Visions of International Law in the Nineteenth Century: The Experience of the French Intervention in Mexico

Tania Atilano*
University of Zurich, Zurich, Switzerland
tania.atilano@gmail.com

'No creo que la naturaleza haya formado diferentes cuerpos de leyes para cada pueblo o para cada familia de pueblos llamadas razas. En mi opinión, es más natural suponer que la providencia rige al género humano por el mismo código de leyes, igualmente aplicable a la raza anglosajona, que a la latina, a los indios que a los africanos.'

[I don't think nature has formed different bodies of laws for each people or for each family of peoples called races. In my opinion, it is more natural to suppose that providence governs the human race by the same code of laws,

* Post Doctoral researcher Zurich University. The author would like to thank Prof. Christian Tams, Rebecca Kruse, Alexander Holzer and the anonymous reviewers for their invaluable feedback and comments, as well as Jorge González Galdamez for his guidance at the Fray Francisco de Burgoa Library in Oaxaca, Mexico.

equally applicable to the Anglo-Saxon race, as to the Latin, to the Indians, and to the Africans.][1]

Matías Romero, 1867[2]

Abstract

The history of international law dedicated to the period of the nineteenth century is still very much concentrated on Europe and the US. However, by the mid-nineteenth century Mexican liberal republicans engaged creatively with international law. In the midst of war and foreign intervention a 'vision of international law' emerged in which the right of independence and the principles of 'equal sovereignty' and 'non-intervention' were enforced through domestic law. The creative ways in which international law was deployed will be explored and will illustrate its emancipatory potential.

Keywords

principle of non-intervention – equal sovereignty – history of international law – self-determination – laws of war – military trials

I. Introduction

In the spirit of broadening the scope of places and actors that have contributed to the development of international legal thought and practice, this article puts the spotlight on a case in which the language and concepts of international law were employed to challenge European hegemony during what is known as the *French Intervention in Mexico* (1862-1867). This case illustrates the challenge of turning formal sovereignty into reality through legal norms and practices while overturning hierarchical visions of sovereign rights.[3] The con-

1 Translation by the author. Unless stated otherwise, all translations are the author's.

2 Extract of a speech given by Matías Romero at a banquet given in his honour to celebrate the defeat of Maximilian's Empire. The banquet was given in New York on 2 October 1867. Matías Romero was a special envoy of the Mexican Republic to the United States and an important figure in the Mexican liberal movement. See *Banquete dado en obsequio del Señor Don Matías Romero, enviado extraordinario y plenipotenciario de México en los Estados Unidos por ciudadanos de Nueva York, el 2 de octubre de 1867* (Imprenta del Gobierno en Palacio 1868), 56.

3 Gerry Simpson, *Great Powers and Outlaw States: Unequal Sovereigns in the International Legal Order* (Cambridge University Press 2004).

testations made to Napoleon III's imperial project were not only discursive but also legal in nature. The arguments and normative frameworks put forward by Mexican liberal republicans challenged the arbitrariness and selectivity of the application of international law by European powers. The interpretation and practice of international law during the French Intervention constituted a 'vision of international law' that was supported by the idea that all states, regardless of their influence or power, should abide by the law and that nations should respect each other's rights.[4] This is perfectly illustrated by the analogy between individuals and states, drawn in 1867 by Benito Juárez, Mexico's first Indigenous president and leader of the liberal republicans:

> 'Among individuals, as among nations, respect for the rights of others is peace.'[5]

This vision of international law sharply contrasts with how international relations among European states were at the time governed by the 'balance of power',[6] while the expansion of international law beyond Europe was under debate and often shaped by racial and cultural biases.[7]

Another characteristic which I think influenced the interpretation and practice of international law more broadly in the Americas and particularly in Mexico is that its starting point was the question of how to separate from Spain, how to obtain sovereignty, maintain it and be recognised by the European powers. The most important issue, however, was how this sovereignty would be acknowledged in everyday interactions and affairs, such as the recurrent theme of the protection of European subjects.[8] In a sense, the interpretation and practice of 'international law', or the law of nations,[9] began

4 Scholars Tom Long and Carsten-Andreas Schulz also call it 'Juarista liberal internationalism', which they define as '[…] an anti-imperial liberal alternative, based on popular sovereignty, equality, non-intervention and fraternity'. Tom Long and Carsten-Andreas Schulz, 'A Turn Against Empire: Benito Juárez's Liberal Rejoinder to the French Intervention in Mexico', Am. Polit. Sci. Rev. (2024), 1-15 (12).

5 'Entre los individuos, como entre las naciones, el respeto al derecho ajeno es la paz', Manifiesto a la nación expedido en la Ciudad de México con motivo del triunfo de la República sobre la intervención francesa, 15 de julio de 1867, in: Benito Juárez, Felix Romero and Ángel Pola, *Discursos y Manifiestos de Benito Juárez,* recopilación de A. Pola (1905), 286-290.

6 Glenda Sluga, *The Invention of International Order: Remaking Europe after Napoleon* (Princeton University Press 2021), 253-282; Milos Vec, 'De-Juridifying "Balance of Power" – A Principle in 19th Century International Legal Doctrine', ESIL 2011 4th Research Forum, 5 December 2011, available at SSRN: https://ssrn.com/abstract=1968667, last access 16 December 2024.

7 Andrew Fitzmaurice, 'Equality of Non-European Nations in International Law' in: Inge Van Hulle und Randall C. H. Lesaffer (eds), *International Law in the Long Nineteenth Century (1776-1914)* (Brill/Nijhoff 2019), 75-104 (95-102); Simpson (n. 3).

8 Kathryn Greenman, *State Responsibility and Rebels: The History and Legacy of Protecting Investment Against Revolution* (Cambridge University Press 2021).

9 The term 'international law' is used here, as by the 1860s it was common in Mexican discourse. See section IV.

with a practical problem, whereas in Europe the study of and reflections on international law were based on a state of affairs derived from the Congress of Vienna.[10] In the following, I present three concrete examples of the 'vision of international law' that emerged during the French Intervention in Mexico:

1) The law of 1862 that criminalised acts against the nation, the law of nations and individual rights.

2) The military trial of Maximilian of Habsburg in 1867 for violating the law of nations and the laws of war.

3) The crime of *violations of the duties of humanity* in the Mexican Criminal Code of 1871.

My work builds on Arnulf Becker Lorca's *Mestizo International Law*[11] and Liliana Obregón's *Creole Legal Consciousness*.[12] However, I would argue that the three above-mentioned examples go beyond 'appropriating' international law, as they proposed alternative ways of enforcing international law through domestic law. That is also why this article is entitled 'Visions of International Law',[13] as the legal measures adopted by liberal republicans not only aimed at enforcing international law but also at projecting a future in which the community of states would uphold the principles of equal sovereignty, non-intervention and self-determination.

The following sections examine the historical background of the French Intervention and how knowledge of international law was constructed, laying the foundation for the innovative ways in which the Mexican republicans thought about and applied international law.

II. The French Intervention: Historical Background

The building of a new political community after independence in 1821 led to struggles around the question of what form of government the new

10 David W. Kennedy, 'International Law and the Nineteenth Century: History of an Illusion', Nord. J. Int'l L. 65 (1996), 385-420.

11 Arnulf Becker Lorca, *Mestizo International Law: A Global Intellectual History 1842-1933* (Cambridge University Press 2014).

12 Liliana Obregón, 'Between Civilization and Barbarism: Creole Interventions in International Law', TWQ 27 (2006), 815-832. Also, Liliana Obregón, 'Regionalism Constructed: A Short History of "Latin American International Law"', European Society of International Law 2 (2012), Conference Paper No. 5/2012.

13 The author was also inspired by the following phrase by Julia Eichenberg, 'Das Recht ist der Modus, in dem sich moderne Gesellschaften ihre Existenz erträumen', cited in: Arvid Schors and Fabian Klose (eds), *Wie schreibt man Internationale Geschichte? Empirische Vermessungen zum 19. und 20. Jahrhundert* (Campus Verlag 2023), 29.

 DOI 10.17104/0044-2348-2024-4-895

independent state ought to adopt.[14] Eventually, this struggle developed into a clash between liberals and conservatives. While liberals '[…] centered on the rights, freedoms, and autonomy of individuals'[15] as well as complete separation from Spain, conservatives were not in favour of a radical change and sympathized with the church and the 'Spanish Motherland'. Further, while liberals were for federalism, conservatives were for centralism.[16] According to historian Alan Knight, the Mexican-American war and the loss of half the territory as a result of Mexico's defeat left the population with greater nationalistic consciousness and led to more radical views among liberals, ultimately leading to the Constitution of 1857.[17]

The Constitution was promulgated by a 'second generation' of Mexican liberals (the first being the one that ignited the wars of independence) who were convinced that radical measures were needed to remove all vestiges of colonial rule. Accordingly, Articles 1 to 29 of section I of the Constitution granted individual rights such as equality before the law, the abolition of slavery, freedom to exercise a profession, freedom of expression, the prohibition of peonage, the abolition of all *fueros*, or special jurisdictions, to which the church and military were entitled. Article 27, a controversial provision, declared corporate property illegal. The provision was mostly directed at the church and aimed to free up land and turn it into privately owned property.[18] The liberals took the view that this was a way to raise a new class of proprietors.[19]

Article 33 of the Constitution granted foreign subjects the protection of their individual rights and obliged them to '[…] obey and respect the institutions, laws, and authorities of the country, subjecting themselves to the rulings and judgments of the courts, without being able to pursue other remedies than those granted to Mexicans by law'.[20] In this provision we can already see reflected what Argentinian jurist Carlos Calvo would argue much

14 See Hilda Sabato, *Republics of the New World: The Revolutionary Political Experiment in Nineteenth-Century Latin America* (Princeton University Press 2018).

