

The practice of holding states responsible is central to modern politics and international relations. States are commonly blamed for wars, called on to apologize, punished with sanctions, admonished to keep their promises, bound by treaties, and held liable for debts and reparations. But why, if at all, does it make sense to hold states rather than individuals responsible in the first place?

There are two contemporary answers to this question. According to the *analogical theory*, states can be held responsible because they are moral agents like human beings, with similar capacities for deliberation and intentional action (e.g., Erskine 2001; Goodin 1995; Lang 2007; List and Pettit 2011). State responsibility is essentially individual responsibility scaled up. According to the *functional theory*, states can be held responsible because they are legal persons that act vicariously through individuals (Brownlie 1983; Cassese 2001; Crawford 2013; ILC 2001). States are principals rather than agents, and state responsibility is akin to the vicarious responsibility of an employer for the actions of her employee. The two theories of state responsibility depend on different understandings of how corporate entities can act.

The analogical and functional theories belong to parallel traditions of scholarship that often appear to be unaware of each other. While the analogical theory is dominant in International Relations (IR), as well as in political theory and philosophy, the functional theory prevails in International Law (IL).<sup>1</sup> Proponents of the analogical theory often appeal to international law for support (Lang 2007, 2008, 2011; Stilz 2011; Tollefsen 2002; Wendt 1999). However, they do not recognize that international lawyers have a fundamentally different

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<sup>1</sup> I use 'IR' and 'IL' to refer to the academic disciplines. I use 'international relations' and 'international law' to refer to the subject-matter.

understanding of state responsibility. Existing scholarship does not even distinguish the analogical and functional theories. Although those on each side of the ethical-legal division ask many of the same questions, they tend to talk past each other because they employ different concepts and vocabularies.

The purpose of this article is to bridge the theoretical gulf between the ethics and the law of state responsibility. Writing mainly from the ethical side, I argue that IR scholars and political theorists have much to gain from legal approaches to state responsibility. There are two reasons to consider the functional theory. First, it avoids the most common objection to the analogical theory: that corporate entities cannot be agents. The functional theory provides a justification for holding states responsible that skeptics of corporate moral agency can accept, since it employs the idea of vicarious action instead. Second, the functional theory is essential for understanding some features of international law that have puzzled IR scholars. In particular, it explains why states are not held *criminally* responsible under international law. Our criticisms of international law are likely to miss the mark unless we understand the functional theory.

The article has four sections. The first section examines the origins, assumptions, and logic of the analogical theory. The second section does the same for the functional theory. These two sections are primarily exegetical, since the two theories of state responsibility have not yet been clearly delineated or differentiated, let alone compared. The third section identifies the causes and consequences of the gulf between the ethics and the law of state responsibility. I show that proponents of the analogical theory tend to project the idea of corporate agency onto international law, which leads them to overlook the role

of the functional theory. The fourth section uses the debate about whether states can commit crimes to illustrate the implications of the difference between the analogical theory and the functional theory. I conclude that we should avoid putting too much stock in any particular analogy. Although the human-agent and principal-agent analogies help us to conceptualize state responsibility, they also blind us to alternative possibilities.

### **States as moral agents: The analogical theory**

The core idea of the analogical theory is that states can be held responsible for the same reasons that we hold human beings responsible. Goodin (1995, 35) argues that ‘the state is a moral agent, in all the respects that morally matter’. The state, ‘like the natural individual, is capable of embodying values, goals and ends; it, too, is capable (through its legislative and executive organs) of deliberative action in pursuit of them’ (Ibid.). Erskine (2001, 69-70) argues that the disanalogy between states and human beings ‘is often over-stated’ and that states are ‘capable of acting and knowing in a way that is analogous—but not identical—to that of most individual human beings’. Because states are capable of deliberating and of acting intentionally, they are ‘moral agents in the same way that we understand most individual human beings to be moral agents’ (Erskine 2008, 2).

The analogical theory was developed by philosophers, most notably French (1979, 1984, 1995, 1998), and later adopted by political theorists and IR

scholars.<sup>2</sup> French argues that certain groups, called ‘conglomerate collectivities’, are moral agents over and above their members and can therefore be held responsible separately from their members.<sup>3</sup> Conglomerate collectivities have two defining features: (1) corporate identities that do not depend on determinate memberships and (2) corporate internal decision (CID) structures. First, unlike ‘aggregate collectivities’ such as mobs and crowds, conglomerates retain their identities despite changes in their memberships (1984, 29-30). Ireland is the same state as it was yesterday even though some of its members have died and others have been born, and Microsoft remains the same company over time even though its employees and shareholders change. Second, conglomerate collectivities have CID structures that allow them to deliberate and to combine the intentions of individuals into corporate intentions (Ibid. 47-48). We might say that Ireland intends to raise taxes or that Microsoft intends to develop a new operating system. French concludes that conglomerate collectivities, such as states and corporations, are distinct agents that can be blamed, praised, punished, and obligated separately from their members. In an often-quoted phrase that sums up his argument, he declares that corporate agents are ‘full-fledged members of the moral community, of equal standing with the traditionally acknowledged residents: human beings’ (Ibid. 32).

