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The Responsibilities of States in International Law

An Overview

Mending Femurs

As long as humans have occupied this earth, they have fought and sought to make amends. A student once asked Margaret Mead (1901–1978), an American anthropologist, when exactly civilization began. In a response that must have surprised her student, Mead said that the history of socialization began 15,000 years ago, the age of an excavated human skeleton containing a broken femur that was healed. To Mead, the fact of the mended femur established that humans had begun caring for one another. Without the social support to mend it, a broken leg was a death sentence carried out by roaming predators. As intertribal contacts increased, humans developed further rules of cooperation such as the fair treatment of travelers. Abraham of Ur, the patriarch of three world religions, was known for his generosity to strangers. Upon the arrival of guests to his tent, Abraham is said to have washed their feet, provided cooked food and offered a place to sleep.[1] Over time, the custom grew into a broader duty of hospitality imposed upon individuals and communities alike.

Fast forward to the modern era of nation-states when governments employed international law to mandate a minimum standard of care to foreigners. It was the legalized duty of hospitality that would form the basis of state responsibility, the modern set of enforcement rules that is the subject of this study. This history is an account of how a handful of American and European lawyers established the first mechanisms of legality to hold states accountable for failing to mend the broken femurs of foreigners.

[1] *See* Genesis 18:4.

A Sacred Doctrine

To international lawyers, state responsibility is a sacred doctrine. As the legal framework that determines whether a state has breached its international duties, and what can be done about such a breach, the existence of state responsibility underpins our hope of ordering the world through law. It is one of the most frequently referenced doctrines of international law. Yet, unlike other international legal norms, state responsibility is a relatively young one. Whereas the concept of state sovereignty was in wide usage since the sixteenth century,[2] the term "state responsibility" was rarely used before the late nineteenth century and had no effective meaning prior to 1930.[3] How could it be that such a fundamental doctrine of international law is of such recent origin?[4] The law of nations has existed for as long as there have been nations. But there was never any technical framework to regulate international disputes until the expansion of US and German territories in the nineteenth century.

I trace the creation of state responsibility through three narratives: (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. As a legal framework for resolving interstitial disputes, state responsibility was created sometime in the late nineteenth century. The US and Germanic conceptions of state responsibility, however, were very different. When the League of Nations, and later the United Nations (UN), undertook to codify the field, they had two credible sources upon which to base their work: (1) The US practice of alien protection and (2) German theories of public international responsibility. The UN ultimately codified state responsibility based on German theory, but international practice is still mostly in the field of alien protection.[5] One was

[2] Jean Bodin, *Les Six Livres de la République* (Paris: J. Du Puys, 1576) (sets out classical principles of absolute state sovereignty).

[3] *See* Martti Koskenniemi, "Doctrines of State Responsibility" in James Crawford, Alain Pellet and Simon Olleson (eds.), *The Law of International Responsibility* 45–51 (Oxford: Oxford University Press, 2011) (there is no concept of state responsibility that would not be connected to or seek justification from its recent manifestation as a doctrine of international law); *see also* Table 1.1.

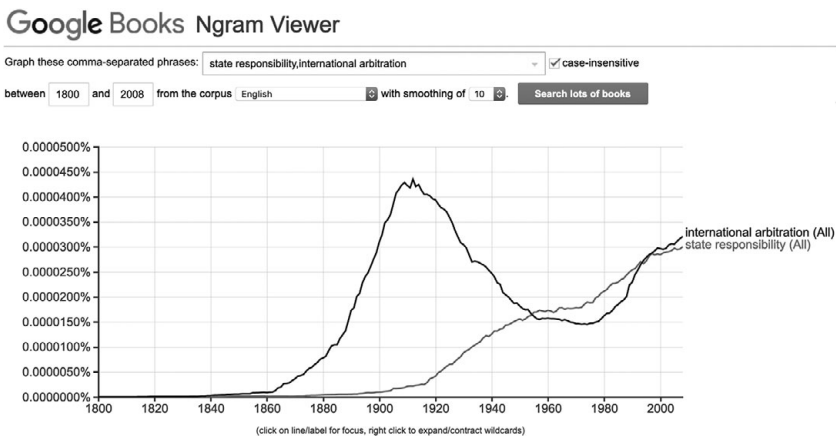
[4] *See* Jean d'Aspremont, *International Law as a Belief System* (Cambridge: Cambridge University Press, 2017), especially at p. 4 (state responsibility as a "fundamental" doctrine of international law).

[5] As will be explained below, the term "alien protection" originated from the Latin "alienus," which means of or belonging to another; namely, something not shared or someone different. The idea of the term is that the law of nations required different protection for Westerners because they were deemed to be different from natives. See Julia Cresswell (ed.), *Oxford Dictionary of Word Origins* (Oxford: Oxford University Press, 2010), at p. 11.

codified by the UN and the other continues to be practiced ad hoc. According to both the narrow (US) and broad (UN) approaches, the existence of state responsibility asserts the legitimacy of international law as the appropriate forum for international dispute resolution.[6]

In sum, this history is a phenomenology of and not a treatise on state responsibility. State responsibility is impossible to define. Despite the legal citations to and commentaries associated with the doctrine, it is important to recognize at the outset of this project that there is no objective thing called "state responsibility."[7] This history is but a series of stories about how merchants and their advocates used legalism to protect private investments abroad. And it is about the unintended consequences of this turn to legalism on fundamental doctrines of international law.

Table 1.1 *State responsibility in books (1800–2008)*[8]



[6] Legitimacy is particularly important to international law because of its "flat," non-hierarchical nature; *see* Alexis Galán, "The Search for Legitimacy in International Law: The Case of the Investment Regime," 43 *Fordham International Law Journal* 79 (2019), at p. 84 ("There is no field in which legitimacy does not appear."). Galán convincingly argues that legitimacy as a concept is a purely evaluative one (as opposed to also being descriptive); it is a thin concept that helps make simple judgments (such as "good" and "bad") as opposed to a thick one (such as "friendly" and "rude"), *ibid* at p. 91.

[7] *See* Yves Dezalay and Bryant Garth Law, "Merchants of Law as Moral Entrepreneurs: Constructing International Justice from the Competition for Transnational Business Disputes," 29(1) *Law & Society Review* 27 (1995), at p. 31 (from where I borrowed this turn of phrase).

[8] This rise in usage is similar in French (though in French there is a higher spike in the 1960s) – Google Ngrams: Jean-Baptiste Michel, Yuan Kui Shen, Aviva Presser Aiden, Adrian Veres, Matthew K. Gray, William Brockman, The Google Books Team, Joseph P. Pickett, Dale Hoiberg, Dan Clancy, Peter Norvig, Jon Orwant, Steven Pinker, Martin A. Nowak and Erez Lieberman Aiden.

Of Modern Origins

The existing literature contains no monographs on the origins of state responsibility.[9] This is the first book-length attempt to provide a history of the topic.[10] What explains this apparent lack of attention to such an important doctrine of international law? One reason is that there is a

[9] Commentators have written histories by way of "introduction" to other agenda, but not as a stand-alone monograph. Existing histories of state responsibility include introductory sections to lengthier studies as well as article-length discussions. *See* Edwin M. Borchard, *The Diplomatic Protection of Citizens Abroad or The Law of International Claims* (New York: The Banks Law Publishing Company, 1915), ∫17; Clyde Eagleton, *The Responsibility of States in International Law* (New York: New York University Press, 1928), ch. 1; Roberto Ago, *L'origine de la responsabilité internationale*, Yearbook of the International Law Commission, 1970, Vol. II, U.N. Doc. A/CN.4/233; Ian Brownlie, "The History of State Responsibility," in R. G. Girardot, H. Ridder, M. L. Sarin and T. Schiller (eds.), *New Directions in International Law: Essays in Honour of Wolfgang Abendroth – Festschrift zu seinem 75. Geburtstag* 19 (Frankfurt: Campus, 1982); Shabtai Rosenne (ed.), *The International Law Commission's Draft Articles on State Responsibility, Part 1, Articles 1–35* (Dordrecht: Nijhoff, 1991), at p. vi; Pierre-Marie Dupuy, "Dionisio Anzilotti and the Law of International Responsibility of States," 3(1) *European Journal of International Law* 139 (1992); 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(5) *European Journal of International Law* 1083 (2002); Jan Arno Hessbruegge, "The Historical Development of the Doctrines of Attribution and Due Diligence in International Law," 36 *New York University Journal of International Law & Politics* 265 (2004); Jan Paulsson, *Denial of Justice in International Law* (Cambridge: Cambridge University Press, 2005), ch. 2; James Crawford, Thomas Grant and Francesco Messineo, "Towards an International Law of Responsibility: Early Doctrine," in Laurence Boisson de Chazournes and Marcelo Kohen (eds.), *International Law and the Quest for Its Implementation* 377–402 (Leiden: Brill, 2010); N.D. Gowda, *State Responsibility in the Present Context: A Critical Study with Reference to the Contemporary Issues under International Law* (Thesis Submitted to University of Mysore, May 2010); Borzu Sabahi, *Compensation and Restitution in Investor-State Arbitration* (Oxford: Oxford University Press, 2011), ch. 2; James Crawford, *State Responsibility: The General Part* (Cambridge: Cambridge University Press, 2013), ch. 1; Robert Kolb, *The International Law of State Responsibility: An Introduction* (Cheltenham: Edward Elgar, 2017), ch. 1; Kathryn Greenman, "Aliens in Latin America: Intervention, Arbitration and State Responsibility for Rebels," 31 *Leiden Journal of International Law* 617 (2018); Katja Creutz, *State Responsibility in the International Legal Order: A Critical Appraisal* (Cambridge: Cambridge University Press, 2020), ch. 2.

