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Chilean Occupation of Lima under International Law

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orden social y político durante un período que ha sufrido el abandono de los historiadores de América Latina y el mundo atlántico. La atención del libro por las violentas tensiones entre las élites regionales resulta ser de gran importancia también para comprender la notable diferencia entre el separatismo brasileño, que siguió siendo monárquico y dinástico, y el de los Estados hispanoamericanos. Valdría la pena explorar más a fondo el argumento de Hamnett sobre porqué las experiencias violentas en una región, influyeron en las estrategias políticas adoptadas por las élites en otras partes del imperio. Tales exploraciones podrían agregar una nueva dimensión a lo que ya sabemos sobre las transferencias constitucionales y legales »transnacionales« que ocurrieron durante la era de la independencia.

Una última observación sobre el marco conceptual que Hamnett ha elegido. Aunque hace un buen trabajo al comparar y vincular situaciones en

ambos lados del Atlántico, presta relativamente poca atención a la larga y compleja historia del concepto »nación« y su uso en la configuración de las identidades tanto imperiales como regionales o locales. El trabajo podría haberse beneficiado de una exploración conceptual más amplia que va más allá de la fórmula legal de »Una sola nación«, lo que habría agregado una mayor profundidad histórica a sus reflexiones en el capítulo 10 sobre la transformación de este concepto en el proceso de formación política de las naciones. A pesar de esta observación, *The End of Iberian Rule* es un libro relevante para cualquier persona interesada en la era de las independencias. La familiaridad de Hamnett con una impresionante cantidad de fuentes primarias y secundarias y su alcance amplio y comparativo indudablemente hacen de este estudio un trabajo imprescindible tanto para especialistas como para estudiantes. ■

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Chilean Occupation of Lima under International Law*

From the perspective of legal history, Bruno Polack's monograph analyses the government of Patricio Lynch as Supreme Military and Political Commandant of Peru from 1882 to 1883 – the final phase of the War of the Pacific between Chile and the Bolivian-Peruvian alliance (1879–1884). The construction of a »legal façade« for the Chilean occupation of Lima was a complex process of clashing and entangled normativities. Lynch's administration tried to adjust to 19th-century international law by building a temporal juridical setting, which was required by Chileans, Peruvians and foreigners living in the occupied territory (43). Once Chile gained Bolivia's nitrate-rich coastal

region, the unplanned occupation of Lima became a problem, but it was also necessary to conclude a favourable peace treaty (164). Polack's book focuses on Chilean and Peruvian legislation as well as the juridical innovations that the history of Peruvian law has omitted, above all in the field of judicial administration.

Polack's publication is interesting because it helps to elucidate the effects of European treaties on international law in non-European legal spaces and warlike contexts outside of the normative order of the *civilised nations* (Europe, North America) in 19th century. *Les lois relatives à la guerre selon le droit des gens moderne* (Paris, 1872) written by the

* BRUNO POLACK, El último virrey del Perú. Patricio Lynch y la ocupación chilena durante la Guerra del Pacífico, Santiago: Planeta 2017, 206 p., ISBN 978-956-360-393-4

French jurist Achille Morin provides a case in point – one that Lynch and his legal team in Peru did in fact use. The history of norms derived from the *ius publicum europeum* crossing the Atlantic is currently a vibrant topic. To overcome tired views on the reception of European literature in peripheral spaces, works such as *El Ultimo Virrey del Peru* are invaluable to study the process of how European legal knowledge, in this case international law, was appropriated, translated and domesticated in local spaces like Chilean-occupied Lima. Further, Polack's study invites the reader to rethink arguments of the imperial and historical turns in international legal scholarship in the South American legal space. Whereas internationalists like Koskenniemi, Angie, Orford, Nuzzo, and Third World Approaches to International Law (TWAIL) see the use of international law by the European colonial powers against the Third World as arbitrary, it is equally likely that South American states employed the corpus of *ius gentium europeum* to justify their expansionist claims during 19th century. How was the conceptual toolbox of international law repurposed in military conflicts in local, non-western spaces in 19th century? Can European legal history omit that dark chapter?

The Chilean jurists' employment of Morin's work in formulating the occupation's decrees of 1881 is perhaps most amenable to the imperial turn in the history of international law. International law neither regulated nor humanised the wartime conduct of the Chilean army according to the modern customs of the civilised nations in an occupied territory. Rather, Lynch's administration used the international legal discourse to protect the economic interests of the military occupation. One of the most widely discussed means Lynch used was the obligatory payment of *cupos de Guerra*, which was levied in several Peruvian cities to sustain the war economy and to stock the Chilean treasury. Polack estimates that this tax raised 30 000 pounds sterling (33). How the war, the occupation and the interventions into property rights were legitimised constitute Polack's central problematique, and their analysis is necessary if we are to reveal the true nature of international law in the 19th century.

As the author explains in his analysis of Lynch's memories and decrees from 1882 to 1884, the Chilean general sought to soften the occupation's strictly military character, instead giving the Chilean occupation a halo of civilisation – *halo de*

civilidad – with a juridical setting (44). Although suggestive, this claim needs to be contextualised, which Polack achieves by surveying the difficult political institutional landscape of post-war Peru. The flight of the usurper Piérola disrupted public order and left the Peruvian state headless. As a result, Chile could not negotiate a peace agreement, and the Supreme Court in Lima refused to fulfil its duties. In consequence, first General Baquedano and later General Lynch imposed martial law and military courts (53), which is the starting point of the administration of Chilean justice in Lima.