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<sup>2</sup> French belongs to an analytic and mostly American tradition of thought about collective action and responsibility. Seminal works include Feinberg (1968), Cooper (1968), and Held (1970).

<sup>3</sup> French (1979, 1984) calls conglomerate collectivities ‘moral persons’ in his early work but ‘moral actors’ in his later work (1995, 1998). The reason for this terminological change is simply that ‘calling corporations moral persons creates more confusion and misunderstanding than clarity’ (1995, 10). His argument remains substantially the same.

O'Neill (1986) was the first to apply the analogical theory to ethical issues in international affairs. She argues that many international ethical issues are intractable if individuals are assumed to be the only moral agents (Ibid. 51-53). 'Individuals have remarkably few options to reduce nuclear dangers' (Ibid. 55), so it is futile to say that they have duties to prevent nuclear war. Many responsibilities, such as duties to prevent war or climate change, must be assigned to states because states are the only agents with the capacities to act on them. The key premise of O'Neill's argument is that 'some institutions may be agents in the literal and unmetaphorical way in which individuals are agents' (Ibid. 58). She argues that 'the two sorts of agents are similar enough to suggest that *if* ethical reasoning is accessible to individuals *then* it is not inaccessible to states' (Ibid. 62, emphasis in original). The decision-making structures of states, like the minds of individuals, allow them to process ethical imperatives and to act on them (Ibid. 61-66). O'Neill uses the analogy between states and human beings to scale up Kantian moral agency.

Erskine (2001) introduced the analogical theory to the discipline of IR, where she remains its most prolific and influential proponent (Erskine 2003, 2004, 2008, 2010, 2014, forthcoming). Drawing from both French and O'Neill, she argues that a group is a moral agent if and only if it has five features:

- (1) an identity that is more than the sum of the identities of its constitutive parts, or what might be called a 'corporate identity'; (2) a decision-making structure that can commit the group to a policy or course of action that is different from the individual positions of some (or all) of its members; (3) mechanisms by which group decisions can be translated into actions (thereby establishing, with the previous characteristic, a

capacity for purposive action); (4) an identity over time; and (5) a conception of itself as a unit (meaning simply that it cannot be merely externally defined). (Erskine 2014, 119)<sup>4</sup>

These five criteria determine which groups are sufficiently analogous to human beings to count as moral agents. For example, mobs and crowds are not moral agents because they do not have corporate identities or decision-making structures. Neither their personalities nor their intentions are distinct from the personalities and intentions of their members. Nor do puppet states or shell companies count as moral agents, since their identities are created and sustained by other agents. Examples of corporate moral agents include (most) states, business corporations, unions, intergovernmental organizations, rebel groups, and drug cartels.

For early proponents of the analogical theory, corporate moral agency was a contentious proposition that had to be defended at every turn. Erskine (2003, 2) once lamented that there is a 'general reticence to accept that the class of moral agent might extend from the individual human being to encompass certain types of groups'. However, since the mid-2000s, the analogical theory has ceased to require much justification, save for some obligatory citations of the works of these early proponents. The next generation of scholarship in the analogical tradition focuses on applying the concept of corporate moral agency to particular issues, such as great-power responsibility (Brown 2004), evil (Lu 2004), Europe's international citizenship (Dunne 2008), national defence (Eckert 2009), and state punishment (Erskine 2010; Lang 2007, 2008, 2011). Many

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<sup>4</sup> For other formulations of the criteria for corporate moral agency, see Erskine (2001, 72; 2004, 26; 2010, 264-65).

works of international political theory now take the idea of corporate moral agency as a basic premise (e.g., Collins, 2016; Crawford 2013b; Pasternak 2010, 2013; Stilz 2011). As Valentini (2011, 133) declares, as if to state the obvious, ‘states, universities, churches, and hospitals clearly have a capacity for “collective will formation” sophisticated enough to warrant attribution of *moral* agency’ (emphasis in original). The analogical theory has a near-monopoly over the ethics of state responsibility. Its only significant rival is the lingering skepticism of corporate agency (e.g., Gould 2009; Lomas 2005, 2014; Wight 1999, 2004, 2006).

Just as the analogical theory originated in philosophy, its dominance is largely due to developments in philosophy. The most important of these developments is List and Pettit’s (2002, 2005, 2006, 2011) work on judgment aggregation.<sup>5</sup> Two of their insights have bolstered the argument for corporate agency. The first is that groups with certain kinds of decision-making procedures can have ‘intentions’ that none of their members have. For example, Tollefsen (2015, 60-62) describes a scenario in which a three-member admissions committee evaluates PhD applicants using four criteria: test scores, grades, letters of recommendation, and writing samples. Only applicants who meet every criterion will be admitted, and whether a given applicant meets a given criterion will be determined by a majority vote. The committee votes as follows on Michael’s application.

