Leiden Journal of International Law (2023), **36**, 203–215
doi:10.1017/S0922156522000644

REVIEW ESSAY

Imperialism through adjudication in Latin America

Justina Uriburu

Graduate Institute of International and Development Studies, Geneva, Switzerland*
Email: justina.uriburu@graduateinstitute.ch

Kathryn Greenman, *State Responsibility and Rebels: The History and Legacy of Protecting Investment Against Revolution*, Cambridge University Press, 2021, 288pp, £85 doi:10.1017/9781009043779
doi:10.1017/S0922156522000644

1. Introduction

Most scholars would agree that reading academic works and literary novels are essentially different experiences. This book comes close to an exception. Insurrections, control over markets and natural resources in newly decolonized states, mixed claims commissions, academic turf wars, and misconstructions of jurisprudential precedents by the International Law Commission: Kathryn Greenman's book *State Responsibility and Rebels: The History and Legacy of Protecting Investment Against Revolution*, has it all and more.[1] Greenman's book critically redescribes the case law of the mixed claims commissions created by Latin American countries, on one side, and either the United States or European powers, on the other, to adjudicate claims for the injuries suffered by aliens caused by rebels in the context of revolutions or civil strife – in today's vocabulary, harm to 'foreign nationals' in the hands of 'non-state armed actors'. In telling this story, Greenman presses where it hurts. The precedents she foregrounds, the arbitral awards of three sets of mixed claims commissions set up in Mexico and Venezuela, are embedded in the relationship between the then newly decolonized Latin American countries and the United States and the European powers, and the role played by international law in the economic ordering of the late nineteenth and early twentieth centuries. This allows her to shed light on international law's colonial past and present, and the (far from pristine) operation of prestigious academics and international institutions.

Greenman's first substantive chapter dives into the background of the three sets of commissions she studies: those established following revolutions, civil wars, and interventions occurring after Mexico's independence (1839, 1849, and 1868), those created as a result of the 1902–1903 blockade of Venezuela by Britain, Germany, and Italy, and those set up after the Mexican revolution in the 1920s.[2] She identifies a constant underlying the three case studies. At that time, newly decolonized countries in Latin America were menaced by internal and external threats that reinforced one another. Having succeeded in the struggle for independence, these states had to cope with weak economies and internal divisions, a landscape turned even more fragile by fears of recolonization, all of which gave way to frequent revolutions and civil wars.[3] Fears of recolonization proved to be warranted as European powers and the United States intervened in Mexico and

*The original version of this review essay contained an error in the affiliation. This error has been corrected. A notice detailing this error has been published.

[1] K. Greenman, *State Responsibility and Rebels: The History and Legacy of Protecting Investment Against Revolution* (2021).

[2] Ibid., Ch. 2.

[3] Ibid., at 38–41, 47–50, 58–60.

Venezuela at different points in time and justified these acts by referring to the unpaid claims for injuries that foreign nationals had suffered in the hands of rebels – acts ultimately aimed at securing access to Mexican and Venezuelan markets and natural resources after the end of formal imperial relations.[4]

The book then delves into the jurisprudence of these three sets of mixed claims commissions (Chapter 3). Greenman's reading of the case law aims to make visible 'the interpretative, and sometimes manipulative, work that later scholars were doing' when writing about these precedents.[5] To achieve this, she foregrounds how the 'practice changed over time, was radically discontinuous with later doctrine and contained multiple ambiguities'.[6] This neatly leads the way to Chapters 4 and 5, which explain how contemporaneous scholars and codifiers incorporated the commissions' jurisprudence in their debates. Greenman first claims that academic works displayed a clash between Anglo-Americans and Latin Americans. She shows that the former mainly justified practices of intervention based on the enforcement of alien claims and further rationalized the inconsistent case law from the mixed claims commissions. They inferred from the arbitral awards what they proposed to be an internationally determined standard of protection owed to foreign nationals, also known as the standard of due diligence.[7] In contrast, Latin Americans attempted to resist intervention and claimed that states' protection towards foreigners should be defined by nationally-crafted standards that took into account each country's circumstances.[8] Greenman then argues that this dynamic between Anglo-American doctrinal development and Latin American resistance played out explicitly in different codification projects, both in private and public institutions. Ultimately, the League of Nations Codification Conference at The Hague in 1930 marked the failure to reconcile the Anglo-American approach with a Latin American one, after which the topic of state responsibility on the basis of injuries to aliens lost attention.[9]

At a time when accounts focused on states are sometimes quickly questioned as complicit in silencing international law's blind spots or marked absences, Greenman's book can be read as a reminder of the importance of not conflating concern for the state with state-centrism. The core of her story addresses the pressing question of how powerful states protected their imperial and commercial interests in 'backward regions', and how they continue to do so today. Indeed, in the book's final chapter, Greenman adds a twist by addressing the legacy of the practice and scholarship of state responsibility for rebels in contemporary international law (Chapter 6). She pays special attention to international investment law, stressing that nineteenth and early twentieth century cases of state responsibility for the acts of rebels continue to be cited in current investor-state proceedings, which are initiated mainly against Global South countries.[10] The International Law Commission also has its fair share of protagonism as Greenman traces its reception of the mixed claims commissions' case law when codifying the law of state responsibility, a story that includes remarks on how some of the precedents were misconstructed in the process.[11] Moreover, her book also speaks to Third World states' limits and possibilities in resisting imperial moves – cornered between adjudicative projects and military intervention,[12] they found in codification a more favourable venue to assert their sovereign equality.[13] Yet *State Responsibility and Rebels* transcends state-centric lenses by carefully tracing the reception of the case law of the mixed

