

CONTENTS

Preface xi

Abbreviations of Hobbes' Works xiii

Introduction: State Responsibility and Corporate Personality	1
§1 <i>The Idea of State Responsibility</i>	3
§2 <i>The Three Fundamental Questions</i>	6
§3 <i>Back to Hobbes</i>	9
§4 <i>The Structure of the Book</i>	14
1 The Agential and Functional Theories of State Responsibility	16
§5 <i>States as Moral Agents: The Agential Theory</i>	17
§5.1 <i>The Agential Answer to the Question of Ownership</i>	19
§5.2 <i>The Agential Answer to the Question of Identity</i>	24
§5.3 <i>The Agential Answer to the Question of Fulfilment</i>	28
§6 <i>States as Legal Persons: The Functional Theory</i>	32
§6.1 <i>The Functional Answer to the Question of Ownership</i>	35
§6.2 <i>The Functional Answer to the Question of Identity</i>	38
§6.3 <i>The Functional Answer to the Question of Fulfilment</i>	41
§7 <i>The Limitations of the Agential and Functional Theories</i>	44
2 Hobbes and the Personality of the State	46
§8 <i>The Skinner–Runciman Debate</i>	47
§9 <i>The Two Faces of Personhood</i>	51
§10 <i>Hobbes' Theory of the State</i>	56
§11 <i>Artificial Men and Artificial Animals</i>	61

§11.1	Hobbes' State as a Corporate Agent	61
§11.2	Hobbes' State as an Organism	65
§12	<i>The Hobbesian Theory of State Responsibility</i>	68
3	Attribution: The Question of Ownership	72
§13	<i>General and Personal Responsibilities</i>	73
§14	<i>The Conditions for Attribution</i>	74
§14.1	Representation	75
§14.2	Authorization	77
§15	<i>A Hobbesian Account of Attribution</i>	79
§15.1	The Background Conditions for Authorization	79
§15.2	The Form of Authorization	85
§15.3	The Content of Authorization	90
§15.4	Non-State Corporate Entities	94
§16	<i>From Attribution to Responsibility</i>	99
§17	<i>Impersonation of the State</i>	105
4	Succession: The Question of Identity	110
§18	<i>The Concept of Corporate Identity</i>	111
§19	<i>The Conditions for Corporate Identity</i>	114
§19.1	Unity	118
§19.2	Continuity	120
§20	<i>Changes in a Single State</i>	125
§21	<i>Relational Changes</i>	132
§22	<i>Non-Identity</i>	138
5	Distribution: The Question of Fulfilment	144
§23	<i>The Problem of Distribution</i>	145
§24	<i>The Conditions for Distribution</i>	150
§24.1	Intragenerational Distribution	150
§24.2	Intergenerational Distribution	156
§25	<i>The Division of Liability</i>	160
§26	<i>Non-Fulfilment</i>	168

CONTENTS ix

Conclusion: The Future of State Responsibility	175
§27 <i>International Criminal Law</i>	178
§28 <i>The Proliferation of Treaties</i>	179
§29 <i>Cyborg States and Robotic Representatives</i>	181

Bibliography 187

Index 201

Introduction

State Responsibility and Corporate Personality

THE PRACTICE OF HOLDING states responsible is central to modern politics and international relations. States are commonly blamed, praised, punished, obligated, and held liable. On an almost daily basis, one hears about the latest round of sanctions against the latest rogue state; the latest treaty that states have signed or repudiated; the latest heavily indebted state to reach the brink of bankruptcy; or the latest call for reparations from former colonial states. The assumption in each case is that the state—as distinct from its individual leaders, officials, or citizens—is the entity that bears the responsibility in question. This book examines the theoretical and normative underpinnings of this so-called ‘state responsibility’. Why, and under which conditions, should we assign responsibilities to whole states rather than to particular individuals?

There are two contemporary theories of state responsibility. According to the *agential theory*, states can be held responsible because they are ‘moral agents’ like human beings, with similar capacities for deliberation and intentional action. The model for state responsibility is an ordinary case of individual responsibility, such as a criminal trial. According to the *functional theory*, states can be held responsible because they are legal persons that act vicariously through their officials. States are ‘principals’ rather than agents, and the model for state responsibility is a case of vicarious liability, such as when an employer is held financially liable for the actions of her employee. While the agential theory is dominant in International Relations, Political Theory, and Philosophy, the functional theory is dominant in International Law.¹ There are also some critics in every discipline who see the practice of holding states responsible as ‘guilt by association’ on a grand scale.

1. I use upper case (e.g., International Relations) to refer to the academic disciplines and lower case (international relations) to refer to the subject matter.

The purpose of this book is to reconstruct and develop a forgotten understanding of state responsibility from Thomas Hobbes' political thought. Like proponents of the agential and functional theories, Hobbes considers states to be 'persons', meaning that actions, rights, and responsibilities can be attributed to them. States can be said to wage war, possess sovereignty, and owe money. What makes Hobbes unique is that he does not consider states to be agents or principals. Unlike an agent, the state cannot will or act on its own; it needs representatives to will and act on its behalf. Unlike a principal, the state cannot authorize its own representatives. States are like 'Children, Fooles, and Mad-men that have no use of Reason', who are 'Personated by Guardians, or Curators; but can be no Authors' (*L* XVI. 248).² Although the state is incapable of acting on its own, it can nevertheless exercise rights and incur responsibilities through the representatives who act in its name. Hobbes' 'Artificiall Man' is conceptually more like an artificial child or 'Foole'.

