

A Swallow in Winter: The Mexican Protest in 1938¹

Gerhard Hafner

Contents

1.	Introduction.....	156
2.	Developments in the League of Nations	158
3.	The substance of the note	162
4.	The political dimension.....	164
a.	The relation of the Note Verbale to the Mexican political situation.....	164
b.	The impact on the Inter-American relations	166
a.	This note and the system of the League of Nations.....	168
i.	Article 10 of the Covenant of the LoN	170
ii.	Article 11 of the LoN Covenant.....	172
iii.	Article 17 of the LoN Covenant.....	173
b.	The general international legal framework/context	175
i.	The Mexican Note as a Protest	175
ii.	The Allegation of a Violation of International Law towards the German Reich.....	177
iii.	The Allegation of a Breach of International Law against Austria	180
6.	Conclusion.....	180

1. Introduction

Just 80 years ago, on 12 March 1938, the German Reich occupied Austria.² A strong political winter was holding Europe firmly in its grip. Nevertheless, in this cold

¹ This article is an edited and updated translation of a presentation originally given at the Austrian Latin-America Institute (“Österreichisches Lateinamerika-Institut”) in Vienna in the March of 1988. I am very grateful to Mag. Gregor Novak for his assistance with the translation.

² See, for example, Kurt Bauer, *Die Dunklen Jahre: Politik und Alltag im nationalsozialistischen Österreich 1938 bis 1945*, 2nd edn. (Frankfurt am Main: Fischer, 2017) pp. 21-114; see also Rolf Steininger, ‘12 November 1918-12 March 1938: The Road to the Anschluß’, in Rolf Steininger, Günter Bischof and Michael Gehler (eds.), *Austria in the Twentieth Century* (New Brunswick, NJ:

weather one different tone was to be heard that reminded one of the possibility of different weather: the protest of Mexico through its Ambassador Isidro Fabela against the occupation of Austria.³ In memory of this event, the former Erzherzog-Karl-Square in the 2nd Viennese District was renamed Mexiko-Square a decade after the Second World War (in 1956) and a public square near the Vienna International Center was named Isidro Fabela Promenade.⁴

International reactions to the events of March 1938, the *Anschluss*, were characterized in large part by the absence of protests from the side of the community of states in accordance with the appeasement policy of Chamberlain and Halifax;⁵ only a few states protested or disapproved of this fact; the formal protest by Mexico to the League of Nations (LoN) constituted an outstanding exception. In a meeting

Transaction Publishers, 2002) pp. 85-114. For an early collection of documents on the subject reproduced in German, see Stephan Verosta, *Die Internationale Stellung Österreichs: Eine Sammlung von Erklärungen und Verträgen aus den Jahren 1938 bis 1947* (Wien: Manz, 1947). See further Radomír Luža, *Austro-German Relations in the Anschluss Era* (Princeton: Princeton University Press, 1975) pp. 47-53.

³ League of Nations, ‘Situation of Austria: Declaration by the Mexican Government’ (March-April 1938) 19 League of Nations Official Journal 239, Doc. C.101.M.53.1938.VII. See, for example, for a brief discussion in the broader context of Austrian-Mexican relations, Stefan A. Müller, ‘The Missed Friendship: Austria and Mexico: 1901-1956’, in Klaus Esterer and Günter Bischof (eds.), *Transatlantic relations: Austria and Latin America in the 19th and 20th centuries* (Innsbruck/Wien: StudienVerlag, 2006) pp. 175-200.

⁴ See Gerhard Drekonja-Kornat (Op-Ed), ‘Anschluss’ I: Wie es zum Mexikoplatz kam’, Der Standard (9 March 2018), available at <https://derstandard.at/2000075791931/Anschluss-I-Wie-es-zum-Mexikoplatz-kam> accessed on 3 May 2018; it is notable that the former as well as the present designation derives from a person (Erzherzog Karl) or a State (Mexico) that stood up against the use of illegal force against another State in international relations. See also City of Vienna, “‘Isidro-Fabela-Promenade’ in Floridsdorf”, Press Release (20 May 2005) available at https://www.ots.at/presseaussendung/OTS_20050520 OTS0081/isidro-fabela-promenade-in-floridsdorf accessed on 3 May 2018.

⁵ See on the *Anschluss* in the larger context of the policy of appeasement, for example, Frank McDonough, *Neville Chamberlain, Appeasement, and the British Road to War* (Manchester: Manchester University Press, 1998) pp. 57-58.

of the Assembly of the LoN, China,⁶ Spain,⁷ and the Soviet Union⁸ protested against or expressed disapproval of the occupation of Austria and its disappearance from the LoN. The LoN itself qualified the occupation as the end of Austria and referred to the country in later documents as the “territory that formerly constituted Austria”.⁹

Although to some extent this protest may seem to be only of historical interest today, it nonetheless raises some interesting questions of international law and exhibits several international legal dimensions worthy of closer illumination and deeper examination. They shed light on the status of the LoN in the late 1930s, on the development of the prohibition of the use of force, as well as on regional relations in the Americas. It is also possible to draw some general conclusions from this incident concerning the possibilities of achieving solidarity in the context of an organized international system. Accordingly, it is worthwhile to recall this protest and to reconsider its political and legal significance.

2. Developments in the League of Nations

On 18 March 1938, the Secretary-General of the LoN, Joseph Avenol, received a note from the State Secretary in the German Ministry of Foreign Affairs, Hans Georg von Mackensen, in the name of the German government that informed of the “return” of Austria to the German Reich.¹⁰ The note can be divided up into several levels: It notifies to the Secretary-General a German statute of 13 March 1938 which incorporated an Austrian statute of the same day. This statute had declared Austria to be part of the German Reich (in the French version “Reich allemand”) and

⁶ League of Nations, ‘Item 23: Report on the Work of the League of Nations in 1937/38’, Continuation of the Discussion, Fifth Plenary Meeting, Friday, September 16th, 1938, at 3.30 p.m., League of Nations Official Journal, Records of the 19th Ordinary Session of the Assembly, Special Supplement No. 183, p. 54.

⁷ League of Nations, ‘Item 25: Report on the Work of the League of Nations in 1937/38’, Continuation of the Discussion, Sixth Plenary Meeting, Friday, September 19th, 1938, at 11 a.m., League of Nations Official Journal, Records of the 19th Ordinary Session of the Assembly, Special Supplement No. 183, pp. 61-63.

⁸ League of Nations, ‘Item 29: Report on the Work of the League of Nations in 1937/38’, Continuation of the Discussion, Sixth Plenary Meeting, Friday, September 21th, 1938, at 10:30 a.m., League of Nations Official Journal, Records of the 19th Ordinary Session of the Assembly, Special Supplement No. 183, p. 74.

⁹ See, for example, 19 League of Nations Official Journal (July 1938), p. 647.

¹⁰ League of Nations, ‘Situation of Austria in Relation to the League of Nations’ (March-April 1938) 19 League of Nations Official Journal 237, Doc. C.102.M.54.1938.VII. The German translation is reproduced in Verosta (n 2), p. 29.

announced a referendum about Austria's "return to the German Reich" to be held on 10 April 1938. The German statute, which is reproduced in the note, also contained provisions about the further application of existing law, provisions on the modalities by which German law would be introduced in Austria, as well as implementing rules. The note contains a resolution providing that, upon the date of the promulgation of the (German) statute, "l'ancien Etat fédéral d'Autriche a cessé d'être membre de la Société des Nations" ["the former federal state of Austria has ceased to be a member of the League of Nations"].

On 21 March 1938, the Secretary-General of the LoN confirmed the receipt of the note to the State Secretary in the German Ministry of Foreign Affairs and accompanied it with the remark that he would not fail to bring the note to the attention of the members of the LoN.¹¹

Already on 19 March 1938 – thus, only a day after the date of the submission of the German note, but before its transmission to the members of the LoN – the representative of Mexico before the LoN, the well-known international lawyer Isidro Fabela, submitted the Mexican protest note to the Secretary-General. The chronology confirms that Mexico had prepared this note in advance: already on 17 March Fabela had sent his draft of the note to Mexico, where, aside from some details, it was approved and released for submission to the LoN.¹²

Additional statements in the LoN relating to the developments in Austria occurred only on rare occasions. During a meeting on 11 March 1938 in the LoN Council, Chile alluded to the developments in Austria as well as to the lack of any reaction to them in the League of Nations¹³; Spain was allowed, on the same day, although it was not a member of the Council of the LoN, to launch a plea concerning the "Spanish Question", in which it referred to the violent and aggressive policies of two European

¹¹ League of Nations, 'Situation of Austria in Relation to the League of Nations' (March-April 1938) 19 League of Nations Official Journal 238, Doc. C.102(a).M.54(a).1938.VII.

