

Aliens in Latin America: Intervention, Arbitration and State Responsibility for Rebels

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1. Introduction

Over the course of the nineteenth century, the question of the responsibility of the state for injuries done by rebels to foreign nationals, or ‘aliens’, in its territory became an important one for international law. Initially, it was common for disputes regarding such responsibility to be resolved through diplomacy, backed up, not infrequently, by the threat and even the use of force. Later it became a matter which also led increasingly to arbitration; beginning around the middle of the nineteenth century a growing number of arbitral tribunals dealt with claims against states for injuries done to aliens by rebels. From the first, set up in 1839 between the US and Mexico, there followed a series of 40 mixed claims commissions which touched, in one way or another, on state responsibility for rebels.¹ Nearly three-quarters of these arbitrations involved a Western state against one of the new Latin American republics.

Latin American international lawyers sought from the beginning to resist intervention (of all types) on the basis of enforcing state responsibility for injuries to aliens, of which, I argue, responsibility for injuries caused by rebels was the archetype. The first moves in the debates about state responsibility for rebels tended to be in the mode of resistance. Towards the end of the nineteenth century, as the numbers of arbitrations grew rapidly, the issue of if and when a state would be responsible for injuries to aliens by rebels began increasingly to draw the attention of the new Anglo-American international legal professionals, who sought to rationalise a doctrine of state responsibility for rebels from the arbitral practice. By the early

¹ As there is no comprehensive collection of international arbitral awards I have been dependent on cross-checking secondary sources such as: J. Bassett Moore, *History and Digest of the International Arbitrations to Which the United States Has Been a Party* (1898); W. Evans Darby, *International Tribunals* (1904); J. H. Ralston, *The Law and Procedure of International Tribunals* (1926); H. Silvanie, ‘Responsibility of States for Acts of Insurgent Governments’, (1939) 33(1) AJIL 78; A. M. Stuyt, *Survey of International Arbitrations, 1794-1938* (1939).

twentieth century this dynamic of resistance and development had driven the emergence of a flourishing, if profoundly disputed, sub-field of international law. This was the central part of the wider field of alien protection, which concerned the rights of states to protect their nationals overseas and the duties of states when it came to the treatment of aliens.

In this paper, I will explore how intervention in Latin America, and particularly its turn to arbitration, produced the doctrine of state responsibility for injuries to aliens caused by rebels.² In Section 2, I will look at the first moves of resistance from Latin American scholars, focusing on the work of Carlos Calvo. Section 3 addresses the turn to arbitration and explains how this was a product of the Americas, which drove the development of the doctrine of state responsibility for rebels. In Section 4, I consider the legal debates, occurring during the period c.1870-1930 and particularly from the turn of the twentieth century onwards, which contested the doctrine. I propose that this is understood as a struggle for the internationalisation of ‘aliens versus rebels’: what standard (national or international) of protection against rebels did states owe foreign nationals and, most importantly, who had the power to decide (domestic or international authority)? While nearly all the various positions made responsibility the exception rather than rule, Latin American international lawyers tended towards narrow exceptions defined by reference to national treatment in contrast with Anglo-Americans who based responsibility on an expansive international standard of alien protection. Finally, I reflect upon what was at stake in this legal contestation – namely, foreign trade and investment in Latin America and the transition from old colonialism to new economic imperialism in the region – and what its legacy might be for international law today.

² Two excellent recent works from Latin American scholars which cover this period and to which I am greatly indebted are: A. Becker Lorca, *Mestizo International Law: A Global Intellectual History 1842–1933* (2014); J. P. Scarfi, *The Hidden History of International Law in the Americas: Empire and Legal Networks* (2017).

Given the controversies of recent years surrounding historical contextualism and international legal history, I will briefly address some questions of methodology before getting underway. TWAIL (Third-World Approaches to International Law) history, within which scholarship this piece could also be read, has received accusations of anachronism and not conforming to ‘correct’ historical methods from certain historians.³ However, following Anne Orford,⁴ my work questions whether ‘[h]istorical methods provide the only form of interpretive practice that can produce an adequate knowledge of the past, not only for historians but also for international lawyers’.⁵ In international law, past and present have a different relationship: ‘[i]nternational law is inherently genealogical, depending as it does upon the transmission of concepts, languages and norms across time and space. The past, far from being gone, is constantly being retrieved as a source or rationalisation of present obligation.’⁶ As result, as Orford argues, limiting ourselves to producing histories that a particular school of historians would approve of shuts down the potential for meaningful critique.⁷ Accordingly, while in sympathy with contextualist historians I aim to understand the development of a legal doctrine in context, as a political intervention in a particular situation and particular relations of power, my work is at the same time unapologetically presentist. I seek to historicize international law so as to enable a critical redescription of its present,⁸ without meaning to suggest that there is necessarily any simplistic causal connection between then and now.

³ See, e.g., R. Lesaffer, ‘International Law and its History: The Story of an Unrequited Love’, in M. Craven, M. Fitzmaurice and M. Vogiatzi (eds.), *Time, History and International Law* (2007), 27; I. Hunter, ‘Global Justice and Regional Metaphysics: On the Critical History of the Law of Nature and Nations’, in S. Dorsett and I. Hunter (eds.), *Law and Politics in British Colonial Thought: Transpositions of Empire* (2010), 11.

⁴ See A. Orford, ‘The Past as Law or History? The Relevance of Imperialism for Modern International Law’, in M. Toufayan, E. Tourme-Jouannet, and H. Ruiz Fabri (eds.), *International Law And New Approaches To The Third World: Between Repetition And Renewal* (2013), 97; A. Orford, ‘International Law and the Limits of History’, in W. Werner, A. Galán, and M. de Hoon (eds.), *The Law of International Lawyers: Reading Martti Koskenniemi* (2017), 297.

⁵ Orford, ‘Limits of History’, *supra* note 4, at 312.

⁶ A. Orford, ‘On International Legal Method’, (2013) 1 *Lond Rev Int Law* 170, at 175.

⁷ Orford, ‘Limits of History’, *supra* note 4, at 305-6.

⁸ See A. Orford, ‘In Praise of Description’, (2012) 25(3) *LJIL* 609.

2. Resistance: the first moves

In 1869, Argentine jurist Carlos Calvo published an article arguing for the non-responsibility of the state for harm caused to aliens as a result of riot or civil war.⁹ This included where such harm was caused by rebels, a scenario that, I will argue, was central to Calvo's thinking. Calvo argued that state responsibility, or the principle of compensation, for civil war damage would create an unwarrantable inequality between foreigners and nationals to the benefit of powerful states at the expense of weaker ones and infringe the principle of territorial jurisdiction. For Calvo, such responsibility is a matter for the domestic courts.¹⁰ At the same time, he argued that civil war, as a circumstance which 'often takes a country to the edge of the abyss', is an exception to the general rule of compensation since civil war amounts to a situation of force majeure.¹¹

Calvo cites a number of examples of opinion and practice supporting non-responsibility. He begins with statements rejecting responsibility from a number of politicians, diplomats and academics in respect of the Don Pacifico affair between Britain and Greece – when British gunboats were infamously sent in after an anti-Semitic mob attacked the house of a British citizen in Athens – and two editorials from the British press in the context of the French intervention in Mexico.¹² Moving on to practice, Calvo's examples include the British claims against Tuscany and Naples in respect of the harm caused to British nationals in the revolutionary disturbances there in 1849-1850 – apparently abandoned after the Austrians intervened at the request of the Grand Duke of Tuscany and the Russians refused to arbitrate on the basis that Britain had no right to bring such claims; the rejection by the US of claims in

⁹ C. Calvo, 'De la Non-Responsabilité des États a Raison des Dommages Soufferts par des Étrangers en Cas d'Émeute ou de Guerre Civile', (1869) 1 (1d series) *Revue de Droit International et de Legislation Comparee* 417.

¹⁰ Calvo, 'De la Non-Responsabilité des États', *supra* note 9, at 417.

¹¹ Calvo, 'De la Non-Responsabilité des États', *supra* note 9, at 422.

