

⁶⁵ Const. of 1967, art. 119 (II) & (III).

⁶⁶ *Id.* at art. 119 (V), (IX) and (X).

⁶⁷ *Id.* at art. 117 (II).

⁶⁸ Promulgated by Decree No. 68.106 of Jan. 25, 1971.

⁶⁹ Promulgated by Decree No. 75.541 of Mar. 31, 1975.

⁷⁰ Promulgated by Decree No. 70.060 of Feb. 18, 1972.

⁷¹ Approved by Legis. Decree No. 87 of Dec. 5, 1972.

⁷² Approved by Legis. Decree No. 109 of Nov. 4, 1980.

⁷³ Promulgated by Decree No. 83.976 of Sept. 17, 1979.

91.524 of August 9, 1985, concerning restrictions on relations with South Africa, in view of Security Council Resolutions 473 (1980), 588 (1984), 566 (1985) and 569 (1985). In addition, Brazil approved the agreement with the United Nations Children's Fund (FISD), signed in New York on March 28, 1966.⁷⁴

As to regional international organizations, one may cite the Protocol to Reform the Organization of American States, signed in Buenos Aires on February 27, 1967;⁷⁵ as well as the Charter of the Organization of American States, as amended by this Protocol.⁷⁶ Brazil participated in the Constitutive Convention of the Latin American Economic System (SELA), signed in Panama City on October 17, 1975;⁷⁷ and the Latin American Integration Association Treaty (ALADI), signed on August 12, 1980.⁷⁸ Included within these regional accords are: the River Plate Basis Treaty, signed in Brasilia on March 23, 1970;⁷⁹ the Agreement on Immunities, Exemptions and Privileges of the Financial Fund for the Development of the River Plate Basin, concluded in Assunción on December 9, 1977;⁸⁰ and the Treaty on Amazon Cooperation, signed in Brasilia on July 3, 1978.⁸¹

The intensification of the problems of development, beginning in the 1960s, spurred Brazil to join defense of the positions taken by the underdeveloped countries, particularly that of the Group of 77, to which Brazil belongs. In 1973, Brazil adopted the Protocol relating to trade negotiations between developing nations, carried out within the GATT framework from December 1970 through August 1971.⁸² Brazil adopted a Protocol adding Part IV (on Trade and Development) to the General Agreement of GATT in 1975.⁸³

Several Conventions were promulgated during this period with respect to airspace. These include: the Convention on Offenses and Certain Other Acts Committed on Board Aircraft, concluded in Tokyo on September 14, 1963, and signed on February 28, 1969;⁸⁴ a Convention for the Unification of Rules Relating to International Air Transportation, complementary to the Warsaw Convention, signed in Guadalajara on September 16, 1961;⁸⁵ and the Convention for The

⁷⁴ Promulgated by Decree No. 62.125 of Jan. 16, 1968.

⁷⁵ Promulgated by Decree No. 66.774 of June 24, 1970.

⁷⁶ Promulgated by Decree No. 67.542 of Nov. 12, 1970.

⁷⁷ Promulgated by Decree No. 78.018 of Jy. 12, 1976.

⁷⁸ Promulgated by Decree No. 87.054 of Mar. 23, 1982.

⁷⁹ Promulgated by Decree No. 67.084 of Mar. 1, 1970.

⁸⁰ Promulgated by Decree No. 84.438 of Jan. 28, 1980.

⁸¹ Promulgated by Decree No. 85.050 of Aug. 18, 1980.

⁸² Promulgated by Decree No. 72.573 of Aug. 2, 1973.

⁸³ Decree No. 76.032 of Jy. 25, 1975.

⁸⁴ Promulgated by Decree No. 66.520 of April 30, 1969.

⁸⁵ Promulgated by Decree No. 60.967 of Jy. 7, 1967.

