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RECENT BOOKS ON INTERNATIONAL LAW

EDITED BY JEFFREY L. DUNOFF

REVIEW ESSAY

STATE RESPONSIBILITY AS MYTH AND LEGEND

*By Chimène I. Keitner**

Merchants of Legalism: A History of State Responsibility (1870–1960). By Alan Tzvika Nissel. Cambridge, UK: Cambridge University Press, 2024. Pp. xvi, 402. Index.

Arbitrating Empire: United States Expansion and the Transformation of International Law. By Allison Powers. Oxford, UK: Oxford University Press, 2024. Pp. xi, 290. Index.

Contemporary international law is "part myth, part legend." It is part myth, because understandings of international law promulgated largely by Global North countries rely on shared fantasies about a set of core values underlying the post-World War II international order.[1] It is part legend, because international law's doctrinal moorings lie in accumulated state practice, and in the meanings and interpretations given to that practice over time.

Canadian Prime Minister Mark Carney's January 2026 speech at the World Economic Forum in Davos evoked both myth and legend.[2] Carney announced the end of a U.S.-centered myth, which he characterized as "the end of a pleasant fiction and the beginning of a harsh reality."[3] This myth persisted because the so-called "rules-based international order" provided countries like Canada with sufficient protection and predictability that they largely refrained from "calling out the gaps between rhetoric and reality."[4] Carney recalled Václav Havel's account of shopkeepers in the Soviet bloc placing the slogan "Workers of the World, Unite!" in their windows to signal an allegiance to communism.[5]

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[1] *See, e.g.*, Thinking Allowed, Interview of Joseph Campbell by Jeffrey Mishlove, *Understanding Mythology with Joseph Campbell* (Feb. 1987), *at* https://www.intuition.org/txt/campbell.htm (describing myth as "a systematized organization of fantasies in relation to the values of a given social order").

[2] World Economic Forum, Forum in Focus, Davos 2026: Special Address by Mark Carney, Prime Minister of Canada (Jan. 20, 2026), *at* https://www.weforum.org/stories/2026/01/davos-2026-special-address-by-mark-carney-prime-minister-of-canada [hereinafter Carney Davos Address].

[3] *Id.*

[4] *Id.*

[5] *Id.*, *quoting* Václav Havel, Essay: *The Power of the Powerless* (1978).

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For Carney, this exemplified an attitude of "go along to get along," in the "hope that compliance will buy safety."[6]

Carney also referred to legend. He cited Thucydides's dialogue between Athenians and leaders of the neutral island of Melos during the Peloponnesian War. The Melians sought to use principles of justice to persuade the Athenians not to invade the island. The Athenians were not moved, stating: "We know, as practical men, that the question of justice arises only between parties equal in strength, and that the strong do what they can, and the weak submit."[7] Carney noted that the Athenians' position is often "presented as inevitable."[8] In his view, countries should develop "greater strategic autonomy" so that "integration [does not] become[] the source of [their] subordination."[9]

Two recent books show that, while the late nineteenth and early twentieth century practice of international arbitration contributed to the "harsh reality" of subordination, it also provided frameworks for resolving "question[s] of justice" between parties of *unequal* strength. Alan Tzvika Nissel's *Merchants of Legalism: A History of State Responsibility (1870–1960)* chronicles the practice of arbitral tribunals established primarily to adjust claims between the United States and countries in Latin America. It illustrates how jurists drew upon the practice of arbitration and theories of public law to shape enduring principles of state responsibility. Allison Powers Useche's *Arbitrating Empire: United States Expansion and the Transformation of International Law* illuminates ways in which foreign nationals injured in the United States used U.S.-backed claims commissions to catalogue and demand redress for state-sanctioned violence. Powers's account illustrates what B.S. Chimni calls "subaltern internationalism"—a principle that seeks to further the interests of weak nations and groups.[10]

Both Nissel and Powers tell stories of unintended consequences: for Nissel, the development of a "social framework" for state responsibility that exceeded the bounds of bilateral dispute resolution; for Powers, the exposure of U.S. hypocrisy in imposing a "standard of civilization" on other countries while denying the application of an equivalent standard at home. Both accounts highlight the impact of legal principles that were treated as generalizable, reflecting the Melians' insistence that it was in the Athenians' "interest to maintain a principle which is for the good of all—that anyone in danger should have just and equitable treatment ...."[11] The optimism of Nissel's account comes from an underlying sense of progress in elaborating a body of secondary rules for state behavior; the optimism of Powers's account comes from her conviction that tools created by powerful states can ultimately be wielded against them.

The first two sections of this review draw primarily on Powers's account to trace how claims commissions both entrenched and exposed U.S. hegemony. The third section focuses on Nissel's reconstruction of the doctrinal evolution from diplomatic protection to state

[6] *Id.*

[7] Thucydides, *The History of the Peloponnesian War*, *in* ATHENIAN DIALOGUE 267 (Richard Crawley trans., 1876; Sir R.W. Livingstone ed., 1949), *at* https://archive.org/details/dli.ernet.1803/page/267/mode/1up.

[8] Carney Davos Address, *supra* note 2.

[9] *Id.*

[10] *See* B.S. Chimni, *The International Law of Jurisdiction: A TWAIL Perspective*, 35 LEIDEN J. INT'L L. 29, 50 (2022).

[11] Thucydides, *supra* note 7, *Melian Dialogue* at 267.

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responsibility. Taken together, Nissel's and Powers's books remind us that there have always been "gaps between rhetoric and reality,"[12] and that international law has always been forged by a combination of state interests and personal agendas. No international legal order will ever achieve complete consistency or complete fairness, but any viable order must at least approximate these values to provide a *modus vivendi* that averts reflexive resort to inter-state violence.

I. The Resort to *Ad Hoc* Claims Commissions

The judicialization of international relations forms part of an international order grounded in shared understandings of permissible conduct rather than pure politics. The obligation to resolve international disputes peacefully prevents countries from having to expend blood and treasure to vindicate claims. Cognizable claims include injuries to a country's nationals. The history of claims commissions is deeply bound up in the evolution of an international order in which protection of nationals—in particular, investors—is treated as a hallmark of membership in the club of "civilized nations."