¹² Calvo, 'De la Non-Responsabilité des États', *supra* note 9, at 417-19.

respect of harm caused to Spanish nationals during mob violence in New Orleans in 1851; and non-responsibility for rebels in respect of the revolution in Venezuela in 1859, the Polish insurrection against Russian rule of 1863-64, and the US civil war.¹³

We see a number of further reasons for non-responsibility being put forward: that those who go abroad for commerce must accept the risk of internal disorders and submit to domestic jurisdiction; the state's lack of control over insurrectionary subjects; the right of the state to use force for its own preservation; and the need to avoid revolutionaries being able to take advantage of the presence of aliens to cause diplomatic incidents. Where European states had paid indemnities in respect of damage caused by rebels, and Calvo here takes examples from France, Belgium and Italy, he argues that such payments were *ex gratia* rather than indicative of a legal obligation. Calvo ends by stating that there is no support in practice for the principle of responsibility for civil war damage and that when powerful states pretend to impose such a right this is an abuse of power contrary to international law.¹⁴

Calvo's article is significant for a number of reasons. For one thing, a number of the arguments and concepts which Calvo raises here, such as risk, due diligence, equality with nationals, and force majeure, are central to the later debates about responsibility for rebels. In a sense Calvo really sets the tone for what comes afterwards both as a matter of substance and method. His exclusion of contrary practice as a breach of the rule of non-responsibility and his manoeuvring of the (ultimately ambiguous) practice to support his position anticipates subsequent exchanges (Calvo does not mention, for example, that following the Don Pacifico affair Greece ultimately paid compensation as did Tuscany and Naples despite Austrian and Russian support).¹⁵ For

¹³ Calvo, 'De la Non-Responsabilité des États', *supra* note 9, at 419-26.

¹⁴ Calvo, 'De la Non-Responsabilité des États', *supra* note 9, at 427.

¹⁵ Regarding the Don Pacifico affair, see J. Goebel, 'International Responsibility of States for Injuries Sustained by Aliens on Account of Mob Violence Insurrections and Civil Wars', (1914) 8 AJIL 802, at 820; and, regarding Tuscany and Naples, see H. Arias, 'The Non-Liability of States for Damages Suffered by Foreigners in the Course of a Riot, an Insurrection, or a Civil War', (1913) 7(4) AJIL 724, at 743.

example, in the 1913 and 1914 issues of the *American Journal of International Law*, Julius Goebel, professor at Columbia Law School, and Harmodio Arias, future president of Panama, published almost mirror image articles arguing opposite points of view.¹⁶ In his article Goebel sets out a series of examples of intra-European practice so as to establish a rule of responsibility for rebels and criticises Latin American states for trying to deny this rule. Arias, meanwhile, sets out a series of different examples of intra-European practice so as to establish a rule of non-responsibility for rebels and criticises Western states for not applying this rule in their dealings with Latin American states. This seems a rather crude caricature of the West versus Latin America clash. Nevertheless, it shows how flexible the material is and how it was marshalled to support various different, even dramatically opposed, positions.

Calvo's article was the first specialist piece addressing state responsibility for rebels (in the first volume of the first international law journal, the *Revue de Droit International et de Legislation Comparee*). Calvo was not the only Latin American international lawyer who was leading the way in this field. For example, Peruvian scholar Carlos Wiese's *Reglas de Derecho Internacional Aplicables á las Guerras Civiles*, first published in 1893, was one of, if not the first monograph on civil war and international law and contained a significant section on responsibility.¹⁷ In his day, Wiese was noted as one of the few Latin American international lawyers to argue for a general rule of responsibility.¹⁸ Wiese proposed responsibility for rebels on the basis of lack of due diligence and denial of justice with a few particular rules carved out of this – for example in the case of successful rebels where there was full responsibility and recognition of belligerency where responsibility was entirely excluded.¹⁹ Despite this, he was commonly associated with the argument that the state should be held responsible for all acts of

¹⁶ Goebel, *supra* note 15; Arias, *supra* note 15.

¹⁷ C. Wiese, *Reglas de Derecho Internacional Aplicables á las Guerras Civiles* (1893).

¹⁸ See J. W. Garner, 'Responsibility of States for Injuries Suffered by Foreigners within their Territories on Account of Mob Violence, Riots and Insurrection', (1927) 21 ASIL Proc 49, at 59.

¹⁹ Wiese, *supra* note 17, at 77, 80-82.

rebels on the basis of fault in letting the rebellion arise.²⁰ Nevertheless, Wiese certainly takes a notably different approach to Calvo; there was far from being one unitary regional position.²¹ Another example is Argentine diplomat and international lawyer Luis Podestá Costa.²² His 1913 work *El Extranjero en la Guerra Civil* devotes five out of six chapters to the question of state responsibility.²³ At the time it was published it was certainly the most extensive existing treatment of responsibility in the context of rebellion and civil war, and possibly still is today. I will look at Podestá Costa's work in more detail below.

Returning to Calvo, he is, of course, most famous for his eponymous doctrine under which Latin American states denied that international law applied to, particularly, contracts with aliens and, more generally, to state-alien relations. Including so-called 'Calvo clauses' in such contracts, and in their regional treaties and constitutions,²⁴ Latin American states sought to limit aliens to domestic remedies in an attempt to protect their newfound independence from foreign intervention – in the form either of bombardment, invasion or occupation or of international arbitration on unfair terms – which, as we shall see, was often justified on the basis of enforcing alien protection claims.

Calvo's publication of his 1869 article has led to it being argued that even though the Calvo doctrine was clearly of much wider application, '[t]he attribution of State responsibility for the

²⁰ See, e.g., E. M. Borchard, *The Diplomatic Protection of Citizens Abroad, Or, The Law of International Claims* (1915), 229.

²¹ One particularly interesting contrast with Calvo is in respect of the equal treatment principle, which Calvo was so well-known for defending. For Wiese, the fact that a state denies indemnity to nationals, as a matter of force and abuse, cannot justify their doing so in respect of aliens. See C. Wiese, *Reglas de Derecho Internacional Aplicables a las Guerras Civiles* (1905), 87.

²² Podestá Costa was Legal Adviser to the League of Nations (a rank of under secretary-general) from 1936 to 1939 and headed the League of Nations mission to Latin America in 1938. See A. McPherson, *Beyond Geopolitics: New Histories of Latin America at the League of Nations* (2015), 239ff.

²³ L. A. Podestá Costa, *El Extranjero en la Guerra Civil* (1913). See also his later *Ensayo sobre las Luchas Civiles y el Derecho Internacional* (1926).

²⁴ See M. R. García Mora, 'The Calvo Clause in Latin American Constitutions and International Law', (1950) 33 *Marquette Law Review* 205.

conduct of revolutionaries was perhaps the chief normative concern underlying [it]'.²⁵ Calvo never made such a statement explicitly. However, although the article does address wider issues of responsibility for harm caused by state forces in civil war and by mobs or rioters, it is evidently based on the section of Calvo's 1868 treatise, *Derecho Internacional Teórico y Práctico de Europa y América*, headed 'responsibility for damages caused by factions to foreigners'.²⁶ It seems significant that it was this section in particular that Calvo chose to work up into a separate piece, and in French so as to reach a wider European audience.

The argument that the Calvo doctrine was aimed at state responsibility for rebels seems even more compelling if we consider that harm caused by rebels was the central case of alien protection. Many arbitrations, including the most influential, followed revolutions or civil wars.²⁷ As Martti Koskenniemi notes, 'by far most of [the nineteenth century international] litigation had concerned the violation of the private rights of Americans *in connection with internal disturbances and changes of government* especially in Latin America'.²⁸ Harm caused by rebels was a key issue in these arbitrations. For example, according to Jackson Ralston, leading authority on international arbitration and umpire at the US-Venezuelan commission of 1903, '[b]efore the various commissions sitting in Caracas in 1903, no question received more careful examination' than that of responsibility for (unsuccessful) rebels.²⁹ That a number of

²⁵ M. Paparinskis, *The International Minimum Standard and Fair and Equitable Treatment* (2013), 22 fn 72. Martti Koskenniemi has also described the Calvo doctrine as the principle 'that governments should not be held responsible for damage caused by acts of domestic insurgents'. See M. Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law, 1870-1960* (2002), 18 fn 23. Scholars in the early decades of the twentieth century also linked the Calvo doctrine to civil war and insurrection. See, e.g., A.S. Hershey, 'The Calvo and Drago Doctrines', (1907) 1 AJIL 26, at 26-7; G. G. Phillips, 'The Anglo-Mexican Special Claims Commission', (1933) 49 LQR 226, at 235.

²⁶ C. Calvo, *Derecho Internacional Teórico y Práctico de Europa y América* (1868), at §291.

²⁷ T. A. Nissel, *A History of State Responsibility: The Struggle for International Standards (1870-1960)* (PhD thesis, University of Helsinki 2016), 78-9. These include most notably the 1868 Mexico-US commission, which addressed claims arising from the Mexican Reform War (among others); the Venezuela commissions of 1903, which followed the period of frequent revolution and civil war which the country suffered during the 1890s; and the Mexican commissions of the 1920s arising out of the Mexican revolution of 1910-1920.

