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International criminal bodies

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Abstract. One of the insights of Constructivism is that our world is, in part, made by what we say about it. We make things what they are by saying what they are. One way is through the use of metaphor; by asserting that one thing is another thing. Does our saying that a state is a person make it a person?

A way to intervene in this discussion is by addressing it not in the abstract, but guided by a cognate question: Can states commit crimes, a uniquely human act? If states can commit and be liable for crimes, they must be able to form intents. If they are indeed persons in the relevant sense, this is no problem; if their personality is trope, however, attribution of criminal responsibility becomes tenuous.

To analyse the issue, I trace the development of the trope of speaking of a group as if it were an individual from Roman Law, through to Hobbes, corporate law and IR Theory. Much hinges on Hobbes' elision of 'body' and 'person'. I conclude that it is too much to expect of a metaphor that it act, that it have reasons, beliefs, and desires, and that these sum to intentions.

Introduction: The conceptual problem

One of the insights Constructivism has brought International Relations is that our world is, in part, made what it is by what we *say* about it. To an extent, we make things what they are by saying what they are.[1] One way by which we do this is the use of metaphor; by asserting that one thing is another thing. We can see this issue at play in debates over the ontological status and personality of the state.[2] The central issue is whether our saying that a state is a person *makes* it a person.

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[1] Nicholas Onuf, *World of Our Making* (Columbia: University of South Carolina Press, 1989); Onuf, 'Constructivism: A User's Manual' in Vendulka Kubálkova, Nicholas Onuf and Paul Kowert (eds), *International Relations in a Constructed World* (Armonk: M. E. Sharpe, 1998). pp. 58–78.

[2] Alexander Wendt, *Social Theory of International Politics* (Cambridge: Cambridge University Press, 1999), pp. 193–245; 'Forum on the State as a Person', *Review of International Studies*, 30 (2004), pp. 255–316; Peter Lomas, 'Anthropomorphism, Personification and Ethics: A Reply to Alexander Wendt', *Review of International Studies*, 31 (2005), pp. 349–55; Wendt, 'How Not to Argue Against State Personhood: A Reply to Lomas', *Review of International Studies*, 31 (2005), pp. 357–60.

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A potentially useful way to intervene in this discussion is by addressing the issue not in the abstract, but guided by cognate questions that have been addressed in isolation from the ontological debate: Can states *per se* commit crimes? Are states subject to punishment?[3] Deceptively simple arguments have been given both in favor of and in opposition to the proposition of state criminality. Neither position offers an argument that is sufficient or compelling. By analysing state criminality in terms of state personality and vice versa, and by analysing the conceptual history of the idea of the state as person, and examining the conceptual and rhetorical underpinnings of the idea of state personality, the debate about the personality of the state will take a very different direction. Conversely, by looking at the question of state personality through the lens of some of its logical implications, new concerns arise. Ultimately, it is my conclusion that while we can remain agnostic about the ontological status of states, it is untenable to treat their *legal and moral* personality as anything other than metaphorical or 'as-if'; they therefore can neither commit crimes nor incur punishment.

Preliminary arguments for state crime as a conceptual and legal category

In support of the idea of state criminality lies the traditional analogy – going back at least to Grotius and Hobbes, but with clear antecedents in the ancient world – between the state and the individual, and the language of the state as person; these tropes are conceptual fundaments of both IR and International Law. At some level, we recognise them as heuristic simplifications, such as when we speak of states acting and having interests. In asserting something to be a state interest, or asserting that some action has been taken by a state, empirically, the state stands in for the aggregation of individuals comprising this merely notional entity.[4]

An appropriation of Hobbes' wonderful metaphor, the famous composite, artificial person from the frontispiece from *Leviathan* is apposite here. In Hobbes' image the state is a person who has passions, who wills, reasons, acts and has rights that derive from but are independent of and go beyond those of the citizens. This understanding was reconfigured by Pufendorf, who added to the metaphor the idea of states being simultaneously rights-bearers and duty-bearers – duties that went beyond being simple corollaries of the rights of individuals.[5] With

[3] David Miller has posed complementary questions regarding the responsibility of nations. David Miller, 'Holding Nations Responsible', *Ethics*, 114 (2004), pp. 240–68. Toni Erskine, however, has explicitly rejected the inclusion of nations as 'moral agents'. Toni Erskine, 'Assigning Responsibilities to Institutional Moral Agents: The Case of States and Quasi-States', *Ethics and International Affairs*, 15 (2001), p. 72.

[4] As Kelsen has stated the issue; 'The question whether a certain behaviour, particularly whether a certain act, a certain function is an act or function of the state, that is, whether it is the state as a person that performs an act or exercises a function, is not a question directed toward the existence of a fact [. . .] If the question did have this meaning, it could never be answered affirmatively. For in fact it is never the state but always a certain individual who is acting.' Hans Kelsen, *Pure Theory of Law* (Berkeley: University of California Press, 1967 (2005), p. 291.

[5] Samuel Pufendorf, *De Jure Naturae et Gentium Libro Octo*, I.1.13; *De Officio Hominis et Civis Libro Duo*, II.6.10. The issue is also treated in David Boucher, 'Resurrecting Pufendorf and Capturing the Westphalian Moment, *Review of International Studies*, 27 (2001), pp. 566–7. Jean-Jacques Burlamaqui basically restates the Hobbes – Pufendorf position: *The Principles of Natural and Political Law*, II.6.iv.

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Hegel, the metaphor of the state as a person became fully hypostatised.[6] It is now deeply internalised, and while it is subject to scholarly questioning, it still forms the commonsense of the discipline, the policy community and public discourse.

The situation is very similar in international law, which *treats* the state as an actor that carries rights, duties and responsibilities. Obligations undertaken on behalf of the state by the agents of one government survive changes of government because the obligation is conceptualised as attaching to the state, albeit for the expressly practical reason of maintaining the continuity of obligations, rather than from any metaphysical commitments. Conversely, when a state is held responsible for a wrongful act and compensation is ordered, the liability will survive the replacement of the malfeasant government. It is acknowledged that materially individuals are the actors, and that they create obligations for their states, but through the Act of State Doctrine, their acts are *considered* the acts of their state; their acts are *imputed* to the state [assuming certain criteria are satisfied].[7] Traditionally, this has also had the effect of shielding state agents from any legal responsibility (tortious or criminal) for their acts on behalf of the state.

In this regime – built upon the same hypostatised metaphor – the argument in favour of considering certain state behaviours criminal and attaching penal liability to them is that if states act, if they have rights (stipulatively), duties (stipulatively) and responsibilities (stipulatively), then the violation of certain of their responsibilities might rise to the level of criminality. We must analyse whether this trope can support the weight of this attribution.

A more strictly positivist argument for the acceptance of the state crime as a legal category has been offered by Nina Jørgensen, who has suggested two possibilities. Because corporate crime and criminality are accepted so widely, they may qualify as general principles of law, and by analogy, the state as a corporate actor can likewise be held criminally liable for any acts stipulated to be unlawful. Alternately, she suggests that state practice indicates the acceptance of state criminal responsibility and is thus indicative of 'an emerging category of customary international law.'[8] The second of these suggestions must be evaluated empirically, but certainly the decision *not* to adopt the category on the occasions it has been discussed must count as damning evidence against her assertion of a customary basis. Her first suggestion, resting on an analogy with corporations, is more promising, and relates in many ways to the general argument introduced above; however, the following sections will undermine the strength of the analogy.

[6] G. W. F. Hegel, *Philosophy of Right and Law*, in Carl J. Friedrich, (ed.), *The Philosophy of Hegel*, (New York: Random House, 1954), p. 320.

[7] 'Articles on Responsibility of States for Wrongful Acts', Arts. 4–11; James Crawford, *The International Law Commission's Articles on State Responsibility* (Cambridge: Cambridge University Press, 2002), pp. 91–123; James Crawford and Simon Olleson, 'The Nature and Forms of International Responsibility' in Malcolm Evans (ed.), *International Law* (Oxford: Oxford University Press, 2006), pp. 454–8; Kelsen, *Pure Theory*, p. 292; Hans Kelsen, *General Theory of Law and State* (New Brunswick: Transaction Publishers, 1949 (2006)), p. 106.

