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One State's Rebel Is Another State's Agent

Alan Tzvika Nissel*

Review of Kathryn Greenman. ***State Responsibility and Rebels: The History and Legacy of Protecting Investment Against Revolution***. Cambridge: Cambridge University Press, 2021. Pp. 230. US$110. ISBN 978-1-316-51729-1.

Abstract

In State Responsibility and Rebels, *Kathryn Greenman explores the post-colonial history of state responsibility, the doctrine of international law that determines whether a state has breached its obligations and what, if anything, can be done about it. Today, the doctrine is one of the most frequently referenced ones of international law. Greenman shows that international arbitrators have applied the rules of state responsibility in order to support a global economic order that sustains Western investments and trade. Greenman also highlights the bilateral or transactional nature of the doctrine. The early practice of state responsibility has been a story of political concessions. Western states would often withhold their recognition of governments until the latter agreed to arbitrate international claims such as injuries to aliens during the rebellions. The resulting awards were often inchoate analyses of international law, in which arbitrators would attribute liability to states for conduct that was often out of their control. These findings are as interesting as they are relevant to today's international practice. Indeed, says Greenman, imposing state responsibility for conduct that is outside of a state's control is effectively sustaining the legacy of international law's colonial past.*

1 Overview of Book

In her monograph *State Responsibility and Rebels*, Kathryn Greenman reveals a little-known history of international law: its origins in post-colonial revolutions. She

* Chief Executive Officer, Wilshire Skyline, USA; Assistant Professor of Law and Practice, Pepperdine Caruso School of Law, USA. Email: alan.nissel@pepperdine.edu. Disclosure: the analysis below heavily relies upon a forthcoming publication of the reviewer, *Merchants of Legalism: State Responsibility for Violations of International Law, Part I: (1870–1960)* (forthcoming).

also exposes how this history remains a legacy of state responsibility – the modern legal framework that determines whether a state has breached its international obligations and what, if anything, can be done about it. In a world that lacks a functional international government or police service, the doctrine of state responsibility allows for the enforcement of international law by states and, in so doing, underpins an enduring hope of ordering the world through law. But, as the 'turn to history' in academic international law has proven, even such constitutional norms as state responsibility can become signposts of subjugation rather than vehicles of liberation. Today, both aspects of state responsibility remain in play. The doctrine remains one of the most frequently referenced ones of international law – for better and for worse.

On one level, *State Responsibility and Rebels* is a post-colonial critique seeking to uncover the dark origins of international law. At the same time, the book is Greenman's attempt to right the ship of our world order by highlighting the practical outcomes that the current framework of state responsibility continues to prefer – such as justifying international legal interventions into domestic legal systems. Greenman, who is a senior lecturer in international law at the University of Technology Sydney, is also an 'insider' who believes in the potential of international law; the final chapter on the legacy of this post-colonial history lays out the author's thoughts on how to foster a better framework of state responsibility. Beyond its historical perspective, Greenman also uncovers the unspoken consequences of state responsibility for rebels, including the subtle internationalization of investment claims; the establishment of a global regime of property protection; reallocation of foreign investment risk; and the marginalization of the United Nations (UN) doctrine on state responsibility – more on all of these themes below.

Greenman identifies a sensitive pressure point of state responsibility as her focus. The thread that runs through the book is her response to the following question: why does international law assure private investments in states experiencing domestic rebellions? This is a critical question of international law. If the thrust of the case law upon which the law of state responsibility is based has emanated from this context, then the nature of state responsibility is subversive. Moreover, as Greenman's history shows, international arbitrators have consistently applied the rules of state responsibility in order to support a global economic order that supports Western investment and trade. This may surprise some of her readers since such an outcome is very different from the domestic legal context, where rules of imputation, liability and remedies are not as singular in purpose (for example, supporting a liberal economic order). In domestic law, regimes of responsibility are relatively more contextual and are developed for particular areas of law – for example, tort obligations are legislated together with other tort liabilities, criminal prohibitions with penalties and so on.[1]

[1] On the jurisprudence of jural relations in the domestic context, see generally Hohfeld, 'Some Fundamental Legal Conceptions as Applied in Judicial Reasoning', 23 *Yale Law Journal* (1913) 16. Famously, the Yale Law School professor argued that law can be analysed in terms of eight fundamental legal concepts.