I argue that Hobbes' idea of state personality provides a richer understanding of state responsibility than the agential theory or the functional theory. According to what I call the *Hobbesian theory*, state responsibility is structurally different from ordinary individual responsibility and from vicarious individual responsibility. Instead, it involves a complex triad of relations between the state, its government, and its subjects.³ Subjects are the principals who authorize the government; the government is the collection of agents who represent the state; the state is the 'person' that is responsible for the consequent debts and obligations; and subjects, in turn, share the costs and burdens of their state's responsibilities. As I argue throughout the book, no individual-level analogue can fully capture the logic of state responsibility, and analogizing between states and individuals often leads us astray.

The Hobbesian theory has both theoretical and practical advantages. First, it avoids the two traps into which critics and proponents of state responsibility tend to fall: reductionism, or treating corporate entities as aggregates of human beings; and anthropomorphism, or treating corporate entities as human beings writ large. Despite what Hobbes' description of the state as an 'Artificiall Man' suggests, he drew a sharp distinction between human persons and corporate persons. Because the Hobbesian theory captures the unique conceptual structure of corporate forms of personhood, it illuminates many features of state responsibility that the agential and functional theories obscure.

2. I cite Hobbes' *Leviathan* (*L*) according to the chapter number and the page number from the 2012 Clarendon edition.

3. For reasons that I explain in the next section, I follow Hobbes in using 'subject' rather than 'citizen'.

Second, the Hobbesian theory is conceptually and ontologically thinner than the agential and functional theories. Since it is built entirely from the basic concepts of authorization and representation, it eliminates the need for the metaphysics of corporate agency and for organic conceptions of the state. The Hobbesian theory explains how state responsibility can be understood and justified from the perspective of ontological and normative individualism. It therefore provides a powerful rebuttal against individualist critics who see corporate personality and responsibility as collectivist dogmas.

Third, the Hobbesian theory translates readily into a set of practical guidelines and policy prescriptions. While the concept of corporate agency is difficult to operationalize, the concepts of authorization and representation provide a familiar and intuitive guide for our normative judgments. The Hobbesian theory is also versatile enough to help us grapple with technological developments, such as autonomous weapons, that challenge both our concept of the state and our concept of responsibility. As the state becomes mechanized, Hobbes' mechanistic conception of the state becomes increasingly apt.

This book can be read as a work of 'realist' political theory.⁴ I start from the position that politics constitutes a distinct normative domain, and I develop a theory of responsibility that is appropriate for the political domain. Although the Hobbesian theory of state responsibility is abstract and general, it is not in any sense an 'ideal' theory. Nor is it an attempt to apply an ideal theory of corporate or collective responsibility to the non-ideal case of the state. An ideal theory of state responsibility would be nonsensical, because the practice of holding states responsible is inherently unjust, tragic, and lamentable. State responsibility would have no place in a just world, or even a 'reasonably' just world. Instead, political leaders would be held personally responsible for their wrongs, debts, and agreements, and ordinary citizens would never have to bear the costs of decisions that they did not personally make. But here we are, in a world full of sovereign debts, treaties, reparations, and economic sanctions, with no way out. This book provides a theory of state responsibility for the real world.

§1 The Idea of State Responsibility

Many of our basic political and economic practices presuppose that the responsibilities of states are distinct from the responsibilities of individuals. Sovereign debt is one salient example. The debts of Greece cannot be

4. E.g., Galston (2010), Hall (2015, 2017), Rossi and Sleat (2014), Sagar (2016), and Waldron (2016).

identified with the debts of individual Greeks. The members of government who borrowed the money are not expected to repay it from their own bank accounts, and they do not take the debt with them when they leave office. As Skinner (2015) points out, ‘sovereign debt’ is ‘a stupid thing to call it—it’s state debt. . . . Who is the debtor? Well you can hardly answer, “the government”. Governments come and go, but that debt doesn’t come and go.’ Nor are Greek subjects the debtors. Although journalists sometimes write as though each subject of a state owes a fraction of its debt, this cannot be literally true, since Greece does not owe less money whenever one of its subjects dies. As Maitland (2003: 70–71) argues, the only way to make sense of sovereign debt is to suppose that the state is a ‘corporation’ with its own moral and legal personality (see also Runciman, 2000a: 95–97). *Greece* owes the money; *Greeks* do not.

State responsibility is a uniquely modern phenomenon. What makes possible the distinction between the responsibilities of states and the responsibilities of individuals is the ‘modern idea of the State as a form of public power separate from both the ruler and the ruled’ (Skinner, 1978: 353). If the state were simply the rulers, then the responsibilities of states would be nothing more than the personal responsibilities of government officials. If the state were simply the ruled, then the responsibilities of states would be nothing more than the personal responsibilities of subjects. The idea that the state is a ‘corporate’ entity that is distinct from both ruler and ruled was not fully developed until the mid-seventeenth century (Skinner, 2002: 394–404). Only then did it become possible to speak of the responsibilities of states as distinct from those of rulers and subjects.

Although state responsibility is a type of corporate responsibility, an adequate theory of state responsibility cannot be deduced from a general theory of corporate responsibility. Jacob Levy (2015: 57) has argued that it is a mistake to treat groups as ‘big individuals or small states’. Similarly, I argue that it is a mistake to treat states as big individuals or big groups.