[8] Nina Jørgensen, *The Responsibility of States for International Crimes* (Oxford: Oxford University Press, 2000), pp. 79, 279–80.

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Preliminary arguments against state crime as a conceptual and legal category

The common argument against the viability of the category of crimes of states rests less on trope and legal fiction and more on a reductive legal positivism. Current international law as it exists simply does not countenance the concept of state crime, and when the issue has come up, the adoption of rules criminalising certain state behaviours as such has been explicitly rejected. In both the Rome Statute (Art. 25) and the Articles on the Responsibility of States for Internationally Wrongful Acts (Art. 40), international law, and the International Law Commission in particular, have unambiguously held that only individuals (even acting collectively) commit international crimes.[9] *Stricto sensu*, black letter allows only that states can commit delicts or 'serious breaches' of international law. Because both crimes and delicts give rise to liability (and, in principle, sanction), the difference may seem simply to be semantic, but that appearance is challenged by the resistance and dissatisfaction of scholars who insist on the need for a legal category that encompasses crimes committed by states.

Earlier drafts of the Articles on State Responsibility did include provision for state crimes:

> Article 19
> *International Crimes and Delicts*
>
> 1. An act of a State which constitutes a breach of an international obligation is an internationally wrongful act, regardless of the subject-matter of the obligation breached.
>
> 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.

The exclusion of Article 19 (and the related Articles 40(3) and 51–53 addressing scope and sanction, respectively) from the Draft Articles and the unwillingness to countenance the inclusion of such an article in the Rome Statute ends the matter for many.[10]

Matters are more complicated than this, however. Abi-Saab reminds us that the purpose of Article 19 was never about creating a penal law; instead, the aim was to create another tier of responsibility, albeit one that used the language of 'crime' based on the gravity of the violated obligation.[11] As Pellet insisted, however, the

[9] In the ICJ's recent *Genocide Case* for example the Court clearly stated that even in the case of Genocide, the responsibility of a state would not be criminal in nature. *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide* para. 167.

[10] The definitive account is to be found in Marina Spinedi, 'International Crimes of State: The Legislative History' in Joseph Weiler, Antonio Cassese and Marina Spinedi (eds), *International Crimes of State: A Critical Analysis of the ILC's Draft Article 19 on State Responsibility* (New York: Walter de Gruyter, 1989), pp. 7–138. Crawford (2002) pp. 16–20 provides detailed discussion of the flaws in Article 19's framing which contributed to its exclusion. See also Jørgensen, *The Responsibility of States*, pp. XI–XV; 175–84, and the essays by Abi-Saab, Graefrath, Dupuy, Stein, Cassese, Aldrich and Sinclair in Weiler, *et al. International Crimes of States*. For a contrasting account, see Luis Molina, 'Can States Commit Crimes? The Limits of Formal International Law' in Ross, (ed.), *Controlling State Crime* (New Brunswick: Transaction Publishers, 2000), pp. 349–88.

[11] Georges Abi-Saab, 'The Uses of Article 19', *European Journal of International Law*, 10 (1999), pp. 345–6. Wyler, however, asserts, 'According to many commentators, the distinction introduced in Article 19 [. . .] between 'crimes' and 'delicts' led to a 'criminalization' of responsibility.' Eric Wyler, 'From "State Crime" to Responsibility for Serious Breaches of Obligations under Peremptory Norms of General International Law', *European Journal of International Law*, 13 (2002), p. 1148.

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type of responsibility invoked in the Draft Articles, the use of the term 'crime' notwithstanding, was 'neither civil nor penal, it was simply "international"'.[12] This type of responsibility would depart from the normal model of strictly bilateral responsibility to a model of responsibility *erga omnes*. Under this type of obligation, '*all other states*' were counted for legal purposes as injured, and Article 40(3), in fact, made specific reference to the idea of the obligation *erga omnes*.[13] Despite these assurances, Crawford asserts that the reluctance to accept the idea of international crimes of state derived from the reluctance, even among supporters of the idea 'to accept a full-scale penal regime, or indeed any punitive elements at all.'[14]

In one respect, these are critiques are surely correct: *nulla poena sine crimen*, but they also miss a larger point, and are still beholden to the Hobbesian trope. It is my contention that both sides in the debate, but especially the advocates of state crime and punishment, rest their positions upon faulty premises, at the core of which are a misunderstanding of intention and an improper analogy to other notions of corporate criminality found in domestic legal systems.

The corporeal metaphor I: antecedents to the state as person

The attribution of 'legal' personality is a metaphor by which non-human, non-conscious entities (usually collectives) are described in the discourse of law to have mental and moral consciousness.[15]

Because so much turns on the question of the legal personality of states, it is worth investigating the development of this trope. Although our metaphor of the state as person derives from Hobbes, the trope of speaking of non-humans or groups of humans collectively as persons (or originally 'bodies') has a much older genealogy in the law. The very word 'corporation' already reveals the metaphorical roots of what we are discussing.

Corpora in Roman law

Debates very similar to those regarding the personality of the state have swirled around the corporation for some time. Roman law is our source for the very concept of a corporation, and many debates stem from the way in which the Romans articulated the agency, rights and status of corporations. For them, to speak of a group of persons collectively holding rights was explicitly a *fiction* of the law, something not literally true, but treated *as if* it were true for certain specific purposes.[16] 'Roman lawyers were quite aware that some bodies, groups, were

[12] Alain Pellet, 'Can a State Commit a Crime? Definitely, Yes!', *European Journal of International Law*, 10 (1999), p. 432.
[13] Giorgio Gaja, 'Should all References to International Crimes Disappear from the ILC Draft Articles on State Responsibility?', *European Journal of International Law*, 10 (1999), p. 365.
[14] Crawford, *The International Law Commission's Articles*, p. 19.
[15] Mortimer Sellers, 'International Legal Theory', *Jus Gentium*, 11 (2005), p. 67.
[16] On the nature of legal fictions, see: Lon L. Fuller, *Legal Fictions* (Stanford: Stanford University Press, 1967); Sanford Schane, 'The Corporation is a Person: The Language of a Legal Fiction', *Tulane Law Review*, 61 (1987); Note, 'What We Talk About When We Talk About Persons: The Language of A Legal Fiction', *Harvard Law Review*, 114 (2001), pp. 1750–4.

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recognized by law as able to own and sue, and in that respect as different from other bodies [. . .].'[17] Groups of individual persons were regarded for legal purposes as having rights and duties collectively, and although they were *treated* as if they were persons under the law, they were not *described* as persons.[18] The Romans' preferred terminology was *corpus*, a body: 'a *persona* is *singularis*, a *corpus* complex and composed of several *personae* acting as a unit [. . .] whatever they do, ten men will never make one *persona* [. . .] Any set of men who are for any purpose regarded as a group may be called a corpus [. . .].'"[19] This distinction will be of central importance below because the language of bodies conveys no necessary connotation of mind, while the language of person and personality does.