Suppression of Unlawful Acts against the Safety of Civil Aviation, concluded in Montreal on September 23, 1971.⁸⁶

Brazil widened the limits of its territorial sea, first to twelve⁸⁷ and then to two hundred nautical miles.⁸⁸ As a developing country with a long seacoast, and as a member of the territorialist faction of the Third Conference on the Law of the Sea, Brazil participated intensely in the negotiations and approved the Convention signed in Montego Bay on December 10, 1982.⁸⁹ Brazil was the thirty-seventh country to deposit its instrument of ratification of this Convention on the Law of the Sea and is awaiting its entry into force on the international level so as to ratify it.

Other Brazilian acts referring to maritime areas and activities include the following: the Convention on the Safeguarding of Human Life at Sea and the Rules to Prevent Collisions at Sea, adopted in London on June 7, 1960;⁹⁰ the Convention for the Regulation of Whaling, signed in Washington on December 2, 1946;⁹¹ the Convention on Civil Liability for Damage Caused by Oil Pollution, signed in Brussels on November 29, 1969;⁹² the Convention on International Regulations to Avoid Collisions at Sea, signed in London on October 20, 1972;⁹³ the Convention for the Facilitation of International Maritime Traffic, signed in London on April 9, 1965;⁹⁴ the Convention on the Conservation of Tuna and Related Fish of the Atlantic, signed in Rio de Janeiro on May 14, 1966;⁹⁵ the Convention for the Prevention of Pollution Caused by Ships, concluded in London on November 2, 1973, and its respective Protocol, signed in the same city on February 17, 1978;⁹⁶ and the Convention on Cargo Lines, signed in London on April 5, 1966.⁹⁷

Brazil also promulgated a number of international conventions and treaties relating to the Antarctic, outer space, and satellite communications. On May 16, 1975, Brazil adhered to the Antarctic Treaty (Washington, December 1, 1959).⁹⁸ In

⁸⁶ Promulgated by Decree No. 72.383 of Je. 20, 1973.

⁸⁷ Decree-Law No. 553 of Apr. 25, 1969.

⁸⁸ Decree-Law No. 1.098 of Mar. 25, 1970.

⁸⁹ Approved by Legis. Decree No. 5 of 1987.

⁹⁰ Promulgated by Decree No. 60.696 of May 8, 1967.

⁹¹ Promulgated by Decree No. 73.497 of Jan. 17, 1974.

⁹² Promulgated by Decree No. 79.437 of Mar. 28, 1977.

⁹³ Promulgated by Decree No. 80.068 of Aug. 2, 1967.

⁹⁴ Promulgated by Decree No. 80.068 of Nov. 7, 1977.

⁹⁵ Promulgated by Decree No. 65.026 of Aug. 20, 1969.

⁹⁶ Both approved (with reservations) by Legis. Decree No. 4 of 1987.

⁹⁷ Promulgated by Decree No. 66.103 of Jan. 22, 1970.

⁹⁸ Promulgated by Decree No. 75.963 of Jy. 11, 1975.

1969, Brazil adhered to the Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies, opened for signature in London, Moscow and Washington on January 27, 1967.⁹⁹ Brazil also adhered to the Accord on Satellite Communications, adopted in Washington on August 20, 1964 and signed on February 4, 1965;¹⁰⁰ the Agreement on Rescue of Astronauts and Return of Astronauts and of Objects Launched in Outer Space, concluded in London, Washington, and Moscow, on April 22, 1968;¹⁰¹ and the Convention on International Liability for Damage Caused by Space Objects, signed in London, Moscow and Washington on July 13, 1972.¹⁰²

Brazil has adhered to a substantial number of international labor conventions (ILO), including: No. 111 on discrimination in matters of employment and occupation; No. 115 on protection against ionized radiation; No. 116 on the revision of the final articles of the Conventions adopted by the General Conference of the International Labor Organization in its first 32 sessions;¹⁰³ No. 96 on remunerated employment offices, adopted by the ILO General Conference in its 32nd session;¹⁰⁴ No. 117 on basic objectives and rules of social policy; No. 118 on to equal treatment of nationals and non-nationals in social security matters; No. 120 on hygiene in trade and offices; and No. 122 on employment policy.¹⁰⁵ Subsequently, Brazil adopted ILO Convention No. 124, concerning medical examination of children for fitness to work in underground mines; No. 125 on the fitness certificates of fishermen; and No. 127 relating to the maximum amount of cargo to be transported by one worker.¹⁰⁶