States have three features that distinguish them from most other corporate entities. First, states are involuntary associations. People typically choose to join universities and companies, but most people do not choose their states and cannot easily leave. Holding states responsible therefore carries a much greater risk of ‘misdirected harm’ (Erskine, 2010; Stilz, 2011: 191). Second, states are non-participatory. Even in democratic states, most people rarely participate in making laws and policies, and many people—children, incapacitated people, and often prisoners and resident foreigners—are entirely excluded from the decision-making process. We might hold a committee or a team responsible for a discriminatory policy because each member participated in making that policy (Gilbert, 2000, 2006; Tuomela, 2007: Chapter 10), but participatory accounts of collective responsibility do not apply to the state

(see §23 below). Third, states are not subject to the principle of limited liability. While the personal assets of shareholders cannot be seized to satisfy the obligations of a corporation, the personal assets of subjects can be seized (as in the 2013 ‘haircut’ of personal bank accounts in Cyprus) to satisfy the obligations of a state (Pasternak, 2013: 364). State responsibility is an ethically distinct and especially complicated kind of corporate responsibility.

State responsibility should not be confused with national responsibility. Although the two concepts are superficially similar, they involve different types of collective responsibility (Feinberg, 1968). National responsibility concerns the responsibilities that individuals have because of their national identities (Abdel-Nour, 2003; Butt, 2006; Miller, 2007). For example, as Jaspers (1961) famously asked, are the German people guilty of the Holocaust? National responsibilities are ‘distributive’: the responsibility of a nation implies the responsibility of each of its members. State responsibilities are ‘non-distributive’: the responsibility of a state is conceptually independent from the responsibilities of its members (Erskine, 2003; Lang, 2007). One could consistently say that Germany is guilty but that the German people are not, and vice versa. Whereas national responsibilities attach to each member of the nation, state responsibilities attach to the state *as distinct from* its members.

I construe ‘responsibility’ broadly to cover both prospective responsibility (duties and obligations) and retrospective responsibility (wrongdoing and punishment).⁵ Prospective responsibilities prescribe what a state ought to do in the future; retrospective responsibilities relate to a state’s past actions (Erskine, 2003: 8; Gilbert, 2006: 94–95). Whereas issues of prospective responsibility include treaty obligations and the responsibility to protect, issues of retrospective responsibility include economic sanctions and reprisals. Some responsibilities are simultaneously prospective and retrospective; reparations are prospective responsibilities to make amends for past wrongs. Claims about responsibility are essentially claims about what someone ought (not) to do or what someone ought (not) to have done. This book aims to explain why it makes sense to address some ought-claims to states rather than to individuals.

Throughout the book, I refer to individuals as ‘subjects’ rather than ‘citizens’, as Hobbes does in *Leviathan*. Citizens are the people whom the state legally recognizes as such, whereas subjects are the people who are subject to the

5. The distinction between prospective and retrospective responsibility corresponds roughly to the distinction in International Law between obligation and responsibility. I use ‘state responsibility’ more broadly than it is used in International Law, where it refers exclusively to retrospective responsibility for wrongful actions (ILC, 2001).

coercive power of the state. Citizenship is a legal category; ‘subjecthood’ is a political category. Although there is a large overlap between the two categories, they are not coextensive, and the distinction is important. Some citizens, such as expatriates, are not subjects.⁶ Some subjects, such as resident foreigners, are not citizens. In a few states, such as Qatar and Kuwait, *most* subjects are not citizens. In other states, such as Ireland, a significant proportion of citizens are not subjects. Subjecthood is the important category for state responsibility, because the people who are subject to the state’s coercive power bear the burdens of its debts, treaty obligations, and reparative obligations.

The passive connotation of ‘subject’, as opposed to the active connotation of ‘citizen’, is apt for a book about state responsibility. The members of the state can play an active role in determining what their state does, such as by voting, campaigning, or protesting. Yet each member of the state is ‘subjected’ to the consequences of the state’s actions regardless of whether he or she is personally responsible for them. Most Iraqis had nothing to do with the 1990 invasion of Kuwait, but many suffered and even died because of the resulting sanctions and reparations against Iraq.⁷ Many young Greeks in the aftermath of the 2007–2008 financial crisis were seriously disadvantaged by debts that previous governments incurred before they were even born. The people who bear the burdens of debts, reparations, treaty obligations, and sanctions are often just unlucky that they were born in a particular state at a particular time. Idealized notions of active citizenship serve to maintain the illusion that the members of the state bring these burdens on themselves. I call the members of the state ‘subjects’ in recognition of the grim reality that they are ‘subjected’ to many burdens that they have done nothing to morally deserve.

§2 The Three Fundamental Questions

Any cogent and complete theory of responsibility must answer three ‘Fundamental Questions’ about the entity in question.

1. *The Question of Ownership*: How can actions be attributed to the entity?
2. *The Question of Identity*: How can the entity be identified over time?
3. *The Question of Fulfilment*: How can the entity discharge its responsibilities?

6. Most expatriates are no longer subjects of their states of origin, but there are exceptions. The Internal Revenue Service taxes American citizens who live abroad, which makes them, to a limited degree, subjects of the United States.

7. I return to the case of Iraq in §6.3 and §24.1.

Every judgment of responsibility depends on judgments of ownership, identity, and fulfilment. For example, the judgment that a person is guilty of theft depends on three auxiliary judgments: (1) that the person who took the object intended to do so, such that the act of theft was his; (2) that the accused and the thief are the same person; and (3) that the accused is fit to be held responsible for the theft. It is both unjust and nonsensical to hold the accused responsible if any of these auxiliary judgments fail. We would not find the accused guilty of theft if he took the object by mistake (lack of ownership). Much less would we punish his identical twin for theft (lack of identity) or try to punish the thief if he were deceased (impossibility of fulfilment). Whether we judge the accused to be responsible depends in large part on our judgments of ownership, identity, and fulfilment.

