

THE HISTORICAL DEVELOPMENT OF THE DOCTRINES OF ATTRIBUTION AND DUE DILIGENCE IN INTERNATIONAL LAW

JAN ARNO HESSBRUEGGE*

I. INTRODUCTION

A papyrus manuscript from about 1000 B.C. recounts an incident involving Wen-Amon, a priest of the Egyptian god Amon-Re from the temple of Karnak.¹ When his ship entered the port of Dor (in what is today Israel), a member of his crew disappeared with a considerable amount of the ship's gold and silver.² The priest approached the local ruler and demanded:

I have been robbed in your harbor. Now you are the prince of this land, and you are its investigator who should look for my silver. Now about this silver—it belongs to Amon-Re, King of the Gods, the lord of the lands³

The prince denied being responsible and retorted:

Whether you are important or whether you are eminent—look here, I do not recognize this accusation which you have made to me! Suppose it had been a thief who belonged to my land who went on your boat and stole your silver, I should have repaid it to you from my treasury, until they had found this thief of yours—whoever he may be. Now about the thief who robbed you—he belongs to you! He belongs to your ship! Spend a few days here visiting me, so that I may look for him.⁴

* First Legal State Exam 2002, University of Muenster, Germany; MALD 2004, The Fletcher School of Law and Diplomacy. The author wishes to express his gratitude to Professor Alfred Rubin for his advice in the preparation of this article and would also like to acknowledge the invaluable assistance of Mrs. Monica Fronius.

1. *The Journey of Wen-Amon to Phoenicia* (John A. Wilson trans.), in *THE ANCIENT NEAR EAST* 16, 16 (James K. Pritchard ed., 1958).

2. *Id.* at 17.

3. *Id.*

4. *Id.* at 17-18.

Wen-Amon, determined to be indemnified for his loss, seized some of the prince's silver and proceeded to justify his action: "[And I said to the Tjeker: 'I have seized upon] your silver, and it will stay with me [until] you find [my silver or the thief] who stole it! Even though you have not stolen, I shall take it'"⁵

Rubin has referred to the quoted incident as an example of the struggle between positivism and naturalism that has characterized international law since its inception.⁶ Wen-Amon makes the naturalist argument that the prince is obligated to investigate the matter because he is subject to the divine command of Amon-Re as interpreted by his priest Wen-Amon—an argument the prince rejects.⁷

Yet, the passage also illustrates another problem inherent to international law: When do subjects of international law bear responsibility for actions of individuals? Wen-Amon seems to make an argument in this respect: The prince is liable to investigate the matter since the thief is now present in his lands. The prince's reply is remarkable from the viewpoint of current international law. He accepts that he is ultimately responsible for all actions of individuals "belonging to" his lands (which is apparently not the case if the perpetrator simply takes refuge in his territory). It may well be that he assumed this far-reaching responsibility only because the instant case had involved a foreign perpetrator acting on a foreign ship. However, it is also conceivable that his words corresponded to his legal opinion, since ancient law generally assumed collective responsibility for acts of individuals, as will be discussed below.

Over the centuries, the standard according to which international law has held its subjects accountable for actions of individuals has varied greatly. This Article traces the historical development of the two contemporary doctrines that concern themselves with this question: the doctrine of attribution (or, as some prefer, imputability) and the doctrine of due dili-

5. *Id.* at 18.

6. ALFRED P. RUBIN, *ETHICS AND AUTHORITY IN INTERNATIONAL LAW* 1-4 (1997).

7. *Id.* A later episode in the same manuscript, which is not relevant to this study, elucidates that jurisprudential aspect of the dispute even further. *See id.* at 3.

gence. The Article shows how the nature of the state and its relation to its members, which has continuously changed over the centuries, are constantly reflected in these doctrines. Doctrinal or historical baggage may delay the doctrinal adjustment for a century or more, but eventually the law adapts. This leads to the question I address in the conclusion: How does a change in the power distribution between states and other actors, such as we purportedly are now experiencing, affect the law of state responsibility?

International law—as applied by international tribunals—derives essentially from European precedents. Only a few non-European doctrines—for instance, the concept of *uti possidetis iuris*, which was introduced into modern legal thought by South American states⁸—have found their way into a system based on the Westphalian paradigm of the territorial, sovereign state. Accordingly, I will focus my inquiry on European legal history starting with the Roman *jus gentium*.