With respect to the law of war, Brazil adopted the long-standing Geneva Protocol of June 17, 1925, on the Prohibition of the Use in War of Asphyxiating, Poisonous or Similar Gases and of Bacteriological Methods of War;¹⁰⁷ and the Convention on the Prohibition of Development, Production and Storage of Bacteriological (Biological) Weapons and those Based upon Toxins and their Destruction, signed in London, Washington and Moscow on April 10, 1972.¹⁰⁸

⁹⁹ Promulgated by Decree No. 64.362 of Apr. 17, 1969.

¹⁰⁰ Promulgated by Decree No. 61.229 of Aug. 23, 1967.

¹⁰¹ Promulgated by Decree No. 71.989 of Mar. 26, 1973.

¹⁰² Approved by Legis. Decree No. 77 of Dec. 1, 1972.

¹⁰³ Conventions 111, 115, and 116 were promulgated, respectively, by Decrees Nos. 62.150, 62.151 and 62.152, all dated Jan. 1, 1968.

¹⁰⁴ Promulgated by Decree No. 63.161 of Aug. 23, 1968.

¹⁰⁵ Conventions Nos. 117, 118, 120, and 127 were promulgated by Decrees Nos. 66496 through 66499, respectively, dated Apr. 27, 1970.

¹⁰⁶ Conventions Nos. 124, 125, and 127 were promulgated by Decrees Nos. 67.342, 67.341, and 67.339 of Oct. 5, 1970, respectively.

¹⁰⁷ Promulgated by Decree No. 67.200 of Sept. 15, 1970.

¹⁰⁸ Promulgated by Decree No. 77.374 of Apr. 1, 1976.

In the area of education, culture and intellectual property, during this period Brazil adhered to the Convention on Measures to be Adopted to Prohibit the Importation, Exportation and Transfer of Illegally Obtained Cultural Property, signed in Paris on November 14, 1970;¹⁰⁹ the Bern Convention for the Protection of Literary and Artistic Works, revised in Paris on July 24, 1971;¹¹⁰ the Universal Copyright Convention, revised in Paris on July 24, 1971;¹¹¹ and the Treaty of Cooperation on Patent Matters, signed in Washington on June 19, 1970.¹¹² Brazil also adhered to the Convention on Psychotropic Substances, signed in Vienna on February 21, 1971.¹¹³ Also noteworthy is the Treaty of Itaipú with Paraguay, dealing with one of the world's largest hydroelectric dams, signed in Brasília on August 2, 1973.¹¹⁴

During this period, various compendiums on international law were published. They include: Celso de Albuquerque Mello, *Curso de Direito Internacional Público* (Course on Public International Law) (Rio de Janeiro, 1968), edited in two successive volumes; Oliveiros Litrento, *Manual de Direito Internacional Público* (Manual on Public International Law) (Forense: Rio 1968); and Luis Ivani de Amorim Araújo, (Course on Public International Law) (Borsoi: Rio 1972). In 1974, the Naval War School (*Escola de Guerra Naval*) published a four-volume work entitled *Direito Internacional Público* (Public International Law) with the collaboration of Raphael Valentino Sobrinho, Celso de Albuquerque Mello, Mário Pessoa and Vicente Marotta Rangel. More recently were published, among other works: José Dalmo F. Belfort de Mattos, *Manual de Direito Internacional Público* (Manual on Public International Law) (Saraiva: São Paulo 1979); Antônio Augusto Cançado Trindade, *Princípios de Direito Internacional Contemporâneo* (Principles of Contemporaneous International Law) (Univ. of Brasília Press: Brasília 1981); and Oyama Cesar Ituassu, *Curso de Direito Internacional Público* (Course on Public International Law) (Forense: Rio 1986).