15 Alan Knight, *Bandits and Liberals, Rebels and Saints. Latin America since Independence* (Nebraska University Press 2022), 51.

16 Knight, *Bandits and Liberals* (n. 15), 79-84.

17 Alan Knight, 'El liberalismo mexicano de la reforma hasta la intervención (una interpretación)', *Revista de Historia Mexicana* 35 (1985), 59-91 (73-80).

18 Constitución Federal de los Estados Unidos Mexicanos, 1857, available at: <https://memoricamexico.gob.mx/swb/memorica/Cedula?oId=rS8-q28BTLysp6JamQ7i>, last access 16 December 2024.

19 Knight, 'El liberalismo mexicano' (no. 17), 78-79.

20 Constitución Federal de los Estados Unidos Mexicanos, sancionada por el Congreso general constituyente el 4 de octubre de 1824. Also available at <https://www.diputados.gob.mx/biblioteca/bibdig/const_mex/const_1824.pdf>, last access 16 December 2024.

later regarding equal treatment of foreign subjects, who could not demand special protection from their governments, and should rely solely to domestic jurisdiction.[21] In addition, Article 15 prohibited the extradition of political prisoners.[22] Finally, Article 29 set a fundamental limit on power during a state of emergency: the preservation of human life.

The provisions of the Constitution went hand in hand with what are known as the 'laws of reform', which aimed to establish a secular state, to grant freedom of religion and to remove those functions that were previously performed by the clergy such as issuing birth certificates and celebrating marriage.[23] Another objective of the reform was to abolish military and ecclesiastical *fueros* and to carry out the disentailment of church property and that of other corporations.[24]

Conservatives who claimed that Catholicism should be the only religion of the Mexican nation did not agree either with the secular character of the Constitution or with the banning of ecclesiastical privileges and corporations. In December 1857, troops marched into Mexico City led by the conservative faction, who refused to recognise the Constitution and called for a new constituent congress. This was the beginning of a three-year war known as the Reform War at the end of which the liberals were the victors.[25]

After the Reform War, the liberals gained even more popular sympathies, as the conservatives had proved to be brutal in their retaliation and commission of massacres.[26] This, of course, did not stop conservatives from continuing with or insisting on their project of reestablishing the powers of the church and establishing a monarchy. After the Reform War, conservatives even went a step further, as they sought the backing of Napoleon III's French Empire.

---

21 Charles Calvo, *Le droit international théorique et pratique: précédé d'un exposé historique des progrès de la science du droit des gens*, Vol. 3 (6th edn, M. Guillaumin 1887), 138-146.

22 This provision advanced the ideas of Robert von Mohl as described by Martti Koskenniemi, *The Gentle Civilizer of Nation: The Rise and Fall of International Law 1870-1960* (Cambridge University Press 2001), 49-70.

23 Ley del matrimonio civil (23 de julio 1859); Ley sobre el estado civil de las personas (28 de julio de 1859); Ley sobre libertad de cultos (4 de diciembre 1860); Se extinguen en toda la república las comunidades religiosas (26 de febrero 1863).

24 On the 'laws of reform', see Richard N. Sinkin, *The Mexican Reform, 1855-1976* (University of Texas Press 1979) and Martín Luis Guzmán, *Necesidad de cumplir las leyes de reforma* (UNAM 2007), 255-293.

25 According to the historian William Fowler, 200,000 people were killed in battle. See William Fowler, *The Grammar of Civil War. A Mexican Case Study, 1857-61* (University of Nebraska Press 2022), 43-44.

26 Fowler (n. 25), 182-184.

In July 1861, shortly after the liberals' victory over the conservatives, the President of Mexico, Benito Juárez, declared the suspension of foreign debt.[27] Juárez's idea was to postpone the debt, as financial resources were needed to implement the liberal law reform that consisted, *inter alia*, of instituting a secular state, male universal suffrage, as well as achieving social equality.[28] Spain, Britain, and France, however, were not in favour of the suspension of payments, and they formed an alliance (the so-called Triple Alliance). In October 1861, the three allies signed the London Convention, in which they agreed to send combined military forces to the coast of Mexico.[29] When the military forces arrived in the port of Veracruz, negotiations began between the three powers' proxies and the Mexican government, which ultimately ended with the signing of the *La Soledad Convention* in February 1862. Under the Convention, the three European powers were obliged not to interfere in the national sovereignty and internal affairs of the Mexican state.[30] Nonetheless, in April, French forces started advancing on Mexican territory. Known as the French Intervention in Mexico and as the *Expedition du Mexique* in France, the armed conflict lasted five years.[31] In the course of these five years a monarchical government was established headed by the Austrian Archduke Maximilian of Habsburg (1864-1867).[32]

The advance of French forces on Mexican territory presented Mexican republicans with the reality that France was violating a treaty that had been signed only one month earlier, which stated that no violent force would be used to secure the payment of reparations claims and foreign debt.[33] Not only was France violating a treaty, it was also resorting to the use of armed

27 *Ley de Suspensión de Pagos de 1861* in: Discurso de Juárez en la apertura de sesiones del Congreso de la Unión, Documentos para la historia de México (Colección Lafragua, Vol. 1519, 1889), 857.

28 See Faviola Rivera Castro, 'El liberalismo decimonónico en México' in: Gerardo Esquivel et al. (eds), *Cien ensayos para el centenario, Constitución de los Estados Unidos Mexicanos* (UNAM 2017).

29 Tripartite Treaty of London (Tratado de Londres), 31 de octubre de 1861, ratificado por SS. MM. la reina Doña Isabel II, el emperador de los franceses y la reina de la Gran Bretaña, canjeándose las ratificaciones en Londres el día 15 de noviembre.

30 Convenio de la Soledad, por el que potencias extranjeras no atentarán contra la soberanía nacional, 19 de febrero de 1862, in: *Derechos del pueblo mexicano. México a través de sus constituciones* (sección segunda, UNAM 2016), 408-409.

31 For a fresh account of the history of the French Intervention, see Héctor Strobel, *Resistir es vencer. Historia militar de la intervención francesa 1862-1867* (Grano de Sal editores 2024); Josefina Zoraida Vasquez, 'De la independencia a la consolidación republicana', in: *Historia mínima de México* (Colegio de México 2008), 245-336.

32 Johann Lubiensky, 'Una monarquía liberal en 1863', in: Patricia Galeana (ed.), *La definición del Estado Mexicano 1857-1967* (Archivo General de la Nación 1999), 57-73.

33 Convenio de la Soledad (n. 30), 408-409.

forces on Mexican territory without formally declaring war.[34] For the Mexican republicans, especially President Juárez, this meant an open violation of the principle of sovereignty, as the Mexican Republic was a duly constituted state supported by popular will. The invasion was also a violation of the principle of self-determination, as it was the will of the Mexican people to organise as a republic and not as a monarchy.

III. Liberal Republicanism and International Law

In his various writings, decrees and personal letters,[35] Benito Juárez envisioned a community composed of equal sovereign states in which all states would in future become republics, as he wrote to Karl Blind in 1868:

> 'I believe that progress is a condition of humanity, I hope that the future will necessarily be one of democracy, and I have more and more faith that the republican institutions of the American world will be extended to the unfortunate peoples of Europe who still retain, in spite of themselves, monarchs and aristocracy.'[36]

In this line of thought, liberal republicanism was seen as a condition for the realisation of international law. This approach was also deemed a collaborative effort among the republics of the Americas, as expressed by President Juárez to United States (US) plenipotentiary Marcos Otterbourg in August 1867:

> 'The United States has given the strength of its moral support to the cause of republicanism everywhere, and to its free preservation in Mexico, upholding the just principles of international law.'[37]

---

34 Jorge Magallón Ibarra, *Proceso y ejecución vs. Fernando Maximiliano de Habsburgo* (UNAM 2005), 567.

35 Juárez, Romero and Pola (n. 5).

36 'Como creo que el progreso es una condición de la humanidad, espero que el porvenir será, necesariamente, de la democracia y tengo cada día más fe en que las instituciones republicanas del mundo americano se harán extensivas a los pueblos infortunados de Europa que aún conservan, a pesar suyo, monarcas y aristocracia.' Letter from Benito Juárez to Karl Blind, London, March 9, 1868, in: Jorge L. Tamayo, *Benito Juárez Documentos, Discursos y Correspondencia,* Vol. 13, Chapter CCLV, Doc. 6. As regards Juárez's statement, in 1858, that democracy was the fate of humanity, see José M. Vigil, *México á través de los siglos, La Reforma, Vol. V.* (Ballesca y Com. Editores 1889), 297.