At its origins, the exercise of diplomatic protection was an essentially bilateral affair, not a vindication of the interests of the broader international community. Claims commissions offered an alternative to using force to protect nationals abroad by recasting diplomatic disputes as legal questions. For example, in 1868, Mexico and the United States signed a treaty establishing the U.S.–Mexico Mixed Claims Commission to resolve claims between them that had accrued since the 1848 Treaty of Guadelupe Hidalgo, which ended the Mexican–American War. The U.S. Congress had created the Examiner of Claims bureau in the State Department in 1866, the predecessor of the State Department's Office of the Legal Adviser (Nissel, p. 53 n. 87, 70 n. 171). The professionalization of international arbitration in the post-bellum United States privileged a legalistic approach designed to "bolster[] [U.S.] foreign investment and political control" in Latin America (Nissel, p. 45). One of Hamilton Fish's early decisions as secretary of state was to appoint his close friend Francis Lieber, who was known for his codification of the laws of war, as the U.S. arbitrator for the Commission (Nissel, p. 72). Claims poured in: over one thousand U.S. individuals and corporations filed claims against Mexico, and Mexican citizens filed close to one thousand claims against the United States (Powers, p. 26; Nissel, p. 77). Powers notes that many of the U.S. claims concerned wartime interruptions to economic activity, while others concerned "domestic legislation or law enforcement that limited the profits generated by foreign-owned corporations" (Powers, p. 27). Most Mexican claims against the United States stemmed from the conduct of U.S. soldiers, U.S. Rangers, filibusters (Southern expansionists), and paramilitaries who had destroyed property of Mexican citizens on Mexican soil (Powers, p. 32).[13]

[12] Carney Davos Address, *supra* note 2.

[13] The 1927 U.S.-Mexico General Claims Commission also became an unexpected forum for 220 denial-of-justice claims brought by Mexican citizens for injuries originating in U.S. territory, including for "the ways in which the US legal system allowed police officers, rangers, soldiers, and civilians to commit acts of anti-Mexican violence with impunity." Allison Powers, Arbitrating Empire: United States Expansion and the Transformation of International Law 183–84 (2024).

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Establishing quasi-judicial procedures to resolve diplomatic protection claims did not in itself dictate the principles that would guide such resolution. Powers recounts that "it was not clear even to the renowned legal scholar [Lieber] what sources of international law he might look to in formulating his decisions" (Powers, p. 29). Moreover, the Commission's judges "framed the awards that they did hand down against the United States as isolated instances of unlawful behavior on the part of deviant officials" rather than a systemic problem (Powers, p. 33). Powers takes issue with the Commission's failure to recognize and acknowledge the structural violence endemic in U.S. policies.

Powers recovers the voices of the Mexican witnesses whose testimony the Lieber tribunal disregarded. For example, the Commission awarded damages to the La Abra Silver Mining company for abandoning its mines even though Mexican witnesses testified that the company had never profitably extracted silver from the mines, and even though the claimants failed to provide any evidence of the company's profitability (Powers, p. 39).[14] The Mexican legal counsel in that case criticized the decision as "effectively facilitat[ing] a colonial power relationship between the United States and Mexico that differed only in name from the forms of extraterritorial jurisdiction that [the] United States and Britain claimed over parts of China, Japan, and the Ottoman Empire" (Powers, p. 41). Powers concurs, observing further that the Commission's rulings "led US corporations to believe they could expect a certain level of investment protections abroad [no] matter how risky the venture or how questionable their labor practices" (Powers, p. 44). Nissel also observes that *ad hoc* arbitration agreements became the functional equivalent of capitulations—unequal treaties by which European countries reserved jurisdiction over their own nationals present in other countries' territory—by protecting foreigners from national treatment (Nissel, p. 135). In Nissel's words, however, "[t]he last thing Lieber's tribunal looked like at the time was a mask for US hegemony," presumably because it carried the hallmarks of formal equality (Nissel, p. 107). Equality in theory and subordination in practice characterize a "rules-based order" used as a tool of hegemonic control.

Structural inequalities were also built into the foundations of many claims commissions. Powers tells the story of the Samoan Claims Commission created following the 1899 bombardment of the Samoan coastline by British and American warships, which gravely injured Samoans and foreign nationals living in Samoa (Powers, p. 64–65). The arbitral convention entered into by Germany, the United States, and Great Britain excluded Samoans from recovery because they were not "citizens or subjects of a state"—a prerequisite for seeking protection under international law (Powers, p. 71). Powers recounts that "[t]he United States justified annexing eastern Samoa in 1900 by invoking a duty to introduce institutions of democratic governance to a Native population in need of 'tutelage'" (Powers, p. 77). But the petitions filed by four hundred Samoans before the Claims Commission "explicitly belied" this fiction, challenging "the hypocrisy of a colonial regime premised on the protection of life and property" (*id.*).

A similar dynamic characterized the Claims Commission created by the 1898 Treaty of Paris ending the Spanish-American War. The United States argued that Spain owed

[14] Later-revealed documents demonstrating the company's lack of profitability prompted congressional investigations and resulted in the United States' return to Mexico of money that had not yet been distributed to the claimants. *Id.* at 45. The State Department did not, however, disavow the underlying theory of recovery in the case. *Id.* at 46.

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$60 million for failing to protect U.S. citizens and their property during the conflict, and the U.S. agreed to assume responsibility for those claims in exchange for Spain's territorial cession of Puerto Rico and Guam (Powers, p. 88). By framing the acquisition of these territories as a collection on wartime claims, the U.S. "disavowed the coloniality of overseas expansion" (*id.*). When the time came to process claims, assistant attorney general William Fuller contested the naturalization of "nearly every petitioner of Cuban descent" who sought redress through the Claims Commission, thereby suggesting "that the US citizenship of all former Spanish subjects should be viewed with suspicion" (Powers, p. 98). Assistant Attorney General William Wallace Brown later recommended referring these claimants to the U.S. district attorney in New York in order to overturn their naturalizations under the 1906 Naturalization Act (Powers, p. 99). In Powers's account, the Commission reinforced a racialized hierarchy that equated citizenship with whiteness—a conception reflected further in the continued subordinate status of these territories.