²⁸ M. Koskenniemi, 'The Ideology of International Adjudication and the 1907 Hague Conference', in *Topicality of the 1907 Hague Conference, the Second Peace Conference* (2008), 127 at 149 (emphasis added).

²⁹ Ralston, *supra* note 1, at 349.

international law organisations, such as the Institut de Droit International, the American Society of International Law (ASIL) and the International Law Association, discussed specifically at their meetings or had special projects on responsibility for harm arising from insurrection or civil war further emphasises the centrality of the topic.³⁰

However, writing in 1869, Calvo was anticipating more than responding to this. There were only a handful of arbitrations prior to 1870 that addressed state responsibility for rebels. In calling the issue ‘one of the most important questions in international law discussed in modern times’,³¹ Calvo was really some 25-30 years too early. So what was the context for Calvo’s article? In it he refers to ‘violence exercised in South America by certain European nations’, noting that ‘certain maritime powers of the Old World’ have, in Latin America, resorted to force to support their diplomatic claims. He does not give any specific examples in the article, but in *Derecho Internacional* he mentions particularly the French intervention in Mexico, the pretext for which was unpaid claims arising out of the War of the Reform, the civil war which Mexico had suffered from 1857-1861. Calvo notes that:

These indemnities [for alien protection claims] made without scrutiny, some with grounds and some without, but always with a threat on the part of European governments of supporting their claims with force, have been the most copious source of interventions by said governments in Latin America.³²

³⁰ While harm arising from insurrection or civil war of course also covers harm caused by the state in suppressing rebellion, it was responsibility for acts of rebels that caused the most controversy here. See (1900) 18 *Annuaire de l’Institut de Droit International* 233-56; L. A. Podestá Costa, ‘International Responsibility of the State for Damage Suffered by Aliens during Civil War’, (1922) 31 *International Law Association Reports of Conferences* 119; K. Strupp, ‘Responsabilité de l’État en Cas de Dommages Causes aux Ressortissants d’un État Étranger en Cas de Troubles, d’Émeutes, ou de Guerres Civiles’, (1922) 31 *International Law Association Reports of Conferences* 127; Garner, *supra* note 18.

³¹ Calvo, *Derecho Internacional*, *supra* note 26, at §291.

³² *Ibid.*

As Calvo was writing the French would have been recently expelled, Emperor Maximilian executed and the Republic restored by Benito Juárez.

We believe ... that the results of the French intervention in Mexico will have made the governments of Europe understand that they must uphold with Latin America the same principles they uphold among themselves. The lesson has been very severe to expect that it would repeat itself again.³³

Unfortunately, Calvo was to prove to be incorrect with this prediction. It is interesting that he entirely overlooks the US here, focusing only on European intervention. This is a crucial oversight, a blind spot perhaps created by the French and British interventions in Argentina in the late 1830s and 1840s, which Calvo discussed at length in *Derecho Internacional*.³⁴ As Martti Koskenniemi has argued, ‘state responsibility for injuries to aliens was really an American [US and Latin American] topic’.³⁵ This we shall explore in the next section.

3. The turn to arbitration

3.1. As a product of the Americas

The debates about state responsibility for rebels did not really take off until the 1890s once the ‘turn to arbitration’ had really been established, and while there was practice among and involving European states, it was the prevalence of arbitration which set the inter-American practice apart. Nearly three-quarters of the arbitrations addressing state responsibility for rebels involved a Western power against a Latin American country.³⁶ Over a third of these involved the US, and it is particularly the earlier arbitrations that the US dominates: it was a party to ten

³³ Ibid.

³⁴ Calvo, *Derecho Internacional*, *supra* note 26, at §§87-8.

³⁵ Koskenniemi, ‘The Ideology of International Adjudication’, *supra* note 28, at 149.

³⁶ See Koskenniemi, ‘The Ideology of International Adjudication’, *supra* note 28, at 133, for some other arbitration statistics supporting American predominance.

of the first 15 mixed claims commissions addressing state responsibility for rebels between 1839 and 1892. This turn to arbitration was thus produced in the Americas, by both the US and the states of Latin America.

In the middle of the nineteenth century the US was relatively weak, both militarily and economically, compared, for example, to Britain. During this period, Britain was the biggest capital importer into Latin America and its Royal Navy was globally dominant. The US, seeking to increase the economic and political control over its southern neighbours to which it felt entitled, made a strategic choice for arbitration, imposed by force on unfair terms, rather than outright invasion or occupation, to try and oust its European rivals and assert its interests in the region.³⁷ Despite arbitration being widely seen as peaceful and non-interventionist, ‘[t]he United States Government was, in fact, never more interested in arbitration than in the 1890s – a time also of war and expansion’.³⁸ Arbitration offered the US a new type of imperialism. It accorded with a widespread US self-understanding as anti-imperialist but under a guise of legality allowed for the universalisation of the US way of doing things.³⁹ That arbitration increased such a great deal after 1870, and particularly after 1890, and began to involve the European powers more and more is testament to the success of US policy here.⁴⁰

Calvo might have seen this coming. In 1839, the US and Mexico signed a convention to submit US claims arising out of the revolutionary unrest of the first decades of Mexican independence to a mixed claims commission. The US accepted Mexico’s offer to arbitrate only after,

³⁷ See Nissel, *supra* note 27, at 59-70; B.A. Coates, *Legalist Empire: International Law and American Foreign Relations in the Early Twentieth Century* (2016), 11, 26, 30-31.

³⁸ Koskenniemi, ‘The Ideology of International Adjudication’, *supra* note 28, at 133. The 1890s saw the Spanish American war of 1898 and the US invasion and occupation of Cuba, the Philippines and Puerto Rico.

³⁹ Koskenniemi, ‘The Ideology of International Adjudication’, *supra* note 28, at 129.

⁴⁰ Only seven out of the 41 arbitrations addressing responsibility for rebels occurred before 1870, and only 13 before 1890. However, there were nine during the 1890s alone. Compared with US involvement in ten of the first 15 such arbitrations, of the 28 that took place after 1890, only four involved the US. The big arbitrations of this period – against Chile in the 1890s, Venezuela in 1903 and Mexico in the 1920s – all involved multiple European states.

however, President Jackson had, in 1837, recommended Congress pass an act to authorise reprisals against Mexico should they refuse to settle claims upon a final demand which was to be made from on board a US warship positioned off the Mexican coast. On 30 January 1843, Mexico and the US signed new convention to deal with the payment of settled claims, which had been set back by Mexico's financial difficulties during this period. Attempts were also made to negotiate a new convention to deal with the settlement of outstanding claims as the 1839 commission had not finished its work. However, the treaty remained unratified after the US refused to cede to Mexican demands for mutuality so as to cover claims against the US regarding Texas, which had rebelled and declared its independence in 1836. Tension increased when Mexico fell behind on its payments under the 30 January convention. Relations deteriorated further when in 1845 the US Congress approved the annexation of Texas.

In 1846, the US invaded Mexico after a skirmish in disputed border territory was presented by President Polk as an attack on the US by Mexico. In his declaration of war, Polk observed that 'the grievous wrongs perpetrated by Mexico upon our citizens throughout a long period of years remain unredressed, and solemn treaties, pledging her public faith for this redress have been disregarded'.⁴¹ The enforcement of alien protection claims thus an explicit part of the US's justification for declaring war on Mexico, and also offered a convenient cover for and juridical legitimisation of US expansionist ambitions.⁴² In the war which followed, Mexico was defeated and on 2 February 1848 signed the Treaty of Guadalupe Hidalgo with the victorious US. The US gained Texas, California and New Mexico, nearly half of Mexico's territory. On its side, the US agreed to pay any unpaid alien protection claims under the 1839 convention and discharge any unsettled claims in accordance with the unratified 1843 convention. In

⁴¹ Moore, *supra* note 1, Vol. 2, at 1247.

⁴² 'In the early decades of relations between Mexico and the United States, the latter harbored territorial ambitions in Mexico, and often the support of claims for injury to American citizens was employed as an instrument of pressure to further such territorial designs.' A. H. Feller, *The Mexican Claims Commissions, 1923-1934: A Study in the Law and Procedure of International Tribunals* (1935), 2.

addition, following the restoration of the republic there was a further mixed claims commission with the US in 1868. The 1868 commission was huge, with over 2,000 claims,⁴³ and considered Mexico's responsibility for rebels during the War of the Reform and for the French-imposed Maximilian government.⁴⁴

While, as we just saw above, the US 'adopted [arbitration] as an aspect of its foreign policy', Latin America's relationship to arbitration was more ambivalent. Although they challenged its imposition through force and its biased operation, Latin American states also promoted arbitration.⁴⁵ Arbitration was not only preferable to direct military intervention. It also reflected domestic elites' liberal values and in some cases furthered their interests.⁴⁶ As Tzvika Alan Nissel has argued, although arbitration was often imposed upon Latin American states by the threat or use of force, it also:

bolstered their sense of independence from European political domination ... ensured the continued flow of foreign capital into Latin American markets, ... [was] an acceptable price for recognition. ... [and] played into the strategy among Liberal rulers ... who believed that [it] would strengthen the positions of their governments.⁴⁷

⁴³ J. I. Rodríguez, *La Comisión Mixta de Reclamaciones Mexicanas y Americanas* (1873), 15.