¹² For an edited and translated set of internal background documents concerning the Mexican protest Note, see Dokumentationsarchiv des österreichischen Widerstandes (ed.), *Österreicher im Exil: Mexiko 1938-1947* (Vienna: Deuticke, 2002) pp. 31-97; see also Gerhard Drekonja-Kornat, 'Warum protestierte Mexiko gegen den Anschluß?' (1987) 36 Österreichisches Jahrbuch für Politik 473, p. 476.

¹³ See League of Nations, 'Third Meeting (11/V/1938) 101st Session of the Council' (May-June 1938) 19 League of Nations Official Journal, p. 323.

powers, Germany and Italy, which it claimed had “devoured” Austria and desired to “reduce Spain to ashes”.¹⁴

In the context of the general debate on the Annual Report of the Secretary-General of the LoN, a few individual speakers drew attention to the case of Austria in September of 1938: on 12 September 1938, the Chinese delegate Wellington Koo pointed to the “aggression” which had occurred in Europe in 1938, which was related to the aggression in East Asia in 1931, and which he linked with the well-known idea that “peace is indivisible”.¹⁵

On 19 September 1938 in the League of Nations Assembly, after recalling the events in China, the Spanish delegate criticized that the report of the Secretary-General contained “not [...] one word of farewell or of sympathy for [the] fate” of Austria. The Spanish delegate asked whether “the Spanish delegation [may] at least be permitted to cast a glance of indignant protest towards the seats formerly occupied by the Austrian delegation”. Moreover, in some additional remarks the Spanish delegate turned against the prevailing “realist policy”, accusing not only the aggressors, but also stating that “the greater responsibilities lie at the door” of the aggressors’ accomplices. According to the Spanish delegate, those truly responsible for the present situation were “the nations which, while proclaiming respect for the sovereignty of States and talking perpetually of peace, have belied their words by making the League a mere office for the registration of the defeats it has suffered in the accomplishment of its mission.” Finally, he lamented the failure of the system of collective security based on Article 16 of the Covenant of the League of Nations in the Far East, Ethiopia, Austria, and Spain.¹⁶

The Soviet Minister of Foreign Affairs Litvinov declared on 21 September 1938 that “[t]wo states - Ethiopia and Austria - have lost their independent existence in consequence of violent aggression.”¹⁷ These immediate statements reflected the general opinion that the events in March 1938 were understood as a case of aggression by the German Reich against Austria and not as a voluntary Anschluss.

¹⁴ See League of Nations, ‘Fourth Meeting (11/V/1938) 101st Session of the Council’ (May-June 1938) 19 League of Nations Official Journal, p. 326. Although Chile at that moment was not member of the Council of the LoN, it was permitted to participate in the discussion on the topic “Application of the Principles of the Covenant of the League of Nations” since it had submitted a pertinent draft resolution in the Assembly. Three days later, the delegate of Chile announced the withdrawal of his country because of the inefficacy of the League, *ibidem*, p. 376.

¹⁵ See *supra* (n 6).

¹⁶ See *supra* (n 7).

¹⁷ See *supra* (n 8).

In contrast to these declarations, however, stand the statements and formulations of the LoN itself. Thus, the German language Annual Report of the LoN for 1938 contains the following wording (translation):

In the course of March, the German Government informed the Secretary-General of the text of a Statute dated 13 March 1938, which provides for the return of Austria to Germany and for this purpose for the organization of a referendum, which will take place in Germany and Austria on 10 April 1938. The German Government adds to its notification that from the date of the promulgation of this Statute, the former Federal State of Austria has ceased to be a member of the LoN.¹⁸

However, the LoN still continued to concern itself with the Austrian question because it had to deal with the problem of Austria's obligations under the Covenant, respectively with the question of whether Austria, after its announced departure from the LoN, was bound to continue to pay its membership contributions for the duration of the two-year withdrawal period foreseen in Article 1 of the LoN Covenant.¹⁹

The 1st Committee of the LoN Assembly reached the conclusion that the note of the German Government was not a declaration of withdrawal by Austria in the sense of Article 1 (3) of the LoN Covenant. The Assembly accepted this recommendation and the Austrian contributions due were removed from the distribution scale. The LoN dealt with Austria also in the context of the refugee question where it referred to Austria by the phrase "the territory which formerly constituted Austria".²⁰

It is impossible to deny that using such phraseology indicates that the LoN had at the time assumed that Austria had ceased to exist as a subject of international law (at least it took no unequivocal position suggesting a continuation of membership). As a consequence, even in the short period of the LoN's existence after 1945, it did not accept the construction of an uninterrupted membership of Austria in the LoN,

¹⁸ See the Annual Report of the League of Nations in German language (1938), p. 92.

¹⁹ Article 1 (3) of the Covenant read as follows: "Any Member of the League may, after two years' notice of its intention so to do, withdraw from the League, provided that all its international obligations and all its obligations under this Covenant shall have been fulfilled at the time of its withdrawal." Covenant of the League of Nations (adopted 28 June 1919, entered into force 10 January 1920) 225 CTS 195.

²⁰ See *supra* (n 9). The topic was whether the competences of the High Commissioner and the provisional agreement of 10 February 1936 on the refugees coming from the German Reich could be extended to the refugees coming from Austria. In this context, the representative of New Zealand referred to the "German occupation" of Austria (Annual Report of the League of Nations in German language (1938), p. 173). Accordingly, the delegate excluded a voluntary act on Austria's part.

which had been claimed by the Austrian Minister of Foreign Affairs Gruber, but instead invited Austria to participate in the Assembly of the LoN as an observer.²¹

3. The substance of the note

The content of Mexico's note is well-known; in addition to the French original and English translation which are reprinted in the LoN Official Journal,²² its German translation is included in a collection of documents relating to the legal position of Austria published by Verosta in 1947.²³ Several scholars have discussed it: for example, Drekonja-Kornat has dealt with the note extensively,²⁴ Katz has investigated it with respect to its historical-political context,²⁵ while Kloyber has done so in the context of the LoN.²⁶

In terms of its substance, the Mexican note can be divided into the following segments:

- a. **Complaint against the LoN:** The note begins by accusing the LoN of having failed to achieve any of the means mentioned in Article 10 of the Covenant of the LoN.
- b. **Assertion of a general violation of international law:** The note further identifies a violation of the LoN Covenant and of the principles of international law by the invasion of Austria.
- c. **Assertion of specific breaches of international law:** According to the note, this event constituted a breach of the Covenant of the LoN, the Treaties

²¹ See Verosta (n 2), p. 102 with a German translation of the League of Nations, 'Item 22: Communication by the President', Fifth Plenary Meeting, Friday, April 12th, 1946, at 10:30 a.m., League of Nations Official Journal, Records of the 21st Ordinary Session of the Assembly, Special Supplement No. 194, pp. 49-50.

²² League of Nations, 'Situation of Austria: Declaration by the Mexican Government' (March-April 1938) 19 League of Nations Official Journal 239, Doc. C.101.M.53.1938.VII.

²³ Verosta (n 2).

²⁴ Gerhard Drekonja-Kornat, 'Warum protestierte Mexiko gegen den Anschluß?' (1987) 36 Österreichisches Jahrbuch für Politik 473, pp. 473-479; Gerhard Drekonja-Kornat (ed.), *Mexikos Protest gegen den Anschluß* (Vienna, Österreichischen Lateinamerika-Instituts: 1988), vol I.

²⁵ Friedrich Katz, 'Mexiko und Österreich 1938', in Gerhard Drekonja-Kornat (n 24), p. 4 seq.

