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# The Locus of Responsibility in International Relations: A Theory of State Responsibility

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The Locus of Responsibility in International Relations:

A Theory of State Responsibility

by

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A THESIS

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## **Abstract**

The practice of assigning responsibilities to states is central to international affairs but underexplored. States are blamed for wars, called on to apologize, held liable for debts and reparations, tasked with protecting human rights, and bound by treaties. What, if anything, justifies assigning certain responsibilities to states rather than to human beings? This thesis argues that, although there is a rational justification for assigning responsibilities to states, the practice of state responsibility outstrips this justification. The justification for state responsibility follows from the concept or internal logic of responsibility. States have the three faculties that make entities candidates for assignments of responsibility: (1) the ability to take ownership of actions, (2) persistence over time, and (3) the ability to fulfill responsibilities. However, the practice of state responsibility in international relations and international law depends on three 'fictions' or assumptions that are not susceptible to rational justification.

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## Introduction

The assumption that states can have responsibilities is seldom articulated but central to international affairs. States are blamed for wars, called on to apologize, held liable for debts and reparations, tasked with protecting human rights, and bound by treaties. Our common practices presuppose that states have moral and legal personalities that are distinct from those of their members. It cannot be particular Americans who owe trillions of dollars in sovereign debt; many of them will not live to repay their shares, and the debt persists even after they die. It could not have been particular Britons who had a responsibility to defend Belgium from the German invasion in 1914; the Britons who negotiated and signed the Treaty of London in 1839 had all since perished, and so had most of the Britons whom they represented. Responsibilities for wars, sovereign debts, state apologies, reparations, and treaties must inhere in states as corporate entities – or, at least, this is what modern International Relations (IR), International Law (IL), and International Political Theory (IPT) assume.<sup>1</sup> What, if anything, justifies assigning certain responsibilities to states rather than to human beings?

The motivation for assigning responsibilities to states is understandable. It is natural to want to hold someone or something responsible for every wrongful act and for every agreement. Deterring wrongdoing and enforcing agreements are the most basic ways of maintaining order in human affairs. In the international realm, states appear to be the most plausible candidates for responsibilities because they

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<sup>1</sup> 'IR,' 'IL,' and 'IPT' are used to refer to the academic disciplines of International Relations, International Law, and International Political Theory respectively. 'International relations,' 'international law,' and 'international political theory' are used to refer to the subject-matter.

have the greatest capacities to act on them. Responsibilities for wars, treaties, reparations, and sovereign debts seem too large for individuals to bear, but it would be unthinkable to conclude that no one is responsible, so we hold states responsible.

On closer examination, assigning responsibilities to states seems redundant or even absurd. States cannot act on their own. All actions of states are performed by state officials, so it seems superfluous to assign responsibilities to whole states – especially given that, with the development of international criminal law since WWII, state officials are now personally responsible for their actions.<sup>2</sup> Holding states rather than state officials responsible seems akin to holding cars rather than drivers responsible. States, like cars, do nothing without the direction of human beings. State responsibility appears to be an archaic practice that has outlived its purpose or an absurd practice that results from personification of the state.

The purpose of this thesis is to determine whether there is a rational or theoretical justification for assigning responsibilities to states. Despite the proliferation of literature on state responsibility in IR, IL, and IPT over the past decade, there remains very little work on the theoretical underpinnings of state responsibility. The work that does exist is scattered across many disciplines, and there has never been an attempt to combine it. State responsibility is fundamental to modern international affairs but theoretically impoverished. It remains unclear whether it is a necessary feature of political life, an anthropomorphic absurdity, or a relic from a more primitive era.

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<sup>2</sup> International criminal law is well-developed but imperfectly applied. The practical difficulties with holding state officials responsible may make state responsibility less redundant than it first appears.

This thesis argues that, although state responsibility has a rational justification, our practices of holding states responsible outstrip our ability to justify them. The theory of state responsibility and the practice of state responsibility are disjointed. State responsibility has a rational basis, but its present form in IR, IL, and IPT does not.

### *Why Focus on the State?*

The debate about state responsibility is part of a broader debate about corporate responsibility – the responsibility of organized groups – in philosophy, law, and business ethics (e.g., Ashman and Winstanley, 2007; List and Pettit, 2011: Chapter 7; Moore, 1999; Wells, 2001). Although many of the arguments for and against state responsibility originate from this broader debate, state responsibility ought to be considered separately because of its unique complications. As Anna Stilz (2011: 191) argues, “since the state is an involuntary association, we must revise this standard view [of corporate responsibility] if we are to generate an adequate account of state responsibility” (see also Pasternak, 2013). Business firms, unions, churches, and most other corporate entities are voluntary associations; states are not. For this reason, although membership in a firm or a church implies consent to share the burdens of its responsibilities, membership in a state does not. State responsibility, unlike other forms of corporate responsibility, cannot be justified by individual consent. Most people have not chosen to be citizens of a particular state, and many cannot easily relocate. State responsibility consequently carries a far greater risk of misdirected harm (Erskine, 2010). Above all, states differ from most



other corporate entities in that they wield coercive power, which requires a different kind of justification than religious or economic power. An adequate theory of state responsibility therefore cannot be derived from a general theory of corporate responsibility.

### *State Responsibility in Classical IR and IPT*

The distinction between individual responsibility and corporate responsibility has a long history in philosophy and law, but E. H. Carr (1939) first articulates its importance for IR and IPT. He notes that it generates two competing conceptions of international morality. Whereas the “morality of states” assigns responsibilities to states as wholes, the “morality of individuals” assigns responsibilities only to human beings (188-92). He shows that this difference is of great practical importance. If responsibilities inhere in the state, then they persist despite changes in its government and citizenship. In Carr’s example, the Treaty of London of 1839 created an “obligation of ‘Great Britain’ to ‘Belgium,’” which is irreducible to the obligations of Britons to Belgians (191). The obligation therefore persisted through 1914 even though Lord Palmerston, who signed the Treaty, had since perished, and even though most of the living Britons and Belgians had not yet been born in 1839. Conversely, if responsibilities inhere in individuals, then they expire with the people who possess them. The morality of individuals implies that a change in government or a generational turnover in citizenship negates debts, treaties, and other state responsibilities. In this case, the Britons of 1914 could not be bound by the Treaty of London; the responsibility to uphold it would die with

Lord Palmerston or with the Britons of 1839. As Carr shows, what is at stake in the debate about state responsibility is the persistence of responsibilities over time and through generations.

Carr (1939) argues that state responsibility is a necessary feature of international affairs but that it depends on a fiction. For Carr, “[t]he hypothesis of state personality and state responsibility is neither true nor false, because it does not purport to be a fact” (191); it is merely a “a necessary fiction” that makes relations between states more stable and predictable (189). The complexity of modern international affairs makes it necessary to assign some responsibilities to states rather than to state officials, but, according to Carr, it is not possible to provide a rational justification for doing so.

Except for a few passing remarks, the issue of state responsibility lay dormant in IR and IPT for decades after Carr. Michael Walzer (1977) resurrects the issue in his discussion of punishment for aggressive wars. He considers “[w]hether the state as a whole or only particular persons are the proper objects of punishment,” and he concludes that “if states are members of international society, the subjects of rights, they must also be (somehow) the objects of punishment” (63). Although he promises to pursue the issue further (63), he never does. He examines the superficially similar issue of whether citizens ought to be responsible for what state officials do on their behalf (296-303), but he gives no further consideration to whether states as such are capable of having responsibilities. He even appears to contradict his earlier remarks when he says that “[a]cts of state are also acts of particular persons, and when they take the form of aggressive war, particular

persons are criminally responsible” (291). Walzer’s view of state responsibility is ultimately either inconsistent or ambivalent.

Charles Beitz (1999 [1979]) raises the issue of state responsibility in his discussion of global distributive justice. Although he argues that distributive principles apply to human beings but not to states, he adds that “[i]t is not inconsistent with this view to understand states as the primary ‘subjects’ of international distributive responsibilities” (153). In other words, while only the distribution of resources among individuals is morally relevant, states are responsible for implementing and enforcing distributive principles. He also claims that “the international obligations of states are in some sense derivative of the more basic responsibilities that persons acquire as a result of the (global) relations in which they stand” (153).<sup>3</sup> The responsibilities of states are somehow conditional on those of individuals, but Beitz does not explain how. He adds in a footnote that “[t]he relation of individual and group responsibilities is a difficult issue, involving a variety of complications. I cannot pursue it here” (153n). Beitz recognizes the importance of state responsibility, but he does not inquire about its foundations.

Classical IR and IPT raise many questions about the theory of state responsibility but provide few answers. Carr concludes that it is neither necessary nor possible to provide a rational justification for state responsibility; Walzer fails to maintain a clear distinction between the responsibilities of states and the responsibilities of state officials; and Beitz brackets the issue after noting its

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<sup>3</sup> Beitz’s intuition – that the responsibilities of states are intrinsically related to those of individuals – is undoubtedly correct. Chapter Three clarifies the relationship between state responsibilities and individual responsibilities.

importance for distributive justice. The present work answers Carr's challenge and continues the search for a rational justification for state responsibility.

*The Fundamental Questions: Ownership, Identity, and Fulfillment*

In order to determine whether there is a rational justification for state responsibility, it is first necessary to determine what counts as a justification. Setting a benchmark for an answer is the most difficult and controversial step. If the benchmark is wrong, then the conclusions of any analysis that uses that benchmark are bound to be flawed. This work employs a new method of evaluating accounts of responsibility. Whereas previous works employ analogical reasoning, this work reasons from the internal logic of responsibility.

The usual method of determining whether entities are candidates for assignments of responsibility is to reason from examples. Theorists typically start with the archetypical moral agents – human beings. They identify the faculties that allow human beings to have responsibilities, such as reason and intentionality, and then ask whether the entities in question possess the same or similar faculties (e.g., Erskine, 2003; French, 1984; O'Neill, 1986; Velasquez, 1983). For example, Kenneth Himma (2009) employs the analogical method to determine whether it makes sense to assign responsibilities to artificially intelligent beings. He identifies two faculties – choice and moral reasoning – that bestow moral agency on human beings (23-24), and he uses these faculties as criteria to determine whether artificial agents can be moral agents. He concludes that, because choice and moral reasoning presuppose consciousness (24-27), artificially intelligent beings are candidates for assignments

of responsibility only if they are conscious (28). Proponents of the analogical method evaluate whether it makes sense to assign responsibilities to certain beings by implicitly or explicitly comparing the faculties of these beings to the faculties of human beings.

Although the analogical method is a good first cut, it is inadequate both for the present task and in general.<sup>4</sup> First, it is doubtful that states possess reason or intentionality, and whether they possess analogous properties is contentious. Decades of analogical reasoning have settled very little in the literature on corporate responsibility. Using the same method is unlikely to be any more fruitful for state responsibility. Second, the analogical method has built-in blind spots. It presupposes that anthropomorphic characteristics are the only ones that can allow entities to have responsibilities, and it rules out all other conceptions of responsibility from the outset. It is possible that some entities have other faculties, which are completely dissimilar to reason and intentionality, that make them candidates for assignments of responsibility. The analogical method has generated little more than a quagmire in the literature on corporate responsibility, and it may lead us to overlook viable justifications for state responsibility.

The method employed here begins with the concept or internal logic of responsibility. Instead of asking whether certain types of entities or beings share certain faculties with human beings, it asks which criteria *any* entity or being must satisfy in order to have responsibilities. The criteria are derived from the concept of

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<sup>4</sup> The analogical method should not be confused with the analogical *answer*, which is discussed below. Whereas the analogical method is a way of determining what counts as an adequate justification for state responsibility, the analogical answer is a particular justification for imputing actions to states.

responsibility rather than from an archetypical example. The justification for each criterion is deductive and takes the form of a negative conditional: if an entity cannot satisfy the criterion, then there cannot be a rational justification for assigning responsibilities to it. The criteria take the form of questions.

A justification for assigning responsibilities to entities or beings of any type must include answers to three fundamental questions. The first is the *question of ownership*: how do the entities become the owners or authors of actions? If an entity cannot take ownership of actions, then it cannot be responsible for them. The second is the *question of identity*: how do the entities persist over time? If an entity ceases to exist before it can act on its responsibilities, then it is futile to assign responsibilities to it in the first place. The third is the *question of fulfillment*: how do the entities act on their responsibilities? If an entity cannot fulfill the responsibilities that it possesses, then its possession of them is of no consequence. The three questions are so basic that they are nearly trivial, but this is precisely what makes them useful. They provide an uncontroversial, three-part test for accounts of responsibility. A rational justification for assigning responsibilities to entities of any type must, at the very least, explain how these entities can incur, possess, and fulfill the responsibilities that are assigned to them.

An account of responsibility is inadequate if it cannot answer all three fundamental questions. Answers to the three questions may or may not be jointly sufficient, but they are individually necessary. For example, trees are not candidates for assignments of responsibility because an account of 'tree responsibility' can answer only one of the fundamental questions. Although trees persist over time

despite changes in their constituents (second question), actions cannot be imputed to them (first question), and, even if trees could take ownership of actions, they would still have no way of fulfilling their consequent responsibilities (third question). Robots also fail the test, but for a different reason. Robots persist over time, and they may even have the capacity to fulfill responsibilities, but they cannot take ownership of actions. The people who build and program robots are ultimately the owners or sources of the actions that robots perform. Crowds fail the test, too, but for a different reason than trees or robots. Imputing actions to crowds is plausible; crowds are often said to occupy, loot, and destroy. Crowds may even be able to fulfill responsibilities (e.g., to protest peacefully). The problem is that crowds are transient. A crowd becomes a different crowd whenever its membership changes (e.g., French, 1984: 5), so it is unlikely to persist long enough to fulfill its responsibilities. The three fundamental questions apply to anything to which one could conceivably assign responsibilities: human beings, animals, extraterrestrials, artificially intelligent beings, corporations, and, of course, states. This work asks the three fundamental questions about states, but the questions are perfectly general.

#### *State Responsibility and the Three Fundamental Questions*

It is obviously senseless and pointless to assign responsibilities to trees and robots, but it is not obvious whether it makes sense to assign responsibilities to states. A deeper inquiry is necessary to determine whether accounts of state responsibility can answer the three fundamental questions.

The first question is the question of ownership: how does a state become the owner or source of an action? For example, what makes the 2003 invasion of Iraq an act *of the US*? If an account of state responsibility cannot explain how actions become imputable to states, then it cannot explain why any particular state ought to be held responsible for any particular action – or even why it makes sense to assign responsibilities to states in the first place. States must be able to take ownership of actions in order to incur responsibility for them.

The second question is the question of corporate identity: how does a state persist over time? For example, what makes Great Britain in 1914 the same state as Great Britain in 1839? If a state does not retain its identity through changes in its population, territory, and institutions, then it cannot be responsible for the actions of its temporal antecedents. Britain cannot be bound by the Treaty of London if it is not the state that signed the Treaty in 1839 (see Carr, 1939: 191). An answer to the question of corporate identity is necessary to explain how the responsibilities of states persist over time and through generations.

The third question is the question of fulfillment: how does a state act on or fulfill its responsibilities? Assigning responsibilities to states is superfluous if these responsibilities cannot be fulfilled or if they are reducible to the responsibilities of individuals. If the responsibilities that we nominally assign to states are in fact borne by particular people, then state responsibility collapses into individual responsibility. Any reference to the responsibilities of states is mere shorthand; it is a matter of verbal economy rather than ethics. State responsibility thus presupposes



that the responsibilities of states need not be reduced to those of individuals. States as such must be able to fulfill their responsibilities.