**Table 1. Tollefsen’s admissions committee**

	Good test score?	Good grades?	Good letters?	Good writing sample?	Accept the candidate?
Member #1	Yes	No	Yes	No	No
Member #2	No	Yes	Yes	Yes	No

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<sup>5</sup> The remainder of this paragraph is based on Fleming (forthcoming, section 2).

Member #3	Yes	Yes	No	Yes	No
Committee	Yes	Yes	Yes	Yes	Yes

(Tollefsen, 2015: 61)

Although none of the committee members believe that Michael meets all of the criteria for admission, the majority of them believe that he meets each criterion. As a result, when the votes are tallied, the committee decides to admit Michael to the PhD program even though none of its members think he is a suitable candidate. ‘We intend to admit Michael to the program’ is true even though ‘I intend to admit Michael’ is false for each committee member. The decision-making structure of the committee thus produces a corporate intention that cannot be ascribed to any individual. The second important insight is that corporate intentions are ‘multiply realizable’, which means that the same corporate intention can result from different combinations of individual intentions (List and Pettit 2011, 65-66; Tollefsen 2015, 87-88). The committee might still have decided to admit Michael if each of its members had voted differently, and even if the committee had entirely different members. List and Pettit (2011, 78) conclude that, since the intentions of corporate entities are irreducible to the intentions of individuals, ‘we must think of group agents as relatively autonomous entities—agents in their own right, as it is often said’. Wendt (1999, 2004, 2005), Stilz (2011), and Erskine (2014) have drawn on these philosophical arguments to strengthen the analogical theory of state responsibility.

The broad picture that we get from the analogical theory is of many nested and layered moral agents (List and Pettit 2011, 40). Human agents can be members of multiple corporate agents simultaneously, and corporate agents can be members of other corporate agents. I am a member of a state, a university,



and a union; my state, in turn, is a member of many international organizations. Although the memberships of moral agents overlap, their responsibilities are mutually independent (Erskine 2003, 23; Lang 2007, 245). A state can be responsible for breaching a contract even if none of its members—corporate or human—are responsible for the breach. Conversely, a state, a university, and several individuals can each be responsible for the same breach. As Erskine (2010, 266) argues, ‘moral agency exists simultaneously at different levels, and moral agents at all levels can be responsible for concurrent, complementary, or even coordinated acts and omissions’. The responsibilities of agents at one level cannot be deduced from the responsibilities of agents at other levels. Each moral agent has its own personality, intentionality, and responsibilities.

### **States as legal persons: The functional theory**

The international law of state responsibility has entirely different origins and influences. Whereas the analogical theory grew out of Anglo-American philosophy, the law of state responsibility developed largely from post-World War One reparations law. As Crawford (2013, 27-28) describes, the Treaty of Versailles ‘placed issues of responsibility for the major events of international war and peace irrevocably within the domain of the “legal”’. Efforts to codify the law of state responsibility began in 1924, when the Assembly of the League of Nations convened a committee to identify and codify the most important areas of customary international law (Matsui 1993, 25). The United Nations International Law Commission (ILC) continued this work after the Second World War, and, after several decades, finished its *Articles on Responsibility of States for*

*Internationally Wrongful Acts* (ILC 2001).<sup>6</sup> Although the *Articles* have not yet been turned into a treaty or convention, they are widely considered to be an authoritative codification of the customary law of state responsibility (Crawford 2013, 42-44; Olleson forthcoming). The *Articles* are of theoretical interest because they contain a functional theory of state responsibility that has little in common with the analogical theory.

The idea of corporate agency is notably absent from the international law of state responsibility. States are held legally responsible not because they are agents, but because they act vicariously through human agents. The ILC (2001, 35) makes this point clearly in the Commentaries that accompany its *Articles*:

The State is a real organized entity, a legal person with full authority to act under international law. But to recognize this is not to deny the elementary fact that the State cannot act of itself. An 'act of the State' must involve some action or omission by a human being or group: 'States can act only by and through their agents and representatives.'<sup>7</sup> The question is which persons should be considered as acting on behalf of the State, i.e. what constitutes an 'act of the State' for the purposes of State responsibility.

There are many similar remarks in the secondary legal literature and in the decisions of international courts. For instance, Cassese (2001, 187) writes that 'for a State to be responsible it is necessary first of all to establish whether the conduct of an individual may be imputed to it', and Nollkaemper (2003, 616) writes that 'in factual terms states act through individuals' (see also Condorelli

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<sup>6</sup> See Crawford (2013a, 3-44), Malekian (1985, 3-29), and Matsui (1993) for detailed accounts of how the international law of state responsibility developed.

<sup>7</sup> The ILC quotes from the *German Settlers in Poland* case (PCIJ 1923).

and Kress 2010, 221; Crawford 2013a, 113). In other words, states can only act vicariously. The relevant 'agents' for international lawyers are state *officials*, not states.