[10] Given the immense volume of data through which I had to sift for this study, several historical works and styles have informed my analysis; but none provided a direct road map or methodological framework for researching the history of state responsibility. On the methodology of my research for this book, see chapter 1 of my doctoral dissertation, Alan Tzvika Nissel, *A History of State Responsibility: The Struggle for International Standards (1870–1960)*, dissertation submitted to Helsinki University in satisfaction of LLD degree, 2016, available online at www.stateresponsibility.com/2016/02/blog-post.html, last visited February 2, 2019.

certain level of inevitability to the concept.[11] The idea that a person (or nation) should be responsible for breaking the law is as old as *lex talionis* and inherent in the idea of law as law.

When the twentieth-century dean of legal positivism H. L. A. Hart (1907–1992) set out to write a clear introduction for first-year law students, his resulting work, *The Concept of Law*, became one of the most influential law books of the twentieth century. For Hart, what is critical to the concept of law is its consequentiality. There must be socially acceptable and predictable consequences when the law is broken: "it has consequences definable in terms of the rules, which the system enables persons to achieve."[12] In international law, if states were not held accountable for breaching their international obligations, "then it would be questionable whether anything worthy of the name of international law – and *a fortiori* international responsibility – would be left."[13]

A second reason why the history of state responsibility is so understudied is the *complexity* of the concept. As the late James Crawford (1948–2021) has written, "[r]esponsibility has a bewildering array of meanings, each of which occupies a distinctive role in legal and moral reasoning."[14] State responsibility exercises multiple functions in the institutionalized regime of international law. Its rules determine the following:

1. Existence of an attributable international wrong;
2. Extent to which a State is liable for an international wrong; and
3. Manner in which a State may act to remedy that international wrong.

These multiple roles of responsibility – culpability, imputability and implementation – are unique to international law. In domestic law, culpability rules govern the extent to which the law can impute a civil

[11] According to Clyde Eagleton (1891–1958), "If one inquires as to the origin of obligation in jurisprudence, he is forced back to moral axioms" (*supra* note 9; Eagleton cites Thomas Atkins Street, *The Foundations of Legal Liability* (Northport: Edward Thompson Company, 1906) at p. 67).

[12] Herbert Lionel Adolphus Hart, *The Concept of Law* (3rd ed., Oxford: Oxford University Press, 2012), at p. 31. *See generally* Anthony Townsend Kronman, "Hart, Austin, and the Concept of a Legal System: The Primacy of Sanctions," 84(3) *Yale Law Journal* 584 (1975).

[13] James Crawford and Jeremy Watkins, "International Responsibility" in Samantha Besson and John Tasioulas (eds.), *The Philosophy of International Law* 283 (Oxford: Oxford University Press, 2010), at p. 292.

[14] *Ibid*. I come back to discuss this point further in the Epilogue.

or criminal wrong to the respondent. Punishment generally reflects a level of fault.[15] A legal remedy will generally be justified to the extent that it "fits" the wrong that was done. It is the task of law enforcement institutions to safeguard the justness of domestic law by implementing legal acts consistently and in a like manner. This is the rule of law.

Considering the function of responsibility in the domestic law highlights the problem of responsibility in international law.[16] There are no formal civil or criminal distinctions of international law. The extent to which civil and criminal (or even private and public) remedies are available is a matter of ongoing debate.[17] The nature and purpose of state responsibility are equally open to controversy. Are they based on utilitarian or deontic principles? Are they limited to compliance, or do they extend to retributive elements? Each adjudicator is left to select the particular nature of the responsibility to apply on a case-by-case basis – with little guidance from positive sources. Indeed, even the nomenclature of "state responsibility" conflates the distinction between a state's duties and the legal consequences of breaching them. International lawyers use "responsibility" to mean either and both.[18]

A related explanation for the lack of attention to the doctrine's history is the confusion over its applicability. In 2001, the International Law Commission of the UN (ILC) finalized its draft articles on state responsibility (Draft Articles).[19] The lengthiness and inclusiveness of this international codification process commanded considerable attention from law scholars, many of whom believe that the resulting code has attained

[15] Obligations of result and strict liability concepts, of course, exist as well as an exception to this rule.

[16] *See* Amanda Perreau-Saussine, "A Case Study on Jurisprudence as a Source of International Law: Oppenheim's Influence," in Matthew Craven, Malgosia Fitzmaurice and Maria Vogiatzi (eds.), *Time, History and International Law* 100 (2007); Arthur Nussbaum, *A Concise History of the Law of Nations* (New York: Macmillan, 1947), at p. 61.

[17] As discussed in Chapters 3–5.

[18] As discussed in the Epilogue.

[19] International Law Commission, *Responsibility of States for Internationally Wrongful Acts 2001*, Text adopted by the Commission at its fifty-third session, in 2001, and submitted to the General Assembly as a part of the Commission's report covering the work of that session. The report, which also contains commentaries on the draft articles, appears in Yearbook of the International Law Commission, 2001, vol. II (Part Two). Text reproduced as it appears in the annex to General Assembly resolution 56/83 of December 12, 2001 and corrected by document A/56/49(Vol. I)/Corr.4; reproduced in James Crawford, *Commentaries to the Draft Articles on Responsibility of States for Internationally Wrongful Acts* (Cambridge: Cambridge University Press, 2001).

the reified status of customary international law.[20] But this acceptance has led to a misconception about the relevance of the ILC rules to actual disputes.[21] The Draft Articles were intended to apply only by default, where no other special laws hold force.[22] The ILC code does not apply when there are other, specific rules that do pertain, based on the general principle of *lex specialis derogat legi generali*; namely, when in conflict, specific rules trump general ones.[23] The fact that the ILC doctrine is

[20] *See, e.g.*, Kaj Hobér, "State Responsibility and Attribution," in P. Muchlinski *et al.* (eds.), *The Oxford Handbook of International Investment Law* (Oxford: Oxford University Press, 2008), at p. 553; *Noble Ventures, Inc. v. Romania*, Award, ICSID Case No. ARB/01/11, para. 69 (October 12, 2005). According to Judge James Crawford (1948–2021), "They have been referred to as often as any treaty of the same sort in the period in question, and much more often than most." (Jack Taylor, "Inside the ICJ: Interview with Judge James Crawford," *Harvard Political Review*, May 11, 2020, available online at https://harvardpolitics.com/interviews/interview-with-judge-james-crawford/, last visited June 2, 2020). In a 2017 report, the UN identified at least 392 decisions including those of the ICJ, the ICC and the WTO that authoritatively reference the Draft Articles (UNSG-UNGA, 'Responsibility of States for internationally wrongful acts – Compilation of decisions of international courts, tribunals and other bodies – Report of the Secretary-General – Addendum' (June 27, 2017) A/71/80/Add.1); The report identifies 264 arbitral decisions referencing the Draft Articles. On the total number of investment arbitrations leading to a decision since 2000, see: UNCTAD, Investment Dispute Settlement Navigator (UNCTAD Investment Policy Hub, December 31, 2019) https://investmentpolicy.unctad.org/investment-dispute-settlement/ as cited in Sotirios-Ioannis Lekkas, "The Uses of the Work of the International Law Commission on State Responsibility in International Investment Arbitration: Maintaining the Unity of the Law of State Responsibility through Interpretation?" in J. M. Alvarez Zarate, Panos Merkouris, Andreas Kulick and Maciej Zenkiewicz (eds.), *The Rules of Interpretation of Customary International Law 93* (Cambridge: Cambridge University Press, 2024), at p. 93. *The Rules of Interpretation of Customary International Law*, available online at SSRN: https://ssrn.com/abstract=3719456, last visited May 5, 2021, at p. 1.

[21] *See, e.g.,* my discussion of how four Argentinian gas cases (*CMS Transmission Co. v. Argentine Republic*, ICSID Case No. ARB/01/8, Award (May 12, 2005); *LG&E Energy Corp. v. Argentine Republic*, ICSID Case No. Arb/02/1, Decision on Liability (October 3, 2006); *Enron Corp., Ponderosa Assets, L.P. v. Argentine Republic*, ICSID Case No. Arb/01/3, Award (May 22, 2007); *Sempra Energy Int'l v. Argentine Republic*, ICSID Case No. Arb/02/16, Award, P 391, September 28, 2007) approach the ILC Draft Articles – Alan Tzvika Nissel, "The Duality of State Responsibility," 44(3) *Columbia Human Rights Law Review* 793 (2013), at p. 853. As Martins Paparinskis states: "there is something to be said against the excessive enthusiasm of adopting the ILC formulae wholesale." (Martins Paparinskis, "Circumstances Precluding Wrongfulness in International Investment Law," 31(2) *ICSID Review – Foreign Investment Law Journal* 484 (2016), at p. 488).

[22] *See* para. 1 of the Introduction to the Draft Articles, *supra* 19.

[23] *See* Draft Article 55 ("These Articles do not apply where and to the extent that the conditions for the existence of an internationally wrongful act or the content or implementation of the international responsibility of a State are governed by special rules of international law").

residual in nature[24] seems to have been overlooked in the literature.[25] There is, thus, a duality of state responsibility doctrines: one general and codified, and the specific and largely uncodified.