A rational account of state responsibility must be able to answer all three fundamental questions. If it cannot answer the question of ownership, then it cannot explain how states incur responsibilities. If it cannot answer the question of corporate identity, then it cannot explain how states' responsibilities persist from one moment to the next. If it cannot answer the question of fulfillment, then it cannot explain how states act on their responsibilities. A plausible account of state responsibility must explain how states incur, possess, and fulfill responsibilities.

### *The Structure of the Thesis*

The thesis has four chapters. The first three chapters identify and evaluate answers to the three fundamental questions. The fourth chapter combines these answers into a general theory of state responsibility and then examines the disjuncture between the theory and the practice of state responsibility. The thesis concludes that state responsibility has a rational justification but that this justification cannot support our common practices in international affairs. The legal and ethical doctrine of state responsibility is built on a series of fictions.

Chapter One addresses the question of ownership. This question has received the most attention, and it has two common answers. The *analogical* answer, which is common in IR and IPT, employs an analogy between states and persons. States, like human beings, take ownership of actions through their decisions or acts of will. On this view, the US is responsible for its debt because it

incurred the debt intentionally or willfully. The US decided to issue bonds, so the resulting debt belongs to the US. The *attributive* answer, which prevails in IL, employs a theory of authority or representation. States take ownership of actions by authorizing individuals to act on their behalf. On this view, the US is responsible for its debt because the people who incurred the debt acted under its authority. Particular people decided to issue the bonds, but, because those people were representatives of the US, the debt belongs to the US as a whole. The attributive answer is preferable because it does not require the contentious analogy between states and persons.

Chapter Two addresses the question of corporate identity. This question has received much less attention than the first, and it proves to be more difficult to answer. How can Canada remain the same state since Confederation given that its government, territory, population, demographics, and even institutions have changed since then? The only feature that has persisted since 1867 seems to be the name, 'Canada,' but our persistent use of the name begs the question. The most plausible answer to the question of corporate identity comes from Aristotle: the identity of a state depends on the way in which its parts are organized, not the particular parts that it contains. A state persists despite changes in its government, territory, population, demographics, and institutions provided that its constitutional form or organizing principle remains the same.

Chapter Three addresses the question of fulfillment. State responsibility presupposes a distinction between the responsibilities of states and the responsibilities of individuals, but the two sets of responsibilities are interrelated.

States cannot fulfill their responsibilities without the help of individuals. The debts of states are paid by their taxpayers, the treaties of states are implemented by their legislators, punishing states inevitably harms their citizens, and state apologies must come from leaders. Although state responsibility and individual responsibility are intrinsically related, the former is not reducible to the latter. Canada's sovereign debt, for example, is not reducible to the debts of Canadians. Canada does not owe less every time a Canadian dies or emigrates. The relationship between state responsibility and individual responsibility contains the answer to the question of fulfillment. The responsibilities of states must be distributed to individuals in order to be fulfilled, but these responsibilities distribute to individuals according to their identities as members of the state rather than their identities as individuals.

Chapter Four combines the answers to the three fundamental questions. The answer to each question corresponds to a stage or moment in a process of state responsibility. The answer to the question of ownership corresponds to the *stage of attribution*, in which a responsibility is assigned or imputed to a particular state. The answer to the question of corporate identity corresponds to the *stage of possession*, in which a state has an unfulfilled responsibility. Finally, the answer to the question of fulfillment corresponds to the *stage of distribution*, in which the members of a state act to fulfill its responsibility. Every particular case of state responsibility takes the form of a progression from attribution to possession to distribution.

Chapter Four concludes by examining the disjuncture between the theory and the practice of state responsibility. It shows that state responsibility as articulated in IR, IL, and IPT depends on three fictions: (1) *the fiction of the uniform*,

or the assumption that states are responsible for all of the actions of their officials; (2) *the fiction of permanence*, or the assumption that states persist despite all changes; and (3) *the fiction of nondistributivity*, or the assumption that the responsibilities of states and the responsibilities of individuals are mutually independent. There are no rational justifications to be found for these assumptions. The only possible justifications are instrumental justifications that appeal to the consequences of employing the fictions.

The questions, answers, stages, and fictions follow the same tripartite structure. In each case, the three parts correspond to the three capacities that any entity must have in order to be a candidate for assignments of responsibility: the capacities to incur, possess, and fulfill responsibilities.

### *Contributions to Literature*

The thesis makes four contributions to the literature on state responsibility. First, and most importantly, it provides a comprehensive review of the theory of state responsibility. Almost all of the existing work on state responsibility is non-theoretical, and the theoretical work that does exist is scattered across several disciplines and often buried in obscure publications. This work compiles the literature; provides a set of benchmarks with which to determine what counts as an adequate justification for state responsibility (i.e., the three fundamental questions); identifies answers that are implicit in the existing literature; and systematically evaluates these answers.

Second, the thesis provides an account of state responsibility that is theoretically sound but also intuitive and free of metaphysical baggage. This account adheres to the basic principle that *only individuals act* without simply reducing state responsibility to individual responsibility.

Third, the thesis clarifies the relationships between three areas of literature that are related to state responsibility: the literature on agency and authority, the literature on corporate identity, and the literature on the connection between corporate responsibility and individual responsibility. Most works on state responsibility, and corporate responsibility more generally, draw from only one of the three areas (e.g., O'Neill, 2003; Runciman, 2003). A complete account of state responsibility requires all three.

Fourth, the thesis introduces new terminology to the study of state responsibility. There have only been about four decades of sustained inquiry into the theory of state responsibility, and the language with which to discuss it remains underdeveloped. The doctrine of state responsibility is theoretically impoverished partly because the study of state responsibility is terminologically impoverished.

State responsibility is fundamental to international affairs but underexplored. It would be impossible to understand sovereign debts, reparations, state apologies, or even treaties without state responsibility, but the internal logic of state responsibility is rarely examined. All assignments of responsibility depend on prior but usually implicit judgments about who or what is capable of being responsible. The practice of assigning responsibilities to states ought to be critically examined rather than taken for granted.

## **Chapter 1: The Question of Ownership**

Almost all of the theoretical literature about state responsibility focuses on the question of ownership: how does a state become the owner or source of an action? There are two common answers. The analogical answer is that states, like human beings, take ownership of actions through their decisions or acts of will. The attributive answer is that states take ownership of actions through the individuals who act under their authority. The two answers belong to parallel traditions that often appear to be unaware of each other. Both answers plausibly explain how states take ownership of actions, but the attributive answer is less problematic because it does not depend on the questionable analogy between states and persons. The chapter concludes that the question of ownership has at least one adequate answer.

### **1.1 The Analogical Answer**

The analogical answer is several centuries old. The conception of the state as a moral person dates back at least to Samuel von Pufendorf (1934 [1672]: 983), who described the state in anthropomorphic terms as a “single person with intelligence and will, performing other actions peculiar to itself and separate from those of individuals” (see also Aufricht, 1943: 218-19). He argued that a state, like a human being, is “a unit which possesses a single will” (Pufendorf, 1934: 986) – in modern terms, an agent or a purposive actor. For Pufendorf, states are capable of having responsibilities because they are capable of taking ownership of actions in the same

way that humans do – through acts of will. A state, like an individual, is the owner of actions that it performs willfully.

Onora O’Neill’s (1986) analogical answer to the question of ownership has been the most influential in modern IPT. Her engagement with state responsibility begins with an attempt to explain our many ethical failures in international affairs. She argues that many international ethical issues, and particularly nuclear issues, appear intractable in part because individuals are assumed to be the only moral agents or subjects of responsibility (51-53). Individuals *qua* individuals are incapable of solving many of the large-scale issues that characterize international affairs. They cannot discharge their responsibilities to prevent nuclear war, for example, because “[i]ndividuals have remarkably few options to reduce nuclear dangers” (55). Institutions, such as states and international organizations, are often the relevant moral agents in international affairs because they are often the only ones with the power to solve global problems.

O’Neill employs an analogy between states and persons to explain how states incur responsibilities. She argues that states are capable of taking ownership of actions in the same way that individuals do. Her key premise is that “some institutions may be agents in the literal and unmetaphorical way in which individuals are agents” (58). The analogy between states and persons holds in one crucial respect: states, like human beings, have integrated capacities for reason and autonomous action that allow them to make unified decisions and to act purposively. The decision-making structures of states, like the minds of individuals, allow them to process information, to deliberate, to pursue goals, and to do so

independently of other entities (61-66). States are therefore capable of taking ownership of actions through the decisions or choices that they make, just as human beings do. O'Neill's argument for state responsibility is a Kantian argument for individual responsibility writ large (see Byrd, 2006). Both states and individuals are the owners of actions that they perform willfully or 'on purpose'.

The analogical answer has since become the most prevalent one in IR and IPT, and its main proponent is Toni Erskine (2003; 2008; 2010). Following O'Neill, Erskine (2003) argues that the disanalogy between states and individuals "is often over-stated" and that states are "capable of acting and knowing in a way that is analogous – but not identical – to that of most individual human beings" (21-22). Because states, like individuals, are capable of reasoning and of acting purposively, they are "moral agents in the same way that we understand most individual human beings to be moral agents" (Erskine, 2008: 2). States can therefore possess duties, be blamed, be praised, and be punished.

Erskine provides five criteria for collective moral agency. A collectivity is sufficiently analogous to an individual, and is therefore a moral agent, if and only if it possesses "[1] an identity that is more than the sum of identities of its constitutive parts; [2] a decision-making structure; [3] an executive function linked to this decision-making structure that allows policies to be implemented; [4] an identity over time; and [5] a conception of itself as a unit" (Erskine, 2004: 26; see also Erskine, 2010: 264-65).<sup>5</sup> First, the identity of a collective moral agent is irreducible

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<sup>5</sup> Erskine's (2001: 72; 2003: 24) first formulation of collective moral agency had only four criteria. Her newer formulations require an executive function that allows the collectivity in question to act on its objectives.



to the identities of its members. Changing the membership of the collectivity does not change its identity, which excludes crowds and other groups whose identities depend on their particular memberships. Second, a collective moral agent has an internal decision-making structure – a set of procedures, roles, and relations of authority – that allows it to deliberate and to set collective goals. Third, a collective moral agent is able to pursue its ends. Its executive function, like the body of an individual, “allows it to translate decisions into actions and ensures that policies can be implemented” (Erskine, 2010: 265). Fourth, the identity of a collective moral agent persists over time. This criterion rules out collectivities that quickly form and disband, such as riots and protests, because they often cease to exist before they can fulfill responsibilities. Finally, a collective moral agent conceives of itself as a unit, which rules out collectivities that are externally defined, such as failed states and puppet states. Erskine argues that collectivities that satisfy these criteria, including but not limited to states, possess the unified capacities for reason and purposive action that are necessary and sufficient for moral agency.<sup>6</sup>

Erskine follows O’Neill closely on the question of ownership, and her second criterion for collective moral agency provides her answer. A decision-making structure allows a collectivity to act purposively or to be an agent. In Erskine’s (2003: 23) words, it “entails a degree of decision-making unity that would allow the collectivity in question to arrive at a predetermined goal”. The capacity for purposive action is analogous to intentionality in human beings. Just as individuals

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<sup>6</sup> Erskine’s first, fourth, and fifth criteria address the question of corporate identity rather than the question of ownership. Erskine’s answer to the question of corporate identity will be evaluated in Chapter Two.

are the owners of actions that they perform intentionally, collectivities are the owners of actions that they perform to fulfill their collective decisions or ends. For example, the US is the owner of the 2003 invasion of Iraq because its decision-making structure is the source of the decision to invade. It is not the owner of every action that its citizens perform abroad. A murder that an American citizen commits in Iraq is not an act of the US unless the murder is sanctioned by a collective decision of the US. When an action is an articulation of a state's collective decision or collective end, the state is owner of that action.

Anthony Lang's (2007: 243-44) answer to the question of ownership is substantially the same as Erskine's and O'Neill's, but he employs the language of intentionality rather than decision-making. He argues that "[s]tates that have a deliberative body that determines not only instrumental actions but also overarching political aims can be said to have intentions" (244). It is through their intentions that states take ownership of actions. O'Neill (1986: 62-63) and Erskine (2003: 6-7) avoid attributing intentions to states simply to avoid the mental connotations of 'intentionality' and to preempt the criticism that collective moral agency presupposes collective consciousness. Although Lang is more comfortable with the language of intentionality, his argument does not presuppose that states have minds of their own. For Lang, as for O'Neill and Erskine, states take ownership of actions through the collective decisions that individuals make via state institutions. The 'intentions' of states are simply their objectives or ends.

This short summary obscures many of the subtle variations within the analogical camp, but it captures the logic of the analogical answer and demonstrates

its force. The analogical answer begins with a premise that is common in IR and IPT – that states are agents – and draws out its ethical implications. If one accepts that states are agents, then it is difficult to deny that states are *moral* agents. As purposive beings, states can take ownership of actions in the same way that human beings do – through their decisions or acts of will.

### *1.1.1 Problems with the Analogical Answer*

The primary objection to the analogical answer is that the analogy between states and persons is faulty. Beitz (1999: Part Two) argues that the analogy breaks down because “states do not think or will or act in pursuit of ends; only people (or perhaps sentient beings), alone or in groups, do these things” (76). States cannot take ownership of actions through their wills or decisions because they do not have wills or make decisions; only human beings do. For Beitz, states are not agents, let alone moral agents, because they have no wills with which to take ownership of actions.

The debate about whether states are agents has received significant attention in IR theory since the publication of Alexander Wendt’s (1999) *Social Theory of International Politics*. For Wendt, states are not *like* persons; they *are* persons. As in the often-quoted phrase, “states are people too” (Wendt, 1999: 215), he makes the identification of states with persons literal rather than analogical. His claim at first seems indefensible, but it is plausible given his definition of ‘person’: “persons are above all intentional – purposive or goal-directed – systems” (Wendt, 2004: 295). For Wendt, persons are purposive agents or what Beitz calls ‘sources of ends’.

Wendt's (2004: 300-05) argument for state personhood is that the ends or intentions of states are not reducible to those of individuals.<sup>7</sup> For example, Israel's intention to invade Gaza is irreducible to the intentions of particular Israelis because the same state-level intention is compatible with different combinations of individual intentions. It would still be the case that Israel intends to invade Gaza if a different coalition of legislators had instead endorsed the invasion. Wendt concludes that, although the intentions of states emerge from or 'supervene' on the intentions of individuals, the former are not reducible to the latter. It follows that states *qua* states are literally persons, agents, or sources of ends.

Others, such as Colin Wight (1999; 2004),<sup>8</sup> defend Beitz's position that only human beings are agents. Wight (1999: 128) argues that "Wendt's theory of the state rests on the classic error of methodological structuralism – the attribution of agential powers and attributes of human agents to a collective social form". He later argues, in a response to Wendt (2004), that "state activity is always the activity of particular individuals acting within particular social contexts" and that "[t]here is an ontological wall here that corporate forms do not cross" (Wight, 2004: 279). His point is similar to Beitz's: that states do not have ends of their own, but exist merely to serve the ends of people. Human beings create and modify state institutions to serve human ends. The only agency involved is that of individuals.

The debate about whether states are agents cannot be resolved here, but it is important to note that its outcome determines the validity of the analogical answer

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<sup>7</sup> Wendt borrows this line of argument from the philosophical literature on corporate agency (see Tollefsen, 2002).

<sup>8</sup> See Lomas (2005), Wight (2006), and Franke and Roos (2010) for other objections to the state-as-agent thesis.

to the question of ownership. If states are not agents, then the analogy between states and persons is faulty in the relevant respect. States cannot take ownership of actions through their wills or decisions if they do not have wills or make decisions in the first place. The analogical answer ultimately depends on the controversial premise that states are purposive agents.