The idea of corporate intentionality, which is foundational for the analogical theory, is treated as both irrelevant and mysterious by international lawyers. The ILC's *Articles* include 'no requirement of *mens rea* on the part of a delinquent state: an act incurring state responsibility could occur even where a state did not undertake the act intentionally' (Crawford 2013a, 37). Crawford adds that 'the "intention" underlying state conduct is a notoriously difficult idea, quite apart from questions of proof' (Ibid. 62). Although proof of intent is sometimes necessary for state responsibility, it is the intent of state officials that counts. Brownlie (1983, 38) similarly argues that 'metaphors based on intention (*dolus*) or negligence (*culpa*) of *natural* persons tend to be unhelpful' for understanding state responsibility, and he suggests that a more appropriate analogue is a principal-agent relation: 'the issues in inter-state relations are often analogous to those arising from the activities of employees and enterprises in English law, where the *legal* person held liable is incapable of close control over its agents' (Ibid. 38, emphasis in original). In accordance with this analogy, international lawyers often describe state officials as 'state agents' (e.g., Cassese 2007, 656, 661; ILC 2001, 78-80; Momtaz 2010, 237-38). States are like principals on behalf of which their officials act rather than like agents in their own right.<sup>8</sup>

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<sup>8</sup> The analogy between a principal-agent relation and a state-official relation is a useful heuristic, but it should be treated with caution. As I explain below, international lawyers are wary of analogies, especially from domestic law.

In place of the concepts of corporate agency and intentionality, international lawyers employ the concepts of attribution and function. 'Attribution' is the process of attaching or imputing an action of an individual to a state (Condorelli and Kress 2010). For example, in *United States v. Iran*, the International Court of Justice (1980, 35) ruled that the actions of Iranian protestors who occupied the American embassy in 1979 were attributable to the state of Iran and that Iran was therefore responsible for them. Although all actions are performed and intended by individuals, some actions are attributed to states, meaning that they count as acts of state.<sup>9</sup>

The most basic rule of attribution is that '[t]he conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions' (ILC 2001, Art. 5). The use of 'organ' rather than 'official' in the *Articles* is indicative of the theory of corporate responsibility that underpins international law. Whereas 'official' implies an office, 'organ' implies a function (Kelsen 1970, 150-58). For example, soldiers are state organs because they perform the function of defence. Other state organs include legislators, judges, diplomats, federal units, mayors, and police officers (Crawford 2013a, 118-24; ILC 2001, 41). Whether an entity is a state organ depends on its function: 'The key element is the role of the entity or official as part of the administration of the state' (Brownlie 1983, 141).

The actions of private entities that 'exercise elements of the governmental authority' are also attributable to the state (ILC 2001, Art. 5). The idea of

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<sup>9</sup> The fact that an action is attributed to the state does not mean that the individual who performed it is off the hook. Some actions 'can be attributed twice: both to the state and the individual' (Nollkaemper 2003, 618-19; Cassese 2001, 186; ILC 2001, Art. 58).

governmental authority, although not functional on the face of it, ultimately collapses into the idea of function. Brownlie (1983, 136) uses 'authority' and 'function' interchangeably: 'state authority has been delegated to local traditional and religious authorities ... state functions have at other times been farmed out to private individuals'. Crawford (2013a, 129) notes that '[t]here is no consensus as to precisely what constitutes "governmental authority"', and he defines it primarily in terms of three functions: detention and discipline, immigration control and quarantine, and seizure of property. For example, employees of private prisons exercise governmental authority because they perform the state function of detention and discipline. In other words, they are '*de facto* organs' (Cassese 2007, 656; Momtaz 2010, 243). The rule is that the actions of entities that 'exercise functions of a public character' are attributable to the state, even if these entities do not have formal state authority (Brownlie 1983, 162; ILC 2001, 43).

The actions of a *de jure* or *de facto* state organ are attributable to the state 'even if it exceeds its authority or contravenes instructions' (ILC 2001, Art. 7). For example, in *Caire v. Mexico*, two Mexican military personnel murdered a French citizen after trying to extort money from him. Although the personnel acted outside of their authority, the French-Mexican Claims Commission ruled that their actions were nevertheless attributable to Mexico because they acted under the guise of their status as state organs (UN 2006, 517). What ultimately determines whether the actions of an individual are attributable to the state is not whether the individual acted under the authority of the state, but whether the individual 'acted using the means and powers pertaining to his public

function’ (Cassese 2001, 188). Function, not authority or intentionality, is thus the foundational concept in the international law of state responsibility.

An important implication of the functional theory is that there is a direct line of responsibility that runs to the state from each of its organs. Although the chain of command may matter for determining individual criminal responsibility, ‘the position of an official in the internal hierarchy has no relevance to the question of state responsibility’ (Brownlie 1983, 134; ILC 2001, 40). The actions of a corporal are attributable to the state no less than the actions of a general, since both perform the function of defence. In the functional theory, unlike in the analogical theory, there is a clear separation between agency and responsibility. Only individual organs can act, but the state is responsible for their actions.