II. Camouflaging Colonialism

Powers offers detailed descriptions of legal maneuvering by the United States to assert extraterritorial control without paying reparations: in other words, using law to exercise dominance. For example, the 1903 Hay-Bunau-Varilla Treaty granted the United States "the power to act 'as though it were sovereign' over the newly created Canal Zone" (Powers, p. 115). Secretary of War Elihu Root told a Chicago crowd of three thousand in 1904 that the Canal Zone was "the world's easement" (Powers, p. 117).[15] Building the Panama Canal allowed ships to avoid traveling eight thousand miles around the tip of South America. The United States sought to exercise control over the Canal Zone without seizing the territory by force. President Theodore Roosevelt commissioned State Department Legal Adviser John Basset Moore "to pen a memo further developing the idea of international eminent domain" (*id.*).[16]

Secretary of State John Hay framed U.S. control of the Canal Zone as furthering "the interests of civilization," thereby "fram[ing] US acquisition of the Canal Zone not as a colonial endeavor, but instead as a public service to the so-called civilized world" (*id.*). He rejected the Colombian foreign minister's repeated proposals to submit the question of U.S. control over the Canal Zone to the recently formed Permanent Court of Arbitration, arguing that Colombia's concerns were political rather than legal (Powers, p. 118). Meanwhile, the United States used the Joint Land Commission created by the 1903 treaty "to claim a right of eminent domain over all of Panama" by providing a compensation scheme for owners of private lands or private property damaged by the construction, maintenance, and operation of the Canal (Powers, p. 121).

Using international eminent domain to acquire control over territory was unprecedented. Powers describes how seventy thousand people living within the boundaries of the Panama

[15] *Id.* at 115, *citing* Elihu Root, *The Ethics of the Panama Question, Delivered Before the Union League Club of Chicago, 1904*, *in* Elihu Root, Addresses on International Subjects 179–80 (1916).

[16] The United States also used recognition decisions to advance its foreign policy goals. For example, shortly after the United States recognized the Republic of Panama as independent from Colombia, it negotiated a treaty for canal rights; the "representative" for Panama in the negotiations was French engineer Philippe Bunau-Varilla, who had been a vocal critic of Colombia's refusal to allow access to the Isthmus of Panama. *Id.* at 117.

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Canal Zone learned that the area was being depopulated under a 1912 executive order by President William Howard Taft:

> In industrial cities like Gorgona and Empire, canal workers on their way to the Culebra Cut noticed signs posted on the walls of local courthouses and police stations. Farmers in rural towns encountered land inspectors who appeared among the fruit groves to inform them that they needed to evacuate the area before their zinc-roofed houses were burned, flooded, or both. Shop owners and food vendors expressed confusion as to why they were required to vacate thriving business districts to facilitate an already completed canal. (Powers, p. 114.)

The 1912 Depopulation Order led to a new wave of expropriation. Initially, the claims settlement approach to territorial acquisition "seemed poised to simultaneously erase the stigma of conquest and lessen the financial burden of colonial expansion on the US Treasury" (Powers, p. 123). However, contrary to the expectations of U.S. officials, the Joint Land Commission received over three thousand claims from individuals who "charged US Zone administrators with widespread fraud and coercion," thereby "challeng[ing] the legitimacy of US governance in the Zone" (Powers, p. 126).[17] Two Panamanian politicians served as commissioners, along with two career colonial administrators (including Leo Rowe, a member of the editorial board of the new *American Journal of International Law*) (Powers, p. 135). Although Rowe was a long-time proponent of colonial government, he later warned the secretary of state that U.S. colonial administrators in the Zone posed a threat to the United States' "international reputation" (*id.*).[18] Colonialism by another name was not necessarily more palatable.

Problems intensified when Frank Feuille, the head of the Law Department of the Isthmian Canal Commission (the Canal Zone's governing body), refused to authorize payment on certain awards made by the Joint Land Commission. Powers recounts that Feuille did not necessarily object to the largest awards; instead, he took issue with awards granted to individuals such as Nicolasa Noriega and Isabel Hernández, two Afro-Panamanian women who Feuille dismissed as "'squatters on public lands, instigated by unscrupulous lawyers, to attempt to establish some kind of title'" (Powers, pp. 142–43).[19] The reference to "private" property in the 1903 treaty allowed U.S. lawyers to dispute claimants' ownership as well as valuation; allegations of unscrupulous lawyering could justly have been made against Feuille, rather than by him.

Although the Joint Land Commission did not provide effective compensation, the claims process created a documentary record of dispossession and abuse. Powers describes how the Panamanian representatives tasked with renegotiating the 1903 treaty used the compensation claims as evidence of the "violence, coercion, and fraud" that Panamanians and other residents of the Canal Zone experienced at the hands of U.S. agents, in violation of the treaty (Powers, p. 144).[20] The behavior of U.S. officials including Feuille belied the claim

[17] *See also id.* at 134 (noting that 3,598 new claims were filed in or after 1913).

[18] Rowe also wrote a private letter to President Woodrow Wilson protesting "against the attitude and actions of the Isthmian Canal commission as represented by the Department of Law." *Id.* at 158.

[19] *See also id.* at 156–57 (noting that the ICC refused to authorize 175 decisions made by the Joint Land Commission).

[20] *See also id.* at 163 (noting that "Panamanian foreign policymakers sought to use these petitions as ammunition through which to challenge the right of the United States to continue to expropriate additional lands for the ostensible purposes of 'canal maintenance' more than a decade after the canal itself had been completed").

