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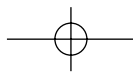
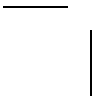
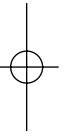
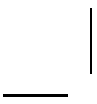
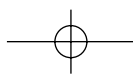
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THE PHILOSOPHY OF
**INTERNATIONAL
LAW**



THE PHILOSOPHY OF

INTERNATIONAL LAW

Edited by

SAMANTHA BESSON AND JOHN TASIOULAS

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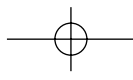
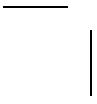
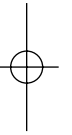
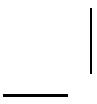
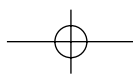
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PREFACE

International law has recently emerged as a thriving field of philosophical inquiry. This volume contains twenty-nine cutting-edge essays by thirty-three leading philosophers and international lawyers. An introduction co-authored by the two editors sets the scene by identifying the value of developing the philosophy of international law, addressing some of the main challenges it confronts, and presenting the aims of the volume together with a brief summary of the essays included in it. The ultimate goal is to help shape an agenda for future research in a burgeoning field.

The contributions to this volume, published here in English for the first time, address central philosophical questions about international law. The volume's overarching theme concerns the articulation and defence of the moral and political values that should guide the assessment and development of international law and institutions. Some of the essays tackle general topics within international law, such as the sources and legitimacy of international law, the nature of international legal adjudication, whether international law can or should aspire to be 'democratic', the significance of state sovereignty and the contours of international responsibility. The other contributions address problems arising in specific domains of international law, such as human rights law, international economic law, international criminal law, international environmental law, and the laws of war. Of course, the volume is not exhaustive and many more issues could have been addressed in an even longer book.

This volume is distinguished by its 'dialogical' methodology: there are two essays (and, in the case of human rights, three essays) on each topic, with the second author responding in some measure to the arguments of the first. At the same time, each chapter may be read independently from the others, as a self-standing contribution to the topic. Cross-fertilization and coherence among the different themes and trends in the book were created thanks to the excellent and intensive discussions that took place in the two workshops that were organized in February and September 2007, respectively in Fribourg and in Oxford.

We wish to thank Ms Joanna Bourke-Martignoni, research assistant at the University of Fribourg from 2006 to 2008, for her editorial assistance, and Mr Keith Bustos, research assistant at the University of Fribourg from 2007 to 2008, for his help at early stages of the editorial process. We are grateful to Mr Peter Momtchiloff at OUP for his unfailing support and kind forbearance during the long, and

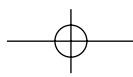
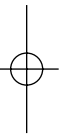
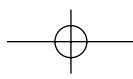
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sometimes challenging, process of putting this book together. We should also like to thank the Swiss National Science Foundation and the British Academy for providing vital financial support for the conferences in Fribourg and Oxford. Last but not least, our special thanks are owed to all of our contributors for making this ambitious inter-disciplinary project such a stimulating and worthwhile experience.

Samantha Besson and John Tasioulas
Fribourg and Oxford, 20 April 2009

SECTION VII

INTERNATIONAL
RESPONSIBILITY



CHAPTER 13

INTERNATIONAL
RESPONSIBILITY

JAMES CRAWFORD AND JEREMY WATKINS

I. INTRODUCTION: THE DIMENSIONS OF
INTERNATIONAL RESPONSIBILITY

One of the complications that besets any treatment of responsibility inside or outside of the law comes from the ambiguities in the term itself. ‘Responsibility’ has a bewildering array of meanings, each of which occupies a distinctive role in legal and moral reasoning.¹ The meaning that is most strongly suggested by etymology is what might be termed ‘responsibility as answerability’.² To declare that a (natural or legal) person is responsible in this sense is to indicate that they can be called to account for their conduct and made to respond to any moral or legal charges that are put. Understood thus, responsibility need not necessarily imply that a wrong has been done since a person may respond to a charge by offering a valid justification for their conduct, thereby deflecting any imputation of wrongdoing. The idea of responsibility as answerability for this reason needs to be set apart from what might be termed ‘responsibility as liability’—the idea that a person has violated their obligations and become liable to some negative response such as punishment, censure, or enforced compensation.

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FN:2

¹ For two excellent surveys of the various meaning of ‘responsibility’, see Hart, H., ‘Postscript: Responsibility and Retribution’, in his *Punishment and Responsibility* (Oxford: Clarendon Press, 1968), 210–37, and Kutz, C., ‘Responsibility’, in Coleman, J. and Shapiro, S. (eds.), *The Oxford Handbook of Jurisprudence and the Philosophy of Law* (Oxford: Oxford University Press, 2002), 548.

² This meaning is given prominence in e.g. Lucas, J., *Responsibility* (Oxford: Oxford University Press, 1993), 5–12, and Gardner, J., ‘The Mark of Responsibility’, *Oxford Journal of Legal Studies*, 23/2 (2003), 157.