Whereas the analogical theory is almost uncontested in IR and political theory, the functional theory has a few rivals in international law. Some lawyers and legal theorists have adopted the analogical theory (e.g., Tanguay-Renaud 2013), and others have proposed still other ways of conceptualizing state responsibility (e.g., Luban 2011, 78-85). However, the functional theory is by far the dominant theory of state responsibility in international law and, crucially, the one that is codified in the ILC’s *Articles*.

### **The gulf between the ethics and the law of state responsibility**

To summarize, the analogical and functional theories employ different concepts and rely on different models of collective action.

**Table 2. The analogical and functional theories**

	<b>Analogical</b>	<b>Functional</b>
<b>Concepts</b>	Agency, intentionality	Function, attribution
<b>Model</b>	Human agent	Principal-agent relation

The key concepts for the analogical theory are agency and intentionality, and the model for state responsibility is a simple case of individual responsibility. States, like human agents, are responsible for actions that they perform intentionally or willfully. The key concepts for the functional theory are attribution and function, and the model for state responsibility is a principal-agent relation. States are responsible for actions that their organs perform on their behalf. Behind the superficial similarities, there are deep theoretical differences between the dominant ethical and legal approaches to state responsibility.

The analogical and functional approaches might also be thought of as intellectual traditions or 'subcultures' (Ashworth 2012; Bell 2009, 19-22). In addition to using different models of collective action, the two approaches use different vocabularies, have different histories, and belong to different communities of scholars. This is not to say that the analogical and functional theories are incompatible or incommensurable; they are not 'paradigms'. They may even be complementary, although no one has yet tried to combine them.

Proponents of the analogical theory do not recognize that international law contains a fundamentally different theory of state responsibility. They often appeal to international law for support, with the assumption that international law considers states to be corporate agents. Lang (2007, 244; 2008, 23) writes that, '[s]ince the heyday of positivism in the nineteenth century, states have been considered the primary agents of international law' and that '[t]he passage of the Articles on State Responsibility by the International Law Commission suggests that states can be considered responsible agents'. Wendt (1999, 10) declares that '[i]nternational politics as we know it today would be impossible without

attributions of corporate agency, a fact recognized by international law'.<sup>10</sup>

Tollefsen (2002, 396) argues, more generally, that '[o]ur practice of attributing responsibility to organizations ... seems to presuppose that organizations literally have intentional states. For we could not hold them legally and morally responsible for an act unless they *intended* to commit the act' (emphasis in original). Many proponents of the analogical theory have overlooked the functional theory because they have projected their own understanding of state responsibility onto international law.

The source of this misinterpretation is the idea that 'only agents can be held responsible in the relevant way' (Copp 2006, 216). Although non-agents can be causally responsible, such as when a hailstorm is responsible for damage, they cannot be normatively responsible. Moral and legal responsibility are typically understood to require a will. As Goodin (1995, 35) puts it, '[r]esponsibility implies agency, and agency implies some capacity for intentional action'. If only agents can be held responsible, then states cannot be held responsible unless they are agents: 'the thesis that no collective is a moral agent ... implies that no state has ever wrongly bombed a city and that no state has ever deserved blame for imprisoning an innocent person' (Copp 2007, 283).<sup>11</sup> Proponents of the analogical theory tend to reason as follows: international law holds states responsible; only agents can be held responsible; therefore, international law assumes that states are agents.

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<sup>10</sup> See Kurki (2008, 254), Lang (2011), Lomas (2014, 29), and Stilz (2011, 191) for similar interpretations of international law.

<sup>11</sup> The assumption that responsibility requires agency is common to proponents and skeptics of corporate agency. Compare Hindriks (2014), Isaacs (2006, 59-60), and Pierik (2008, 473-74) with Miller (2007, 389) and Wight (2006, 194).



The flaw in this line of reasoning is far from obvious. The conclusion follows logically from the premises, so, since it is false that international law assumes that states are agents, one of the premises must be false. The first premise is clearly true: international law does hold states responsible. The fault lies with the second premise. Although it is true that an entity must, in some sense, be able to act in order to be held responsible, it is not true that only agents—construed as intentional actors—can be held responsible. It is possible for an entity to be *vicariously* responsible for actions that it neither performs nor intends. To use Brownlie's (1983, 38) example, an employer is usually liable for damage that his employee causes, even if the employer did not specifically order the employee's actions. Even non-agents can be vicariously responsible. Someone who is in a coma is not, at that time, an agent, but her guardian or representative might still sign contracts and incur debts in her name. The international law of state responsibility operates on the assumption that the capacity for vicarious action is sufficient for responsibility. States are not agents in their own right, but they can nevertheless be held responsible because the actions of their organs are attributed to them.