37 'Los Estados Unidos han dado la fuerza de su apoyo moral a la causa del republicanismo en todas partes, y a su libre conservación en México, sosteniendo los principios justos del derecho internacional.' Benito Juárez in his acceptance speech to the US plenipotentiary Marcos Otterbourg in 1867, *El Siglo Diez y Nueve*, Miércoles 21 de Agosto de 1867.

 DOI 10.17104/0044-2348-2024-4-895

Juárez and his liberal companions formed what scholars Tom Long and Carsten-Andreas Schulz categorise as 'Juarista Liberal Internationalism', in which international law sets rights and duties for all states, not only powerful states.[38] The vision of the Mexican republicans was truly novel if we consider that by the mid-nineteenth century the assumption that all states were equal legal subjects was by no means settled.[39] I would argue that international law in this sense is an expression of 'liberal internationalism' or a tool for instituting liberal internationalism. In the view of Juárez and his followers, if states were liberal republics, they would comply with and enact international law. Non-liberal, or tyrannical, governments were not compatible with international law, they believed, as these would not respect the rights of other states but simply impose their own will.[40] This idea went hand in hand with the principle of non-intervention, which for Juárez entailed the obligation '[…] to respect the liberties of the people and the rights of nations'.[41] However, what the French Intervention crudely showed the republican liberals is that no matter how proficient they were in the language of international law they also had to enforce it. This might explain why all three examples discussed in this article share a central feature: they are methods of enforcing international law through domestic law. What the republican government could not achieve through diplomacy it would attempt to accomplish through the law.

The different legal measures republican liberals came up with also went hand in hand with a critical attitude towards the Janus-faced discourse of civilisation.[42] This critique can be found in statements made at the time, such as by Carlos de Gagner, a liberal German and nationalised Mexican who studied law:[43]

---

38 Tom Long and Carsten-Andreas Schulz, 'Benito Juárez Against the World: France, Mexico, and the Clash of Nineteenth-Century Liberal Internationalisms'. Presented at the Rethinking the Past and Present of Liberal Internationalism conference, City, University of London, 11-13 May 2023, and Long and Schulz (n. 4).

39 Simpson (n. 3). See also Milos Vec, 'Das Theater der Souveränität. Performative Dimensionen souveränen Handelns im Völkerrecht des 19. Jahrhunderts verstehen' in: Thomas Maissen, Niels F. May and Rainer Maria Kiesow (eds), *Souveränität im Wandel. Frankreich und Deutschland, 14.-21. Jahrhundert* (Wallstein Verlag 2023), 203-223.

40 Benito Juárez, *Manifiesto justificativo de los castigos nacionales en Querétaro* (Tipografía del Gobierno, en Palacio 1887), 43.

41 Contestación del C. presidente Benito Juárez al discurso del Ministro Marcos Otterbourg al presentar sus credenciales, *El Siglo Diez y Nueve*, Miércoles 21 de Agosto de 1867.

42 In this regard, see also Long and Schulz (n. 4).

43 Martha Celis de la Cruz, 'Presencia de la masonería alemana en México: Carlos de Gagnern (1826-1885)', Revista de estudios históricos de la masonería latinoamericana y caribeña 2 (2011), 152-159, available at <https://revistas.ucr.ac.cr/index.php/rehmlac/article/view/6601/6292>, last access 16 December 2024.

> 'The ancient continent boasts much of the advances of civilization; we do not want to investigate now if this civilization is as complete, as real, and true as they want to present it to us. Suffice it to state here a fact, which does not cease to be curious, and that is that in almost all parts of the world where this much praised European civilization has placed its plant, its immediate effects have been rather harmful than beneficial.'[44]

In the same vein, the lawyer and journalist Manuel Payno said the following in the same year, 1862:

> 'Even if we have revolutions, if our roads are unsafe, if we are uncivilized barbarians, we say, leave us alone!'[45]

In addition, liberalism enjoyed wide acceptance among the population, as it resonated with people's concerns and advocated for the abolition or reform of conditions that restricted their liberties or limited major participation in their everyday lives,[46] such as a hierarchical organisation of society, limitations on the exercise of professions and limited access to education.[47]

To understand how the ideas about and attitudes to international law emerged and were disseminated among the wider population, the next section examines the development of theoretical knowledge of international law among Mexican republican liberals.

IV. Visions of International Law Founded on Knowledge

1. Learning and Teaching International Law

The visions of international law held by Latin American republicans were founded in both theoretical and practical knowledge. Scholar Nicola Miller

---

44 He further draws attention to examples of the negative effects of 'civilization' in China and Japan. See Carlos de Gagern, *Apelación de mexicanos a la Europa bien informada de la Europa mal informada* (imprenta de I. Cumplido 1862), IX-X.

45 Quoted in Sinkin (n. 24), 158.

46 Knight, *Bandits and Liberals* (n. 15), 71-75; Guy P. C. Thomson, 'Popular Aspects of Liberalism in Mexico, 1848-1888', Bulletin of Latin American Research 10 (1991), 265-292. On liberalism and popular participation in the state of Oaxaca, see Peter Guardino, *The Time of Liberty: Popular Political Culture in Oaxaca, 1750-1850* (Duke University Press 2005), 288-291.

47 François Chevalier, 'Conservateurs et libéraux au Mexique. Essai de sociologie et géographie politiques de l'indepéndance a l'intervention Française', Journal of World History 8 (1964), 457-474.

argues that, after gaining independence, 'the liberators' realised they needed knowledge to put the project of building a nation-state into practice. Additionally, she argues that acquiring and producing knowledge belonged to the overall project of creating new epistemologies in the new nation-states.[48] Fields on which a particular focus was placed included political philosophy, economy, engineering, and law.

It could be argued that Latin-American republicans first gained their knowledge of the law of nations through formal education. In a second stage, their knowledge of the topic was broadened by practice. The combination of the two enabled them to imagine political projects, of which the law was a part.[49] The vision republicans had differed from the European view, which held that the application of international law depended on the level of 'cultural' and material accomplishments.[50]

Another crucial element in the formation of liberal thought in post-colonial Spanish America was the foundation of 'institutes of science'. For example, the *Instituto de Ciencias y Artes del Estado de Oaxaca* (Institute of Arts and Sciences of the State of Oaxaca, Mexico),[51] founded after independence in 1827, was a secular institution the main aim of which was to educate individuals in liberalism and in all other scientific endeavours regardless of their class or race. Students were trained in political philosophy, political economy, and law. Prominent figures of the liberal movement studied law at the Institute of Oaxaca, including Benito Juárez (who was part of the first generation of law graduates), Porfirio Díaz, and Matías Romero. Benito Juárez also taught natural law at the institute and even became its director in 1848.[52] When the Institute was founded in 1827, the law of nations (*derecho de gentes*) was taught alongside constitutional law; by 1835, it was taught alongside natural law.[53]

48 See Nicola Miller, *Republics of Knowledge* (Princeton University Press 2020), 124-127.

49 See Martti Koskenniemi, *To the Uttermost Parts of the Earth: Legal Imagination and International Power 1300-1870* (Cambridge University Press 2021).

50 There is a vast literature on the European view. For an overview, see Koskenniemi, *Gentle Civilizer of Nations* (n. 22); Andrew Fitzmaurice, 'Scepticism of the Civilizing Mission in International Law' in: Martti Koskenniemi, Walter Rech and Manuel Jiménez Fonseca (eds), *International Law and Empire: Historical Explorations* (Oxford University Press 2017), 359-384.

51 On the overall importance of the institute in forming liberal elites in nineteenth-century Mexico, see Joaquín Santana, *Entre catédras, hombres de letras, clérigos y libros. Los primeros años del Instituto de Ciencias y Artes del Estado de Oaxaca.* Tesis de Licenciatura (UNAM 2020), 65-70, 99-131; Annick Lempériere, 'Formación de las elites liberales, en el México del Siglo XIX: Instituto de Ciencias y Artes del estado de Oaxaca', Revista Secuencia 30 (1994), 57-94.

52 Santana (n. 51), 119; Lempériere (n. 51), 57-94.

53 Santana (n. 51), 101-102, 114-115.

It could be argued that the European view of various stages of civilisation depending on race made little sense to those like Juárez, a Zapotec born to a poor family in a small village in Oaxaca who rose to become President of the Republic. Many students at the *Instituto de Ciencias y Artes* came from a similar background, and they formed the next generation of lawyers who would fight alongside Juárez in the Reform War and the French Intervention.[54] It was easy for Mexican liberals to recognise that 'civilizational' arguments were only deployed to take advantage of non-European states – as Juárez put it in a speech to the nation in 1861.[55] Their personal experiences contradicted the notion that achieving a certain level of civilization – such as becoming a fully sovereign state – was reserved solely for Europeans and US Americans. They had witnessed their own personal transitions, moving from being part of a class with no access to education under colonial rule to becoming lawyers and more broadly observing the transformation from a colony to being an independent nation-state.