²⁶ Christian Kloyber, 'Mexikos Protest vor dem Völkerbund', in Drekonja-Kornat (n 24), p. 8 *et seq.*

of Versailles²⁷ and St. Germain,²⁸ as well as the Geneva Protocol of 1922²⁹ by the Great Powers and Austria; these treaties had obliged the Great Powers to respect and “to guarantee” the independence of Austria; Austria would have been obliged to request the approval of the Council of the LoN in matters concerning the maintenance of its independence.³⁰ For these reasons, every decision and every agreement that diminished the independence of Austria was to be treated by the members of the LoN as arbitrary and impermissible. In its specific formulation of independence, the note drew on the Advisory Opinion of the Permanent Court of International Justice (PCIJ) of 1931 concerning the project of a *Customis Régime between Germany and Austria*.³¹

- d. **Discussion of a possible justification:** The approval by the Vienna authorities was no justification for the aggressor’s conduct; the legitimization of the authorities of the executive to represent the people was questionable; the *topos* of the “*voluntas coacta voluntas non est*” was meant to suggest that the Austrian authorities had acted under duress.

²⁷ Treaty of Peace between the Allied and Associated Powers and Germany (signed 28 June 1919, entered into force 10 January 1920) 225 CTS 188.

²⁸ Treaty of Peace between the Allied and Associated Powers and Austria (signed 10 September 1919, entered into force 8 November 1921) 225 CTS 482, also State Treaty of Saint-Germain-en-Laye between Austria and the Allied and Associated Powers, Austrian State Law Gazette (StGBl.) No. 303/1920.

²⁹ Promulgated in the Austrian Federal Law Gazette (BGBl.) No. 842/1922.

³⁰ Article 88 of the Treaty of Saint-Germain (n 28) reads as follows: “The independence of Austria is inalienable otherwise than with the consent of the Council of the League of Nations. Consequently, Austria undertakes in the absence of the consent of the said Council to abstain from any act which might directly or indirectly or by any means whatever compromise her independence, particularly, and until her admission to membership of the League of Nations, by participation in the affairs of another Power.”

³¹ *Customis Regime between Germany and Austria* (Advisory Opinion) PCIJ Series A/B No 41, p. 45 (“If we consider the general observations at the beginning of the present Opinion concerning Austria’s present status, and irrespective of the definition of the independence of States which may be given by legal doctrine or may be adopted in particular instances in the practice of States, the independence of Austria, according to Article 88 of the Treaty of Saint-Germain, must be understood to mean the continued existence of Austria within her present frontiers as a separate State with sole right of decision in all matters economic, political, financial or other with the result that that independence is violated, as soon as there is any violation thereof, either in the economic, political, or any other field, these different aspects of independence being in practice one and indivisible.”).

- e. **Protest:** By this note, Mexico “enters the most emphatic protest against the external aggression” against Austria, which is equated with the recent “attentats internationaux” against Ethiopia, Spain, and China.

4. The political dimension

a. The relation of the Note Verbale to the Mexican political situation

This note had a political dimension within Latin-American relations and in relation to Mexico itself. Like Austria, Mexico found itself under the influence of a far greater center of power in its immediate vicinity.³² This scenario created and always creates a special situation, because the presence of an exceedingly powerful neighbor generates a pull in political and economic respects which can only be resisted with great effort. The history of Mexican-US American relations confirms these special circumstances to a sufficient extent. The USA acquired large parts of Mexico in the course of time and continued to strongly influence the country’s economy. In the light of this situation and its experience with the USA, Mexico was interested to show that any attempt of influence by threat would be seen as a flagrant violation of international law.³³

³² See Dokumentationsarchiv des österreichischen Widerstandes (ed.), *Österreicher im Exil: Mexiko 1938-1947* (Vienna: Deuticke, 2002), p. 31; see also Gerhard Drekonja-Kornat, ‘Warum protestierte Mexiko gegen den Anschluß?’ (1987) 36 *Österreichisches Jahrbuch für Politik* 473, p. 474. See also Mònica Serrano, ‘Between Two Regions: The Scope and Limits of Mexico’s Cuspness’, in Marc Herzog and Philip Robins (eds.), *The Role, Position and Agency of Cusp States in International Relations* (New York: Routledge, 2014) pp. 129-151. See also Friedrich E. Schuler, *Mexico Between Hitler and Roosevelt: Mexican Foreign Relations in the Age of Lázaro Cárdenas, 1934-1940* (Albuquerque, NM: University of New Mexico Press, 1999). See further for the context of Mexico’s relations with other Latin American countries in the relevant period, Amelia M. Kiddle, *Mexico’s Relations with Latin America During the Cárdenas Era* (Albuquerque, NM: University of New Mexico Press, 2016) and Jürgen Buchenau, *In the Shadow of the Giant: The Making of Mexico’s Central America Policy, 1876-1930* (Tuscaloosa, University of Alabama Press, 1996).

³³ See Gerhard Drekonja-Kornat, ‘Warum protestierte Mexiko gegen den Anschluß?’ (1987) 36 *Österreichisches Jahrbuch für Politik* 473, pp. 474-475. See also Government of Mexico, *Mexico’s Oil: A Compilation of Official Documents in the Conflict of Economic Order in the Petroleum Industry, with an Introduction Summarizing its Causes and Consequences* (Mexico City: 1940) available at <http://repository.icse.utah.edu/dspace/bitstream/123456789/7953/1/Government%20of%20Mexico%201940%20part.pdf> accessed 15 November 2018. See also on this episode, for example, Amelia M. Kiddle, *Mexico’s Relations with Latin America During the Cárdenas Era* (Albuquerque, NM: University of New Mexico Press, 2016) pp. 110-112.

This already makes it apparent that Mexico had internal reasons to clarify that any influence exerted on another smaller state achieved by threat should be rejected in every case and be seen as a breach of international law. The historical events surrounding the nationalization of the Mexican oil industry,³⁴ which coincided with the submission of the protest note, served to additionally heighten the necessity of such a position.³⁵ The protest note can thus be understood as an instrument by which Mexico sought to clarify to other states that it would not tolerate any influence from abroad, which it viewed as a violation of international law. In this sense, the Mexican Minister of Foreign Affairs stressed to the German Minister Counselor in Mexico the position of his state as follows (translation): “Mexico pursues a consistent position, which has also led it to take positions against the attacks on Abyssinia, China, and Spain”.³⁶ For its independence, Mexico would take individual measures, but also measures through the LoN (while recognizing that the LoN was only able to do so to a limited extent). One can identify in the note an expectation on the part of Mexico that other states, and in particular the members of the LoN, would react in the same way in the case of similar events in Mexico or in other regions of Latin America. The note can therefore be placed in the context of the entire Mexican foreign policy of the year 1938, which was based which was based on efforts to ensure Mexican sovereignty in international fora, both in Geneva and on the regional level,³⁷ and on the acknowledgment that the “effective sovereignty of the Mexican nation was established on the international forum”.³⁸

³⁴ See Wilhelm Friede, ‘Der mexikanische Erdölstreit’ (1939) 9 Zeitschrift für ausländisches öffentliches Recht und Völkerrecht 31.

³⁵ See Gerhard Drekonja-Kornat, ‘Warum protestierte Mexiko gegen den Anschluß?’ (1987) 36 Österreichisches Jahrbuch für Politik 473, pp. 474-475.

³⁶ See (in somewhat differing translations) Dokumentationsarchiv des österreichischen Widerstandes (ed.), *Österreicher im Exil: Mexiko 1938-1947* (Vienna: Deuticke, 2002), pp. 68-71 and Klaus Volland, *Das Dritte Reich und Mexiko: Studien zur Entwicklung des deutsch-mexikanischen Verhältnisses 1933-1942 unter besonderer Berücksichtigung der Olpolitik* (Frankfurt am Main: Peter Lang, 1976) p. 112.

³⁷ See generally on the challenges faced by the League of Nations from the perspective of the foreign policies of Mexico and other Latin American countries during the relevant period, Alan McPherson and Yannick Wehrli (eds.), *Beyond Geopolitics: New Histories of Latin America at the League of Nations* (Albuquerque, NM: University of New Mexico Press, 2015).

³⁸ Porfirio Muñoz Ledo, ‘Developing Nations – A Mexican point of View’, in August Schou and Arne Olav Brundtland (eds.), *Small States in International Relations* (Stockholm: Almqvist & Wiksell, 1971) p. 174.

