***Nissel, Alan Tzvika*: Merchants of Legalism: A History of State Responsibility (1870-1960).** Cambridge UK: Cambridge University Press 2024. ISBN 978-1-009-37864-2 (hardback). 418 pp. £105.00

To the lawyers and students of the 21st century, the law of state responsibility is an integral and indispensable branch of general international law. Yet writing its history, or even tracing how this branch of law has taken shape, is an enormously challenging task. Any attempt to trace its development quickly reveals a story that is non-linear, discontinuous, and deeply entangled. There is no definitive moment marking the 'birth' of state responsibility, nor a stable consensus on what 'state responsibility' denotes. Even the codification of the 2001 Articles on State Responsibility – often treated as a milestone – emerged from a long contested process.

Against this backdrop, Nissel's *Merchants of Legalism* makes a remarkable intervention. The book does not assume a single, pre-ordained doctrine of state responsibility waiting to be discovered; rather, it reconstructs the diverse historical contexts in which lawyers, institutions, and states gave meaning to the term across the 19th and 20th centuries. As Nissel reminds us, 'there is no objective thing called "state responsibility."' (p. 5) Rather than presenting a single genealogy, the author identifies three episodes that have been instrumental in shaping what is known today as state responsibility: '(1) the US arbitral practice in the New World; (2) the German theorization of public law in the setting of its national unification and (3) the institutional effort to codify state responsibility within world bodies.' (p. 4)

What unites these otherwise distinct strands is the pivotal role of lawyers. As the title of the book shows, lawyers acted as 'merchants' of legalism – figures who 'purvey[ed] legitimacy on behalf of their clients' and promoted 'expansive view of international law' (p. 27). Through the work of practitioners, philosophers, and publicists (pp. 20, 27), distinct but converging visions of state responsibility emerged. This focus on the agency of lawyers and legalism gives the book a highly novel perspective.

The first episode, developed in Chapters 2 and 3, focuses on the the turn of the United States (US) to arbitration to protect foreign investment in the 19th century. In this context, state responsibility was 'a technical term they [i.e., practitioners] invoke when it is appropriate to address international claims – especially international investment disputes' (p. 21). Since the first half of the 19th century, international arbitration was conducted between the US and Latin America to address disputes about protection of foreign commerce. For the US, arbitration was a tool to curtail British influence and expand its own commercial reach (p. 56); for Latin American states, arbitration signalled recognition of their sovereignty, independence from European domination, and access to much-needed capital (p. 64). However, this balance changed in the second half of the 19th century: the increased presence of US entrepreneurs and corporations in Latin America, combined with the instable

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domestic politics in this region led to more international claims brought to the US State Department (pp. 52, 64-66). Under Hamilton Fish's tenure as Secretary of State from 1869, the Department adopted 'bureaucratic professionalism' (p. 69) and began systematically favouring arbitration as a mechanism for alien protection.

The Lieber Tribunal, created between the US and Mexico, epitomised this turn. It processed over 2,000 claims and articulated early standards regarding causation, attribution, recognition, and the 'international minimum standard' (pp. 156-163). Yet its jurisprudence was inconsistent (pp. 80-86), and its deeper legacy lay in the imposition of the 'standard of civilization': sovereignty for Latin American states became conditional upon their ability to safeguard foreign property (pp. 62-63). As such, the author considers state responsibility in this context as 'a mask for US power in the region' (p. 107).

The US legalism underlying this 19th-century practice had distinctive features: reliance on third-party tribunals, professional lawyers, binding arbitral awards, and decision based on legal rules (pp. 87-89). The US embrace of arbitration reflected its complex, pragmatic attitude towards international law, its endorsement of legalism, and its assertion of regional hegemony over Latin America (pp. 110-111). This attitude continued towards the establishment of the Permanent Court of Arbitration at the end of the 19th century.