Alongside *corpus*, we sometimes find *universitas* (D.3.4.7.1) a term that signified 'a whole as contrasted with its parts, or [. . .] a group as contrasted with its members [. . .].' Particular manifestations of *corpora* or *universitates* included *collegia*, churches, *municipia* (D.48.18.1.7) and the state itself: 'Sometimes [. . .] *corpora* stretches so as to cover the bodies of men politically organized, towns, the State, the Senate, the plebs. All are bodies [. . .].'[20] Although there was some variation between categories, they were generally able to own property (including slaves), inherit, and were granted standing under the law to be represented in their own right before the courts – all things that persons can do.[21] What is important, and pre-figures our understanding of the corporation, is that for legal purposes the fictional body – rather than its constituent members – held these rights and obligations as a whole.[22]

The corpus of the Church and the Body of Christ

The grant to churches of *corpus* in Roman law complements an analogous move in the early history of Christianity in which the Church (both the institution and the congregation – Church as *universitas*) was equated doctrinally with the Body of Christ ('The Church was One and Indivisible, the Body of Christ. . .'). In legal rather than theological terms, this meant, 'ownership of all Church property was [attributed] either to God Himself [. . .] or to His Body the Church [. . .].'[23]

[17] P. W. Duff, *Personality in Roman Law* (Cambridge: Cambridge University Press, 1938), p. 28.
[18] Duff, *Personality*, pp. 21, 35, 50, 72, 223; Andrew Borkowski and Paul du Plessis, Textbook on Roman Law 3rd edn (Oxford: Oxford University Press, 2005), p. 87; Barry Nicholas, *An Introduction to Roman Law* (Oxford: Oxford University Press, 1996 (1962)), p. 60. French, however, holds that anything that was allowed to be a party to a legal dispute was referred to as a person, but offers no textual support. Measured against the abundance of textual support Duff provides, French's assertion cannot hold. Peter French, *Collective and Corporate Persons* (New York: Columbia University Press, 1984), p. 34.
[19] Duff, *Personality*, pp. 21, 26 commenting on Ulpian in D.4.2.9.1.
[20] Duff, p. 33. Oakeshott famously also includes *societates*, associations of 'individuals each of whom conditions his actions to accord with the terms of a joint agreement.' These are just as well rendered as *collegia*. Michael Oakeshott, 'On the Character of a Modern European State', in Michael Oakeshott (ed.), *On Human Conduct* (Oxford: Oxford University Press, 1975), pp. 199–266.
[21] Duff, *Personality*, pp. 33, 50, 62, 70, 172; Hans Julius Wolff, *Roman Law*, (Norman: University of Oklahoma Press, 1951), p. 235.
[22] Duff, *Personality*, pp. 37, 72.
[23] Ibid., pp. 171 and 175.

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Corporeal language is a central part of Christian theology; *Colossians* 1:18 states that, 'The Head of the Body is Christ [. . .] He is the head of the Body which is the Church.'[24] These are articulations of positions established early in the Church's history, contemporaneous and clearly indebted to the Roman concept of corporation.

The equation of the church with the body of Christ is traceable – in addition to the reference to Colossians made above – to statements by Paul in I *Corinthians*, *Ephesians* and *Romans*, but the particular term, 'mystical body' of Christ, originally had a different connotation. The 'mystical body' was not at first the notion of the church as *universitas*, but instead referred to the transubstantiated 'consecrated host'. It was the influence of the rediscovery of Roman law and the importation of its ideas into Canon law in the twelfth century that led to the transformation of the terminology; '"mystical body", which originally had a liturgical or sacramental meaning, took on a connotation of sociological content.'[25] The identification of the church with the body of Christ was affirmed by the Bull *Unam Sanctum* in 1302 in which Boniface VIII stated that the church 'represents one mystical body, the head of which is Christ, and the head of Christ is God.'[26]

It was to bolster this appropriation of religious terminology, that the doctrine of Christ's two bodies was developed: the true body in the form of the transubstantiated host, and the mystical body in the form of the Church. Kantorowicz quotes Simon of Tournai on this: 'Two are the bodies of Christ: the human material body which he assumed from the Virgin, and the spiritual collegiate body, the ecclesiastical college.' The debt to Roman legal thought could hardly be clearer.

Giving content to the mystical body extended this trope; Isaac of Stella disaggregated the body by including not only Christ as the head, but the priesthood as the limbs.[27] The flock became 'members', in Latin *membra* (limbs, body parts, organs). The trope was given definitive redirection by Aquinas, who changed the language from the mystical body of *Christ*, to the mystical body of *the Church*.

> Now [. . .] the Church, which had been *the* mystical body of Christ, became *a* mystical body in its own right [. . .] the Church organism became a 'mystical body' in an almost juristic sense: a mystical corporation [. . .] The *Corpus Christi* had been changed into a corporation of Christ.[28]

In all of this, however, the Church was never understood to be a person; it remained always a body. With this background, in the next section I turn to the more specific question of how the language of corporeality has influenced discussion of the state as an intentional actor.

[24] Hale cites similar passages from I Corinthians 12:12–27. David G. Hale, 'Analogy of the Body Politic', in Philip Wiener (ed.), *Dictionary of the History of Ideas*, 1 (New York: Scribner and Sons. 1974), pp. 68–70.

[25] Kantorowicz, *The King's Two Bodies*, pp. 195–6; Anton-Herman Chroust, 'The Corporate Idea and the Body Politic in the Middle Ages', *The Review of Politics*, 9 (1947), p. 431.

[26] Cited in Ernst Kantorowicz, *The King's Two Bodies*, (Princeton: Princeton University Press, 1997 (1957)), p. 194.

[27] Chroust documents similar accounts in Remigio de' Girolami and Augustinus Triumphus of Ancona. Chroust, 'The Corporate Idea', pp. 432–3.

[28] Kantorowicz, *The King's Two Bodies*, pp. 200–2.

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The corporeal metaphor II: the origins of state personality

'[. . .] crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced.'[29]

'Although they seem real enough to their citizens, States are juridical abstractions.'[30]

Hobbes and the person of the state

Thomas Hobbes' conceptions of representation and 'personation' are central developments in this story, because they represent the transformation of the idea of a collective body to the state. While the Romans did use the language of the *corpus* of the state, and Hobbes builds upon the Roman formulation, his adaptation (and Pufendorf's emendations) are really responsible for the notion of the state as actor which is fundamental to International Relations, and is presupposed by advocates and critics of the idea of state criminality.

Hobbes, of course, was not the first to utilise this language; we have already seen the Roman use of *corpus* in reference to the state, and the equation (or at least equivalence) of the state with the human body predates Rome. We find it also in *The Politics* (1253a) but at this stage, it is mere analogy, not even metaphor. Outside of the *corpus juris civilis*, Cicero utilised this imagery in *De Officis* (III.22), and Seneca in *De Ira* (II.31) and *De Clementia* (I.5.1).[31]

In the medieval period, these tropes – still closely linked to the Church's utilisation of corporeal language – were put to aims similar to those of the Church. Kantorowicz invokes Baldus' rendering of the *populus* as a 'mystical body': 'a *populus* was not simply the sum of individuals of a community, but "men assembled into one mystical body" (*hominum collectio in unum corpus mysticum*), men forming [. . .] a body or corporation to be grasped only intellectually, since it was not a real or material body.'[32] To emphasise, however, they asserted the *corporeality* of the group, never its *personality*. There were a number of variations upon this theme of the corporeality of the state; one common variation was the state's marriage to the ruler.[33] Others, borrowing from Seneca, identified the ruler with the soul and the state with the body. The most common characterisation, however, mirrored in secularised fashion that used by the Church: the Prince was the head of a body itself composed of the people.[34] In this body, every part had its 'particular place and task [. . .] Although every member constituted a vital part of the [. . .] whole [. . .] this whole was not affected by the changes of its many parts.'[35]

In England, there was a lengthy tradition of corporealising the state of which Hobbes was inheritor and systematiser. Only a few decades before Hobbes

[29] *Judgment of the International Military Tribunal for the German Major War Criminals*, Cmd. 6964, at 41. Cited in Klabbers, 'The Concept of Legal Personality', *Jus Gentium*, 11 (2005), p. 45.
[30] Crawford and Olleson, 'The Nature and Forms of International Responsibility', p. 460.
[31] Hale, 'Analogy of the Body Politic', pp. 68–70.
[32] Kantorowicz, *The King's Two Bodies*, p. 210.
[33] Ibid., pp. 212–23.
[34] Chroust, 'The Corporate Idea', pp. 445, 447.
[35] Ibid., p. 441.