In Polack's eyes, the foreign administration of justice is the saddest and least-studied topic in the history of Peruvian law, because Lynch and his legal assessor, Carrasco Albano, created a legal system for the administration of justice and court procedure to promote the interests of the Chilean occupation (65). Thus, Lynch's decree of 6 November 1881 is, for Polack, the cornerstone of Peruvian legal life. The first instance in the hierarchy were the justices of the peace, the Chilean military court in Lima was the second, and the Supreme Military and Political Commandant was responsible for the rest of the occupied territory. Errors and omissions in *praxis iuris* appeared before long, and Lynch had to promulgate a second Decree of Judicial Administration on 24 April 1882, which supplemented the first text and introduced justices of the peace into civil and commercial matters as well as criminal court judges in penal matters. The establishment of lower courts in Lima and Callao were also Chilean legal innovations. Lynch himself was the supreme instance for settling lawsuits in tax matters, which were important because the tax surplus financed the occupation and serviced the Chilean public treasury (74).

Lynch's decrees also introduce arbitration into criminal and civil proceedings, which Peruvian Civil Code of 1852 had already included. Arbitration was used to settle all kinds of matters, though it was excluded from cases of expropriation and land ownership with the goal of benefitting the Chilean owners in Peruvian territory (91). Another new legal feature was legally binding conciliation as the initial phase of dispute resolution. Common-law relationships were also part of art. 28 of Lynch's decree, which was not integrated into Peruvian legislation until 1984. Finally, the acquisition of possession was also reconceptualised by Chile's legal team. Polack explains that Lynch's

new decree legally avoided any kind of repossession by owners against the Chilean army in the occupied territory. The author thus concludes that Lynch's *sentido jurídico utilitario* – utilitarian legal logic (97) – shifted the use of public and private real estate in favour of the occupying forces.

For Polack these legal innovations derived legitimation from 19th-century laws of war, and Chile's diplomatic success depended on adhering to this normativity by signing a beneficial peace treaty with cession of territory. The norms and international customs of civilised nations were taken from Morin's work, a handbook that served as the principal guide to the opinions of Emer de Vattel and Johann Caspar Bluntschli. Polack quoted important passages from the handbooks of these Swiss jurists, although he fails to specify the translations used. The author errs in affirming that the works of Vattel and Bluntschli belong to the same epoch. While *Le droit de Gens* appeared in 1757 (Neuchâtel), *Das moderne Völkerrecht der Civilisirten Staaten* was published in 1869. A Spanish translation of the first handbook was published in 1820 in Madrid; Dr. Díaz Covarrubias translated Bluntschli in 1871 in Mexico (114). Despite this omission, it should be emphasised that those texts of European international law were employed to justify the deeds of the Chilean army. Lynch tried to consolidate the conquest through the international law, positing the war and occupation waged by Chile as a »civilizing practice« (116).

Morin's text was advantageous because it included clear rules on the treatment of enemies, injured soldiers, military interactions with the civilian population and the protection of private property, so that the occupation succumbed neither to licentiousness nor dishonour – *libertinaje ni deshonra* – in other words, avoiding »barbarian uses« that could have damaged the Chilean image abroad. From the principles of Morin, von Martens, Schmalz and even Hegel, Polack concludes that the commander-in-chief in occupied territories

may impose not only martial law, but also penal and criminal legislation with the goal of protecting the civilians from violations by the invading army (126–127). A key argument for Polack was the legitimation that Lynch found in the opinions of Morin, Bluntschli and Vattel about the rights owned by the belligerent state after occupying an enemy country. Lynch sought to secure the territories rich in guano and saltpetre belonging to Tarapaca from future protests by Bolivia and Peru. According to Bluntschli, conquering a foreign territory can only give the victorious state temporary rights, but not permanent rights, including property rights. This is because occupation is a violent action, not a legal one. But like Morin and von Martens, Bluntschli also stated that a long-term occupation, as was the case with Chile, could accord lawful property rights to occupying army. Hence, Polack concludes that Bluntschli's doctrine, which Lynch knew through reading Morin's treatise, became an intellectual touchstone of Chilean legislation in the attempt to suspend the Peruvian legal order and to create an advantageous juridical system (132). Of further interest, other jurists, like A.G. Heffter, whom Morin quotes, negates the property rights of the occupying army. Heffter's opinion was no less important than theories of Martens and Vattel, but, as Pollack explains, this German lawyer did not convene to Lynch's utilitarian legal sense. In summary, the strategic use of these European internationalists as well as the implementation of the Lieber Code, and the Conventions of Geneva (1864), Brussels (1874) and Saint Petersburg (1878) during the Saltpetre War evidences less a universalisation of international law than the existence of regional normative orders that clearly exemplify the multiple and insufficiently researched »histories« of international law of the 19th century (H. Steiger).¹

1 HEINHARD STEIGER, *Das Ius Publicum Europaeum* und das Andere: a global history approach, in: ANDREAS VON ARNAULD (ed.), *Völkerrechtsge-*

schichte(n): Historische Narrative und Konzepte im Wandel. Berlin: Duncker & Humblot, 2017.