2 State Responsibility as Philosophy

As a result, the book has tremendous import for the philosophy of international law. It touches on one of the most critical jurisprudential issues in international law: on what basis are states responsible for the wrongdoings of individuals? Recall that, because all states are juridical entities, their actions are conducted by individuals. The principles for attributing blame to states for the actions of individuals are central to the state responsibility project – hence, the importance of Greenman's book on state responsibility for rebels. Historically, rebels are a great case study since they are individuals who are obviously not acting with governmental authority. In such cases, the legal question arises: why then should rebel conduct be imputed to the states that they seek to overtake? In general jurisprudence, philosophers often limit the scope of one's moral responsibility to one's capacity to conduct oneself morally. Accordingly, to the extent that people's mental disabilities render them incapable of making or acting on moral judgement, we identified them as possessing proportionately less moral responsibility for their actions. This makes intuitive sense. Credit and blame ought to be measured in accordance with one's authority and capacity to act in a prescribed manner. As *State Responsibility and Rebels* demonstrates, the contrast to international law could not be clearer.

Much of international law scholarship – even historical and jurisprudential scholarship – has not much bothered with this question.[2] The UN's codification of state responsibility in 2001 takes a functional approach to state responsibility and, in so doing, avoids discussion of the jurisprudential problem of agency.[3] International legal scholarship has tended to focus on the nature of international obligations (such as the positivist critique) or the authority to enforce a state's rights (especially compliance issues). But what about our existing regulatory structure of international law enforcement? As Greenman demonstrates, the practice of state responsibility has been more a story of political concessions than moral conclusions. Historically, Western states would withhold their recognition of governments until the latter accepted responsibility for injuries caused to foreigners during the rebellions that brought about a new government (at 17). The recognition of statehood was tied not to capacity but, rather, to a state's willingness to accept liability for injuries committed to aliens. Moreover, the most frequent type of 'wrong' for which new states were held responsible was the acts of rebels – namely, acts that were outside of their control to prevent. This is exactly the

[2] A couple of recent examples, however, include Murphy, 'International Responsibility', in S. Besson and J. Tasioulas (eds), *The Philosophy of International Law* (2010) 299; S. Fleming, *Leviathan on a Leash: A Theory of State Responsibility* (2020). Fleming has described state responsibility as 'the most illiberal feature of the liberal international order'. See Overgaard Wessels, 'Interview with Dr Sean Fleming: Why the Leviathan Needs a Leash', *Cambridge Journal of Political Affairs*, 13 May 2021, available at www.cambridgepoliticalaffairs.co.uk/interviews/lz8tphwdm0qhdlknodygt2uixrfrkb.

[3] As the Draft Articles set out secondary rules that are formally based on the content of primary norms. In other words, why a state would be held responsible for a wrongdoing would depend on the rule defining the wrongdoing. There is no general answer to the question according to the International Law Commission of the United Nations (UN). International Law Commission (ILC), Articles on Responsibility of States for Internationally Wrongful Acts (Draft Articles), Doc. A/56/10, November 2001.

focus of Greenman's research, which shows that, when the international law of state responsibility is based on conduct outside of a state's control, then such responsibility is not morally justified. State responsibility becomes a living vestige of colonialism. For this reason, among many others I shall discuss below, Greenman's book is necessary reading for anyone interested in justifying or critiquing the international rules of holding states responsible for wrongdoings.

3 A History of Article 10

State Responsibility and Rebels is an adaptation of Greenman's doctoral dissertation at the Amsterdam Center for International Law under the supervision of Jean d'Aspremont and André Nollkaemper.[4] Before engaging further with the contents of the book, a note about its structure. Greenman begins her book with the situs of state responsibility for rebels: the early modern international arbitrations. She then continues with an analysis of the early awards and how they were debated by Anglo-American and Latin American scholars and codifiers. The book ends with a warning about the legacy of the 19th-century practice that is likely to continue unabated if left unchecked. In the introductory chapter, Greenman provides an overview of the monograph. She sets out the principal task of the book as tracing the origins of Article 10 of the 2001 Draft Articles on Responsibility of States for Internationally Wrongful Acts (Draft Articles) by the International Law Commission (ILC).[5]

But in the process of studying the history of holding states accountable for the acts of rebels (that is, non-state actors), Greenman also engages with a much broader issue; she traces how much of our current understanding of state responsibility actually emerged in the 'New World', where Latin American governments and Western governments disputed how best to redress injuries arising out of civil wars and revolutions. She illustrates how there was little intra-American consensus on the doctrine of state responsibility, which went through decades of disputes between the 'North' and the 'South' before being codified by the ILC in 2001. The North insisted that recognition of sovereignty implied an acceptance of state responsibility. The 'South' argued that requiring international levels of protection was simply imperialism by other, more legal means; it was a foreign intervention into the sovereign affairs of Latin American nations. Greenman discusses how this debate was sidestepped by the ILC, which codified the project of state responsibility as 'secondary rules', i.e. the ILC avoided discussing what the content of a state's responsibility should be for violating international law and, instead, made the meaning of a state's 'responsibility' dependent on the obligation being breached.