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published *Leviathan*, James I combined a number of the tropes we have seen so far, announcing to Parliament: '"What God hath conjoined then, let no man separate." I am the husband, and all the whole island is my lawful wife; I am the head, and it is my body [. . .].' Prior to Hobbes, however, the best-known English usage of the corporeal metaphor was that of John of Salisbury in *Policraticus*. The trope is also picked up in France by Bodin, for whom the state had both a body and a soul. Throughout this arc, however, the significance of these tropes remained to be worked out in any detail, and it is for this reason that Hobbes' contribution is central.

Pitkin and Skinner have extensively detailed the evolution of Hobbes' idea of the state as a 'purely artificial' person.[36] The core of his position is that when all of the people, the 'multitude', jointly contract to submit their wills to a chosen representative, that representative *becomes* an artificial person; it carries their personality or 'personates' them.[37] 'The only means, according to Hobbes, by which a multitude can manage to "institute" a commonwealth is by transforming themselves into an artificial person by way of authorizing some natural person or persons to represent them.'[38] The chosen representative, the artificial person who represents all of the natural persons and wields the combined power of the populace is, of course, the sovereign, the bearer of the 'Person of the State'.[39] This act of contracting *creates* the body politic, what Hobbes also calls the civil person or the state. By eliding person and body, artificial person and body politic, Hobbes changed the metaphor, and created the corporate *person*, opening the door to a new set of associations – especially cognitive – that body does not entail.

For Hobbes, artificial persons are often also natural persons.[40] In Hobbes, artificial personality is a *role* or *office* rather than an ontological signification. Persons act; they may be distinguished in terms of the origins of their actions. Some persons' acts are their own; they are natural persons – another variance from familiar usage where 'natural' connotes biological. Some persons' acts represent others; Hobbes calls them feigned or artificial persons.[41] Acting in the manner of a representative of another – acting *as* them or *for* them – is to bear their person. One individual can bear one other individual's person, or one individual can bear the persons of many – hence the sovereign makes the multitude into a single person by being their sole representative. The unity of the representative is what makes the person one. It is what makes the multitude into a single civil person.[42]

[36] Hannah Pitkin, 'Hobbes's Concept of Representation – I', *American Political Science Review*, 58 (1964), pp. 328–40; Hannah Pitkin, 'Hobbes's Concept of Representation – II', *American Political Science Review*, 58 (1964), pp. 902–18; Quentin Skinner, 'Hobbes and the Purely Artificial Person of the State', in Quentin Skinner, *Visions of Politics v. III: Hobbes and Civil Science* (Cambridge: Cambridge University Press, 2002), pp. 177–208; Quentin Skinner, 'Hobbes on Representation', *European Journal of Philosophy*, 13 (2005), pp 155–84. See also, *inter alia*, Runciman, *Pluralism*, pp. 6–33, David Runciman, 'Moral Responsibility and the Problem of Representing the State' in Toni Erskine (ed.), *Can Institutions Have Responsibilities? Collective Moral Agency and International Relations* (Basingstoke: Palgrave. 2003), pp. 41–8, and David Copp, 'Hobbes on Artificial Persons and Collective Action', *The Philosophical Review*, 89 (1980), pp. 579–606.

[37] Thomas Hobbes, *Human Nature* XIX.7; *De Cive* V.7; Leviathan, Introduction.

[38] Skinner (2002), p. 197.

[39] Hobbes, *Human Nature* XIX.10; the quoted phrase Skinner takes from Cicero's '*De Officis*' I.XXXIV. Skinner, 'Hobbes and the Purely Artificial Person', p. 199.

[40] Skinner, 'Hobbes and the Purely Artificial Person', pp. 192–3.

[41] Hobbes, *Leviathan* I.XVI.1-3; *De Homine* XV.1.

[42] Hobbes, *Leviathan* I.XVI.13; *De Homine* XV.2.

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When one person acts on behalf of another, the former is the actor, and the latter is the author – the author of the representative's actions. Acting on behalf of the author is to act with authority.[43] Because the people have authorised the artificial person, the sovereign, to act on their behalf, they are the *authors* of the sovereign's acts and bear responsibility for them regardless of whether the 'author' ordered, consented to, or willed them. Hobbes indicates that the people are to be understood as having willed whatever act the sovereign takes.[44] It is *as if* they willed the acts of the sovereign. Therefore, they likewise undertake responsibility for any pledges the sovereign makes as their representative.[45]

In this rendering (and the political configuration it represented), there is a relationship of identity between the state and its ruler. In his capacity as the representative of all the people, the head of state is an artificial person; he also *is* the state. 'The rulers *are* the state; their interests the state interests; their will the state's will.'[46] Looked at from the other way round, the state is a person because it possesses a single will; wherever there is one will for all, there is one person. The state therefore is one person, and its will is also the citizenry's will.[47] In Hobbes' own words:

> A Multitude of men, are made *One* Person, when they are by one man, or one Person, Represented; so that it be done with the consent of every one of that Multitude in particular. For it is the *Unity* of the Representer, not the *Unity* of the Represented, that maketh the Person *One*. And it is the Representer that beareth the Person, and but one Person [. . .][48]

> This is more than Consent, or Concord; it is a reall Unitie of them all, in one and the same Person [. . .][49]

In *De Cive*, Hobbes makes the ruler the soul of the body/person; 'Because man has a soul, he has a will, that is he can assent and refuse; similarly a commonwealth has a will, and can assent and refuse through the holder of sovereign power, and only so.'[50] This formulation changes in *Leviathan* to the Introduction's famous anatomy of the artificial person. Here the soul is no longer the sovereign per *se* but sovereignty; sovereignty is the artificial soul that gives 'life and motion to the whole body.'

Hobbes' account bears some similarities – especially in language – to the accounts we saw previously; Hobbes' particular usages differ from them in some important ways, but they share a number of fundaments. In all of these cases, we find either bodies or artificial persons aggregated from individuals, and – at least with Hobbes – acting with discrete wills and able to contract.

It is not clear, however, that Hobbes would be willing to countenance the possibility that the 'purely artificial person of the state' could commit crimes, or that the populace as a whole would be necessarily liable if the state were to commit

[43] Hobbes, *Leviathan* I.XVI.4.
[44] Hobbes, *De Corpore Politico* XX.2; *De Cive* V.9; *Leviathan* I.XVI.14; *De Homine* XV.2.
[45] Ibid., *Leviathan*, I.XVI.5; *De Homine*, XV.2.
[46] Torbjørn Knutsen, *A History of International Relations Theory* 2nd edn (Manchester: Manchester University Press, 1997), p. 105.
[47] Hobbes, *De Cive*, V.9; *Leviathan*, I.XVI.13–4.
[48] Hobbes, *Leviathan*, I.XVI.13.
[49] Hobbes, *Leviathan*, I.XVII.13.
[50] Hobbes, *De Cive*, VI.19.

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a crime. Again, the issue rests on authorisation and representation; although the multitude is understood to be that author of the sovereign's acts, a natural person, an author, can only grant to their representative the authority to do that which they possess the right to undertake. As a matter of logical semantics, we do not possess the right to commit crimes, so we cannot transmit that right to a representative. It is likewise a truism for Hobbes that if a representative were to do something that the author could not authorise, not personally possessing that right, it cannot be attributed to the author. It cannot therefore, be attributed to the artificial person. As Hobbes says in the context of Covenants made by artificial persons:

> [. . .] when the Actor maketh a Covenant by Authority, he bindeth thereby the Author, no lesse than if he had made it himself; and no lesse subjecteth him to all the consequences of the same. And therefore all that hath been said formerly [. . .] of the nature of Covenants between man and man in their naturall capacity, is true also when they are made by their Actors, Representers, or Procurators that have authority from them, so far-forth as is in their Commission, *but no farther* [. . .] *For no man is obliged by a Covenant, whereof he is not Author; nor consequently by a Covenant made against, or beside the Authority he gave* [. . .] *so when the Authority is feigned, it obligeth the Actor onely; there being no author but himselfe*.[51]

What Hobbes says specifically about promising applies *a fortiori* to all acts from which derive either obligation or liability. If the actor acts with authority, their acts will bind (or impute liability to) their author; in the absence of authority, either express or derivative, no obligation or liability will be transferred – the actor is in that instance the author as well, the represented natural person is not. Hobbes does not allow, however, that the people might make this determination, but this does not bear upon the *external* evaluation of acts ascribed to the state.