The idea of vicarious action can be used to explain how states can have *moral* responsibilities as well as legal responsibilities. The vicarious responsibilities that employers, officers, and ministers bear for the actions of their subordinates are both moral and legal. Just as employers are morally responsible for the actions of their employees—for instance, they have moral obligations to repair damage that their employees cause—states can be morally responsible for the actions of their organs. France has a moral obligation to compensate people who have been abused by French soldiers, but we do not

need to assume that France is a corporate agent or to prove France's intentions in order to make this judgment. States can be 'moral principals' instead of 'moral agents'.

One advantage of conceptualizing state responsibility in terms of vicarious action is that it allows us to avoid the most common objection to holding states responsible—that collective entities cannot truly be agents, let alone moral agents (Ludwig 2007, 2014; Miller 2007). Despite the dominance of the analogical theory, skepticism of corporate agency remains common in IR. As Wight (2006, 188) argues, the idea that the state is an agent 'rests on the classic error of methodological structuralism: the attribution of the agential powers and attributes of human agents to a collective social form'.<sup>12</sup> The functional theory provides a justification for holding states responsible that skeptics of corporate agency can accept.

Conceptualizing states as moral principals rather than moral agents also allows us to sidestep the thorny issue of whether states have intrinsic rights. Moral agency is often taken to imply rights as well as responsibilities (cf. Erskine 2014, 141). If 'the state is a moral agent, in all the respects that morally matter' (Goodin 1995, 35), then states seem to be entitled to rights that are analogous to human rights. There is a tension between corporate moral agency and 'normative individualism', or the principle that human beings are the ultimate units of concern (Hindriks 2014). The common position that individuals are the primary bearers of rights, and that the rights of states are merely conditional or derivative, is difficult to sustain if we take states to be moral agents. Wendt

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<sup>12</sup> See Franke and Roos (2010), Gould (2009), Kustermans (2011), Lomas (2005, 2014), and Wight (1999, 2004) for other arguments against ascribing agency to states.

(2004, 293) is one of the few proponents of the analogical theory who recognizes this: 'if states really are people too, then we need some other, non-metaphysical way to justify liberalism, which may force us to confront possibly uncomfortable truths'.<sup>13</sup> But if states are moral principals rather than moral agents—that is, if they are only vicarious actors with no agency of their own—then there is no reason why they must have intrinsic rights. The functional theory allows us to take the asymmetrical position that states have non-derivative responsibilities but that their rights, such as sovereignty, are derived entirely from the rights of individuals.

Proponents of the analogical theory may have shunned the ideas of vicarious action and vicarious responsibility in part because they have associated them with juridical fictions. But vicarious actions and responsibilities need not be fictional. For instance, if Margaret buys a house through an estate agent, we say 'Margaret bought a house'. The action of buying a house really counts as Margaret's, and she is really responsible for it, even though her estate agent physically performed it (see Fleming forthcoming). Contemporary international lawyers treat the actions and responsibilities of states in the same way—as vicarious but real. The ILC (2001, 35-36) emphasizes that '[t]he State is a real organized entity', not a juridical fiction, and it uses 'attribution' rather than 'imputation' in its *Articles* because the former term 'avoids any suggestion that the legal process of connecting conduct to the State is a fiction, or that the conduct in question is "really" that of someone else' (see also Crawford 2013a, 113n). The functional theory is not a fictional theory.

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<sup>13</sup> Wendt uses 'person', 'actor', and 'agent' as synonyms (see Wendt 2004, 289n; 2015, 23).

Conceptualizing states as moral principals instead of moral agents gives us a much thinner conception of state responsibility. If the responsibilities of states are purely vicarious, then they can be restitutive but not retributive. It does not seem possible to be vicariously guilty or culpable. Guilt, culpability, and punishment require intent, and intent is not something that can be transmitted from agents to principals. For example, suppose that an employee assaults a customer while on the job. We might, in some circumstances, hold the employer liable for compensating the victim, but we would not charge the employer with assault. Assault requires intent, and the intent of the employee cannot be attributed to his employer. Similarly, international law holds states liable for repairing harms that their organs cause, but it does not attempt to punish states for these harms. As I explain in the next section, the functional theory forecloses the very possibility of ‘state crimes’.

### **Can states commit crimes?**

Even if we ultimately favour the analogical theory, we ought to understand the functional theory, since we can neither understand nor effectively criticize the international law of state responsibility without it. The debate about state crimes illustrates this point.

Although states are held responsible under international law, they are not held criminally responsible. The Nuremberg Tribunal’s (1947, 221) often-quoted declaration that ‘[c]rimes against international law are committed by men, not by abstract entities’ remains the rule. As Crawford (2013a, 53) confirms, ‘state responsibility eschews any division between “criminal” and “civil” illegality’. It is significant that the International Criminal Court has jurisdiction over *natural*

persons only (UN 1998, Art. 25.1). However, earlier drafts of the ILC's *Articles* did include a controversial article about international crimes of states.