Since most of the academic attention has focused on the UN, its codification of state responsibility has become identified as *the* doctrine of state responsibility,[26] and its history as *the* history of state responsibility. However, the majority of doctrines of state responsibility – including those regarding the use of force, regional human rights regimes, environmental law, consular law and alien protection – remain either expressly or implicitly outside its purview.[27] Recently, international scholars have begun to question the relevance of the ILC Draft Articles to all international disputes.[28] Some have critiqued its eloquent simplicity

[24] See para. 5 of the Introduction to the Draft Articles, *supra* 19: "In principle, States are free, when establishing or agreeing to be bound by a rule, to specify that its breach shall entail only particular consequences, and thereby to exclude the ordinary rules of responsibility."

[25] In their recently edited book on "Exceptions in International Law," while Lorand Bartels and Federica Paddeu analyze the exceptional structure of ILC doctrine of state responsibility, almost no attention is paid to the biggest loophole of the project – *i.e.*, the distinction between *lex specialis* and *lex generalis* in Draft Article 55 (Lorand Bartels and Federica Paddeu (eds.), *Exceptions in International Law* (Oxford: Oxford University Press, 2020). To Lorand Bartels and Federica Paddeu, "In its simplest form, a rule is a norm that, when its preconditions and international conditions are satisfied, generates a specified outcome" (*ibid* at p. 1). They continue, "Rules regulating conduct, for example, typically state that when a given event occurs (the antecedent), a given legal person must (obligation) or may (a right) engage in a certain type of conduct (the consequent)." Is the exception a part of or a deviation from the rule? Cambridge University criminal law professor Glanville Williams argued that it was the former. To him there really is "no intrinsic difference between the elements of an offence and an exception (or defence) to that offence" (Glanville Williams, "The Logic of 'Exceptions,'" 47 *Cambridge Law Journal* 261 (1988), at pp. 277–278).

[26] James Crawford, "The International Court of Justice and the Law of State Responsibility" in Christian J. Tams and James Sloan (eds.), *The Development of International Law by the International Court of Justice* 71 (Oxford: Oxford University Press, 2013), at p. 81 (it has "encoded" the manner in which we think about *all forms* of international responsibility).

[27] *See* Katja Creutz, *State Responsibility in the International Legal Order: A Critical Appraisal* (Cambridge: Cambridge University Press, 2020), at p. xi ("State responsibility is a blunt tool." "This is why in practice, state responsibility has been taken over by special . . . regimes").

[28] *See, e.g.,* Lekkas, *supra* note 20; The Rules of Interpretation of Customary International Law series, available online at SSRN: https://ssrn.com/abstract=3719456, last visited May 5, 2021 (the ILC Articles on state responsibility "constitute an experiment in international law-making" (p. 1)).

as breeding professional (if not intellectual) laziness.[29] Indeed, the Draft Articles are clearly written and seem easy to apply. Of course, they are not – state responsibility, as Crawford noted, is a particularly loaded doctrine that international courts and tribunals have inconsistently applied in practice.[30]

This book is a critique of the ILC doctrine as well as of the existing academic literature in two important ways: (1) I trace the legal doctrine of state responsibility to its pre-institutional origins in nineteenth-century US and Germany and (2) I explain that development in terms of a *duality of doctrines*. I note that the existing literature's focus on the ILC and its unified doctrine of state responsibility makes it difficult to appreciate how to apply the law to general *as well as to* specific situations, as I will explain in the next section. As such, this book is a *counter-history* of sorts regarding state responsibility – one that complements current accounts of the codified doctrine, but also one that helps situate it within the overall spectrum of international law enforcement theories. It will

[29] *See, e.g.,* Sotirios-Ioannis Lekkas, *ibid* at p. 6 (often times tribunals cite to the Draft Articles axiomatically, as reflective codified law; however, only rarely do tribunals understand or explain why – *e.g.*, as a work of highly qualified writers.) and *ibid* at pp. 10–11 (there is an abundance of decisions in which tribunals proceed to apply the Draft Articles "as self-explanatory to the facts of the case"); Martins Paparinskis, "The Once and Future Law of State Responsibility," 114(4) *American Journal of International Law* 618 (2020), at pp. 624–625 ("A critical reading of practice in support of the ILC Articles may suggest that impressive numbers are not always matched by the quality of reasoning, approval in state and institutional practice, and representativity of the international community. Concerted practice could attempt to reshape, for example, the rule of necessity around the gravity-of-peril axis, or relax the 'only available means' to 'reasonable means,' or relax or even drop altogether the qualification as to contribution.").

[30] It seems that all an attorney has to do is to input the facts of state conduct and out from the court or tribunal comes the ILC's equation of responsibility. As discussed in Chapter 5, "The success of an ideology consists precisely in its ability to make its assumptions seem natural or transparent to the mind" (Jack M. Balkin, "The Rhetoric of Responsibility," 76(2) *Virginia Law Review* 197 (1990), at p. 201, internal citations omitted). More critically, according to David Caron, the ILC Articles engender intellectual laziness and practice has shown a marked increase in citations of articles without further analysis – as though the ILC Articles are already customary international law – which they are not entirely. *See* David D. Caron, "The ILC Articles on State Responsibility: The Paradoxical Relationship Between Form and Authority," 96a *American Journal of International Law* 857–873 (2002).

provide a broader context for studying the history of this continuously practiced field of international law.[31]

An Exceptional Nature

It is easy to appreciate the exceptional nature of state responsibility. To begin with, international law itself is often perceived as somehow different from *normal*, domestic types of law.[32] Generally, *for law to be law* (*e.g.*, something more binding and different than social mores), it needs to be enforced by a sovereign power with the authority and ability to do so. Philosophers from the English legal theorist John Austin[33]

[31] For one such "blinded" history, *see* Florian Grisel, "Arbitration as a Dispute Resolution Process: Historical Developments," in Andrea Bjorklund, Franco Ferrari and Stefan Kröll (eds.), *Cambridge Compendium on International Commercial and Investment Arbitration* 1 (Cambridge: Cambridge University Press, 2019), which declines to trace a history of international arbitration and instead opts to examine international arbitration's developments in the twentieth century by studying Filip Batselé, "Foreign Investors of the World, Unite! The International Association for the Promotion and Protection of Private Foreign Investments (APPI) 1958–1968," 34(2) *European Journal of International Law* (2023), pp. 415–447 and the International Centre for the Settlement of Investment Disputes. For a recent history on the rise of arbitration and international arbitration, *see* Michaël Schinazi, *The Three Ages of International Commercial Arbitration* (Cambridge: Cambridge University Press, 2021), ch. 1.

[32] Regarding the anxiety of state responsibility in particular, and of international law in general, *see* Martti Koskenniemi, "Law of Nations and the 'Conflict of the Faculties,'" *The Intersection of Theory and History* (Spring 2018), at pp. 4–28, at p. 1, available online at www.academia.edu/39100486/LAW_OF_NATIONS_AND_THE_CONFLICT_OF_THE_FACULTIES_?auto=download&email_work_card=download-paper, last visited July 4, 2020 ("Histories of international law rarely engage with what experts – teachers and practitioners – feel as the existential insecurity of the field. Is there such a thing as 'international law'? What sort of thing is it? Engaging with the 'deniers' is a traditional textbook topos and every international lawyer knows half – dozen ways to defend the existence or relevance of the field, as well as some rejoinders' 'to those responses'"). Tangentially, Viktor E. Frankel once wrote: "An abnormal reaction to an abnormal situation is normal behavior" (*Man's Search for Meaning: An Introduction to Logotherapy* (Boston: Beacon Press, 2006 [1959]), at p. 20).

[33] This is often referred to as the "Austinian Critique." Traditionally, positivists have viewed international law as being less law-like than municipal law. John Austin first articulated this view – A rule is usually considered to be a "law" when issued by a sovereign and backed by sanctions. *See* John Austin, "The Province of Jurisprudence Determined" in *The Province of Jurisprudence Determined and the Uses of the Study of Jurisprudence* (Introduction by H.L.A. Hart, Indianapolis: Hackett, 1954 [1832]), at pp. 141–142. Perhaps ironically, it was his mentor, Jeremy Bentham (1748–1832), who first coined the term "International Law" (Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation* (Burns and Hart, eds. 1970 [1789]), at p. 6). In response, international jurists (often ritualistically) begin their monographs with a statement of faith on

(1790–1859) to contemporary Israeli positivist Joseph Raz[34] (1939–2022) have noted international law's *special* character. However, even granting the "law-ness" of international law, enforcing that "law" is quite another matter. How is state responsibility to be implemented in a world without an effective international judiciary or police force? A rule-of-law environment is a society that is constrained by a framework of predictable rules. Disputes are resolved according to those rules, and usually resolved when they are followed.[35]

But international disputes are relatively infrequently resolved by the UN or the International Court of Justice (ICJ or World Court). Most are settled on a case-by-case basis by diplomats or international arbitrators.[36] International claims are resolved in a less rule–like manner than the otherwise traditional doctrine of state responsibility would provide. The process is inherently fluid and dependent upon state consent. It operates by hired attorneys using fountain pens and wearing tailored suits rather than civil servants with their familiar gowns and gavels.