Chapter 3 reflects on two consequences of intra-American arbitration: the legalisation of alien protection and the creation of state responsibility. Before 1870, the US protected citizens abroad mainly by domestic law enforcement and international diplomacy. Institutionalised arbitration transformed such claims into international disputes resolved technically by courts and tribunals (pp. 122-123). The development of the standard of civilisation crystallised the legal, political, and cultural confrontation between the US and Latin America (pp. 130-131). For the US, property rights and civilised protection to all aliens were integral to the law of nations and necessitated the international minimum standard (p. 132). In contrast, Latin Americans considered such a standard as 'offend[ing] their sense of national pride' (p. 144); they argued that 'so long as states provided the same level of protection to both, no denial of justice claim could arise' (p. 145). Their repulsion against international standards of protection overlapped with their rejection of state responsibility itself (pp. 147-148). Arbitration in this period also displayed a strong indemnification approach, emphasising damages and injuries (pp. 164, 167), as well as analogies drawn from domestic law (p. 172). Yet the international minimum standard was unevenly applied: new states were held responsible more expansively than old powers (p. 183). By the end of the century, disillusioned by this inequality, Latin America had become a determined opponent of international arbitration.

The second narrative turns to German-speaking legal scholars of the same period, who approached international responsibility through the lens of

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domestic public law. For them, state responsibility was 'primarily an iteration of state liability under *domestic* public law', which they sought to systematise as a coherent field (p. 31). The author distinguishes between two successive waves of German jurists. The first, represented by August Wilhelm Heffter, Johann Kaspar Bluntschli, and Heinrich Triepel, held that 'the reality of sovereignty left little room for a robust conception of state responsibility' (p. 187). They made the first efforts to conceptualise state responsibility as 'a legal category of its own' focusing on the conditions of attribution, rather than associating it with the ability to enforce against the alleged breach (p. 188). The second wave of lawyers, including but not limited to Georg Jellinek, Hans Kelsen, Karl Strupp, and Hersch Lauterpacht were inclined to impose more legal constraints on states, and even held that the law of the international community preceded the will of states. The views of this intellectual community were shared also by lawyers beyond the German-speaking scholarship, including William Edward Hall, Dionisio Anzilotti, and Lassa Oppenheim.

This German intellectual tradition was distinctive in the sense that it 'conceived of international law as a genus of public law' (p. 218), and eventually produced a systematic vision of state responsibility as 'a general regime of international enforcement actions' (p. 248). Unlike the US arbitral tradition, which bound responsibility to national interests and regional hegemony, the German jurists were more concerned with preserving sovereignty through legal abstraction and systematisation (pp. 241-242). Strikingly, the two traditions developed in near isolation: German theorists rarely invoked the American practice of alien-protection arbitration in their doctrinal writings (e. g. pp. 205, 230).

The author's discussion is attuned to contemporary readers: it highlights themes that remain familiar – such as reparation, the balance between sovereignty and responsibility, and the sources of rules. At the same time, the discussion also draws comparisons with elements that have shifted, such as whether fault and attribution constitute inherent parts of state responsibility. This mode of presentation is particularly helpful, given how much the conceptualisation of responsibility has evolved. At times, Nissel's interventions come at particularly apt moments in the historical narrative – for example, in his reflections on the hegemonic dimensions of arbitral practice, and on the ways German scholars' understandings of responsibility transformed during the World Wars.

At the same time, the public/private law dichotomy outlined in this chapter invites reflection. Nissel's contrast between the private-law orientation of US arbitration and the public-law framework of German theorists is both illuminating and provocative (pp. 273-277). Yet, the boundary was not always clear-cut. Some German theories rested on the assumption of a horizontal international society in which enforcement of state responsibility

occurred among formally equal states – a premise that itself bears a 'private' character. Indeed, the author notes Heffter's reference to state responsibility as 'internal private responsibility' (p. 191), and Lauterpacht's conceptualisation of state responsibility as a twin discipline to tort law (p. 237). These examples suggest that the boundary between public and private was always relative rather than categorical.