## 1.2 The Attributive Answer

The attributive answer to the question of ownership has an even longer history. It dates back at least to Thomas Hobbes (1996 [1651]). The state is a person for Hobbes, but, despite what the cover and introduction of *Leviathan* suggest,<sup>9</sup> it is not the kind of person that proponents of the analogical answer have in mind. On the contrary, he argues that the state is not a “natural person” or agent because it cannot act on its own: “the Common-wealth is no Person, nor has the capacity to do any thing, but by the Representative” (XXVI. [137]). Hobbes instead conceives of the state as an “artificial person” – an entity that can be represented but cannot represent itself (XVI. [80-83]).<sup>10</sup> Although a state cannot perform actions, it is responsible for actions that natural persons perform under its authority. The state is the owner or author of actions that state officials carry out in its name (XXIII. [123-27]). Artificial personhood is not exclusive to the state, nor even to corporate

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<sup>9</sup> The cover of *Leviathan* depicts the state as a large man composed of smaller men, and the introduction features an extended analogy between the state and the human body.

<sup>10</sup> There is considerable debate among Hobbes scholars about the meaning of ‘artificial person’. While some scholars interpret it to mean ‘agent’ or ‘representative’ (e.g., Runciman, 2000b), Quentin Skinner (1999: 11-12) provides compelling reasons to interpret it to mean ‘author’ or ‘that which is represented’.

entities. Hobbes claims that almost anything can be an artificial person, including churches, hospitals, and bridges. Even “[a]n Idol, or meer Figment of the brain, may be Personated” (XVI. [82]). His answer to the question of ownership is attributive rather than analogical: it is based on a theory of authority or representation, not on an analogy between states and persons.

The attributive answer prevails in modern IL. It is neatly codified in the UN International Law Commission’s (ILC, 2001) *Articles on Responsibility of States for Internationally Wrongful Acts* and in Special Rapporteur James Crawford’s (2002; 2013) commentaries thereon. Of particular importance is Part One of the *Articles*, which specifies the conditions for state responsibility. A state is legally responsible for a wrongful act or omission if and only if that act or omission “(a) is attributable to the State under international law; and (b) constitutes a breach of an international obligation of the State” (ILC, 2001: Art. 2). While the rules of attribution determine whether the actions of individuals count as actions of a state, the substantive responsibilities of states – treaties, customs, human rights, etc. – determine whether these actions are wrongful.

The principle of attribution is the foundational principle of state responsibility in IL. When an individual acts under the authority of a state – for example, by occupying the role of prime minister – his or her conduct is attributed to that state. The state is the owner of actions that its representatives perform, and it is therefore responsible for them. Crawford’s (2002: 82) commentary on this point is so succinct and revealing that it deserves to be quoted in full:

The State is a real organized entity, a legal person with full authority to act under international law. But to recognize this is not to deny the elementary

fact that the State cannot act of itself. An 'act of the State' must involve some action or omission by a human being or group: 'States can act only by and through their agents and representatives.' The question is which persons should be considered as acting on behalf of the State, i.e. what constitutes an 'act of the State' for the purposes of State responsibility.

Although Crawford describes the state as a real entity and a legal person, he is clear that it is not an agent. States cannot act on their own; they need human beings to act for them. The secondary legal literature on state responsibility is peppered with similar statements. For example, Antonio Cassese (2001: 187) writes that "States act on the international level through individuals," and Andre Nollkaemper (2003: 616) writes that "in factual terms states act through individuals". The analogy between states and persons is notably absent from IL. A theory of authority, not of corporate agency, underpins the attributive answer to the question of ownership.

Only the actions of authorized individuals are attributable to the state. As Crawford (2002: 91) explains, "the general rule is that the only conduct attributed to the State at the international level is that of its organs, or of others under the direction, instigation or control of those organs". First, states own the actions of their officials – presidents, legislators, judges, police officers, soldiers, etc. When an individual acts through a state office, he or she is a *de jure* state organ, and his or her actions belong to the state (ILC, 2001: Art. 4; Cassese, 2001: 188-89). The actions of a state organ are attributable to its state "even if it exceeds its authority or contravenes instructions" (ILC, 2001: Art. 7). Second, states own the actions of private individuals who exercise state authority or who are under the control of state organs. When a state instructs, coordinates, condones, or finances the conduct of a non-state agent, that agent becomes a *de facto* state organ, and its actions are

attributable to that state (ILC, 2001: Art. 5, 8, 9, 11; Cassese, 2001: 190-91). All actions of state officials and of private individuals under state control are attributable to their states.

Carr (1939) is a notable exception among proponents of state responsibility in IR and IPT. His answer to the question of ownership is attributive rather than analogical. Although he does not address the issue at any length, his answer is clear from the language that he uses: “The acts with which international morality is concerned are performed by individuals not on their own behalf, but on behalf of those fictitious group persons [i.e., states]” (194). Carr sees state personhood as a fiction, albeit a necessary one, rather than an analogy with metaphysical implications. Following international lawyers, his position is that states are the owners of actions that individuals perform under state authority.

### *1.2.1. Problems with the Attributive Answer*

The attributive answer appears to be either infinitely regressive or circular. States act only through individuals, but how do individuals obtain the authority to act on behalf of the state? It does not suffice to say that individuals obtain their authority from other individuals who already possess the authority to act on behalf of the state. This response is infinitely regressive: individuals get their authority from other individuals who get their authority from still other individuals *ad infinitum*. At some point, there must have been a transfer of authority from the state to a human being, but it seems impossible to explain how this transfer happened without presupposing that some individual *already* had the authority to act on



behalf of the state. The problem is that every action of the state – including the act of granting state authority to individuals – must be performed by individuals. The state cannot act unless it authorizes individuals to act on its behalf, but it cannot authorize individuals to act on its behalf unless some individuals already possess the authority to act on its behalf.

The circularity disappears if some individuals obtain state authority directly from the roles or offices that they occupy. State authority need not always be transferred from some individuals to other individuals. Instead, some individuals possess state authority by virtue of their ascribed roles. Natural-born citizens obtain their authority not from others who already possess state authority, but from the citizenship that they are born with. Citizens transfer their authority first to legislators and then, indirectly, to ministers, soldiers, and other public officials. This account of how individuals obtain state authority is neither circular nor infinitely regressive. It also provides a more accurate description of how state officials obtain their authority, at least in democratic states. Some individuals gain state authority from their ascribed roles as citizens, and they then transfer this authority to state officials through elections and other political processes.

Authorization also has an external dimension. The domestic institutions of a state do not always determine who has the authority to represent it. International institutions also, in some cases, determine who has the authority to act on a state's behalf. Under normal circumstances, the domestic institutions of a state determine who possesses its authority. Barack Obama, for instance, has the authority to represent the US because he occupies the office of president in accordance with the

constitutional and electoral rules of the US. No reference to international institutions is necessary to explain why the actions of President Obama are attributable to the US. The international dimension of authorization becomes important when state authority is contested or disputed. When disputes about who possesses state authority cannot be resolved from within domestic institutions, they must be resolved from without. *United States of America v. Iran* (ICJ, 1980) is the most well-known dispute of this kind. At issue was whether the actions of Iranian militants, who stormed the American embassy in Tehran, were attributable to Iran. Although the militants were private citizens, and although the Iranian government did not instruct or arm them, the International Court of Justice (ICJ) ruled that their actions were nevertheless attributable to Iran because the Iranian government neglected its duty to protect the American embassy from them. International institutions, and particularly courts, determine who represents the state when domestic institutions are unable to do so.

Although there are often legal disputes about whether particular individuals have the authority to act on behalf of a particular state, these should not be taken as evidence that the logic of the attributive answer is flawed. On the contrary, the disputants presuppose the attributive answer: they take for granted that actions of states are actions of authorized individuals, and they disagree only about which individuals possess state authority at a given time. Whether a particular person has the authority to act on behalf of a particular state is an empirical question. It can be answered only by examining the domestic institutions of the state, the ways in which individuals participate in them, and the relevant set of international

institutions. The theoretical question – how do states take ownership of actions? – is necessarily prior.

### **1.3 The Answer to the Question of Ownership**

Previous inquiries into the question of ownership have been productive. The question has at least one adequate answer. The analogical and attributive answers are both plausible, but the latter is less problematic because it does not require the questionable analogy between states and persons. The analogical answer depends on the metaphysical doctrine of corporate agency, which remains contentious in social science and philosophy. The attributive answer provides an intuitive, empirically accurate, and theoretically sound account of how states take ownership of actions, all without the baggage of corporate agency. The answer to the question of ownership can be stated in a single sentence: *states take ownership of actions through the individuals who act under state authority.*

## Chapter 2: The Question of Corporate Identity

The question of corporate identity has received much less attention than the question of ownership, and it proves to be more difficult to answer. The question dates back at least to Aristotle (1981: III.3, 1276<sup>a</sup> [17]):<sup>11</sup> “how are we to tell whether a state is still the same state or a different one?” Although many features of states change over time, we assume that states retain their identities. Canada’s population, government, territory, institutions, and constitution have changed since 1867, but we continue to refer to it as ‘Canada’. The assumption that states retain their identities despite change is crucial for state responsibility. Unless states persist despite changes in their parts, their responsibilities must expire before they can be fulfilled. A state cannot inherit the responsibilities of its temporal antecedents unless its identity persists over time. Canada cannot be liable for sovereign debt from the 1970s, for example, unless it is the same state as the one that incurred the debt. Without an answer to the question of corporate identity, an account of state responsibility cannot explain how a state’s responsibilities persist from one moment to the next.

The most compelling answer to the question of corporate identity comes from Aristotle: the identity of a state depends not on its particular constituents, but on the *organizing principle* that determines the relations between these constituents. The same population, territory, and institutions organized differently constitute a different state, and a state remains the same state despite changes in its population, territory, and institutions provided that the relations between these

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<sup>11</sup> Cited according to the book, chapter, page, and paragraph of the Sinclair translation of Aristotle’s *Politics*.

parts remain the same. For example, Weimar Germany and Nazi Germany were different states even though they shared most of the same constituents. Conversely, Canada has been the same state since 1867 despite that its population is completely different and despite that several provinces have since joined the federation. The corporate identity of a state depends on the principle that determines how its constituents are organized, not on its particular constituents at a given time.

## **2.1 The Meaning of Corporate Identity**

'Identity' is used in dozens of different ways. It is necessary to eliminate the ambiguity in the notion of corporate identity before attempting to answer the question of corporate identity.

### *2.1.1 Corporate Identity as Token Identity*

The question of corporate identity concerns the identity of the state as a token, not as a type. Types are categories or classes of things; tokens are particular things that instantiate these categories or classes. As Jens Bartelson (1998: 297) describes, "[t]ype identity concerns the identity of the state as a general concept, whereas token identity concerns ... individual states". 'State' is a type, while 'Uruguay' is a token. The type identity of the state is a major point of debate in comparative politics (see Jessop, 2006), but the token identity of the state is a common presupposition that has seldom been explored since Aristotle. State responsibility requires both. An account of the type identity of the state is necessary to determine the scope of the doctrine, or the set of entities to which it applies. An

account of the token identity of the state is necessary to determine the temporal spread of particular states and, by implication, their responsibilities. While type identity determines what counts as a state, token identity determines what counts as a *particular* state – as Canada, as Britain, etc. Unless states persist as tokens – that is, unless particular states retain their identities over time – the doctrine of state responsibility collapses. If a state does not retain its (token) identity through changes in its population, territory, and institutions, then it cannot retain its responsibilities long enough to fulfill them. ‘Corporate identity’ denotes token identity rather than type identity.

### *2.1.2 Social Identity and Corporate Identity*

Corporate identity should not be confused with the kind of state identity with which constructivist IR scholars are concerned. Wendt’s (1994: 385) distinction between social identity and corporate identity is apt. While “[s]ocial identities are sets of meanings that an actor attributes to itself while taking the perspectives of others,” “[c]orporate identity refers to the intrinsic, self-organizing qualities that constitute actor individuality” (385). The social identity of a state is its position or role within the society of states, which determines its interests and preferences. The corporate identity of a state is its character as a unique and unitary entity.

The corporate identities of states are necessarily prior to their social identities. Whereas the social identities of states are externally constituted through the process of interaction with other states, their corporate identities are internally constituted and precede social interaction. As Wendt (1999: 198) describes, “[t]he

state is pre-social relative to other states in the same way that the human body is pre-social. Both are constituted by self-organizing internal structures, the one social, the other biological". For example, although Canada's social identity as a sovereign, peaceful, Western state is a product of its relations with other states, its corporate identity as *this particular state* necessarily precedes all of these relations. Ascribing sovereignty, peacefulness, or Western-ness to Canada presupposes that it is already a unitary entity that can be distinguished from other states. The corporate identity of a state is the peg on which its social identity hangs.

The distinction between social identity and corporate identity is important for determining what constitutes an adequate answer to the question of corporate identity. The corporate identity of a state cannot be created by social or external factors, such as the structure of international society or recognition from other states. Recognition assumes that there is a preexisting corporate entity to which recognition is granted, and, as Wendt (1999: 198) argues, "states are ontologically prior to the states system". The social identities of states are (at least to some extent) constituted by their relations with other states, but the corporate identities of states are wholly constituted by their internal structures. An answer to the question of corporate identity must come from within the state.

## **2.2 Corporate Identity and State Responsibility in IPT and IL**

Before evaluating answers to the question of corporate identity, it is useful to examine the assumptions that existing accounts of state responsibility make about corporate identity. Proponents of state responsibility in both IPT and IL assume that

the identity of a state persists despite changes in its population, government, territory, institutions, and constitution. Consequently, a state almost always inherits the responsibilities of its temporal antecedents. Even wholesale changes do not usually negate a state's responsibilities for wars, debts, treaties, or reparations.

### *2.2.1 Corporate Identity in IPT*

Erskine is the only proponent of state responsibility in IPT who explicitly recognizes that state responsibility depends on a set of assumptions about the corporate identity of the state. Her first, fourth, and fifth criteria for collective moral agency specify the kinds of entities to which her account of corporate responsibility applies. She argues that a collectivity is a moral agent only if it has “[1] an identity that is more than the sum of identities of its constitutive parts ... [4] an identity over time; and [5] a conception of itself as a unit” (Erskine, 2004: 26). A collectivity must have a decision-making structure in order to incur responsibilities (see s. 1.1), but it must also have a certain kind of identity in order to possess these responsibilities over time.

First, a collective moral agent must have an identity that is irreducible to the identities of its members. Erskine's (2003: 24) earlier formulation of this criterion is clearer: “A collectivity is a candidate for moral agency if it has ... an identity that is more than the sum of the identities of its constitutive parts and, therefore, does not rely on a determinate membership”. The membership-independence of corporate identity is minimally necessary for state responsibility. The membership of each state changes daily as a result of births, deaths, immigration, and emigration. If



states' identities change whenever their memberships change, then they can never justly be held responsible for anything. Responsibility will always be misdirected; the state that is held responsible for an action will always be different from the state to which the action was attributed. The corporate identity of the state must depend on something other than its membership.

Erskine borrows the criterion of membership-independent identity from Peter French (1984: 1-18), who grounds it in a distinction between aggregate and conglomerate collectivities. Whereas the identities of aggregate collectivities change whenever their membership changes, the identities of conglomerate collectivities persist despite complete changes in their membership (1-18). For example, a riot is an aggregate collectivity because its identity changes as its membership changes. It will be a different riot depending on whether its members are Irish nationalists or unionists. A corporation, state, or sports team is a conglomerate collectivity because its identity is independent of its membership. Britain is still the same state that it was yesterday even though some of its members have died and others have been born, and even complete changes in its government, citizenship, or demographics do not make it a different state – or so we commonly assume.