The Fundamental Questions are perennial questions in ethics and law, although they are rarely posed alongside each other. The Question of Ownership involves issues of intent and representation, such as whether agents are responsible for the unintended consequences of their actions and whether following orders mitigates responsibility (Estlund, 2007; Finkelstein, 2005). The accused might not be guilty of theft, even if he did take the object intentionally, if he were commanded to do so under the threat of force. The person who commanded him might instead be the ‘owner’ of the theft. The Question of Identity concerns the transmission of responsibility through time (Glanon, 1998; Shoemaker, 2012; Weiss, 1939). For instance, Parfit’s (1984) ‘non-identity problem’ implies that the ‘victim’ of the theft would have no claim to compensation if the theft had somehow caused him to exist in the first place. If, through some series of events, the ‘victim’ were conceived because his family’s fortune was stolen, then he would have no claim to compensation. The Question of Fulfilment covers the old issue of whether ‘ought implies can’, as well as more recent issues of whether a lack of motivation or feasibility precludes responsibility (Estlund, 2011; Gilabert and Lawford-Smith, 2012). The accused might not be guilty of theft, or might instead be excused, if he had a medical condition that impaired his impulse control. We might say that his obligation not to steal was unfulfillable under the circumstances. A great deal of thought about responsibility concerns issues of ownership, identity, and fulfilment.

The Fundamental Questions apply to any theory of responsibility, whether the entities in question are humans, non-human animals, groups, or machines. For example, there is increasing interest in the question of whether it makes sense to assign responsibilities to artificial intelligences (AIs), such as robots and computer systems (e.g., Bostrom and Yudkowsky, 2014; European Parliament, 2017; Floridi and Sanders, 2004). One issue is whether AIs can ‘own’ actions or whether ownership resides with the people who program them.

Does it make sense to ‘blame’ a self-driving vehicle for running over a pedestrian in anything but a metaphorical sense? Another issue is how it is possible to identify AIs over time. If the vehicle’s navigation software is replaced, is it still the same vehicle? Yet another issue is how AIs can be *held* responsible. If a self-driving vehicle can act wrongly, then can it be punished? The Fundamental Questions apply no less to AIs than to human beings, although the answers will certainly be different.

A theory of state responsibility must answer the very same questions. I examine how the agential and functional theories of state responsibility answer the Fundamental Questions in Chapter 1, and I develop Hobbesian answers to the Fundamental Questions in Chapters 3–5. For now, I simply pose the questions.

First, how can actions be attributed to a state? It is necessary to determine what counts as an ‘act of state’ in order to determine what states are responsible for. For example, was the 2014 missile attack on Malaysian Airlines Flight MH17 an act of Russia or simply an act of particular pro-Russian rebels? Russia cannot be responsible for the attack unless the attack can be attributed to Russia. A theory of state responsibility must explain how actions of states can be distinguished from actions of individuals, despite the fact that states act only through individuals.

Second, as Aristotle (1992: III.3, 175) asked, ‘how are we to tell whether a state is still the same state or a different one?’ Unless states retain their identities despite changes in their populations, territories, and governments, they cannot be responsible for what their antecedents have done. Britain cannot owe reparations to former British colonies, for example, unless it is the same state as the one that colonized them in the first place. A theory of state responsibility must explain how states can be identified over time as their constituents change.

Third, how can a state fulfil its responsibilities? Corporate entities cannot act on their own, so their responsibilities must be distributed to individuals in order to be fulfilled. 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 inevitably harms their subjects. The question, then, is what makes the distribution of responsibility legitimate. For example, why should Greeks bear the burden of their state’s debt? Many did not vote for the governments that borrowed the money, and some young Greeks had not yet been born when the money was borrowed. A theory of state responsibility must provide a justification for distributing states’ responsibilities to their subjects.

The Fundamental Questions provide a structured way to interpret and evaluate theories of state responsibility. The agential, functional, and

Hobbesian theories answer each question differently, which makes the questions useful points of comparison.

§3 Back to Hobbes

Returning to Hobbes for a theory of state responsibility may seem antiquarian or anachronistic. Much has been written about state responsibility since the mid-seventeenth century, and Hobbes could never have foreseen contemporary issues of sovereign debt, economic sanctions, or reparations. Hobbes obviously does not provide all of the answers. However, he does provide some crucial but forgotten insights that help us to understand state responsibility in the present. His theory of state personality lays the groundwork for a theory of state responsibility.

One reason to return to Hobbes is that his theory of the state helped to make state responsibility possible. He provides one of the first unambiguously modern theories of the state, as well as the first systematic exposition of the idea that the state is a person. Skinner (2002: 404) points out that Hobbes, ‘more clearly than any previous writer on public power . . . enunciates the doctrine that the legal person lying at the heart of politics is neither the *persona* of the people nor the official person of the sovereign, but rather the artificial person of the state.’ Given that Hobbes’ theory of the state paved the way for the idea of state responsibility, we would do well to understand it.

Another reason to return to Hobbes is that his idea of state personality has no counterpart in the current scholarship on state responsibility. What makes Hobbes unique, as I explained above, is that he considers the state to be a person but neither an agent nor a principal. Hobbes’ state is represented ‘by fiction’ (Runciman, 2000b; Skinner, 2007), much like a child or a ‘Foole’, which (unlike an agent) wills and acts only through its representatives but (unlike a principal) cannot authorize its own representatives. For example, an incapacitated defendant in a trial can neither represent herself nor authorize a lawyer to represent her. However, if the judge authorizes a lawyer to represent her, then she is nevertheless a person as far as the court is concerned. The defendant can act vicariously through a court-appointed lawyer. The personality of the state is conceptually similar. Although the state ‘can do nothing but by the Person that Represents it’ (*L XVI*. 388), it can nevertheless be said to make laws, borrow money, sign treaties, and wage wars. The actions of the sovereign are attributable to the state, much as the actions of the lawyer are attributable to the incapacitated defendant. The subjects are the ‘principals’; the sovereign is the ‘agent’; but the state is the person that owns the actions that the sovereign performs.