[4]Ibid., at 44–6, 50–7, 67.
[5]Ibid., at 107.
[6]Ibid., at 69.
[7]Ibid., at 125–31.
[8]See, for example, the cases of diplomats and jurists Argentine Luis Podestá Costa and El Salvadorean José Gustavo Guerrero. Ibid., at 134–6.
[9]Ibid., at 166–71, 176.
[10]See, for example, ibid., at 186–91.
[11]Ibid., at 176–84.
[12]Ibid., at 8.
[13]Ibid., at 142–3.

https://doi.org/10.1017/S0922156522000644 Published online by Cambridge University Press

claims commissions confronting capital-exporting and -importing states by scholars, codifiers, state representatives, and professional organizations. The background assumption is clear. Accounting for states' actions in the international sphere entails understanding their relationship with surrounding entities. Likewise, international institutions – in this case, mixed arbitral tribunals – are no islands themselves. Analysing their behaviour and impact demands paying attention to the actors interacting with them. It is in this sense that the book masterfully paints a more encompassing story that concerns how international law is made and used.

This review essay discusses what I believe are among *State Responsibility and Rebels*' most salient dimensions. Section 2 draws on the book's grounding in Latin America to examine how scholars frame and use regional experiences in their scholarship. It proceeds in two steps. First, I discuss Greenman's assertion that her book is not a thesis about Latin American international law. I argue that this statement can be better appreciated when understood as a move to overcome contributionism but is not fully substantiated as it is unclear what Greenman understands by Latin American international law. Second, I look at *State Responsibility and Rebels*' core argument closely and use this as a window to discuss the analytical and normative purchase of critical works. I consider whether Greenman's critique of power could have been even more powerful than its present shape. Section 3 addresses the book's challenge to the established histories of international adjudication and its understanding of the United States' relationship with arbitration projects at the turn of the twentieth century. I argue that the book could benefit from a slightly different framing in how it contests existing histories of international adjudication, and that a more nuanced understanding of the United States' relationship with arbitration projects might help advance overlooked discussions on the history of international adjudication in the Americas. Section 4 briefly concludes.

2. Regions as sites of inquiry and means of critique

2.1 Overcoming contributionism: The challenge of framing regional experiences

The turn to history in international law has enabled the exploration of events, developments, and personalities situated in different corners of the world, displacing dominant Eurocentric and indulgent understandings of international law's past.[14] Rich historiographical debates accompanied these studies – conversations perhaps crowned by one of the most awaited publications of 2021, Anne Orford's *International Law and the Politics of History*.[15] However, certain aspects concerning the spatiality of international legal history remain underdiscussed. These include how scholars justify their focus on (and neglect of) specific regions, contexts, and locations,[16] as well as the ethics involved in writing international legal histories – a dimension encompassing questions such as the relevance of positionality in works featuring the Global South as a site of inquiry, or how Global North scholars should read, interact, and frame critiques to works from the Global South.[17]

[14]However, on the idea that the consensus there is about 'the history of international law being profoundly Eurocentric and that correcting that bias should be one of the main preoccupations' is, actually, a fictional or apparent consensus because there are 'irreconcilable differences about the meaning of Eurocentrism, imperialism, and the character of international law', see N. Tzouvala, 'The Specter of Eurocentrism in International Legal History', (2021) 31 *Yale Journal of Law & the Humanities* 413, at 414–15.

[15]A. Orford, *International Law and the Politics of History* (2021).

[16]For a noteworthy (and early) exception, see the special series 'International Law in the Periphery', edited by Fleur Johns, Thomas Skouteris, and Wouter Werner. For the series' opening piece see F. Johns, T. Skouteris and W. Werner, 'Editors' Introduction: Alejandro Álvarez and the Launch of the Periphery Series', (2006) 19 LJIL 875.

[17]The dimension of positionality is not frequently addressed in international legal scholarship – and when it is, it is sometimes disappointing. Among the latter, consider Karen Alter's review essay 'The Empire of International Law?', which preludes its critique of Juan Pablo Scarfi's book *The Hidden History of International Law in the Americas: Empire and Legal Networks* as follows: '[a]s a former ASIL Executive Council member, an *AJIL* board member, and a scholar who has written about the idea

https://doi.org/10.1017/S0922156522000644 Published online by Cambridge University Press

Greenman's introduction begins with an important assertion: she says she 'do[es] not intend for this to be a thesis about Latin American international law'.[18] This will not come as a surprise to anyone who thinks that titles mean something, as the book's title and subtitle give no hint about the book's geographical focus. However, once the reader learns about the centrality of its case studies, this quickly raises the question of what it means to foreground a Latin American experience without framing it as a work about Latin American international law. To properly unpack this question, one should draw attention to the other historiographical choices accompanying this statement. In the book's introduction, Greenman also claims that her work does not retrieve an experience that complements 'the globalisation of a law of European nations'.[19] In other words, Greenman means that she will not recover forgotten precedents or contributions that show how international law, a European creation, expanded across the world, thus becoming 'the product of a number of civilizations'.[20] While she does not say this herself, I read this as a move to elude contributionism, a choice that will not go unnoticed to the critical eye as, by now, scholars working on and from the Global South have long advised against its perils.