Only conglomerate collectivities are capable of possessing responsibilities *qua* collectivities. Aggregate collectivities cannot have responsibilities because they are not ontologically distinct from the set of their members (French, 1984: 7-13). Assigning responsibilities to a riot is only shorthand for assigning responsibilities to each particular rioter. Conglomerate collectivities have irreducible identities, which allows them to possess irreducible responsibilities (13-15). Because Britain is not

reducible to the set of its members, its debts are not reducible to the debts of particular Britons, and they therefore persist despite changes in its membership. States *qua* states cannot possess responsibilities unless their identities are independent of the identities of their particular members.

Second, Erskine (2004: 26) argues that a collective moral agent must have an identity that persists over time. She recognizes that assigning responsibilities to states is pointless if their responsibilities do not persist long enough to be fulfilled. The criterion of temporal persistence is redundant in some cases, but it is sometimes crucial. For example, the criterion of membership-independence already guarantees the persistence of France despite the gradual turnover of its membership, but it is insufficient to guarantee the persistence of France through revolution. The French Revolution changed France's political institutions and constitution (in Erskine's terms, its 'decision-making structure') in addition to its membership. Erskine does not specify how long a collectivity must persist in order to satisfy the criterion of temporal persistence, but, presumably, the second criterion is meant to cover cases in which the decision-making structures of collectivities change. The corporate identity of the state must be independent of both its particular membership and its particular institutions.

Third, Erskine (2004: 26) argues that a collective moral agent must be a self-defined unit. This criterion rules out collectivities that are externally defined, such as failed states and puppet states. For example, the Transkei Homeland would not have qualified as a moral agent because its identity was, for most of its existence, created and sustained by South Africa. The problem with externally defined

identities is that they can be created and eliminated at will, and their arbitrariness makes them liable to abuse. A state can create as many 'homelands' as it likes, use them as proxies to do its bidding, and then eliminate them when they become burdensome – debts, treaty obligations, and all. The corporate identity of the state must not be another state's contrivance.

Erskine's three criteria restrict her account of corporate responsibility to groups with certain kinds of identities. In order to be a candidate for responsibilities, a group must have an identity that (1) is independent of its particular membership, (2) persists over time, and (3) is not a contrivance of another group. Erskine is undoubtedly correct that these three criteria are necessary for corporate responsibility, but whether any group meets these criteria is questionable. If a state's corporate identity depends on neither its membership nor the wills of other states, then on what does it depend? What accounts for the persistence of a state's identity over time? Erskine does not provide a theoretical account of corporate identity, and she does not claim to. However, she does help to answer the question of corporate identity by identifying the claims that an adequate answer must justify.

### *2.2.2 Corporate Identity in IL*

The doctrine of state continuity describes the assumptions about corporate identity that underpin state responsibility in international law.<sup>12</sup> The general rule is

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<sup>12</sup> International lawyers tend to use 'continuity' rather than 'identity,' but the meaning of 'continuity' is substantially the same as the meaning of 'corporate identity'. For example, for Krystyna Marek (1968: 5), continuity "means that one and

that “the identity of a state continues *except* where, by such change, it legally ceases to exist” (Kunz, 1955: 72). Changes in the fundamental attributes of a state – territory, population, and government – do not change its identity (Crawford, 2007: 667-99; Kunz, 1955: 71-72; Marek, 1968: 15-110). As a result, states retain their legal responsibilities despite changes in their attributes.

The first rule is that “territorial changes do not affect the identity and continuity of States” (Marek, 1968: 15; see also Craven, 1998: 159). States retain their identities after they gain or lose territory, regardless of how this gain or loss occurs. Even “the *total change* of territory by a people which, under the same government and law, settles in a different territory, leaves the identity of the state intact” (Kunz, 1955: 72). Canada remained the same state after Newfoundland joined the federation in 1949, and it would remain the same state even if it somehow relocated to Antarctica. A state must have *some* territory in order to exist,<sup>13</sup> but changes in its territory do not change its identity.

The second rule is that changes in the population of a state do not change its identity (Crawford, 2007: 678; Kunz, 1955: 71-72). States retain their identities through births, deaths, immigration, and emigration, even if these changes alter the demographic composition of the state or result in a complete turnover in its membership. To use Josef Kunz’s (1955: 71) example, “[t]he young US with five million and the present US with one hundred and sixty million [and now more than

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the same subject of rights and obligations continues to exist”. She reserves ‘identity’ for “the logical meaning of the term, [which] implies the complete identity of all the attributes of an object” (5). ‘Continuity’ and ‘identity’ will be used interchangeably. <sup>13</sup> Even a complete loss of territory is sometimes insufficient to eliminate a state’s identity: “annexation of the territory of a State as a result of the illegal use of force does not bring about the extinction of the State” (Crawford, 2007: 690).

317 million] of inhabitants is, of course, the identical state in law". A state must have a population in order to exist, but it need not have any particular population.

The third rule is that changes in the government of a state do not change its identity (Cassese, 2001: 52-54; Crawford, 2007: 678-88; Marek, 1968: 24-40). As Marek (1968: 25) describes, "the somewhat general expression 'changes of government' in fact covers two entirely distinct possibilities: constitutional changes and revolutionary changes". States persist through both constitutional and unconstitutional changes in government, as well as through changes in the form of government. For example, in the precedent-setting *Tinoco Arbitration*, William H. Taft (1923) ruled that Costa Rica was responsible for the actions of the government of Federico Tinoco, which came to power through a coup in 1917 and was deposed in 1919 (see Cassese, 2001: 52; Marek, 1968: 40). Similarly, and much to the displeasure of the Soviets, the Soviet Union inherited the identity and the responsibilities of the Russian Empire (Crawford, 2007: 676-78; Kunz, 1955: 73). Changes in the form or composition of a state's government do not change its identity.

The fourth rule, which might be considered an extension of the third, is that "belligerent occupation does not affect the continuity of the State" (Crawford, 2007: 688). Occupied states retain their identities even if their governments are eliminated or exiled. For example, Latvia, Lithuania, and Estonia were the same states in 1991 that they were in 1940 even though the Soviet Union occupied them for over 50 years (Crawford, 2007: 689-90; Van Elsuwege, 2003). However, occupying states cannot 'hijack' the identities of the states that they occupy: "Where

the change [in government] results from external imposition (in particular of a puppet entity), continuity is not to be presumed; such an entity lacks any international status other than as agent of the belligerent” (Crawford, 2007: 680-81).<sup>14</sup> The Soviet governments of the Baltic states carried the identity of the Soviet Union, not of Latvia, Lithuania, and Estonia. Even the temporary absence of a legitimate government does not extinguish a state’s identity.

The doctrine of state continuity holds that a state persists despite changes in its fundamental attributes. With the important exceptions of illegal occupation and annexation, only a complete loss of territory, population, or government is sufficient to negate the identity of a state. Illegally occupied states retain their identities even if they lack territory and government, and even if decades or centuries have passed.

### *2.2.3 The Permanence Principle*

Erskine’s account of collective moral agency and the legal doctrine of state continuity are largely in agreement. The principle that underlies both will be called the *permanence principle*: the identity of a state persists despite changes in the state’s constituents. For Erskine, the principle marks the limit of state responsibility. A state (or any other collectivity) cannot have responsibilities unless its identity persists despite changes in its constituents. For international lawyers, the principle is an assumption; the identity of a state persists in law despite changes in the state’s constituents. The permanence principle sets a benchmark for answers to the question of corporate identity. An adequate answer must explain how it is possible

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<sup>14</sup> The legal rule about puppet governments is similar to Erskine’s criterion that excludes groups whose identities are externally defined.

for a state to persist over time despite changes in its population, territory, government, and institutions. What is it that persists?

### **2.3 Carr's Challenge: The Intractability of Corporate Identity**

Some inquiries into the question of corporate identity have found it to be unanswerable. E. H. Carr (1939) and David Runciman (2003) argue that the corporate identity of the state is a fiction – that it is impossible to provide a rational or theoretical basis for it.

Carr (1939) addresses, or perhaps sidesteps, the question of corporate identity in his discussion of international morality. He begins by arguing that the corporate identity of the state is an indispensable feature of modern international affairs. He notes that “[r]elations between Englishmen and Italians’ is not a synonym for ‘relations between Great Britain and Italy’” (190), and he observes that sovereign debts and treaties presuppose that states have identities that are distinct from those of their members (190-92). It is difficult to discuss international affairs, let alone conduct international affairs, without assuming that states have corporate identities. However, anticipating the philosophical quagmire ahead, Carr denies that the identity of the state is susceptible to justification. He argues that “[t]he personality of the state is not a fact whose truth or falsehood is a matter for argument” and that it is merely “a necessary fiction or hypothesis – an indispensable tool devised by the human mind for dealing with the structure of a developed society” (189). According to Carr, the corporate identity of the state is indispensable but fictional.

Runciman (2003: 45) similarly argues that state responsibility presupposes corporate identity but that the question of corporate identity has never been adequately answered:

if the state is to be a moral agent, it must have a corporate identity, yet the means for giving it a clear corporate identity are lacking. One could argue, as many philosophers have, that the state has a clear corporate moral identity independent of law. However, this argument has never been so persuasively put that any agreement has been reached on what allows us to recognize such entities: Culture? Nationhood? Territoriality? Spirit?

The problem, in other words, is that there is no essential feature of the state that is capable of accounting for the persistence of its identity over time. For example, although we commonly assume that Canada has existed since 1867, there is no persistent feature that justifies treating 'Canada at 1867' and 'Canada in 2014' as the same state. Canada's population, demographics, government, borders, institutions, political culture, and even constitution have all changed; the only thing that remains the same is our question-begging use of the name, 'Canada'. Moreover, identifying the state with any of its properties would eliminate the corporate character of its identity: "a state cannot be made out of its constituent parts – its citizens, its laws, its government, even its constitution. It must be something more than the sum of its parts, if it is to be recognizably separate from them" (Runciman, 2000a: 99). Like Carr (1939), Runciman (2003: 48) concludes that state responsibility depends on "the fiction of [the state's] corporate character". The corporate identity of the state has no rational basis, but it remains "one of the conventional certainties of modern politics" (48) because it is necessary to support state responsibility.

In the spirit of British pragmatism, Carr and Runciman sidestep the obscure and protracted debate about the nature of identity. Although both argue that the



corporate identity of the state is a necessary but unjustified presupposition of state responsibility, neither provides a compelling argument to show that the corporate identity of the state is *unjustifiable*. It may indeed be impossible to provide a rational basis for corporate identity, but this ought to be demonstrated rather than simply asserted. It is necessary to examine existing answers to the question of corporate identity in order to determine whether Carr and Runciman's skepticism can be overcome.

#### **2.4 Aristotelian and Legal Answers to the Question of Corporate Identity**

Although state responsibility requires an extensive set of assumptions about the corporate identity of the state, answers to the question of corporate identity are scarce. The Aristotelian and legal answers are among the few.

Aristotle's answer to the question of corporate identity is both the oldest and the most promising. He asks, "how are we to tell whether a state is still the same state or a different one?" (1981: III.3, 1276<sup>a</sup> [17]), and he uses Heraclitus's river paradox, which he takes to be an analogous problem, as his model. Given that a river contains different water at each time, is it possible to bathe in the same river twice? Unlike Heraclitus, Aristotle thinks so. He employs the same principle to answer both Heraclitus's question and the question of corporate identity: the identity of an object depends on the principle that determines the organization of its parts, not on the particular parts that it contains (III.3, 1276<sup>a</sup> [34]). The same parts organized differently constitute a different object, and an object retains its identity despite changes in its parts as long as it has the same organizing principle.

Aristotle argues that “the main criterion of the continued identity of a state ought to be its constitution” (III.3, 1276<sup>a</sup> [34]). The criterion cannot be population or territory because “it is quite possible to divide both population and territory in two” (III.3, 1276<sup>a</sup> [24]). The particular constituents of a state are inessential to it. Just as a river retains its identity as different water passes through it, a state retains its identity as its population and territory change (III.3, 1276<sup>a</sup> [35-39]). The identity of a state, like the identity of a river, depends on the way in which its parts are organized rather than the particular parts that it contains. The criterion for the persistence of a state is the principle that determines the organization of its parts – its constitution (III.3, 1274<sup>b</sup> [32]).<sup>15</sup> Given that a state is “an association of citizens in a constitution” (III.3, 1276<sup>b</sup> [1-2]), a change in a state’s constitution must change its identity. The identity of a river depends on the form of its banks rather than the particular water that it contains. The identity of a state depends on the form of its constitution rather than the particular population or territory that it has.

For Aristotle, the organizing principle of an institution or association is always a teleological principle: “all associations aim at some good” (I.1, 1252<sup>a</sup> [1]). However, the idea that the identity of an institution depends on the organization of its parts is compatible with many non-teleological conceptions of institutions. One could conceive of institutions as products of evolutionary processes or spontaneous emergence, for example, but still accept that the identity of an institution depends on the way in which its constituents are organized. It is this more general idea of an organizing principle, not the teleological conception of institutions as such, that

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<sup>15</sup> The meaning of ‘constitution’ for Aristotle is different than its modern meaning. For Aristotle, its meaning is closer to ‘regime type’ than to ‘founding principles’.

contains the answer to the question of corporate identity. A broad interpretation of Aristotle yields a more robust answer.

There are two problems with Aristotle's use of constitutional form as the criterion for corporate identity. First, constitutional form is a criterion for type identity rather than token identity. Democracy and aristocracy, for instance, are types rather than tokens; they are classes of states rather than particular states. Consequently, sameness of constitutional form is necessary but not sufficient for corporate identity. Difference of constitutional form implies non-identity, but sameness of constitutional form does not imply identity. For example, if Canada ceased to be a democracy, then it would become a different state. However, although Canada and Australia are both democracies, they are clearly not the same state. All democracies would constitute one state if constitutional form were the only criterion for corporate identity. Additional criteria are necessary to differentiate particular states. In Aristotle's defence, he presents sameness of constitutional form as a necessary condition, not a sufficient condition, for corporate identity: "when the constitution changes and becomes different in kind, the state also would seem necessarily not to be the same" (III.3, 1276<sup>a</sup> [34]). Although states with different constitutional forms are necessarily different, states with the same constitutional form are not necessarily the same. Constitutional form is "the main criterion of the continued identity of a state" (III.3, 1276<sup>a</sup> [34]), but it cannot be the only criterion.

Second, sameness of constitutional form is too weak a criterion to justify the permanence principle – the assumption that states persist despite changes in their constituents (see s. 2.2.3). Many states have undergone constitutional changes,

especially since the end of the Cold War, but we continue to refer to them using the same names and to hold them responsible for the actions of their antecedents. For example, Chile has become a democracy since 1990. If sameness of constitutional form were necessary for corporate identity, then 'Chile in 1974' and 'Chile in 2014' would not be the same state, and the latter therefore could not be bound by the responsibilities of the former. The present state of Chile could not be responsible for the crimes committed or the debts incurred during Augusto Pinochet's rule.<sup>16</sup>

Aristotle's argument that sameness of constitutional form is necessary for corporate identity puts him at odds with the doctrine of state responsibility in IL and IPT. The common assumption that the identities of states persist despite constitutional change requires a much stronger justification. However, the fact that Aristotle's account of corporate identity fails to justify the permanence principle does not imply that his account is incorrect. More plausibly, it implies that the permanence principle is incorrect (see s. 4.2.2).