Viewed through the lens of international law, the world is flat. There is no hierarchy of governing entities overseeing states to ensure their

the bindingness of international law – *see* Glanville L. Williams, "International Law and the Controversy Concerning the Word 'Law,'" 22 *British Yearbook of International Law* 146 (1945). For a recent discussion on the relevance of this critique, *see* Jean d'Aspremont, "Bindingness," in Jean d'Aspremont and S. Singh (eds.), *Fundamental Concepts for International Law* (Cheltenham: Edward Elgar, 2016), Amsterdam Law School Research Paper No. 2015-44; Amsterdam Center for International Law No. 2015-19, available at http://ssrn.com/abstract=2690155 (the paradox of bindingness has endured since the nineteenth century).

[34] Joseph Raz, "The Law's Own Virtue," *Columbia Public Law Research Paper* No. 14-609, at p. 1, available online at https://ssrn.com/abstract=3262030, last visited on February 28, 2019 ("The Law is a structure of rules, institutions, practices and the common understandings that unite them, which normally are an aspect of some social organization: state, city, university, corporation. International Law is a possible exception, not being united by its relation to a single organization").

[35] It is outside the scope of this project to discuss the rule of international law, the international rule of law, etc., but *see further* Sir Arthur Watts, "The International Rule of Law," 36 *German Yearbook of International Law* 15 (1993); Jeremy Waldron, "The Rule of International Law," 30 *Harvard Journal of Law & Public Policy* 15 (2006); Carmen Pavel, "International Rule of Law," 23(3) *Critical Review of International Social and Political Philosophy* 332 (2020).

[36] Yves Dezalay and Bryant G. Garth have famously written on how "The abstraction of the rule of law, for example, draws from what could be termed the rule of business and especially from the rule of lawyers who serve business interests" (*Dealing in Virtue International Commercial Arbitration and the Construction of a Transnational Legal Order* (Chicago: University of Chicago Press, 1996), at p. 3).

compliance. This horizontality inevitably fosters an environment of auto-interpretation,[37] the pre-modern environment in which states were constantly at risk of other states unilaterally imposing their rights when and how they so desire.[38] Today, international law generally requires lawyers rather than soldiers to resolve international disputes. This is by necessity as there is no international court or police to enforce the law of nations. It is this aspect of international life that is most often critiqued as its structural weakness. As the Finnish law professor Martti Koskenniemi writes, it is precisely this difficulty that "always made the distance between domestic and international law seem greatest."[39]

With this gulf in mind, Sir Hersch Lauterpacht (1897–1960) drafted the legislative 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*.[40] The ILC was to establish a doctrine of state responsibility that provides for the possibility of international law, one that could control international relations by binding nations to an international rule of law. This was not, of course, a modest goal. And the first *Special Rapporteur* of state responsibility, Cuban diplomat Francisco "Paco" V. García Amador (1917–93), was unable to secure a majority view within the newly formed ILC.

A decade later, however, the second *Special Rapporteur,* Roberto Ago (1907–95), was able to implement Lauterpacht's view by reconceiving the codification project of state responsibility as a set of abstract principles that could regulate any occurrence of international wrong; it would implicitly depend on the content of whatever primary obligation was alleged to have been breached. Ago's abstract division between primary

[37] *See generally*, Leo Gross, "States as Organs of International Law, and the Problem of Auto-Interpretation," in G. A. Lipsky (ed.), *Law and Politics in the World Community* (Berkeley: University of California Press, 1953), at p. 59. *See also* James Leslie Brierly, *The Basis of Obligation in International Law, and Other Papers* (Hersch Lauterpacht and C. H. M. Waldock, eds., Oxford: Clarendon Press, 1958), at p. 230.

[38] On the horizontality of international law, *see further* Christopher Whytock. "From International Law and International Relations to Law and World Politics" *Oxford Research Encyclopedia of Politics*, 2018, UC Irvine School of Law Research Paper No. 2018-29, available at https://ssrn.com/abstract=3170066 last visited February 16, 2019.

[39] Martti Koskenniemi, "Solidarity Measures: State Responsibility as a New International Order?" 72 *British Yearbook of International Law* 337 (2001), at p. 337.

[40] Koskenniemi, *supra* 39, at p. 339. *See generally,* Alan Tzvika Nissel, "The ILC Articles on State Responsibility: Between Self-Help and Solidarity," 38 *N.Y.U. Journal of International Law & Politics* 355 (2006).

obligations and secondary responsibilities was broadly accepted within the ILC; if a government fails to meet its primary obligation to protect aliens in its territory, this automatically triggers its secondary responsibility to repair that wrong. In Ago's worldview, when one state violates one international law, *all* states have an interest in ensuring that the responsible state will be brought to justice. A state's responsibility is not owed just to the directly injured state; it extends to all states because of their innate interest in international order. It was this sweeping idea of state responsibility as a set of rules that was generally applicable *to all nations for all nations* that was codified by the UN between 1948 and 2001.[41]

A Fragile Norm

As the general legal basis upon which states could assert their international rights, state responsibility has come to represent both the potency as well as frailty of international law. The everyday practice of state responsibility continues to reflect the disparity of power possessed by states; the impossibly complex matter of law enforcement still depends on a state's ability and willingness to compel compliance.[42] North American states are, not surprisingly, more likely to be plaintiffs and South American states defendants in such actions. This inequality has posed obvious challenges to the legitimacy, and illustrates the inherent fragility, of the doctrines. On the one hand, the code is broadly recognized as a juridical milestone.[43] It is rare for an international court or tribunal to issue a decision or award without citing to the Draft

[41] The ILC finalized its *Draft Articles on the Responsibility of States for Internationally Wrongful Acts* (ILC Articles) in 2001: Text adopted by the International Law Commission at its fifty-third session, in 2001, and submitted to the General Assembly as a part of the Commission's report covering the work of that session (A/56/10), available online at http://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf, last visited November 12, 2018; reprinted as James Crawford (ed.), *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (Cambridge: Cambridge University Press, 2002).

[42] For a classical statement, *see* Alwyn V. Freeman, "Responsibility of States for Unlawful Acts of their Armed Forces," 88(2) *Recueil de Cours* 267 (1955), at pp. 15 ("If reprisals and war are construed as sanctions for the realization of the rule of law, the international legal structure at once takes on the appearance of an uncentralized system which delegates the task of enforcing its rules to the individual States").

[43] On the customary international legal status of the Draft Articles, *see* Fernando Lusa Bordin, "Reflections of Customary International Law: The Authority of Codification Conventions and ILC Draft Articles in International Law," 63(3) *International and*

Articles.[44] On the other hand, it does not seem to actually regulate state behavior. The force of the ILC code seems more in its symbolic than its predictive nature. While the doctrine of state responsibility is applicable to any violation of international law *in theory*, it does not seem to prevent the most notorious international violations – or even portend their consequences – *in practice*. Where was it in the aftermath of the 9/11 attacks that occurred just after the ILC finalized its codification of state responsibility on August 9, 2001?

Parallel Histories

The duality of state responsibility[45] is reflected in its parallel histories. One arc follows the pre-codified history of the doctrine from US diplomacy to European theory in the nineteenth century; the other tracks the effort to legislate a code of international enforcement within world bodies in the twentieth century. There is no singular history that covers both paths of its journey. While there are several overviews of state responsibility in the literature, the historical accounts within these works largely fixated on the ILC's five-decade effort to codify the field.[46] This is not

Comparative Law Quarterly 535 (2014); *see also* Kaj Hobér, "State Responsibility and Attribution," in P. Muchlinski *et al.* (eds.), *The Oxford Handbook of International Investment Law* (Oxford: Oxford University Press, 2008), at p. 553. For caselaw on the status, *see Noble Ventures, Inc. v. Romania*, Award, ICSID Case No. ARB/01/11, para. 69 (October 12, 2005) ("While those Draft Articles are not binding, they are widely regarded as a codification of customary international law"); United States – Definitive Anti-dumping and Countervailing Duties on Certain Products from China WT/DS379/AB/R (adopted March 25, 2011) or regarding Draft Article 25, *see, e.g., LG&E Energy Corp. et al. v. Argentine Republic,* ICSID Case No. ARB/02/1, Award of July 25, 2007. As James Crawford and Simon Olleson have written, "responsibility is the necessary corollary of obligation: every breach by a subject of international law of its international obligations entails international responsibility" ("The Nature and Forms of International Responsibility," in Malcolm Evans (ed.), *International Law* (2nd ed, Oxford: Oxford University Press, 2006), at p. 451).

[44] On how the world court operates within the ILC framework since the 1970s, *see* Christian J. Tams, "Law-Making in Complex Processes: The World Court and the Modern Law of State Responsibility," in Christine Chinkin and Freya Baetens (eds.), *Sovereignty, Statehood and State Responsibility: Essays in Honour of James Crawford* 287 (Cambridge: Cambridge University Press, 2015) at p. 297.

[45] As mentioned above, one doctrine is a general rule and the other its exception – s*ee further* Alan Tzvika Nissel, "The Duality of State Responsibility," 44(3) *Columbia Human Rights Law Review* (2013).