Both senses of responsibility are in evidence in the international legal system, albeit at somewhat different points in its operation.³ The idea of responsibility as answerability is at work at the point in the legal process *before* it has been decided one way or another whether a breach of international law has taken place. It finds expression, for example, in the rules that determine *locus standi* and the admissibility of claims. These rules organize the lines of international legal accountability, determining who is answerable to whom, and in respect of what conduct. In recent years they have undergone a process of significant development, reflecting the changing demands that actors on the international scene can make on one another. Whereas once only states could invoke responsibility, and only then in respect of putatively unlawful conduct which was directly injurious to their interests, now states can hold one another accountable for the violations of at least certain norms regardless of whether they have been individually victims,⁴ and, at least in a limited sense, individuals can both be held to account—as, for example, when they are made to stand trial in the International Criminal Court—and force others to account, as, for example, when ‘just satisfaction’ is sought before the European Court of Human Rights.⁵

The idea of responsibility as liability, by contrast, comes into operation *after* it has been decided that a breach of international law has occurred, in the principles that determine the legal consequences following from the violation of an international obligation. These principles shape the judicial response to international lawbreaking and the legal obligations which responsible parties thereby acquire. In their present formulation, they are complicated by the interplay of a number of variables, including the identity of the responsible agent (state, individual, international organization, etc.) and the type of legal response (enforced reparation, monitoring, punishment, etc.), with the end result that liability gets fragmented into several distinct regimes, including the regime of ‘civil’ liability to which states—and, by derivation, international organizations—are subject when they perform an internationally wrongful act and the regime of criminal liability to which individuals are subject when they commit an international crime.

Both at the level of conceptual analysis and legal practice, international responsibility is thus a large and multifaceted subject. Besides the cleavage between

³ However, international law tends to use the word ‘responsibility’ as a synonym for ‘liability’, not least because other UN languages have equivalents for the former but not the latter. For example article 263 of the 1982 Law of the Sea Convention is entitled in English ‘Responsibility and Liability’; in French and Spanish it is entitled simply ‘Responsabilité/Responsibilidad’, and likewise in Chinese, Russian, and Arabic.

⁴ See the ILC Articles on Responsibility of States for Internationally Wrongful Acts, annexed to UNGA Res. 56/117, 12 Dec. 2001, reprinted in Crawford, J., *The ILC’s Articles on State Responsibility: Introduction, Text and Commentaries* (Cambridge: Cambridge University Press, 2002), esp. article 48 and commentary, 276–80.

⁵ The sense is limited because individuals can only bring claims under special treaty arrangements (such as the European Convention on Human Rights or under bilateral or multilateral investment treaties). They do not have a general prerogative to bring claims under international law. On this see Okawa, P., ‘Issues of Admissibility and the Law on International Responsibility’, in Evans, M. (ed.), *International Law* (2nd edn., Oxford: Oxford University Press, 2006), 479.

answerability and liability, it encompasses a number of theoretical and practical distinctions, including the distinctions between individual and corporate subjects, criminal and civil responsibility, and claims brought at domestic and international levels. In what follows, we focus specifically on the portion of this complex field that centres on the liabilities of states implemented through international bodies such as the International Court of Justice (ICJ) and inter-state tribunals. This is not to discount the philosophical interest of other dimensions of international responsibility, such as the accountability of international organizations and the criminal liabilities of individuals. But it does acknowledge the primacy of state responsibility within the international system as presently arranged. To the extent that one regime stands out in terms of its institutional refinement, it is the regime of liability that states trigger when they violate an international rule. From a philosophical as well as a legal perspective, it provides an obvious point of departure.

II. THE CHARACTER OF STATE LIABILITY

In the event that a state breaches an international obligation and commits ‘an internationally wrongful act’,⁶ it incurs an obligation (i) to cease that wrongful act, if it is still continuing, and (ii) to make full reparation for any material or moral damage caused. These two obligations, which have been articulated in the judgments of international tribunals and courts and which are codified in the International Law Commission’s (ILC) Articles on State Responsibility,⁷ make up the core content of the general international law relating to the liabilities of states. They bring out the underlying character of state responsibility as a system of civil—as opposed to criminal—liability. At present, the burdens that are imposed on delinquent states are exclusively reparative rather than penal in character. In spite of the arguments of those who have wanted to see introduced a category of state crime,⁸ there has been no development of corporate criminal responsibility to parallel the introduction of individual criminal responsibility on the international plane, nor has there been any trend among arbitral tribunals to impose punitive damages on states.

The twin obligations of cessation and reparation, moreover, give an important insight into the underlying character of those international legal prohibitions that are

⁶ ‘Internationally wrongful act’ is the general term used for a breach of an international legal obligation by a state. It need not imply a *moral* transgression.

⁷ (above, n. 4). The ILC Articles were adopted by the ILC itself in Aug. 2001 and are annexed to GA resolution 56/83 of 12 Dec. 2001.

⁸ For such arguments, see Pellet, A., ‘Can a State Commit a Crime? Definitely, Yes!’, *European Journal of International Law*, 10/2 (1999), 425–34, and Jorgensen, N., *The Responsibility of States for International Crimes* (Oxford: Oxford University Press, 2000), esp. ch. 13. The ILC eventually rejected the category: see Crawford, J., *The ILC’s Articles on State Responsibility* (above, n. 4), 35–8.

imposed on states. If we ask for a specification of the hallmarks of an internationally wrongful act, two features come to mind, corresponding to the two dimensions of state liability. First, an internationally wrongful act is one that is forbidden or disallowed by an international rule. This is fundamental. By prohibiting conduct, the international legal system provides a legal reason against performing it that would otherwise be absent. An internationally wrongful act is not a permissible act for which a price is charged or an act which a state is entitled to perform so long as it provides adequate reparation for any resulting harms; it is an act which should not be done; if done and the performance is ongoing (as when one state is unlawfully occupying the territory of another), it should cease.