The conclusion of the Convention on the Law of Treaties stimulated studies on this source of international law. In 1971, Geraldo Eulálio Nascimento e Silva published *A Conferência de Viena sobre o Direito dos Tratados* (The Vienna Conference on the Law of Treaties). In that same year, he also published *A Missão Diplomática* (The Diplomatic Mission) (Companhia Americana: Rio 1971). Six years later, he gave a course at the Academy of International Law in the Hague on "Le facteur temps et les traités."¹¹⁵ João Grandino Rodas presented his dissertation at the University of Coimbra on *Os Tratados Internacionais e o Direito*

¹⁰⁹ Promulgated by Decree No. 72.312 of May 31, 1973.

¹¹⁰ Promulgated by Decree No. 75.699 of May 6, 1975.

¹¹¹ Promulgated by Decree No. 76.905 of Dec. 24, 1975.

¹¹² Promulgated by Decree No. 81.742 of May 31, 1978.

¹¹³ Promulgated by Decree No. 79.388 of Mar. 14, 1977.

¹¹⁴ Promulgated by Decree No. 72.707 of Aug. 28, 1973.

¹¹⁵ 154 *Recueil des Cours* 215-298 (1977- I).

Constitucional (International Treaties and Constitutional Law); he also defended theses for his doctorate and faculty membership (*livre docência*) at the University of São Paulo respectively on *Alguns Problemas de Direito dos Tratados, Relacionados com o Direito Constitucional à Luz da Convenção de Viena* (Certain Problems of the Law of Treaties Related to Constitutional Law in Light of the Vienna Convention) (1973) and *Publicidade dos Tratados Internacionais* (Publicity in International Treaties) (1980). Besides treating a topic of conflict of laws, Celso Láfer, in his thesis for membership on the faculty of the University of São Paulo, dealt with *Da Reciprocidade no Direito Internacional Econômico: O Convênio do Café de 1976* (Reciprocity in International Economic Law: the Coffee Convention of 1976) (São Paulo 1977). Antonio Paulo Cachapuz de Medeiros wrote *O Poder Legislativo e os Tratados Internacionais* (The Legislative Power and International Treaties) (Porto Alegre 1973). In 1984, José Francisco Rezek published a book entitled *Direito dos Tratados* (The Law of Treaties) (Forense: Rio 1984).

In 1968, Laércio Francisco Betiol's book *Integração Econômica e União Política Internacionais* (Economic Integration and International Political Union) (RT:1968) was published in São Paulo. In 1969, Mário Pessoa published *Leis da Guerra e Armas Nucleares* (Laws of War and Nuclear Weapons) (RT: São Paulo 1969). *Contribuição ao Estado da Política Nuclear Brasileira* (A Contribution to the State of Brazilian Nuclear Policy) was the doctoral thesis submitted in 1974 to the Catholic University of São Paulo by Guido Fernando Silva Soares. Three years later, he published *As Salvaguardas nos Acordos Nucleares* (Safeguards in Nuclear Agreements) (Bushatsky: São Paulo 1977). The same writer, in a thesis for faculty membership at the University of São Paulo dealt with *Das Imunidades de Jurisdição e de Execução* (Immunities from Jurisdiction and Execution) (1980). The theme of international procedural law is also the subject of a book by A.A. Cançado Trindade, *O Esgotamento de Recursos Internos no Direito Internacional* (The Exhaustion of Internal Resources in International Law) (Univ. of Brasília Press: 1984), which received a prize offered by the University of Cambridge in 1979.

The convergence of international law, science and technology is at the heart of *Os Novos Horizontes do Direito Internacional* (New Horizons of International Law) by Ilmar Pena Marinho (Horizonte Ltda.: Brasília 1978). Renato Ribeiro wrote *Nacionalização de Bens Estrangeiros ante o Direito Internacional* (The Nationalization of Foreign Property under International Law) (Resenha Universitária: São Paulo 1977). Araminta Azevedo Mercadante's doctoral thesis at the University of São Paulo was on the subject of *Empréstimos Públicos Internacionais* (Public International Loans) (1982), while Maria de Nazaré Oliveira Imbiriba's doctoral dissertation at the same university dealt with *Do Princípio do Patrimônio Comum da Humanidade* (The Principle of Common Patrimony of Humanity). A similar topic was dealt with by Christian G. Caubet at the Federal University of Santa Catarina, where he published *Fundamentos Político-Econômicos da Apropriação dos Fundos Marinhos* (Political-economic Bases for the Appropriation of the Ocean Floor) (1979).