Perhaps once important to affirm the agency, dignity, identity, and history of the (semi-) periphery, scholars working on and from the Global South have explained that contributionist accounts are analytically deficient as they rewrite (semi-)peripheral participation in international law's falsely universal history and all too often spare international law's mercantilist and imperialist character. More than a decade ago, James Thuo Gathii brought forward the scholarship of Taslim Olawale Elias to illustrate contributionist accounts' perils.[21] Elias' works, Gathii explained, aimed at 'establishing accommodation for an African cultural heritage as a part of the international civilization that contributes to international law' and 'sought to reverse the view in Eurocentric international law that Africa was backward and uncivilized and therefore never participated in the collective enterprise of building customary international law'.[22] Yet, in pursuing this project, he neglected international law's implications with slavery and colonial violence.[23]

The situation of Latin America[24] by the turn of the twentieth century is well captured by the concept of semi-periphery.[25] As explained by Frédéric Mégret:

---

of a rule of law in international relations, I worry that believed ideas—perhaps botched in articulation—might be construed as imperialistic ethnocentrism' (K. J. Alter, 'The Empire of International Law?', (2019) 113 AJIL 183, at 184). It is interesting that she prefaces her disagreements with a Latin American (Argentine) scholar who has written a book on the history of Pan-Americanism and the legal ideas justifying United States imperialism in the region foregrounding her professional affiliations. Such a move is done without reflecting upon the possible power dynamics at stake (between both her and Scarfi, and her and potential readers writing critical histories of American institutions), nor on what such a book may mean for Global South academia.

[18]See Greenman, *supra* note 1, at 32.

[19]Ibid., at 28.

[20]J. T. Gathii, 'Africa', in B. Fassbender and A. Peters (eds.), *The Oxford Handbook of the History of International Law* (2012), 407, at 407.

[21]J. T. Gathii, 'A Critical Appraisal of the International Legal Tradition of Taslim Olawale Elias', (2008) 21 LJIL 317. See also J. T. Gathii, 'International Law and Eurocentricity', (1998) 9 EJIL 184. Gathii has also explored the role of contributionism in TWAIL scholarship in J. T. Gathii, 'TWAIL: A Brief History of Its Origins, Its Decentralized Network, and a Tentative Bibliography', (2011) 3(1) *Trade, Law and Development* 26.

[22]See Gathii, *supra* note 20, at 416.

[23]See Gathii, *supra* notes 20 and 21. Cf. C. Gevers, 'Literal "Decolonization": Re-reading African International Legal Scholarship through the African novel', in J. von Bernstorff and P. Dann (eds.), *The Battle for International Law: South-North Perspectives on the Decolonization Era* (2019), 383.

[24]Shared characteristics in Latin American countries' history and international legal traditions justify a regional lens of analysis. This does not overlook power differentials within the region, reflected, for example, in the active (and sometimes successful) use of international law by countries such as Argentina, Brazil, and Mexico to defend their interests.

[25]As put by Arnulf Becker Lorca, '[t]he semi-periphery specifically describes those states that have acquired some margin of autonomy to insert themselves strategically in the global economy and that aspire to move upwards, but that because of geo-political or economic reasons still do not amass enough power to become part of the world's core'. A. Becker Lorca, *Mestizo International Law* (2014). His monograph, which studies semi-peripheral states and lawyers' turn to international law 'in the

https://doi.org/10.1017/S0922156522000644 Published online by Cambridge University Press

> [Latin American] states were sovereign enough ... that they could require the mediation of mixed claims commissions, although probably not sovereign enough that they could avoid the imposition of them. Capital-exporting countries, by contrast, were not in a position to impose consular jurisdiction and the application of their national law, but they could continue to rely on special arrangements such as mixed claims commissions to put pressure on capital-importing countries.[26]

Despite Gathii's warnings, however, portrayals of Latin American (or, likewise, Asian or African) developments as distinct or regional contributions to a so-called global or universal project continue to haunt the international legal discipline. The expectation that regional stories ought to be narrated to understand 'how regional debates reflected or differed from debates occurring in Europe' lives on.[27]

The preceding remarks, therefore, should allow readers to appreciate this laudable aspect of Greenman's framing better. However, they do not account for the book's framing fully: there are non-contributionist critical works that can be characterized as works of Latin American international law. Within the increasingly rich literary genre on the history and theory of international law, an obvious example is Juan Pablo Scarfi's *The Hidden History of International Law in the Americas*, which, exploring the engagements between James Brown Scott and Alejandro Álvarez, addresses the construction and discussions over the existence of a (Latin) American international law without adopting a contributionist lens.[28] Thus, the questions on how and why a piece of scholarship that 'centres Latin America in the narrative of the past of international law'[29] might not be a thesis of Latin American international law nor a work on international law and Latin America still stand. In this regard, it would have been desirable for Greenman to explain what she understands by 'Latin American international law'[30] and how her work is different from it, and to develop what this framing both allows and releases her from doing – most importantly, to be explicit about how this will determine her engagement with scholarship on Latin America and international law beyond her 'indebt[edness] to the work of scholars interested' in these subjects.[31]

Nevertheless, the absence of such an explanation does not make the book's framing less productive. Greenman's work is built on a sophisticated substantiation of how semi-peripheral experiences and debates inform disciplinary understandings of the origins and operation of international law. This is not an easy endeavour. In addition to the work the author must carry out concerning the history, politics, and materials of a specific region – tasks that are far from negligible and that Greenman takes seriously[32] – she must also articulate the (complex) question of what (United States and European) international legal scholars can learn from works grounded

hopes of narrowing the scope of power core states could legitimately exercise over their territory', engages with international legal developments driven by Latin American jurists in the early twentieth century. Ibid., at 20.