This note is also to be seen in the context of the delivery of ammunition from the Austrian ammunition factory Hirtenberger to the Republicans in Spain via Mexico. The occupation of Austria stopped this delivery against Mexican interests.³⁹

b. The impact on the Inter-American relations

This general understanding also provides a framework in which to situate the protest note in the context of the development of Inter-American international legal developments, in particular in connection with the Monroe Doctrine.⁴⁰ These developments consisted essentially of the following principles: a) The American continent was not to become an object of any future European colonialism; b) American powers would not participate in the wars between European powers; and c) European Powers were not to intervene in the Americas.

This doctrine was used by the USA at the start of the 20th century in order especially to buttress its own hegemony across the Americas.⁴¹ Although the doctrine was not anchored doctrinally, but was based on political statements, it was still incorporated into Article 21 of the LoN Covenant and was evidently also the principal reason for this Article, which declared it as compatible with the provisions of the LoN Covenant (stating that “Nothing in this Covenant shall be deemed to affect the validity of international engagements, such as treaties of arbitration or regional understandings like the Monroe doctrine, for securing the maintenance of peace.”).⁴²

³⁹ Dokumentationsarchiv des österreichischen Widerstandes (ed.), *Österreicher im Exil: Mexiko 1938-1947* (Vienna: Deuticke, 2002), pp. 19-20; see also Gerhard Drekonja-Kornat, ‘Warum protestierte Mexiko gegen den Anschluß?’ (1987) 36 *Österreichisches Jahrbuch für Politik* 473, pp. 476-477.

⁴⁰ For example, Thomas D. Grant, ‘Doctrines (Monroe, Hallstein, Brezhnev, Stimson)’, in Rüdiger Wolfrum (ed.), *Max Planck Encyclopedia of International Law Online* (Oxford: Oxford University Press 2012), vol III, pp. 181-189.

⁴¹ See James Monroe, ‘Seventh Annual Message to Congress 2 December 1823’, in James D. Richardson (ed.) *A Compilation of the Messages and Papers of the Presidents, 1789-1897, Vol. 2* (Bureau of National Literature and Art New York, 1901), pp. 207-220; see also Philip Marshall Brown, ‘Mexico and the Monroe Doctrine’ (1932) 26 *American Journal of International Law* 117, pp. 117-121. See on the historical background of the Monroe Doctrine, for example, Jay Sexton, *The Monroe Doctrine: Empire and Nation in Nineteenth-Century America* (New York: Farrar, Straus and Giroux, 2011).

⁴² Lassa Oppenheim (Hersch Lauterpacht (ed.)), *International Law: A Treatise*, 6th edn. (London: Longmans, Green, 1947), vol. I, p. 371 (fn. 3).

Latin American states, which had been meant to be the objects of protection of this doctrine, turned against it⁴³ and even refused to accede to the Briand-Kellog-Pact of 1928 because the USA had declared it to be compatible with the Monroe doctrine.⁴⁴ On the occasion of its accession to the LoN, Mexico declared that it had never recognized the regional understanding of Article 21 of the LoN Covenant.⁴⁵ It thus becomes easily explainable and understandable that, with its protest note, Mexico was ready to take measures which were actually not in conformity with the original understanding of the Monroe doctrine, as they stood in contrast to the principle of isolation from European affairs.⁴⁶

With the Declaration of Lima (on Inter-American Solidarity),⁴⁷ this doctrine was turned into a matter of concern for all American states. Thus, the Declaration of Lima explicitly enshrined the legal equality and individual freedom of action in the framework of the solidarity of the American states and reaffirmed that the principle of non-intervention and the absolute sovereignty of the American states was to be maintained and defended “against all foreign intervention or activity that may threaten them”.⁴⁸ At the same time, recalling earlier resolutions, other instruments adopted at the Lima Conference further explicitly reaffirmed in a prominent way the principle of non-recognition of territorial changes produced by non-peaceful means or of the occupation or acquisition of a territory by armed force as a fundamental legal principle of America.⁴⁹

⁴³ Charles Rousseau, *Droit international public* (Paris: Dalloz 1971), vol I, p. 107; Oppenheim (n 42), p. 284.

⁴⁴ *Ibid.*

⁴⁵ *Ibid.*

⁴⁶ See, for example, for a statement of that understanding John H. Latané, ‘The Monroe Doctrine and the American Policy of Isolation in Relation to a Just and Durable Peace’ (1917) 72 Annals of the American Academy of Political and Social Science 100, pp. 100-109.

⁴⁷ See for a collection of the key instruments deriving from the 8th International Conference of American States in Lima ‘Eighth International Conference of American States’ (1940) 34(4) American Journal of International Law: Supplement 190, pp. 190-201 (for the ‘Declaration of the Principles of the Solidarity of America’ see pp. 199-200).

⁴⁸ See ‘Eighth International Conference of American States’ (1940) 34(4) American Journal of International Law: Supplement 190, pp. 190-201. See also Yannick Wehrli, ‘A Dangerous League of Nations: The Abyssinian War and Latin American Proposals for the Regionalization of Collective Security’, in Alan McPherson and Yannick Wehrli (eds.), *Beyond Geopolitics: New Histories of Latin America at the League of Nations* (Albuquerque, NM: University of New Mexico Press, 2015) p. 45.

⁴⁹ See in this regard the instrument, also adopted at the Lima conference, on the ‘Non-Recognition of the Acquisition of Territory by Force’ (*ibid.*, p. 197). See also Oppenheim (n 42), p. 139. This principle has already been reflected in the Saavedra-Lamas-Treaty of 1933 and the Convention on the Rights and Duties of States of 1933, see Herbert W. Briggs (ed.), *The Law of Nations, Cases*,

The Mexican protest note is thus to be seen as part of the development which led to the formulation of the Declaration of Lima, and as one of its preparatory acts, because it determined the Mexican position towards the particular design of the Monroe Doctrine and emphasized the principle of non-recognition. It can also not be excluded that it sought to signal this position to the other Latin American states, be they members of the LoN or not. In light of these considerations, the protest note was meant to advance the emancipation of the Latin American states and is to be understood as part of their political efforts. These efforts extend to contemporary international politics and have continued to be the subject of conflicts in this region up to the present.

The note can therefore be placed in the context of the entire Mexican foreign policy of the year 1938, which was based on the acknowledgment that the “effective sovereignty of the Mexican nation was established on the international forum”.⁵⁰

5. The legal dimension

a. This note and the system of the League of Nations

As to the legal dimension, Mexico used the LoN as the seemingly appropriate multinational platform for launching the protest.

The LoN, created “in order to promote international co-operation and to achieve international peace and security”,⁵¹ was based on the mechanism of a coalition of the victors of the preceding World War; the experiences with non-military sanctions from World War I were incorporated into the Covenant. The LoN consisted of two main organs, as well as a permanent secretariat: the Assembly and the Council, composed of permanent and non-permanent members (representatives).⁵² Since the LoN was constructed as a decentralized system of collective security, sanctions were left to the individual members, which were however already under corresponding obligations under the Covenant of the LoN. This organization thus formed a decentralized “multistate” system with sovereign states as its basis, in which the Great

Documents, and Notes, 2nd edn. (New York: Appleton-Century-Crofts, 1952), p. 968; Hanspeter Neuhold, *Internationale Konflikte - verbotene und erlaubte Mittel ihrer Austragung* (Vienna: Springer, 1977), pp. 69 et seq.

⁵⁰ Ledo (n 38), p. 174.

⁵¹ See Preamble of the Covenant (n 19).

⁵² See, for example, for an overview Ruth Henig, *The League of Nations* (London: Haus Publishing, 2010).

Powers enjoyed precedence,⁵³ and in which the European system was essentially understood as a universal system.⁵⁴ The original capacity of this system to overcome or resolve conflicts (see, e.g., the Åland Islands question, Vilna, Memel), drastically deteriorated in the early 1930s: thus, there was almost no reaction to Japan's claim of a right to proceed to war in relation to Manchuria⁵⁵ and a resolution of the Council of the LoN concerning a ceasefire failed given Japan's negative vote (the LoN finally created – however, without further consequences – a commission of inquiry⁵⁶). The sanctions against Italy in relation to the attack on Abyssinia, which had originally been supported by 50 members, produced a very limited effect. The renewed attack by Japan on China was followed only by rather muted reactions from the LoN, which were related only to the bombardment of undefended cities. The first withdrawals from the LoN occurred already in 1927 (Costa Rica) and 1928 (Brazil), followed by Japan (1933) and Germany (1935).