"Le Plateau Continental dans la Convention de 1982 sur le Droit de la Mer" was the title of the course given by Vicente Marotta Rangel at the Academy of

International Law at the Hague (1985).¹¹⁶ José Francisco Resek gave a course at that same academy on "Le Droit International de la Nationalité" in 1986.¹¹⁷ Two years before, José Sette Câmara had spoken at that Academy on "Pollution of International Rivers."¹¹⁸ In that same year the *Anuário do Instituto Hispano-Luso-Americano do Direito Internacional* (1984) published the dissertation of Irineu Strenger entitled "Proteção do meio ambiente: responsabilidade internacional do Estado" (Protection of the Environment: International Liability of States). The question of the environment was taken up again by Geraldo Eulálio Nascimento e Silva in the *Institut de Droit International* as reporter on the topic "Air Pollution across Natural Frontiers", whose conclusions were approved in the session of that institute held at Cairo.¹¹⁹

In addition to the previously noted doctoral theses at the University of São Paulo, one should note that of Gustavo Zanini on *O regime jurídico e a função econômica dos rios internacionais* (The Legal Regime and the Economic Function of International Rivers) (unpublished, undated); that of Hermes Marcelo Huck on *Contratos com o Estado: aspecto de direito internacional* (Contracts with the State: an Aspect of International Law) (unpublished 1981); that of José Carlos de Magalhães on *Arbitragem internacional entre Estado e particular* (International Arbitration between States and Private Parties) (unpublished 1983); and that of Paulo Borba Casella on *Apoderamento ilícito de aeronaves* (Unlawful Taking Possession of Aircraft) (unpublished 1986). After defending his doctoral thesis at the University of Paris on *Les Joint Ventures dans les Relations Internationales* (1981), Luiz Olavo Baptista submitted a thesis for faculty membership at the University of São Paulo on *Aspectos jurídicos das transferências eletrônicas internacionais de fundos* (Legal Aspects of International Electronic Transfers of Funds) (1986).

The Treaty of Itaipu was the subject of theses defended at the University of Paris I and at Toulouse I in 1983 by Laércio Francisco Betiol (*Le Traité d'Itaipu*) (1979) and Christian G. Caubet (*Le Barrage d'Itaipu et le Droit International Fluvial*) (1983) respectively. The former is a professor at the Getúlio Vargas Foundation in São Paulo and the latter at the Federal University of Santa Catarina.

The theme of human rights was dealt with profoundly by A.A. Cançado Trindade in his course on "Co-existence and Co-ordination of Mechanisms of International Protection of Human Rights" given at the Hague Academy of International Law in 1987,¹²⁰ and in Celso Lafer's thesis for a chair professorship at the University of São Paulo published as *A Ruptura Totalitária e a Reconstrução dos Direitos Humanos* (The Totalitarian Break and the Reconstruction of Human Rights) (Companhia das Letras: São Paulo 1988).

¹¹⁶ 194 *Recueil des Cours* 269-428 (1985-V).

¹¹⁷ 198 *Recueil des Cours* 333-400 (1986-III).

¹¹⁸ 186 *Recueil des Cours* 117-218 (1984-III).

¹¹⁹ Provisional Report in 62-I *Annuaire de l'Institut de Droit International* (1987).

¹²⁰ 202 *Recueil des Cours* 9-435 (1987-II).

V. THE PRESENT CONSTITUTION (1988-1990)

Compared with prior Brazilian Constitutions, the present Constitution, which went into force on October 5, 1988, is at first glance surprising, because it does not reiterate constitutional provisions for the resolution of international conflicts and the prohibition of wars of conquest. As to the latter, the position is correct, since normative international law today condemns all armed aggression, which may occur even if there is no attempt at conquest. The present Constitution preferred to note its commitment "to the peaceful resolution of controversies" (Preamble), and to include among the principles of international relations, that of defending peace and of peaceful resolution of conflicts.¹²¹ Such principles are sufficient to indicate a commitment identical to prior commitments *i.e.*, to the peaceful resolution of conflicts.