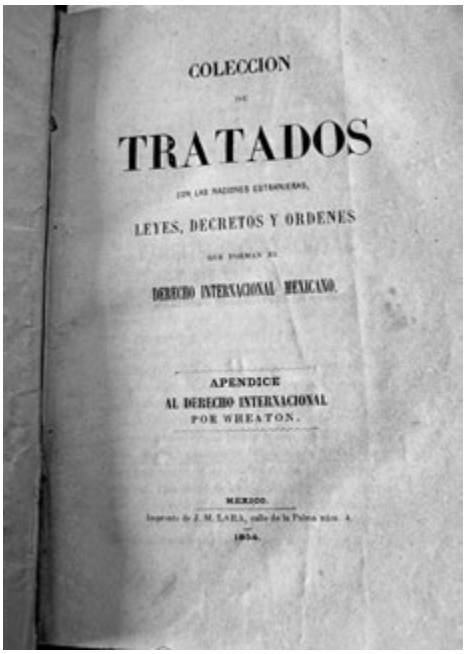
That the law of nations, or international law (a term that was already in use in Mexico by the 1860s), was an important subject of study is evident from the library book catalogue of the Institute of Sciences and Arts of Oaxaca.[56] Published in 1887, the catalogue lists classical works such as that of Hugo Grotius (ed. 1651) and Emmer de Vattel (ed. 1834), as well as Johann Klüber (ed. 1831), Henri Wheaton, and Caspar Bluntschli. The Mexican edition of Henry Wheaton's *Elements of International Law* was published in 1854 and translated into Spanish by José Mariano de la Vega. This edition included a separate volume, designed as an annex, titled *Sources of Mexican International Law*. The annex encompassed all the treaties that had been signed by Mexico with foreign powers between 1821 and 1854.[57] This demonstrates that positive law was considered the primary source of international law, marking a departure from natural law traditions. It also explains the liberals' preference for codifying international law in domestic law, and their insistence on treaties being complied with, as was the case during the military trial against Maximilian of Habsburg.

54 Lempériere (n. 51), 68; Chevalier, (n. 47), 469-470.

55 Manifiesto del presidente constitucional de la república a la nación, 18 de diciembre de 1861, in: Benito Juárez, Felix Romero and Ángel Pola, *Discursos y Manifiestos de Benito Juárez*, recopilación de A. Pola (1905), 257-262.

56 *Catalogo alfabético de la Biblioteca del Estado, Oaxaca* (Imprenta del Estado en la Escuela de Artes y Oficios a cargo de Ignacio Candinal 1887).

57 José Mariano Lara, *Elementos del derecho internacional* / por Henry Wheaton, exministro de los Estados-Unidos de América cerca de la corte de Prusia, miembro honorario de la Academia Real de Ciencias de Berlin, y miembro corresponsal de la Academia de Ciencias Morales y Políticas en el Instituto de Francia; traducción hecha por el Lic. José María Barros (Imprenta de J. M. Lara 1854).


COLECCION

DE

TRATADOS

CON LAS NACIONES ESTRANGERAS,

LEYES, DECRETOS Y ORDENES

QUE FORMAN EL

DERECHO INTERNACIONAL MEXICANO.

APENDICE

AL DERECHO INTERNACIONAL

POR WHEATON.

MEXICO.

1854.

Appendix to Elementos del derecho internacional / por Henry Wheaton, Imprenta de J. M. Lara, calle de la Palma núm. 4, 1854-1855 (Photo by Tania Atilano)

Another example of the reception of the international law doctrine is José Díaz Covarrubias's 1871 translation from French into Spanish of Johann Caspar Bluntschli's treatise on international law.[58] Covarrubias included own comments on the treatise as he thought necessary and wrote in the introduction that it was the most didactic source to teach in the classroom. Indeed, as his students would later report, his translation of Bluntschli's treatise was used as a manual for learning international law at the School of Jurisprudence in Mexico City, where, according to these reports, there was already a Chair in International Law by 1871.[59]

As we can see, to the liberal republicans, proficiency in legal knowledge was necessary to achieve their aim of becoming an independent and sovereign nation. Such knowledge also enabled them to identify breaches of international law, such as that of the French Intervention in Mexico.

58 José Díaz Covarrubias, *El derecho internacional codificado* / por M. Bluntschli, Doctor en derecho, profesor ordinario en la Universidad de Heidelberg; traducción, adiciones y notas de José Díaz Covarrubias (imprenta dirigida por José Batiza 1871).

59 Manuel Cruzado, *Memoria para la bibliografía jurídica mexicana* (Antigua imprenta de E. Murguía 1894), 62-66.

It could also be added that liberal jurists who held important positions after independence emerged from a *mestizo* class that did not enjoy the privileges of the white class during colonial times.[60] In contrast to figures like Andrés Bello or Carlos Calvo, those from the legal profession were taught at Mexican universities or in the post-independence institutes of science. The most prominent example is Benito Juárez.[61] In addition, the leading representatives of liberalism were jurists who not only practised law but also held public office, taught at universities and worked as journalists, literary critics, and writers.[62] Consequently, their legal knowledge was both theoretical and practical. The political engagement of the liberal jurists might also explain why their visions of international law went hand in hand with a political project, namely liberal republicanism.

2. International Law and Language

Language and the establishment of a common grammar became particularly important during the period of 'state building', which in my view influenced how Mexican republicans conceptualised the enforcement of international law. As Liliana Obregón has shown, Andrés Bello not only wrote a treatise on international law but also on the grammar of Spanish language.[63] When Nicola Miller writes of the Latin American republics' decision to adopt Castillian Spanish instead of local variants, she quotes a passage by Andrés Bello, in which he stressed how important it was for the new nations to follow the rules and grammar of the 'Real Academia Española' (RAE, the last authority in matters of the correct use of the Spanish language) to continue communicating with Europe.[64] In this sense, Andrés Bello's position on a common language was consistent with his view on the law of

60 Luis Villoro, *El proceso ideológico de la revolución de independencia* (UNAM 1977), 14-31.

61 Brian Hamnett, 'Juárez, Early Liberalism, and the Regional Politics of Oaxaca, 1828-1853', Bulletin of Latin American Research 10 (1991), 3-21. For an authoritative biography of Juárez, see Ralph Roeder, *Juarez and His Mexico* (Viking Press 1947); see also Patricia Galeana, *Benito Juárez: El hombre y el símbolo* (Crítica México 2023).

62 A biographical review of the major figures of the Mexican liberal reform can be found in Sinkin (n. 24), 31-54.

63 Liliana Obregón, 'The Colluding Worlds of the Lawyer, the Scholar and the Policymaker: A View of International Law from Latin America', Wisconsin Journal of International Law 23 (2005), 145-172 (148-150); Liliana Obregón, 'Construyendo la región americana: Andrés Bello y el derecho internacional' in: Beatriz González-Stephan and Juan Poblete (eds), *Andrés Bello y los estudios latinoamericanos* (Serie Criticas Universidad de Pittsburgh: Instituto Internacional, de Literatura Iberoamericana 2009).

64 See Miller (n. 48), 124-127.

nations.[65] The new nations of the Americas had to adopt the law of nations – just as they had to adopt Castillian Spanish and abide by the rules of the RAE – in order to communicate and argue in the language that was intended to govern interactions between states.

The choice of Castillian Spanish as the common language in the region as well as the choice of the law of nations to communicate with the transatlantic 'other' entailed a rejection of regional legal epistemologies as well as of Mexican Spanish, Chilean Spanish, and Argentinian Spanish. However, far from being a failure to consider or create local legal knowledge, these choices enabled Latin American republics and their leading figures '[…] to situate themselves and their potentially sovereign states within international circuits of recognition, both diplomatic and cultural.'[66] In this respect, the adoption of a common language did not prevent the hybridisation of international law in the Americas (or '*Mestizo* international law' in the words of Arnulf Becker Lorca).[67] This hybridisation gave way to new visions of international law, as we will see in the following sections.

V. Concrete Visions of International Law

1. The Law of 1862 that Criminalised Acts Against the Nation, the Law of Nations and Individual Rights

a) The Right to Independence

Jörg Fisch has argued in his book on the right to self-determination that Hispanic America was a pioneer when it came to articulating a right to independence, based on which colonies had an absolute right to found an independent state. In this regard, Mexico's Declaration of Independence of 1821 states that the Mexican people had the '[…] freedom to concentrate on the achievement of their happiness in the way that best appealed to them.'[68] In addition, Article 1 of the 1824 Mexican Constitution stated that 'The Mexican nation is forever free and independent from the Spanish government

65 On Andrés Bello, see Nina Keller-Kemmerer, *Die Mimikry des Völkerrechts: Andrés Bellos 'Principios de Derecho Internacional'* (Nomos 2018), especially as regards how education was seen as the cornerstone of nation-building, 138-141.

66 Miller (n. 48), 219.

67 Becker Lorca (n. 11).

68 Jörg Fisch, *The Right of Self-Determination of Peoples: The Domestication of an Illusion*, translated by Anita Mage (Cambridge University Press 2015), 74-75.

and any other foreign power.'[69] It can be deduced from this that the right of independence entailed separation from the 'Motherland' through which the Mexican people could pursue happiness by the means they deemed best. More specifically, by 1857 the Mexican people had decided to organise as a liberal republic. After a three-year war between the conservatives and liberals over the 1857 Constitution (from which the liberals emerged victorious), the will of the people to constitute as a liberal republic was reaffirmed.