Hobbes’ idea of the state may seem like nothing more than the ‘fiction theory’ of corporate personality applied to the state. The fiction theory dates

back at least to Pope Innocent IV, who declared in 1245 that a corporate entity, such as a guild or a church, is only a *persona ficta* and therefore cannot be excommunicated (Dewey, 1926: 665–66; Kantorowicz, 1957: 305–6; Koessler, 1949: 436–39). The idea that corporate personality is a fiction is now ubiquitous in politics and law.

Although Hobbes might be considered a proponent of the fiction theory in a broad sense, he differs from other proponents of the fiction theory in several important ways. First, whereas proponents of the fiction theory consider corporations to be creations of law, Hobbes considers the state to be a precondition for law.⁸ Hobbes' state is a fiction, but it is not a *legal* fiction.

Second, whereas the fiction theory carries the connotation that corporate personality is *just* a fiction, and hence that it should not be taken too seriously, Hobbes reifies the fiction. He refers to the state as both an 'Artificiall Man' and a 'Mortall God' (*L* Intro. 16, XVII. 260). Only in his earliest political work, *The Elements of Law*, and then only once, does Hobbes explicitly say that 'a body politic . . . is a fictitious body' (*EL* XXI.4).⁹ Even here, the 'body politic' that he refers to is an assembly, not a state (see §10 below). Not once in *Leviathan* does he say that the personality of the state is fictitious, even though his theory of personhood clearly implies it (Runciman, 2003: 30). He downplays this implication because he wants to emphasize that the personality of the state has very real and important consequences. Having a separate personality from the sovereign gives the state an 'Artificiall Eternity of life', or continuity over time, despite the deaths of individual sovereigns and members of sovereign assemblies (*L* XIX. 298). For Hobbes, the fiction of state personality was the only thing that prevented subjects from falling back into the state of nature after each generation.

Third, and most importantly for my purposes, Hobbes' theory of the state is much more sophisticated than the present-day fiction theory. Hobbes does not simply maintain that corporate entities are fictions in order to avoid ontological commitments. He also provides a well-developed account of attribution that explains how real actions and responsibilities can be attributed to fictional entities (see Fleming, 2017a). There are more and less plausible ways of representing the state, just as there are more and less plausible ways of representing a fictional character, such as Robin Hood or Harry Potter (see §14.1). The fiction of state personality cannot be used in any which way.

8. More precisely, the state is a precondition for *civil* law, or human-made law. *Natural* law precedes the state.

9. I cite *The Elements of Law* (*EL*) according to the paragraph numbers.

Hobbes' idea of state personality was quickly overtaken and displaced by metaphysically thicker ideas of state personality, which have more in common with the agential theory. Although 'the Hobbesian view of the person of the state as the seat of sovereignty won immediate acceptance among a broad range of writers on natural jurisprudence in continental Europe' (Skinner, 2002: 407), these writers also abandoned the features that made this view of the state distinctly Hobbesian. Samuel von Pufendorf, whose work was 'the most important conduit for the transmission of [Hobbes'] doctrine', altered his idea of state personality in a crucial way. Whereas Hobbes understood the state as a fictional person, Pufendorf (1934: BVII II.13, 984) understood the state as a 'moral person.'¹⁰ Skinner (2009: 349–52) takes this shift in terminology to be rather insignificant. He maintains that Pufendorf's theory of the state is little more than an 'adaptation of Hobbes's fictional theory' (ibid. 349). On the contrary, I argue, the shift from Hobbes' fictional personality to Pufendorf's moral personality marks a substantive shift.¹¹ For Hobbes, the state is a *fictional* person because it has no will of its own: 'a Common-wealth hath no Will, nor makes no Lawes, but those that are made by the Will of him, or them that have the Sovereign Power' (L XXXI. 570). For Pufendorf, the state is a *moral* person because it does have a will, as well as an intellect that guides this will. He describes the state as 'a single person with intelligence and will, performing other actions peculiar to itself and separate from those of individuals' (Pufendorf, 1934: BVII II.13, 983; see also Boucher, 2001: 566–67). One of Pufendorf's crucial moves was to reify the will of the state. He thus popularized Hobbes' theory of the state but stripped it of what made it distinctly Hobbesian.

The issue of whether non-rational entities can be persons illustrates the difference between Hobbes' theory of personhood and Pufendorf's theory of personhood. Hobbes thought there were 'few things, that are incapable of being represented by Fiction' (L XVI. 246). Anything that has an authorized representative 'can be a person, that is, it can have possessions and other goods, and can act in law, as in the case of a temple, a bridge, or of anything whatsoever that needs money for its upkeep' (DH XV.4).¹² Just as 'Children,

10. I cite Pufendorf's *De jure naturae et gentium* according to the book number, chapter number, and paragraph number, as well as the page number from the 1934 edition of the Oldfather translation.

11. Skinner (2015) later acknowledges this. See Holland (2017: 6–14, 83–91, 199–207, 211–21) for a detailed account of the differences between Hobbes' theory of the state and Pufendorf's theory of the state.