⁴⁴ For more on the 1868 commission see Rodríguez, *supra* note 43; Moore, *supra* note 1, Vol. 2, at 1287-1360; Nissel, *supra* note 27, at 87-99 (arguing that it was 1868 commission, rather than the Alabama claims, which was the first modern international arbitration).

⁴⁵ For example, at the Third International Conference of American States in 1906, a resolution was adopted to 'ratify adherence to the principle of arbitration' and to endeavour to secure at the forthcoming second Hague Peace Conference a general arbitration convention. See J. B. Scott (ed.), *The International Conferences of American States 1889-1928* (1931), 124-125. See also J. T. Gathii, 'War's Legacy in International Investment Law', (2009) 11 *International Community Law Review* 353.

⁴⁶ For example, during the Mexican revolution, various governments used the offer of arbitration as an incentive for foreign governments to recognise them. See Chapter 2 in Feller, *supra* note 42. Alejandro Alvarez is a good example of a Latin American liberal internationalist who advocated arbitration. For a general overview of the reasons why Latin American states agreed to arbitration, see Nissel, *supra* note 27, at 71-7.

⁴⁷ Nissel, *supra* note 27, at 77.

3.2. As the driver of doctrine development

It was towards the end of the nineteenth century, as the numbers of arbitrations grew rapidly, that the issue of if and when a state would be responsible for injuries to aliens by rebels began increasingly to draw the attention of the new Anglo-American international legal professionals, who sought to rationalise a doctrine of state responsibility for rebels from the arbitral practice. Why was it that the turn to arbitration drove the doctrinal debates in this way? The ‘international arbitration movement’, based on a faith in the power of international law and arbitration to bring lasting peace to the world, had been gaining momentum since the 1870 Alabama arbitration, and, by the turn of the century, ‘was at the forefront of the internationalist struggle’.⁴⁸

This movement was intimately connected to the emerging professional networks of international lawyers, particularly in the US. The peace movements of the nineteenth century had always been dominated by Anglo-Americans ‘but this was especially the case of its emphasis on arbitration towards the end of the century ... After the precedent of the Alabama affair in 1872, [this] wave of peace movements ... began to include lawyers.’⁴⁹ There was a strong relationship between this movement for peace through arbitration and the new international law organisations like the Institut de Droit International and the International Law Association (both set up in 1873 just a few years after the Alabama arbitration) and ASIL.⁵⁰ These organisations all discussed specifically at their meetings or had special projects on responsibility for harm arising from insurrection or civil war.⁵¹ Latin American international lawyers were, of course, also involved in these institutions. Luis Podestá Costa, for example,

⁴⁸ C. J. Tams, ‘World Peace through International Adjudication?’, in H.-G. Justenhoven, C. Kress, and M. E. O’Connell (eds.), *Peace Through Law: Reflections on Pacem in Terris from Philosophy, Law, Theology, and Political Science* (Nomos 2016), 215.

⁴⁹ Koskenniemi, ‘The Ideology of International Adjudication’, *supra* note 28, at 132.

⁵⁰ *Ibid.*

⁵¹ See note 30 *supra*.

took a lead role in the International Law Association's work on state responsibility for civil war damages.⁵² Of particular note, however, given his huge influence in the field, is the significance of the role played in this movement by John Bassett Moore.⁵³ His *History and Digest of the International Arbitrations to Which the United States Has Been a Party*, published in 1898,⁵⁴ has been described as 'a kind of apex in [the arbitration movement's] support from the legal profession'.⁵⁵ It made the arbitral opinions widely available for the first time,⁵⁶ and remains the only readily available means of access to the earlier materials. It was relied upon so heavily by subsequent commentators that Moore almost single-handedly set the terms of the debates to come.⁵⁷

The movement for peace through arbitration was, however, also intimately linked with capitalist expansion. The third side of the triangle with peace and arbitration was free trade. On one hand, it was thought that free trade would in and of itself bring peace – the rationality of business contrasted with the passions of politics.⁵⁸ At the same time, international adjudication would guarantee both: free trade by forcing states to protect overseas commercial interests and peace by preventing disputes between states about harm to such interests from escalating into war.

[W]hat were needed were international tribunals that could deal justice to Governments trespassing on the rights of innocent foreigners carrying out business in their territories ... International adjudication – in this American version – is based on the assumption

⁵² Podestá Costa, 'International Responsibility', *supra* note 30. Another Latin American well-known in this respect is Alejandro Alvarez. See Koskenniemi, *Gentle Civilizer*, *supra* note 25, at 302-6.

⁵³ C. R. Marchand, *The American Peace Movement and Social Reform, 1889-1918* (1972), 47.

⁵⁴ Moore, *supra* note 1.

⁵⁵ Marchand, *supra* note 53, at 44.

⁵⁶ F. S. Dunn, *The Protection of Nationals: A Study in the Application of International Law* (1932), 59.

⁵⁷ His later work, *A Digest of International Law* (1906), was also influential in the development of the subject. See Dunn, *supra* note 56, at 59. Wiese, for example, notes Moore's influence in the preface to the second edition of his book, *supra* note 21, as does Borchard in his preface to *Diplomatic Protection*, *supra* note 20, at ix. Moore himself had a long career with the US State Department and was handsomely paid for representing private clients, such as Standard Oil and Bethlehem Steel. See Coates, *supra* note 37, at 40, 53, 117, 137.

⁵⁸ Koskenniemi, 'The Ideology of International Adjudication', *supra* note 25, at 130-2.

that international problems are caused by Governments and experienced by individuals as violations of rights. A system of rules and tribunals will stabilize and protect those rights, enabling individuals and commercial operators to plan their activities and use the opportunities of enrichment available in the international world by interacting with each other through private contracts.⁵⁹

Fitting in with their liberal internationalist (read capitalist imperialist) project then, the turn to arbitration was thus a crucial factor in attracting the interest of the new professional Anglo-American international lawyers, who sought to draw on the growing arbitral practice and rationalise it into rules of responsibility. As Tzvika Alan Nissel has argued, '[a]s arbitrators developed more positive law in practice, [US] writers updated their commentaries ... By the twentieth century, a budding sub-field of alien protection was becoming visible: State responsibility for injuries to aliens.'⁶⁰ It was during the period 1914-1930 that the most significant systematisation took place in this respect.⁶¹ Most notably, Edwin Borchard's *The Diplomatic Protection of Citizens Abroad, Or, The Law of International Claims* was published in 1915 and Clyde Eagleton's *The Responsibility of States in International Law* followed in 1928.⁶²

4. A contested doctrine

By the early twentieth century this dynamic of resistance and development described in the previous two sections had driven the emergence of state responsibility for rebels as a

⁵⁹ Koskenniemi, 'The Ideology of International Adjudication', *supra* note 28, at 148-9.

⁶⁰ Nissel, *supra* note 27, at 185-6.

⁶¹ See J. Crawford and T. Grant, 'Responsibility of States for Injuries to Foreigners', in J. P. Grant and J. C. Barker (eds.), *The Harvard Research in International Law: Contemporary Analysis and Appraisal* (2007), 77 at 82. It would seem that Crawford and Grant use 1914 as their start date as that of Borchard's PhD thesis but it could also be the date of Julius Goebel's article, see *supra* note 15, although Grant and Crawford do not refer to it. 1930 is presumably chosen as the date of the 1930 Codification Conference.