A more recent account of the corporate identity of the state comes from James Crawford (2007), who employs the legal criteria for statehood as criteria for corporate identity. He argues that "we should treat the determination of identity and continuity as dependent on the basic criteria for statehood" (671). The criteria to which Crawford refers are the four criteria for statehood from the *Montevideo Convention* (1933: Art. 1): "a) a permanent population; b) a defined territory; c)

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<sup>16</sup> In international law, responsibilities for debts and for crimes are somewhat different. Only states can be responsible for sovereign debts, but many international crimes, including crimes against humanity and torture, "can be attributed twice: both to the state and the individual" (Noellkaemper, 2003: 618-19). Pinochet and Chile can be *concurrently* responsible for the same crimes.

government; and d) capacity to enter into relations with the other states". On his view, a state persists as long as its fundamental attributes remain substantially the same: "A State may be said to continue as such so long as an identified polity exists with respect to a significant part of a given territory and people" (2007: 671). For example, although Turkey is not coextensive with the Ottoman Empire, the former and the latter share a territorial base. Turkey inherited the legal identity and responsibilities of the Ottoman Empire because of this substantial overlap (Avedian, 2012). For a similar reason, the Soviet Union inherited the identity of the Russian Empire (Crawford, 2007: 676-78; Kunz, 1955: 73). According to Crawford, a state becomes a different state after a wholesale change in its fundamental attributes, but it retains its identity as long as a significant part of its population, territory, or government remains the same.

There are at least two problems with Crawford's use of the criteria for statehood as criteria for corporate identity. First, and most importantly, the criteria for statehood are criteria for type identity rather than token identity. They are conditions for admission into the class of states, not identifying features of particular states. Matthew Craven (1998: 160) preempts Crawford's argument:

'Identity' assumes that individual states, whilst being members of a particular class of social or legal entities, also possess certain distinguishing features that differentiate one from another. Identity, therefore, presumes personality but is concerned with what is personal or exceptional in the nature of the subject. This can never be provided by reference to the traditional requirements of statehood.

Again, an account of type identity is necessary but not sufficient for token or corporate identity. A state must meet the four conditions for statehood in order to

retain its corporate identity, but the fact that an entity has a particular population, territory, or government is insufficient to identify it as particular state.

Second, Crawford's account of corporate identity is intolerably vague. It is not clear what counts as an "identified polity" or a "significant part of a given territory and people" (2007: 671). Small changes in territory and incremental changes in population presumably leave a state's identity intact, but Crawford's account provides little guidance in more difficult cases. Which state is identical with pre-Revolution China – Taiwan or the People's Republic of China (PRC)? Both states seem to have equally valid claims to be the 'real' China. The PRC shares much more territory with pre-Revolution China, but Taiwan inherited the government of pre-Revolution China. Crawford's account provides no way to arbitrate between the two.

While Crawford's answer to the question of corporate identity is of little use for theoretical purposes, Aristotle's answer provides a useful starting point. Sameness of constitutional form is necessary but not sufficient for corporate identity. Other criteria are necessary to differentiate particular states, but what these other criteria could be is not immediately clear.

## **2.5 The Analogy between Corporate Identity and Personal Identity**

The question of corporate identity has an individual-level analogue. W. V. Quine (1950: 621) puts it best: "Undergoing change as I do, how can I be said to continue to be myself?" The question of personal identity has attracted much more attention than the question of corporate identity, and the answers to the former suggest possible answers to the latter.

Paul Weiss (1939) explains the importance of personal identity for ethics.<sup>17</sup>

He argues that all assignments of responsibility presuppose that the identities of actors persist over time.

It is wrong to praise or blame one man for actions independently performed by another. But this wrong would be an inevitable result if the individual judged were not identical with the one who committed the act. An act, however, usually occurs before a judgment is or can be made. Unless individuals persisted for a period of time, to condemn or approve, to punish or reward would be the surest way to be consistently immoral. (349)

Just as assignments of responsibility to human beings assume that individuals persist despite changes in their bodies, assignments of responsibility to states assume that states persist despite changes in their populations, territories, and institutions. The questions of personal identity and corporate identity are analogous, which suggests that they may have analogous answers.

Psychological continuity is the most common criterion for personal identity (e.g., Garrett, 1998; Nagel, 1986; Shoemaker and Strawson, 1999). According to the bulk of the philosophical literature, 'person at  $t_1$ ' and 'person at  $t_2$ ' are stages of the same person if and only if they are connected by mental states, such as intentions and memories. According to this view, I know that I am the same person that I was yesterday because I remember what I did yesterday and because my mental states yesterday are causally antecedent to my mental states today. A person persists as long as each of its temporal stages is psychologically continuous with the stages that preceded it.

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<sup>17</sup> The present work is heavily indebted to Weiss for the idea that judgments of responsibility presuppose judgments of identity. The use of "The Locus of Responsibility" in the title is in recognition of this debt.

It is doubtful that the criterion of psychological continuity has a state-level analogue. Contrary to what Wendt (2004: 311-14) argues, states are not conscious – or, at least, there is no reason to believe that they are. James Keeley’s (2007: 9) response to Wendt is apt: “If such higher-order consciousnesses exist, how would we know it?” A state cannot simply be placed in front of a mirror to see whether it recognizes its reflection. Even if states were purposive agents, as the analogical answer to the question of ownership implies (see s. 1.2), there would still be no reason to believe that they are conscious. An entity need not be conscious in order to exhibit purposive or goal-directed behaviour. The criterion of psychological continuity will not work as a criterion for corporate identity because states do not possess psychological properties and, even if they did, human beings would have no way of knowing it. The analogy between states and human beings is of little help for answering the question of corporate identity.

Quine (1950) argues that the question of personal identity is only an instance of the more general question of identity. Although personal identity is a particularly important case because of its implications for ethics and law, the identities of other objects are also problematic. He begins, as Aristotle does, with Heraclitus’s river paradox: “You cannot bathe in the same river twice, for new waters are ever flowing in upon you” (621). A river at each time contains different water, so it seems to become a different river with each passing moment. Positing an immortal soul or a unity of consciousness may be a plausible way to answer the question of personal identity, but it does not work to explain how the identities of rivers or



states persist. The identities of physical and social objects must have some other basis if they have any rational basis at all.

Quine's answer to the general question of identity, which is based on the solution to Heraclitus's river paradox, suggests a promising answer to the question of corporate identity. He argues that "you *can* bathe in the same *river* twice, but not in the same river-stages" (621). In other words, one can bathe in the same river without bathing in the same water. Rivers are not simply sets of particular water molecules; they are sets of water molecules that stand in certain relations to each other. Although a river at each moment contains a different set of water molecules, the relations between the water molecules persist over time. The Bow River continues to run from the Rocky Mountains through the Prairies even though the particular water that it contains is constantly changing. River-stages are fleeting, but rivers persist – at least for some time.

The underlying principle is that the identity of an object depends on the relations between its parts, not on the particular parts that it contains. Quine calls entities that persist despite changes in their constituents "processes or time-extended objects" (622). Some objects, such as rocks and machines, retain both their forms and their constituents over time.<sup>18</sup> Many others, such as rivers and organisms, retain only their forms. A time-extended object consists of a set of relations, not of a determinate set of parts. It therefore persists as long as this set of relations persists. Water flows and evaporates, and cells grow and die, but rivers and organisms persist.

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<sup>18</sup> Even the constituents of rocks and machines change over long periods of time. Rocks erode, and machines wear out.

Quine claims that “[t]he solution of Heraclitus’s problem ... will afford a convenient approach to some less familiar matters” (621). Although his examples are sparse, the idea of time-extended objects seems especially applicable to social objects. Many social objects – particularly institutions, however broadly they are defined – depend for their identities on their forms rather than their constituents. Citizens die and are born, legislators and executives gain and lose office, and laws change, but the relations between citizens, legislators, executives, and laws exhibit considerable continuity. Canada’s citizens, legislators, executives, laws, and even constitution have all changed since 1867. The only thing that persists is the *relations* between these parts. Citizens still elect legislators, the executive is still responsible to the legislature, laws must still be passed in the legislature, ministers are still responsible for their departments, and the provincial and federal governments still share constitutional authority. According to a Quinean account of corporate identity, a state persists as long as the relations between its constituents persist.

The Quinean account of corporate identity complements the Aristotelian account. The difference between the two is a matter of scale rather than substance. Quine’s account of identity is micro-level, and Aristotle’s account is macro-level. Whereas the Quinean account identifies the state with the set of relations between its parts, the Aristotelian account identifies the state with the organizing principle that determines the relations between its parts. The Quinean account focuses on the relations as such; the Aristotelian account focuses on the principle that gives rise to the relations. For example, while the Quinean account identifies Canada with the relations between its citizens, legislators, executives, and laws, the Aristotelian

account identifies Canada with its democratic constitution. The answers are sides of the same coin: the relations between Canada's citizens, legislators, executives, and laws are expressions or articulations of its democratic constitution.

The Aristotelian and Quinean accounts of corporate identity suffer from a common problem. Although both can explain how states persist despite changes in their populations, territories, and institutions, neither can account for the uniqueness of states. The Aristotelian account cannot explain how it is possible to distinguish states that have the same type of organizing principle (see s. 2.4). The Quinean account cannot explain how it is possible to distinguish states whose parts stand in the same relations. For example, both Canada and Australia have democratic constitutions, and an abstract, relational description of Canada could easily be confused with a similar description of Australia. Both are Commonwealth democracies in which citizens elect legislators, the executive is responsible to the legislature, laws must be approved by a majority of legislators, ministers are responsible for their departments, and the two levels of government share constitutional authority. The organizing principle of a state can account for its persistence, but it cannot account for the state's uniqueness or distinctness.

The intuitive response is that states can be distinguished according to their particular constituents. It is tempting to say that Canada and Australia are unique states because they have unique populations and territories, but this will not suffice. The Aristotelian and Quinean accounts of corporate identity imply that the particular constituents of a state, like the particular water molecules in a river, are inessential to it. Just as a river remains the same river despite changes in the water

that it contains, a state remains the same state despite changes in its population and territory. Canada and Australia would be the same states even if they had completely different populations and territories, so their particular populations and territories cannot possibly account for their uniqueness. The constituents of a state cannot be the basis for its identity because it persists despite changes in its constituents. Further, as Runciman (2000: 101) points out, “[i]f the corporation is identified with any of its constituent parts – its members, officers etc. – then the idea of the corporation, as a separate entity, is lost”. The identity of a state would cease to be corporate if it were dependent on a particular set of people, territory, and institutions. The Aristotelian and Quinean accounts of corporate identity successfully explain how states persist despite changes in their parts, but, as a consequence, both accounts struggle to explain the uniqueness of states.

## **2.6 Kripke’s Origin Criterion**

How is it possible to distinguish states that have the same constitutional form or are constituted by the same set of relations? Saul Kripke (1980: 114n) provides a compelling answer: “the *origin* of an object is essential to it”.<sup>19</sup> If states originate from different sets of people, territory, and institutions, then they are necessarily distinct.

Kripke uses several examples to illustrate the principle that identity requires sameness of origin. He begins with the example of Queen Elizabeth. He asks, “can we imagine a situation in which it would have happened that this very woman [instead]

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<sup>19</sup> For an informal derivation of this principle, see Kripke (1980: 114, n. 56).

came out of Mr. and Mrs. Truman?" (112). He argues that we cannot. Although it is possible to imagine the woman that we call the Queen as many things – as a pauper instead of a queen, for example – it is not possible to imagine her as being born of different parents. A woman who resembled the Queen in all respects but had been born of different parents would be “some other woman who had many of the properties that are in fact true of Elizabeth” (113); this woman would not be the Queen. A person could not have originated from different parents than the ones that he or she in fact originated from.

Kripke then uses the example of a table. He asks, “could *this table* have been made from a completely different block of wood, or even of water hardened into ice – water taken from the Thames River?” (113). Again, Kripke’s answer is negative. It is possible for the table to have been a different colour or a different type of table, and it is even possible for the table to have not been made in the first place. However, it is not possible for the table (given that it exists, and given that it was made from a particular block of wood) to have been made from a different block of wood or from ice (114). A table could not have originated from different matter than it in fact originated from.

The logical principle that explains why the origin of an object is essential to it is not obvious, and Kripke (1980: 114, n. 56) devotes only a footnote to it. His key premise is that relations of identity and non-identity are necessary: they are true in all possible states of affairs if they are true at all (108-09). In other words, if objects are identical (or distinct), then they are identical (or distinct) at all times, in all places, and in all counterfactual scenarios. It follows that objects with different

origins are necessarily non-identical. Objects with different origins must have been distinct at one time, so, given that relations of identity and non-identity are necessary, the objects cannot be identical at any subsequent time.

Kripke extends the example of the table to illustrate that it is impossible for objects to be identical unless they have the same origin (114, n. 56). Suppose that there are two tables, 'B' and 'D'. Table B is made from a block of wood called 'A,' and table D is made from a block of wood called 'C'. Given that there is at least one difference between the tables – namely, that they were made from different blocks of wood – it follows that the tables are not identical:  $B \neq D$ . Suppose, further, that B is a kitchen table and D is a coffee table. If someone refashioned B into a coffee table that has exactly the same qualities as D, it would not be the case that B has become D. An essential property of D is that it is made from C. A table that had exactly the same characteristics as D but was made from a different block of wood would not be D; it would be a different table that resembles D. The tables can never become identical because the non-identity relation is necessary; they were distinct at one time, so they must be distinct at every other time.

The principle that objects with different origins are necessarily distinct, which will hereafter be called the *origin principle*, applies equally to states as to tables. Although Canada and Australia have the same kind of organizing principle – both are Commonwealth democracies – they are distinct because they originate from different sets of people, territory, and institutions. Intuitively, Canada would not become Australia even if the former somehow came to have the same

population, territory, institutions, and organizing principle as the latter. If states have different origins, then they are necessarily distinct.

Using the origin principle to establish the uniqueness of states seems unduly complex. However, although we readily distinguish states without any knowledge of their origins, our common-sense criteria of identity are inadequate for philosophical purposes. The origin principle accounts for the necessary distinctness of states while preserving their corporate character. It therefore captures the uniqueness of states without undermining the Aristotelian or Quinean account of identity. Because the origin principle appeals to the populations, territories, and institutions that states originate from instead of the populations, territories, and institutions that states possess at a given time, it is consistent with the principle that the constituents of a state are inessential to it. The origin principle complements the Aristotelian and Quinean accounts of identity by providing a way to distinguish states that have the same organizing principle.

## **2.7 The Answer to the Question of Corporate Identity**

The answer to the question of corporate identity is much more complex than the answer to the question of ownership, but, in this case, parsimony must be sacrificed for consistency and rigour. Aristotle's constitutional account of the identity of the state, Quine's idea of time-extended objects, and Kripke's origin principle jointly provide a complete account of corporate identity.

First, and most importantly, Aristotle's constitutional account shows how it is possible for a state to persist despite changes in its population, territory, and

institutions. A state persists despite changes in its constituents because a state is a set of relations, not a set of particular constituents. The identity of a state depends on the way in which its parts are organized rather than the particular parts that it contains. A state therefore remains the same state as long as its organizing principle remains the same.

Second, Quine's idea of time-extended objects provides a micro-level complement to Aristotle's macro-level account of corporate identity. Whereas Aristotle identifies the state with its organizing principle, Quine's account identifies the state with the relations between its parts. The two accounts express the same principle but at different levels or scales: the relations between a state's parts are articulations of its organizing principle.