Secondly, an internationally wrongful act is one whose harmful consequences should, as far as possible, be undone by the responsible state and should not be left to the injured party to suffer without remedy or compensation. By attaching an obligation of repair to acts which it prohibits, international law marks out a certain class of losses—namely, those that follow directly from unlawful conduct—as ones which should not lie where they fall. Of course, not every material harm or loss that can befall a state gives rise to a right to compensation. A state whose interests are damaged as a result of the withdrawal of economic aid, for example, has to bear the loss itself because the withdrawal of economic aid is (absent an express treaty commitment) legally permissible. But it belongs to the nature of an internationally wrongful act that any resulting injuries must not be endured by the injured party but must be transferred back to the responsible state. As the Permanent Court of International Justice (PCIJ) put it in the *Chorzów* case:

The essential principle contained in the notion of an illegal act—a principle which seems established by international practice and in particular by the decisions of arbitral tribunals—is that reparation must, so far as possible, wipe out all the consequences of the illegal act and re—establish the situation that would, in all probability, have existed if that act had not been committed.⁹

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Needless to say, both of these features of the internationally wrongful act require elaboration and qualification if they are to mesh with the realities of international practice, including legal practice. The reference to undoing past injury, in particular, is complicated by the fact that states can rarely take back the consequences of their conduct and restore the *status quo ante* in any literal sense: the best that can be managed in most situations is to offer victims compensation for the financially assessable losses or—failing that—to provide an apology or expression of regret (so-called ‘satisfaction’). But the twin hallmarks of the internationally wrongful act are nonetheless worth setting out in these abstract terms because they help to shed light on what is at stake in decisions to prohibit conduct under international law. By virtue of the reason—giving and loss-shifting dimensions of the internationally wrongful act, the imposition of a new obligation on a state has a particular

⁹ PCIJ, *Factory at Chorzow, Jurisdiction*, PCIJ Series A, No. 9 (1927), 47.

evaluative complexion, serving to limit the state's freedom of action whilst at the same time enhancing the security of those to whom the obligation is owed. When the United Kingdom (UK) signed the UN Convention Against Torture, for example, it surrendered its right to extradite suspects to countries in which they would be in danger of torture whilst at the same time affording to such suspects legal protection from torture and remedial rights in the event that such protection was unforthcoming. Through its support for the Convention, the UK thus signalled (among other things) its commitment to a particular normative judgement, namely that individual protection against torture is more important than its own freedom to shape its extradition procedures. And this kind of judgement, at least in a generalized form, is at work in any decision to impose a new obligation on a state: whenever a decision is made to impose a new obligation on a state, then the assumption is present that the freedom of action of the obligated state is worth restricting for the sake of the interests of those who acquire the corresponding rights and that the range of losses which should be reassigned through enforced reparation should be expanded to include the losses resulting from the breach of the proposed obligation.¹⁰

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This point is germane because it helps to demystify some of the general preconditions of international liability. By convention, the law on state responsibility not only spells out the legal consequences of an international breach but also defines some of the terms under which such a breach occurs. The ILC Articles, for instance, include rules on attribution and justification that are intended to interact with the definitions of particular wrongs to determine when such wrongs are committed.¹¹

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These rules, which might otherwise seem mysterious or unmotivated, can usefully be seen as embodying higher-order decisions about the reason-giving and loss-shifting functions of international legal prohibitions. A good example is the rules on attribution of conduct to states. These determine which actions of which natural or legal persons constitute conduct of the state for the purposes of responsibility. They are indispensable to the law on state responsibility for the obvious reason that states, lacking bodies of their own, can only act through the agency of others—in the end, of natural persons. In their current formulation, they stipulate that the official and *ultra vires* conduct of any individual who is deemed a public functionary under national law counts as the conduct of the state, but that the actions or private citizens do not.¹² At the most general level of analysis, this way of construing state agency registers a determinate judgement about the scope of state obligations, marking out the range of natural persons who are bound by any given norm and the

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¹⁰ This point, which follows from the principles of international law as opposed to the psychologies of particular lawmakers, applies regardless of whether the corresponding rights-holder is a state or an individual and regardless of whether the obligation is peremptory or non-peremptory.

¹¹ For rules on attribution, see ILC articles 4–10; for rules on justification ('circumstances precluding wrongfulness'), see articles 20–7.

¹² To be sure, there are complications—for example, relating to the conduct of paramilitaries and para-statal entities. See esp. ILC articles 10–11.

spread of losses which give rise to remedial rights. In relation to the ban on states maltreating foreign aliens, for example, it implies, first, that the legal reason which speaks against maltreatment should be addressed to any state official regardless of rank or function, and, secondly, that the victim of maltreatment should be entitled to reparation so long as the injurer was a public functionary acting in an official or *ultra vires* capacity. Were it cast differently—were it, say, to limit state agency to the actions of the leaders or ‘controlling minds’ of the state—it would register a different judgement about the terms of international interaction, one which would be more favourable to the interests of agents in freedom of action (since fewer natural persons would be bound by state obligations) and less favourable to the interests of victims in protection from unremedied losses (since fewer cases would give rise to remedial rights).