The President of the Republic is given exclusive powers, in case of foreign aggression, to declare war "as authorized by the National Congress or *ad referendum*" when the aggression occurs between legislative sessions, as well as to "declare national mobilization, total or partial, under the same conditions."¹²² This is followed by a grant of power to the President of the Republic to "celebrate peace, authorized by or *ad referendum* the National Congress."¹²³

The Constitution now in force reiterates the specific power of the President of the Republic to "maintain relations with foreign States," a technical improvement in wording due to the removal of the definite article "the", previously inserted before the word "foreign". Nevertheless, the new Constitution diverges from its predecessors by giving the President of the Republic the power both to "maintain relations with foreign States" and to "accredit their diplomatic representatives." The innovation lies in the device of listing, among the roll of powers of the President of the Republic, one that was implicit in two other constitutional provisions: (a) where the Federal Senate is granted power to approve the representatives of permanent diplomatic missions; and (b) where the President of the Republic is recognized as empowered to maintain relations with foreign States.

The Constitution brought further innovations in the procedure for conclusion of international treaties. Article 84 (VIII) grants exclusive powers to the President of the Republic to "enter into international treaties, conventions and acts, subject to the approval of the National Congress." Thus, the provisions of the 1969 Constitution have been retained. But the *ad referendum* powers of the National Congress have been modified. What powers does this body have in this respect? The answer is given in Article 49(I), which confers on Congress exclusive powers "to decide definitively on international treaties, accords or acts that involve serious charges or commitments on the national patrimony." One can immediately note a discrepancy between the two provisions, with the former referring to "international

¹²¹ Const. of 1988, art. 4 (VI) and (VII).

¹²² *Id.* at art. 84 (XIX).

¹²³ *Id.* at art. 84 (XX).

treaties, *conventions* and acts" and the latter referring to "international treaties, *accords* and acts." This discrepancy, which should have been avoided, leads us to verify that the term "foreign accords" was used in the 1969 Constitutional Amendment, whose Article 42(IV) gave exclusive power to the Federal Senate to "authorize foreign loans, transactions or *accords*, of any nature, of interest to the States, the Federal District and the Counties, after consultation with the Federal Executive Branch." The vehement debates that arose over the legality of the foreign loan agreements contracted by the Federal Government, which resulted in the growth of the foreign debt, surely explain the wording of Article 52(IV) of this Constitution, in which any mention of "foreign accords" was removed. Under the new provision, only the Federal Senate has the power "to authorize foreign financial transactions of interest to the Federal Government, States, Federal District, Territories and Counties."¹²⁴ The Federal Senate retains its prerogative of approving the heads of permanent diplomatic missions, even though the 1988 text introduces a change in language from the corresponding provision in the 1969 Constitutional Amendment. The change consists in adding that approval will be given "after debate in closed session."¹²⁵ Not only is the vote secret, but so too is the debate on the person nominated by the President of the Republic to be the head of a permanent diplomatic mission.

The complex question of the separation of powers between the President of the Republic and the National Congress with respect to concluding international acts was resolved in a surprising way, to a certain extent unknown in comparative constitutional law. The criterion for determination of whether the President may act alone is whether the act involves serious commitments or encumbrances upon national patrimony. Any treaty, accord or international act that involves a serious commitment or encumbrance to the national patrimony must be submitted to a decision by the National Congress.

In general, the powers of the Federal Supreme Court were retained¹²⁶ as were those of federal courts.¹²⁷ These powers were restricted, however, in relation to international treaties, since only the Federal Supreme Court can declare an international treaty unconstitutional.¹²⁸ The Regional Federal Tribunals, instituted by the new Constitution, may decide, at the appellate level, cases decided by the federal district judges.¹²⁹ The Superior Tribunal of Justice, also created by the New Constitution, has the power to decide, on ordinary appeal, "cases in which the parties on one side are a foreign State or an international organization, and, on the other side, a County or a person resident or domiciled in Brazil."¹³⁰ It may further

¹²⁴ *Id.* at art. 52 (V).