Austria occupied a special position within the LoN because it had already become the subject of debates in the LoN on several occasions before 1938, and because the leading members of the LoN had already dealt with the economic and political difficulties posed by interwar Austria. For example, the LoN marked a significant success through the provision of a LoN bond for the benefit of Austria. With its assistance and the associated reforms, it was possible to restore the Austrian economy, which Balfour had depicted in dire colors on 30 September 1922 in the

⁵³ See Yannick Wehrli, 'New Histories of Latin America at the League of Nations', in Alan McPherson and Yannick Wehrli (eds.), *Beyond Geopolitics: New Histories of Latin America at the League of Nations* (Albuquerque, NM: University of New Mexico Press, 2015) p. 2 ("Very soon after its founding, the Latin American states expressed their interest in the organization. It allowed them to strengthen their position on the international stage, particularly in relation to the United States. At the end of 1920, seventeen of the twenty Latin American republics were members of the organization, and all joined at some point in the League's life (1920– 1946). Latin America accounted for a quantitatively significant part of the League— in its early years, more than one-third of its member states. Although this proportion decreased as other European and Asian countries became members and some Latin Americans withdrew, it never fell below 20 percent. Of course, this presence did not reflect Latin America's real political power, but neither was it neglected during votes and elections in an organization in which each member state had one vote. France, for instance, quickly realized all the advantages it could obtain by ensuring Latin American votes. Relationships between Latin America and the League were characterized by a series of ups and downs.").

⁵⁴ *Ibid.*, p. 3 ("Despite the significant Latin American presence, the League focused all its attention on European affairs, especially because the Treaty of Versailles had given it several missions related to the restoration of peace in Europe.").

⁵⁵ See Ruth B. Henig (ed.), *The League of Nations* (New York: Barnes & Noble, 1973) p. 91.

⁵⁶ *Ibid.*, 106.

Assembly of the LoN.⁵⁷ A prerequisite and at the same time a result of these measures was the Geneva Protocol of 1922⁵⁸, which – like the Protocol of Lausanne of 1932⁵⁹ – extended the prohibition of an *Anschluss* of Austria with other states to form economic unions. This formulation finally formed the basis of an Advisory Opinion of the PCIJ initiated by the LoN in which the Court declared the Schober-Curtius-Plan of a customs union (or régime) between Austria and Germany to be incompatible with the Geneva Protocol of 1922.⁶⁰

To some extent, Mexico also represented a special case for the LoN: It was explicitly invited to become a member of the LoN in 1931, whereas it was simultaneously stressed that this invitation was an exception and should not constitute a precedent.⁶¹ It was thus a member of that organization for only seven years, a period during which it used its note to position itself directly in the group of those countries which were opposed to a policy of appeasement within the LoN.

The possibilities of the LoN and its members to react to the occupation of Austria in the light of this protest note using the system of the LoN should be investigated in particular by reference to Articles 10, 11, and 17 of the Covenant of the LoN.

i. Article 10 of the Covenant of the LoN

Already at the outset, Mexico's protest note expressed regret that the LoN had failed to indicate any means pursuant to Article 10 of the Covenant of the LoN, thereby

⁵⁷ *Ibid.*, p. 154. In this connection, Balfour referred to the relation between credit and reform.

⁵⁸ See Protocol No I (Declaration) concerning the Restoration of Austria (signed 4 October 1922, entered into force 4 October 1922) 12 LNTS 385; see also League of Nations, 'The Financial Reconstruction of Austria: General Survey and Principal Documents' (Geneva 1926) Doc. C.568.M.232.1926.II. See 'The Austrian Loan' (1932) 9 Bulletin of International News 11, pp. 11-14. See also Barbara Susan Warnock, *The First Bailout - The Financial Reconstruction of Austria 1922 - 1926* (Ph.D. Dissertation, University of London, 2015).

⁵⁹ Austrian Federal Law Gazette (BGBI.) No. 12/1933 (the 'Austrian Protocol' of 1932 was signed in Geneva).

⁶⁰ On 19 May 1931, the Council asked the Permanent Court of International Justice to deliver an advisory opinion on the question whether the customs union between Austria and Germany as foreseen in a Protocol of 19 March 1931 would contradict Article 88 of the Treaty of St. Germain and the Geneva Protocol of 1922. In its opinion of 5 September 1931, adopted by majority, the Court opined that this customs union would constitute a breach of those instruments. The opinion was introduced by the sentence: "Austria, owing to her geographical position in central Europe and by reason of the profound political changes resulting from the late war, is a sensitive point in the European system." *Customs Regime between Germany and Austria* (Advisory Opinion) PCIJ Series A/B No 41, p. 9.

⁶¹ Oppenheim (n 42), p. 345. When Mexico accepted the invitation to join the LoN it attached a particular interpretation of Article 21 of the Covenant to this acceptance; *ibid.*, p. 371 (notes).

suggesting that it deemed such measures to be justified and necessary. Article 10 of the Covenant of the LoN⁶² represented the actual, but very ambiguously worded,⁶³ kernel of the idea of collective security⁶⁴: In it, the League's members committed themselves "to respect and preserve as against external aggression the territorial integrity and existing political independence of all Members of the League". The Article further provided that "[i]n case of any such aggression or in case of any threat or danger of such aggression the Council shall advise upon the means by which this obligation shall be fulfilled."⁶⁵ Pursuant to the actual meaning of this provision, which relates to the guarantee of the territorial integrity and political independence of member states, the individual members of the League had the obligation to provide such a guarantee, and not merely in the sense of a collective guarantee, but an individual mutual guarantee against every violent alteration (i.e. not caused through civil war)⁶⁶ deriving from outside. Thus, this guarantee became relevant not only in the case of wars of aggression, but in the case of any violent change (using external force) of the territorial scope or political status of a state.⁶⁷ Pursuant to the interpretation of this provision that was already dominant at the time⁶⁸, Article 10 was not connected to the sanctions system of the LoN.⁶⁹ Therefore, the Council of the LoN was unable to order any measures itself, but was only in a position to "advise" in this regard. Mexico, which was then not a member of the Council, evidently aimed at provoking a reaction of the Council members⁷⁰ on the basis of this Article. By referring to Article 10, it recalled the obligation of member states for providing an individual guarantee. Mexico also underlined this by including a reference to the obligation to call on the Council in the case of an alteration to Austrian independence

⁶² See also on this provision Yoram Dinstein, *War, Aggression and Self-Defence*, 4th edn. (Cambridge: CUP, 2005) p. 80.

⁶³ As to the vague wording see Ian Brownlie, *International Law and the Use of Force by States* (Oxford: Clarendon Press, 1963) p. 64 (noting that while "[t]he powers of the Council under the article were vague, the principle it stated was not, at least when its text was considered in isolation.").

⁶⁴ This qualification goes back to Wilson, Oppenheim (n 42), p. 362. This qualification was, however, criticized by some, as recounted by Henig (n 55), p. 10.

⁶⁵ The view of the Congress of the United States that this provision too extensively impaired its competences constituted one of the reasons why the United States did not join the LoN; see Henig (n 55), p. 38.

⁶⁶ Oppenheim (n 42), p. 362.

⁶⁷ *Ibid.*, p. 363.

⁶⁸ The doctrine at that time has always been cognizant of the problem of the connection of Article 10 with the system of sanctions of the LoN, Brownlie (n 63), p. 55.

⁶⁹ *Ibid.*, p. 64.