#### *Article 19*

##### *International Crimes and Delicts*

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2. An internationally wrongful act which results from the breach by a State of an international obligation so essential for the protection of fundamental interests of the international community that its breach is recognized as a crime by that community as a whole constitutes an international crime.<sup>14</sup>

The ILC deleted Article 19, along with all other references to international crimes, before the UN General Assembly adopted the final version of the *Articles* in 2001. In order to avoid the penal connotations of 'crime', the ILC (2001, Ch. III) chose to designate severe violations of international law as 'serious breaches' instead.

Some proponents of the analogical theory have criticized international law for omitting the concept of state crime. As Lang (2008, 23) argues, '[t]he passage of the Articles on State Responsibility by the International Law Commission suggests that states can be considered responsible agents, although their refusal to include punitive sanctions as part of those articles vitiates their impact'. His argument has two prongs. The first is that 'the failure of the ILC to include Article 19 in its final articles is not a conceptual one' (Lang 2011, 110), since states are literally intentional agents. The elements of a crime—*actus reus*

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<sup>14</sup> Text of the 1976 draft of the ILC's *Articles on Responsibility of States for Internationally Wrongful Acts*, quoted in Spinedi (1989, 9).

and *mens rea*—apply to states as well as to individuals (Lang 2007, 244-45). Tanguay-Renaud (2013, 262) similarly argues that a ‘corporate agent, which in an important sense has a mind of its own, may ... exhibit the types of *mens rea* attitudes that are deemed so central to modern criminal culpability—namely, intention, recklessness, negligence, and the like’. The second prong of Lang’s argument is that holding states responsible but denying that they can be criminally responsible is pedantic if not incoherent. He is particularly critical of the law of genocide, which holds that states can be responsible for genocide but that only individuals can be criminally responsible for genocide: ‘To distinguish between committing a crime and being responsible for committing something that is called a crime seems to be stretching the meaning of language beyond comprehension’ (2011, 104). If genocide is a crime, and if states can be responsible for genocide, then how could genocidal states not be criminals? Lang concludes that the law of state responsibility is impoverished without the concept of state crime.

The ILC had two reasons for omitting Article 19. One reason is that the concept of state crime was ‘[t]he single most controversial element in the draft articles on State responsibility’ (Crawford 1998, 9). Replacing ‘international crime’ with ‘serious breach’ was, in part, a pragmatic compromise that allowed the ILC to move forward. The deeper reason for omitting Article 19 is that the concept of state crime is at odds with the functional theory. International lawyers do not employ the concepts of corporate agency and intentionality, so, from their perspective, it is not clear how states could form the requisite *mens*

*rea* to commit crimes.<sup>15</sup> As Marek (1979-80, 464) argues, the application of 'crime' to the state 'founders on the truism that penal law deals necessarily with individuals ... No amount of anthropomorphism can make the State an object of psychological analysis'. Caron (1998, 311) makes the same point: 'Criminal jurisprudence ties moral culpability to intent; crimes require both an act and a *mens rea*. But what then does it mean to speak of an organization being criminally responsible? Corporations and states do not have intent'.<sup>16</sup> Part of the reason that there was so much opposition to the concept of state crime is that ascriptions of *mens rea* to states are difficult to square with the functional theory. States cannot have 'guilty minds' because they do not have minds in the first place.

Even defenders of Article 19 in IL reject analogies between state crime and individual crime. Their justification for the concept of state crime was never that states have analogous capacities for *actus reus* and *mens rea*, as Lang (2007, 2011) and Tanguay-Renaud (2013) argue, but that the most serious breaches of international law (such as aggression) must be distinguished from ordinary breaches (such as trade violations). State crimes were to be distinguished according to their seriousness, not by analogy with individual crimes (Abi-Saab 1999, 345-46; Pellet 1999, 426-27; Spinedi 1989, 50-57). As Crawford (1998, 13) noted in his 'First Report on State Responsibility', 'even those Governments which support the retention of article 19 in some form do not support a

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<sup>15</sup> See Gould's (2009) perceptive analysis of the concept of state crime. While I focus on the question of why international law omits the concept of state crime, Gould addresses the more fundamental question of whether the concept of state crime makes sense.

<sup>16</sup> See Khanna (1999) and Laufer (2006) on the concept of corporate *mens rea* in domestic law.

developed regime of criminal responsibility of States, that is to say, a genuine “penalizing” of the most serious wrongful acts’. Although most governments agreed that a special category was necessary for the most serious breaches of international law, it was ‘quite widely felt that the terminology of “crimes” of State is potentially misleading’ (Ibid.). It is notable that Jørgensen (2000), who provides the fullest defence of the concept of state crime, draws an analogy with corporate crime in domestic law rather than with individual crime in international law (see also Caron 1998). International lawyers on both sides of the state crime debate reject the state-human analogy that underpins the analogical theory. We cannot understand the arguments of either side until we recognize that the international law of state responsibility employs the idea of vicarious action rather than corporate agency.