Brownlie has warned that the obsessive and overly ambitious tracing of the origins of a legal concept may lead to solecism.⁹ The history of the law of state responsibility lends itself particularly well to misinterpretations. Until the end of the 19th century, the unilateral use of force was considered a lawful means of asserting the legal rights of sovereign states.¹⁰ At the same time—disregarding ever-existent scholarly opinions about just war—states generally have used force whenever they deemed it appropriate. Thus, it is not easy to determine when a state exacted retribution because it considered the other state internationally responsible, and when it merely acted out of political opportunity. Bearing Brownlie's sound advice in mind, this Article does not seek to pinpoint the exact status of the law at various points in time (which would in all likelihood be impossible anyway). Rather, it is a study of the gradual evolution of legal ideas and arguments over time. Therefore, more attention is devoted to the writings of contemporary publicists than to the actual state practice of a given era.

8. IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 132 (5th ed. 1998) [hereinafter BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW].

9. IAN BROWNLIE, STATE RESPONSIBILITY 1 (1983) [hereinafter BROWNLIE, STATE RESPONSIBILITY].

10. See AHMED M. RIFAAT, INTERNATIONAL AGGRESSION 29 (1979).

II. AN ESTIMATE OF THE LEGAL STATUS QUO

Before venturing back through the centuries, it is necessary to establish an estimate of the legal status quo to provide a benchmark for comparison. It is an estimate because the law of responsibility remains to be codified and some details remain unclear or shifting. However, two broad principles can be distinguished:

1. States are responsible for the acts or omissions of individuals exercising the state's "machinery of power and authority,"¹¹ since these actions are *attributed* to the state even if the acts exceeded the authority granted by the state.

2. Acts or omissions of non-state actors are themselves generally not attributable; however, the state may incur responsibility if it fails to exercise *due diligence* in preventing or reacting to such acts or omissions.¹²

In the past, the two principles have been referred to as direct and indirect responsibility.¹³ Even today, governments sometimes utilize this terminology, arguably because the latter term suggests a lesser degree of culpability to the lay observer.¹⁴ The use of the term "indirect" is unfortunate. Not only does it wrongly suggest that there are "shades of culpability,"¹⁵ it also implies that there exists a bearer of direct responsibility even though the acting individual can in principle not incur responsibility under international law.¹⁶ To avoid such

11. Gordon A. Christenson, *Attributing Acts of Omission to the State*, 12 MICH. J. INT'L L. 312, 322 (1991).

12. See AMOS S. HERSHEY, *THE ESSENTIALS OF INTERNATIONAL PUBLIC LAW* 162 (1918).

13. See *id.* at 161-62. For a discussion of the issue, see CLYDE EAGLETON, *THE RESPONSIBILITY OF STATES IN INTERNATIONAL LAW* 214-15 (1928).

14. The Israeli Commission of Enquiry, which investigated the 1982 massacre of Palestinian civilians in refugee camps situated in West Beirut by Phalangist militiamen found, for instance, that the Phalangist forces were directly responsible. Conversely, Israel bore only indirect responsibility for allowing the Phalangists to enter the refugee camps. See Christenson, *supra* note 11, at 349-51.

15. *Id.* at 350.

16. The term "indirect responsibility" can be employed, however, to describe cases in which one state incites another to breach international law, because in such cases there exists a subject of international law that can bear direct responsibility. See Dionisio Anzilotti, *La Responsabilité Internationale des États: A Raison des Dommages Soufferts par des Étrangers* [*The International Responsibility of States: The Grounds for Damages Suffered by Foreigners*], 13 REVUE

insinuations, I will refer to the two principles respectively as responsibility by attribution and responsibility due to failure to exercise due diligence.

The issue of responsibility by attribution has been addressed and specified by the International Law Commission of the United Nations (ILC). The ILC has considered the doctrine of state responsibility since its first session, during which it selected the law of responsibility as suitable for codification.¹⁷ Initially, the ILC focused on state responsibility for injuries to aliens. Later, it expanded that focus to cover all instances in which one state injures another state or its citizens.¹⁸ The first draft articles were provisionally adopted upon their first reading in 1980.¹⁹ A number of detailed and much-acclaimed reports by Roberto Ago, special rapporteur on the topic, accompanied the first draft of articles.²⁰ The commentary embodied in these reports still forms the basis of what the ILC perceives to be the existing law of state responsibility. From 1998 to 2000, the ILC considered the Draft Articles again in order to incorporate comments by "Governments and developments in State practice, judicial decisions and literature."²¹ This second reading led to the adoption of the Draft Articles on Responsibility of States for Internationally Wrong-

GÉNÉRALE DE DROIT PUBLIC [GENERAL REVIEW OF PUBLIC LAW] 5, 285-86 (1906).