[26]F. Mégret, 'Mixed Claim Commissions and the Once Centrality of the Protection of Aliens', in I. de la Rasilla and J. E. Viñuales (eds.), *Experiments in International Adjudication: Historical Accounts* (2019), 127, at 129.

[27]See Alter, *supra* note 17, at 198.

[28]J. P. Scarfi, *The Hidden History of International Law in the Americas: Empire and Legal Networks* (2017).

[29]See Greenman, *supra* note 1, at 28.

[30]Ibid., at 32.

[31]Ibid.

[32]Two aspects of Greenman's book should be commended. She acknowledges that certain Latin American states' foreign policies, such as the support for arbitration, reflected 'domestic elites' liberal values and, in some cases, furthered their interests' (see Greenman, *supra* note 1, at 8). Embedding this point in Liliana Obregon's important work on 'creole legal consciousness', she adds that domestic elites 'perceived foreign investment as vital for economic recovery and nation building, as well as a means to shore up their own internal authority and wealth' (ibid., at 14, 124). Moreover, while the unit of Latin American states is almost never pierced, Greenman clarifies from the outset that while there is 'a lot of internal diversity when it came to the impact of colonisation, independence and integration into the global economy', regional experiences can '"be used as general guidelines to direct attention to important matters in the history of the region"' (ibid., at 15).

https://doi.org/10.1017/S0922156522000644 Published online by Cambridge University Press

on the history, politics, and materials of these distant states.[33] The core of *State Responsibility and Rebels*' argument is that the establishment of mixed claims commissions pulled the question of states' responsibility for the acts of rebels away from postcolonial domestic authorities, a move that concerned the allocation of risk of doing business in Latin America and 'the conditions required for commercial relations and US and European access to Latin American markets and resources'.[34] The establishment of the commissions also favoured capital as they entailed an 'homogenisation of standards, and swung the odds towards economic liberalisation'.[35] Highlighting Latin American states' early independence, Greenman adds that her claims should be understood as early projections of the decolonization movements that followed the Second World War.[36] This adds to the pathway laid out by other scholars, which have claimed that the tactics rehearsed by the United States in Latin America were later utilized in the rest of the world or have portrayed Latin America's decolonization as a process enclosing the promises and struggles of 'most of the world'.[37] Against this background, the book's historiographical framing ultimately ends up being not only rare but productive, as it joins the efforts of those (semi-) peripheral scholars that expose, with vividness, how their history and the institutions that govern(ed) them are entwined with foreign countries and international orders of law.

2.2 The critique of power (and the power of critique)

Let us now look at the book's core argument closely and explore the analytical and normative purchase of critical works. How did the mixed claims commissions secure conditions that favoured foreign and commercial actors? In Chapter 3, Greenman develops three focal points of the commissions' jurisprudence, which shed light on how these conditions were advanced. First, she describes the commissions' case law that established jurisdiction over claims based on contracts (as opposed to claims based on property damage, personal injury, or the deprivation of liberty), even though their founding instruments did not explicitly empower them do so.[38] To her, this 'reduced the risk of doing business overseas' and 'was a central part, along with the protection of private property, of the conditions that enabled foreign trade and later investment to penetrate Latin America'.[39] Second, she fleshes out how the rules of state responsibility for the acts of rebels were constructed. While non-responsibility was foregrounded as the general rule, the exception according to which states' failure to protect aliens against rebels could give rise to state responsibility allowed the construction of a flexible system that burdened newly decolonized states comparatively more.[40] Third, she addresses what would become the 'key battleground between US and Latin American scholars': the jurisprudence's stand on whether the duty of protection of aliens – also known as the standard of due diligence – should be determined nationally, the Latin American approach, or whether it demanded a universal and objective standard, the position primarily defended by Anglo-Americans.[41]

[33]Even when scholars go through such significant work, they still run the risk of being read as solely speaking about Latin America. See, for example, Stephen Schwebel's reading of Luis Eslava's chapter in the edited book *The Battle for International Law* on the emergence of the idea of the 'developmental state'. Schwebel limits his appreciation of Eslava's chapter to the following statement: that it 'evokes the history of Latin America'. See S. M. Schwebel, 'The Battle for International Law – South-North Perspectives on the Decolonization Era, Edited by Jochen von Bernstorff and Philipp Dann', (2020) 21 *Journal of World Investment & Trade* 631, at 633.

[34]See Greenman, *supra* note 1, at 70.

[35]Ibid., at 30.

[36]Ibid., at 32.

[37]L. Eslava, 'The Developmental State: Independence, Dependency, and the History of the South', in J. von Bernstorff and P. Dann (eds.), *The Battle for International Law* (2019), 71, at 99; see also G. Grandin, *Empire's Workshop: Latin America, the United States, and the Making of an Imperial Republic* (2006).

[38]See Greenman, *supra* note 1, at 71–4.

[39]Ibid., at 71.

[40]Ibid, at 103–5.