Finally, Kripke's origin criterion provides a way to distinguish states that have the same organizing principle without reference to their particular parts. Because the distinctness relation is necessary, states that originate from different sets of people, territory, and institutions can never be identical – even if they somehow come to have exactly the same organizing principle and constituents. The answer to the question of corporate identity is that *states retain their identities, as well as their responsibilities, as long as their organizing principles remain the same.*



### **Chapter 3: The Question of Fulfillment**

The question of fulfillment is the simplest of the three: how does a state fulfill its responsibilities? The answer seems obvious. States fulfill their responsibilities by paying their debts, upholding their treaties, respecting the rights of others, and apologizing for their transgressions. The complication is that the responsibilities of states implicate individuals. The citizens of a state must be taxed in order for the state to pay its debts, and punishing the state inevitably harms them. The legislators and executives of a state must implement its treaties, refrain from taking actions that violate the rights of others, and apologize on the state's behalf. If the responsibilities of states are ultimately fulfilled by their members, then assigning responsibilities to states seems to be shorthand for assigning responsibilities to individuals. States have responsibilities in name only. An adequate account of state responsibility must show that the responsibilities of states are not reducible to the responsibilities of individuals – that states as such are capable of fulfilling their responsibilities.

Although it proves to be impossible to disentangle the responsibilities of states from the responsibilities of individuals, it is not the case that one set of responsibilities is reducible to the other. The responsibilities of states are neither reducible to nor independent from the responsibilities of individuals. State responsibilities must be distributed to individuals in order to be fulfilled, but these responsibilities distribute to individuals according to their identities as members of the state rather than their identities as individuals. The set of roles and relations of

authority that determines who has the authority to act on the state's behalf also determines to whom the state's responsibilities are distributed.

### 3.1 State Responsibilities as Nondistributive

Proponents of state responsibility claim that the responsibilities of states are *nondistributive*.<sup>20</sup> In other words, they claim that state responsibility and individual responsibility are mutually independent. For example, Carr (1939: 192) argues that “[t]he obligation of the state cannot be identified with the obligation of any individual or individuals”. Erskine (2003: 26) similarly argues that “some duties [of states] cannot be distributed among individuals at all,” and Lang (2007: 245) argues that “crimes can be attributed to states *without* attributing them to individuals”. Whether a state has a given responsibility and whether its members have it are different questions, and the answer to one cannot be inferred from the answer to the other.

The principle that the responsibilities of states are nondistributive follows from a peculiar feature of language. As French (1984: 5) points out, there is “a class of predicates that just cannot be true of individuals, that can only be true of collectives”. Individuals do not disband, lose football games, or elect presidents; only groups do. Erskine (2003: 27) argues that “descriptions of the actions of the state are not reducible to descriptions of the actions of its individual members” and that “some actions can only be described at the collective level of the state”. A soldier can

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<sup>20</sup> The literature on state responsibility in IR, IL, and IPT does not address the question of fulfillment at any length. The existing answers are buried in the philosophical literature on collective responsibility from the 1960s to the 1980s.

fight, but only a state can wage war. If some actions can only be attributed to states, then it seems that only states can be responsible for them. Individuals cannot be responsible for actions that cannot be predicated of them. Although a soldier can be responsible for war crimes, only a state can be responsible for war (Erskine, 2003: 26). Irreducibly corporate actions give rise to irreducibly corporate responsibilities.

The argument that the responsibilities of states are nondistributive implies that there are several 'levels' of responsibility – the individual level, the corporate level, the state level, and possibly even a supra-state level (Erskine, 2004). As Erskine (2010: 266) argues, “moral agents at all levels can be responsible for concurrent, complementary, or even coordinated acts and omissions”. The principle of concurrent responsibility in international law invokes the same principle: states and individuals can be held responsible for the same action separately but simultaneously (e.g., Nollkaemper, 2003). The responsibility of an agent at one level neither implies nor precludes the responsibility of agents at other levels. A state can be responsible for war even if none of its soldiers are responsible, and, conversely, its soldiers can be responsible for war crimes even if the state is not. The *nondistributivity principle* holds that the responsibilities of states and individuals are mutually independent – that one set of responsibilities cannot be inferred from the other.

### **3.2 Weak and Strong Nondistributivity**

The nondistributivity principle has a weak form and a strong form. The existing literature fails to distinguish them, which produces considerable confusion.

The weak form holds that states can have responsibilities that none of their members have – for example, that ‘Serbia is responsible for aggression’ does not imply that ‘some Serbians are responsible for aggression’ (e.g., French, 1984: 14-15; Held, 1970: 92-93). The strong form holds that the responsibilities of states cannot be reduced or analyzed in terms of individuals – that ‘Serbia is responsible for aggression’ is not equivalent to ‘Serbian *A* is responsible for murder, Serbian *B* for robbery, Serbians *C* and *D* for providing reparations...’ (e.g., McGary, 1986: 79). An adequate answer to the question of fulfillment requires the strong form of the nondistributivity principle. If the responsibilities of states must be reduced to the responsibilities of individuals in order to be fulfilled, then assigning responsibilities to states is mere shorthand.

The weak form of the nondistributivity principle is an implication of a general principle of logic: what is true of a whole need not be true of its parts. Consequently, what is true of a state or of any other corporate entity need not be true of its members (Cooper, 1968: 259-63; Velasquez, 2003: 538-40). Just as a pile of sand can be large even if none of the grains within it are large, a state can be responsible for aggression even if none of its members are responsible for aggression. Virginia Held (1970: 93) provides the most precise statement of the weak nondistributivity principle: “from the judgment ‘Collectivity *C* ought (ought not) to have done *A*,’ judgments of the form ‘Member *M* of *C* ought (ought not) to have done *A*’ cannot be derived”. The responsibilities of states are obviously nondistributive in the weak sense. It is true that the US owes trillions of dollars, but it is not true that any particular American owes trillions of dollars. The judgment

that a state possesses a particular responsibility does not imply that any of its members possess that responsibility.

The strong form of the nondistributivity principle holds that the responsibilities of states cannot *in any way* be reduced or analyzed into the responsibilities of individuals. As Howard McGary (1986: 79) argues, “[j]udgments about the liability of individual members of a group are not logically deducible from judgments about the liability of the group as a whole”. Judgments of individual responsibility do not follow from judgments of state responsibility, and vice versa. On this view, not only is it false that ‘the US owes trillions of dollars’ implies that ‘some American owes trillions of dollars’; it is also false that ‘the US owes trillions of dollars’ is equivalent to ‘each American owes  $x$  dollars, where  $x$  multiplied by the number of Americans is equal to the debt of the US’. Contrary to the way that newspapers often describe sovereign debt, it is not possible to reduce the debt of the US to “what every man, woman, and child in America owes” (Tanner, 2012). While the weak form of the nondistributivity principle rules out inferences of the form ‘state  $S$  is responsible for action  $x$  implies that some members of  $S$  are responsible for  $x$ ,’ the strong form rules out inferences of the form ‘ $S$  is responsible for  $x$  if and only if members  $A, B, C...$  of  $S$  are responsible for  $y, z, w...$ ’. The strong form, in short, holds that the responsibilities of states cannot be equivalently expressed in terms of the responsibilities of individuals.

State responsibility requires the strong form of the nondistributivity principle. If the responsibilities of states could be analyzed into the responsibilities of individuals, then assigning responsibilities to states would be shorthand. More

precisely, if statements of the form 'S has a responsibility to x' could be expressed as 'members A, B, C... of S have responsibilities to y, z, w...', then the responsibilities of states could be paraphrased away without any loss of content. States would then possess responsibilities in name alone; the responsibilities of individuals would do all of the ethical work. An answer to the question of fulfillment must show that states *qua* states are capable of fulfilling their responsibilities – that the responsibilities of states need not be reduced in order to be fulfilled.

The strong form of the nondistributivity principle, unlike the weak form, is not logically provable. The weak form follows from the logical principle that what is true of a whole need not be true of its parts, but the strong form does not follow from a similar principle. It is not true that *none* of the properties of the whole can be inferred from the properties of its parts or that *none* of the properties of the parts can be inferred from the properties of the whole. For example, one can infer the hardness of a piece of carbon from the arrangement of its constituent atoms, and, conversely, one can infer the arrangement of the constituent atoms from the hardness of a piece of carbon. The atoms in a piece of carbon that scratches glass (i.e., diamond) are strongly bonded; the atoms in a piece of carbon that rubs off on glass (i.e., graphite) are weakly bonded. It is possible to make some inferences about the parts from the whole and about the whole from the parts. The strong nondistributivity principle – that state responsibility and individual responsibility are mutually independent – is therefore not susceptible to a purely logical justification.

There are two arguments for the nondistributivity principle, but only the second justifies its strong form. The first appeals to the irreducibility of collective predicates (see s. 3.1). Recall that some predicates, such as 'waged war' and 'concluded a treaty,' are irreducibly collective; they can apply to states but not to individuals. It seems to follow that responsibilities for irreducibly collective actions must also be irreducibly collective. If a war is not reducible to a series of murders and robberies, then holding a state responsible for a war is not the same as holding each citizen responsible for his or her share of the murders and robberies.

The irreducibility of collective predicates provides a justification for only the weak form of the nondistributivity principle. The fact that only states can wage war implies that only states can be responsible for war, but it does not imply that the responsibility for waging war is irreducible to the responsibilities of individuals. For example, while it is possible for Britain to wage war, it is impossible for any of its members as individuals to wage war. It follows that Britain can be responsible for war but that its members cannot be. However, it does not follow that 'Britain is responsible for war' is irreducible to a series of responsibilities of individuals – e.g., 'A is responsible for spreading propaganda, B is responsible for contributing to reparations, C is responsible for issuing an apology...'. Britain's responsibility for war may be reducible to the responsibilities of its members even though it cannot be predicated of any of them. The responsibility for the war may nevertheless be reducible to a series of responsibilities that *can* be predicated of individuals. The responsibilities of states may be distributive even if, in their unreduced form, they can only be predicated of states.

The second argument, which appeals to the irreducibility of collective subjects, succeeds in justifying the strong nondistributivity principle. As David Cooper (1968: 260) argues, “it is absurd to equate the meaning of a statement about a collective with the meaning of a statement about a number of individuals. This would have the bizarre consequence that, had one of the individuals belonging to the collective not been a member, the meaning of the statement about the collective would have been different”. For example, it would be wrong to paraphrase ‘the US owes trillions of dollars’ as ‘Americans *A, B, C...* each owe *x* dollars’ because ‘the US’ does not refer to a determinate set of individuals. The truth-values of the two statements can vary independently, which shows that they are not logically equivalent. The US would owe the same amount of money even if *C* died or left the country, and even if Americans *A, B, C...* had all vanished and been replaced with Americans *i, ii, iii...* The US does not owe *x* fewer dollars whenever one of its members dies or leaves the country. The responsibilities of states cannot be reduced to the responsibilities of individuals because states cannot be reduced to sets of individuals.

### **3.3 The Inevitability of Distributing State Responsibilities**

The responsibilities of states and individuals can and must be neatly distinguished in principle, but the distinction collapses in practice. As Jan Narveson (2002: 180) argues, “moral predicates over groups must imply moral requirements for individuals”. The debts of states must be paid by their taxpayers, the treaties of states must be implemented by their legislators, state apologies must come from



their leaders, and punishing states causes harm to their citizens. The responsibilities of states must be distributed to individuals in order to be fulfilled.

Many criticisms of the nondistributivity principle focus on the problems with corporate punishment. Manuel Velasquez (1983: 12), who is possibly the staunchest opponent of corporate responsibility, argues that “it is not possible to punish a ‘group as a whole’ without having those punishments fall on the shoulders of particular members who make up the group”. Similarly, Joel Feinberg (1968: 687) argues that “group-liability is inevitably distributive: what harms the group as a whole necessarily harms its members”. Even Erskine (2010: 263), despite her support for state responsibility, is acutely aware of “the danger of harming innocent individuals while ostensibly punishing delinquent states”. Sanctions, reprisals, reparations, and every other conceivable way of punishing or extracting restitution from a state is bound to cause harm to the people who reside within it.

One might object that the harm that individuals endure when their states are punished is a form of collateral damage. In Erskine’s (2010: 270-82) terms, the harm to individuals that results from punishing states is “misdirected harm” or “overspill”. Just as imprisoning a murderer causes unintended harm to his or her innocent family, imposing sanctions on an aggressive state causes unintended harm to its innocent members. Neither the murderer’s family nor the members of the aggressive state are blamed, punished, or held responsible in any way; the harm that they endure is an unintended consequence of holding the murderer or the aggressive state responsible. If this objection is correct, then the harm, but not the punishment, is distributive.

The objection is impossible to counter. Critics of corporate punishment show that punishing states is morally problematic because it harms innocent people, but they fail to show that punishing states is equivalent to punishing their members. No matter how much individuals suffer from sanctions or reprisals, one can always maintain that this suffering is overspill from punishing their state. There seems to be no way to show that the *punishment as such* is distributive.

A similar defence of the nondistributivity principle will not work in cases of forward-looking or prospective responsibility. As Avia Pasternak (2013: 361) argues, “it is invariably the case that states pass their responsibilities on to their citizens”. The duties of states must be reduced to those of individuals if they are ever to be fulfilled. For example, if Canada has a duty to provide military assistance to Libyan rebels, then Canadians must also have a series of duties: Canadian legislators have duties to authorize the military assistance, Canadian taxpayers have duties to pay for it, and particular members of the Canadian military have duties to provide it. If the duty to provide military assistance were not distributive, then it could never be acted on. Similarly, Canada cannot repay its debts unless its citizens pay their taxes and its government opts to pay back the money. A state cannot fulfill its duties if its members do not fulfill their ancillary duties.

The responsibilities of states always implicate individuals. Punishing a state inevitably harms individuals even if the punishment itself is not distributive, and the duties of states must be distributed to individuals in order to be fulfilled. The mutual independence of state responsibility and individual responsibility is impossible to sustain. The argument that the responsibilities of states are distributive is powerful

because it would be so easy to refute if it were false. A single example would be sufficient. If some responsibilities of states are nondistributive, then it should not be difficult to produce an example in which a state fulfills a responsibility without distributing it to individuals. There is no such example to be found.

### **3.4 Roles and Responsibilities**

We are left with an antinomy. Distributing state responsibilities to individuals is impossible in principle but inevitable in practice. On one hand, states are irreducible to sets of individuals, so the responsibilities of states cannot possibly be reduced to the responsibilities of sets of individuals. On the other hand, the responsibilities of states must be distributed to individuals in order to be fulfilled. The solution to the antinomy is to abandon the artificial separation between state responsibility and individual responsibility. The responsibilities of states are distributive, but they distribute to individuals according to their identities or roles as members of the state, not according to their identities as individuals.

There is a grain of truth in the strong nondistributivity principle, and especially in Cooper's (1968) argument for it. Cooper is correct that the responsibilities of states cannot be reduced to the responsibilities of particular individuals. Britain is not reducible to the set of its members, so its responsibilities cannot be reduced to the responsibilities of its members. 'Britain is responsible for the Treaty of London' has no logical equivalent of the form 'individual *A* is responsible for *x*, individual *B* is responsible for *y*, individual *C* is responsible for *z*,

...' (see s. 3.3). The responsibilities of states simply cannot be analyzed or expressed in terms of the responsibilities of particular individuals.

There is also a grain of truth in Feinberg's (1970), Velasquez's (1983), and Pasternak's (2013) criticisms of the nondistributivity principle. The responsibilities of states must be distributed to human beings if they are to be of any consequence. Individuals must pay sovereign debts, individuals must implement treaties, and individuals must apologize on the state's behalf. The responsibilities of states cannot be fulfilled unless human beings act to fulfill them.