[4] K.J. Greenman, 'The History and Legacy of State Responsibility for Rebels 1839–1930: Protecting Trade and Investment against Revolution in the Decolonised World' (2019) (PhD thesis on file at the Amsterdam Center for International Law), available at https://hdl.handle.net/11245.1/05ab71ae-3dfb-4b43-b209-9c2d7943be9b.

[5] Text of the Draft Articles, *supra* note 3, adopted by the ILC at its 55rd session in 2001 and submitted to the UN General Assembly as a part of the commission's report covering the work of that session.

In practice, the ILC's decision to articulate the rules of state responsibility as 'secondary principles' resulted in the crystallization of specific regimes of state responsibility (*lex specialis*) such as in the field of international investments: 'Today, state responsibility is most effectively implemented in the context of international investment law, where it continues to have a disproportionate effect on the decolonised world' (at 21).[6]

4 Latin American Origins

The second chapter is a brief and excellent account of the US-Mexican narrative of international arbitration between 1830 and 1920. But it is not just about Mexico; it also includes a gripping description of another relevant saga, the Western blockade of Venezuela and its subsequent arbitrations. Greenman emphasizes that Latin American governments acceded to these legalistic resolutions of resolving their conflicts in the shadow of Western uses of force or the threat of such force.[7] Capital-exporting states placed immense pressure on the importing (Latin American) states to arbitrate alien protection claims for several reasons, including the specific US interest in territorial expansion and the general Western interest for a global economic order.[8] While I agree with this conclusion, I would add that this was not always the intent of the US lawyer diplomats involved in the turn to arbitration in the late 19th century. Sometimes, it was simply an excuse for ulterior motives, such as the desire to provide a second bite at the investor-protection apple. It was more often about providing investment protection (usually to US investors) that was superior to local solutions than it was about creating or maintaining a general framework of economic stability for the region.

Greenman explains that the turn to international arbitration in the 19th century solved a uniquely Western problem of complaints by nationals who alleged being injured while travelling or investing in the 'New World'. The technique of international arbitration served to internationalize the conditions upon which foreign travellers and trade entered new states such as Mexico. Usually, when foreigners (or 'aliens' in legalese) crossed international boundaries, they became subject to the laws of the host state. The availability of international arbitration meant that aliens would be governed by international rules to their private sojourns. In this way, instead of being limited to local remedies, Western investors were protected not only by a second layer of norms – international law – but also by another dispute resolution procedure – international arbitration – as well (at 40). This was not just a legal shift. Economically, the internationalization of alien protection claims also served to reallocate the risk of harm caused by rebels and mobs from the investors themselves to the host states

[6] On the theme of adjudication as imperialism in Greenman's book, see Uriburu, 'Imperialism through Adjudication in Latin America', 36(1) *Leiden Journal of International Law* (2023) 203.

[7] To Greenman, arbitration was a form of sanctioned violence: 'The Venezuelan commission were thus the clearest example of the forcible imposition of arbitration of questions of state responsibility for rebels' (at 57).

[8] 'Enforcing state responsibility for rebels went hand in hand not only with territorial expansion but also with commercial exploitation' (at 40).

– which often had no control over the conduct that caused injuries to aliens. Helpfully, Greenman invests quite a bit of time in explaining the issue of internationalization that goes to the heart of the risk allocation question.

Greenman does an excellent job of convincing her readers that when a foreigner's investment fails in a developing country such as Mexico or Venezuela – even if a sovereign contract was breached in the process – the nature of that risk should often be borne by the investor rather than the host state. If investors had recourse to domestic legal remedies, why should they also expect foreign or international standards of protection? Obviously, during civil wars, domestic protections of investors would be lessened compared to during times of peaceful order, but did this make the state of Mexico or Venezuela any less a state during that time? Should they be more responsible for failing to meet 'civilized' (or 'international') standards of protection? Greenman makes the persuasive argument that they should not. This risk is just something that foreigners should account for when deciding to make an investment – that is, a risk of doing business in that locality. In the opinion of the global North states, when there was a breakdown of national order, someone had to pay for the ensuing chaos, and, in a system of international states, that someone was the host state. But, as Greenman forcefully critiques, the opposite conclusion is more convincing: it is instead foreign investors who should bear the risk for having voluntarily entered the new market. Yet it was often the case that, so long as domestic legislation was not 'in accordance with the principle of international law', it would be appropriate to delegate diplomatic claims to international tribunals applying international standards of protection (at 53).