The peace following the civil war did not, however, bring the stability the liberals had hoped for. When combined military forces from Spain, Britain, and France arrived at the port of Veracruz in October 1861, Juárez recognised the threat to the right of independence, territorial integrity and 'nationality'. In response to this threat, Juárez issued a law by executive decree that criminalised acts against the nation, the order, public peace, and individual rights (*Ley para castigar los delitos contra la nación, contra el órden, la paz pública y las garantías individuales* 1862).[70] The law consists of thirty-one articles and is divided into four categories of crimes: a) crimes against the independence and security of the nation (Article 1); b) crimes against the law of nations (Article 2); c) crimes against public peace and order (Article 3); and d) crimes against individual rights (Article 4).

As we can see from the categories of crimes, the aim was not only to protect sovereign rights but also to impose obligations established by the law of nations and individual rights.

b) Content of the Law

The law of 1862 defined any armed invasion executed by foreigners[71] as a crime against the independence and security of the Mexican nation if no declaration of war preceded the 'invading power'.[72] Any invitation by Mexicans or foreign residents in Mexico to subjects of another power that

69 'La nación Mexicana es para siempre libre e independiente del gobierno español y de cualquier otra potencia', cited in: Fisch (n. 68), 75.

70 Ley para castigar los delitos contra la nación, contra el órden, la paz pública y las garantías individuales, espedida por el Supremo Gobierno de la Nación, C. Victoria de Tamaulipas, año de 1862, impresa por Ascención Pizaña.

71 According to the law of 1862, Mexican citizens who aided the foreign power in the armed invasion would also be prosecuted.

72 According to the customs and usages of war at that time, war was permitted as a means to pursue a political aim but formalities had to be respected, such as declaring war. See Geoffrey Best, *Humanity in Warfare* (Weinfeld and Nicolson 1980), 31-74; Oona Hathaway, Scott Shapiro, *The Internationalists, How a Radical Plan to Outlaw War Remade the World* (Simon & Schuster 2018), 31-55.

encouraged the invasion of Mexican territory or the alteration of its form of government was also made a punishable offence. Further, in the event of the invasion actually taking place, it would also be considered a crime against the right of independence to contribute in any way to the organisation of the invasion by attending meetings, taking minutes, or accepting employment or commissions.

Article 2 defines crimes 'against the law of nations' as piracy and the slave trade in Mexican waters (providing for extraterritorial jurisdiction in case the 'prisoners' were Mexican). This provision plausibly relates to the abduction and selling of Yucatán prisoners of war to Spanish slave traders and owners in Cuba.[73] Juárez probably believed that in case of open war with Spain the slave trade from Yucatán to Cuba would increase. As early as May 6, 1861, Juárez prohibited by decree the extraction of Indigenous people from Yucatán to foreign countries.[74]

Paragraphs IV and V of Article 2 also made '[…] engaging nationals to serve foreign powers to invade the nation' a punishable offence. The Mexican provision was, thus, ahead of international law, as it was not until 1874 that the Brussels Declaration – and not until 1899 that the Hague Convention – prohibited '[…] any compulsion of the population of occupied territory to take part in military operations against its own country'.[75]

Additionally, Article 4 defined crimes against individual guarantees (individual rights) and made violence against individuals or against their property a punishable offence. This provision gave protection to all individuals, regardless of their nationality. This could also be interpreted as a reflection of 'cosmopolitan humanity' in the same sense as Kant's *Weltbürgerrecht*.[76] In a manifesto dated December 18, 1861, Juárez already gave the assurance that 'non-combatant' enemies would be given hospitality and that they would be protected by national law. Juárez further animated the population to abide by the laws and usages established 'for the benefit of humanity', in order to

73 Javier Rodríguez Piña, *La guerra de Castas. La venta de indios maya a Cuba*, 1848-1861 (CONACULTA 1990).

74 Decreto del gobierno que prohíbe la extracción para el extranjero de los indígenas de Yucatán, mayo 6 de 1861, in: Manuel Dublan and José Maria Lozano, *Legislación mexicana, colección completa de las disposiciones legislativas expedidas desde la independencia de la República* (Imprenta del comercio de Dublan y Chavez 1878), 203-202.

75 Project of an International Declaration concerning the Laws and Customs of War. Brussels, 27 August 1874, Art. 36; Convention (II) with Respect to the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land. The Hague, 29 July 1899, Art. 44. Andres Bello, in his Treaty on International Law, also comments on the 'injustice' of forcing a prisoner of war to serve the hostile enemy, see Andres Bello, *Principios de Derecho Internacional* (3rd edn, Imprenta de la Patria 1864), 184.

76 Phillip Hölzing, *Republikanismus und Kosmopolitanismus* (Campus Verlag 2011), 181-186.

prove the nation's capability of being independent.[77] This was further stressed in April of 1862, when Juárez declared in a manifesto that '[…] once hostilities broke out, all peaceful foreign residents in the country would be protected by Mexican law' and gave the assurance that '[…] during the war the rules of the law of nations would be abided by the military and authorities of the republic.'[78]

Since the law of 1862 criminalising acts against the nation, the law of nations and individual rights was enacted to cover the eventuality of a foreign invasion, it can be concluded that crimes against individual rights were set within the context of an armed conflict. This was ahead of later proposals put forward by Gustave Moynier.[79] It is also likely that the reason for the provision 'crimes against individual rights' is the reparations claims made by the United States, Spain, France, and Britain due to the harm caused to their nationals during the American intervention (1846-1848) and the civil war between the liberals and conservatives (1858-1861).[80] In this regard, Juárez constantly argued that foreign citizens were not entitled to privileges, as all were equal before the law and that foreigners were subject to domestic jurisdiction.[81]

Procedural guarantees were included in the 1862 law, giving jurisdiction to the military authority. Accordingly, 'citizens of the republic' had the right to report the commission of such crimes, military courts would then be instituted and composed of seven military judges and defendants were given 60 hours to present their arguments. The punishments ranged from the death penalty for committing 'crimes against the independence of the nation' to eight years' imprisonment for spying for the enemy (Articles 12 to 28). The punishment for the commission of crimes by persons 'caught in flagranti

77 Manifiesto del C. Presidente de la Republica a la Nación, Diciembre 18 de 1861, in: Benito Juárez, Felix Romero and Ángel Pola, *Discursos y Manifiestos de Benito Juárez,* recopilación de A. Pola (1905), 261-262.

78 Manifiesto del C. Presidente Juárez llamando a la defensa de independencia nacional frente a la intervención francesa, 12 Abril 1862 in: Benito Juárez, Felix Romero and Ángel Pola, *Discursos y Manifiestos de Benito Juárez,* recopilación de A. Pola (1905), 264-265.

79 Daniel Marc Segesser, 'Forgotten, but Nevertheless Relevant! Gustave Moynier's Attempts to Punish Violations of the Laws of War 1870-1916' in: Mats Deland, Mark Klamberg and Pål Wrange (eds), *International Humanitarian Law and Justice: Historical and Sociological Perspectives* (1st edn, Routledge 2018), 197-211.

80 See José M., Vigil, *México á tráves de los siglos. La Reforma*, Vol. V. (México, Ballescá y Compañía; Barcelona Espasa y Compañía, 1882), 391-405.

81 He further argued that the reparations claims made by Spain were unjustified as her subjects were no more injured than any other person regardless of nationality due to a '[…] social revolution held by own right to abolish abuses', Juárez, Manifiesto del C. presidente de la República a la Nación, Diciembre 18, 1861. On the reclamations made by Spain, see Josefina Zoraida Vázquez, 'La deuda española en México. Diplomacia y política en torno a un problema financiero, 1821-1890 de Antonia Pi-Suñer Llorens', Historia Mexicana 56 (2007), 1448-1455.

 DOI 10.17104/0044-2348-2024-4-895

during an act of war' was immediate execution, as it was for those caught committing crimes against individual rights.

Through the law of 1862, President Benito Juárez proposed a model in which the right to independence and the right to self-determination would be protected under domestic law. As regards the right of self-determination of peoples, even though it was not strictly formulated as such by Juárez, in his speech to Congress in April 1862 he said that nations have the right '[…] to exist by themselves and to be governed by themselves' (*derecho de existir por sí mismas y de regirse por voluntad propia*).[82] To put this into perspective, Jörg Fisch traces the expression of 'self-determination' in Europe firstly to the German *Selbstbestimmungsrecht* (1865) and the French *droit des peuples de disposer d'eux-mêmes* (1860s).[83]

Finally, it can be concluded that Juárez aimed to enforce the right to self-determination through criminal justice, foreshadowing the hypothesis drawn in Article 8 *bis* paragraph 2 of the Rome Statute, where an act of aggression is defined as '[…] the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations.'[84]

2. The Military Trial Against Maximilian of Habsburg

a) Trial Proceedings

In 1867, after the French had retired their forces from Mexican territory, the Mexican imperial army – under Archduke Maximilian's command – was defeated by the Republican forces.[85] When Maximilian was captured along with his associates, Miguel Miramón and Tomás Mejía, President Juárez ordered a military trial under the above-mentioned law of January 1862.[86] Once again, reading Juárez's discourses provides further insight into the logic

82 El Sr. Juárez, al abrir el segundo período de sesiones del Congreso, Abril 15 1862, in: Benito Juárez, Felix Romero and Ángel Pola, *Discursos y Manifiestos de Benito Juárez*, recopilación de A. Pola (1905), 62.