[41]Ibid., at 99.

https://doi.org/10.1017/S0922156522000644 Published online by Cambridge University Press

Greenman repeatedly highlights the case law's instability, both when unpacking the mixed claims commissions' jurisprudence and in general terms. Chapter 3 shows that the case law establishing jurisdiction over contractual claims was 'never clearly established' and continued to be debated in the following decades,[42] that the construction of a general rule of non-responsibility for the acts of rebels 'did not entirely stop state agents and national commissioners from trying to reassert a presumption of responsibility for certain states',[43] and that the standard of due diligence remained undetermined and later became a contentious issue between scholars and codifiers.[44] Moreover, when doing an overall assessment of the commissions' activities, Greenman acknowledges that they did not always find respondent states responsible and that 'the rules and principles they articulated [did not] necessarily reflect the agenda of the states that imposed them'.[45] She explains that:

> [w]hat was at stake in the cases was connected to what was at stake in the system, even though the impact of cases was more ambiguous. That the practice was messy and at times incoherent does not mean that it did not have a politics.[46]

To draw this distinction between the cases and the system, Greenman borrows from Martti Koskenniemi, who, in a review essay of Muthucumaraswamy Sornarajah's *Resistance and Change in the International Law on Foreign Investment*, points out that in the book Sornarajah:

> puts too much emphasis on the case-law and the attitudes and actions of arbitrators ... who, in conjunction with a certain technical scholarship, have used the avenues opened by the indeterminacy of the law to advance investor interests through expansive interpretation.[47]

Koskenniemi's objection, shared by Greenman, is that, under this lens:

> [l]ittle is visible of larger historical processes, the rise of a global system of economic governance operating over the heads of politicians and citizens groups ... the social significance of ISDS lies not in the case-law but in the effect that it is expected to and will produce on the relations between public power – the power of municipal and regional authorities, domestic governments, courts and parliaments – and foreign investors at the moment when the public body is expected to choose a policy that will influence investor interests.[48]

Greenman's elaborate articulation of how a semi-peripheral experience and its accompanying debates inform the origins and operation of international law makes one reflect upon (to borrow from Andrea Bianchi) the 'fatigue'[49] with which some legal scholars meet critical scholarship's normative dimensions. Not long ago, a renowned legal philosopher claimed on Twitter that 'international legal scholars [were] generally the most deferential to existing power structures and hierarchies of any of the category of academics [he had] interacted with'[50] and that critical approaches had not successfully disrupted this deference. Explaining his position, he argued that '[a] lot of these "critical" approaches are based on wholesale sophomoric scepticism about meaning [and]

[42] Ibid., at 71–2.
[43] Ibid., at 89.
[44] Ibid., at 103.
[45] Ibid., at 70.
[46] Ibid.
[47] M. Koskenniemi, 'It's Not the Cases, It's the System', (2017) 18 *Journal of World Investment & Trade* 343, at 347.
[48] Ibid., at 347, 351–2.
[49] A. Bianchi, *International Law Theories* (2016), at 42.
[50] www.twitter.com/JTasioulas/status/1292088963558264832.

https://doi.org/10.1017/S0922156522000644 Published online by Cambridge University Press

value judgments. They disdain the construction of reasoned normative arguments. They pose no real challenge, which is maybe why they thrive'.[51]

It is somewhat uncomfortable to engage with these arguments, not least because it entails drawing attention to claims that ignore the sophisticated and rich strands of works within feminism, critical legal studies, Marxism, and Third World Approaches to International Law that have successfully challenged and exposed power, and advanced agendas of reform. Leaving that aside, I want to focus on the broader claim that critical accounts '[disdain] the construction of reasoned arguments' insofar as they do not 'address questions like whether international law is legitimate, and under what conditions'.[52] The disagreement's core then becomes clearer and boils down to what counts as the normative dimension of a piece of legal scholarship. My remark is far from novel. As noted by Susan Marks more than two decades ago, while traditional approaches to international law (or, in the words of Marks, 'problem solving scholarship') draw 'a clear distinction between description and prescription, commentary and advocacy, facts and values'[53] critical works 'hold fast to a preoccupation with the transformation of relations of domination' and are concerned with existing institutions and ideas' limitations and transformative possibilities.[54] Insofar as they place asymmetrical power relations at the centre of academic explorations, critique invites us to answer the question of '[w]hich international law to further' and guides us in answering it.[55]

Greenman advances an important critique of power. Yet this critique could achieve an even more powerful character if it were to combine the macro historical view with a more concrete description of the institutions she studies. In other words, readers could wish that *State Responsibility and Rebels*' normative dimensions were explored in more detail, as the questions of through what means and to which extent these adjudicative institutions could protect foreign and commercial interests remain. Koskenniemi's distinction between the cases and the system as applied in Greenman's account, while helpful, does not provide an answer to all the queries one may have about the impact of the mixed claims commissions on the power differentials between host states, and foreign investors and the states protecting them. This is a gap readers cannot fill by themselves considering the discipline's lack of familiarity with the mixed claims commissions' architecture, which stands in stark contrast with the existing literature on ICSID's institutional design. There is so much a book can do, and Greenman's reconstruction of the commission's work is beyond impressive. However, to identify what international law we may want to advance – a mission that Greenman embraces as she confirms that '[t]he story of state responsibility for rebels and its legacy also contributes . . . to our understanding of the history and politics of their development, how we came to be where we are, and how reform might thus proceed'[56] – it would be perhaps important to learn more about the institutional design of the commissions that facilitated the insulation of economic interests or that, in other words, enhanced the mixed claims commissions' potential to fulfil the purpose they were expected to achieve upon their creation. Such questions could include where the commissions sat; what rules governed their operation, such as their budget, procedure, voting mechanisms, and timeframes; the commissions' composition and appointment mechanisms; how parties presented their cases, etc. – all questions central to understand how the particularities of international adjudication could make (the already uneven) playing field more (or less) uneven. Questions could also cover whether mixed claims commissions

[51]www.twitter.com/JTasioulas/status/1292427698250358784.