There is, of course, a more direct reason that Hobbes would not countenance the possibility of state crime; going back to his particular conception of the state of nature in *Leviathan* I.XIII, there is no possibility of crime, because there neither is nor can be law, and without law, there definitionally can be no crime. Like Grotius, Hobbes held that states could only do those things that individuals could do in their original condition; in Hobbes' state of nature (but not Grotius'), there were no moral restrictions on what an individual might do because there was neither law nor right nor wrong. There is nothing in *Leviathan* I.XIII.12 to indicate that he felt that this was in any regard different in the state of nature within which states were posited to exist. Thus, it was for Hobbes a conceptual impossibility for states to commit crimes. Advocates of state criminality might turn instead to Pufendorf for support; he did assert that there are binding obligations in the state of nature, and carries that association forward into the international state of nature, but he explicitly rejects the idea of international punishment, and it is unclear that his mode of natural law reasoning would be congenial to punishment advocates.[52] We find ourselves in a situation in which the very conceptual underpinnings of the idea of crimes of states are undermined at the very origin of the language of state personality – Hobbes is no friend to those who would make the artificial person an international criminal body.[53]

[51] Hobbes, *Leviathan*, I.XVI.5. Emphasis added.
[52] Richard Tuck, *The Rights of War and Peace* (Cambridge: Cambridge University Press), pp. 158–65.
[53] Runciman seems ultimately to disagree with this conclusion. Runciman, 'Moral Responsibility', p. 48.

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The corporeal metaphor III: corporations, corporate crime and corporate punishment

Corporate Personality

> [W]hen a jurist first said 'A corporation is a person,' he was using a *metaphor* to express the truth that a corporation bears some analogy or resemblance to a person, and is to be treated in law in certain respects *as if* it were a person, or a rational being capable of feeling and volition.[54]

> The misinterpretation of the anthropomorphic metaphor 'juristic person' as a real entity [. . .] is the unpermissible hypostatization of a thinking aid or auxiliary concept constructed by jurisprudence merely for the purpose of simplifying and illustrating the description of a complex legal situation.[55]

Hobbes utilised a somewhat different notion of artificial person from what we find in discussions of the personality of the corporation. Hobbes felt that a natural person could simultaneously be an artificial person if they represent others; modern law, while utilising Hobbes' pleonasm of 'corporate person', holds closer to older usages in treating the corporate person as something separate from all of the natural persons that make it up. While the law treats corporations as persons, the nature of this legal personality has long been disputed.[56] The Fiction Theory, exemplified in the work of Savigny and von Iherring held that 'the personality [. . .] of the corporation is not natural – it is fictitious.'[57] For Savigny, 'corporate property belonged to a fictitious being and not to any real person or entity [. . .] ownership involves the possession of a will by the owner; and [. . .] inasmuch as a corporation does not really possess a will, it must as a property-owner be a fictitious person.'[58]

Von Iherring agreed that the legal personality of the corporation is a fiction, or indeed a metaphor, but insisted that this was also the case with the very *existence* of the corporation. '[T]he fictitious personality is not 'created' by the state, because it does not exist. [. . .] a corporation is merely an abbreviated way of writing the names of the several members.'[59] Therefore, the putative rights of the corporation are, in fact, the rights of the members, not of some notional entity.[60]

[54] Arthur Machen, 'Corporate Personality', *Harvard Law Review*, 24 (1911), p. 263. Emphasis added.
[55] Kelsen, *Pure Theory*, p. 178.
[56] Mark M. Hager, 'Bodies Politic: The Progressive History of Organizational "Real Entity" Theory', *University of Pittsburgh Law Review*, 50 (1989), p. 578. John Dewey tried to set aside the debate, and H. L. A. Hart also tried to move jurisprudence beyond the question 'what is a corporation'. John Dewey, 'The Historic Background of Corporate Legal Personality', *Yale Law Journal*, 35 (1926), p. 655; H. L. A. Hart, 'Definition and Theory in Jurisprudence', in H. L. A. Hart, *Ethics in Jurisprudence and Philosophy* (Oxford: Clarendon Press, 1983), p. 43.
[57] Frederic Maitland, 'Moral Personality and Legal Personality', *Journal of the Society of Comparative Legislation*, 6 (New Series) (1905), p. 195. Both Laufer and Horwitz identify this position less with nominalism than methodological individualism. William S. Laufer, *Corporate Bodies and Guilty Minds* (Chicago: The University of Chicago Press, 2006), p. 11. Morton Horwitz, *The Transformation of American Law 1870–1960: The Crisis of Legal Orthodoxy* (Oxford: Oxford University Press, 1992), p. 72.
[58] Machen, 'Corporate Personality', p. 255. Contrast Schane's account: 'Legal relations [. . .] take place between one person and another. Now, individuals may enter into an association, but the resulting group has no independent existence [. . .] and unlike a natural person, it has no preexisting rights. Only in contemplation of the law does it become a legal entity – a *persona ficta* – an artificial, moral or juristic person.' Schane, 'The Corporation is a Person', p. 565.
[59] Machen, 'Corporate Personality', p. 257. Hager, 'Bodies Politic', p. 580.
[60] Schane, 'The Corporation is a Person', p. 566.

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Elaborating on the idea of corporate personality as metaphor, Cohen asserted that 'to speak [. . .] of the union or group as having a single mind is a convenient but dangerous metaphor [. . .] this use of the language of identity for two different things that are in some way analogous is precisely what constitutes the nature of fiction.'[61] 'The corporation is given personality [. . .]' and that whatever will the law understands it to have is a 'delegated will [. . .] the corporation is invisible and *in abstracto*. It has no human wants.'[62] It likewise does not act per se: 'When we speak of an act or an attribute as corporate, it is not corporate in the psychologically collective sense, but merely representative, and imputed to the corporation for reason of policy and convenience.'[63] Laski cites Chief Justice Marshall on this point: '[The corporation] is [. . .] an artificial being, invisible, intangible, and *existing only in contemplation of law* [. . .]'[64]

Opposed to these sceptical, nominalist understandings of the personality of corporations is the Realist or Person Theory most closely associated with Otto Gierke, for whom the personality of the corporation 'is neither fictitious, nor artificial, nor created by the state, but both real and natural, recognized but not created by the law [. . .] When a corporation is formed by the union of natural persons, *a new real person, a real corporate "organism", is brought into being*.'[65] Most important, for those subscribing to this view, the corporation, as a real entity, exists independent of the individual, natural persons making it up.[66] Other figures in this tradition carried the corporeality metaphor further, endowing the corporation with organs, gender, will and senses. The third of these attributions, in particular, has become the central point of contention.[67]

Corporate liability

When turning to the question of corporate criminal liability and punishment, courts tended to find that corporations could not be prosecuted for 'crimes requiring intent', because lacking minds, they could not possess a 'corrupted mind'.[68] As Laski summarised the matter, crimes requiring intent require a mind,

[61] Morris Cohen, 'Communal Ghosts and Other Perils in Social Philosophy', *The Journal of Philosophy, Psychology and Scientific Methods*, 16 (1919), p. 678–81; Laufer, *Corporate Bodies*, p. 47.
[62] Harold Laski, 'The Personality of Associations', *Harvard Law Review*, 29 (1916), p. 406.
[63] Ernst Freund, *The Legal Nature of Corporations* (Chicago: University of Chicago Press, 1897), p. 52. Quoted in Borkowski, *The Transformation of American Law*, p. 102.
[64] Laski, 'The Personality', p. 406. Emphasis added. Compare Lord Reid's 1972 decision in the *Tesco Supermarkets* Case, 'A living person has a mind which can have knowledge or intention or be negligent and he has hands to carry out his intentions. A corporation has none of these [. . .]' which illustrates the longevity of this view. Eric Colvin, 'Corporate Personality and Criminal Liability', *Criminal Law Forum*, 6 (1995), p. 5.
[65] 'A corporation exists as an objectively real entity [. . .] the law merely recognizes and gives legal effect to the existence of the entity. To confound legal recognition of existing facts with creation of facts is an error [. . .] A corporation is an entity – not imaginary or fictitious, but real, not artificial, but natural.' Machen, 'Corporate Personality', p. 156; 161–2. Emphasis added. On Gierke generally, see David Runciman, *Pluralism and the Personality of the State* (Cambridge: Cambridge University Press, 1997), pp. 34–63.
[66] Colvin, 'Corporate Personality', p. 2.
[67] Machen, 'Corporate Personality', pp. 161–2.
[68] Ann Foerschler, 'Corporate Criminal Intent: Toward a Better Understanding of Corporate Misconduct', *California Law Review*, 78 (1990), p. 1291; Hart, 'Definition and Theory', p. 45.