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that U.S. control over the Canal Zone was required to further the interests of civilization. In 1922, Secretary of State Charles Evans Hughes supported paying the remaining awards to avoid "the accusation that we enforce arbitral awards where weaker countries are involved while we refuse to accept such awards when they are contrary to our own interests."[21]

Double standards also characterized other claims processes. After the Mexican–American War, Mexican citizens who were dispossessed of their lands following U.S. annexation in 1848 brought denial-of-justice claims against the U.S. government. The United States argued successfully that such claims fell outside the scope of the Mixed Claims Commission's jurisdiction, even though they fell within the designated time period. The United States argued that characterizing a U.S. court ruling on a land claim as a denial of justice "would be a usurpation of power . . . as much so as if [the Commission] were to pass laws for the government of the United States" (Powers, p. 33). Yet the same logic did not prevent the Commission from entertaining claims against Mexico for lost profits allegedly caused by Mexican legislation.

Despite the uneven access to compensation, the claims process itself exposed U.S. state violence. Take claims for wrongful death and denial of justice brought by Mexico before the 1927 United States–Mexico General Claims Commission. The circumstances giving rise to the claims were eerily contemporary: On April 8, 1919, U.S. Cavalry Second Lieutenant Robert Gulley shot at a raft and killed nine-year-old Concepcíon García as she crossed the Rio Grande from Texas to Mexico with her mother and aunt.[22] Gulley was court-martialed and removed from service for shooting at unarmed civilians in contravention of army regulations, but U.S. President Woodrow Wilson reinstated him on the advice of the secretary of war (as the position was then called). According to Presiding Commissioner C. van Vollenhoven, the Claims Commission had to decide "whether, under international law, the American officer was entitled to shoot in the direction of the raft in the way he did."[23] In his view, the question was whether shooting at unarmed civilians violated an "international standard concerning the taking of human life."[24] The dissenting U.S. commissioner would have instead asked whether "American law sanctions an act that outrages ordinary standards of civilization."[25] The majority saw the Commission's role as applying international standards to injuries caused by officials of the respondent state; the dissent admonished the majority for substituting its view of international law for municipal law.[26] For the U.S. commissioner, acknowledging a substantive role for international law would intrude too far into the prerogatives of sovereign states. This is one reason why so many international claims were brought as claims for denials of justice, rather than violations of substantive conduct-regulating rules.[27]

[21] *Id.* at 161, *citing* Charles E. Hughes to Warren G. Harding, at 4 (Aug. 21, 1922).

[22] Teodoro García & M.A. Garza, *(United Mexican States) v. United States of America*, IV RIAA 119 (Dec. 3, 1926); *see* Monica Muñoz Martinez, *Indemnity for State Murder*, SOCIAL*TEXT* ONLINE (Sept. 12, 2011), *at* https://socialtextjournal.org/periscope_article/indemnity_for_state_murder.

[23] García & Garza, *supra* note 22, at 120, para. 3 (majority opinion).

[24] *Id.*, para. 4.

[25] *Id.* at 127 (dissenting opinion of U.S. Commissioner Fred Nielsen).

[26] *Id.* at 128; *see also id.* at 133 (rejecting the majority's reference to the prohibition on murder in the Fourth Hague Convention as having "no bearing . . . on the propriety of domestic law dealing with the difficult subject of the use of force in connection with the repression of crime").

[27] On the merits, the majority determined that, as a matter of international law, the act of endangering lives by shooting toward the raft was not proportional to the suspected delinquency of smuggling *mezcal* (a "native liquor") into the United States. But President Wilson's reversal of the officer's sentence did not amount to a denial of justice. *Id.* at 122, para. 6.

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When the United States–Mexico General Claims Commission resumed its operations in 1934, the State Department lawyer in charge of defending U.S. interests found himself overwhelmed by a backlog of nearly eight hundred Mexican claims (Powers, p. 210). Powers describes that one strategy used by State Department lawyers to "avoid the legal question of whether a denial of justice had occurred" was to argue that "even if a denial of justice had occurred, compensation would be negligible because the decedents had not earned enough money for their deaths to have had a significant financial impact on dependent relatives" (Powers, pp. 212–13). U.S. lawyers also argued that "Mexican citizens killed by US law enforcement agents had been bandits, smugglers, or generally 'bad men'" (Powers, p. 214). Finally, they argued that most of the claimants present in the United States had lost their Mexican nationality and were ineligible to seek redress from an international tribunal (Powers, p. 215). U.S. motions to dismiss Mexican claims routinely included the assertion that stateless persons lack protection under international law, and that "however much they are maltreated, International Law cannot aide them."[28] Powers acknowledges that disputing a claimant's nationality was not unusual in international arbitration; in her view, what was distinct was "the scope and scale" of the United States' deployment of this strategy (Powers, p. 217).

The General Claims Commission was ultimately shuttered in 1937, with outstanding claims resolved by means of a negotiated Global Settlement. Among the factors contributing to the decision to abandon the Commission, Powers cites the inability to resolve core disputes about "whether the United States might be held accountable for racialized state violence under international law" (Powers, p. 234). Although the commissioners remained unwilling to address systemic violence, Powers concludes that the Commission's creation, work, and ultimate collapse "reveals how a legal institution designed to reproduce existing power relations came to be transformed into a forum capable of challenging the legitimacy of established power hierarchies" (Powers, p. 238). She observes that "the State Department's use of arbitration to promote the power of US investors abroad [was] tempered by arbitration's potential to cast international legal scrutiny on US government policies at home" (Powers, p. 108). In her view, it is no coincidence that state-to-state mass claims settlement has given way to investor-state dispute settlement, in which "capital-exporting states d[o] not have to expose their governments to international legal scrutiny in order to protect the interests of their nationals abroad" (Powers, p. 250). But a posture of "international law for thee and not for me" is not sustainable indefinitely, as proponents of greater consistency in U.S. approaches to arbitration recognized.