83 Fisch (n. 68), 117-119.

84 UN General Assembly, Rome Statute of the International Criminal Court (last amended 2010), 17 July 1998.

85 Iván Segura Muñoz, 'La participación guerrillera republicana en la intervención francesa', in: José Luis Soberanes Fernández et al. (eds) *Derecho, guerra de reforma, intervención francesa y segundo imperio. personajes e instituciones* (UNAM 2022), 227-253.

86 A more in-depth analysis of the trial can be found in Tania Atilano, 'The Search for Truth in the Trial Against Maximilian of Habsburg (1867)', in: Luca von Bogdandy, Dr. Julius Schumann and Christoph Resch (eds), *Konflikte um Wahrheit* (Nomos 2024), 181-206.

behind the trial: In 1862, when French military forces were advancing on Mexican territory, he stated the following:

> 'The responsibility for all ensuing disasters shall be borne only by those who, without reason or excuse, have violated the faith of international conventions.'[87]

The trial was held in a theatre (Teatro Itúrbide) with a capacity of 600 people.[88] Maximilian was charged with violating the sovereignty of the Mexican Republic and the law of nations.[89] The jury was composed of seven military judges and one counsel, all members of the Republican army.[90] The jury and public prosecutor established a narrative of the French Intervention that was actually labelled by the public prosecutor as a 'historical account'.[91] In it, they established that the French Empire had engaged in hostilities without declaring war on the Mexican state. As part of the accusation, the prosecutor quoted Napoleon III's justification for his non-declaration of war, in which Napoleon declared that ordering the withdrawal of the French troops would mean 'being an accomplice to the moral oppression under which the Mexican people were suffering'.[92] According to the republican government, Mexico's sovereignty was violated by the French imposition of a monarchical regime, which was legitimised through the collection of votes in territories occupied by French forces. The prosecutor argued that the votes that had been collected could not be considered in the trial as a legitimate

87 La responsabilidad de todos los desastres que sobrevengan, recaerá sólo sobre los que, sin motivo ni pretexto, han violado la fe de las convenciones internacionales, Manifiesto del C. Presidente Juárez llamando a la defensa de independencia nacional frente a la intervención francesa, 12 Abril 1862, in: Benito Juárez, Felix Romero and Ángel Pola, *Discursos y Manifiestos de Benito Juárez*, recopilación de A. Pola (1905), 264.

88 Kathleen Ibsen, *Maximilian, Mexico, and the Invention of Empire* (Vanderbilt University Press 2010), 51-83.

89 Magallón, *Proceso y ejecución* (n. 34), 564.

90 Ivan Tejeda Vallejo, *El fusilamiento de Maximiliano de Habsburgo* (Porrúa 2010), 20.

91 See *Alegato no. 10*, in: Magallón, *Proceso y ejecución* (n. 34), 558. That military trials judging war crimes provide historical narratives is an argument that has similarities to what today is said about international tribunals. See Barrie Sander, 'Unveiling the Historical Function of International Criminal Courts: Between Adjudicative and Sociopolitical Justice', International Journal of Transitional Justice 12 (2018), 334-355.

92 Magallón, *Proceso y ejecución* (n. 34), 560. It recalls contemporary arguments justifying interventions for the sake of protecting human rights or of 'humanitarian interventions'. See Anne Orford, 'Muscular Humanitarianism. Reading the Narratives of New Interventions', EJIL 10 (1999), 679-711 (696-699). From a historical perspective, see Fabian Klose's work on interventions in the name of humanitarianism, Fabian Klose, *In the Cause of Humanity: Eine Geschichte der humanitären Intervention im langen 19. Jahrhundert* (Vandenhoeck & Ruprecht 2019).

basis of power, as the occupation of territories amounted to the subjugation of the civilian population.[93]

Maximilian was charged with acting as an instrument of the French Intervention and waging war against the legitimate Republic of Mexico without declaring it or performing the formalities established by the law of nations. The prosecutor cited Hugo Grotius and Emmer de Vattel to make his point.[94] Other charges included a) usurpation of a sovereign people's rights, disposing of people's interests, rights, and life with violence; b) excesses done to civilians and with them, violating the laws of war; but above all c) issuing a decree that violated the law of nations and the laws of war, since the decree ordered the execution of those who rebelled against the imperial government and those who aided the rebels within 24 hours.[95] Other violations against the law of nations included plunder, murder, and the burning of villages.[96]

As regards the competence of the Mexican jurisdiction, the prosecutor invoked Vattel, adding that

> '[…] according to international law, the laws of a state bind all of its subjects, with the exception of foreigners. However, if a foreigner disrupts the order and peace of a nation, they will be subject to the criminal laws of the country whose rights were violated […].'[97]

Besides punishing the three main figures of the French Intervention and subsuming facts of an armed conflict to legal doctrine and legal categories, the trial served other practical purposes, such as officially ending the war. This was particularly important, as the liberal Jesús Terán proposed to Juárez that after the end of the war and defeating the Empire, new treaties should be signed with the European powers as they did not recognise the legitimate national government and, by extension, the treaties signed with it. This was later known as the 'Juárez doctrine'.[98] Accordingly, in December 1867, when he opened the session in Congress Juárez remarked that during the 'European monarchic intervention' friendly relations were only maintained with the American republics due to their 'common democratic and liberal institutions', thereby stressing the moral support given by the United States of America. However, Spain and Britain had supported the government imposed by France, and the rest of the European nations that had diplomatic

93 Magallón, *Proceso y ejecución* (n. 34), 562.

94 See Alegato no. 37, Magallón, *Proceso y ejecución* (n. 34), 567.

95 See Public Prosecutor citing Vattel, Alegato no. 43, Magallón, *Proceso y ejecución* (n. 34), 571. The prosecutor also cited Wheaton, who stated that it was only justified to execute prisoners of war when they rebelled.

96 See n. 95.

97 Alegato no. 48, Magallón, *Proceso y ejecución* (n. 34), 572.

98 Patricia Galeana, 'La doctrina Juárez', Revista Decires 8 (2021), 117-124.

relations with the Mexican Republic had not remained neutral, as they backed the imperial government. As a result, they had broken all those treaties that had been signed with the Republic, and new ones would only be established under equal and fair conditions, particularly regarding 'interest rates'.[99] The relevance of treaties as a source of obligations was also expressed during the trial, as one of the major violations of international law was argued to be the breach of the Treaty of La Soledad, in which France was obliged not to advance on Mexican territory.[100] For Mexican liberals the fact that sovereigns were obliged by treaties was an essential element of the peaceful coexistence between nations, as treaties were the major source of international law (as we have seen in section IV.). The trial was thus also a way of demonstrating that treaties were enforceable under domestic jurisdiction and that it was possible to create a uniform body of law that would be predictable and that would respect the principle of equality among nations.

b) 'The Theatre of Sovereignty' Played Out in a Theatre

The trial against Maximilian of Habsburg was staged as an embodiment of progress, as a monarch was being accused of acts of war and of violating the law of nations. It was also a display of how both parties – the defendant and public prosecutor – applied European legal scholarship. As previously mentioned, records of the trial include numerous references to the works of Emmer de Vattel, Hugo Grotius, and Henry Wheaton.[101]

In this regard and drawing upon Milos Vec's article on the performative dimensions of exercising sovereignty in the nineteenth century,[102] republican liberals enacted and performed international law, quite literally, as the trial took place in an actual theatre. As in any play, many people were involved, the most important being the director, the actors, and the audience. In this case, we could say that Juárez was the director and the actors were Maximilian of Habsburg, Miguel Miramón, Tomas Mejía, Manuel Aspiroz (the public prosecutor), and the military judges. As for the audience, this was composed of a domestic audience and an international audience. The trial sent a message to the Mexican conservative party and to the European powers. This was indeed a very innovative way of using the trial as a medium for communicating the

99 El Sr. Juárez, al abrirse el primer periodo de sesiones, diciembre 8 de 1867, in: Benito Juárez, Felix Romero and Ángel Pola, *Discursos y Manifiestos de Benito Juárez,* recopilación de A. Pola (1905), 86-94.

100 Magallón, *Proceso y ejecución* (n. 34), 584-585.

101 Magallón, *Proceso y ejecución* (n. 34), 567. See also n. 86.

102 Vec, 'Das Theater der Souveranität' (n. 39).

law and the practice of the law to a domestic and international audience. We would become more accustomed to this kind of communication in the twentieth century, for example in the Nuremberg and Eichmann Trials.[103]

The trial against Maximilian of Habsburg also shows the interplay between domestic law, international law, legal scholarship and legal practice. In this sense it became a platform that enabled this interplay in real time as well as a trialogue between the different ideological stances, i. e. republican liberals, conservatives, and imperialists. As in a heroic play, there is a triumphant victor, in this case the rule of law, personified by the public prosecutor and the judges.