[46] Commentators have written histories by way of "introduction" to other agenda, but not as a stand-alone monograph. Existing histories of state responsibility include

surprising given that general understanding that, *by default*, international law enforcement is governed by the ILC doctrine.[47] However, it is an unfortunate oversight since the ILC Articles are not – nor were they intended to be – the final word on state responsibility.[48]

introductory sections to lengthier studies as well as article-length discussions: Edwin M. Borchard, *The Diplomatic Protection of Citizens Abroad or the Law of International Claims* (New York: The Banks Law Publishing Company, 1915), ∫17; Clyde Eagleton, *The Responsibility of States in International Law* (New York: New York University Press, 1928), ch. 1; Roberto Ago, *L'origine de la responsabilité internationale*, Yearbook of the International Law Commission, 1970, Vol. II, UN Doc. A/CN.4/233; Ian Brownlie, "The History of State Responsibility," in R. G. Girardot, H. Ridder, M. L. Sarin and T. Schiller (eds.), *New Directions in International Law: Essays in Honour of Wolfgang Abendroth – Festschrift zu seinem 75. Geburtstag* 19 (Frankfurt: Campus, 1982); Shabtai Rosenne (ed.), *The International Law Commission's on State Responsibility, Part 1, Articles 1–35* (Dordrecht: Nijhoff, 1991), at p. vi; Pierre-Marie Dupuy, "Dionisio Anzilotti and the Law of International Responsibility of States," 3(1) *European Journal of International Law* 139 (1992); 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(5) *European Journal of International Law* 1083 (2002); Jan Arno Hessbruegge, "The Historical Development of the Doctrines of Attribution and Due Diligence in International Law," 36 *New York University Journal of International Law & Politics* 265 (2004); Jan Paulsson, *Denial of Justice in International Law* (Cambridge: Cambridge University Press, 2005), ch. 2; James Crawford, Thomas Grant and Francesco Messineo, "Towards an International Law of Responsibility: Early Doctrine," in Laurence Boisson de Chazournes and Marcelo Kohen (eds.), *International Law and the Quest for Its Implementation,* 377–402 (Leiden: Brill, 2010); N.D. Gowda, *State Responsibility in the Present Context: A Critical Study with Reference to the Contemporary Issues under International Law* (Thesis Submitted to University of Mysore, May 2010): Borzu Sabahi, *Compensation and Restitution in Investor–State Arbitration* (Oxford: Oxford University Press, 2011), ch. 2, James Crawford, *State Responsibility: The General Part* (Cambridge: Cambridge University Press, 2014), ch. 1; Katja Creutz, *State Responsibility in International Law: From Paradigm to Periphery*, ch. 2 (Doctoral Thesis Submitted to the Faculty of Law at the University of Helsinki, August, 2015); Antal Berkes, "The League of Nations and the International Law of State Responsibility," (May 31, 2020). *International Community Law Review*, vol. 22, nos. 2–3, at pp. 332–333. Available at https://ssrn.com/abstract=3680512, last visited September 2, 2021.

[47] *See* Christian J. Tams, "Law-Making in Complex Processes: The World Court and Modern Law of State Responsibility," in Christine Chinkin and Freya Baetens (eds.), *Sovereignty, Statehood and State Responsibility: Essays in Honour of James Crawford* 287 (Cambridge: Cambridge University Press, 2015), at p. 289: "so completely have we internalised the ILC's approach that it has become quite a challenge to identify the choices made on the journey towards the ILC's 2001 text."

[48] The ILC designed its code as default principles to be triggered in the event that no other specific law applied (*lex specialis*) according to Draft Article 50. According to *Special Rapporteur* Crawford, the reason for codifying state responsibility as a set of abstract "secondary rules" of general application was: "[T]o formulate, by way of codification and progressive development, the basic rules of international law concerning the

Due to the lack of historical scholarship on this topic, in researching this project, I found it challenging to systematically follow a particular historiographical approach. What I can state categorically is this is no attempt at providing *the* history of state responsibility, as though the topic is some stable object that can be "found" and provided to readers.[49] This book employs a quilted historical approach relying upon many methodological threads: Biographical,[50] Chronological,[51] Critical,[52] Diplomatic,[53] Epochal,[54]

responsibility of States for their internationally wrongful acts. The emphasis is on the secondary rules of State responsibility: that is to say, the general conditions under international law for the State to be considered responsible for wrongful actions or omissions, and the legal consequences which flow therefrom. The articles do not attempt to define the content of the international obligations, the breach of which gives rise to responsibility. This is the function of the primary rules, whose codification would involve restating most of substantive customary and conventional international law." This is the first sentence of the first paragraph of "General Commentary" to *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, *supra* note 19.

[49] Anne Orford, *International Law and the Politics of History* (Cambridge: Cambridge University Press, 2021), at pp. 253–257 (international lawyers often support claims of substantive legal content based on "finding" evidence for such positions in the history of international law). No attempt here is made at "method laundering" (*ibid* at p. 286).

[50] *See, e.g.,* Simone Lässig, "Biography in Modern History – Modern Historiography in Biography," in V. R. Berghahn and Simone Lässig (eds.), *Biography between Structure and Agency: Central European Lives in International Historiography* 1–27 (Oxford: Oxford University Press, 2008).

[51] *See, e.g.,* Robert L. Beisner, *From the Old Diplomacy to the New 1865–1900* (2nd ed., Arlington Heights, IL: Harlan Davidson, 1986), at p. 2: "A strictly chronological narrative . . . would not adequately clarify some of the sharpest and most bewildering differences among historians."

[52] *See, e.g.,* Jack M. Balkin, "The Rhetoric of Responsibility," 76(2) *Virginia Law Review* 197 (1990), at p. 210.

[53] *See, e.g.,* Charles A. and Mary R. Beard, *The Rise of American Civilization* (New York: Macmillan, 1927), at p. vii: "To put in the presidents and the leading senators . . . and leave out such prime actors in the drama is to show scant respect for the substance of life. Why, moreover, should anyone be interested in the beginnings of the House of a Howard or Burleigh and indifferent to the rise of the House of Morgan or Rockefeller?"

[54] This history contains multiple narratives, not a linear sequence of "epochs," that show the development of state responsibility. In contrast to, *e.g.,* Wilhelm Georg Grewe, *The Epochs of International Law* (transl. Michael Byers, Berlin; New York: Walter de Gruyter, 2000); Hessbruegge, *supra* note 9; Brownlie, *supra* note 9; Ole Spiermann, *International Legal Argument in the Permanent Court of International Justice: The Rise of the International Judiciary* (Cambridge: Cambridge University Press, 2005); Jean d'Aspremont, "Time Travel in the Law of International Responsibility," in Samantha Besson (ed.), *Theories of International Responsibility Law* (Cambridge: Cambridge University Press, 2022) at p. 257, available online at ssrn.com, at p. 6 ("the present, built on a past, is now working for the future; the future has already begun in the past"). *See further* David Schneiderman, *Investment Law's Alibis: Colonialism, Imperialism, Debt and*

Geological,[55] Political,[56] Sociological,[57] *etc.* On the historiographical continuum, examining realist and idealist accounts of international law, I have borrowed from both with an appreciative but wary eye.[58] Realist histories tend to focus on state power,[59] whereas geopolitical and idealist histories concentrate on lawyers, philosophers, and institutions.[60] To date, historical writing on state responsibility has been the purview of idealists, those with a distinctly legalist bias, giving little validity towards the pragmatic nature of diplomacy. Chapters 2, 3 and 5, which emphasize the importance of particular power structures, are a counterpoint to such views.

An influential example of the doctrinal pull of idealist accounts is Sir Ian Brownlie's *System of the Law of Nations: State Responsibility Part I* (1983).[61] The former Chichele Professor at Oxford University, Brownlie (1932–2010) describes state responsibility as inherent to international society:

Development (Cambridge: Cambridge University Press, 2022), at p. 7 and accompanying notes; Michaël Schinazi, *The Three Ages of International Commercial Arbitration* (Cambridge: Cambridge University Press, 2021), at pp. 39–40.

[55] More than any other, I have borrowed Professor Weiler's "geological" mode of historiography – J. H. H. Weiler, "The Geology of International Law-Governance," 64 *Heidelberg Journal of International Law* 547 (2004).

[56] I have sought to use a form of "analytical narrative" pioneered by political scientists in the late 1990s – Robert H. Bates, Avner Greif, Margaret Levi and Jean-Laurent Rosenthal, *Analytic Narratives* (Princeton, NJ: Princeton University Press, 1998). This model helped me combine vast quanta of data with general legal theories.

[57] *See, e.g.,* Louis Henkin, *How Nations Behave: Law and Foreign Policy* (2nd ed., New York: Columbia University Press, 1979), at p. 7.

[58] *See* Martti Koskenniemi, "Histories of International Law: Dealing with Eurocentrism" Inaugural Lecture delivered on November 16, 2011 on the occasion of accepting the Treaty of Utrecht Chair at Utrecht University (on file with author), at p. 9. A similar (but earlier) draft of the piece was published in *Zeitschrift des Max-Planck-Instituts für europäische Rechtsgeschichte*, Rg 19/2011. For an excellent if brief historiographic discussion on "scientism," the empiricist turn in the scholarship of the history of international law (and the critical response to that turn), *see* Jean d'Aspremont, "International Law and the Rage against Scienticism. Review of Anne Orford, International Law and the Politics of History," 33(2) *European Journal of International Law* 679 (2021).

[59] Exemplary is Jonathan Zasloff's history of US diplomatic legalism in the late-nineteenth and early-twentieth centuries (Jonathan Zasloff, "Law and the Shaping of American Foreign Policy: From the Gilded Age to the New Era," 78 *New York University Law Review* 239 (2003) and Jonathan Zasloff, "Law and the Shaping of American Foreign Policy: The Twenty Years' Crisis," 77 *Southern California Law Review* 583 (2004)).