III. From Diplomatic Protection to State Responsibility

Formulating generalizable legal principles carries the danger of exposing hypocrisy in the form of selective and inconsistent application. The possibility for doctrines developed in the context of international arbitration to operate as double-edged swords was evident to those involved in the International Law Commission's (ILC) work on state responsibility, which

[28] Powers, *supra* note 13, at 217, *citing* Bert L. Hunt, Edward L. Metzler & Benedict M. English, Reply Brief of the United States in the Case of The United Mexican States on Behalf of Sixto Quintanilla v. The United States of America (Oct. 28, 1935).

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Nissel explores in depth. International legal protections for property rights have been characterized both as international law's "'noblest triumph'" and as a tool for "legitimat[ing] international law's dark underbelly of imperialism."[29] Nissel discerns "imprints of both interpretations" in his reading of late nineteenth-century arbitral awards (Nissel, p. 171). By transforming the "standard of civilization" into an international legal standard of alien protection, international arbitrators "decoupled alien protection from the European 'civilization' project" (Nissel, pp. 173–74). The same arbitral practice that enabled colonial dispossession generated doctrines that later reformers used to construct a general law of state responsibility that could be invoked, at least in theory, against powerful states.

Powers notes that unpublished nineteenth-century international arbitral tribunal decisions became influential because they were elevated by professionalized U.S. international lawyers such as John Bassett Moore, Edwin Borchard, and Jackson Ralston, while other opinions were published in journals organized by the *Institut de droit international* (founded in 1873) and the American Society of International Law (founded in 1906) (Nissel, p. 48).[30] Nissel highlights the inception of the *Digest of International Law of the United States* in 1886; its first editor was Francis Wharton, who had served as examiner of claims in the State Department (Nissel, p. 113). In 1896, Moore wrote that "[i]n the conduct of its foreign relations, the Government of the United States has exerted a potent influence upon the development of international law."[31] By the time the Permanent Court of Arbitration was formed during the 1899 Hague Peace Conference, "decisions from the 1868 Claims Commission and other arbitral tribunals like it had become leading sources of international law" (Powers, p. 31).

Just as Anglo-American courts were developing modern tort law in the domestic context, so were international arbitral tribunals articulating a minimum standard of care owed to foreigners. Nissel observes that "[l]iability in the domestic context was labeled 'negligent' and in the international setting 'uncivilized'" (Nissel, p. 136). Former Secretary of State Elihu Root articulated this international minimum standard in a 1910 speech to the American Society of International Law: "There is a standard of justice, very simple, very fundamental, and of such general acceptance by all civilized countries as to form a part of the international law of the world."[32] Carlos Calvo, a founding member of the *Institut de droit international*, famously took a different view. He saw the principles of liability emerging from Intra-American arbitrations as "an exorbitant and fatal privilege, essentially favorable to the powerful states and injurious to the weaker nations, establishing an unjustifiable inequality between nationals and foreigners."[33] On the one hand, as Venezuelan Commissioner José

[29] ALAN TZVIKA NISSEL, MERCHANTS OF LEGALISM: A HISTORY OF STATE RESPONSIBILITY (1870–1960) 171 (2024), *citing* TOM BETHELL, THE NOBLEST TRIUMPH: PROPERTY AND PROSPERITY THROUGH THE AGES 100 (1998); Antony Anghie, *Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law*, 40 HARV. INT'L L.J. 1, 73 (1990).

[30] *See also id.* at 117 (noting that in 1906 "US lawyer-diplomats Elihu Root and James Brown Scott gathered to form the first professional US organization of international law: the American Society of International Law").

[31] *Id.* at 109 n. 341, *citing* JOHN BASSETT MOORE, THE UNITED STATES AND INTERNATIONAL ARBITRATION 3 (1896).

[32] *Id.* at 136, *quoting* Elihu Root, *The Basis of Protection to Citizens Residing Abroad*, Opening Address as President of the American Society of International Law at the Fourth Annual Meeting of the Society (Apr. 28, 1910), *reprinted in* 4 AJIL 517, 521 (1910).

[33] *Id.* at 146, *quoting* CARLOS CALVO, LE DROIT INTERNATIONAL THÉORIQUE ET PRATIQUE, VOL. 1, at 350 (5th ed. 1896).

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Andrade wrote in rejecting a denial of justice claim against Venezuela brought by the United States, "No nation can be required to do for others what she has not been able to do for herself."[34] On the other hand, the idea that "[e]very human being has rights, which civil society is bound to respect," pushed against a national treatment standard.[35] Claims commissioners navigating these tensions often "ruled intuitively, broadly based on general legal principles and their own senses of justice" (Nissel, p. 155).

Even though international claims commissions were established on an *ad hoc* basis to resolve bilateral claims, Nissel details how their cumulative jurisprudence contributed to broader understandings of international obligations—if not rules regulating conduct, then doctrines specifying when a state would bear legal responsibility for conduct and incur an obligation to provide redress. Presiding Commissioner van Vollenhoven lauded the new generation of international arbitral tribunals as "not any longer of the old diplomatic and subservient type, but of a new judicial and independent stamp ... clothed with disinterestedness."[36] The "secondary" rules of international law were forged largely in the context of these *ad hoc* proceedings, even though this was not an intended result.

In Nissel's view, the crucial innovation of international arbitration is the "move from dyadic diplomacy to triadic arbitration," which "opens up the opportunity for independent law-making."[37] Initially, "[t]he Western expectation was that attributions of international liability would be effectively limited to other states" (Nissel, pp. 179–80). However, the net effect of accumulated practice under international arbitration agreements was that international law morphed from a "diplomatic tool" into a "social framework" (Nissel, p. 180). His exhaustively documented study (at times too exhaustively, with detailed footnotes and extensive description that occasionally verges on repetition) is an essential resource in the field. It chronicles how lawyers drew both on "the US practice of alien protection" and "German theories of public international responsibility" to create a legal framework for determining "whether a state has breached its international duties, and what can be done about such a breach"—a framework that "underpins our hope of ordering the world through law" (Nissel, p. 4).