To justify international – as opposed to domestic – levels of investment protection, Western diplomats went to great lengths and created intricate argumentative pretzels. As already mentioned, the book's second chapter is a fascinating backstory and diplomatic narrative behind the Mexican and Venezuelan arbitrations. Key issues here included the obligation of states to maintain internal order and rights of national sovereignty. Greenman describes the largely untold story of multinational corporations who negotiated sweet investment structures for themselves with capital-importing states in the South (see, e.g., at 51). The analysis and conclusions in this chapter are balanced and fair, citing both the North and the South for their role in the creation of state responsibility through domestic need and neglect as well as foreign protection and exploitation (see, e.g., at 50).[9]

The chapter also shares with a wider audience the lesser-known accomplishments of Columbia law professor Francis Lieber. Lieber was the first umpire of the 1868 Mexico-US Mixed Claims Commission. But he is better known for his 'Lieber Code', which is hailed as the first modern code of the laws of war.[10] To this reviewer, it is a pleasure to see such renewed interest in the work of Francis Lieber and the

[9] Recent research about the Latin American protection of property during the 19th century confirms the legal willingness to protect foreign property. See Mirow, 'The Mexican Civil Code of 1928 and the Social Function of Property in Mexico and Latin America', 37 *Emory International Law Review* (2023) 365, at 411.

[10] For a critical evaluation, see Roberts, 'Foundational Myths in the Laws of War: The 1863 Lieber Code, and the 1864 "Geneva Convention"', 20(1) *Melbourne Journal of International Law* (2019) 158.

Mexican-US Mixed Claims Commissions. When I began my research on the topic in the 2000s, nothing had been written on it. In the past several years, in addition to *State Responsibility and Rebels*, serious historic studies have been produced by the likes of Jean d'Aspremont, Arnulf Becker Lorca, Santiago Montt, Liliana Obregón, Ignacio de la Rasilla and Juan Pablo Scarfi.[11] It would be great to see additional attention paid to the form of international arbitration as well. For example, I would love to know what Greenman, d'Aspremont and the rest think is the reason that mixed claims commissions were more influential in the development of state responsibility (for rebels) than ad hoc arbitrations such as those resolving the *Alabama* claims (1871)[12] as well as the *Montijo* (1874)[13] and *Delagoa Bay* disputes (1891). For example, was it their visibility as individual arbitral awards? Were ad hoc arbitrations[14] reasoned more effectively than mixed claims awards? The answer to these questions can have a significant impact on diplomatic policy when it comes to resolving international investment disputes.

5 Controversial from Inception

After discussing the turn to arbitration in the 19th century, Greenman considers the resulting body of awards that ensued regarding state responsibility arising out of revolutions and other internal wars. The extent of the state's liability for injuries caused during insurrections 'was the most controversial aspect of the rules of state responsibility for rebels' (at 65). Another important, but controversial, contribution of the early Mexican-US commissions of 1839, 1849 and 1868 was that they established jurisdiction over contract claims. To Greenman, this was somewhat surprising given that arbitrators were not 'explicitly empowered to do so by their founding instruments' (at 71). I am less surprised by this outcome given how little in fact was included in their so-called 'founding instruments'. As Greenman writes regarding Lieber's award in *Miller v. Mexico*, arbitrators were comfortable freely relying on general principles of law when attributing responsibility under international law for the conduct of non-state actors (at 78).[15]

[11] See, e.g., d'Aspremont, 'The General Claims Commission (Mexico and the United States) and the Invention of International Responsibility (March 27, 2018)', in I. de la Rasilla and J.E. Viñuales (eds), *Experiments in International Adjudication: Historical Accounts* (2019); A. Becker Lorca, *Mestizo International Law A Global Intellectual History 1842–1933* (2015); S. Montt, *State Liability in Investment Treaty Arbitration: Global Constitutional and Administrative Law in the BIT Generation* (2009); L. Obregón, *Completing Civilization: Nineteenth Century Criollo Interventions in International Law* (2002, unpublished S.J.D. dissertation, Harvard Law School, on file with Harvard Law School Library); J.P. Scarfi, *The Hidden History of International Law in the Americas: Empire and Legal Networks* (2017).

[12] *The Alabama Claims (United States v. Great Britain)*, Award of 14 September 1872, J. Bassett Moore (ed.), *History and Digest of the International Arbitrations to which the United States Has been a Party*, Vol. I (1898).

[13] *The Montijo (United States v. Colombia)*, Award of 26 July 1875 (*id*, at 1444).