A similar line of analysis goes for the rules on justification too. These rules spell out considerations that render legally permissible state conduct that would otherwise be unlawful. Articles 20–6 of the ILC Articles identify six considerations which ‘preclude wrongfulness’: consent, self-defence, lawful countermeasures, *force majeure*, distress, and necessity. Taken together, they place determinate limits on the application of state obligations, marking out circumstances in which states are exempt from their normal duties and remedial responsibilities. As such, they embody a particular decision as to when states should be bound by legal reasons and when they should be obliged to remedy losses they have caused. By including ‘necessity’ in their number (to fix upon one example), they imply that states shouldn’t be held to the performance of their normal obligations at a time when their vital interests are at risk.¹³ Were necessity not counted as a justification, then a different conception of the scope of international obligations would be in evidence, one that would be less congenial to the interests of states in freedom of action (since they would be duty-bound in a wider range of cases) whilst being more congenial to victims in protection from unremedied losses (since they would enjoy more extensive remedial rights).

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Of course, none of this is meant to vindicate the *status quo*, whether in legal terms or as concerns the relation of law to practice. There is plenty of room to query the existing rules on justification and attribution and to put forward alternatives, either by arguing that state obligations need to be assigned a broader or a narrower scope. But the point that deserves to be stressed here is that such alternatives need to be assessed in light of a proper appreciation of the character of state obligations and the values which they implicate: only by first indentifying what is at stake in decisions to prohibit conduct can we hope to evaluate the merits or demerits of any proposed precondition of liability.

¹³ For a more exact definition of necessity, see esp. Crawford, J., *The ILC’s Articles on State Responsibility* (above, n. 4), 178–86. For a critique of the freedom which necessity, along with the other justifications, appears to give to states, see Allott, P., ‘State Responsibility and the Unmaking of International Law’, *Harvard International Law Review*, 29 (1988), 16–24.

The reason-giving and loss-shifting dimensions of the internationally wrongful act thus set the scene for ‘internal’ disagreements about state liability. They also provide the context for ‘external’ critiques of the system as a whole. Apart from challenging specific rules on attribution and justification, the entire practice of imposing liabilities on states can be brought into question. Those who are sympathetic to an individualist paradigm of responsibility have, in particular, argued that the existing practice is both unfair to the population of the responsible state and ineffective in promoting those ends such, as peace, security, and respect for human rights, which are often assumed to be a priority concern of the international order. For the time being, we propose to focus on their arguments and to leave to one side the rules on attribution and justification. This is not because these rules are unimportant or uncontentious but because they can only earn their keep in the international system if the broader practice to which they belong can itself be justified. Only by first deflecting what might be termed the *individualist challenge* can determinate standards of state liability obtain foundational support.

III. THE INDIVIDUALIST CHALLENGE

In his textbook on international law, Antonio Cassese writes:

The international community is so primitive that the archaic concept of collective responsibility still prevails. Where States breach an international rule, the whole collectivity to which the individual State official belongs, who materially infringed that rule, bears responsibility . . . On the international plane, it is the whole State that incurs responsibility and which therefore has to take all the required remedial measures.¹⁴

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Cassese gives the impression in this passage that whenever a state is held responsible in international law, the aggregate of persons in that state themselves incur responsibility. At one level this is misleading. A state, construed as an artificial legal person, is not the same as any ‘collectivity’ of natural persons, nor is the legal responsibility or liability of the state tantamount to that of any given population. But the conceptualization of state responsibility as a form of collective responsibility is nonetheless useful because it brings out an important line of complaint that can be directed at this area of international law, one that trades on the predominantly non-individualistic character of responsibility-ascriptions on the international plane.

The complaint in question concerns the effects that the imposition of liability has on the interests of the general population of the responsible state. When a state incurs liability, the resulting costs may be borne by the entire citizenry of the state and not its leadership or officials. In the event that a state incurs an obligation to provide compensation for the material damage it has caused, for example, the

¹⁴ Cassese, A., *International Law* (2nd edn., Oxford: Oxford University Press, 2005), 241.

funding for the compensation payments will invariably come from general taxation rather than from the private finances of the individuals who are morally implicated in the international breach. This wouldn't be troubling if the entire population of the responsible state were, in some sense, morally blameworthy for the state's breach of international law. If, for example, the entire citizenry of a country had given its willing support to a government's decision to undertake an unlawful act of aggression, then it might be justifiable for any liabilities to be shared among the population at large. But in virtually every case of state responsibility, the population that is eventually called upon to carry the costs of responsibility includes members who are, by any standard, morally blameless. Indeed they may be a majority. So far as they are concerned, their treatment at the hands of the international system may seem as unfair and ethically backwards as the treatment meted out under primitive systems of collective responsibility in which whole tribes or nations are subject to reprisals: after all, in both set-ups innocent people are called upon to pay the price for the misdeeds and mistakes of their rulers.¹⁵

FN:15

This sense of unfairness, moreover, can be heightened by an additional line of complaint that concerns the effectiveness of international law in promoting compliance with international values. On the face of it, state responsibility seems to be a very poor instrument for discouraging behaviour that is deemed undesirable by the international community. In terms of its deterrent possibilities, it affords to those officials on whose conduct state agency depends no motive for staying within the parameters set down by state obligations. The police officer who maltreats a foreign visitor or the military commander who violates foreign airspace, for example, will not be subject to any sanctions at the international level since liability, if it is incurred at all, will be allocated to the state as a whole and not to the officials who were personally involved in the breach. Given this fact, and given the supervenience of state agency on the agency of officials, it is, Philip Allott argues, unsurprising 'that states behave badly. The moral effect of the law is vastly reduced if the human agents involved are able to separate themselves personally both from the duties that law imposes and from the responsibility which it entails'.¹⁶