[52]www.twitter.com/JTasioulas/status/1292430954099871744.

[53]S. Marks, *The Riddle of All Constitutions: International Law, Democracy, and the Critique of Ideology* (2000), at 142.

[54]Ibid., at 144. Eliav Lieblich has recently articulated this idea in more colloquial terms: '[i]t should be emphasized that critical research questions are also normative in the deeper sense: by seeking to expose power relations, they imply that something is wrong with law'. See www.harvardilj.org/2021/01/how-to-do-research-in-international-law-a-basic-guide-for-beginners/.

[55]See Marks, *supra* note 53, at 146.

[56]See Greenman, *supra* note 1, at 192.

https://doi.org/10.1017/S0922156522000644 Published online by Cambridge University Press

functioned effectively and if they competed with other mechanisms that could diminish the impact of their work.

3. Challenging the 'peace through law' myth

I will now turn to a more specific question: how Greenman's work interacts with the history of international adjudication. I will focus on two dimensions. The first one concerns the works *State Responsibility and Rebels* claims to challenge. While Greenman rightly targets accounts that associate arbitration with peace and non-intervention, I argue that this claim can benefit from a slightly different framing as the book could be read not only as a correction, but also as a complement to the premises promoted by the heterogeneous works on the birth of international adjudicative arrangements. The second dimension concerns the historical assumptions the book identifies as one of its points of departure. Greenman situates her object of study – the mechanisms created to address the claims for injuries to aliens in the context of civil war and revolution – in the turn of the twentieth century, when there was an apparent relationship between US imperialism and the promotion of arbitration.[57] In her words, '[d]uring this period the United States "adopted [arbitration] as an aspect of its foreign policy", as it sought to assert its interests in Latin America'.[58] I will advance some specifications that may allow better understanding the (not so straightforward) relationship between US imperialism and arbitration.

In the book's introduction, Greenman observes that:

> [d]espite arbitration's recurring association with peace and non-intervention, the turn to arbitration that occurred during the second half of the nineteenth century did not mark a decline in the use of force. Rather, arbitration existed alongside bombardment, blockade, invasion and occupation as means of coercing the settlement of claims for injuries to aliens (or alien protection claims). At the same time, arbitration was also imposed by the threat or use of force.[59]

The accounts Greenman cites as those associating arbitration with peace and non-intervention constitute a varied mix – Martti Koskenniemi's well-known essay 'The Ideology of International Adjudication and the 1907 Hague Conference', Christian Tams' 'World Peace through International Adjudication?', Mark Mazower's *Governing the World*, and an article by Cecilie Reid entitled 'Peace and Law: Peace Activism and International Arbitration, 1895–1907'.[60] The first question that comes to mind is how these accounts (a combination of references that features throughout different chapters[61]) frame the relationship between law and peace, a question Greenman does not clarify. Do they leave unquestioned that the goal of adjudicative arrangements concerned peace? Or do they discuss the existence of movements, state-sponsored projects, or jurists that promoted peace through international adjudication? Do these authors circumscribe these movements or projects, and if so, how? Do they critically explore what laid behind such great enthusiasm for international adjudication, or do they take these movements and projects at face value? These questions reflect diverse claims that should be differentiated, as, in my view,

[57] Ibid., at 7.

[58] Ibid., at 119.

[59] Ibid., at 6–7.

[60] M. Koskenniemi, 'The Ideology of International Adjudication and the 1907 Hague Conference', in Y. Daudet (ed.), *Actualité de la Conférence de la Haye de 1907, Deuxième Conférence de la Paix/Topicality of the 1907 Hague Conference, the Second Peace Conference* (2008), 127; C. J. Tams, 'World Peace through International Adjudication?', in H. G. Justenhoven and M. E. O'Connell (eds.), *Peace Through Law* (2016), 215; M. Mazower, *Governing the World: The History of an Idea, 1815 to the Present* (2012); C. Reid, 'Peace and Law: Peace Activism and International Arbitration, 1895–1907', (2004) 29 *Peace & Change* 527.

[61] See Greenman, *supra* note 1, at 6–7, 37.

https://doi.org/10.1017/S0922156522000644 Published online by Cambridge University Press

State Responsibility and Rebels merits being understood at times as a correction and at others as a complement to the existing explorations of the relationship between law and peace.