On a more general note, the trial of Maximilian of Habsburg could also be seen as a metaphor of the real world contest of sovereignty and further illustrates what Milos Vec refers to as 'the international theatre of sovereignty'.[104] The trial shows how there was a plurality of actors contesting the definitions, limitations, and practical consequences of 'sovereignty' during the nineteenth century. As we can see from the trial of Maximilian, these actors were not only European, and they had highly creative and innovative ways of claiming sovereignty and contesting imperial visions of international law that were based on power and not on the law. The fact that, in the specific Mexican case, the role that the different actors played in the overall 'theatre of sovereignty' was less constrained and more varied compared to their European counterparts should also be highlighted. A special envoy like Matías Romero in New York was a diplomat as well as an activist who organised conferences and meetings between members of the anti-slavery movement, US pacifists, and Mexican exiles.[105] Guillermo Prieto, a lawyer, historian, poet, and journalist, started a satirical journal during the French Intervention that also served to share views of international law.[106] José Luis Covarrubias, who translated Caspar Bluntschli's treatise, was also a liberal member of congress, professor of international law and maritime law at the School of Jurisprudence in Mexico City in 1871, and was mostly remembered for his work as Minister of Education in 1875.[107]

---

103 See Lawrence Douglas, *The Memory of Judgement: Making Law and History in the Trials of the Holocaust* (Yale University Press 2000); Gerry Simpson, *The Sentimental Life of International Law, Literature, Language, and Longing in World Politics* (Oxford University Press 2021).

104 Vec, 'Das Theater der Souveranität' (n. 39).

105 Mareite Thomas, 'Mexico and Transnational Antislavery Connections in Nineteenth-Century North America', in: Lawrence Aje and Claudine Raynaud (eds), *Ending Slavery* (Presses universitaires de la Méditerranée 2022); Thomas D. Schoonover (ed.), *Mexican Lobby: Matías Romero in Washington 1861-1867* (University Press of Kentucky 1986), XIII-XV.

106 Vicente Quirarte, *La Chinaca. Periódico escrito única y exclusivamente para el pueblo*, Edición facsimilar. Estudio introductorio (Siglo XXI Editores 2012).

107 Pablo Latapi, *Biografía de José Diaz Covarrubias*, Revista Latinoamericana de Estudios Educativos 13, 129-133.

Finally, the fact that the trial took place in a theatre not only illustrates the pedagogical character that war trials are often meant to have,[108] it also adheres to the democratic concept that the performance of justice should be accessible to all kinds of people. Mexican republicans were very well versed in the doctrine, practice, and interpretation of the law of nations and, in their view, the implementation of that law was to be seen by all people. This is understandable when we consider Juárez's personal correspondence and speeches, in which he inspires the population to '[…] prove that we are capable, and worthy of the freedom and independence inherited from our parents'.[109] In his speech to Congress in 1862 he further remarked that '[…] the nation is capable of gaining respect from other governments and gaining sympathies from all men befriended with liberty'.[110]

The military trial against Maximilian of Habsburg was certainly an improvement on the law of nations, as up to that point acts of war were considered acts of state and, as such, could not be prosecuted.[111]

Riva Palacios Martínez de la Torre, drawing of the military trial against Maximilian of Habsburg, Queretáro, 1867. Source: Mediateca Instituto Nacional de Antropología e Historia, Lugares INAH <https://mediateca.inah.gob.mx/repositorio/islandora/object/objetohistorico%3A2650>

108 See Douglas (n. 103); Simpson (n. 103), and Barrie Sander (n. 91).

109 Benito Juárez, Manifiesto del C. presidente de la República a la Nación, diciembre 18 de 1861 (n. 77).

110 El Sr. Benito Juárez en la apertura de las sesiones ordinarias del nuevo Congreso, octubre 20 de 1862, in: Benito Juárez, Felix Romero and Ángel Pola, *Discursos y Manifiestos de Benito Juárez*, recopilación de A. Pola (1905), 75.

111 See Daniel Marc Segesser, *Recht statt Rache oder Rache durch Recht? Die Ahndung von Kriegsverbrechen in der internationalen wissenschaftlichen Debatte 1872-1945* (Ferdinand Schöningh 2010), 49-128 and Best (n. 72), 128-215.

c) The Trial of Maximilian in the Arts

Overall, we could say that the trial against Maximilian was both symbolic and instrumental. Intriguingly, despite the trial's relevance for the development of international law, it had no impact on Carlos Calvo's treatise on international law. Notwithstanding that, Juárez's correspondence includes a letter from Carlos Calvo from the year 1868 in which he sent Juárez a copy of his treatise and asked for materials and documents on the French Intervention that he could include in his work.[112] Calvo's treatise, published in 1887, includes a long section on the French Intervention[113] and a brief comment on Maximilian, though without any reference to the trial.[114]

Although Maximilian's trial had no echo in treatises on international law, the painter Edouard Manet did a whole series entitled *The Execution of Emperor Maximilian*.[115] It might be no coincidence that Manet was interested in the event, as Pierre Bourdieu, in his study on Manet, concludes that Manet undertook a symbolic revolution in painting not only in terms of its forms but also in his chosen topics, which include, among others, a naked woman in a park (*The Luncheon on the Grass*, 1863), A dead Toreador (1865) and the execution of Maximilian (1868).[116]*The Execution of Emperor Maximilian* is organised as a happening on a stage, and we can identify three actors (as in the trial): the executioners, the executed, and the audience (behind a fence). The audience is witnessing the execution of a European monarch by a non-European republican firing squad. The dichotomies are hard to miss, as the painting is also organised in two horizontal and vertical planes, which also build a rupture of hierarchies.[117] For the Mexican liberals, Manet would have understood very well the symbolic message of the trial, as for them it signified a clear rupture with the past giving way to a new stable order and a consolidated state underpinned by the law.[118]

---

112 'Envío al Sr. Mariano Riva Palacio con dos ejemplares de la obra 'Derecho Internacional […]' por el Sr. Carlos Calvo', 31 Diciembre 31 1868, Gabinete de manuscritos de la Biblioteca Nacional de México, Biblioteca Nacional de México-UNAM, Fondo Reservado, Archivo Juárez, Documento 6657.

113 Charles Calvo, *Le droit international théorique et pratique: précédé d'un exposé historique des progrès de la science du droit des gens*, Tome 1 (Guillaumin 1887), 337-352.

114 Calvo (n. 113), 347-348.

115 For more on this topic, see Tania Atilano, 'The Execution of Emperor Maximilian by Édouard Manet: Intervention, Sovereignty and the Laws of War', in: Giovanni Rossi and Pietro Schiró (eds), *Law and Art in the 19th Century* (Pacini editore 2024), 193-218.

116 Pierre Bourdieu, *Manet. Eine symbolische Revolution* (Suhrkamp 2015), 73-120.

117 Bourdieu (n. 116), 616-618, 840.

118 Regarding the transitional phases and challenges of acquiring independence, see Tamar Herzog, 'Independence(s): What Is a Revolutionary Law?', in: Thomas Duve and Tamar Herzog (eds), *The Cambridge History of Latin American Law in Global Perspective* (Cambridge University Press 2024), 258-265.

Other artistic representations of the trial can be found in the play *Juárez*, performed at the Chateau d'Eau in Paris in 1886.[119] The hero of the play was President Juárez and, according to one reviewer, it vividly showed that Mexico had never been in enmity with France but with the Empire. The play was positively reviewed in French republican journals.[120]

3. The Criminal Code of 1871

The Mexican Criminal Code was commissioned in 1861 by Benito Juárez and drafted by a team of notable jurists, including Chief Commissioner Arturo Martínez de Castro. The work took 10 years to complete as it was interrupted by the armed invasion. Finished in 1871, Mexican legislators adopted a criminal enforcement model to penalise violations against what they regarded as legal interests protected by the law of nations. As a result, the drafters created the category of 'crimes against the law of nations'. It encompassed five crimes: piracy, violations of the immunity of diplomats, slavery, the slave trade, and *violations of the duties of humanity*.[121] The catalogue of crimes also serves as a diagnostic of what was considered at the time to be most valuable by 'civilized nations'.

The most novel of all the above-mentioned crimes, and relevant to the French Intervention, was the crime of *violations of the duties of humanity* under Article 1139 of the Mexican Criminal Code. Little is known about the exact legal reasoning behind the provision. However, according to the Explanatory Memorandum, the overall goal of the Criminal Code was to express a certain republican character; it was to be a 'modern criminal code' that would also contribute to achieving peace.[122]

The designation given to the crime – *violations of the duties of humanity* – may sound slightly odd to modern ears. However, after reading various documents of the time, it can be concluded that 'duties of humanity' was conceived of as conduct by which combatants would not inflict unnecessary suffering. It is, though, important to note that, as Raphael Schäfer has argued,

119 *La Petite Presse: Journal Quotidien Illustré,* 14 October 1886, available at <https://gallica.bnf.fr/>, last access 16 December 2024.

120 *Le Petit Parisien: Journal Quotidien du Soir,* 7 October 1886; *Le Petit Colon Algérien,* 13 October 1886, available at <https://gallica.bnf.fr/>, last access 16 December 2024.

121 For a more in-depth analysis of this provision, see Tania Atilano, 'The 1871 Mexican Criminal Code as the Missing Piece in the History of Criminalizing Violations of the Laws of War', Int' l Rev. of the Red Cross 104 (2022), 1650-1683.