12. I cite Hobbes' *De homine* according to the chapter and paragraph numbers.

Fooles, and Mad-men that have no use of Reason, may be Personated by Guardians, or Curators . . . Inanimate things, as a Church, an Hospital, a Bridge, may be personated by a Rector, Master, or Overseer'. Even 'An Idol, or meer Figment of the brain, may be Personated' provided that someone is authorized to speak and act in its name (L XVI. 248).¹³ Pufendorf, on the other hand, argued that it was a mistake to ascribe personhood to non-rational entities.

On this point Hobbes, *Leviathan*, chap. xvi, is mistaken in holding that in communities a man may frequently represent the person of an inanimate object, which in itself is not a person, such as a church, a hospital, a bridge, &c. For it is not necessary by a fiction of law to assign a personality to any of these things, since it is very much simpler to say that certain states have assigned to particular men the duty to collect the revenues for the preservation of such places, and to prosecute and defend any suits that arise on such account (1934: BI I.12, 11).

Pufendorf argues that ascriptions of personhood 'should presuppose such qualities as are appropriate' (ibid. I.14, 15)—namely, intelligence and will. For this reason, it was 'sheer madness and silly impudence' for Caligula to make his horse a Roman consul and a householder (ibid. I.15, 15–16), as it was for Hobbes to describe inanimate objects as persons. Whereas Hobbes thought anything that had an authorized representative could be a person, Pufendorf thought only rational agents could be persons. In List and Pettit's (2011: 170–73) terms, Hobbes' conception of personhood is 'performative', while Pufendorf's is 'intrinsicist'. For Hobbes, the state is a person because someone speaks and acts in its name. For Pufendorf, it makes sense to speak and act in the name of the state only because it has a will and an intellect. Hobbesian persons, unlike Pufendorffian persons, need not have any intrinsic capacity for rationality or agency.

Later ideas of state personality owe much more to Pufendorf than to Hobbes. Pufendorf's conception of the state as a moral person was taken up by many others, including Wolff, Vattel, Rousseau, and Kant,¹⁴ and it remains common in Political Theory and International Relations to describe the state

13. A contemporary example of a Hobbesian fictional person is the Whanganui river in New Zealand, which has two guardians or representatives who speak and act its name (BBC, 2017b; Hutchison, 2014). The Whanganui can initiate court proceedings, assert its rights, and incur debts through its authorized representatives.

14. See Holland (2011: 439–41; 2017) on the influence of Pufendorf's idea of moral personhood on Wolff, Vattel, Kant, and others. See Derathé (1995: 397–410) on the relationship between Hobbes', Pufendorf's, and Rousseau's conceptions of state personality.

as a moral person (e.g., Vincent, 1989; Stilz, 2011; Wendt, 2004). What these disparate ideas of state personality have in common is that they take personhood to be constituted by a set of intrinsic properties rather than by a process of social ascription. Hobbes' claim that bridges and idols can be persons falls strangely on modern ears because, like Pufendorf, we tend to take for granted that rationality and will are preconditions for personhood. Hobbes' theory of the state has thus been thoroughly eclipsed by Pufendorf's adaptation of it.

Hobbes' idea of state personality has no contemporary counterpart in the scholarship on state responsibility. In Political Theory, International Relations, and Philosophy, it has been supplanted by the idea of the state as a moral agent. In International Law, it has been supplanted by the idea of the state as a functional legal person. However, there was one previous attempt to understand state responsibility in Hobbesian terms. E. H. Carr (1946) approvingly cites Hobbes in (of all places) his chapter titled 'International Morality' in *The Twenty Years' Crisis*. He describes Hobbes' idea of state personality as 'an important step forward', which 'made possible the creation of international law on the basis of natural law' (ibid. 146). Hobbes' theory of the state helps to explain how states can have responsibilities—not just legal responsibilities, but *moral* responsibilities: 'States could be assumed to have duties to one another only in virtue of the fiction which treated them as if they were persons' (ibid.). For Carr, as for Hobbes, the personality of the state is 'a necessary fiction' (ibid.). It is a fiction because it has no factual or metaphysical basis, but it is necessary because it underpins sovereign debts, treaty obligations, and other corporate responsibilities (ibid. 149–51). Carr even describes the process of attribution in Hobbesian terms: '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 "Great Britain" and "Italy"' (ibid. 152). Attribution is a product of representation, not of agency, will, or function.

The only significant difference between Carr and Hobbes is one of emphasis. Whereas Hobbes downplays the fictional character of the state, Carr emphasizes it. His primary aim in doing so is to discredit 'utopian thinkers', who 'reject [state personality] with fervour, and are consequently led to deny that morality can be attributed to the state'. Carr's response is that the 'controversy about the attribution of personality to the state is not only misleading, but meaningless' (ibid. 148). The utopians have made the same mistake as the 'real personality' theorists (perhaps Otto von Gierke and the British Idealists), which is to assume that the question of whether states are persons can be answered by metaphysics. As he later adds: 'The hypothesis of state personality and state responsibility is neither true nor false, because it does not purport to be a fact, but a category of thought necessary to clear thinking about

international relations' (ibid. 150). What drew Carr to Hobbes' idea of state personality is that it carries little metaphysical baggage.