⁶² Borchard, *Diplomatic Protection*, *supra* note 20; C. Eagleton, *The Responsibility of States in International Law* (1928). Also of particular note here is Ralston's *The Law and Procedure of International Tribunals*, *supra* note 1, which contains a significant section on responsibility, at 326-74.

flourishing, if profoundly disputed, sub-field of international law. This is not to say that the debates can be reduced to the pro-responsibility West versus anti-responsibility Latin America. There was complexity on both sides. Nevertheless, I suggest that we can identify two basic opposing currents – albeit not uncontested, clear-cut or singular – which opposed national versus international authority and the interests of the newly decolonised capital importing states with those of the capital exporting imperial powers. Later, this configuration would play out again in the debates about state responsibility which took place after the Second World War.⁶³

Some Western international lawyers were critical of alien protection. This was evident at the ASIL Annual Meeting in 1927. Take this statement, for example, from Raymond Leslie Buell, regrettable references to ‘backward’ regions aside:

Is armed intervention for the protection of property good policy? Should we claim damages for aliens in backward regions who have not conducted themselves like gentlemen? Judging by the people [i.e. foreigners] that I have seen in many backward countries, I feel that some of them should be run out of the country without any compensation. I feel it is a debatable question whether [the US] government or any government in Europe should support concessions obtained from a country in Central America by bribery. I think it is debatable whether this government or any other government in the world should claim damages for the so-called confiscation of a concession over resources which the government had no legal right to alienate.⁶⁴

Even establishment US international lawyers like Borchard and Eagleton did not entirely deny the relationship between imperialism and state responsibility for alien protection. The problem

⁶³ See A. Anghie, *Imperialism, Sovereignty and the Making of International Law* (2004), 196-244; S. Pahuja, *Decolonising International Law: Development, Economic Growth and the Politics of Universality* (2011), 95-171.

⁶⁴ Garner, *supra* note 18, at 77-8.

was that they did not necessarily see this as a bad thing. The preface to Borchard's *Diplomatic Protection* opens thus:

With the drawing together of the world by increased facilities for travel and communication, the number of persons going abroad for purposes of business or of pleasure has steadily increased. Coincidentally, an increasing amount of capital, American as well as European, has been seeking investment in foreign countries, and the growth of international commerce and intercourse has resulted in the creation of vast commercial and other interests abroad. These movements of men, money, and commodities, while of economic advantage to the exploiting and to the exploited country and establishing bonds of mutual dependency between them, also create occasional friction.⁶⁵

Capitalist imperialism, then, is the context to which the development of alien protection responded; it is a matter of, in Borchard's words, 'the growth and necessities of commerce'. Although Borchard adds that this is 'combined with the enlightened views of individual rights which the French Revolution brought in its train', it is business that is presented as the primary driver.⁶⁶ Eagleton also gives the doctrine of state responsibility for injuries to aliens unapologetically imperialist underpinnings.

[T]here are ... great potentialities for compelling the maintenance of better standards of justice within countries which may have been remiss in this respect, to the advantage not only of aliens, but of the nationals themselves. As judicial standards more and more approach uniformity within the different states, intercourse between states through the interchange of inhabitants and articles of commerce is more unobstructed and

⁶⁵ Borchard, *Diplomatic Protection*, *supra* note 20, at v.

⁶⁶ Borchard, *Diplomatic Protection*, *supra* note 20, at 35.

encouraged, and the community of nations becomes more homogenous and less subject to the psychological reactions produced by ignorance.⁶⁷

For Eagleton, state responsibility for alien protection has a mission that is both explicitly civilizing and about opening up the world to commerce.

Borchard is critical of the practice of some European nations in enforcing claims for harm caused by rebels against Latin American states on the basis of ‘a lack of diligence in preventing or suppressing uprisings’. He argues that ‘the highest interests of the state are too deeply involved in the avoidance of such commotions’ to suppose that they are the result of negligence occasioning international responsibility. He goes on to note that such negligence would be difficult to prove and that, ‘if the claims rested upon this ground alone few of them could be prosecuted to payment’.

[A]ssuming that the government is so organized that civil commotion is only a fortuitous event and not one invited by lack of proper political organization, the Latin-American republics would appear to deserve support in their endeavors to be relieved from the diplomatic pressure of claims resulting from injuries suffered in the legitimate operations incident to civil war, or caused by insurgents.⁶⁸

Eagleton also admits that ‘the indefiniteness of the standard leaves small states at the mercy of larger ones in the matter of such claims’.⁶⁹ Like Borchard, he addresses the Latin American experience, noting that, ‘[i]t is a notorious fact ... that successful claims for damages due to civil war disturbances have rarely been prosecuted except against the Latin-American states, or occasionally against other weaker states’.⁷⁰

⁶⁷ Eagleton, *supra* note 62, at 102.

⁶⁸ Borchard, *Diplomatic Protection*, *supra* note 20, at 242-3.

⁶⁹ Eagleton, *supra* note 62, at 109.

⁷⁰ Eagleton, *supra* note 62, at 144.

However, despite this criticism, Borchard ultimately characterises the problem as abuse of what was basically a sound doctrine: ‘the element of physical power and political expediency [has been permitted] at times to obscure and even obliterate purely legal rights’⁷¹ This is in contrast with Podestá Costa, who saw abuse as a virtually inevitable consequence of the nature of the doctrine, arguing that state responsibility for civil war damage ‘leads almost fatally to abuse, because it has a fiction as its foundation’.⁷² Eagleton goes even further than Borchard. At the ASIL annual meeting in 1927 Eagleton damned José Gustavo Guerrero – unfairly as we shall see below – as ‘naturally represent[ing] the heterodox Latin American position’ which was, in Eagleton’s view ‘destructive to international law’. However, this insult may well be more applicable to Eagleton himself, who represents the extremes of the partisan US approach. Eagleton argues that ‘one is free to put his own construction’ on the ‘notorious’ practice against Latin American states. For Eagleton, it is not necessarily ‘always the bullying conduct of a more powerful against a weaker state unable to resist’ or ‘unwarranted aggression’ since, ‘[c]hronic civil disturbances have, in some of these states, demonstrated their failure to measure up to the standard [of alien protection] required’.⁷³ This, Eagleton argues, ultimately justifies intervention:

[T]he possibility of abuse ... is, after all, the usual weakness of international law; and it has the corresponding advantage of achieving improvement in the administration of justice in all states ... Until the standard is more precisely stated, and until an international organization is effected capable of giving a fair and impartial interpretation of the principle, the right of a state to intervene in disregard of local

⁷¹ Borchard, *Diplomatic Protection*, *supra* note 20, at 26. US commentators writing after the Second World War did make this same argument. See R. B. Lillich, *The Human Rights of Aliens in Contemporary International Law* (1984), 15; P. C. Jessup, *A Modern Law of Nations: An Introduction* (1948), 95-6.

⁷² Podestá Costa, *El Extranjero*, *supra* note 23, at 252.

⁷³ Eagleton, *supra* note 62, at 144-5.

remedies, where they are insufficient, must be justified by the importance of the principle of responsibility itself.⁷⁴

Although only a few Western international lawyers were meaningfully critical of alien protection, a number of Latin Americans supported a certain degree of responsibility, even as they contested its content and enforcement. On one hand, this was for strategic reasons – as a condition of Western recognition of their statehood and to encourage foreign investment. On the other, it reflected their liberal legal sensibility; Calvo’s successors, like José Gustavo Guerrero and Luis Podestá Costa, were modern liberal internationalists, for whom international law was a result of international community, leaving behind the classical, sovereignty-based approach of the early nineteenth century.⁷⁵ Despite sometimes being portrayed as such,⁷⁶ Latin American international lawyers were not radical iconoclasts.

For example, the Convention Relative to the Rights of Aliens adopted by the Second International Conference of American States in 1902 provided that, ‘[s]tates are not responsible for damages sustained by aliens through acts of rebels ... and in general, for damages originating from ... the acts of war, whether civil or national; *except in the case of failure on the part of the constituted authorities to comply with their duties*’.⁷⁷ It also excepted from the exclusion of international remedies ‘cases where there shall have been on the part of the Court, a manifest denial of justice, or unusual delay, or evident violation of the principles of International Law’.⁷⁸ James Garner, in his paper to ASIL’s roundtable conference on the ‘responsibility of states for injuries suffered by foreigners within their territories on account of

⁷⁴ Eagleton, *supra* note 62, at 109-10.

⁷⁵ On this move from classical to modern international legal thought among Latin American international lawyers, see Becker Lorca, *supra* note 2, at 221ff.

⁷⁶ See, e.g., Eagleton’s comments at the 1927 ASIL annual meeting reported in Garner, *supra* note 18, at 66-7.

⁷⁷ See Scott, *supra* note 45, at 91 (emphasis added).