122 See Martínez de Castro, 'Explanatory Memorandum', in: Código Penal para el Distrito Federal y Territorio de la Baja California sobre delitos del fuero común y para toda la República Mexicana sobre delitos contra la federación (Librería de Donato Miramontes 1883), 7-8.

the word 'humanity' has been used as a vehicle to justify multiple actions.[123] The meaning of the word thus varies depending on who is mobilising it. I would also add that, at least in the context of the French Intervention, 'humanity' was seen as being on a par with 'barbarism'. These two terms were mobilised in relation to each other and gave meaning to one another. For the French, for instance, the state of the Mexican republican government equated to barbarism,[124] while 'humanity' was invoked to justify their own actions. An example of this is Emperor Maximilian's justification in his decree of October 1865, in which he ordered the execution of all those who opposed the Empire:

> 'The government, confident in its power, will henceforth be inflexible in its pursuit of punishment, as demanded by the privileges of civilization, the rights of humanity, and the imperatives of morality.'[125]

As for the Mexican side, by surveying an authoritative compilation of official Mexican documents from the nineteenth century, the term 'humanity' can be traced back to as early as 1828.[126] The term is then related to the good treatment of prisoners or the maintenance of hospitals.[127] The terms 'lack of humanity' and 'against humanity' can also be found, and were related to massacres, acts of vandalism, excessive reprisals, and when no quarter was given.[128] As a result of this brief survey, it could be then concluded that 'duties of humanity' was, in the Mexican context, related to certain conduct during war. These 'duties of humanity' restrained hostilities. The different types of conduct in the above relate to warfare and explain why the wording '*violations of the duties of humanity*' was chosen and how it defined the persons and objects to be protected, namely the wounded, prisoners of war, hostages, and field hospitals. Most importantly, by incorporating 'duties of humanity' into domestic criminal law, the Mexican provision transformed 'humanity' into a legal interest that was to be protected. This was a major

123 Raphael Schäfer, 'Humanität als Vehikel – Der Diskurs um die Kodifikation des Kriegsrechts im Gleichgewichtssystem des europäischen Völkerrechts in den formgebenden Jahren von 1815 bis 1874', Dissertation, Zusammenfassung, Universität Heidelberg, 2022.

124 Ellie Frédéric Forey, *Forey insiste en Orizaba, que la bandera invasora es protectora*, 3 de noviembre de 1862, in: *Memoria Política de México,* online repository curated by historian Doralicia Carmona Dávila, <https://www.memoriapoliticademexico.org/Textos/4IntFrancesa/1862-F-BFP.html>, last access 16 December 2024).

125 Maximiliano, 'El gobierno, fuerte en su poder, será desde hoy inflexible para el castigo, puesto que así lo demandan los fueros de la civilización, los derechos de la humanidad y las exigencias de la moral', octubre 2 de 1865, in: José M. Vigil, *México a través de los siglos,* Vol. V (Ballesca y Com. Editores 1889), 725.

126 Enrique Olavarria y Fernández, *México a través de los siglos,* Vol. IV (Ballesca y Com. Editores 1889), 173-184.

127 Olavarria y Fernández (n. 126), 247.

128 Olavarria y Fernández (n. 126), 369, 623, 657, 714.

milestone in the history of international law and the laws of war, as the Mexican legislators chose to protect the principle of 'humanity' over the principle of necessity.[129]

Overall, it is important to note that the goal behind the vision of regulating war through law was not to maintain a balance of power (as was the case in Europe) but to limit the actions of hegemonic powers through the predictability, homogeneity, and specificity of legal norms. Just as criminal law aims to limit the arbitrariness and partiality of authorities through specific norms, it could be argued that the same objective was sought between states in the conduct of warfare.

The crime of *violations of the duties of humanity* in the Mexican Criminal Code does not derive from the calm study of legal doctrine but rather is the result of legal practice and of the concrete need to achieve independence from imperial powers. It is, again, a proposition, an option on the table – like the trial against Maximilian – for enforcing international law.

It is also important to highlight that this project of limiting the conduct of warfare through criminal law was not at odds with the recognition of 'irregular combatants'. Following the republican tradition, citizens had the right to oppose tyranny, and according to Article 31 of the Constitution the duty to defend the independence, territory and the rights of the fatherland (*patria*). In this regard, Article 1113 of the Mexican Criminal Code granted combatant immunity to those who rebelled, who were defined as 'those who rise up and in open hostility in order to change the form of government of the nation, to reform or abolish the constitution or to remove from office the president of the republic' (Article 1095 of the Mexican Criminal Code). This, again, was an interesting proposal in which those involved in a rebellion were also bound by the law and would then benefit from the status of 'combatant immunity'.

Finally, if the provision is interpreted against the historical background, the crime of *violations of the duties of humanity* also served as a preparation for and protection against future interventions.[130]

VI. Conclusion

New visions of international law flourished in the 1860s among Mexican republicans. These 'visions of international law' were thought of as emanci-

129 On the history of the principle of necessity, see Best (n. 72), 166-179.

130 As to the need to define the principle of non-intervention to avoid war, see Milos Vec, 'Intervention/Nichtintervention. Verrechtlichung der Politik und Politisierung des Völkerrechts im 19. Jahrhundert' in: Ulrich Lappenküper and Reiner Marcowicz (eds), *Macht und Recht. Völkerrecht in den internationalen Beziehungen* (Schöningh Verlag 2010), 135-160.

patory tools and did not emerge spontaneously or contingently but were based on formal legal education and on intensive practice. The reception, study and practice of international legal doctrine not only permitted its adaptation to concrete circumstances (hybridisation), it also paved the way for improving international law in the sense that it would be enforceable and instrumental in protecting the sovereignty of non-European states.

Mexican republicans interacted with a number of international actors while developing their concepts and negotiated a variety of different issues, including reparations claims with the Spanish crown, foreign debt with Britain and the French Intervention. For Mexican republicans, the Intervention was seen as an attack on individual liberties and rights, and they sensed it was a serious threat because it would enable monarchists to restore the old social and racial hierarchies and revoke popular sovereignty.[131]

The three examples presented in this article can be viewed as an expression of how international law was envisioned and set in motion in terms of protecting the rights of independence and sovereignty while also safeguarding individuals regardless of their nationality, including prisoners of war, civilians, and civilian property in times of war. The law of 1862 that made acts against the nation and the law of nations a punishable offence shows how sovereignty was not incompatible with international law. Quite the contrary, sovereignty was a principle of international law that had to be protected. Equally, sovereignty entailed other rights and obligations regarding the use of force and the conduct of hostilities. In the trial against Maximilian of Habsburg we see how this idea was put into practice, resulting in the adjudication of individual criminal responsibility for a breach of the Treaty of La Soledad, conducting war without declaring it and, finally, for violating individual rights during hostilities. By invoking European doctrines of international law and juxtaposing them with the stark realities of the Intervention, the trial functioned as a mirror, reflecting the inconsistency of European powers in their application of international law. While the trial found no echo in Carlos Calvo's treatise, the innovative ways of communicating the law and putting international legal doctrine into action did find resonance in the cultural field. This speaks to how truly innovative the measures were, as they attracted other realms of society beyond legal scholarship. The crime of *violations of the duties of humanity* can then be considered as a synthesis of

131 The 'office of colonization' was a concrete expression of the restoration of the old order. It was ordered by Maximilian of Habsburg. It aimed to attract 'white colonizers that would occupy the vast lands of the north of Mexico'. But, most importantly, it forged alliances with US confederates who could settle and were allowed to keep their slaves. See *Decreto de Colonización*, decretado por el emperador Maximiliano de Habsburgo, 5 de septiembre 1865, Diario del Imperio, 9 Septiembre 1865.

the law of 1862 and of Maximilian's trial. Through the 'codification technique', the conduct of war would become a set of uniform and foreseeable norms. Codifying and criminalising conduct in war could also be held to be a means to prevent more violence in the form of reprisals. Beyond war, the incorporation of principles and practices of international law can also be interpreted as a proposal for states to interact with one another in a uniform and predictable manner.

From all of the above it can also be concluded that the interactions between law and politics were seen as natural and were not demonised. No objection was raised to the fact that law was influenced by a political ideology, as liberal republicans conceived the law as part and parcel of the broader political project of being an independent nation-state.

The above also shows how Juárez mobilised and brought into relationship the principles of sovereignty, equal sovereignty, independence, non-intervention, and self-determination. These principles were not only mobilised discursively but also legally: They were protected by the law of 1862 and invoked during Maximilian of Habsburg's trial. The case at hand testifies to the fact that the multiplication of norms and the 'juridification' of international relations and war did not only happen in Europe but also beyond.[132] Further, it demonstrates that international law is not inherently an obstacle to achieving emancipatory goals. Facing the challenges of war and foreign intervention, the 'vision of international law' held by Mexican republicans exemplifies its potential for contesting hegemony on multiple levels: as a language, as a strategy, as an instrument and symbolically.[133]

132 For the European case, see Vec, 'Intervention/Nichtintervention' (n. 130).

133 On the 'strategic use of current technical legal means', see Walter Rech, 'The Death of God, Systemic Evolution, and the Event: On the Temporality of International Law', Telos 185 (2018), 165-185 (19-21).