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At the most general level of analysis, both of these criticisms point in the same direction. They both imply that international law would do well to substitute or

¹⁵ The complaint has been elicited esp. by the United Nations Claims Commission, set up in the wake of the First Gulf War to facilitate claims for compensation 'resulting from Iraq's unlawful invasion and occupation of Kuwait': see e.g. Falk, R., 'Reparations, International Law, and Global Justice: A New Frontier', in De Greiff, P. (ed.), *The Oxford Handbook of Reparations* (Oxford: Oxford University Press, 2006), 486; Arnove, A. (ed.), *Iraq Under Siege: The Deadly Impact of Sanctions and War* (Cambridge, Mass.: South End Press, 2000), *passim*; and Klein, N., 'Why is War-Torn Iraq giving \$190,000 to Toys R Us?', at <www.guardian.co.uk/comment/story/0,,1328664,00.html>. (All websites were most recently checked in Dec. 2007). For broader philosophical critiques of collective responsibility grounded in fairness considerations, see Lewis, H., 'Collective Responsibility', *Philosophy*, 24 (1948), 3; Sverdlik, S., 'Collective Responsibility', *Philosophical Studies*, 51 (1987), 68.

¹⁶ Allott, P., 'State Responsibility and the Unmaking of International Law' (above, n. 13), 14.

supplement state responsibility with a paradigm of responsibility which is more sensitive to considerations of individual deterrence and blameworthiness. But in spite of this common orientation, the two complaints are worth distinguishing because they threaten to discredit somewhat different aspects of the state system, thereby generating different proposals for reform.

The fairness complaint is, in essence, an objection to the loss-shifting function of state obligations. The specific feature of international law that it challenges is the imposition of obligations of repair on states. Subtract this feature from the international order and the apparent injustice done to innocent populations would disappear. By contrast, the effectiveness complaint is an objection to any feature of the state system that hinders the promotion of accepted international values. Being consequentialist in character, it is open-ended in its targets. Although it could be used to question the loss-shifting function of state obligations, it could also be used to cast doubt on their reason-giving function. A case might be made, for instance, for thinking that the motivational inefficacy of international law is due to the fact that its demands are addressed to artificial—as opposed to natural—legal persons. Perhaps the explanation given for the prevalence of international noncompliance is that international obligations speak to states as opposed to individuals, thereby allowing officials and leaders to distance themselves morally and psychologically from the wrongs in which they are implicated. The particular feature of international law that would then be impugned by the effectiveness complaint would be the imposition of legal reasons and obligations on states rather than the imposition of obligations of repair.

The charge of ineffectiveness thus has the potential to be much more radical in its implications than the fairness objection. Developed in a suitable way, it yields the recommendation that states should surrender their standing as principal duty-bearers under international law in favour of individuals. Whether this recommendation is taken seriously depends, in part, on the plausibility of the empirical assumptions on which it draws. One way of responding to the complaint is to show that it fails in its own terms. Being a consequentialist argument, it can be countered by showing that the benefits of the state system, on closer inspection, exceed the benefits of the proposed alternatives. Even if we concede that state liability has a weaker deterrent effect than individual liability, we might nonetheless think that it has other consequential benefits that tell in its favour. One such benefit, for example, might be its capacity to give proper recognition to complex corporate goals: only a state-centric system of obligations, we might argue, can give due acknowledgement to aims such as the reduction of greenhouse gas emissions or the protection of the endangered species which call for positive interaction and cooperation among a multiplicity of actors. Another benefit we might highlight relates to the longevity of states: it is not too much to define states as the principal mechanism for the transmission of the accrued rights of human communities over time. This is true not only of their boundaries and jurisdiction but also of their

obligations. Governments and governmental arrangements change, leaders come and go, constitutions are overthrown, but (unless otherwise agreed or decided) the state continues. In a world in which long-term planning is important, we might argue that imposing obligations on states contributes to a sense of ongoing security and predictability which is valuable to any corresponding rights-holders, and which would be lost if obligations were allotted only to officials or leaders.

Even if these benefits don't add up to a decisive case in favour of the state system, however, there is another way to respond to the effectiveness complaint, which is to note that it falls foul of what Allen Buchanan calls the 'Vanishing Subject Matter Problem'.¹⁷ If states were no longer assigned international obligations, then it would be questionable whether anything worthy of the name of international law—and *a fortiori* international responsibility—would be left. States would not only lack their status as duty-bearers but they would forfeit their *right* to assume duties voluntarily through treaty-making. These two adjustments would effectively strip them of international legal personality in any meaningful sense, thus subtracting from international law its defining legal entity.