[60] Representative is Jan Arno Hessbruegge's "The Historical Development of the Doctrines of Attribution and Due Diligence in International Law," a thoughtful and detailed history of two crucial doctrines related to state responsibility (Hessbruegge, *supra* note 9).

[61] Brownlie, *supra* note 9.

> The essential idea of responsibility is simple and has its basis in religious thought or secular morality of which law is the outwork . . . Consequently, responsibility is an inherent element in any community based upon some system . . . of morality, religion or law, or several of these.[62]

To Brownlie, the idea of responsibility is both unitary and innate, no matter its form or function (penal, compensatory, strict, domestic, international, *etc.*). He suggests that only an intellectual curiosity – and a childlike one at that – would lead one to investigate the historical origins of state responsibility. More interestingly, Sir Ian actually wrote a paper on the history of state responsibility, *except it was not a history at all*, since

> 'Tracing the origins' of legal concepts and institutions can be an artificial and practically fruitless endeavour . . . In the case of state responsibility, the task is complicated by two peculiarities of the genre. The first lies in the fact that the concept of responsibility is both very simple and yet sophisticated. It is both a fundamental moral idea common to laymen and lawyers, and a concept which legal experience calls for considerable study and refinement, involving nice problems of measure of damages, liability of 'moral damage' and so forth.[63]

While I have been mindful of various approaches to the histories of diplomacy and international law, I have customized my methodology to suit the needs of this study.[64] I have presented this history as three overlapping narratives, reflecting how three groups of professional lawyers – practitioners, philosophers and publicists – have coped with the problem of state responsibility in international law.[65] A common

[62] *Ibid*, at p. 19.

[63] *Ibid*, at pp. 19–20. Similarly, Jean d'Aspremont in a recent book review of Crawford *supra* note 9, wrote that "It obviously is impossible to trace and establish precisely the conceptual and functional variations that affected the development of the law of state responsibility over the last centuries." http://dev.sharesproject.nl/book-review-james-crawford-state-responsibility-the-general-part-cup-2013, last visited March 12, 2024.

[64] For example, in order to locate the early positive sources of state responsibility (discussed in Chapter 3), I turned to the world of international arbitration. The result is Chapter 2, which is not about substantive international law at all, but Chapter 3 would make little political sense without it. Thus, my effort to explain why the US professionalization of international arbitration was a necessary (albeit unforeseen) offshoot of this project. What emerges from these sources is a history of international law based on my several research methodologies. This decision reflects the various observational standpoints at play in the creation of state responsibility.

[65] I hasten to note that this trichotomy is similar to but is perhaps slightly more precise than the influential dichotomy presented by Dezalay and Garth in 1995: "The field of international commercial arbitration is given its structure and its logic of transformation through oppositions and complementarities that we shall now begin to map. The key

theme is the motivation to *show* the consequentiality of breaching international law. American, German and other lawyers debated the relevance of law to the resolution of international disputes. By the 1930s, a rough consensus had emerged about the existence of an international doctrine that governs the resolution of (at least some) international disputes.

Three Observational Standpoints

That state responsibility existed as a doctrine became increasingly uncontroversial, but when and how it applied remained contested, depending on the professional viewpoint taken.[66] I present the history of this doctrine through the lens of three archetypes of international lawyers: (1) practitioners like the US lawyer-diplomats; (2) philosophers like the European professor-diplomats and (3) publicists like those institutional-diplomats who comprised the ILC.

Practitioners

From the practitioner's observational standpoint, state responsibility is a weak but important legal tool that helps validate their clients' claims of redress. State responsibility is a technical term they invoke when it is appropriate to address international claims – especially international investment disputes. Practitioners understand why, while there are the thousands of annual claims in the dockets of international tribunals, there is a relatively meager caseload within international courts; this is because international doctrines do not account for international power,

source of conflict, and also of transformation, is that between two generations 'grand old men' versus 'technocrats'" (Yves Dezalay and Bryant Garth, "Merchants of Law as Moral Entrepreneurs: Constructing International Justice from the Competition for Transnational Business Disputes," 29(1) *Law & Society Review* 27 (1995), at p. 35). I also note that Jean d'Aspremont uses a "hall of mirrors" to illustrate "the three distinct images of the international lawyer" (*see* Jean d'Aspremont, "Three International Lawyers in a Hall of Mirrors," 32(3) *Leiden Journal of International Law* 367 (2019), available online at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3334075, last visited on May 3, 2021, at p. 1); to d'Aspremont, the hall of mirrors "refers to the extent to which international legal discourses are built on self-referential mechanisms tantamount to mutually reflecting mirrors, by virtue of which movements and postures are reproduced ad infinitum without disclosing the origin thereof" (*ibid*).

[66] The extent to which the doctrine actually reflected diplomatic practice exposed international law to criticisms ranging from apology to utopia. *See generally* Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (Helsinki: Finnish Lawyers' Publishing Company, 1989).

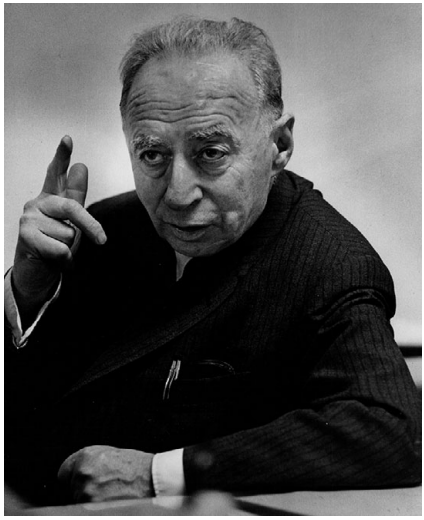


Figure 1.1 Hans Joachim Morgenthau[67]

which is an inherent element to the resolution of international disputes. This perspective privileges the everyday practice of international lawyers without denying the value of doctrine, but almost certainly minimizing the relevance of theory. A leading voice within this group is the German-born US international lawyer Hans Morgenthau (1904–80) (Figure 1.1), for whom *diplomatic practice* counts as a source of law far more than either doctrine or theory.[68] Some commentators refer to this group somewhat cynically as "managerialists," for whom international law need not – perhaps even ought not – resemble the theoretical rigors of domestic law.[69] In the international system, observed practice is a strong

[67] Photo courtesy: Getty Images, www.gettyimages.no/detail/news-photo/morgenthau-hans-news-photo/162084772?adppopup=true.

[68] *See, e.g.,* Hans Joachim Morgenthau, *Die internationale Rechtspflege. Ihr Wesen und ihre Grenzen* (Leipzig: Noske, 1929); *see also, e.g.,* Jack L. Goldsmith and Eric A. Posner, *The Limits of International Law* (Oxford: Oxford University Press, 2006).

[69] On "managerialism" in international law generally, see Martti Koskenniemi, "The Politics of International Law – 20 Years Later," 20 *European Journal of International Law* 7 (2009); Michaël Schinazi, *The Three Ages of International Commercial Arbitration* (Cambridge: Cambridge University Press, 2021), at pp. 11, 15. (It was during the third generation of arbitrators that investment protection became secured as a technical, specialized practice to be legalistically upheld by the "Managers" of investment protection (what Schinazi calls the "age of Autonomy").)

normative component that usually serves to limit doctrinal or theoretical formulations of the law.

Each area of practice comprises its own reality: environmental law employs the "responsibility" or "liability" of states differently than, for example, investment protection law. Environmental lawyers and commercial arbitration lawyers know this well and act accordingly. They are, thus, careful to rely on "international law" to the extent that its rules further their clients' interests. This stream of international law is sometimes associated with the Anglo-American culture of legal pragmatism.[70]

Philosophers

To philosophers, in contrast to practitioners, *theory* is the best device for explaining the inherent completeness of international law.[71] Philosophers search for the fundamentals of international society, seeking to provide the preconditions and the relevance of just what we mean when we say a state is "responsible." This group consists exclusively of law professors who tend to be more concerned with *examining the criteria* for the possibility of law than with the substance of its doctrine.[72] The most important of the philosophers, or theorists, is Austrian public

[70] Yves Dezalay and Bryant G. Garth, *Dealing in Virtue: International Commercial Arbitration and the Construction of a Transnational Legal Order* (Chicago: University of Chicago Press, 1996), at p. 56 ("the conflict specialists from the United States (or elsewhere) do not feel any responsibilities except to their client."); Joseph R. Stromberg, "Sovereignty, International Law, and the Triumph of Anglo-American Cunning," 18(4) *Journal of Libertarian Studies* 29 (2004).

[71] I use the term "theory" in the broad, Kantian sense of: "A collection of rules, even of practical rules, is termed a *theory* if the rules concerned are envisaged as principles of a fairly general nature, and if they are abstracted from numerous conditions which, nonetheless, necessarily influence their practical application" (Immanuel Kant, "On the Common Saying: 'This May Be True in Theory, But It Does Not Apply in Practice,'" in H. Reiss (ed.), *Kant's Political Writings* (Cambridge: Cambridge University Press, 1970), at pp. 61–62). I do not, however, employ the term "practice," in the circular manner prescribed by Kant in the continuation of the above-quoted passage: "Conversely, not all activities are called *practice*, but only those realisations of a particular purpose which are considered to comply with certain generally conceived principles of procedure" (*ibid*).