Nissel offers a "phenomenology" of state responsibility constructed from "a series of stories about how merchants and their advocates used legalism to protect private investments abroad [and] ... the unintended consequences of this turn to legalism on fundamental doctrines of international law" (Nissel, p. 5). To tell a more complete story, Nissel explores how the German systematization of public law in general, and German theorists' focus on the conditions of attribution in particular, shaped evolving understandings of how a tribunal could establish "the existence of a breach that was imputable to a state" (Nissel, p. 188). One influential theorist was German-Jewish law professor Georg Jellinek, who viewed

[34] *Id.* at 149, *quoting Joseph Forrest v. The United States of Venezuela*, No. 5 (1885), *in* JOHN BASSETT MOORE, HISTORY AND DIGEST OF THE INTERNATIONAL ARBITRATIONS TO WHICH THE UNITED STATES HAS BEEN A PARTY, VOL. 3, at 2948 (1898).

[35] *Id.* at 154, *quoting* Lecture Notes of John Basset Moore, Columbia Law School Archives, Box 21, at 3.

[36] C. van Vollenhoven, *International Arbitration, Past and Present*, 88 ADVOCATE OF PEACE THROUGH JUSTICE 542, 543–44 (1926).

[37] NISSEL, *supra* note 29, at 179, *citing* Thomas M. Franck, *On Proportionality of Counter-measures in International Law*, 102 AJIL 715, 717 (2008).

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international law as possessing a "proto-constitutional quality" (Nissel, p. 201). This presaged Italian jurist Dionisio Anzilotti's effort to elaborate the principles of state responsibility in the first monograph devoted exclusively to this topic in 1902.[38] Anzilotti was a legal advisor to the Italian foreign ministry and a founding judge and president of the Permanent Court of International Justice (PCIJ). By rejecting a requirement of fault under domestic law for state responsibility to attach under international law, Anzilotti severed international law from domestic analogies (Nissel, p. 212). As articulated by Pierre-Marie Dupuy, "[t]he act or 'wrongful act' results only from the gap existing between the actual conduct of the State (by intermediary of its agents) and the substance of the rule of law applicable in the situation considered."[39] Attaching international legal consequences to the divergence between state behavior and an applicable international legal rule created the possibility of an objective legal regime for states.

Despite the attractive simplicity of these formulations, consensus remained elusive. The *Institut de droit international* adopted a set of principles on state responsibility for injuries to aliens in 1927, but a 1930 conference in The Hague attended by forty-seven governmental delegations failed to agree on draft articles (Nissel, pp. 263, 267). Latin American delegations to The Hague wanted to focus on a broader conception of state responsibility, whereas international lawyers from the United States and Europe prioritized the law of alien protection (Nissel, p. 270).

When Sir Hersch Lauterpacht drafted the agenda for the newly formed International Law Commission in 1948, he "recommended codifying state responsibility as a kind of *ersatz* criminal law, a regime of international sanctions modeled as similarly as possible on its domestic *doppelganger*" (Nissel, p. 14).[40] The ILC's first two special rapporteurs on the topic, Francisco Victor García Amador and Roberto Ago, saw post-World War II developments in international law as supporting the criminal responsibility of states as well as that of individuals, and they emphasized "the need to combat violations of duties 'owed to the international community as a whole.'"[41] Yet the history of interstate arbitrations that found states liable for injuries to foreigners did not support a criminal or punitive notion of state responsibility.

García Amador's 1955 article on "State Responsibility in the Light of the New Trends of International Law," published in the *American Journal of International Law*, articulated a vision of international law with individuals as its subjects and human rights as its central purpose.[42] This vision presaged the approach of the drafters of the 1987 Restatement (Third) of the U.S. Law of Foreign Relations, who were both criticized and praised for

[38] *Id.* at 210, *citing* DIONISIO ANZILOTTI, TEORIA GENERALE DELLA RESPONSABILITÀ DELLO STATO NEL DIRITTO INTERNAZIONALE [GENERAL THEORY OF STATE RESPONSIBILITY IN INTERNATIONAL LAW] (1902).

[39] Pierre-Marie Dupuy, *Dionisio Anzilotti and the Law of International Responsibility of States*, 3 EUR. J. INT'L L. 139, 141–42 (1992).

[40] *See* Hersch Lauterpacht, *A Survey of International Law in Relation to Codification of the International Law Commission* (1948), *in* LAUTERPACHT, INTERNATIONAL LAW. VOL I: THE GENERAL WORKS 513 (Eli Lauterpacht, ed., 1970).

[41] Martti Koskenniemi, *Solidarity Measures: State Responsibility as a New International Order?*, 41 BRIT. Y.B. INT'L L. 337, 338–39 (2002), *citing* García Amador, *International Responsibility, Second Report*, YILC I957/II, at 112–14; Roberto Ago, *Sixth Report* YILC I976/II-I, at 24–54, especially 29, 53.

[42] NISSEL, *supra* note 29, at 272, *citing* Francisco Victor García Amador, *State Responsibility in the Light of the New Trends of International Law*, 49 AJIL 339 (1955).

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emphasizing state responsibility to protect human rights.[43] Like Nissel, Powers also challenges the narrative that international arbitration has always focused on investment protection. In her view, the legacy of these tribunals could have included developing enforcement mechanisms for international human rights law, in addition to international investment law. Instead, these two branches of law and their enforcement have followed different trajectories, such that "US-owned and multinational corporations with assets or plants abroad are now able to use international law to challenge foreign taxation, labor protections, or environmental regulations, while the US government has become increasingly insulated from international legal challenges concerning state violence against Native nations, foreign nationals, migrants, and asylum seekers" (Powers, p. 246).