17. UNITED NATIONS, THE WORK OF THE INTERNATIONAL LAW COMMISSION 89, U.N. Sales No. E.88.v.1 (4th ed. 1988).

18. See *id.* at 91.

19. *Report of the International Law Commission on the Work of its Thirty-Second Session*, U.N. GAOR, 35th Sess., Supp. No. 10, at 59, U.N. Doc. A/35/10 (1981).

20. *First Report on State Responsibility*, [1969] 1 Y.B. Int'l L. Comm'n 125, U.N. Doc. A/CN.4/217; *Second Report on State Responsibility*, [1970] 1 Y.B. Int'l L. Comm'n 97, U.N. Doc. A/CN.4/233; *Third Report on State Responsibility*, [1971] 1 Y.B. Int'l L. Comm'n 199, U.N. Doc. A/CN.4/246; *Fourth Report on State Responsibility*, [1972] 1 Y.B. Int'l L. Comm'n 71, U.N. Doc. A/CN.4/264; *Fifth Report on State Responsibility*, [1976] 1 Y.B. Int'l L. Comm'n 3, U.N. Doc. A/CN.4/291; *Sixth Report on State Responsibility*, [1977] 1 Y.B. Int'l L. Comm'n 39, U.N. Doc. A/CN.4/302; *Seventh Report on State Responsibility*, [1978] 1 Y.B. Int'l L. Comm'n 31, U.N. Doc. A/CN.4/307; *Eighth Report on State Responsibility*, [1979] 1 Y.B. Int'l L. Comm'n 3, U.N. Doc. A/CN.4/318.

21. *Report of the International Law Commission to the General Assembly*, U.N. GAOR, 56th Sess., Supp. No. 10, at 32, U.N. Doc. A/56/10 (2001) [hereinafter *Draft Articles on State Responsibility*].

ful Acts in 2001.²² The basic approach is one of objective responsibility. Fault (intent or negligence) generally is not required to incur responsibility as long as the behaviour is attributable to the state, unless the primary rule (i.e., the relevant substantive obligation) specifically requires fault.²³

Articles 4 to 11 of the 2001 Draft Articles outline when individual acts or omissions are attributed to the state.²⁴ The state is responsible for the conduct of all persons it has designated in its municipal law to be acting as legislative, judicial, or executive organs of the state.²⁵ There is no exception for minor functionaries or organs pertaining to a territorial unit of the state (such as a provincial government).²⁶ Moreover, a state is responsible for the conduct of private persons in so far as it has vested the power to exercise elements of governmental authority in them (responsibility for para-statal entities).²⁷

According to the Draft Articles, *ultra vires* acts (i.e., acts by which the organ exceeds the authority vested in it) are attributable to the state as long as the organ acts in its capacity as an organ.²⁸ The Commentary on the Draft Articles finds that the rule has attained the status of customary law despite the earlier equivocal practice in diplomatic communications and arbitral awards because it provides for clarity and security in international relations.²⁹ Of course, it would be tantamount to requiring fault in each and every case if it were otherwise. Either the lawmaker has outlawed the behavior offensive to international law, in which case the organ's act cannot be attributed to the state because it is committed *ultra vires*, and the state is responsible only if it negligently failed to prevent or control the act, pursuant to the due diligence principle; or the state has failed to outlaw the offensive act. In the latter case, the act

22. *Id.* at 41.

23. *See id.* art. 2 comment. 3, 4.

24. *Id.* arts. 4-11.

25. *Id.* art. 4. *See also* Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights, 1999 I.C.J. 62 ¶ 62 (April 29) ("According to a well-established rule of international law, the conduct of any organ of a State must be regarded as an act of that State.").

26. *Draft Articles on State Responsibility*, *supra* note 21, art. 4.

27. *Id.* arts. 5, 6.

28. *Id.* art. 7. *See* Velásquez Rodríguez Case, 1988 Inter-Am. Ct. H.R. (ser. C) No. 4 (July 29), at para. 170.