⁷⁰ At the beginning of 1938, the following States constituted the Council: Belgium, Bolivia, United Kingdom, China, Ecuador, France, Iran, Italy, Latvia, New Zealand, Poland, Romania, Sweden, USSR.

pursuant to Article 88 of the State Treaty of St. Germain⁷¹ and Article 80 of the Peace Treaty of Versailles.⁷²

Merely on the basis of the wording and the original aims, and on the basis of Mexico's evaluation of the factual circumstances of the events in March 1938, this provision would have sufficed to trigger the mechanism of this guarantee. However, this obligation had already been weakened through the practice of the member states.⁷³ Thus, Canada had already wanted to eliminate this provision in 1920.⁷⁴ In 1924, a draft resolution – which eventually failed to be adopted – had foreseen that every state should by itself evaluate to what extent it was bound to the obligation of Article 10;⁷⁵ Great Britain in fact proceeded to adopt this interpretation for itself. Even those states that were victims of such violent actions rarely invoked this provision,⁷⁶ just as the other LoN members failed to take effective measures on the basis of the provision.⁷⁷ Therefore, at that time in the case of Austria, there was hardly any prospect for the LoN as well as the individual members to become active in an effective way on the basis of Article 10, even by reference to the competence of the LoN Council deriving from the two Peace Agreements.

ii. Article 11 of the LoN Covenant

However, the obvious question is whether the LoN was entitled to take any measures on the basis of another provision. Article 11 states that

[a]ny war or threat of war, whether immediately affecting any of the Members of the League or not, is hereby declared a matter of concern to the whole League, and the League shall take any action that may be deemed wise and effectual to safeguard the peace of nations. In case any such emergency should arise the Secretary General shall on the request of any Member of the League forthwith summon a meeting of the Council.

However, the practical relevance or applicability of this provision for the present case was limited primarily in two respects. On the one hand, the competences of the LoN Council to adopt its own measures were very limited; in those cases where the

⁷¹ See *supra* (n 28).

⁷² See *supra* (n 27).

⁷³ As to the various efforts to strengthen this system see Henig (n 55), pp. 47-58.

⁷⁴ Oppenheim (n 42), p. 362.

⁷⁵ As to the attempts to weaken the obligations resulting from this provision see William E. Rappard, 'Vues rétrospectives sur la Société des Nations' (1947) 71(II) Recueil des Cours 111, pp. 211 *seq.*

⁷⁶ Oppenheim (n 42), p. 362.

⁷⁷ Adriaan H. Philipse, *Le Rôle du Conseil de la Société des Nations dans le règlement pacifique des différends internationaux* (The Hague: Martinus Nijhoff, 1929) p. 59; Brownlie (n 63), p. 64.

Council had been called to discuss issues by reference to Article 11 (for example, on issues such as the Åland question, Poland-Lithuania, Upper Silesia, the Romanian expropriations, Javorzina, or the Greek-Turkish boundary),⁷⁸ the relevant question was only whether to institute fact-finding commissions, a commission of inquiry or to take similarly limited measures.⁷⁹ Even if doctrine to some extent suggested that broad competences should be accorded to the Council on the basis of this Article,⁸⁰ and to the extent that this provision was in 1927 still seen as a sufficient legal basis for coercive measures, it no longer served this purpose during the Manchuria incident in 1931.⁸¹

In addition, the non-membership of the German Empire in the LoN hindered the application of this provision. It is true that the Council could nonetheless have dealt with the present situation given the broad wording of Article 17. Thus, in 1931 the USA were in fact invited as a non-member to participate in the discussion of the Manchuria conflict.⁸² However, in the case of an attempt to impose sanctions against a non-member, the obstacles that hampered an application of Article 17 would have become pertinent.⁸³ Moreover, if the involved states did not find that a situation falling under Article 11 existed, the Council would have hesitated to deal with a matter under Article 17 unless it had been called on to do so by one of the members affected by the respective matter.⁸⁴

It may thus be concluded that the practice of the LoN and within the LoN does not do justice to the broad and far-reaching formulation of Article 11. An invocation of Article 11 would hardly have had any effect at this time given the restrictive practice already in existence.

iii. Article 17 of the LoN Covenant

Based on the idea of general responsibility for international peace, Article 17 of the LoN Covenant contained a provision which was targeted at third states and could

⁷⁸ Philipse (n 77), pp. 58-59. See also Oppenheim (n 42), p. 65. The invocation of this provision by China resulted only in the non-recognition of changes produced by breaches of this provision.

⁷⁹ See generally Philipse (n 77). See also, for example, Arthur K. Kuhn, 'The Lytton Report on the Manchurian Crisis' (1933) 27 American Journal of International Law 96, pp. 96-100.

⁸⁰ See Philipse (n 77), pp. 113-124.

⁸¹ See the extensive discussion in Lassa Oppenheim (Hersch Lauterpacht (ed.)), *International Law: A Treatise*, 5th edn. (London: Longmans, Green, 1935) vol. II, pp. 86-87 (fn. 2).

⁸² As to the statement of the United States in the Council see Henig (n 55), pp. 99-100. The Government of the US declined to take part in the "formulation of any action envisaged under that instrument".

⁸³ Oppenheim (5th edn.) (n 81), p. 98-99.

⁸⁴ Philipse (n 77), p. 66.

have become relevant in relation to the German Reich as a non-member of the LoN. This provision made the sanctions system of Article 16 applicable also to a third state, but also offered this state the protection of Articles 12-16.⁸⁵ However, it required – other than the presence of a state of war – the initiative of a member state (Mexico would have had to refer to it explicitly) and the approval of the third state.⁸⁶ In the opinion of contemporary doctrine, third states had no obligation to heed an invitation to submit themselves to Article 17. This was because the right to intervention with respect to third states of paras. 2 and 3 of this Article, which was claimed by the LoN with respect to third states, was deemed to be incompatible with general international law. In the Finnish Karelian case the Soviet Union (not yet a member of the LoN) was invited to accept the obligations under Article 17, but the Soviet rejection was followed by no further sanction; even the PCIJ failed to accede to the Council's request for an Advisory Opinion in the absence of an acceptance from the Soviet Union. The effects of Article 17 on non-members could thus be evaluated as merely political obligations.⁸⁷

Particularly this development shows that the application of this provision by the LoN did not do justice to either the wording or the intention of the original authors of the Covenant of the LoN and that the LoN adopted a very restrictive interpretation. This is confirmed by a report sent to the British Foreign Office by the British Delegation in the face of the threat against Czechoslovakia in September 1938: According to the view of the president of the Assembly, de Valera, and the Secretary-General of the LoN, Avenol, it was strongly to be doubted whether such a decision (pursuant to Article 17) from the Council concerning an aggression was achievable. The smaller neighboring states of Germany which belonged to the Council would have been very hesitant to take a decision which would have exposed them to German hostility.

Viewed overall, the case of Article 17 also confirms that in light of the contemporary practice it was hardly likely for reactions both in the LoN and from the LoN to the occupation of Austria in March 1938 to occur, even if the wording of the LoN Covenant allowed for more action than in fact materialized.

⁸⁵ Philipse (n 77), pp. 204-205.

⁸⁶ See, for example, Yoram Dinstein, *War, Aggression and Self-Defence*, 4th edn. (Cambridge: CUP, 2005) p. 82 (noting that “[i]t goes without saying that non-Members had an option to accede to such an invitation or to decline it.”).

⁸⁷ Non-members of the LoN were not entitled to invoke Article 17 as was the case with Hungary, a non-member State, concerning the return of the emperor Karl I. to Hungary in 1921; Philipse (n 77), p. 201.

b. The general international legal framework/context

If the protest note is now taken outside of its limited LoN context, further questions arise as to the effect of the protest, the function of the note in the Austrian-German context, as well as its Latin-American dimension.

i. The Mexican Note as a Protest

The Mexican note was clearly meant to be understood as an expression of protest, something that is clearly apparent from its wording: Mexico “enters the most emphatic protest against the external aggression of which the Austrian Republic has just been the victim.”

A protest constitutes an independent one-sided legal act or transaction, that is, its legal effect does not depend on its acceptance, although it does depend on its receipt. With a protest, a state contests the lawfulness of a factual situation.⁸⁸ In order for a protest to become fully realized, it must be effective, immediate, unequivocal, raised expressly,⁸⁹ and must actually indicate a specific intention that allows the other states to form unambiguous expectations with respect to the position of the protesting state (this definition draws on the idea of a “reduction of complexity”⁹⁰). According to Günter (translation):

The protest, to be successful, must become lastingly engraved in its recipient, should destroy that tendency which all too readily reads approval into silence, and should thereby be capable of binding the silent one to its interpretation.⁹¹

The protest can thus not consist in a single or one-off action (even if this may depend on the circumstances), but requires a consistent continuation of the policy that is expressed by it.⁹² To be sure, in the case of Mexico doubts as to the continuity of its

⁸⁸ See generally Lassa Oppenheim (Hersch Lauterpacht (ed.)), *International Law: A Treatise*, 8th edn. (London: Longmans, Green, 1952), vol. I, pp. 873-874; see also Christophe Eick, ‘Protest’, in Rüdiger Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law* (Oxford: Oxford University Press, 2012), pp. 556-559. See also generally Eric Suy, *Les actes juridiques unilatéraux en droit international public* (Paris: Librairie Générale de Droit et de Jurisprudence 1962) pp. 47-80.