⁷⁸ *Ibid.*

mob violence, riots and insurrection’ at its annual meeting in 1927,⁷⁹ noted that in the treaties Latin American states had entered into among themselves many more recognised an exception to non-responsibility in the case of fault or negligence than recognised absolute non-responsibility.⁸⁰

The Guerrero Report,⁸¹ which became infamous for its supposedly restrictive stance on responsibility apparently in purely self-interested defence of the Latin American position, is another example; it is more complex and subtle than the partisan diatribe it has been considered in certain quarters. Indeed, it shows that Guerrero is a good liberal internationalist. The sanctity of property, for example, is a cornerstone of his thinking, as is the public-private divide.⁸² He recognises that there are international standards governing protection of aliens; he argues that the international community recognises rights to life, liberty and property as ‘universal’ beyond nationality,⁸³ just as Borchard does in very similar terms.⁸⁴ Guerrero also makes exceptions to the general rule of non-responsibility for acts of rebels in the event of appropriation of property and denial of justice.⁸⁵

Although in the 1890s a number of arguments were raised proposing general responsibility for acts of rebels,⁸⁶ by the first decades of the twentieth century, Anglo-American international lawyers also largely supported a general rule of non-responsibility, with an exception where

⁷⁹ This was the third subdivision of the more general topic of the conference ‘the responsibility of states for damage done in their territories to the person or property of foreigners’.

⁸⁰ Garner, *supra* note 18, at 59, citing Arias (see note 15 *supra*).

⁸¹ League of Nations Committee of Experts for the Progressive Codification of International Law, Questionnaire No. 4 adopted by the Committee at its Second Session, held in January 1926: Responsibility of States for Damage Done in Their Territories to the Person or Property of Foreigners, Annex: Report of the Sub-Committee (‘Guerrero Report’) (1926) 20 AJIL Special Supplement 177.

⁸² Regarding the latter, see the Guerrero Report, *supra* note 81, at 189, and regarding the former, see notes 83 and 85 *infra*.

⁸³ Guerrero Report, *supra* note 81, at 182.

⁸⁴ Borchard, *Diplomatic Protection*, *supra* note 20, at 12: ‘the individual, as a human being, is accorded certain fundamental rights by all states professing membership in the international community ... the right to personal security, to personal liberty and to private property’.

⁸⁵ Guerrero Report, *supra* note 81, at 197, 202.

⁸⁶ They were discussed in detail at the 1900 meeting of the Institut de Droit International at Neuchâtel. See (1900) 18 *Annuaire de l’Institut de Droit International* 233-56.

the government had failed to exercise due diligence in protecting alien interests from rebels or repair any harm through the domestic courts. There was also an exception for successful rebels, now well-known as Article 10 of the International Law Commission's Draft Articles on State Responsibility, but which at the time received relatively little attention, one of a number of peripheral exceptions to the general rule.⁸⁷

Borchard argued that there was now 'general support' for a principle of non-responsibility for acts of rebels 'unless there is proven fault or a want of due diligence on the part of the authorities in preventing the injury or in suppressing the revolution'.⁸⁸ This support, according to Borchard, can be found 'on the part of writers, of arbitral commissions, and of foreign offices ... [and] in numerous treaties between the states of Europe and the Latin-American republics'. He sets this authority out in a footnote spanning four pages.⁸⁹ Borchard cites commentators that I mention here – such as Calvo, Moore, Wiese, Arias, Goebel and Podestá Costa – as well as others,⁹⁰ despite the fact that they represent a wide variety of different positions. The most significant references are, however, the arbitral decisions, with a notable number from the Venezuela commissions of 1903.⁹¹ Borchard rejects the significance of a number of decisions making exception to his general principle.⁹² The only diplomatic practice cited is that of Britain and the US. The latter of course denied responsibility for the Confederate rebels. Overall, this footnote is typical of the way in which commentators manoeuvred the highly malleable

⁸⁷ See, e.g., Borchard, *Diplomatic Protection*, *supra* note 20, at 241-2, who presents this as an afterthought to his general rules. On the development of this particular rule, see K. Greenman, 'The Secret History of Successful Rebellions in the Law of State Responsibility' (2017) 6(9) ESIL Reflection.

⁸⁸ Borchard, *Diplomatic Protection*, *supra* note 20, at 229. Eagleton, in contrast, starts from the opposite side with a general rule of responsibility, but ends up in the same position as Borchard. See Eagleton, *supra* note 62, at 146.

⁸⁹ Borchard, *Diplomatic Protection*, *supra* note 20, at 229 fn 7.

⁹⁰ Borchard cites Hall, Fiore, Bluntschli, Pennetti, Rougier, Sadoul, Anzilotti, Pradier-Fodéré, Despagnet, Bonfils and Oppenheim, Borchard also notes that '[t]he very few writers who support the contrary doctrine of state responsibility qualify their rule considerably', citing Brusa, de Bar and Rivier. For full references, see Borchard, *Diplomatic Protection*, *supra* note 20, at 229-30 fn 7.

⁹¹ See Borchard, *Diplomatic Protection*, *supra* note 20, at 230 fn 7.

⁹² These include the *Venezuelan Steam Transportation Company Case* (US v Venezuela, 1882), the *Montijo Case* (US v Columbia, 1874), *Easton* (US v Peru, 1863) and a number of cases from the Venezuela commissions. For full references, see Borchard, *Diplomatic Protection*, *supra* note 20, at 231 fn 7.

materials to support their various positions, emphasising particular sources over others and explaining contrary practice as exceptions to or breaches of their general principles, just as we saw Calvo do. Borchard gives no normative justification for his general rule. It is presented as simply a matter of rationalising the practice. This is typical of the Anglo-American approach that he exemplifies. Borchard was the protégé of John Bassett Moore,⁹³ whose highly influential 1898 compilation of arbitrations I have already mentioned above. Borchard dedicates *Diplomatic Protection* to Moore, who supervised his 1914 doctorate of the same title. Accordingly, ‘Borchard’s determination to root State responsibility in international practice reflects the approach of his mentor and closest colleague’.⁹⁴ Latin American scholars, in contrast, tended towards an approach based on ‘perfecting [rules] and bringing them into harmony with new social conditions’ rather than systematising existing rules from practice.⁹⁵ This latter approach was seen, understandably, as favouring US interests.

Eagleton’s use of the arbitral practice takes matters beyond a manipulation of inherently malleable materials and into the realm of the sloppy and even the misleading – even his colleague Borchard apparently accused Eagleton of being ‘not intellectually honest’.⁹⁶ In support of his statement that ‘factors have at times been present which enabled the tribunal to convict the parent state of negligence’, Eagleton cites the *Santa Clara Estates Co Case* (Britain v Venezuela, 1903), the *Venezuelan Steam Transportation Company Case* (US v Venezuela, 1892), and the *Wenzel Case* (Germany v Venezuela, 1903).⁹⁷ However, in *Santa Clara Estates*,

⁹³ See note 57 *supra* on Borchard’s tribute to Moore’s influence in the preface to *Diplomatic Protection*. For an interesting article on Borchard and Moore, see J. D. Doenecke, ‘Edwin M. Borchard, John Bassett Moore, and Opposition to American Intervention in World War II’, (1982) 6(1) *The Journal of Libertarian Studies* 1.

⁹⁴ Nissel, *supra* note 27, at 266. See Borchard’s own statements on the importance of arbitration to the development of international law and the sources he has used in his preface to *Diplomatic Protection*, *supra* note 20, at v, vii.

⁹⁵ This contrast was made by Portuguese delegate José Lobo d’Avila Lima at The Hague in 1930 between what he called the continental and Anglo-Saxon approaches. See League of Nations, Acts of the Conference for the Codification of International Law, Held at The Hague from March 13th to April 12th 1930 (1930), Vol. 4, at 18. See also, Becker Lorca, *supra* note 2, at 305.

⁹⁶ Doenecke, *supra* note 93, at 10.

⁹⁷ Eagleton, *supra* note 62, at 151.

while it was argued by the British agent that Venezuela was negligent for having failed to suppress the revolution for a year, this argument was rejected by the umpire, something which Eagleton only mentions in a footnote. In fact, the umpire was sympathetic towards Venezuela, alluding to both the foreign finance received by the Matos revolution and the serious impact which the blockade had on its funds.⁹⁸ The supposed reason why Venezuela was held responsible in *Wenzel* – that ‘a fort near the mouth of the Orinoco was held against the Venezuelan Government as late as January, 1872, by a ‘Blue’ officer and his wife with two old fashioned smoothbore guns equally dangerous at both ends’ – is in fact a quotation from the *Venezuelan Steam Transportation Company* case which was quoted in *Wenzel*.⁹⁹ A number of commentators, such as Borchard, argued that the *Venezuelan Steam Transportation Company* case was not good precedent since no reasons were given for the decision.¹⁰⁰ In the *Wenzel* case responsibility was in fact denied. Despite this, it is more often than not the work of Latin America international lawyers which is accused of being unscholarly, including by Eagleton himself.