Tams' work is, perhaps, the only account among those cited that displays a teleological and linear understanding of international law's history. His piece, which traces 'the history of international arbitration and adjudication over the past two centuries',[62] is organized around a prevalent frame in the international legal discipline that describes the beginning of the twentieth century as a flourishing period for international institutions, quickly interrupted by the war and ultimately revitalized towards the end of the Cold War.[63] Particularly, Tams describes the end of the nineteenth century as a moment in which a 'powerful "legalist movement"' came into existence, for which 'courts and tribunals were the obvious instruments of world peace, and arbitration and adjudication natural ways of resolving international conflicts in a civilized world society'.[64]

For its part, Koskenniemi's 'The Ideology of International Adjudication and the 1907 Hague Conference' emphasizes the links between the United States' foreign policy and the promotion of arbitration.[65] Far from idealizing adjudication, he attributes to a number of adjudicative projects other purposes well beyond facilitating peace. For example, Koskenniemi explains the support of the United States' foreign policy for the creation of a permanent international court as stemming 'from their shared cultural sense that for law to play a beneficial role in the world of States, it must be conceived in common law terms and in accordance with the American perception of the relations of courts to the surrounding society'.[66] He also links the creation of mixed claims commissions in Latin America to the protection of private rights, describing this project as one concerning an '"empire of civil society" – a global system of enforcement of private rights against public power'.[67] This goes in line with the story told by Mazower, who, in his seminal book *Governing the World*, explores campaigns for arbitration at the end of the nineteenth century and stresses the strategical dimensions of these searches for peace,[68] as well as the account put forward by Reid, who explores the interests of 'international arbitrationists' in protecting commerce, and their beliefs in Anglo Saxon racial superiority and Christianism's civilizing mission.[69]

This closer examination of the literature indicates that *State Responsibility and Rebels* stands as a correction to mainstream international legal literature. Greenman disrupts dominant chronologies that portray the end of the nineteenth century as a period in which 'idealist sentiment dominated the day and led to significant advances in the cause of peaceful dispute resolution'[70] by showing that the pursual of peace was not at the core of the creation of mixed claims commissions. Conversely, when assessed in relation to Koskenniemi's essay, as well as critical histories such as those of Mazower and Reid, Greenman's book operates as an important complement. Her case studies provide granularity to understand the interests behind the negotiations to establish mixed

[62]See Tams, *supra* note 60, at 217.

[63]Tams argues that 'four years after the end of the war, the international community would eventually set up its first "world court", the Permanent Court of International Justice, in The Hague. Yet by then, faith in international courts and tribunals as guardians of world peace had been shaken, many progressive internationalists began to embrace other projects, and the legalist movement for international arbitration and adjudication had begun to lose steam' (ibid., at 224).

[64]Ibid.

[65]See Koskenniemi, *supra* note 60, at 129.

[66]Ibid., at 144.

[67]Ibid., at 150.

[68]See, for example, Mazower, *supra* note 60, at 86–7. He points out that British Liberals, among them Sir Randal Cremer (recipient of the Nobel Peace Prize and one of the leading figures within the arbitration movement), 'thought the growth of American power in the hemisphere and in the world was in Britain's interest, and they welcomed arbitration because it offered a way to cement an Anglo-American alliance'. He further highlights that 'U.S. administrations at the turn of the new century adopted the arbitration cause ... as a means of eradicating threats while consolidating their reputation in the eyes of the world'. Moreover, Mazower touches on the classist and conservative underpinnings of Elihu Root's thoughts (ibid., at 92–3).

[69]See Reid, *supra* note 60.

[70]See Tams, *supra* note 60, at 224.

https://doi.org/10.1017/S0922156522000644 Published online by Cambridge University Press

claims commissions that would address the responsibility of states for the acts of rebels, as something different from arbitration movements in general or the thoughts of individual landmark personalities, such as the much-studied James Brown Scott and Elihu Root. They also allow her to touch on the relationship between the creation of the mixed claims commissions and the interest of capital. Overall, Greenman shows how juridical training, an indispensable tool to understand the relevance of the legal technicalities at stake in these arrangements, can serve as powerful and irreplaceable complements to historical claims of a general character.

This takes me to the second remark I want to make in this section. Greenman also situates her story at a time when the United States was especially interested in promoting arbitration abroad. Borrowing from Koskenniemi, Greenman tells readers that 'the US government "was never more interested in arbitration than in the 1890s – a time also of war and expansion"'.[71] She continues to explain that:

> The United States made a strategic choice for arbitration, imposed by (threats of) force on unfair terms, rather than outright invasion or occupation, to try and oust its European rivals and assert its interest in the region. Arbitration offered the United States a new type of imperialism. It accorded with a widespread US self-understanding as anti-imperialistic while, under the guise of legality, allowing for the universalisation of the US way of doing things.[72]

Moreover, she argues that the pursuit of peace through arbitration was closely linked to the expansion of United States capitalism: peace was understood as a precondition to trade as it allowed individuals to run their businesses without interruptions.[73] Based on Koskenniemi's essay, Greenman concludes that '[d]uring this period the United States "adopted [arbitration] as an aspect of its foreign policy", as it sought to assert its interests in Latin America'.[74]