¹²⁵ *Id.* at art. 52 (IV).

¹²⁶ *Id.* at art. 102 (I) (e), (g) and (I); art. 102 (III) (b).

¹²⁷ *Id.* at art. 109 (II), (III), (V), (IX), and (X).

¹²⁸ *Id.* at art. 102 (III) (b).

¹²⁹ *Id.* at Art. 108 (II).

¹³⁰ *Id.* at art. 105 (II) (c).

judge, in special appeals, "cases decided, in sole or last instance, by the Regional Federal Tribunals or by the Tribunals of the States, Federal District and Territories, when the appealed decision is contrary to an international treaty or federal law, or denies the effectiveness thereof."¹³¹

An innovation in the jurisdiction of the courts in deciding labor claims against foreign States was also made. Prior Constitutions contained a conflict between the generic jurisdiction *ratione personae* of the federal district courts, and the generic jurisdiction *ratione materiae* of the labor courts. This conflict in jurisdiction, which judicial bodies formerly had to resolve, has today been decided in favor of the labor courts. Under Article 114 of the present Constitution, "the Labor Court System has the power to conciliate and adjudicate individual and collective labor disputes between workers and employers, including foreign public entities...."

The wording of the Constitution was unfortunate when it included among the property of the Federal government (and, therefore, of Brazil) "the natural resources of the continental shelf" (art. 20-V); the prior Constitution included the *shelf itself* (art. 4-III), which meant that the natural resources, as accessories to the principal, were also ours. By limiting the property of the Federal Government to the natural resources of the shelf, it permits an interpreter to argue that the continental shelf itself is no longer part of the territory of the federal government, and therefore, of the Federal Republic of Brazil.... This point should be considered at the first constitutional revision, to occur in 1993.

During these few months when the new Constitution has been in effect, the doctrine has developed in two textbooks published in 1989: *Direito Internacional Público* (Public International Law) (vol. I) by Gilda Maciel Corrêa Meyer Russomano (Forense: Rio 1989), and *Direito Internacional Público* (Public International Law, Basic Course) by Jose Francisco Rezek (Saraiva: São Paulo 1989).

During this period, the doctrine has been concerned with a topic which lies at the heart of two books: *A Dívida Externa Brasileira* (The Brazilian Foreign Debt), by Jacob Dolinger (Nova Fronteira: Rio 1988) and *A Dívida Externa: uma Questão de Direito Internacional Público* (The Foreign Debt: a Question of Public International Law) by José Carlos de Magalhães (São Paulo 1989). Edited by the author, the latter book was a thesis submitted in the competitive examination to become a member of the faculty at the University of São Paulo.

A new law review, edited by Forense Universitária, entitled *Revista do Direito de Comércio e das Relações Internacionais* (International Law, Trade and Relations Journal) has appeared. Its directors are Irineu Strenger and Vicente Marotta Rangel, with Luiz Olavo Baptista as editor-in-chief. As the name indicates, the Journal covers not only contributions and research on the law of nations, but also on related areas.

At the end of a necessarily incomplete overview of public international law in Brazil during the last five decades, it is fitting to observe that, notwithstanding

¹³¹ *Id.* at art. 105 (III).

the existence of specific trends in each period we examined, there have always subsisted, throughout this half century, intrinsic elements that have been exceedingly consistent and constant. As José Mendes said, when he taught international law at the University of São Paulo during the course of the First World War, "law is to the social organism as clothing is to the individual organism...; each phase of social evolution contains the prior phase, with something added."¹³² This is what has occurred during the last decades, so that the contemporary period represents not mere continuity, but also a complementation of the prior periods. Component elements of this complementation are those provision of the present Constitution that reflect upon the international order, some of which, through practice, case law and doctrine, will make a contribution towards crafting and perfecting the law of nations.

¹³² "Relação entre o direito internacional público e o direito nacional nos países americanos," 18 RT 81 (1918).