⁸⁹ Herbert Günter, *Zur Entstehung von Völkergewohnheitsrecht* (Berlin: Duncker & Humblot, 1970) p. 129.

⁹⁰ In the sense of Niklas Luhmann, *Vertrauen: Ein Mechanismus der Reduktion sozialer Komplexität* (Stuttgart: Enke, 1968), pp. 23 et seq.

⁹¹ Günter (n 89), p. 132.

⁹² Discussing various criteria for a valid “objection” to the formation of a CIL rule by a “persistent objector”, including “consistency”, see James A. Green, *The Persistent Objector Rule in International Law* (Oxford: OUP, 2016) pp. 59-188. See also specifically with respect to diplomatic protests more

position could have been raised because its statements in the LoN to the Report of the Secretary-General in September 1938 – contrary to for example those of China or Spain – did not contain any further reference to the events in Austria or its own protest note.⁹³ However, Mexico did take specific subsequent acts which suggest a continuous and protest-conforming position. For example, Mexico continued to recognize Austrian nationality,⁹⁴ and closed its honorary consulate in Vienna because the request for exequatur would have implied a recognition of the annexation⁹⁵.

However, the protest suffered from the defect that it was not directed at the actual addressee, as it should have been for the purpose of making the protest fully effective⁹⁶. The German Reich was then no longer a member of the LoN, so that it could have seen the protest as a *res inter alios acta*.⁹⁷ These were circumstance that set limits to the full effectiveness of the protest note as a unilateral international legal act.

Moreover, the question of Mexico's right to issue a protest should be raised, irrespective of the right of any member of the LoN to bring such a situation to the attention of the Assembly of the Council under Article 11 (2) of the Covenant. The protest as an international legal act primarily serves to protect a state's own right. To the extent that this was foreseeable, the rights of Mexico or its citizens seem hardly to have been affected by the events in question. However, in the absence of an effect on Mexico itself the legitimization for issuing a protest can only be derived from the idea that a violation of the peace affects the rights of every single state, a theory derived from the idea of the indivisibility of peace,⁹⁸ coming close to a solidaristic approach

generally Lassa Oppenheim (Hersch Lauterpacht (ed.)), *International Law: A Treatise*, 8th edn. (London: Longmans, Green, 1952), vol. I, p. 874.

⁹³ League of Nations, 'Item 31: Report on the Work of the League of Nations in 1937/38', Continuation of the Discussion, Eight Plenary Meeting, Wednesday, September 21st, 1938, at 3.30 p.m., League of Nations Official Journal, Records of the 19th Ordinary Session of the Assembly, Special Supplement No. 183, pp. 80-82.

⁹⁴ Kloyber (n 26), p. 10.

⁹⁵ See the Memorandum issued by Mexico, reproduced by Kloyber, *ibid.*, p. 9. See also, for example, Daniela Gleizer, *Unwelcome Exiles: Mexico and the Jewish Refugees from Nazism, 1933-1945* (Leiden: Brill, 2013) p. 106 (at footnote 73).

⁹⁶ Eick (n 88).

⁹⁷ A conversation between the Mexican Foreign Minister Eduardo Hay and the German ambassador in Mexico concerned this demarche in the LoN. It suggests that the German Reich regarded itself as addressed by this note since it considered to take measures against Mexico, which, however, it did not carry out. For a German translation of the conversation report, see Dokumentationsarchiv des österreichischen Widerstandes (ed.), *Österreicher im Exil: Mexiko 1938-1947* (Vienna: Deuticke, 2002), pp. 68-71.

⁹⁸ Compare the explanations of Wellington Koo in the Assembly, *supra* (n 15).

in international law. The note therefore affirmed a development in international relations which went beyond the existing relativity of international rights and obligations in the case of *erga omnes* obligations and entitles all other States to invoke such a violation.⁹⁹ In the meantime, this has been corroborated in the works of the ILC¹⁰⁰ and in judgements of the International Court of Justice.¹⁰¹ At the same time, through its protest note Mexico preserved its right to evaluate the existing factual situation as illegal and its ability to invoke the international responsibility of the German Reich for the occupation under international law.

ii. The Allegation of a Violation of International Law towards the German Reich

The right of Mexico to raise allegations against the German Reich for having committed breaches of international law was limited in light of the relativity of

⁹⁹ See, for example, Maurizio Ragazzi, *The Concept of International Obligations Erga Omnes* (Oxford: OUP, 2000); Institut de Droit International, ‘Resolution on Obligations erga omnes in International Law’ (2005) 71(2) AnnIDI 286, pp. 286-289.

¹⁰⁰ See Article 48 of the Responsibility of States for Internationally Wrongful Acts (“Invocation of responsibility by a State other than an injured State”), which reads as follows:

“1. Any State other than an injured State is entitled to invoke the responsibility of another State in accordance with paragraph 2 if:

(a) the obligation breached is owed to a group of States including that State, and is established for the protection of a collective interest of the group; or
(b) the obligation breached is owed to the international community as a whole.

2. Any State entitled to invoke responsibility under paragraph 1 may claim from the responsible State:

(a) cessation of the internationally wrongful act, and assurances and guarantees of non-repetition in accordance with article 30; and
(b) performance of the obligation of reparation in accordance with the preceding articles, in the interest of the injured State or of the beneficiaries of the obligation breached.

3. The requirements for the invocation of responsibility by an injured State under articles 43, 44 and 45 apply to an invocation of responsibility by a State entitled to do so under paragraph 1.”

See further International Law Commission, “Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries” (2001) GAOR 56th Session Supp 10, pp. 126-128; the General Assembly took note of these articles in Resolution A/RES/56/83. See in particular James Crawford, ‘Responsibility for Breaches of Communitarian Norms: an Appraisal of Article 48 of the ILC Articles on Responsibility of States for Internationally Wrongful Acts’, in Ulrich Fastenrath *et al.* (eds.), *From Bilateralism to Community Interest: Essays in Honour of Bruno Simma* (Oxford: OUP, 2011) pp. 224-240.

¹⁰¹ As to cases, see in particular *Questions Relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)* [2012] ICJ Rep 422, at p. 449: (noting that “[t]hese obligations may be defined as ‘obligations erga omnes partes’ in the sense that each State party has an interest in compliance with them in any given case.”). See also *Barcelona Traction, Light and Power Co Ltd (Belgium v. Spain) (Second Phase)* [1970] ICJ Rep 3, at p. 32; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) [2004] ICJ Rep 136, at p. 199.

international law. In light of the treaties violated by the occupation,¹⁰² Mexico and Germany were not mutually bound to either the State Treaty of St. Germain, the Peace Treaty of Versailles,¹⁰³ or the Austrian-German Agreement of 11 July 1936,¹⁰⁴ nor the Geneva¹⁰⁵ or Lausanne Protocols.¹⁰⁶ In the absence of Germany's membership in the LoN, Mexico was also unable to hold Germany responsible for a violation of the LoN Covenant. Mexico could merely accuse the German Reich – and even here only while drawing on the solidaristic idea and the indivisible nature of peace¹⁰⁷ – of a violation of general international law, and in particular of the Briand-Kellogg Pact of 1928.¹⁰⁸ However, this would have assumed that the occupation of Austria, which the Mexican protest note had described as an “armed foreign intervention”, a “coup de force”, and an “external aggression”, could be subsumed under the notion of war utilized in this Pact.

The notion of war was still defined very narrowly in the year 1928 and was formalized through the requirement of a declaration of war. However, efforts in doctrine already existed which sought to enlarge the definition, such as for example through the interpretation of Article II of the Briand-Kellog Pact of 1928, which forbade the settlement of disputes with non-peaceful means. From this it was possible to derive a prohibition of all non-peaceful means.¹⁰⁹ Even within the LoN, trends towards an expansion of the definition were visible in practice. Already in 1932, the Assembly adopted a resolution in the context of the Chinese-Japanese conflict pursuant to which it was “contrary to the spirit of the Covenant that the settlement of the Sino-Japanese dispute should be sought under the stress of military pressure on the part of either party”.¹¹⁰ However, this trend consolidated itself only in the late 1930s. On the occasion of the occupation of Austria, only the Soviet Union recalled the

¹⁰² Compare the statement of the Chairman of the Foreign Relations Committee of the Austrian National Assembly, Eduard Ludwig, on the international status of Austria 1938 – 1945. He listed seven treaties breached by this occupation, Verosta (n 2), p. 119.