So, it was the case that nearly all the various positions make responsibility the exception rather than the rule.¹⁰¹ However, the scope of the exceptions to non-responsibility was profoundly contested. Indeed, such a rule feeds controversy because it can be configured in so many ways.¹⁰² For example, on one side, it was Guerrero’s narrow definition of denial of justice which was the most unacceptable aspect of his report to many rather than any absolute denial of responsibility on his part. On the other, arguments made by Anglo-American commentators

⁹⁸ See Santa Clara Estates Case (Supplementary Claim) (1903) IX RIAA 455, at 458.

⁹⁹ *Wenzel* Case (1903) X RIAA 428, at 431.

¹⁰⁰ Borchard, *Diplomatic Protection*, *supra* note 20, at 231 fn 7. See also Ralston, *supra* note 1, at 348.

¹⁰¹ James Garner identifies an ‘intermediate category of writers, which includes the majority, who maintain that the state is responsible and therefore bound to indemnify aliens in certain cases, but is irresponsible in other cases’. Garner, *supra* note 18, at 60.

¹⁰² That may also be why it prevailed, since its flexibility enabled it to hold together a wide range of disparate perspectives and respond to a variety of differing interests, although at the same time this also robbed it of much of its utility as a standard.

that the general presumption of non-responsibility was rebutted where ‘it can be shown that a state is not reasonably well ordered’ threatened to make the exceptions more important than the rule as applied to Latin America. Borchard, for example, having set out his general principle of non-responsibility, immediately qualifies it: ‘[t]his doctrine is predicated on the assumption that the government is reasonably well ordered, and that revolution and disorder are abnormal conditions’.¹⁰³ He continues:

‘Where a state has fallen into anarchy, or the administration of law has been nerveless or inefficient, or the government has failed to grant to a foreigner the protection afforded citizens, or measures within the power of the government have not been taken to protect those under its jurisdiction from the acts of revolutionists,’ the general rule is suspended and foreign states may not only intervene by force for the protection of their subjects, but may demand indemnities, whether the injuries were sustained at the hands of the government forces or the insurgents.¹⁰⁴

The quotation here is from the umpire’s opinion in the *Sambiaggio* case from the Italian-Venezuelan commission of 1903.¹⁰⁵ It is interesting to note that in its original context, its meaning is far less clear. Umpire Ralston is in fact noting that *Sambiaggio* is *not* such a case of anarchy, inadequate administration of justice or failure to protect, but rather one of ‘open, flagrant, bloody, and determined war’. Ralston then goes on to discuss the rules applicable to the latter case, without pronouncing on the rules applicable to the former. Borchard does not offer any authority other than this ambiguous dictum from *Sambiaggio* in support of this position. Under Borchard’s approach, where the general rule of non-responsibility is excluded and the use of force is permitted in cases of anarchy, inadequate administration of justice or

¹⁰³ Borchard, *Diplomatic Protection*, *supra* note 20, at 230.

¹⁰⁴ Borchard, *Diplomatic Protection*, *supra* note 20, at 230-31.

¹⁰⁵ *Sambiaggio Case (of a general nature) (1903) X RIAA 499*, at 512.

failure to protect, plenty of scope remains for the type of practice which we saw above Borchard seem to be criticising in respect of Latin America. The whole point is that Western governments frequently argued – drawing on an image of Latin America that, as we shall see, had more to do with ideology than fact – that ‘civil commotion’ was endemic to Latin American societies which lacked ‘proper political organization’.

Eagleton’s position is, again, more extreme than Borchard’s. He argues that, ‘[a state] cannot avoid international responsibility on the plea of a deliberate preference for anarchy’.¹⁰⁶ He notes the ‘many ingenious though vain schemes for evading responsibility’ devised by certain Latin American states and argues that, ‘however one may sympathize with them, they are based on an antiquated concept of sovereign irresponsibility, and must inevitably prove futile’. In a truly extraordinary passage, Eagleton then goes so far as to suggest that a failure to meet the international standard of alien protection could lead to (re)colonisation.

The state which is consistently unable to meet its international obligations has no claim to membership in the family of nations. Penalties and restrictions will become increasingly burdensome; and its ultimate absorption by a state which is able to assume responsibility for the protection of rights within it is within the bounds of historical record and reason.¹⁰⁷

Just as controversial as the scope of the exception to non-responsibility was the question of who decides. Few international lawyers in fact argued that aliens were entitled to more than the same standard of protection from the state against rebels as nationals. The issue was whether national or domestic authority determined such a standard, judged whether it had been met and enforced it. Eagleton argued:

¹⁰⁶ Eagleton, *supra* note 62, at 144.

¹⁰⁷ Eagleton, *supra* note 62, at 145-6.

The state must assure to the alien the same amount of protection which it gives to its own citizens, no more, no less. While this is unquestionably correct as a general statement of the rule, it must always be subject to the proviso that the justice administered within a state is satisfactory to the community of nations. A state may be responsible, not merely for the same protection which it offers to its own citizens, but for a protection which measures up to reasonably standards of civilized justice ... [T]his international standard of justice ... sets a limitation upon the respondent state, and prohibits it from setting itself up as the final judge concerning the treatment which aliens within its territories receive from its hands.¹⁰⁸

For Eagleton, ‘it cannot be presumed that states have provided and will maintain such excellent systems of justice, as to render international supervision unnecessary’.¹⁰⁹ We can contrast this with the Guerrero Report, which asserts that, ‘[s]tates, as at present organised, possess in themselves the necessary means for rendering the protection of foreigners effective’.¹¹⁰ Similarly Podestá Costa argues that the state’s ‘capacity to ensure [essential rights] enjoyment and exercise has been recognised on its being deemed a sovereignty entity by the rest of the nations’.¹¹¹

While it was taken for granted that state-state relations were international and state-citizen relations were domestic, the nature of state-alien relations was up for grabs. Fundamental to Borchard’s approach was the internationalisation of the state-alien relationship. He explains that, ‘[w]hen the citizen leaves the national territory he enters the domain of international law. By residence abroad ... he enters into a new sphere of mutual rights and obligations between

¹⁰⁸ Eagleton, *supra* note 62, at 83-4; cf. the remarks of Charles Fenwick at the ASIL annual meeting in 1927 reported in Garner, *supra* note 18, at 78: ‘I am prepared to go further ... and admit the principle that aliens should be entitled to greater privileges in a country than the citizens of that country enjoy.’

¹⁰⁹ Eagleton, *supra* note 62, at 121-2.

¹¹⁰ Guerrero Report, *supra* note 81, at 185.

¹¹¹ Podestá Costa, *El Extranjero*, *supra* note 23, at 229-30.

himself as a resident alien and the state of his residence.¹¹² This is in marked contrast with Podestá Costa, for whom the alien leaves behind his old national society to enter into a pact with his new one.¹¹³ While for Borchard and Eagleton the standard of protection is an international one, Podestá Costa, for example, defines both negligence and denial of justice by reference to domestic standards. The standard of diligence required of a state is ‘that which a particular government is used to using in such circumstances’.¹¹⁴ A denial of justice must involve a breach of domestic law; the state has fulfilled its obligations when it has allowed the foreigner access to the courts to defend his or her legal rights.¹¹⁵ This was thus a struggle for the internationalisation of ‘aliens versus rebels’. It was a struggle which took place on the terrain of international law, with all sides deploying international legal language and concepts, but opposing different understandings of the relationship of the international to the national, an opposition which repeated itself in the debates about state responsibility after the Second World War. In the next section we will look at what was at stake in this contestation.

5. State responsibility for rebels in context

5.1. Capitalist expansion, decolonisation and economic imperialism

The rise of alien protection was contemporaneous with a period of intensifying penetration of US and European capital in recently independent Latin America.¹¹⁶ The legacy of Spanish colonialism combined with Western capitalist expansion created an explosive mix of aliens and rebels under conditions of violence in the region during the nineteenth century. I propose

¹¹² Borchard, *Diplomatic Protection*, *supra* note 20, at 26.

¹¹³ Podestá Costa, *El Extranjero*, *supra* note 23, at 254.

¹¹⁴ Podestá Costa, *El Extranjero*, *supra* note 23, at 183-4.

¹¹⁵ Podestá Costa, *El Extranjero*, *supra* note 23, at 256-7. See also along similar lines the Guerrero Report, *supra* note 81, at 192-3.