[14] *The Delagoa Bay Railway (United States and Great Britain v. Portugal)*, Award of 29 March 1900 (*ibid.*, at 1865–1899).

[15] Rafael M. Miller v. Mexico, Award of 02 August 1871, John Bassett Moore (ed.), *History and Digest of the International Arbitrations to Which the United States has been a Party*, vol. 3 (1898), at 2974.

To Greenman, the protection of contractual interests expanded the scope of state responsibility and, in so doing, tells us about the unstated purpose that state responsibility for rebels served: '[A]liens were protected from rebels not as individual moral persons but as commercial actors' (at 72). This makes intuitive sense, but I would have liked to see more analysis to support such a conclusion. For example, it is not clear to me that Lieber and his successor Sir Edward Thornton can be lumped together easily. Greenman herself notes that Thornton limited the justiciability of contract claims to gross injustices, whereas Lieber generally accepted them without any such qualification (at 73–77). The former was more concerned with individual property claims and the latter with overall economic stability. That is just one contrasting example between the two men.

Another major contribution in this chapter is the author's discussion of the principle of non-responsibility – namely, was a state really responsible for the injuries caused by non-state actors such as rebel forces? Perhaps the default position in international law is that the state should not be responsible for alien injuries absent a clear treaty obligation to the contrary. This was a very controversial question among international lawyers in the early 20th century who began to wonder about the nature of state responsibility and whether it was fundamentally contrary to the nature of state sovereignty.[16] 'The most significant issue grappled with by the commissions', writes Greenman, 'was whether there was a general principle of responsibility for rebels beyond the specific rules of responsibility for successful rebels and de facto authorities' (at 89). The chapter clearly demonstrates that there was a general rule of non-responsibility, which jives with the prevailing theories of state responsibility at the time, particularly that of the British jurist, mountain climber and member of the Institut de Droit International William Edward Hall (1835–1894). To Hall, responsibility in international law was similar to that in domestic law; it was a corollary of control, such that without state control there was no state responsibility (at 89).

However, there were many exceptions to this general rule of non-responsibility – for example, those based on tort theories of negligence, as is discussed in Chapter 4 of the book under study. The discussion here reminded me of philosophy texts grappling with the problem of personal capacity as a precondition for moral responsibility. Specifically, Greenman's treatment of the *Sambiaggio* case is fascinating,[17] especially where she shows how Jackson Ralston and other international lawyers have misquoted it to support state responsibility for the acts of rebels. The fundamental question of responsibility with which Ralston struggled was whether the standard of care to be applied to Venezuela was a subjective or objective one (at 99). Greenman cites the

[16] The issue is akin to the *Lotus* principle regarding international obligations, that states are presumed to be acting within their sovereign rights unless there is an express duty to behave otherwise. Similarly with regard to state responsibility: what was the default position of international law? See *S.S. Lotus (France v. Turkey)*, 1927 PCIJ Series A, No. 10, at 18. On the role of the principle today, see Handeyside, 'The Lotus Principle in ICJ Jurisprudence: Was the Ship Ever Afloat?', 29 *Michigan Journal of International Law* (2007) 71.

[17] *The Sambiaggio case (Italy v. Venezuela)* (1903) 10 R.I.A.A. 499.

Montijo award, an ad hoc international arbitration, in which Robert Bunch states that the standard was an objective, international one (at 100).

The tribunalization narrative in this chapter is a masterful contextualization of the international tribunals that created the first positive rules on state responsibility for rebels. It is also a demonstration of the power of law. The same set of rules of state responsibility that the West imposed on Latin American states for injuries caused by rebels was later repurposed by the latter in order to hold the former liable under international law.[18] Such is the inherent potential of law. It cannot be contained within the arguments of a single court or tribunal. Once a dispute is decided and recorded, it can be reinterpreted and expanded or contracted by later courts and tribunals. As Greenman concludes, '[w]hat emerged as a response to decolonisation and capitalist expansion in Latin America was a struggle; international law was used as a tool of imperialism and a means to justify intervention, as well as offering a vocabulary and a location for resistance to that imperialism and intervention' (at 99).

One quip I have with the chapter is about the development of due diligence rules. Given the importance of due diligence to the book's thesis, I wonder if perhaps some more time could have been spent discussing (and perhaps distinguishing) precedents such as the *Alabama* claims and its 'three rules'.[19] Francis Lieber of the 1868 Mexico-US Mixed Claims Commission was in close communication with then Secretary of State Hamilton Fish about resolving the notorious *Alabama* claims dispute with Great Britain about the latter's breach of neutrality rules by failing to prevent Confederate rebels from purchasing military vessels from private Liverpudlian shipbuilders. Since the breach of a duty of care owed to aliens was the basis for imposing international liability on states, it may have been fruitful to compare the development of due diligence principles in the late 19th century to see if they tracked those of state responsibility for rebels and, if not, then to see why not.