Because this implication is so far removed from the current legal order and from the feasible reforms which it could undergo, we propose to leave it to one side and take for granted the existence and standing of states *qua* bearers of legal obligations and perpetrators of legal wrongs. For the rest of this chapter, we focus instead on the question whether it is unfair to impose obligations of repair on states given the impact this has on innocent populations. The charge of unfairness and ethical primitivism certainly can't be dismissed as utopian or unrealistic in its reformist agenda: it is perfectly possible to envisage a legal order in which states are subject to primary obligations without being subject to obligations to provide reparation for the wrongful damage they have caused. In fact, current legal practice approximates much more closely to such a legal order than the principles of state responsibility might seem to imply. For while it is a well-established *principle* of international law that responsible states are under an obligation to provide full reparation for the injuries they have caused, in a significant proportion of the cases which come before international arbitral tribunals, what is sought is not the payment of damages but clarification of a confused or contested legal situation. Out of the 435 inter-state arbitrations which took place in the period 1794–1972, for instance, only 261 dealt with claims for damages; the remaining 174 confined themselves to legal interpretation, of which about half concerned boundary disputes or questions of title to territory.¹⁸ Moreover, there are branches of international law—most notably the law of the World Trade Organization (WTO)—where the basic remedy is cessation and damages are practically excluded. A real-world

¹⁷ Buchanan, A., *Justice, Legitimacy, and Self-Determination: Moral Foundations of International Law* (Oxford: Oxford University Press, 2003), 53.

¹⁸ See Gray, C., *Judicial Remedies in International Law* (Oxford: Clarendon Press, 1987), 11.

model is therefore available for a state system that does away with the feature of responsibility which causes the alleged injustice to innocent civilians. The question that needs to be addressed is whether this model should be extended more widely and be reflected in the general principles of state responsibility. Should the fairness objection motivate the abandonment of inter-state loss-shifting altogether, thus leaving the state system to focus on accountability and, as necessary, cessation?

IV. JUSTIFYING STATE RESPONSIBILITY

There is one response to the question that circumvents any need to enter into the deeper waters of political morality and normative ethics. The fairness objection is the product of two assumptions—a factual assumption to the effect that the remedial dimension of the state system imposes extra burdens on innocent populations and a moral assumption to the effect that this is unfair. Without assessing the merits of the standard of fairness on which the moral assumption calls, we might try to nullify the force of the complaint by claiming that its factual assumption is, if not quite false, seriously misleading: although states are sometimes called upon to provide reparations, the impact which this has on the private citizens is so negligible as to be barely worth mentioning.

At least three features of current legal practice, moreover, might be enlisted in order to support and develop this line of response. The first of these concerns the *transferability* of the burdens of the responsible state to innocent populations. At least some of the obligations that are imposed on responsible states don't lend themselves to a process of onwards distribution to natural persons. In the event that reparation takes the form of an apology or expression of regret, for example, then no extra burden is imposed on the general population of the responsible state at all. An official apology or expression of regret must come through a public channel and not through the words or gestures of private individuals. When France apologized for the acts of its agents in bombing the Greenpeace vessel *Rainbow Warrior* in Auckland Harbour, no individual French citizen apologized;¹⁹ had they done so, it would have been without any relevance to the issues of state responsibility arising from the event.²⁰

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¹⁹ See New Zealand High Court, *R v Mafart & Prieur* (1985) 74 ILR 241; UN Secretary-General's Ruling (1986), 74 ILR 256; Arbitral Tribunal, *New Zealand v France* (1990) 82 ILR 499.

²⁰ In this respect, international law provides a counterexample to J. Feinberg's claim that the burdens of corporate responsibility must necessarily fall on to natural persons (see Feinberg, J., 'Collective Responsibility', in May, L. and Hoffman, S. (eds.), *Collective Responsibility* (Lanham, Md.: Rowman and Littlefield, 1991), 73). Just as there are certain actions that only corporate beings can perform (e.g. signing treaties, declaring war), so there are certain burdens that only they can carry.

Secondly, some of the liabilities that are imposed on responsible states don't qualify as *burdens* in the relevant sense and *eo ipso* don't add to the burdens of innocent citizens. Especially in cases where reparation takes the form of restitution, the responsible state may be left no worse off than it would have been had there had been no unlawful conduct in the first place. A responsible state that is required to return looted property or annexed territory may be stripped of a benefit, but it is not made to suffer costs that would be absent had it stuck to its international obligations. To the extent that 'a burden' is defined relative to a counterfactual scenario of legality, it is questionable whether restitutionary liabilities are generally burdensome to responsible states or to their populations, at least insofar as they are confined to situations in which there has been no period of sustained dependence on the unlawful distribution of land or property.

Thirdly, the liabilities that are imposed on states, even if transferable and in the relevant sense burdensome, don't normally constitute especially large burdens, as these things go. In the event that a state is called upon to pay compensation for an internationally wrongful act, the resulting burdens will normally be trivial when set against the total resources of the state. To give some examples which illustrate the kind of sums at stake, in the *Corfu Channel* case, the ICJ awarded damages against Albania of £ 843,947;²¹ in the case of *Loizidou v Turkey*, the European Court of Human Rights (ECtHR) awarded damages against Turkey of Cyp.£ 470,000;²² and in the *Del Caracazo* case, the Inter-American Court of Human Rights (IACtHR) awarded total damages against Venezuela totalling US\$ 5,481,300.²³ In none of these cases were the damages awarded of an order of magnitude to have a noticeable impact on the public treasury or on the ordinary taxpayer.