Although state responsibilities must be distributed to individuals in order to be fulfilled, they cannot be reduced to the responsibilities of particular individuals. Instead, the responsibilities of states distribute to individuals according to the roles or offices that they occupy within the state. *Citizens* and *residents* pay sovereign debts, *legislators* implement treaties, and *leaders* issue state apologies. Recall the example from above: 'the US owes trillions of dollars' is not reducible to 'Americans A, B, C... each owe x dollars'. The US would not owe x fewer dollars if one of its citizens died or left the country. However, 'the US owes trillions of dollars' is reducible to 'American citizens owe trillions of dollars'. The debt distributes to individuals *as citizens* rather than to individuals *as such*. Because the responsibilities of states distribute to individuals according to their roles within the state, these responsibilities persist despite changes in the occupancy of these roles. American citizens owe trillions of dollars even though many of them were not yet born when the debt was incurred, and even though many of them will not live to repay their shares. The responsibilities of states cannot be reduced to the responsibilities of

particular individuals, but they must be reduced to the responsibilities of individuals as members of the state.

When individuals act to fulfill the responsibilities of a state, they act only as its members. A description of their actions requires no reference to their particular identities. For example, when individuals act to fulfill Canada's responsibilities under the North American Free Trade Agreement (NAFTA), they act as representatives of Canada rather than as particular individuals. It does not matter which people act to fulfill Canada's responsibilities; it only matters that these people are Canada's citizens, legislators, and executives. Canada would still fulfill its responsibilities under NAFTA if different citizens, legislators, and executives act to fulfill them. Further, many of the actions of individuals would be incomprehensible without reference to their identities as state officials. It is impossible to understand why people fulfill an agreement that they did not sign or repay money that they did not borrow without understanding that they act on behalf of a state. State responsibility and individual responsibility cannot be understood separately.

### **3.5 The Answer to the Question of Fulfillment**

Carr's opposition of the morality of states and the morality of individuals is a false one. Neither position is tenable; the responsibilities of states and the responsibilities of individuals are intrinsically related. States cannot act on their responsibilities without individuals, and many of the responsibilities of individuals cannot be understood apart from their identities as members of the state. The answer to the question of fulfillment is that *states fulfill their responsibilities by*

*distributing their responsibilities to their members.* The responsibilities of states must be distributed to individuals in order to be acted on, but they can only be distributed to individuals according to their roles or identities as representatives of the state. State responsibilities distribute not to individuals as such, but to individuals as citizens, legislators, presidents, prime ministers, soldiers, and other public officials.

## **Chapter 4: The Theory and the Practice of State Responsibility**

This chapter uses the answers to the three fundamental questions to construct a process of state responsibility. It then shows that three important features of the doctrine of state responsibility in IR, IL, and IPT are unjustifiable. The chapter concludes that there is an unbridgeable gap between the theory of state responsibility and the practice of state responsibility. State responsibility has a rational justification, but its current manifestation does not.

### **4.1 Three Stages of State Responsibility**

The answers to the three fundamental questions correspond to three stages in a process of state responsibility. Whereas the answers to the questions jointly provide a rational justification for assigning responsibilities to states, the process explains how state responsibility works in particular instances.

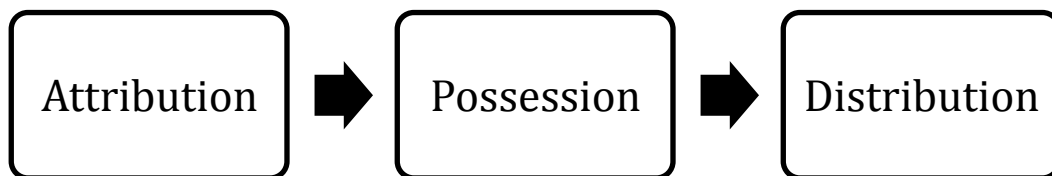
The three questions and answers explain how it is possible for states to have responsibilities. The answer to the question of ownership explains how states incur responsibilities; the answer to the question of corporate identity explains how states persist and possess responsibilities over time; and the answer to the question of fulfillment explains how states act on their responsibilities. The fundamental questions express three conditions that any coherent account of state responsibility must satisfy, and the answers to the questions are the most plausible ways of satisfying these conditions.

Although the answers to the fundamental questions jointly provide a justification for assigning responsibilities to states, they cannot determine whether

any particular state has any particular responsibility. They cannot, for example, tell us whether Canada is responsible for the Royal Proclamation of 1763 or whether Uruguay is bound by the Single Convention on Narcotic Drugs of 1961. The answers to the fundamental questions establish the theoretical coherence of state responsibility, but they are not applicable to particular cases.

The process of state responsibility is a necessary complement to the rational or theoretical account of state responsibility. The three stages in the process explain how particular states incur, possess, and fulfill particular responsibilities. While the fundamental questions and answers have no necessary order, their corresponding stages do. It does not matter which fundamental question is asked or answered first, second, or third, but particular cases of state responsibility are directional. A state must incur a responsibility before it can possess it, and a state must possess a responsibility before it can fulfill it.

**Figure 1. The Process of State Responsibility**



State responsibility occurs as a progression from attribution to possession to distribution. States incur responsibilities through the actions of individuals who possess state authority; these responsibilities then inhere and persist in their organizing principles; and, finally, states fulfill their responsibilities by distributing them to their members. The three stages are derived from the answers to the three fundamental questions.



The *stage of attribution* is the moment at which a particular state becomes the owner of a particular responsibility. Attribution occurs whenever an individual acts under state authority – e.g., as a soldier, president, legislator, or other state official. An action (and its consequent responsibilities) is attributable to a state when it is performed by an individual who possesses the authority to act on that state's behalf. For example, the US became bound by NAFTA when it was signed by President Bill Clinton and ratified by Congress, and the US incurs debt when Treasury officials issue bonds. Treaty obligations are attributed to a state whenever a treaty is signed by its head of state and ratified by its legislature, and debt is attributed to a state whenever its officials borrow money in its name. Attribution begins the process of state responsibility; responsibilities cannot be possessed or fulfilled until a particular state takes ownership of them.

The *stage of possession* is the static phase during which a state has an unfulfilled responsibility. Some time must elapse between the moment at which a state incurs a responsibility and the moment at which it either fulfills that responsibility or ceases to exist. Possession occurs after a responsibility is attributed to a state but before that responsibility terminates. In some cases, possession is simply a transitional or intermediary stage between attribution and distribution. The state possesses the responsibility until it fulfills the responsibility. For example, a state possesses debt until it repays the lenders, at which point the debt ceases to exist. In other cases, the state's possession of a responsibility is continuous, so possession both precedes and follows distribution. Many treaty obligations are of this sort. Although Mexico has fulfilled its responsibilities under

NAFTA, it is not thereby relieved of these responsibilities; it continues to possess them. In still other cases, the process of state responsibility ends at the stage of possession. When a state perishes, so must the responsibilities that it possesses. Some of the responsibilities of the Roman Empire, for instance, ceased to exist before they could be fulfilled. Possession is the stage at which a state has a responsibility that has not yet terminated.

The *stage of distribution* is the moment at which a state responsibility is translated into human action. States act only through their representatives, so they cannot fulfill their responsibilities on their own. State responsibilities must be distributed to individuals *qua* citizens, legislators, and executives in order to be fulfilled. Distribution occurs when the members of a state act to create the reality that its responsibility prescribes. A state fulfills its debt when its residents pay their taxes and when its legislators opt to pay the interest or the principal. A state fulfills a trade agreement when its legislators eliminate tariffs or subsidies. A state fulfills a responsibility for wrongdoing when its leaders apologize and when its citizens pay reparations. Distribution is the moment at which the members of a state act on its behalf to fulfill its responsibility.

The virtue of the process of state responsibility is that it is individualist but not reductionist. On one hand, states cannot act on their own, so the inputs and outputs of any account of state responsibility must be the actions of human beings. On the other hand, states are not reducible to sets of individuals, so the responsibilities of states cannot be reduced to the responsibilities of sets of individuals. The process captures the fact that only individuals act but does not

reduce state responsibility to individual responsibility. States incur responsibilities through the actions of individuals, but only individuals who possess state authority. States fulfill their responsibilities through the actions of individuals, but only individuals *qua* members of the state. The responsibilities of states are intrinsically related to but not reducible to the responsibilities of individuals.

The answers to the three fundamental questions, as well as their corresponding stages, are interrelated. The same features of the state are crucial in each of the three. The organizing principle of the state is not only the locus of its corporate identity; it also determines who has the authority to act on behalf of the state and to whom the state's responsibilities are distributed. For example, Canada's democratic organizing principle accounts for the persistence of Canada over time, but it also determines who occupies the roles of citizen, legislator, and executive. These roles, in turn, determine who has the authority to act on Canada's behalf and who has to pay Canada's debts, fulfill its treaty obligations, and apologize for its wrongdoing. The set of relations that comprises the organizing principle of the state also determines who possesses its authority and who bears the burdens of its responsibilities. The answers to the three fundamental questions and their corresponding stages all follow from the set of relations between individuals and the state.

#### **4.2 Three Fictions of State Responsibility**

Jeremy Bentham (1977 [1766]: I.37) once declared that "the season of *Fiction* is now over" and that "to introduce any *new* one, would be *now* a crime". If Bentham

is correct, then international lawyers are criminals. The law and the practice of state responsibility depend on three fictions, each of which corresponds to one of the three fundamental questions. Our practices of holding states responsible outstrip our ability to justify them.

#### 4.2.1 *The Fiction of the Uniform*

IL assumes that all actions of state officials are attributable to their states, even if these officials exceed their authority. As Cassese (2001: 188) describes, “[a] wrongful act is imputed to the State even if the State official performed that act *outside his instructions or even outside his remit*”.<sup>21</sup> Similarly, the ILC (2001, Art. 7) declares that “[t]he conduct of an organ of a State or of a person or entity empowered to exercise elements of the governmental authority shall be considered an act of the State under international law if the organ, person or entity acts in that capacity, even if it exceeds its authority or contravenes instructions”. Even the actions of rogue officials are attributed to their states. The assumption that states are the owners of every action that their officials perform will be called *the fiction of the uniform*.

The fiction of the uniform is inconsistent with the theory of authority that underpins state responsibility in international law. If states take ownership of actions only through the authority that they grant to individuals, then states cannot be responsible for actions that they have not authorized. As Hobbes (1996: XVI. [81]) argues, “no man is obliged by a Covenant, whereof he is not Author”. The

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<sup>21</sup> The older international legal literature uses ‘imputation’ rather than ‘attribution,’ but its meaning is exactly the same.

attributive answer provides no justification for holding states responsible for the actions of their rogue officials. Anna Stilz (2011: 201) employs an analogy between the ward-guardian relationship and the state-official relationship to make a similar argument. Just as guardians act under the authority of their wards, state officials act under the authority of their states. Both wards and states are therefore bound by the debts and other responsibilities that their agents incur on their behalf. However, not all actions of guardians are attributable to their wards: “when the guardian clearly acts outside his mandate, (say, by contracting personal gambling debts on the ward’s credit), the ward is not liable for what the guardian does” (201). By the same logic, not all actions of state officials are attributable to their states. If we take the attributive answer seriously, then states cannot be responsible for the actions of officials who exceed their authority. Not everyone who wears a state uniform has a credible claim to possess state authority.

The analogical answer to the question of ownership also implies that not all actions of state officials are attributable to their states. Whereas Stilz (2011: 201) argues that only authorized actions can be attributed to states, Lang (2007: 244-45) argues that actions can only be attributed to authorized states. Democratic states can take ownership of actions because they have wills that are distinct from the wills of their particular members (see s. 1.1). Dictatorships cannot take ownership of actions because their wills are simply the wills of their rulers: “when a dictatorial regime commits a crime, it makes more sense to attribute that crime to the head of state, in that the policy results from his individual intention” (245). According to

Lang's analogical account, democratic states are responsible for the decisions of their officials, but authoritarian rulers are personally responsible for their decisions.

The practice of attributing all actions of state officials to their states is not only inconsistent with both answers to the question of ownership; it also makes state responsibility liable to abuse. The danger, as John Parrish (2009: 127) describes, is that "the modern nation-state can effectively become a very efficient responsibility-laundering machine". Governments often use sovereign debt to fund clientelism, to enrich themselves, and even to finance the oppression of the people that they govern, and then they leave these same people – and even their descendents – with the bill. In these cases, the fiction of the uniform allows oppressive regimes to make people pay for their own oppression. Similarly, when leaders sign treaties or trade agreements that further their own interests, they bind their states, and the burden again falls on their citizens. State officials can "launder" their responsibilities by attributing their unscrupulous behaviour to the state.

It is desirable to abandon the fiction of the uniform both for theoretical consistency and to avoid the problem of responsibility laundering. To abandon the fiction of the uniform is to treat rogue officials as private individuals and to hold them personally responsible for their actions. As Hobbes (1996: XVI. [81]) puts it, "when the Authority is feigned, [the action or covenant] obligeth the Actor only; there being no Author but himself". When a state official acts contrary to the purpose of the office that he or she occupies or outside of the authority that he or she possesses, he or she has no credible claim to act on the state's behalf. For example, Mobutu Sese Seko did not act on behalf of Congo when he borrowed

money in its name. He borrowed the money primarily to enrich himself, so, despite that he was president of Congo, he acted on his own behalf. The debt therefore ought to have been attributed to Mobutu, not to Congo. State officials who act outside of their authority act on behalf of themselves, not on behalf of their states.

#### 4.2.2 *The Fiction of Permanence*

IL and IPT assume that states retain their identities and responsibilities through all changes in their parts (see s. 2.2). States persist despite changes in their populations, governments, territories, institutions, and even constitutions. Almost nothing – even, in most cases, failure to meet the criteria for statehood – can negate a state’s identity. States simply persist. The assumption that states retain their identities through all changes will be called *the fiction of permanence*.

If states persist despite changes in all of their parts, then what is the locus of the state’s identity? There seems to be *nothing* that persists; the persistence of the state is simply postulated. As Chapter Two shows, states cannot persist despite all changes. Although states persist despite changes in their particular constituents – their populations, territories, and institutions – they do not persist through changes in the principles that determine how these constituents are organized. The Third Reich, for example, was not the same state as the Weimar Republic even though the former and the latter shared population, territory, and institutions. The same set of people, territory, and institutions organized differently constitutes a different state. A change in the organizing principle of a state implies a change in its identity.

The implications of abandoning the fiction of permanence are contentious and of great practical importance. In the absence of the fiction, a change in the organizing principle of a state negates its responsibilities. Modern-day Germany is not identical with Nazi Germany and, consequently, is not responsible for any of the actions performed on behalf of the latter. The perpetrators of the Holocaust are individually responsible for their crimes, but a state that did not exist when the crimes were committed (i.e., modern-day Germany) cannot possibly be responsible for them. Similarly, Turkey is not responsible for the actions of the Ottomans, Russia is not responsible for the actions of the Soviets, and Chile is not responsible for the actions of Pinochet or the Junta. Actions that have been performed on behalf of states that no longer exist can be attributed either to their particular perpetrators or to no one.

The contentious implications of abandoning the fiction of permanence perhaps explain why it has so seldom been questioned. Aristotle's account of corporate identity, for example, does not depend on the fiction of permanence; the identity of a state changes whenever its constitution changes. However, Aristotle concludes his discussion of corporate identity with a peculiar remark: "whether, when the state's constitution is changed, it is just to disown obligations or to discharge them – that is another question" (1981: III.3, 1276<sup>a</sup> [60-62]). He clearly recognizes the radical implication of his account of corporate identity – that a change in a state's constitution negates all of its responsibilities – but he wishes to find a way around it. It seems that, for Aristotle, there is some justification for upholding the responsibilities of states whose constitutions have changed despite



that, by his own account, these states have ceased to exist. Unfortunately, Aristotle does not provide this justification or even suggest what it might be.