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but the corporation 'cannot have a mind at all.' He believed, however, that the law might need to *attribute* a mind to corporation so that it might *infer* intent, a mental state, to acts attributable to the corporation.[69] The way around this has generally been to *impute* the intent of the agents or representatives of the corporation to the corporation itself. ' [. . .] the corporation is liable for the acts and intents of its employees, acting on behalf of the corporation, which are imputed to the entity.'[70]

In this approach, an outgrowth of the rule *respondeat superior*, 'corporate responsibility is always derivative. It must always be located through the responsibility of an individual actor. An individual first commits the offense; the responsibility of that individual is then imputed to the corporation [. . .] if there is no individual responsibility, there can be no corporate responsibility.'[71] The stipulation that the initial wrongful act must always be made by a flesh-and-blood natural person is central. 'Speaking of corporate conduct or corporate fault is [. . .] a shorthand way of referring to the conduct and culpability of the individual members of the collectivity [. . .].'[72] Utilising the corporeal metaphor to its fullest (if perhaps rather un-self-consciously), Lord Justice Denning further explicated the imputational approach in *Bolton v. Graham & Sons* (1956):

> A company may in many ways be likened to a human body. It has a brain and nerve centre which control what it does. It also has hands which hold the tools and act in accordance with directions from the centre. Some of the *people* in the company are mere servants and agents who are nothing more than hands to do the work and cannot be said to represent the mind or will. Others are directors and managers who *represent* the directing mind and will of the company, and control what it does. *The state of mind of these managers is the state of mind of the company* [. . .].[73]

The most nuanced version of the imputational approach, and the one which comes closest to the Realists, is May's; he retains the view that responsibility for acts must be imputed to the corporation from the conduct of its employees because 'corporations can only act vicariously.'[74] Despite individuals always being the material actors, their place within the corporation, their acting from corporate directives links their acts to the corporation. 'The best way to conceive of corporate actions is on the model of vicarious agency [. . .] corporate actions are really only very complex arrangements of joint and vicarious actions of individual

[69] Laski, 'The Personality of Associations', pp. 413–5.

[70] Jørgensen, 'The Responsibility of State', p. 75; Lee, 'Corporate Criminal Responsibility', p. 9; R.E. Ewin, 'The Moral Status of the Corporation', *Journal of Business Ethics*, 10 (1991), pp. 749–52. This is, of course, the model that international law follows in the Act of State Doctrine.

[71] Colvin, 'Corporate Personality', p. 2; Radin, p. 663.

[72] Colvin, 'Corporate Personality', pp. 1–2. Compare Kelsen: 'It is the action or refrainment from action by an individual that is interpreted as the action or refrainment of the corporation – 'attributed' to the corporation. The human being through whom the corporation acts as a juristic person, and whose behaviour is attributed to the corporation, is called the 'organ' of the corporation.' Kelsen, *Pure Theory*, p. 175, see also p. 177 and p. 181 where Kelsen ultimately concludes, however, that juristic persons are 'not capable of committing a delict'. Earlier, however, Kelsen was willing to grant juristic persons the capacity to commit both civil and criminal delicts. Kelsen, *General Theory*, pp. 103–6.

[73] Colvin, 'Corporate Personality', pp. 8–9. Emphasis added. This decision actually resembles what Jørgensen (following Andrews) calls the 'Identification Theory'; in it the 'basis for liability is that the acts of certain person are actually the acts of the corporation. 'These people are not seen as the agents of the company, but as its very person, and their guilt is the guilt of the company."' Jørgensen, *The Responsibility of States*, p. 75 quoting J. Andrews, 'Reform in the Law of Corporate Liability', *Criminal Law Review*, 20 (1973), pp. 91–2.

[74] May, *The Morality of Groups*, p. 41.

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persons.'[75] He then qualifies this view by insisting that the agent's act must be in furtherance of a decision made by an appropriately authorised senior manager.

Matters, however, are simpler for corporate Realists, for whom the corporation, as a real person, has a mind and thus may form intent, and may therefore possess the *mens rea* necessary for subjective criminal liability. 'When a corporation is guilty of crime it is because of a corporate act, a corporate intent [. . .] The fact that a corporation can act only by human agents is immaterial.'[76] *Inter alia*, Foerschler, French, Wells, Laufer and Clarkson have suggested ways to articulate what they consider a meaningful Realist notion of corporate intent, insistent that the corporation *must* be treated as capable of forming intents *suo iure*: 'Corporations exhibit their own special kind of intentionality, namely corporate policy.'[77]

French, upon whose account Wendt largely bases his own and Erskine hers, is primarily concerned with the *moral* personality of corporations.[78] The lynchpin of his account is the attribution of intentionality to the corporation's 'Internal Decision Structure', a move that he feels 'licenses the predication of corporate intentionality.'[79] The CIDS works to aggregate the decisions, intentions and acts of individual natural persons within the corporation into a 'corporate decision'; it '*incorporates* acts of biological persons.'[80] For French, any decision taken in accordance with a CIDS is to be understood, not at all figuratively, as the *corporation's* decision. For French, corporations make decisions; antecedent to decision, he attributes interests and reasons to them; as a result, they therefore also have intentions and take actions. This is emphatically not a metaphor for French; talk of corporations having reasons and intents, acting and consequently bearing responsibility is quite literal. Foerschler follows French's account quite closely, but also makes the *structure* of the corporation a causal actor.[81]

As the realists approach the matter, it is necessary to look not only at the natural persons composing a corporation, but also at their *relationships*. The corporation affects the conduct of individuals; as an institution it can 'possess knowledge or means of knowledge that may be unavailable in total to any single individual.'[82] They turn us away from the notion of intention as a subjective, individual mental state, and toward an understanding that is almost wholly inferential. '[R]eference to the policies pursued by a corporation may be a reference to the rationale that makes sense of its actions rather than to any goals that have been identified and articulated by the participants [. . .] intent can be attributed to a set of policies [. . .] *The intent is the rationale that presents the best explanation of*

[75] Ibid., p. 91.
[76] This is taken from *American Medical Association v. US* (1942) cited in Foerschler, 'Corporate Criminal Intent', p. 1291.
[77] Celia Wells, *Corporations and Criminal Responsibility* 2nd edn (Oxford: Oxford University Press, 2001), p. 71. Wells quotes Brent Fisse and John Braithwaite, 'The Allocation of Responsibility for Corporate Crime: Individualism, Collectivism and Accountability' *Sydney Law Review*, 11 (1988), p. 483.
[78] Erskine, 'Assigning Responsibilities to Institutional Moral Agents', pp 70–2.
[79] French, *Collective and Corporate Responsibility*, p. 39.
[80] Ibid., p. 42.
[81] Foerschler, 'Corporate Criminal Intent', pp. 1302–3. Clarkson's approach is similar. C.M.V. Clarkson, 'Kicking Corporate Bodies and Damning Their Souls', *The Modern Law Review*, 59 (1996), pp. 557–72.
[82] Colvin, 'Corporate Personality', p. 24.