The third story concerns the rivalry over the codification of state responsibility in the 20th century. By this time, the US arbitral tradition and the German public-law conception coexisted, and the latter had gained traction among jurists from Latin America and other semi-peripheral regions. The 'move to international institutions' and the attempt to codify the law of state responsibility brought a fundamental question to the forefront: should codification rest on the precedents of alien-protection practice, or should it be oriented toward 'the future needs of the international community' (p. 250)? The former approach was supported by economically advanced states that had frequently been claimants in arbitral proceedings, while the latter was championed by Latin American and other developing states keen on abolishing the legacy of alien protection. This competition played out in successive codification initiatives, including the work of the Committee of Experts for the Progressive Codification of International Law in the 1920s, the Harvard Law School drafts, the Institut de Droit international and other professional bodies, as well as the 1930 codification conference of the League of Nations. Figures such as José Gustavo Guerrero, Green Hackworth, Edwin Borchard, and Walther Schücking emerge in Nissel's account as emblematic actors in this contested terrain. Yet none of the above initiatives succeeded: Latin American resistance to codifying rules on alien protection prevented any consensus from being reached.

The decisive stage came with the International Law Commission (ILC), where codification efforts were both constrained by earlier disputes and destined to shape modern doctrine. The first Special Rapporteur, García Amador, framed the protection of individuals and human rights as the central aim of the regime. While conscious of the critiques of alien protection, he pursued an incremental approach by continuing to elaborate rules in this area. This provoked fierce resistance within the ILC (p. 275), particularly from members representing Latin America, the Soviet bloc, and other semi-peripheral states who were eager to reflect postcolonial realities. Among the critics was Italian lawyer Roberto Ago, whose proposal to codify the '*general* rules governing the international responsibility of States' (p. 289) quickly gained overwhelming support. The changing composition of the Commission in the 1960s, when Third World states achieved a majority, made Ago's project politically feasible (pp. 290-291). His success was further bolstered by a shift in Latin American legal thinking towards universalism and formalism (p. 293). For Latin American states, this turning point represented the chance

 DOI 10.17104/0044-2348-2026-1-431

to 'finally avenge the disgrace of their earlier losses in the fora of international arbitrations' (p. 288).

In the epilogue, Nissel situates the three narratives of state responsibility within a broader historical trajectory, which he captures in three stages. The first is pre-legalism, when, prior to the 19th century, findings of responsibility were 'either unilaterally asserted […] or bilaterally negotiated […]' (p. 303). The second is ad hoc legalism, represented by 19th-century arbitral practice in the Americas, where responsibility was determined case by case, without reference to a general legal framework (p. 305). The third is institutional legalism, shaped in the 20th century by German theorists who 'envisioned an international law that was complete and completely necessary', one in which any breach necessarily triggered responsibility (p. 306). This vision was realised through the institutional consolidation of international law, particularly the codification efforts of the ILC after the two World Wars. Yet, the author points out in a thought-provoking way that institutional legalism did not replace ad hoc practice. Instead, the two have long coexisted: US-driven arbitration persisted well into the 21st century, creating a 'duality of state responsibility' between general rules of state responsibility and investment arbitration (pp. 307, 315).

Despite their differences, the three traditions share certain unifying themes. Across contexts, state responsibility has been framed surrounding the consequences of breach, the reliance on legalism as method, the embedding of political interests within legal discourse, and the recognition that the field remains 'more a doctrine of exceptions than of general rules' (pp. 308-311).

The analysis in this part functions as a strong recap and conclusion to the study. It gives the reader a clear sense of the historical depth of state responsibility, while also showing how varied traditions have interacted and coexisted across centuries. At the same time, the epilogue gently opens the door to further questions. Readers may be curious about how these trajectories continue to shape the contemporary law of state responsibility, or how the different legacies interact in today's doctrinal and institutional frameworks. These are questions that Nissel has raised in other work,[1] and gesturing to them here might have added yet another layer of richness. But even without such an extension, the epilogue closes the historic study on a fitting note: one that is reflective, synthetic, and suggestive of new paths for research.