¹⁰³ Article 80 of this treaty obliges Germany to respect Austria's independence, reading as follows: “Germany acknowledges and will respect strictly the independence of Austria, within the frontiers which may be fixed in a Treaty between that State and the Principal Allied and Associated Powers; she agrees that this independence shall be inalienable, except with the consent of the Council of the League of Nations.” See *supra* (n 27).

¹⁰⁴ Reproduced in Verosta (n 2), p. 147.

¹⁰⁵ See *supra* (n 58).

¹⁰⁶ See *supra* (n 59).

¹⁰⁷ Yoram Dinstein, *War, Aggression and Self-Defence*, 4th edn. (Cambridge: CUP, 2005) p. 82.

¹⁰⁸ General Treaty for Renunciation of War as an Instrument of National Policy (signed 27 August 1928, entered into force 25 July 1929) 94 LNTS 57 (Kellogg-Briand Pact).

¹⁰⁹ Brownlie (n 63), p. 86, Oppenheim (n 81), p. 155.

¹¹⁰ See Briggs (n 49), p. 964.

obligations under the Pact of 1928 and referred to an aggression,¹¹¹ whereas at the time of the threat to Czechoslovakia in May and September 1938 the USA, France, and Great Britain also did so.¹¹² Eventually, the majority of the state community present in the Assembly of the LoN declared as follows on the occasion of the Finnish-Soviet conflict, even though neither a declaration of war was present nor an *animus belligerendi* was claimed:

It is impossible to argue that the operations of the Soviet forces in Finland do not constitute resort to war within the meaning of the Pact of Paris or Article 12 of the Covenant of the League of Nations.¹¹³

Mexico (as well as the other states which had taken a position towards the occupation of Austria) contributed through its qualification of the events in March to this extension of the term's meaning – however, in the absence of support from the remaining members of the LoN, this development failed to succeed at the time.

Indirectly, the Mexican protest note also invoked the principle of the non-recognition of any territory, treaty, or agreement which was incompatible with the Briand-Kellog Pact and the LoN Covenant, an idea that had developed on the basis of the 1931 Stimson Doctrine. This principle had found entrance into a resolution of the Council of the LoN and was confirmed in 1932 by the LoN Assembly¹¹⁴ as well as by 19 American states in the Chaco Declaration.¹¹⁵ With its later refusal to obtain the German exequatur for its honorary consulate in Vienna, Mexico thus confirmed a principle that it had already suggested in its protest note and that was confirmed by the ILC in the articles on State responsibility.¹¹⁶

¹¹¹ Statement delivered on 21 September 1938, see *supra* (n 8). Brownlie (n 63), p. 78.

¹¹² *Ibid.*, p. 79. According to Brownlie, the statements regarding Austria, Czechoslovakia and Poland in 1938 and 1939 already indicated that the Briand-Kellog Pact of 1928 was applicable also to “peaceful invasions” (p. 88). However, this view of a broadening of the definition of war is disputed by Neuhold (n 49), p. 70.

¹¹³ See Briggs (n 49), p. 964. This broadening was also reflected in national judgments such as in that of the British Court of Appeal 1939 in the case *Kawasaki Kisen Kabushiki Kaisha of Kobe v. Bantham Steamship Co., Ltd.* (see *ibid.*, pp. 965 - 966).

¹¹⁴ Oppenheim (n 42), p. 138.

¹¹⁵ Brownlie (n 63), p. 92. See also Article II of the Saavedra-Lamas-Treaty of 1933 and Article 11 of the American Convention on the Rights and Duties of States, *ibid.*, pp. 95 -97. The Chaco Declaration is quoted, for example, in Sharon Korman, *The Right of Conquest: The Acquisition of Territory by Force in International Law and Practice* (Oxford: Clarendon, 1996) p. 240.

¹¹⁶ See articles 40 and 41 of the Articles on the Responsibility of States for Internationally Wrongful Acts, *supra* (n 100), pp. 112-114. According to article 41 (2), “No State shall recognize as lawful a situation created by a serious breach within the meaning of article 40, nor render aid or assistance in

iii. *The Allegation of a Breach of International Law against Austria*

In the Mexican note, Austria was also alleged to have breached its contractual obligations, namely of Article 88 of the State Treaty of St. Germain and of the Geneva Protocol of 1922. However, this allegation of a legal breach found its limit through the added claim that the will of the Austrian government had been “coacta”. Austria could thus not be accused of having accepted a conduct by Germany that was contrary to its existing treaties because its acceptance had been procured by means of force. This argument was subsequently confirmed in the ILC’s work on the Articles on State Responsibility, in the context of the ILC’s elaboration of circumstances precluding wrongfulness. When dealing with the circumstances precluding wrongfulness, the ILC, in reference to the Nuremberg War Crimes Trials judgments, did not assume that any valid consent had been given by Austria during the Anschluss¹¹⁷ so that Austria could have been seen as being exposed to a situation of force majeure¹¹⁸ as such a circumstance.

6. Conclusion

Mexico’s protest note is thus characterized by its multifaceted nature. It was used by Mexico in order to resuscitate the purposes of the LoN which were based on the idea of a solidarity of the community of states in the preservation of peace. The majority of states, however, did not follow these ideas and expectations, even though the LoN

maintaining that situation.” Article 40 defines such delicts as instances of “a serious breach by a State of an obligation arising under a peremptory norm of general international law”.

¹¹⁷ The ILC pointed out that “the issue of Austrian consent to the Anschluss of 1938 [was] dealt with by the Nuremberg Tribunal. The tribunal denied that Austrian consent had been given; even if it had, it would have been coerced and did not excuse the annexation.” See *supra* (n 100), p. 73 (at footnote 321).

¹¹⁸ *Ibid.*, Article 23 (*Force majeure*) reads as follows:

“1. The wrongfulness of an act of a State not in conformity with an international obligation of that State is precluded if the act is due to *force majeure*, that is the occurrence of an irresistible force or of an unforeseen event, beyond the control of the State, making it materially impossible in the circumstances to perform the obligation.

2. Paragraph 1 does not apply if

(a) the situation of *force majeure* is due, either alone or in combination with other factors, to the conduct of the State invoking it; or

(b) the State has assumed the risk of that situation occurring.”

The commentary clarifies: “Certain situations of duress or coercion involving force imposed on the State may also amount to *force majeure* if they meet the various requirements of article 23. In particular, the situation must be irresistible, so that the State concerned has no real possibility of escaping its effects.” See *supra* (n 100), p. 76.

arguably could have offered a set of instruments suitable for this purpose. Nonetheless, this observation is met by the criticism that the LoN was not doomed to failure on the basis of the mechanisms it had at its disposal, but rather due to the absence of a willingness on the part of its membership to make use of them. In the speech at the final session of the League Assembly (9 April 1946), Lord Cecil quite rightly stated:

Why, then, did it fail? ... Its failure was nor due to any weakness in the terms of the Covenant. To my mind it is plain beyond the possibility of doubt that it failed solely because the Member States did not genuinely accept the obligation to use and support its provisions.¹¹⁹

However, both with respect to its Austria-related and Latin America-related aspects, the Mexican note should be viewed as part of a process which led to a sentiment or norm providing for common responsibility on the part of the state community, at least with respect to those international delicts which are today understood as constituting *ius cogens*. The further historical steps of this process were the Moscow Declaration of 1943¹²⁰ and the International Military Tribunal of Nuremberg. At the same time, this protest note, which was significant for Austria, constituted a step in the development from a narrow notion of war to a broader concept of the use of force, which found undisputed entrance into international law following World War II. Accordingly, this Mexican note constituted a major step in the development of international law on its way to the United Nations system.

¹¹⁹ Reproduced in Henig (n 55), p. 166.

¹²⁰ 'Great Britain-Soviet Union-United States: Tripartite Conference in Moscow' (1944) 38 American Journal of International Law 3, p. 7.