The point here is not that the fiction of permanence ought to be abandoned; the point is only that it lacks a rational justification. As Aristotle implies, there may still be compelling ethical or instrumental reasons to continue to employ the fiction – e.g., to ensure fairness, to ensure intergenerational justice, or to recover reparations for past injustices. The assumption that states persist despite changes in their organizing principles has no rational justification, but whether this assumption is instrumentally useful is an open question.

#### *4.2.3 The Fiction of Nondistributivity*

IL and IPT assume that the responsibilities of states are independent from the responsibilities of individuals (see s. 3.1). State responsibility and individual responsibility exist at two ‘levels,’ and the responsibilities at one level cannot be inferred from the responsibilities at the other. The assumption that the responsibilities of states and the responsibilities of individuals are mutually independent will be called *the fiction of nondistributivity*.

The mutual independence of state responsibility and individual responsibility is unsustainable. Although the responsibilities of states are not reducible to the responsibilities of particular individuals, neither are they nondistributive. The responsibilities of states must be distributed to individuals in order to be fulfilled, but they distribute to individuals according to their identities as members of the state rather than their identities as individuals (see s. 3.4).

The problem with the fiction of nondistributivity is that it obscures the burdens that state-level responsibilities impose on individuals. The responsibilities of states are inevitably distributive, so to pretend otherwise is to ignore the rights and interests of human beings. Ronald Dworkin (2013: 10) puts it best: “It seems unfair that people should suffer serious disadvantage only because politicians chosen by entirely different people under entirely different constitutions signed a document many generations ago”. What Dworkin suggests is that the justice or injustice of upholding state responsibilities cannot be determined simply by examining the agreements of states. *Pacta sunt servanda*<sup>22</sup> cannot be the only relevant principle. Given that individuals ultimately bear the burdens of state responsibilities, moral judgments about state responsibilities must take these burdens into account. A dogmatic insistence that states must uphold their responsibilities in all circumstances is bound to cause injustice to individuals.

Although some proponents of state responsibility recognize that the responsibilities of states are inevitably distributive, there remains a great deal of debate about what, if anything, justifies this distribution. The uncontested starting point is that mere membership in a state is an insufficient justification. Most people do not choose their states, and many cannot easily leave. The fact that people are citizens or residents of a state does not, by itself, justify distributing its responsibilities to them. It is an obvious travesty to hold people responsible for debts, treaties, or wars that they did not participate in, did not condone, and could not have prevented. The debate about the justification for distributing state

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<sup>22</sup> *Pacta sunt servanda* is Latin for ‘agreements must be kept’. In international law, it denotes the principle that agreements *between states* must be kept.

responsibilities to individuals cannot be resolved here, but it is useful to provide a review of the recent arguments.

Parrish (2009) and Stilz (2011) put forth a justification that they call the *authorization account*. They argue that the responsibilities of a state are distributable to its members provided that it has the authority to represent them.<sup>23</sup> States obtain the requisite authority to distribute their responsibilities not through the explicit consent of their members, but through the provision of public goods and protections for basic rights that their members require. As Parrish (2009: 137) argues, “the state can properly claim to be authorized by its citizens because those citizens need their state like they need no other form of social connection”. Similarly, Stilz (2011: 200) argues that “if a state that credibly interprets my basic right exists, then I *necessarily authorize* it – whether I agree to join it or not – since I require its system of law to secure me against others’ interference”. Citizens are responsible for fulfilling their state’s responsibilities as long as the state protects their rights and provides them with public goods. The authorization account is essentially the inversion of the attributive answer to the question of ownership. Whereas the attributive answer holds that the actions of authorized individuals are attributable to their states, the authorization account holds that the responsibilities of authorized states are distributable to their members.

Pasternak (2013) argues that the authorization account is doubly faulty.

First, it depends on a questionable notion of authorization. Authorization requires

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<sup>23</sup> An important point for both Parrish (2009) and Stilz (2011) is that citizens are not blameworthy or punishable for the wrongdoing of their states. Only the state as a whole is blameworthy and punishable for its wrongdoing, but its citizens are responsible for repairing the harm that their state has caused.

something like consent – or at least the active participation of the person who transfers his or her authority (367). Authority cannot be transferred passively, as Parrish and Stilz suggest. Second, Pasternak argues that the authorization account gives insufficient weight to the actions and intentions of individuals: “individuals’ own input as to whether or not they wish to be part of the state and whether or not they see themselves as authorizing it are irrelevant, thus denying individuals the opportunity to divorce themselves from their state and its policies” (367). To derive benefits from the state is not necessarily to authorize it, and, even if this were the case, the authorization account would still make individuals responsible for actions that are entirely beyond their control.

Pasternak (2013) argues that an adequate justification for distributing state responsibilities must take the attitudes of citizens into account. On her view, the members of a state can justifiably bear the burdens of its responsibilities if and only if they *intentionally participate* in the state. To intentionally participate in the state is simply to intend to be a member of the state (367-68). Although most people do not voluntarily join their states, most people do intentionally participate in their states – e.g., by taking pride in their citizenship or by choosing to receive certain benefits of citizenship. Whereas the authorization account appeals to the objective features of states to justify distributing their responsibilities to their members, the intentional participation account appeals to the mental states of individuals.

The implications of the intentional participation account do not differ greatly from those of the authorization account. The main difference is that the former provides citizens with a very limited way to opt out of the responsibilities of their

states. Pasternak (2013: 375) argues that, because citizens benefit from being members of a state, “the onus is on them to signal that they are not its intentional members”. In order to escape responsibility for the debts and treaty obligations of their states, citizens must indicate publicly and consistently that they do not wish to be its members, and they must also attempt to eschew the benefits of membership. There are three ways that citizens can show that they are not intentional members of their state: they can leave; they can attempt to secede or to fundamentally change its institutions; or they can remain within its borders while minimizing their interaction with it (375). The third option seems to be relatively easy, but only extreme cases suffice. Pasternak’s archetypical example is the “ultraorthodox Jewish groups within Israel, who object to the Zionist state and minimize their contacts with it as much as is possible” (375). If the citizens of a state wish to opt out of its responsibilities, then they must bear great burdens to show that they are not its intentional members. Passivity is a form of tacit consent; there is a strong presumption that the citizens of a state intend to be its members.

Once we expose the fiction of nondistributivity, it becomes clear that human beings ultimately bear the burdens of all state responsibilities. We are then left with a difficult ethical question: what, if anything, justifies distributing state responsibilities to individuals? Distributing responsibilities to individuals according to their roles is far more problematic in the case of the state than in other corporate entities. It does not suffice to say that, like shareholders in a corporation, the members of a state justifiably bear these burdens simply because they are members. Citizenship is, for many people, an accident of birth; it is more akin to gender or race

than to membership in a corporation. Parrish (2009) and Stilz's (2011) authorization account and Pasternak's (2013) intentional participation account are two plausible justifications for distributing state responsibilities, but they are probably not the only possible justifications. The literature on this aspect of state responsibility is in its infancy.

#### **4.3 The Process and the Fictions of State Responsibility**

State responsibility occurs as a three-stage process. The fundamental questions are a set of necessary conditions, and, as such, they cannot capture the directionality of state responsibility. States must incur responsibilities before they can possess responsibilities, and they must possess responsibilities before they can fulfill responsibilities. Particular instances of state responsibility take the form of a progression or development from attribution to possession to distribution. Attribution is the stage at which a state takes ownership of a particular responsibility; possession is the stage at which a state has an unfulfilled responsibility; and distribution is the stage at which the members of a state act on its behalf to fulfill its responsibility.

The three fictions indicate points of disjuncture between the theory and the practice of state responsibility. First, the fiction of the uniform is the assumption that all actions of state officials are attributable to their states, regardless of whether these officials act within the scope of their authority. The first fiction outstrips the answer to the question of ownership. States take ownership of actions only through the authority that they grant to individuals, so they cannot be responsible for

actions that they have not authorized. Second, the fiction of permanence is the assumption that states retain their identities through all change. The second fiction outstrips the answer to the question of corporate identity. States persist despite changes in their parts, but they cannot survive changes to the principles that determine how their parts are organized. Third, the fiction of nondistributivity is the assumption that the responsibilities of states and the responsibilities of individuals are mutually independent. The third fiction outstrips the answer to the question of fulfillment. The responsibilities of states are not reducible to those of particular individuals, but state responsibilities must be distributed to citizens, legislators, executives, and other state officials in order to be fulfilled. Each part of the practice of state responsibility is, in Bentham's (1977: I.36) words, "supported on the sandy foundation of a fiction".

## Conclusion

State responsibility is as theoretically sound as individual responsibility. The practice of assigning responsibilities to states is a necessary feature of international affairs, not a recalcitrant feature from a previous era or an absurdity that results from personification of the state. The justification for state responsibility follows from the internal logic of responsibility. States perform the three central functions that any entities must perform in order to be candidates for assignments of responsibility. States are just as capable of incurring, possessing, and fulfilling responsibilities as human beings, although states and human beings perform these functions in very different ways.

The theory of state responsibility has a tripartite structure. There are three fundamental questions that any account of responsibility must be able to answer; three answers that jointly provide a justification for state responsibility; three stages in the process of state responsibility; and three fictions that mark the ways in which the practice of state responsibility outstrips the justification for state responsibility.

**Figure 2. The Tripartite Structure of State Responsibility**

	<b>How states incur responsibilities</b>	<b>How states persist over time</b>	<b>How states fulfill responsibilities</b>
<b>Question</b>	Ownership	Corporate Identity	Fulfillment
<b>Answer</b>	Attributive	Aristotelian/Quinean	Distributive
<b>Stage</b>	Attribution	Possession	Distribution
<b>Fiction</b>	The Uniform	Permanence	Nondistributivity

The fundamental questions express three criteria that any rational account of responsibility must satisfy. The questions follow from the concept of responsibility:



if an account of responsibility cannot answer one or more of the questions, then it cannot be rational. A justification for state responsibility must, at the very least, explain how states incur, possess, and fulfill the responsibilities that are assigned to them.

The questions not only provide a series of tests with which to evaluate accounts of state responsibility; they also provide a useful way to organize and interpret the literature on state responsibility. The theoretical literature is more like a warehouse full of spare parts than a functioning machine. There is no settled terminology, let alone settled camps or traditions. Parts of a justification for state responsibility are scattered across several disciplines and often buried in obscure and dated publications. Some works discuss corporate agency and responsibility (e.g., French, 1984; O'Neill, 1986); others discuss the relationship between individual responsibility and state responsibility (e.g., McGary, 1986; Pasternak, 2013); others discuss authority and state responsibility (e.g., Crawford, 2002; ILC, 2001); and still others discuss identity and state responsibility (e.g., Aristotle, 1981; Carr, 1939; Craven, 1998). Although the extant literature provides most of the necessary components of a justification for state responsibility, it does not combine them. The fundamental questions provide instructions for how to assemble a coherent account of state responsibility from the fragments that currently exist.

The answers to the fundamental questions provide the justifications that the questions demand. First, the answer to the question of ownership explains how states incur responsibilities. States take ownership of actions (and the consequent responsibilities) through individuals who possess state authority. Second, the

answer to the question of corporate identity explains how states possess responsibilities over time. States persist despite changes in their parts as long as their organizing principles remain the same. Finally, the answer to the question of fulfillment explains how states act on their responsibilities. States fulfill their responsibilities by distributing them to citizens, legislators, executives, and other state officials. The answers to the fundamental questions jointly explain why the concept of responsibility is applicable to states.

The three (or four) answers identified here may not be the only possible answers. Accounts of state responsibility are, to some extent, wedded to particular conceptions of the state. A broadly liberal conception of the state underpins the answers presented here. Individuals are the loci of value and action, relations of authority are the crucial connections between individuals and the state, and authority inheres in roles or offices rather than particular people. Starting with a liberal conception of the state is useful for two reasons. First, it permits internal criticism of existing accounts of state responsibility. Most international lawyers and international political theorists take a liberal conception of the state for granted. Second, a liberal conception of the state presents the hardest case for state responsibility because it is the most thin and individualistic. If it is possible to justify state responsibility from a liberal starting point, then it is probably possible to do so from many others.

A different conception of the state might require a different set of answers to the fundamental questions. For example, a Rousseauian conception of the state would require a different answer to the question of ownership. Although Rousseau

is often lumped into the liberal tradition, he would probably appeal to the notion of willing rather than authorization to explain how states take ownership of actions.

The actions of individuals would be attributable to the state when they articulate its general will.<sup>24</sup> The fundamental questions are completely general and necessary, but their answers cannot be. Answers to the fundamental questions are necessary only in relation to a particular conception of the state. Just as every account of individual responsibility presupposes a conception of the individual, every account of state responsibility presupposes a conception of the state.

The process of state responsibility captures the directionality that is present in particular instances of state responsibility. Although the fundamental questions and answers have no necessary order, the responsibilities of states unfold in three stages. State responsibility takes the form of a progression from attribution to possession to distribution. Attribution is the stage at which a state incurs a responsibility through the actions of its members; possession is the stage at which a state has an unfulfilled responsibility; and distribution is the stage at which the members of a state act to fulfill its responsibility. The theoretical or rational account of state responsibility forms the basis for a developmental account of state responsibility. Whereas the answers to the fundamental questions explain how it is possible for states to incur, possess, and fulfill responsibilities, the process explains

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<sup>24</sup> Rousseau does not address the question of ownership explicitly, but his answer is implicit in the *Social Contract*. He argues, contrary to the attributive answer, that individuals cannot represent the state: “the sovereign, which is nothing but a collective being, can only be represented by itself; power can well be represented, but not will” (1997: II.1, 368 [2]). Only the general will represents the state, so the actions of individuals are attributable to the state only if they are articulations of its general will.

how the three answers are present in the particular responsibilities of particular states. The fundamental questions and answers apply to types of entities or beings; the process applies to particular instances of state responsibility.

The fictions of state responsibility are corrupt or deviant forms of the answers to the fundamental questions. Each fiction marks a way in which the practice of state responsibility outstrips the justification for state responsibility. First, the fiction of the uniform is the principle that all actions of state officials are attributable to states. Although states incur responsibilities through the actions of their officials, they are not responsible for every action that their officials perform. States take ownership of actions through relations of authority, so they cannot be responsible for actions that they have not authorized. Second, the fiction of permanence is the principle that states retain their identities through all changes. Although states persist over time, they are not permanent. States persist despite changes in their populations, territories, and institutions, but they cannot survive changes in the principles that determine how these constituents are organized. Third, the fiction of nondistributivity is the principle that the responsibilities of states and the responsibilities of individuals are mutually independent. Although one set of responsibilities cannot be reduced to the other, state responsibility and individual responsibility are intrinsically related. The responsibilities of states must be distributed to individuals in order to be acted on. The fictions are the presuppositions of the practice of state responsibility that cannot be justified by the theory of state responsibility.

It is clear that state responsibility has outgrown its justification, but how we ought to respond is less clear. The appropriate response depends on how we view political fictions. One response, in line with Bentham's view, is to dispense with the fictions and to modify the practice of state responsibility accordingly. This would require us to hold rogue officials personally responsible for their actions, to negate the responsibilities of states whose organizing principles have changed, and to cast aside *pacta sunt servanda* when debts and treaty obligations become onerous for citizens. Another response, in line with Carr's view, is to maintain the fictions as long as they are useful. For Carr, it does not matter whether state responsibility depends on a series of fictions as long as "[t]he spirit of international relations seems more likely to be improved by stimulating this belief [in the fictions] than by decrying it" (1939: 193). While Bentham requires that political principles have rational justifications, Carr requires only that political principles be instrumentally useful. In any case, state responsibility ought to have *some* justification, whether rational or instrumental. It is too important to be taken for granted.

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