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the corporation's policies [. . .].'[83] Laufer goes furthest in explicating an account of 'corporate mental states'.[84]

By following this path, however, it potentially becomes necessary for the Realists to infer not just intent, but also to infer the existence and content of the very policy from which the intent is to be inferred when there is no actual statement of policy. Again, the inference is based upon the deduction of the 'most reasonable explanation of the conduct of that corporation' – a standard which is more subjective than they might like to admit.[85] This is a delicate tissue indeed when the underlying motivation is the attribution of criminal responsibility and the levying of punishment.

Corporate punishment

The attribution of conduct and criminal intent to corporations and the imposition upon them of criminal liability is ethically troubling for some, and the parallels with the punishment of states are obvious. Cohen was insistent that in attributing intent to a collection of individuals 'we are apt to forget "its" action may simply be the action of certain individuals in authority.'[86] However, if corporations are subjected to punishment for violating the laws to which the state subjects them, 'punishment [. . .] may be inflicted upon the corporate entity, but in so doing, the law is using the corporate entity as a mere means of reaching the human beings who act for the corporation.'[87]

The problem with even this understanding is that the punishment does not *only* reach the 'human beings who act for the corporation'; indeed, the effects are significantly broader:

> [C]onsideration must [. . .] be given to the 'spillover' effect of corporate sanctions onto persons, such as shareholders, who are removed from the commission of the offense. The standard dismissal of the significance of spillover effects is that those who reap the benefits of corporate wrongdoing must be prepared to incur the costs. Yet [. . .] those who will be affected [. . .] cannot adequately protect themselves against this risk [. . .] *The spillover effects are indiscriminate*.[88]

As Radin makes clear, a putative corporate punishment is, in actuality *designed* to harm individuals in no way linked to the formulation of the criminal policy or its execution, and again, it does so indiscriminately. '[The] apparent punishment of the corporation as such will not stand analysis. It is obvious that when the corporation's property is taken, the shareholders must be the sufferers. *If they did not suffer in any way, there would be no point in punishing the corporation* [. . .].'[89]

Not all commentators are concerned; French and Clarkson, in particular, are unsympathetic to the fates of innocent employees or shareholders, the latter in

[83] Ibid., pp. 33–4.
[84] Laufer, *Corporate Bodies*, pp. 77–83. Emphasis added.
[85] Colvin, 'Corporate Personality', p. 40.
[86] Cohen, 'Communal Ghosts', p. 681.
[87] Machen, 'Corporate Personality', p. 165.
[88] Colvin, 'Corporate Personality', p. 15. Emphasis added.
[89] Radin, 'The Endless Problem', p. 661. Emphasis added.

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particular for having voluntarily assumed the risks associated with investing.[90] However, they miss a fundamental distinction between commercial risk, which investors can be held knowingly and voluntarily to undertake, and non-commercial risk, which no account can reasonably postulate they undertake. It is simply untenable to assert that investors can be held to have voluntarily undertaken the risk that those acting as agents of the company in which they have invested might act illegally and face sanction which would harm the interests of the investors. To assert otherwise is, in fact to assert the investors' willing and knowing participation in a criminal conspiracy merely by having invested in a corporation.

Evaluating the prospects of state criminality

We have seen a number of tropes in play so far. In Roman law, a group could – for legal purposes – constitute a body; in Christian Theology, a group could likewise constitute a *mystical* body. Likewise in Medieval political thought, the *populus* could constitute a mystical body. It was only with Hobbes that the equation and its signification changed. Despite carefully detailing the etymology of 'person', Hobbes is remarkably lax in sliding back and forth between person and body, using body politic and person interchangeably, even in his Latin writings. From Hobbes, through twentieth century corporate law, down to International Relation's current advocates of state personality and state crime, the group is now regarded as constituting a person *simpliciter* with all that personality entails. Much hinges on this change; persons – unlike bodies – can reason, form intentions and bear obligations. When speaking of bodies, there is no necessary connotation of mind. Blindly following Hobbes, we have slid very carelessly from the fiction that a group is a body (*corpus*), to the assertion that a body is a person. More completely parsed, the position underpinning advocacy of state criminality is that group = body = person. Although it does not settle matters to remind that this was a move the Roman initiators of this metaphor explicitly rejected, it does raise the question of why they rejected regarding groups as persons.

To finally evaluate the tenability of asserting the personality of states for purposes of international criminal liability, we need to look closely at our understandings of a number of concepts in addition to the state as actor: crime (responsibility and liability) and antecedent to the latter, intention. There are also political and ethical questions relating to the *consequences* of adopting the idea of state criminality: If the state can commit, and thus be held responsible for, crimes, *who* is to be punished? If the state is punished collectively – and if we *provisionally* accept that it is a composite or artificial person, this is the only way in which it can be punished – how is the resulting punishment of parties (citizens) who had no part in the design or execution of the unlawful act to be justified?[91] There are obvious parallels with the moral questions surrounding international sanctions because the modes of punishment tend in most accounts to follow the model of

[90] French, *Collective and Corporate Persons*, p. 188; Clarkson, 'Kicking Corporate Bodies', p. 563.
[91] Lang offers one account of how this might be justified. Anthony Lang, 'Crime and Punishment: Holding States Accountable' *Ethics and International Affairs*, 21 (2007), pp. 239–57.

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international sanctions, although strictly speaking, international sanctions are punitive without being penal.

With regard to the question of states acting, the real question is how far we want to take as literal something that has been from its outset avowedly *metaphoric* and *fictive*. If we want to attach criminal liability to the state for violating certain types of obligation, we need to be very certain about the tenability of this trope and how far we might extend it. Like corporations, the attribution of rights and duties to states is a fiction, the remnant of a trope we forgot was a trope; as a result, to claim that states can commit crimes, they must be able to form (beyond mere imputation or fiction) the requisite intention and *mens rea*. We must be able to attribute intention and *mens rea* to states in more than a rhetorical or figurative sense. The trope of the state as person, however, simply cannot support the weight of this demand. In domestic legal contexts, as we have seen, it is held to be the case (but not unproblematically so) that legal persons other than individuals can act intentionally and may thus be subject to criminal sanction for violating the law, but it is premature to leap from this norm to treating the state in the same way *simpliciter*.

Articulating (state) intention

Accounts of state crime and state punishment uniformly work from a direct analogy between the state and the corporation as an intentional actor. In order to determine the aptness of treating states as intentional actors subject to liability and punishment, it is essential to work out what it means to act intentionally. In order to determine if states can commit crimes, besides examining the meaningfulness of attribution to them of actions, we need to ascertain if there is any meaningful sense in which we might say that they intend.

Following Donald Davidson, we might say that at its most basic, to act intentionally is to act from (or in accordance with) a statable *reason* itself based upon certain statable *beliefs* in pursuit of articulable *desires*.[92] To assert that states act intentionally it must be possible to attribute to them an entire complex of mental states. There are long traditions of speaking of states as having interests, and of states' reason (*raison d'etat*), but except in cases of the blindest adherence to the Hobbesian metaphor, or the most tortuous of metaphysical contortions, these are – and have always been – no more than rhetorical devices. To speak of state intentions, we need to countenance the existence of not only state reasons, but also state beliefs and state desires.

In the Hobbesian tradition, the state is a person, and not just a body. As a person rather than merely a body, it is possesses a mind, reason and all that is associated with reason. Hobbes' transformation is essential. If we restrict ourselves to Hobbesian imagery this attribution is perhaps no great leap; indeed when we bear in mind the political configurations Hobbes' writings described (reflected and advocated), it is not difficult to speak of *that* sort of state having interests and

[92] Donald Davidson, 'Intending', in Davidson, *Essays on Actions and Events* (Oxford: Oxford University Press, 1980), pp. 83–102.

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beliefs, forming intentions and acting because the state was its sovereign and vice versa. The mental states of the state were the sovereign's mental states.