The reader of the previous chapters is then well prepared for the fourth chapter. Given that the turn to arbitration in the Americas in the late 19th century did not produce a consistent jurisprudence, it comes as no surprise that the scholarship surrounding the awards was fraught with debate. When the field of state responsibility for rebels was born by the early 20th century, it was a polarized and polarizing one. Greenman elegantly conceptualizes this dynamic as one ranging from 'resistance' by Latin American governments to 'development' by Western powers.[20]

[18] For another, more recent, discussion on this topic, see Scarfi, 'The Monroe Doctrine in the Americas: Towards a Hemispheric Intellectual History', *Diplomatic History* (forthcoming), available at https://academic.oup.com/dh/advance-article-abstract/doi/10.1093/dh/dhad044/7222929?login=false (Latin Americans sought to transform (or 'pan-Americanize') the doctrine as a multilateral legal principle as well as to condemn it as a flexible and unilateral imperialist principle invoked to legitimize US interventions).

[19] See Alabama claims of the USA against Great Britain Award rendered on 14 September 1872 by the tribunal of arbitration established by Article I of the Treaty of Washington of 8 May 1871, reprinted in J. Bassett Moore (ed.), *History and Digest of the International Arbitrations to Which the United States has been a Party*, vol. 1 (1898), at 653.

[20] A theme that tracks M. Sornarajah, *Resistance and Change in the International Law on Foreign Investment* (2015).

A clear manifestation of this debate can be seen in the techniques that commentators used to deny or to justify state responsibility for non-state actors. Was it the rule or an exception to the rule?[21] The Latin American position of resistance within this framework is closely associated with the views of Argentine jurist Carlos Calvo (1804–1926), as he set out in 1869.[22] Calvo's eponymous doctrine of non-responsibility for rebel acts was embraced (at least formally) by virtually all of the 'South'. Calvo was the most famous but not the first Latin American to make this argument for non-responsibility. By the time of Calvo's rise, the legal position of Latin American governments regarding rebel acts was already fleshed out by Andrés Bello, the Venezuelan lawyer-diplomat and colleague of Simón Bolívar, who represented the interests of several Latin American nations (such as Chile and Colombia) in Europe. Greenman claims that, although the Calvo doctrine was of much wider application than responsibility for non-state actors, it 'was primarily motivated by concern about state responsibility for rebels' (at 115). She supports this conclusion with references to several eminent European scholars (such as Martti Koskenniemi and Martins Paparinskis). In the opinion of this reviewer, in retrospect, the sheer number of awards arising from rebel contexts supports the argument, but, given that the doctrine was developed by scholars such as Calvo in the 19th century, it may not have been clear to them that alien injuries caused by rebels were the most provocative sources of state responsibility.[23]

Either way, as Greenman notes, by the early 20th century, there was neither a homogeneous 'Anglo-American' or 'Latin American' view of state responsibility for rebels. For example, in North America, Edwin Borchard (1884–1951), a Columbia Law School professor, led a group of conservative US international lawyers, and Clyde Eagleton, a New York University Law School professor, led a circle of progressives. Similarly, in Latin America, Alejandro Álvarez and his generation of Anglophile international lawyers had little in common with Luis Padilla Nervo and their non-aligned movement.[24] There were subtleties to the debate, and Greenman teases them out: the debate was about the boundaries of rules and their exceptions. While most acknowledged the general principle of non-responsibility, states generally were not liable to

[21] 'Nearly all the various positions made responsibility for rebels the exception rather than the rule, just as we saw in the practice of the mixed commissions' (at 110).

[22] Calvo, 'De la non-responsabilité de l'État à raison des pertes et dommages éprouvés par les étrangers en temps de troubles intérieurs ou de guerres civiles', 1(3) *Revue de droit international et de législation comparée* (1869) 417.

[23] There were many other and more famous examples of controversial interventions, such as the Don Pacifico affair (about mob violence) that resulted in the '*civis Romanus* sum' speech by Lord Palmerston, or the *Alabama* claims (about neutrality) that were the first international tribunal comprised of a panel of professional international lawyers.