There are different claims here that are worth disentangling. To start, these remarks are meant to contextualize the idea that scholars with 'liberal internationalist (and capitalist imperialist)' agendas warmly welcomed the United States' increased resort to arbitration.[75] This helps explain their drive when rationalizing the unstable and ambiguous case law of the mixed claims commissions into clean and objective rules of responsibility, one of the core arguments of Chapter 4. However, as shown in the excerpts cited above, these background descriptions are, from time to time, conflated with the different questions of why and to which extent the United States embraced arbitration as part of its foreign policy. True, academia and the foreign policy establishment were closely related in the United States. As repeatedly highlighted by the literature and as recognized by Greenman herself, officers working at the State Department were involved in institutions like the American Society of International Law.[76] Yet the exploration of these entities and their internal factions merit a differentiated treatment. Indeed, one of the weaknesses of the mainstream international legal literature's treatment of peace initiatives at the turn of the century has been the general references to the 'peace through law' or 'legalist' movements. An example lies in the work of Tams, who refers to a 'legalist movement', that goes as far as including the influential networks of international lawyers of the moment – the *Institut de Droit International* and the International Law Association – the 'pacifists, the Inter-Parliamentary Union, socialist movements, national leagues for the furtherance of peace, and – not least – religious associations

[71]See Greenman, *supra* note 1, at 7–8.
[72]Ibid, at 8.
[73]Ibid., at 119.
[74]Ibid.
[75]Ibid.
[76]See, for example, Koskenniemi, *supra* note 60; Mazower, *supra* note 60, at 93; Scarfi, *supra* note 28; P. Amorosa, *Rewriting the History of the Law of Nations: How James Brown Scott Made Francisco de Vitoria the Founder of International Law* (2019).

https://doi.org/10.1017/S0922156522000644 Published online by Cambridge University Press

and the Catholic Church', and 'relevant political establishment figures (notably within the United States)'.[77]

Additionally, general references to the practice of arbitration may be prone to confusion. For instance, the United States' relationship with arbitration did not only concern its promotion or dissemination. The discussions taking place in the First and Second International American Conferences (the first one hosted in Washington, D.C., in 1889–1890 and the second one in 1901–1902 in Mexico City) show that the United States aimed to restrict and even sometimes block initiatives that would lead to a widespread regional commitment to inter-state arbitration, something that many Latin American states sought to materialize. In Washington, D.C., the Argentine and Brazilian delegations jointly tabled a proposal under which American states would bound themselves to arbitration as 'a principle of American public law' on all questions compatible with their sovereignty and coupled this question with the prohibition of the right to conquest, something the United States was reluctant to accept.[78] Moreover, President Theodore Roosevelt instructed his delegates to the Second International American Conference to only accept commitments to voluntary arbitration with no defined location.[79] This point is not detrimental to Greenman's main argument, which exclusively concerns the establishment of mixed claims commissions to settle claims between a state and the citizens of another state. However, as the interest in the histories of the Americas advances at a quick pace, it is important that claims are specific when identifying what kind of legal projects were mobilized and to what ends. In this case, such differentiations could be key in exploring understudied questions, such as whether adjudicative initiatives could be promoted by Latin American states with counter-hegemonic ends.

4. Conclusions

State Responsibility and Rebels puts into conversation the histories of imperialism through adjudication with accounts of how international law is made, and crafts this intersection to shed light on this process' nature: inter-generational conversations including academics, arbitrators, state representatives, professional organizations, and beyond. In this endeavour, Greenman does not leave behind those who remained at the end of these developments. Invoking Venezuelan international lawyer Nicomedes Zuloaga's views, Greenman illustrates the injustices at stake in a stinging way. Imagining those Venezuelans whose loved ones had perished standing up for their states amid internal strife and left to economic ruin, Zuloaga questioned: was it fair that foreigners should say '"I have lost nothing by the war … not only does the government (which I do not defend) pay me for the losses which it has inflicted on me but for those occasioned by its enemies as well"'?[80]

That the knowledge of the past yields invaluable lessons for the present is not an empty mantra. Greenman's book is a powerful reminder of everything one misses when engaging with international law whilst committing the mistake of casting aside its imperial past: from the political economy of international adjudication down to the present, to its impact on the daily lives of

[77]See Tams, *supra* note 60, at 225–6.

[78]See *International American Conference 1889-1890: Washington, D.C., Minutes of the International American Conference. Actas de la Conferencia Internacional Americana*, at 107–8. See also the account of José Martí, the Cuban poet, essayist, and journalist who chronicled the First International American Conference. J. Martí, *Nuestra América* (1910), at 'La conferencia de Washington (II)'.

[79]57th Congress Senate, *Second International Conference of American States: Message from the President of the United States: Transmitting a Communication from the Secretary of State, Submitting the Report, with Accompanying Papers, of the Delegates of the United States to the Second International Conference of American States: Held at the City of Mexico from October 22, 1901, to January 22 [i.e., January 31] 1902, April 29, 1902* (1902), at 34. Delegates were further recommended that in the case of having to agree to an experimental framework, it 'should be for a limited time and should embody nothing compulsory' (ibid., at 35).

[80]See Greenman, *supra* note 1, at 93.

https://doi.org/10.1017/S0922156522000644 Published online by Cambridge University Press

individuals, as powerfully illustrated by Zuloaga's reflection. In a world with normative developments and processes of reform underway, Greenman leaves valuable lessons for those who continue to seek change.

Acknowledgements. I am grateful to Ana Luísa Bernardino, Alejandro Chehtman, Francisco-José Quintana, Phil Saengkrai, and the two anonymous reviewers for their insightful comments. I am also indebted to Lucas Lixinski, who invited me to share my incipient reflections on this book in International Law Agendas.

Cite this article: Uriburu J (2023). Imperialism through adjudication in Latin America. *Leiden Journal of International Law* **36**, 203–215. https://doi.org/10.1017/S0922156522000644