Oddly, although Carr occupies a central place in the International Relations canon, his discussion of state personality and responsibility has been almost entirely overlooked in the literature on these subjects. One of the few passing mentions comes from Wendt (1999: 196), who invokes Carr to support his own theory of state personality: 'As Carr points out, it would be impossible to make sense of day-to-day IR without attributions of corporate actorhood.' The irony is that Wendt's theory, which aims to provide a metaphysical foundation for state personality, is exactly the kind of theory that Carr aimed to discredit. Carr's Hobbesian way of thinking about state responsibility has been misread on the rare occasions when it has been read at all. Although Carr's remarks on state responsibility are intriguing and suggestive, they are also brief and polemical, so they leave many important questions unanswered. What follows can be understood as an attempt to pick up where Carr left off—to develop a 'political' theory of state responsibility using Hobbes' theory of political representation.

§4 The Structure of the Book

The book has five main chapters. Chapter 1 reconstructs and critiques the agential and functional theories of state responsibility. I show that neither provides adequate answers to the Fundamental Questions. At best, the 'agent' and 'principal' models provide an incomplete set of answers. At worst, they blind us to important facets of state responsibility.

Chapter 2 lays the groundwork for the Hobbesian theory of state responsibility. It first sets out to determine what exactly Hobbes means when he says that the state is a person. Scholars of state and corporate responsibility, and even many Hobbes scholars, have failed to appreciate the novelty of Hobbes' idea of state personality because they have projected the idea of corporate agency—the core of the agential theory—back onto Hobbes. I show that it is possible to recover a novel understanding of state personality from Hobbes if we resist this urge to read him through the contemporary literature on corporate agency.

The next three chapters develop Hobbesian answers to the Three Fundamental Questions. Chapter 3 addresses issues of ownership, such as whether the actions of dictators and rogue officials ought to be attributed to states and whether states can commit crimes. I show that, with some modifications, Hobbes' account of attribution provides an intuitive and compelling answer to the Question of Ownership: an action counts as an act of state if and only if the agent who performed it was an authorized representative of the state.

Much of the chapter focuses on the conditions for authorization and representation.

Chapter 4 addresses issues of identity, such as whether changes in a state's population, territory, government, or constitution alter its personality and hence negate its responsibilities. According to Hobbes, the corporate identity of the state is created and sustained by representation. The state has a corporate identity because it has an authorized representative who speaks and acts in its name. This identity persists as long as the state has a continuous 'chain of succession', or an unbroken series of representatives. I show that this Hobbesian account of corporate identity solves many of the identity problems that arise in cases of revolution, annexation, secession, absorption, unification, and dissolution.

Chapter 5 addresses issues of fulfilment, such as why subjects ought to bear the costs of their state's debts and reparative obligations. I focus on intergenerational distributions of liability, in which the subjects who bear the costs were not yet born when their state incurred the responsibility. I use Hobbes' idea of 'representation by fiction' to explain how subjects can be implicated in acts of state that occurred before they were born.

The conclusion summarizes the implications of the Hobbesian theory of state responsibility and then looks to the future. There are three ongoing trends that are likely to alter both the nature and the scope of state responsibility: the development of international criminal law, the proliferation of treaties, and the replacement of human representatives with machines and algorithms. Although the practice of holding individuals responsible for acts of state might seem to render state responsibility redundant, I argue that the rise of international criminal law will not lead to the decline of state responsibility. The two forms of international responsibility are complementary rather than competitive. If anything, the domain of state responsibility will continue to expand in the coming decades because of the proliferation of treaties. As states continue to sign bilateral and multilateral treaties about everything from investor protection to environmental protection, political decisions will increasingly be circumscribed by international agreements. A sovereigntist backlash is already underway.

New technologies pose the greatest challenge to current understandings of state responsibility. Our theories of state responsibility are designed for a world in which the 'members' or 'organs' of states are flesh-and-blood human beings. But states are becoming 'cyborgs' as they rely more and more on algorithms to make decisions and on machines to execute them. Hobbes' theory of the state, which is mechanistic to begin with, is well suited to the emerging world of mechanized states.

INDEX

- agents: corporate, xi, 1–3, 9, 11–14, 16–34, 39, 44–47, 61–65, 67, 70, 76n2, 102, 108, 114, 172n, 176, 183–84; individual, 79–85, 100–2, 181–86; robotic, 7–8, 65, 181–86; of the state, 33–34, 72, 78, 92–94, 99, 105–6, 171 (*see also* principal-agent relationships).
- analogy: in Hobbes' political thought, 2, 10, 47–48, 54–55, 58, 61, 67; between states and corporations, 4–5, 184; between states and individuals, 1–2, 17–18, 26–28, 31–32, 44–45, 110, 114, 140–42, 176–78; between states and objects, 110, 115–17; between state responsibility and vicarious liability, 1–2, 16, 33, 45–46, 65–66, 100–1, 152, 176.
- Aristotle, 8, 25, 115–16.
- artificial intelligence, 7–8, 181–86.
- authorization: and authenticity, 80–82, 84–85; and democracy, 89–90; and the distribution of liability, 30–31, 147–48, 150, 163–66, 167n, 173; by fiction, 153–55, 158–59; in Hobbes (*see* Hobbes, Thomas: on authorization); in international law, 35–36; and state identity, 119, 120, 124; and *ultra vires* actions, 92–94.
- Carr, E. H., 13–14, 104–5, 142.
- China. *See* identity: of China.
- Congo. *See* debt: of Zaire.
- constructivism: in International Relations, 111, 142–43. *See also* Wendt, Alexander.
- Czechoslovakia. *See* debt: of Czechoslovakia; identity: of Czechoslovakia.
- debt: 29, 100, 106–7, 112–13, 148, 154–55, 163–64, 166, 174, 177; of Czechoslovakia, 138–39; across generations, 148, 150, 156–60, 169–73; of Greece, xi, 3–4, 6, 8, 42, 146; and inheritance, 141–42; of the Ottoman Empire, 127, 139; of the Soviet Union, 123, 141, 171; of Zaire, 37–38, 43, 106–7, 109, 171, 175.
- Erskine, Toni, xii, 17–20, 24–26, 29.
- Estonia. *See* identity: of the Baltic states.
- Ethiopia. *See* identity: of Ethiopia.
- French, Peter, 17–18.
- Germany, 5, 43, 97, 102, 139, 146–47, 149. *See also* identity: of Germany.
- Greece. *See* debt: of Greece.
- Hobbes, Thomas: use of analogies, 2, 10, 47–48, 54–55, 58, 61, 67; on authorization, 2–3, 9, 50, 57–61, 65–67, 69–70, 77–78; on corporations, 10, 63n, 68, 72, 94–95; on representation, 48–49, 52–54, 60, 66–67, 69–70, 75–77; and representation of God, 51–52, 59n, 67, 121; on sovereignty, 59–60, 64–65, 68–69, 75–79, 85, 86n7, 90–92, 117, 119, 169.
- identity: and authorization, 119, 120, 124; of the Baltic states, 111, 123, 128–29, 131; of China, 39–40, 136–37; corporate versus personal, 26–28, 32, 110, 114, 117, 142; corporate versus physical, 114–17, 142; corporate versus social, 111–12; of Czechoslovakia, 131, 134, 138–39; of Ethiopia, 130–31; of Germany, 115, 135–36; in international law, 38–41, 114–15, 128, 130n, 140n;