[24] I enjoyed reading about how the progressive Eagleton still viewed Guerrero's report on state responsibility as 'destructive to international law' (at 123). See further H. Shinohara, *US International Lawyers in the Interwar Years: A Forgotten Crusade* (2012), at 34. For a similar grouping (into conservatives/realists and progressives/idealists), see Wertheim, 'The League That Wasn't: American Designs for a Legalist-Sanctionist League of Nations and the Intellectual Origins of International Organization, 1914–1920', 35(5) *Diplomatic History* (2011) 797.

repay aliens for injuries suffered from investing abroad. However, few concurred on the contours of the exceptions such as when host states did not provide a high enough level of property protection as compared to Western legal systems (at 125–126).

In reading this chapter, I wondered again about the contrasting treatments of responsibility under international and domestic law. There is no doctrine of non-responsibility under domestic law. Obviously, a surfer in California likely has no business being concerned about an elevator falling on a New York City pedestrian. What is noteworthy – and Greenman notes – is how many Western lawyers argued for a default principle of state responsibility even for the non-state actions of rebels. The general principle of non-responsibility is as sensible as it is obvious. States, like individuals, are generally presumed to be innocent and non-liable for injuries to others. In this sense, apart from the field of strict liability, the whole of tort law is a field of exceptions. But it is not viewed that way by tort law scholars, as this would be misrepresentative. Tort law takes the presumption of non-liability for granted and is built on a robust system of general duties of care, standards of care, principles of causation and so on. So why was so much emphasis (not just by Greenman but also by the objects of her research) placed on the distinction between the general rule of non-responsibility and its exceptions?

To this reviewer, it seems that this was a tactical move. Those who argued for the broader principle of non-responsibility were making the existential claim that national sovereignty implies that international standards have no purchase within the domestic administration of law. Why should exceptions like the 'general neighbour principle' of tort law (of *Donahue v. Stevenson* fame)[25] be extended to international law? Surely, this was colonial intervention by other (legal) means. Indeed, as Greenman notes, it engenders the possibility not just of state responsibility but also of state 'double responsibility', where host states are responsible not just for the acts of rebels but also for the acts of the government they are seeking to overthrow (at 140). And those who argued for the narrower principle of non-responsibility were trying to minimize the applicability of international arbitration. They were arguing that an international tort law was not an intervention into domestic affairs but, rather, a stop gap safety mechanism that only applied when domestic law failed to function as law. In other words, the applicability of international law was a function of state failure. How could a state claim it was an intervention on sovereignty when no such sovereignty was being exercised?[26] (As though sovereignty was a fickle attribute rather than a legal presumption.) The contours of this debate, concludes Greenman, were determined by both policy ('someone had to pay') and principles (e.g. of attribution). In sum, while not able to answer all the historic or legal questions, the chapter provides broad insights into the scholarly deliberations that defined the development of state responsibility for rebels in international law.

[25] *Donoghue v Stevenson* [1932] AC 562.
[26] Great discussion on this point at 131–133.

6 Codifying State Responsibility

The chronicle of courts, awards and legal debates culminates in the fifth chapter, in which Greenman explains how the ILC's codification in 2001 (after 70 years of effort) largely rejected a century of arbitral practice. We learn that, despite initial efforts to the contrary, the Institut de Droit International eventually adopted the rule imposing state responsibility for rebel acts and for breaches of the duty of due diligence (at 145, 147). Even at the Pan-American conferences, where Latin Americans were less susceptible to Western influence, lawyers who argued for the general rule of non-responsibility still allowed for wide exceptions such as 'a manifest denial of justice' (at 149) and when governments have 'been negligent in the suppression of acts disturbing this order [of the interior]' (at 150). The chapter also describes other private codification efforts, including the famous Harvard Draft Convention of 1929, which was circulated to all governments participating in the 1930 codification conference sponsored by the League of Nations, whose codification efforts were resumed by the UN.

One of the early acts of the League of Nations was to establish a Committee of Experts both to investigate the history of international law and to propose paths for its codification. The expert tasked with promoting the codification of state responsibility was the future president of both World Courts, José Gustavo Guerrero of El Salvador (1876–1958). His 1926 report included 12 tentative conclusions about rules of state responsibility for discussion among the committee.[27] Guerrero, who in many ways was Calvo's intellectual and professional successor, took a balanced approach. He opposed imperialistic impositions of responsibility – for example, he limited 'denial of justice' claims to 'denial of access to courts' (at 163). Yet he also acknowledged the broader significance of international responsibility as the constitutive order of states (at 160). Guerrero's 'via media' approach to codification pleased neither side.