Nissel recounts that dueling ideas of state responsibility as a "constitutional framework for all international enforcement actions" rather than simply "tortious remedies for alien injuries" stalled work in the ILC and prompted the ILC secretariat to reach out to professors Louis Sohn and Richart Baxter to revise a draft convention that had been prepared in 1929 under the auspices of Harvard Law School (Nissel, p. 273). In the end, neither initiative bore fruit in the ILC; García Amador was "flayed by his ILC colleagues" when he presented his findings, in sessions dominated by "intellectual bickering" (Nissel, p. 275). García Amador viewed the treatment of his reports by the ILC and the UN General Assembly's Sixth Committee as a product of "one of the most aggressive and demagogic propaganda campaigns in the history of the United Nations," waged by "a group of countries which had never been concerned with the development and codification of international law, but had customarily opposed them," and who had "suddenly tried to pose as the champion of the progress of international law and as the defender of its principles."[44] Nissel expresses sympathy for this "well-intentioned internationalist" whose "goal had been to fight the international standard of justice," but who instead faced intense criticism for promoting it (Nissel, p. 284–85, 285 n. 166).

By 1957, "agreement over codification was no longer about whose legal argument was most persuasive, but rather which political bloc made up the membership on the ILC" (Nissel, p. 278). Italian international lawyer Roberto Ago, who had addressed state responsibility in his 1939 Hague lectures, advocated "separating the contentious codification project of alien protection from the progressive development of general principles of state responsibility, which need not be based on past arbitral practice" (Nissel, p. 280). The ILC passed the baton of state responsibility to Ago. Georg Nolte has characterized Ago's mandate as the new ILC special rapporteur as "the result of a compromise between the traditional Western approach of viewing the law of state responsibility as primarily one of responsibility

[43] *Compare* Thomas E. Carbonneau, *The Convergence of the Law of State Responsibility for Injury to Aliens and International Human Rights Norms in the Revised Restatement*, 25 VA. J. INT'L L. 99, 101 (1984) (criticizing proposed section 711 for "eliminat[ing] virtually all of the accepted concepts, definitions, and consecrated formulae which applied in state responsibility practice, replacing them with more abstract and less specific human rights language") *with* Daniel T. Murphy, *The Restatement (Third)'s Human Rights Provisions: Nothing New, But Very Welcome*, 24 INT'L L. 917, 919 (1990) ("celebrat[ing]" the inclusion of human rights provisions as "a testament ... to the heightened consciousness regarding fundamental human rights and the necessity for their protection that has occurred during the twenty-five or so years since the prior restatement").

[44] NISSEL, *supra* note 29, at 283, *quoting* Report of the International Law Commission on the Work of Its Thirteenth Session, UN Doc. A/CN.4/141, 1 May to July 1961, Official Records of the General Assembly, Sixteenth Session, Supp. No. 10 (A/4843), Extract from the INT'L L. COMM'N Y.B., VOL. II, at 207–08, para. 51 (1961).

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for injuries to aliens, and the demand by representatives from the socialist and some Third World states to codify the rules of responsibility for the violation of the most important rules of international law," in particular those relating to peace and security.[45] In Ago's view, as recounted by Nissel, "the UN could succeed only if international law could stand up to states" (Nissel, p. 289).

Nissel attributes Ago's relative success to "his capacity to construct a language of state responsibility that resembled US and German doctrines, but without connecting them" (Nissel, p. 297). Nissel views the ILC's doctrine as "a form of what Chilean law professor Arnulf Becker Lorca calls *mestizo* international law . . ., a hybrid of Anglo- and Latin American contributions born of a secularized imperialism that arose within the new world."[46] Nissel offers a provocative metaphor of state responsibility as "a modern iteration of international love" that is "both necessary and impossible."[47] With the appointment of James Crawford as special rapporteur in 1998, "lawyers were able to reformulate the same rules of international hospitality that were first used to impose reparative duties upon weak states into broad principles that could be wielded by those same weak states against the Great Powers" (Nissel, p. 301). Critics of this approach argued that by "unmoor[ing] state responsibility from the unpleasant but effective limitations of international practice," the ILC risked "seriously compromis[ing]" the deterrent effect of imposing international responsibility by "leaving room for argument in every conceivable case of potential responsibility."[48] Ultimately, Nissel agrees with the criticism that state responsibility is fluid rather than fixed, but he does not see this as a fatal flaw; rather, he offers a more sanguine characterization of the doctrine of state responsibility as "a pliable one that has been continuously made, unmade and remade to address the specific needs of those invoking its name" (Nissel, p. 327).

IV. Concluding Thoughts: Contemporary Echoes

Joseph Weiler has said that "[a]t the heart of state responsibility is a regime of consequence."[49] Yet as of December 2025, U.S. strikes on alleged narcotrafficking boats in the Caribbean and Eastern Pacific had killed over one hundred people.[50] Russia's campaign to gain control of Ukraine continued largely unabated.[51] Four hundred thousand people had

[45] Georg Nolte, *From Dionisio Anzilotti to Roberto Ago: The Classical International Law of State Responsibility and the Traditional Primacy of a Bilateral Conception of Inter-state Relations*, 13 Eur. J. Int'l L. 1083, 1097 (2002); *see also* Nissel, *supra* note 29, at 287.

[46] Nissel, *supra* note 29, at 297, *citing* Arnulf Becker Lorca, Mestizo International Law: A Global Intellectual History 1842–1933 (2015).

[47] *Id.* at 300, *citing* Martti Koskenniemi, *Human Rights, Politics and Love*, *in* The Politics of International Law 153 (2011); U2, *With or Without You*, The Joshua Tree (1987).

[48] *Id.* at 324–25, n. 83, *quoting* Philip Allot, *State Responsibility and the Unmaking of International Law*, 29 Harv. Int'l L.J. 1, 2 (1988).

[49] *Id.* at 308, *citing* Joseph H. H. Weiler, *Editorial: Crime and Punishment: The Reification and Deification of the State (A Footnote to the Syria Debate)*, 24 Eur. J. Int'l L. 993, 993 (2013).

[50] Joe Walsh, *U.S. Strikes 2 More Alleged Drug Boats in Pacific, Bringing Total Death Count to Over 100*, CBS News (Dec. 18, 2025), *at* https://www.cbsnews.com/news/strikes-two-more-alleged-drug-boats-total-death-count-over-100.