[72] *See* Jörg Kammerhofer, "The Interaction of Doctrine and Theory in (International) Legal Scholarship," in Pauline Westerman, Kostiantyn Gorobets and Andreas Hadjigeorgiou (eds.), *Conceptual (De)Constructions of International Law* (Cheltenham: Edward Elgar, 2022), at p. 9, available online at SSRN: https://ssrn.com/abstract=3777918, last visited May 3, 2021, at p. 1 ("Legal theory is the key to understanding what it means to engage in legal scholarship. It partakes both of the realm of philosophy and of law and links them as well as the human activities, discourses and jargons centred around them").

Figure 1.2 Georg Jellinek[73]

lawyer Georg Jellinek (1851–1911) (Figure 1.2), who constructed the concept of *Selbstverpflichtungslehre* (self-limitation) to explain how international law binds sovereigns. In Jellinek's view, the starting point was simple: state responsibility *must exist* – even if inconsistently in practice – for international law to exist at all.

The fact that the theory of international law was more unified or complete than diplomatic practice would allow was easily explained. Compared to civilized domestic societies, the international community of nations was in an earlier stage of legal development. To the philosophers, the inadequacies of international practice was a temporary problem that should not hinder the formulation of a robust theory of state responsibility. As a younger legal system, international law would require more time to produce more sophisticated bodies of norms as found in

[73] Photo courtesy: Wikimedia commons, available online at https://commons.wikimedia.org/wiki/File:Georg_Jellinek_%28HeidICON_28827%29_%28cropped%29.jpg, last visited May 24, 2023.

domestic societies. In the meantime, when legitimating their systems, theorists rely on authoritative legal sources rather than provisional political acts. As such, domestic laws and international treaties will be more valuable than *ad hoc* arbitrations. This view of international law is often associated with the German-speaking approach to public law.[74]

Publicists

From the perspective of this third group of lawyers, state responsibility is constitutive of international law. From their experience with constitutional law, it is the role to help explain the capriciousness of state practice.[75] Paradigmatic of this group is Roberto Ago (1907–95) (Figure 1.3), the Italian jurist who led the ILC's successful codification of state responsibility in the 1960s (until he was appointed to the bench of the World Court). Doctrinalists employ doctrine to describe legal rules in a predictable and coherent form – despite the vicissitudes of practice. To them, *the overarching ideal is the rule of law*. According to Ago,

> there is not a single judgment of the Permanent Court of International Justice or of the International Court of Justice, nor of a single international arbitral award, that explicitly or implicitly recognizes the existence of international obligations the breach of which would not be a wrongful act and would not entail international responsibility.[76]

This approach to international law is often associated with international lawyers operating within the League of Nations and later the United Nations.[77] Like theorists, they share an optimistic faith in history, one that will lead to a more full and consistent judicial practice. Thus,

[74] *See* Martti Koskenniemi, "Between Coordination and Constitution: International Law as a German Discipline," 15 *Redescriptions. Yearbook of Political Thought, Conceptual History and Feminist Theory* 45–70 (2011).

[75] Perhaps another way to label this group is as the "Global Administrative Lawyers." In this study, I use the term "doctrine" in the manner Judge Harry T. Edwards suggests in "The Growing Disjunction between Legal Education and the Legal Profession," 91 *Michigan Law Review* 34 (1992), at p. 43: "the various sources of law (precedents, statutes, constitutions) that constrain or otherwise guide the practitioner, decisionmaker, and policymaker."

[76] Roberto Ago, "Fifth Report on State Responsibility," *Yearbook of the International Law Commission*, Vol. II, (1976), Part One at para. 74, p. 25.

[77] See Bardo Fassbender, "The United Nations Charter as Constitution of the International Community," 36(3) *Columbia Journal of Transnational Law* 529 (1998); *see generally* Moshe Hirsch, *Invitation to the Sociology of International Law* (Oxford: Oxford University Press, 2016).

Figure 1.3 Roberto Ago[78]
Roberto Ago, 5th President of the Italian Republic, 1965

when appointed to global bodies such as the ILC, they see their roles as progressive developers of international law. To them, once practitioners are set on the correct course of international law (as articulated in doctrine), the system will settle into a sophisticated structure that resembles its domestic counterpart.

Merchants of Legalism and Purveyors of Legitimacy

Viewing the history of state responsibility through these three lenses helps situate its multi-branched development within specific social and political contexts. These include reunification in the US after the Civil War of 1861–1865; unification in Germany following the Franco-Prussian War of 1870–1871; and the establishment of world bodies in the wake of two catastrophic world wars in 1914–1918 and 1939–1945. These lawyers wielded principles of law and philosophy to solve diplomatic disputes in Latin America, to understand the rapid growth of a federating empire

[78] Photo courtesy: https://en.wikipedia.org/wiki/Roberto_Ago.

and to design a system of international law enforcement that could appeal to a postcolonial audience.

While each of these models represents a different observational standpoint, what is common to all of them is a struggle to justify their expansive view of international law.[79] Yale legal historian Robert Gordon describes late-nineteenth century lawyers as purveyors of legitimacy on behalf of their clients:

> The law . . . is an artificial utopia of social harmony . . . The lawyer's job, thus, is to mediate between the universal vision of legal order and the concrete desires of his clients, to show how what the client wants can be accommodated to the utopian scheme.
>
> The lawyer, thus, has to find ways of squeezing the client's plan of action into the legally recognized categories of approved conduct. Of course, the law's view of the client's reality is often a highly distorted one, since its categorizing forms are administratively manageable only if they drastically abstract and simplify for that reality, and legitimate only if they seem to be part of the system of universal normative order. Even so, *the lawyer's job is selling legitimacy*: reassurance to the client and its potential regulators, investors, or business partners that what it wants to do is basically all right . . .[80]

There is a theme of norm entrepreneurship in these stories. State responsibility emerged through the creative efforts of professional lawyers.[81] In

[79] For a recent articulation of this struggle for binding international standards, described in the literature as a "battle for international law," *see* Jochen von Bernstorff and Philipp Dann (eds.), *The Battle for International Law: South–North Perspectives on the Decolonization Era* (Oxford: Oxford University Press, 2019).

[80] Robert W. Gordon, "'The Ideal and the Actual in the Law': Fantasies and Practice of New York City Lawyers,1870–1910," in Gerard W. Gawalt (ed.), *The New High Priests: Lawyers in Post-Civil War America*, 53 (Westport, CT: Greenwood Press, 1984), at pp. 53–54 (emphasis added). Katja Creutz explores difference standards for assessing the legitimacy of state responsibility (Katja Creutz, *State Responsibility in the International Legal Order: A Critical Appraisal* (Cambridge: Cambridge University Press, 2020), at pp. 43–52).

[81] Attorneys are a professional group that has historically worked magic through the abstraction of rules. As Dezalay and Garth argue, they often draw "from what could be termed the rule of business and especially from the rule of lawyers who serve business interests" (Yves Dezalay and Bryant G. Garth, *Dealing in Virtue International Commercial Arbitration and the Construction of a Transnational Legal Order* (Chicago: University of Chicago Press, 1996), at p. 3). On the role of "norm entrepreneurs" in norm creation, *see* Cass R. Sunstein, "Social Norms and Social Roles," 96 *Columbia Law Review* 903 (1996), at p. 909. *See also* Richard Abel, "Speaking Law to Power: Occasions for Cause Lawyering," in Austin Sarat and Stuart Scheingold (eds.), *Cause Lawyering: Political Commitments and Professional Responsibilities* (Oxford: Oxford University Press, 1998).

the US, lawyer-diplomats used state responsibility as a loose framework of remedies borrowed from domestic law that could be imposed on states for alien injuries; states, *as states*, were liable for damages when they failed to provide international standards of protection to aliens in their territory. Latin American lawyer-diplomats, also, viewed state responsibility as a characteristic of statehood; but the US model of the field was an acceptable double-standard of protection in their eyes.

This international standard of care seemed to apply more frequently to new states than it did to established ones. To Latin Americans, the appropriate form of state responsibility would have to be more general than one field of law and it would have to apply equally to the North and South. Hence their affinity for German theory. German public lawyers contemplated state responsibility similarly to the Latin Americans – as a unified, overarching theory of public law, one that could be used both as a tool for civilizing their expanding colonial governments, and a standard for measuring the liability of all states.

These norm entrepreneurs did not describe their projects as legislative in nature. This would have been an impractical position to take, and they were professional attorneys after all. US lawyer-diplomats described their government's allegations of state responsibility for alien injuries as consistent with existing legal doctrine and based on general principles of law.[82] German philosophers articulated their expectations of public responsibility in terms of a valid system of public law; and even though such a system did not yet exist, they would invent one to address the

Martti Koskenniemi sketches four standard roles for international lawyers: the judge, the adviser, the activist and the academic in "Between Commitment and Cynicism: Outline of a Theory of International Law as Practice," in *Collection of Essays by Legal Advisors of States, Legal Advisors of International Organizations and Practitioners in the Field of International Law* 495 (New York: United Nations, 1999). On interpretative entrepreneurship, *see* Melissa (MJ) Durkee, "Interpretive Entrepreneurs," 107 *Virginia Law Review* (2021), available online at https://ssrn.com/abstract=3782643, last visited May 3, 2021, at p. 1 ("Private actors use interpretation to influence legal rules. Interpretive entrepreneurship is particularly significant in the international context, where many disputes are not subject to judicial resolution, and there is no official system of precedent."). For David Schneiderman's description of norm entrepreneurs in this context, *see* his *Investment Law's Alibis: Colonialism, Imperialism, Debt and Development* (Cambridge: Cambridge University Press, 2022), at p. 1 (lawyers, arbitrators and scholars promoted and participated in the spread of international investment law).