An inspection of legal practice thus does much to sustain a purely empirical response to the fairness objection. Given the nature and size of awards made by international courts and tribunals, the loss-shifting dimension of the state system rarely has a large-scale impact on the population of the responsible state. However, this response, important though it is, cannot be the whole story. For one thing, the imposition of obligations of repair on states, even in those cases where the impact on blameless populations is relatively trivial, is still vulnerable to the charge that innocent people are being made to pay the price (albeit a small price) for the misdeeds of their rulers. For another thing, there have been exceptional cases in which the liabilities imposed on states have been large enough to impact significantly on the interests of private citizens. At the end of the First Gulf War, for example,

²¹ ICJ, *Corfu Channel (UK v. Albania)*, ICJ Rep. 1949, 249 (damage and loss of life caused by mines which sank one warship and damaged another).

²² ECtHR, *Loizidou v. Turkey* (1998) VI ECHR, 1807 (damages for wrongful exclusion from property following the Turkish invasion of Cyprus).

²³ IACtHR, *Del Caracazo v. Venezuela* (2002) 95 IACHR (ser. C). The award consisted of pecuniary damages (\$1,559,800) and moral damages (\$3,921,500) arising from the torture and disappearance of 37 persons and the ill-treatment of a further 3 persons.

Iraq was called upon to pay compensation totalling in excess of US\$ 52 billion for its unlawful invasion and occupation of Kuwait, thus adding significantly to the burdens of a population that was also subject to a regime of stringent economic sanctions.²⁴

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To offer a fuller response to the fairness objection, we therefore need to engage in normative as well as descriptive reasoning. To provide a thoroughgoing response to the individualist challenge, we need to query the assumption that it is always unfair for a system of liability to impose extra burdens on innocent populations. One way in which we might do this is to show that the moral ideal that lies behind the assumption is utopian in its aspirations. Assuming for the moment that the ideal in question is that 'innocent' citizens should never suffer extra burdens as a result of matters that lie outside of their control, we might point out that this ideal is both unrealized and unrealizable both in our moral and legal practices. Not only do the domestic arrangements of states make it inevitable that citizens will sometimes be exposed to unwanted and unchosen costs (for instance, through unpopular tax programmes), but the context of international loss-shifting makes this inescapable too.²⁵ In cases where one of two states must bear the costs of injury, then assuming that costs are always covered through general taxation, one of two populations is bound to end up worse off than it would otherwise have been. In relation to the damage suffered by Kuwait at the end of the First Gulf War, for example, the costs of post-war reconstruction were either going to be borne by Iraq and the Iraqi people or Kuwait and the Kuwaiti people. The practical choice was not between visiting burdens on a 'guilty' population or visiting burdens on an 'innocent' population; the choice was between imposing extra burdens on one of two groups, both largely blameless for the original injuries caused but one of which suffered a great deal more.

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Given this fact, it is unrealistic to insist that innocent populations should never suffer extra burdens as a result of matters that lie outside of their control. The moral ideal that apparently lies behind the fairness is impossibly demanding in its moral recommendations. However, this doesn't, by itself, show that the loss-shifting aspect of the state system is fair. There may be other interpretations of the individualist challenge that aren't so easy to meet. To provide a stronger case in favour of the practice of state reparations, we therefore need to engage in constructive moral reasoning, identifying a positive principle of fairness which is both plausible and attractive in its own right, and which the practice satisfies.

²⁴ The total amount of damages claimed was some US\$350 bn. Of the US\$52.5 bn awarded by the UNCC, approximately US\$21 bn has been paid via the arrangements for sale of Iraqi oil. See <<http://www2.unog.ch/uncc/status.htm>>.

²⁵ For further discussion of this point, see Cane, P., *Responsibility in Law and Morality* (Oxford: Hart Publishing, 2002), ch. 3.

To this end, we might draw upon some of the intuitions that are articulated elsewhere in moral thinking, particularly those that are elicited by examples of enterprise liability and corporate responsibility. David Miller, for instance, suggests that it is fair for the partners in a business to share the costs of any resulting compensation payments regardless of the individual causal contributions which each of them made to the harms in question. His grounds for this claim are that the partners 'are beneficiaries of a common practice in which participants are treated fairly—they get the income and other benefits which go with the job . . .—and so they should also be prepared to carry their share of the costs, in this case the costs that stem from external aspects of the practice'.²⁶ Perhaps we could extend a rationale of this kind to the international level, exploiting the analogy between the 'innocent' partners in a trading company and 'innocent' citizens of a state. Perhaps we could claim that the practice of state responsibility is fair to its members (in spite of its 'external costs') in virtue of the profile of benefits and burdens that all-things-considered they obtain from it.

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To develop this line of justification, we would need to adapt Miller's suggestion to mesh with the broader contours of the debate. It would be no good, for instance, adopting as our standard of fairness the principle that a practice is fair to a population so long as the population obtains more benefits than burdens from it overall. For one thing, this standard is too conservative to engage with some of the reform proposals of the individualist: in effect, it holds that the loss-shifting dimension of the state system is justified so long as people obtain *sufficient* benefits from it, thereby ignoring the possibility that there may be alternatives—such as a system of international civil liability in which *individual* officials or leaders are called upon to pay damages—which are even better in terms of their effects. For another thing, it relativizes fairness to specific populations, thereby yielding a series of verdicts that are unhelpful in assessing the *overall* credentials of general principles of international law.²⁷

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Nonetheless, it seems plausible to think that the benefit test could be refined and developed in a way that meets our dialectical needs. We could, for example, take it in a Rawlsian direction, focusing on the benefits and burdens which different schemes of liability would be assigned in a suitably defined choice-situation. Suppose, more especially, we defined a rule as fair if it would be chosen above any alternative in a position of partial ignorance, in which we were unaware of the particular state or population to which we belonged but we knew the various kinds of effects which different forms of liability had on different types of states and their populations. We would then have at our disposal a standard of fairness which, through its use of informational constraints and the consideration of alternatives,

²⁶ Miller, D. 'Holding Nations Responsible', *Ethics*, 114 (2004), 253.