[51] Jonathan Landay, Erin Banco & John Irish, *US Intelligence Indicates Putin's War Aims in Ukraine Are Unchanged*, Reuters (Dec. 22, 2025), *at* https://www.reuters.com/world/europe/us-intelligence-indicates-putins-war-aims-ukraine-are-unchanged-2025-12-19 (indicating that "U.S. intelligence reports continue to warn

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been killed in Sudan in the past two and a half years, and eleven million had been displaced.[52] Attacks by Israeli settlers against Palestinians in the West Bank were on the rise, and the population in Gaza continued to experience displacement, violence, and high levels of food insecurity.[53] And in February 2026, the United States and Israel attacked Iran in violation of the UN Charter, with a military response by Iran that exceeded the bounds of lawful self-defense.[54] The apparent lack of consequences for international and domestic law-breaking has made the post-World War II international legal order feel ever-more precarious, if not entirely illusory.

In the late nineteenth and early twentieth centuries, the United States championed international arbitration as a preferred means for resolving conflicts between states. Former U.S. Secretary of State Elihu Root was awarded the 1912 Nobel Peace Prize "for having pursued the aim that conflicts between states must be resolved by arbitration."[55] Yet as David Bederman has observed, and Nissel's and Powers's books reflect, "[a]lthough the terms of many of the treaties establishing the claims settlements were nominally reciprocal (that is, nationals of both parties could bring claims), in practice, this was rarely the case."[56] International law must continually navigate the dual challenges of sovereign equality and the unequal power of states. Until recently, the United States exercised its unequal power in the name of principles that many other countries found appealing, and that they could use to hold a mirror up to the United States' own shortcomings. But the current U.S. president has said that the only limiting principle for U.S. conduct is his "own morality."[57] A core challenge for this generation's international lawyers will be to pursue safety and stability without foregoing human rights and small-d democratic values, when the most powerful states no longer even pay lip service to those values. Hence Carney's reference in his Davos address to the importance of new coalitions based on "variable geometry, in other words, different coalitions for different issues based on common values and interests."[58] In the immediate term, this "variable geometry" included a new energy deal with India despite persistent concerns about Indian interference in

that Russian President Vladimir Putin intends to capture all of Ukraine and reclaim parts of Europe that belonged to the former Soviet empire").

[52] Center for Preventive Action, *Civil War in Sudan*, COUNCIL FOR. REL. (Apr. 21, 2026), *at* https://www.cfr.org/global-conflict-tracker/conflict/power-struggle-sudan.

[53] United Nations Office for the Coordination of Humanitarian Affairs (OCHA), *West Bank Monthly Snapshot—Casualties, Property Damage and Displacement, November 2025* (Dec. 17, 2025), *at* https://www.ochaopt.org/content/west-bank-monthly-snapshot-casualties-property-damage-and-displacement-november-2025; IPC Global Initiative, Special Brief, Integrated Food Security Phase Classification, *Gaza Strip: Famine Conditions Offset, But Situation Remains Critical* (Dec. 19, 2025), *at* https://www.ipcinfo.org/fileadmin/user_upload/ipcinfo/docs/IPC_Gaza_Strip_Acute_Food_Insecurity_Oct2025_Apr2026_Special_Brief.pdf.

[54] Edith M. Lederer & Farnoush Amiri, *UN Chief Condemns U.S.-Israeli Attacks on Iran During Emergency Security Council Meeting*, PBS NEWS (Feb. 28, 2026), *at* https://www.pbs.org/newshour/world/un-chief-condemns-u-s-israeli-attacks-on-iran-during-emergency-security-council-meeting.

[55] *Elihu Root—Facts*, NOBELPRIZE.ORG, *at* https://www.nobelprize.org/prizes/peace/1912/root/facts.

[56] David J. Bederman, *The United Nations Compensation Commission and the Tradition of International Claims Settlement*, 27 N.Y.U. J. INT'L L. & POL. 1, 3 (1994); *see id.* at 6 (observing that "claims settlement practice has retained—even in this century—coercive, unilateral, and fundamentally inequitable features").

[57] Maya Yang, *"I Don't Need International Law": Trump Says Power Constrained Only by "My Own Morality,"* THE GUARDIAN (Jan. 8, 2026), *at* https://www.theguardian.com/us-news/2026/jan/08/trump-power-international-law.

[58] Carney Davos Address, *supra* note 2.

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Canadian domestic affairs, and full-throated (if later tempered) support for U.S. military actions in Iran.[59]

The histories Nissel and Powers reconstruct remind us that the Athenians' logic—that justice arises only between equals—has always competed with the Melians' counterclaim that general principles serve the interests of all, including the powerful. What is new is not the gap between rhetoric and reality, but the abandonment by the principal architect of the post-war order of even the pretense of principle. These books leave us with the question whether international law can survive as "legend"—a set of doctrines and shared understandings built from accumulated practice and meaningful enough to shape state conduct—alongside heightened contestation of, and disillusionment with, its mythological foundations. Countries need not abandon the "hope of ordering the world through law" (Nissel, p. 4). Yet what enduring international legal frameworks will look like—and who can serve credibly as their custodians—remain to be seen.

[59] Prime Minister of Canada, Statement by Prime Minister Carney and Minister Anand on the Situation in the Middle East (Feb. 28, 2026), *at* https://www.pm.gc.ca/en/news/statements/2026/02/28/statement-prime-minister-carney-and-minister-anand-situation-middle-east; John Paul Tasker, *Carney Signs Deal Worth Billions in Diplomatic Breakthrough with India's Modi*, CBC NEWS (Mar. 2, 2026), *at* https://www.cbc.ca/news/politics/carney-modi-canada-india-deal-9.7110805; Nadine Yousif, *Canada's Mark Carney Tries to Strike a Balance on Iran*, BBC NEWS Mar. 6, 2026, *at* https://www.bbc.com/news/articles/cvg1124027go.

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