In 1930, the League's codification conference in The Hague ended in failure. Consensus for a doctrine of state responsibility that was based on the international law of alien protection was clearly impossible to achieve. The issue of holding host states responsible for the acts of rebels 'was a key issue' driving Latin American opposition to codification efforts (at 171). Latin American approaches to the topic – led by scholars such as Alvarez and Guerrero – were focused more on theoretical principles of non-responsibility and non-discrimination. They did not go far enough to appease Western codifiers who sought to capitalize on the past practice of international arbitration, especially in the New World. This divide came to a head at the Hague conference, which Greenman perfectly describes as 'the beginning of the end of state responsibility on the basis of injuries to aliens and thus of state responsibility for rebels' (at 173).

In the book's final chapter, Greenman spells out the lasting legacy of the early international awards for injuries by rebels. After the 'failure' of 1930, the subfield of state responsibility for rebels did not disappear. Well, it largely disappeared from

[27] League of Nations, 'Report of the Sub-Committee of the Committee of Experts for the Progressive Codification of International Law', 20 *American Journal of International Law Special Supplement* (1926) 177. For example, the first conclusion was that state responsibility is triggered only upon the event of a wrongful act committed by one state against another (*ibid.*).

the codification agenda, but it continued to form the basis of the most popular form of international litigation: investment protection claims. This hidden history of investment protection is what the book seeks to expose. The other purpose of the final chapter is to demonstrate the adverse consequences of ILC Special Rapporteur Roberto Ago's abstraction of the doctrine into 'secondary principles' of international law. Rather than consider the merits of responsibility or non-responsibility for particular obligations such as due diligence, Ago (and his later successor James Crawford) had the ILC focus on more procedural issues such as attribution than the content of a state's liability, which was at the core of the US-led practice of international arbitration. As mentioned, the ILC did codify the issue of attributing non-state conduct to the state for injuries caused by rebels as Draft Article 10 (conduct of an insurrectional or other movement).[28]

In its commentaries to the Draft Articles, the ILC cites the US practice of international arbitration but does so confusingly and, Greenman implies, perhaps dishonestly (at 181). Surprisingly, despite the overwhelming popularity of the Draft Articles, Article 10, in particular, 'has had little practical impact' on international practice (at 182). In this sense, the primary legacy of state responsibility is not its 2001 codification; rather, it is the thriving and growing world of international investment law and arbitration (at 176). The ILC's codification of general state responsibility (*lex generalis*) was in many ways a rejection of the US-led practice of alien protection for injuries caused by rebels (*lex specialis*). This made it appear that the South had 'won' the codification debate that began in 1930. But, as Greenman makes irrefutably clear, in reality the battle had shifted to other arenas such as international investment law (at 184) and international humanitarian law (at 192). There was an agreement about the general rules – namely, that states, in general, are not responsible for injuries to aliens caused by rebels – but the states disagreed about the extent to which exceptions applied to this rule. Indeed, writes Greenman, '[t]he exceptions to non-responsibility… ended up being more important than the rule' (at 10).

7 Conclusion

Clearly, the history of state responsibility for rebels is complex. Greenman warns against celebrating the ILC's codification as a victory. The concluding paragraphs to *State Responsibility and Rebels* provide a sobering assessment of the enduring legacy of the US-led practice. Alien protection claims have 'lived on', and the Latin American efforts to re-enforce their national sovereignty by reasserting their 'authority over natural resources and foreign investors' has failed, as is demonstrated by the growing

[28] 'Article 10. Conduct of an insurrectional or other movement 1. The conduct of an insurrectional movement which becomes the new Government of a State shall be considered an act of that State under international law. 2. The conduct of a movement, insurrectional or other, which succeeds in establishing a new State in part of the territory of a pre-existing State or in a territory under its administration shall be considered an act of the new State under international law. 3. This article is without prejudice to the attribution to a State of any conduct, however related to that of the movement concerned, which is to be considered an act of that State by virtue of articles 4 to 9'. Draft Articles, *supra* note 3.

docket of international arbitrations (at 185). Such an outcome is unlikely to surprise anyone reading this review. Still, it is a sobering and timely reminder of international law's imperial past.

Greenman's book offers a thorough history of state responsibility for injuries to aliens caused by rebels, as well as a provocative and cogently argued forecast of its enduring legacy today. Greenman's critique of the ILC's approach to state responsibility, especially the ambiguity surrounding its codification as general principles or 'secondary rules' of law, is grounded in her meticulous history. She highlights the shifting battlegrounds within international law – from the use of general rules to their exceptions. While there was certainly a broad acceptance of the ILC's codification of state responsibility as general rules, the significance and applicability of exceptions to those rules cannot be underestimated as they often take precedence within contemporary international practice. For these reasons and others, Greenman's work is a beautiful reminder that the theory, doctrine and practice of international law is a dynamic process, shaped as much by its history as by the legal and political needs of each era.