²⁷ Unless we are willing to hold that principles of general international law should apply selectively, thereby denying the so-called 'equality of states', it is no use being told that a principle is fair to this-or-that population or this-or-that state: we need to know whether it is fair *sans phrase*.

would deliver judgements that were neither ‘population-relative’ nor rigged against the individualist.

This standard, moreover, could then be used to argue that the principle of state reparations is fair. We could claim that such a principle would be chosen over any feasible alternative in a fairness-conferring choice-situation. Although we would need to run through a lengthy sequence or pair-wise comparisons in order to make this argument watertight, it is not implausible to think that in the crucial choice between imposing remedial responsibilities on states or on assignable individuals (officials, leaders, etc.), we would choose the former over the latter. The grounds for this centre on the interest that we would have, from behind ‘the veil of ignorance’, in ensuring that we wouldn’t have to bear the costs of injury in the event that we—or the state to which we belonged—were the victims of international lawbreaking. Insofar as we were anxious to ensure an effective scheme of international loss-shifting, we would have at least two reasons for preferring a scheme which shifted losses onto states as opposed to individuals. First, such a scheme would give us the confidence that any large-scale damage claims could be met: in the event that we (or the state to which we belonged) were to put in a multi-million-dollar claim, for example, we could rest assured that the responsible state would have the financial resources needed to pay out in full whereas we couldn’t be so certain that the same would be true of the individual officials who were personally responsible for the international breach. Secondly, it would afford us clear targets for reparations claims in cases where the alleged wrongdoing issued from organizational as opposed to individual failure: in the event that we were to bring a claim in respect of an alleged violation of our right to a fair trial or our right to marry, for example, it would be much easier for us to meet with success if we only had to identify failings ‘in the system’ and didn’t have to identify the specific causal and moral roles of individual officials.

Whether this argument is decisive for our purposes is, of course, a matter for further speculation. A suppressed premise is that the advantages of the ‘state option’ in terms of enhanced remedial rights are sufficiently great to outweigh the disadvantage of having to pay the price for the misdeeds of one’s officials and leaders. This seems plausible enough in the type of cases that come before international courts such as the ICJ and the ECtHR where the sums involved are unlikely to have a significant impact on the taxpayers of the responsible state. But it seems less credible in cases of war reparations where the impact could, in principle, be very serious indeed.²⁸ There may, in consequence, be a moral case,

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²⁸ The largest damages sum in modern times was the global amount imposed on Germany pursuant to the war guilt clause of the Treaty of Versailles, 1919. Of the sum of 132 billion gold marks (approx £ 6.6 billion) Germany eventually paid around 23 billion marks (15%): see Kent, B., *The Spoils of War: The Politics, Economics and Diplomacy of Reparations 1918–1932* (Oxford: Clarendon Press, 1989), 11. The largest post-1945 agreed settlement involving damages as distinct from debt seems to have been the FRG–Israel Agreement of 10 Sept. 1952, 162 UNTS 205, involving payments of some DM 3 bn over 10 years in respect of the Holocaust.

rooted in considerations of hypothetical consent, for treating the losses which arise from illegal aggression as a special category which shouldn't come within the normal ambit of the principle of state reparations but which should be dealt with in some other way—possibly through a system of international loss-spreading which extends across the community of nations.

Nonetheless, we hope that we have said enough to show that the case in favour of divesting the state system of its loss-shifting function is open to doubt. Not only is the individualist challenge unconvincing on both empirical and moral grounds, but a positive argument, rooted in considerations of hypothetical consent, can be made for continuing to impose remedial duties on states. This argument can also be used to explain the reluctance of international law to impose criminal liability on states. Whilst international law imposes civil damages on responsible states, it doesn't impose penal damages on them. A moral justification for this asymmetry can be found in the decisions that we would make in a suitably defined choice-situation. Whilst we might acknowledge that the imposition of any kind of damages on states would have an unwelcome impact on us, we might think that penal damages are especially objectionable because they are part of a system of liability from which we don't obtain the offsetting benefits of effective remedial rights. In this respect, they would seem to have all of the disadvantages of civil liability without any of the advantages. From the relevant position of choice, we might therefore opt for a system of state responsibility very much like the one that we have at present. Delinquent states would be subject to obligations of repair but not punishments.

V. CONCLUSION

International law is not static. Like any legal system, it evolves with the broader moral and political climate. Over the past fifty years or so, international organizations have become increasingly important as actors on the international stage and given the development of international human rights mechanisms and international criminal law, individuals too have acquired a more prominent role. These changes have complicated the subject of international responsibility, but they have not changed its fundamentals. The regime of state 'civil' liability continues to provide the principal model of responsibility on the international plane. In this chapter, we have sought to defend it from 'external' attack and explain some of its internal architecture. Appealing to the potential benefits it brings, we have argued that it is neither a primitive form of collective responsibility nor an unfair scheme of loss-shifting. Although we don't believe it's perfect, we don't believe it's morally groundless either.