- identity (*continued*)
of Israel, 131–32; of Poland, 123–24, 130–31;
and recognition, 120–31, 143; and representation, 117–21, 124–25, 178; and responsibility, 6–7, 15, 109, 112–14, 143, 171; of Russia, 125–26, 128, 133; synchronic (unity) versus diachronic (continuity), 112; token versus type, 40, 44; of Turkey, 25, 41, 109, 114, 127–28, 135, 139–40; of the United Kingdom, 24–25, 109, 118; of Yemen, 134.
- intergenerational responsibility, 25, 144–149, 156–60, 169–70, 172.
- international criminal law, 15, 37, 78, 102, 176, 178–79, 184–85.
- Iraq, 6, 38, 41, 43, 102, 146–47, 151–52, 166–67.
- Ireland, 6, 77–78, 92, 97, 105.
- Israel. *See* identity: of Israel.
- Latvia. *See* identity: of the Baltic states.
- Lithuania. *See* identity: of the Baltic states.
- national responsibility, 5, 149.
- Ottoman Empire. *See* debt: of the Ottoman Empire; Turkey.
- personhood: in Hobbes, 9, 11–13, 46–67, 75–77, 95, 100, 115–19, 121, 124, 184; of inanimate things, 11–13, 50–51, 60–62, 100; legal, 9–10, 13, 33, 38, 134, 183–84.
- Pettit, Philip, 12, 20–24, 50, 61–64, 93.
- Poland, 33n, 98. *See also* identity: of Poland.
- principal-agent relationships, 33, 45, 65–66, 69–70, 99–100, 118, 176.
- Pufendorf, Samuel, 11–13.
- realism, 3, 89; *see also* Williams, Bernard.
- reparations, 5, 8, 26, 32, 43, 45, 104, 145–49, 152, 155–56, 161, 165–66, 173–74, 176–77, 179. *See also* Iraq.
- representation: by fiction, 9–13, 15, 47–53, 55–62, 67, 76, 95, 100, 142, 144–45, 153, 155, 158, 173; of future generations, 144, 148, 157–60, 164–65, 169, 173; in Hobbes (*see* Hobbes, Thomas: on representation); and state identity, 110–11, 117–22, 124–33, 136–37, 142–43.
- Rousseau, Jean-Jacques, 12, 80, 101.
- Runciman, David, 47–52, 55–56, 58–59, 66, 69, 76, 86n8, 91, 153, 158, 169–71.
- Russia, 8, 20, 74, 82, 108. *See also* identity: of Russia; Soviet Union.
- Skinner, Quentin, 4, 9, 11, 47–52.
- sovereignty. *See* Hobbes, Thomas: on sovereignty.
- Soviet Union, 39, 111, 122–29, 132–35, 137, 139, 141, 171. *See also* debt: of the Soviet Union; Russia.
- subjects: as authors of the state's actions, 2, 59–60, 66–71 (*see also* authorization); as bearers of the state's burdens, 29, 38, 41–45, 58, 73, 100–5, 107; versus citizens, 5–6; defined, 143.
- Taiwan. *See* identity: of China.
- treaties, 32, 45, 77, 100, 104–5, 107, 127, 129, 138, 163–64, 168, 172n, 179–80; on German reunification, 135–36, 138; Vienna Convention on, 170–71.
- Turkey, 82. *See also* debt: of the Ottoman Empire; identity: of Turkey.
- United Kingdom, 8, 76, 80, 91–92, 96, 104–5, 108–9, 121–22, 130, 134, 146, 148, 156, 177. *See also* identity: of the United Kingdom.
- United States, 6n6, 26, 27n, 29, 78, 86, 95–99, 120, 122–23, 128, 133–34, 146, 150, 166, 178, 180; civil war, 88, 166; and the International Criminal Court, 78, 178; invasion of Iraq, 21–22.
- United States v. Iran*, 35–36.
- Wendt, Alexander, 14, 21, 26–28, 34, 108, 111, 114. *See also* constructivism.
- Williams, Bernard, 82–83, 86–89.
- Yemen. *See* identity: of Yemen.
- Zaire. *See* debt: of Zaire.