Overall, this book presents an exceptional historical narrative: nuanced, engaging, and richly contextualised. It deftly balances historical reconstruction with analytical insight, illustrating how legalism intertwined with broader social, political, and cultural developments. As the author notes in the first chapter, the work weaves together biological, chronological, critical,

1 Alan Nissel, 'The Duality of State Responsibility', Columbia HRLR 44 (2013), 793-858 (in particular 845-854).

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diplomatic, epochal, geological, political, and sociological threads (pp. 18-19). Inevitably, any summary provided in this review would have to leave out significant subtleties and rich details.

The book's major contribution is its illumination of the history of state responsibility. While some episodes, such as 19th-century arbitration for alien protection or the failed codification attempts of the early 20th century, were not previously unknown or unexamined,[2] Nissel's achievement lies in connecting these strands and mapping their genealogies, iterations, causal relationships, and divergences in the most comprehensive way achieved to date. The book clearly shows how contemporary conceptualisation of state responsibility has been constructed by multiple groups of lawyers, blending practice, theory, and institutional innovation. The narrative is strengthened by a wide array of sources: archival documents, arbitral awards, codification drafts, writings of publicists, and modern commentary, in English, French, and German.

Minor points could be noted. The continuity between the three episodes might be emphasised more; for example, the statement that Latin American and semi-peripheral lawyers inherited the German public law tradition (p. 248) – a key point that links Chapters 4 and 5 – is not fully substantiated. Some threads across chapters, such as the Lieber Tribunal's reliance on intent behind domestic legislation (p. 81) and German theories that exclude fault in triggering responsibility (p. 212), could have been more clearly compared and connected.

Moreover, Roberto Ago's contributions might benefit from more emphasis. While his theoretical work is noted in Chapter 4, the discussion is relatively brief (pp. 219, 241). Given Ago's distinctive approach to constraining sovereignty with state responsibility,[3] a bit more elaboration could have helped highlight its originality. In Chapter 5, the narrative understandably emphasises the role of the ILC's changing composition (p. 297) and appears more sympathetic to García Amador, though more attention to Ago's proposal itself would have further enriched the account.

These are minor observations on an otherwise outstanding work. Nissel offers a sophisticated, multi-layered intellectual history that convincingly shows state responsibility as a product of centuries of practical and theoretical engagement by lawyers. This book is strongly recommended for anyone seeking a deep understanding of the evolution of state responsibility in international law.

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2 For example, Kathryn Greenman, *State Responsibility and Rebels: The History and Legacy of Protecting Investment Against Revolution* (Cambridge University Press 2021).

3 See for example, 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', EJIL 13 (2002), 1083-1098.

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Dr. Bertold Huber, VorsRiVG a.D., in:
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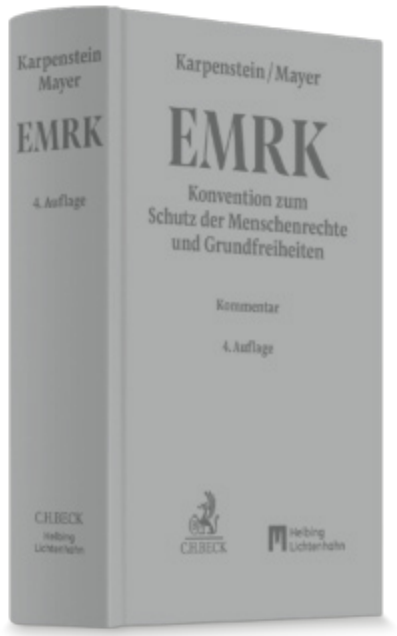

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