[82] *See* Martti Koskenniemi, *To the Uttermost Parts of the Earth: Legal Imagination and International Power, 1300–1870* (Cambridge: Cambridge University Press, 2021) at p. 9 (how lawyers adapted and reused existing domestic legal terminologies and applied them at the international level, referring to the phenomenon as *lawyers building vocabularies*).

needs of modern society. International lawyers within world bodies sought to draw up a code that was a hybrid of the above two models: it was purportedly based on the actual practice of states as well as conceptualized using existing theories of public law. It is important to emphasize that all three groups overlapped in varying degrees, especially the doctrinalists.[83] This account of their efforts is not my attempt to provide a neat history of state responsibility.[84] The best I can hope for is to offer a contextual account of its origins while avoiding oversimplifying what is one of the most intricate fields of international law.

In the next and final section of this introduction, I preview the six chapters that comprise this book. For the reader's convenience, I provide summaries at the end of each substantive chapter. Further, I wrote Chapter 6 as an "epilogue" to state responsibility's history that both summarizes the first five chapters and conceptualizes some lasting legacies.

Road Map

Chapter 1 – In the introductory chapter, I introduce the norm of international responsibility and describe it as an exceptional doctrine that is easy to oversimplify. I presented my thesis on the recent origins of state responsibility, which was "born" sometime between 1870 and 1930 to American and German parents. I discussed the problems with state responsibility that are unique to international law – at the same time, it could seem like everything and nothing at all. Lawyers have coped with this in very different ways. This book is structured to reflect three such perspectives: (1) International practitioners in the US, (2) Philosophers based in German-speaking countries and (3) Publicists within international institutions. I set out to trace the pre-institutional origins of state responsibility and connect these narratives to existing doctrines. This expanded historical framework highlights the non-unified doctrine of state responsibility as well as the political contexts from which they emerged.

[83] For example, many ILC commissioners (including Roberto Ago) were not just institutional codifiers (doctrinalists); they were also governmental lawyers (practitioners) and law school professors (philosophers).

[84] As Cass Sunstein writes, causal claims of this kind "inevitably involve counterfactual history" (though, he continues, "there is nothing dishonorable about that fact") – *see* Cass R. Sunstein, "Historical Explanations Always Involve Counterfactual History," 10(3) *Journal of the Philosophy of History* 433 (2016), at p. 436.

Chapters 2 and **3** – In the first narrative, I describe state responsibility as the enforcement of the age-old rules regarding hospitality to strangers that have come to really mean *investment protection*. In the New World, international arbitrators employed the word "responsibility" in the many different settings of diplomatic protection claims: European-Latin American,[85] Anglo-American[86] and intra-American.[87] However, "responsibility" did not refer to a singular legal idea at the time. It was a word that connoted many legal and moral ideas about state rights vis-à-vis alien injuries. I identify the first modern usages of responsibility – that is, the legalistic consequences of a state's breaching its international obligations – in the diplomatic practice of the US Government following the Civil War.[88]

At that time, US nationals flooded the State Department with claims for diplomatic protection. To resolve international claims efficiently with scant political or human resources, the State Department began delegating the resolution of these disputes to professional international arbitrators. In so doing, US lawyers firmly established international arbitration as the forum for resolving alien injuries. The US staffed these tribunals with likeminded lawyers who would base their awards on international, rather than local, standards of protection. This manner of litigating alien protection claims generated a body of positive law on state responsibility for alien injuries.[89] US lawyers did not set out to create a doctrine of state

[85] *Cotesworth & Powell* (Great Britain v. Colombia), John Bassett Moore, *History and Digest of the International Arbitrations to which the United States has been a Party, Together with Appendices Containing the Treaties relating to such Arbitrations, and Historical Legal Notes* (Washington, DC: Government Printing Office, 1898) (hereinafter *History and Digest*), at p. 2081.

[86] *The Alabama Claims (United States of America v. Great Britain)*, Moore, *History and Digest*, at pp. 655, 656.

[87] *Tomas Marin v. The United States*, No. 751 of the Lieber Tribunal (United States v. Mexico), Moore, *supra* note 85, at pp. 2889–2891.

[88] I discuss the concept of "legalism" further in Chapters 2 and 3. I prefer the term "legalistic" to the term "modern" in reference to the law of state responsibility. However, I could use the term "modern" in the sense that Professor Michael Levenson uses it (*see generally*, Michael Levenson, *Modernism* (New Haven: Yale University Press, 2011)). To slightly paraphrase Levenson, religion in the past and politics in the present have failed to become "a sphere of conviction and a site of shared value" (Michael Levenson, "Why We're Still Struggling to Make Sense of Modernism," *The Atlantic* (October 2013), at p. 39).

[89] Not just for the protection of property claims *stricto sensu* but for a broad range of property rights including contract, personal injury, etc. *See further* Jean Ho, *State Responsibility for Breaches of Investment Contracts* (Cambridge: Cambridge University Press, 2018), at p. 3.

responsibility, but to use international law *as a tool for securing better than local protection* of property in the New World. But the unavoidable result was a set of precedents that would ultimately become applicable to the US as well. By internationalizing alien protection claims, the US unwittingly positioned itself to be judged in the same manner. Such is the power of law.

Chapter 4 – In the second narrative, I describe state responsibility as a theory for holding states accountable for their actions. In nineteenth-century Germany, academic lawyers applied a "juristic method" to construct theories of public law to account for expanded governmental powers that resulted from political unification. German legal scholar August Wilhelm Heffter (1796–1880) is often cited as the first to articulate principles of state liability, but it was Georg Jellinek (1851–1911) who offered its first theoretical basis, *Selbstverpflichtungslehre*. German public lawyers did not base their theories on international awards from the New World. To them, international arbitration did not produce law in the technical sense. They viewed liability under international law primarily as an iteration of state liability under *domestic* public law. In this way, fledgling international practice did not prevent them from articulating comprehensive theories extrapolated from their domestic legal experience. In the end, the German theorization of state responsibility had a far greater impact upon lawyers within international institutions (*e.g.*, ILC) than it did within Germany (*e.g., Auswärtiges Amt*).

Chapter 5 – In the third narrative, I explain how and why the United Nations first sought to codify state responsibility based on the US practice and later, on German theory. This decision was neither simple nor obvious. The world body had two choices: interpret state responsibility narrowly as alien protection, or broadly as a general code of international enforcement. On one level, the codification question was structural: should world bodies codify a fragmented law of state responsibility (akin to the domestic analogy) or a unified law of state responsibility (unique to international law)? On another level, the legislative question was one of scope: should it be limited to past practice, or should it provide a doctrine that addresses longer-term institutional needs? Finally, the issue was a political one as well that pitted two groups of litigants – North and South Americans – against each other within world legislative bodies. Going into the 1930 Hague Codification Conference, US diplomats were optimistic about limiting the codification of state responsibility to alien protection. However, they sobered up soon

thereafter. By 1960, it was clear that any endeavor to base the UN's work on the US practice amounted to codification suicide.

By that time, five attempts to codify state responsibility as alien protection had already failed. This is because Latin American lawyers had finally accumulated sufficient voting power within international institutions to oppose US efforts to entrench an imperialistic practice. A turning point came in the early 1960s under the stewardship of Special Rapporteur Roberto Ago, who untethered the UN's codification from past practice and set out to draft a general code of international enforcement. In contrast to German theory, however, Ago drafted the code to allow for specific regimes of practice to remain as exceptions to its rule. In this way, both North and South America could claim victory. The US could maintain its arbitral practice of alien protection while Latin America secured a general code of international enforcement that applied, technically speaking, to the North and South equally. As such, the ILC doctrine of state responsibility is both a rejection as well as a validation of the US practice of alien protection.

Chapter 6 – In this final chapter, I take a step back to offer a few generalizations about state responsibility and its historic role of selling legitimacy. I reconceptualize the growth of state responsibility in terms of three overlapping phases: (1) pre-legalism, (2) *ad hoc* legalism and (3) institutional legalism.[90] The continuously fertile field of alien protection has survived beyond the ILC's codification. There remains a duality of doctrines of state responsibility, one specific and one general. While these doctrines are, of course, very different in scope and content, I identify several motifs that are present across the spectrum of state responsibility doctrines. *One idea that runs through all three narratives of this history is the consequentiality of breaking international law*. A second theme is the habitual reliance on legalism as the appropriate process for resolving international claims. Another motif is the exceptional nature of state responsibility; it is a doctrine in which the exceptions are more applicable than its rules. While, as a doctrine of international law enforcement, it

[90] Interestingly, the structure of this historic and normative development seems to conform with Max Weber's analysis that new legal norms have two primary sources: the standardization of certain consensual understandings and judicial precedent – Max Weber, *Economy and Society: An Outline of Interpretive Sociology* [1921] (Guenther Roth and Claus Wittich (eds.), Ephraim Fischoff, et. al., trans. Berkeley and Los Angeles: University of California Press, 1968, reprinted 2012), Vol. II, at p. 759.

does not predict state behavior well, it remains a crucial symbol about the relevance of international law to world affairs. The codification of state responsibility as secondary rules has provided international society with an argumentative tradition for questioning and judging any type of state conduct. We begin in the US, where lawyer-diplomats in the White House turned to law as a tool of diplomatic power.