As for the second prong of Lang’s argument, there is nothing incoherent about holding individuals criminally responsible and the state non-criminally responsible for the very same action. Once again, the idea of vicarious action is the key to the puzzle. One person can be criminally responsible for an action while another is vicariously responsible for it. For example, an employee could be guilty of criminal negligence for causing an industrial accident while her employer, who was not personally negligent, has a duty to compensate the victims. The industrial accident was indeed a crime, but this does not mean that everyone who bears some responsibility for it is a criminal. Questions about who is guilty are distinct from questions about who has an obligation to repair the harm (Crawford 1998, 23). Just as we assign criminal responsibility to the employee but only vicarious responsibility to her employer, we can assign criminal responsibility to individuals but only vicarious responsibility to their



state. A state can have obligations to compensate the survivors of genocide, to promote reconciliation, and to reform the institutions that made the genocide possible even though only individuals are criminally responsible for genocide. Understanding the functional theory dissolves the apparent contradiction.

What initially appears to be a first-order normative debate about whether states ought to be held criminally responsible is a symptom of a deeper disagreement about how to conceptualize state responsibility. IR scholars and international lawyers often disagree about *how* states can be held responsible because they disagree about *why* states can be held responsible in the first place. This is not to say that the debate about state crimes cleaves perfectly along theoretical lines. For instance, a proponent of the analogical theory could argue against criminalizing states on the grounds that, in the absence of a world state, it creates a pretext for vengeance. However, the deeper, theoretical dimension of the state crime debate has escaped many commentators (though see Gould 2009), in large part because they do not recognize that IR and IL rely on different theories of state responsibility.

Which theory we accept affects how we respond to the international wrongs of states, such as genocides and cyberattacks. If we subscribe to the analogical theory, then we are likely to see the offending states as criminals and to demand that they be punished. What we need is an International Criminal Court that is capable of trying states in addition to individuals. If we subscribe to the functional theory, then we are likely to see the offending states as pools of resources that can be used to compensate victims. Although the state is liable for repairing the harm, it is particular individuals, if anyone, who should be put on trial. What we need is an International Court of Justice with compulsory

jurisdiction and an international sheriff's office that is capable of enforcing judgments against states. The analogical theory and the functional theory suggest different responses to the international wrongs of states, as well as different proposals for international legal reform.

## **Conclusion**

Ethical and legal approaches to state responsibility have developed in almost total isolation from each other. They are divided by disciplinary boundaries as well as theoretical differences. While IR scholars, following philosophers and political theorists, employ the idea of corporate agency to explain why and how states can be held responsible, international lawyers employ the idea of vicarious action. Neither side seems to recognize that the other has a fundamentally different understanding of state responsibility. The first contribution of this article is thus to distinguish the analogical and functional theories and to compare their logic and assumptions.

The second contribution is to identify the causes and consequences of the theoretical gulf between the ethics and the law of state responsibility. I argue that proponents of the analogical theory have overlooked the functional theory, and consequently misunderstood some of the subtler points of the international law of state responsibility, because they have projected the idea of corporate agency onto international law.

The third contribution is to begin to bridge the gulf between the ethics and the law of state responsibility. I argue that IR scholars and political theorists have much to gain from engaging with legal approaches to state responsibility. First, the functional theory provides a plausible alternative to analogical theory,

and one that IR scholars and political theorists have not yet explored. Conceptualizing state responsibility in terms of vicarious action instead of corporate agency allows us to sidestep the difficult issues of whether states are agents and whether they have intrinsic rights. Second, we cannot fully understand the international law of state responsibility unless we understand the functional theory. Some apparently normative debates, including the debate about whether states can commit crimes, follow from deeper disagreements about how to conceptualize state responsibility. We must understand the functional theory in order to effectively intervene in these debates.

The broader lesson from international legal approaches to state responsibility is that we should be more cautious with analogies. Although analogies are helpful for understanding how states and other non-human entities can be held responsible, they can also close off alternative possibilities. The assumption that individual responsibility is the only possible model for state responsibility has led proponents of the analogical theory to overlook the functional theory entirely. The common notion that only moral agents can be held responsible has blinded them to the possibility that states are moral principals instead.

The principal-agent analogy may or may not turn out to be a more fruitful device for thinking about state responsibility. In any case, it comes with its own problems and blind spots. It suggests that state responsibility is purely civil—just tort law on a grand scale. On the contrary, international legal responsibility is ‘neither civil nor criminal’ (Crawford 2013a, 53; Pellet 2010, 13). The important lesson to take from international law is not that we should avoid analogies altogether, but that we should be ‘analogical omnivores’; we should

vary our diet of analogies. Each analogy illuminates certain features of state responsibility but obscures others. States are like human agents in that their identities are not simple sums of the identities of their constituents, but they are unlike human agents in that their constituents are moral agents. States are like principals in that they act through their representatives, but they are unlike principals in that they act only through their representatives. Nor are the human-agent and principal-agent analogies the only possible two. There is no reason why state responsibility must be closely analogous to individual responsibility, vicarious responsibility, or even other forms of corporate responsibility, and we should leave open the possibility that it is, in some ways, fundamentally different.

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