The language of 'reason of state' is actually older than Hobbes' appropriation of corporeal imagery, but came very easily to complement it.[93] There are cognate concepts to be found in Cicero and Tacitus, but the formulation with which we are most familiar has fifteenth and sixteenth century origins.[94] Throughout its conceptual development, this phrase connoted merely the idea that a human agent acting on behalf of a state was allowed to engage in conduct not normally allowed a private citizen in a non-political context. States were not held to have reason or reasons *per se*; the justification or legitimisation of certain normally impermissible acts was found in the *reason* for which they were committed. *The reason was the state*, but no one was attributing a mind or mental states to the state. It was only with the subsumption of this trope to the imagery of Hobbes, however, that it came from the late seventeenth century to have cognitive associations while retaining its original political meaning. From this point, the *state* was considered able to act in ways and do things that were impermissible to other persons – natural or legal – in other contexts. It was only by accepting this trope built upon an antecedent trope that the language of states forming and possessing intentions became intelligible. As a basis for the attribution or imputation of intents, however, it is insufficient.

State personality in IR theory and international legal theory

The issue is not simply that we are burdened by un-reflected-upon inheritances from early modern thought; Alexander Wendt is very concerned to identify the state as a person, indeed as an intentional actor and perhaps an organism or 'superorganism'.[95] In his account, he goes to great pains to justify the tenability of the state as the most important actor in international relations, ultimately by treating it in Scientific Realist terms as an unobservable. Wendt insists that states are *real things*, out there, acting intentionally but unobservable, and that International Relations cannot do without them conceptually. Without positing their personality, we allegedly cannot explain a great many central elements of international relations, and for that reason we cannot merely rest content treating them *as if* they were persons or treating their personality as a fiction; they *must* be real persons to do the things they are purported to do. While remaining agnostic about the ontological issues, I cannot agree with Wendt's attributions of agency and intention to states.

[93] Malcolm addresses Hobbes' relationship with the Reason of State literature. Noel Malcolm, *Reason of State, Propaganda, and the Thirty Years' War* (Oxford: Clarendon Press, 2007), pp. 92–123.

[94] Maurizio Viroli, *From Politics to Reason of State* (Cambridge: Cambridge University Press, 1992); Richard Tuck, *Philosophy and Government: 1572–1651* (Cambridge: Cambridge University Press, 1993), pp. 31–64; Peter Burke, 'Tacitism, Scepticism, and Reason of State', in J. H. Burns and Mark Goldie (eds), *The Cambridge History of Political Thought 1450–1700* (Cambridge: Cambridge University Press, 1991), pp. 479–98; Edward Keene, *International Political Thought: A Historical Introduction* (Cambridge: Polity Press, 2005), pp. 98–118; Jonathan Haslam, *No Virtue Like Necessity: Realist Thought in International Relations since Machiavelli* (New Haven: Yale University Press, 2002), pp. 17–88.

[95] Wendt, 'The State as a Person', pp. 306–11.

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In the end, it comes to this: if we cannot attribute intention to the state, we cannot hold it criminally liable (wrongs of strict liability not requiring intention imputed to it via the rule *respondeat superior* will be addressed below). When we question the viability of the very language of the state acting, of attributing reason(s) to it, and the validity of speaking of its interests, there is no longer any conceptual foundation upon which to posit intentionality and hence criminal responsibility. It is too much to expect of a metaphor, a construct that Kelsen reminds us is only a 'thinking aid', that it act, that it have reasons, beliefs, and desires, and that these sum to intentions. Even if we accept the trope of the state acting, it acts on the behalf of those who make it up and control its apparatus; *they* have reasons, beliefs and desires, and *they* act intentionally, but they are not the state, and their actions even in the aggregate are the state's only figuratively. They are responsible for their acts and for the acts of those who act upon their behalf (command responsibility), but the state, the collectivity (practically speaking, the people) cannot be reasonably held blameworthy for the actions of the individuals or groups directing things. It is, as Kelsen said, only 'If [. . .] the state is considered as a real being, a kind of superman, the *illusion* is created that the sanctions provided by international law are directed against the same individual who has violated the law, in other words, we have the *illusion* of the individuality of the state as an international person.'[96]

If we accept the conclusion that fictional entities with only fictional minds cannot form intentions (or that they form them only fictively), then the question of the tenability of *any* attributions of state responsibility arises. This is not a problem because we can still accept the utility of the Act of State Doctrine without the metaphysical baggage – at least in cases of strict liability (that is, where there is no requirement of intent, only causation) through the use of the rule *respondeat superior*. Whether or not the state exists as any more than a legal fiction, when the acts of specified classes individuals are conventionally attributable to it in cases where fault does not require the intent to violate the law, it seems that at least delictual responsibility is tenable. This still does not support taking the next step unless a great deal more is stipulated.

The stakes

The necessary stipulations referred to above are legal and political questions, and turn us to practical questions: what is the utility of criminalising the *state's* actions above and beyond that of the individuals who planned, ordered, carried out or abetted the actions? The utility issue is rhetorical, but the demand itself betrays a historical blindness. The demand for the criminalisation of state acts returns us to the old dynamic of international punishment as advocated by *inter alia* Gentili,

[96] Kelsen, *Pure Theory*, p. 356; c.f. p. 106. This position represents a complete reversal of his earlier arguments. Writing about the prosecutions after the Second World War he stated, 'If it is possible to impute physical acts performed by individuals to the State although the State has no body, it must be possible to impute psychic acts to the State although the State has no soul.' Hans Kelsen, 'Collective and Individual Responsibility in International Law with Particular Respect to the Punishment of War Criminals', *California Law Review*, 31 (1942–1943), pp. 530, 533. Quoted in Jørgensen, *The Responsibility of States*, p. 281.

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Grotius and Locke. Then, in the absence of the conceptual category of 'the state', the nation (*gens*), effectively the populace, was punished for perceived violations of the natural law of nations. With the developments signalled in Hobbes, Pufendorf and Vattel, the state became the primary actor, and because it was recognised as sovereign it was rendered above the judgment of any of its peers. By focusing the law upon an imaginary entity that was immune from judgment or sanction, no one was subject to punishment for the violation of the fundamental (but no longer natural) laws of international society. When we rejected this in 1945 and demanded individual responsibility and liability for criminal(ised) actions, we made a major advance: from holding the entire populace responsible for the actions of some, to holding no one responsible, to holding the actual materially responsible parties liable. The demand to criminalise state behaviour seen in the work of Lang and Jørgensen seems a remarkable leap backward. In one terminological respect this advocacy of punishing state criminality is an improvement on the Hobbes – 1945 epoch, because it does represent recognition that no matter whom we consider to be the relevant actor, there are certain behaviours that will not be tolerated, and that no status confers immunity from judgment; sovereignty is not a shield. This does not, however, call for state criminalisation in addition to individual criminal liability. Without accepting some sort of belief that the citizenry of the state collectively forms collective intentions upon which the state as the embodiment of the citizenry acts, and that the entirety of the population bears an aliquot share of the responsibility, there is no normative (or theoretical) justification for this re-assertion of international punishment in its classical form.[97] Jørgensen sees little reason for concern on this ground, asserting contentedly 'the implications of the term "collective punishment" ought not, perhaps, to be exaggerated.'[98] Lang, following Grotius' admonition 'Guilt attaches to the individuals who have agreed to the crime, not to those who have been overmastered by the votes of others', is less blasé about collective punishment, but does not rule out the punishment of whole societies, and regards the ILC's deletion of Article 19 as a signal failure of nerve.[99] If the sanction for states committing crimes is international sanctions in our more general sense of the term, it can be nothing other than collective punishment. If 'smart' or targeted sanctions are put into place, designed to harm only certain parties while leaving the general populace unharmed, then the *state* is not being punished, only the leadership, and we are then led right back to individual liability and have no need to speak of state crimes.

[97] Maitland, 'Moral Personality', p. 200 offers a similar formulation.
[98] Jorgensen, *The Responsibility of State*s, pp. 170–1.
[99] Hugo Grotius, *De Jure Belli ac Pacis,* II.21.7.2 quoted in Lang, 'Crime and Punishment', p. 15.

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