¹¹⁶ This is also acknowledged in much of the early twentieth century scholarship. See, e.g., Dunn, *supra* note 56, at 53. I am also drawing here on a number of recent TWAIL histories which have considered the doctrine of state responsibility in the context of the second wave of post-Second World War decolonisation. See the works of Anghie and Pahuja, at note 63 *supra*.

reading the development of the doctrine of state responsibility for rebels as a response to this. In the nineteenth century the newly independent Latin American republics, no longer confined to trading with or via Spain, offered a vital market for Europe's surplus capital and manufactured goods. Their natural resources were essential to the continued growth of European industry. Foreign investors, merchants and traders arrived in ever increasing numbers throughout the century, particularly after around 1880 when the investment of foreign capital in Latin America really began in earnest (and when we also see the number of arbitrations rise dramatically).¹¹⁷ At the same time, the local elites which took power upon independence inherited huge debts and imbalanced economies left de-capitalized and in disarray by the devastating impact of the wars of independence. They perceived foreign investment as vital for economic recovery and nation building as well as a means to shore up their own internal authority and wealth. It was not in their short-term interest, however, to re-balance their economies. Being chronically on the verge of bankruptcy, governments were susceptible to the demands of foreign finance to maintain or create economic and legal systems which served their (foreign finance's) interests and yet which only reinforced economic instability.

Such economic instability, combined with the political and social distortions left by centuries of brutal and exploitative Spanish colonisation and the violence of the wars of independence, also meant that the new Latin American states were open to revolution and civil war. Independence had not equated to social reform or an improvement in economic conditions for ordinary people – for many precarity had only increased – and such socio-economic injustice fomented longstanding unrest. Nation states had been conceived in the interests of ejecting the

¹¹⁷ On foreign investment generally in Latin America since independence, see Department of Economic and Social Affairs – Economic Commission for Latin America, *External Financing in Latin America*, UN Doc E/CN.12/649/Rev.1 (1965), at 5-19; A. M. Taylor, 'Foreign Capital Flows', in V. Bulmer-Thomas, J. Coatsworth, and R. Cortes-Conde (eds.), *The Cambridge Economic History of Latin America* (2008), Vol. 2. More specifically, I. Stone, 'British Direct and Portfolio Investment in Latin America Before 1914', (1977) 37 *Journal of Economic History* 690, has a lot of information on British investment.

Spanish but there was often little sense of cohesive political community across large and poorly connected territories. After years of colonial domination political institutions were weak and governments struggled to hold together the contradictions of postcolonial society, especially during the frequent economic crises caused by the vulnerability of the new republics to fluctuating global commodity prices. However, while the political and economic trials of the new republics are undeniable, it is important not to overstate them.¹¹⁸ That nineteenth century Latin American existed in a state of perpetual political and financial disorder was in significant part a European impression. Such impression was both based upon and functioned so as to found and reinforce European assumptions about Latin Americans as violent and frivolous as well as serving to legitimise intervention.¹¹⁹

When foreign commercial interests were harmed by rebels, merchants and traders sought protection from their home governments. Prior to decolonisation, this was not an issue. Thanks to the pre-independence prohibition on non-Spanish immigration to Latin America and the Spanish monopolisation of trade with the region, there would have been few truly ‘foreign’ interests in Latin America. Protection of Spanish trade could be assured through the influence of the imperial government in Madrid; any question of responsibility for harm caused by rebels was dealt by the law of the colonial state. Now the states of Latin America were newly sovereign, the Western powers called upon international law to enable them to carry out such protection. The doctrine of state responsibility for rebels can thus be understood as a response to the decolonisation of Latin America: that is, in response to the need to ‘externalise what had

¹¹⁸ See, e.g., L. M. Summers, ‘Arbitration and Latin America’, (1972) 1 *California Western International Law Journal* 1, at 8, quoting Kalman Silvert: ‘[t]he number of revolutions in Latin America is accentuated by the North American, who tends to forget that there are twenty different republics all having their own troubles, and who does not understand the patterning of Latin violence, the often reduced number of persons involved, and the built-in limitations of the impact of civil disorder on daily life’.

¹¹⁹ See, for example, the flippant comments of Lord Lansdowne, the British Foreign Minister, regarding the Venezuela blockade in I. Adams, *Brothers across the Ocean: British Foreign Policy and the Origins of the Anglo-American ‘Special Relationship’, 1900-1905* (2005), 46.

been internal aspects of colonial law and governance'.¹²⁰ Due to the particular situation of Latin America, having already gained recognition as independent states in the first half of the nineteenth century, the means of protection employed in other regions, such as extraterritorial jurisdiction or unequal treaties in Asia and the Middle East, were not available. A method of protection was required that was compatible with the new republics' formal sovereign equality.

5.2. Legacy

In this sense, the resistance of Latin America to the doctrine of state responsibility for rebels anticipated the resistance to state responsibility by the states which became newly independent in the second wave of decolonisation after the Second World War, which manifested itself in the concept of permanent sovereignty over natural resources (PSNR).¹²¹ Latin America – its states achieving independence over a century before colonies in Africa and Asia – was the site of the first experiment in economic imperialism beyond formal colonialism. After the Second World War, 'the distinctive history of Latin American international law merged with the histories of the new states'.¹²² In both cases, international law served to legitimise this imperial project as well as offering a site for resistance to it and this struggle was structured around opposing understandings of the relationship of the international to the national.

The failure to agree a convention on state responsibility at League of Nations Codification Conference at The Hague in 1930 was seen as a defeat of state responsibility on the basis of alien protection and as such a victory for Latin America.¹²³ Such victory was however, only

¹²⁰ A. Orford, 'Food Security, Free Trade, and the Battle for the State' (2015) 11(2) *J Int Law Int Relat* 1, at 30.

¹²¹ See the leading works from a TWAIL perspective by Antony Anghie and Sundhya Pahuja, above note 63. The definitive history of PSNR is N. Schrijver, *Sovereignty over Natural Resources: Balancing Rights and Duties* (1997).

¹²² See Anghie, *supra* note 63, at 209.

¹²³ For an account from the time by one of the US delegates at The Hague see, e.g., E. Borchard, "'Responsibility of States" at the Hague Codification Conference', (1930) 24 *AJIL* 517. For a contemporary account of the role played by Latin American international lawyers in codification more generally, see Becker Lorca, *supra* note 2, at 305-52.

temporary; in the long term, alien protection has survived and, indeed, thrived. In simple terms, while the International Law Commission's codification project unhooked state responsibility from alien protection,¹²⁴ the latter has nevertheless lived on in the specialist technical discipline of international investment law – in *AAPL v. Sri Lanka*, an ICSID tribunal confirmed state responsibility for rebels on the basis of due diligence, citing *Sambiaggio*.¹²⁵ PSNR eventually gave way to investor protection and the international prevailed over the national.¹²⁶ Fragmentation, I suggest, has thus made more difficult the type of resistance described above which was posed from Latin America during the period c.1870-1930 to (economic) imperialism through international law.

6. Conclusion

In this paper, I have explored how intervention in Latin America, and particularly its turn to arbitration, produced the highly-contested doctrine of state responsibility for injuries to aliens caused by rebels. While Latin American international lawyers sought from the beginning to resist intervention on the basis of enforcing state responsibility, Anglo-American international lawyers sought to rationalise a doctrine of responsibility for rebels from the arbitral practice. We saw how by the early twentieth century this dynamic of resistance and development had driven the emergence of a flourishing, if profoundly disputed, sub-field of international law. Reading this history in the context of decolonisation, capitalist expansion and economic imperialism in Latin America, I have argued that the doctrine of state responsibility for rebels was produced out of and used to manage the transition from old colonialism to new imperialism in the region so as to guarantee foreign trade and investment. I have shown how international

¹²⁴ See Draft Articles on Responsibility of States for Internationally Wrongful Acts with commentaries, 2001, YILC, Vol. II (Part Two).

¹²⁵ *Asian Agricultural Products Ltd (AAPL) v Republic of Sri Lanka*, Case No. ARB/87/3 (1997) 4 ICSID Reports 250.

¹²⁶ See the works of Anghie and Pahuja, *supra* note 63, for full accounts of this transition.

law here was a site both of legitimisation of (US) imperialism and (Latin American) resistance to it. The history of the doctrine of state responsibility for rebels was not a matter of a straightforward opposition between Latin American international lawyers on one side and Anglo-Americans on the other. Rather, it was an encounter of a more complex nature. Nevertheless, I have identified two basic opposing currents which opposed national versus international authority and the interests of the newly decolonised capital importing states with those of the capital exporting imperial powers and which structured the contestation over state responsibility for rebels. Understanding this history is, I suggest, essential to understanding the post-Second World War developments in the law of state responsibility and the state of the law today. It helps us to put back together the pieces of alien protection which fragmented after 1945 and illuminates how international law continues to protect foreign investment against rebels in the decolonised world.