29. *See Draft Articles on State Responsibility*, *supra* note 21, art. 7 comment. 3.

would be *intra vires* and could thus be attributed. But that would make no difference because the state already could be held responsible for failing to outlaw the offensive behaviour and thereby not exercising due diligence. Thus, there exists a linkage between the *ultra vires* doctrine and the fault principle³⁰—linkage which is rooted in legal history, as will be demonstrated in this Article.

One should note that the clarity and security provided by the decision to attribute *ultra vires* acts is limited by the fact that it applies only where the state organ “acts in that capacity.”³¹ The commentary offers the following clarification: “[C]ases where officials acted in their capacity as such, albeit unlawfully or contrary to instructions, must be distinguished from cases where the conduct is so removed from the scope of their official functions that it should be assimilated to that of private individuals, not attributable to the State.”³²

Even where persons do not bear governmental authority, their conduct can be attributable to the state. Four different situations can be distinguished. First, the state can lend its authority retrospectively to the action by acknowledging and adopting the conduct in question as its own.³³ The principle of the “adopted agent” was endorsed by the International Court of Justice in the *Tehran Hostages Case*.³⁴ The Court held that Iran was responsible for the occupation of the American embassy and the detention of its staff as hostages, despite that fact that the acts were committed by militant private individuals, because Ayatollah Khomeini had endorsed the acts publicly as a matter of State policy and other Iranian authorities complied with his statements.³⁵ The commentary explains with regard to the subjective element of the principle that a mere statement of support of a private act does not suffice for its attribution.³⁶

30. See BROWNLIE, *STATE RESPONSIBILITY*, *supra* note 9, at 145 (“[The *ultra vires* principle] accords generally with a regime of objective responsibility.”).

31. *Draft Articles on State Responsibility*, *supra* note 21, art. 7.

32. *Id.* art. 7 comment. 7.

33. *Id.* art. 11.

34. United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran), 1980 I.C.J. 3 (May 24).

35. *Id.* at 35.

36. *Draft Articles on State Responsibility*, *supra* note 21, art. 11 comment. 6.

Second, the conduct of an individual is attributable to the state if he is *de facto* acting on behalf of the state. The 2001 Draft Articles stipulate that acts of non-state persons are attributable to a state if they are “in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct.”³⁷ The International Court of Justice also considered the responsibility for such “de facto agents” in *Tehran Hostages*. The Court found that private conduct “might be considered as itself directly imputable to the Iranian State only if it were established that, in fact, on the occasion in question the militants acted on behalf (of) the State, having been charged by some competent organ of the Iranian State to carry out a specific operation.”³⁸ Since the evidence did not suffice to establish such a link between the Iranian state and the militants, the Court ultimately did not find Iran responsible on that ground.³⁹

In the *Nicaragua Case*,⁴⁰ the Court specified the requirements under which *de facto* agency may be assumed. The Court held that “United States participation, even if preponderant or decisive, in the financing, organizing, training, supplying, and equipping of the *contras*, the selection of its military or paramilitary targets, and the planning of the whole of its operation, is still insufficient in itself, on the basis of the evidence in the possession of the Court, for the purposes of attributing to the United States the acts committed by the *contras* in the course of their military or paramilitary operations in Nicaragua.”⁴¹ Instead, the Court held that the United States was responsible for breaches of humanitarian law by the *Contras* only if it either had “effective control of the military or paramilitary operations in the course of which the alleged violations were committed” or if the “United States directed or enforced the perpetration of the acts contrary to human rights and humanitarian law alleged by the applicant State.”⁴² In his separate opinion, Judge Ago clarified that the latter cases re-

37. *Id.* art. 8.

38. United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran), 1980 I.C.J. 3, 29 (May 24).

39. *Id.*

40. Military and Paramilitary Activities (Nicar. vs. U.S.), 1986 I.C.J. 14 (June 27).

41. *Id.* at 64.

42. *Id.* at 64-65.

quired that state organs specifically instructed the Contras to commit a *particular* act or to carry out a *particular* task of some kind on behalf of the United States.⁴³ That is to say, there is only a principal-agent relationship allowing for attribution if the controlling principle micromanages the conduct of the individual agents.

The third and fourth grounds refer to the conduct of non-state actors during revolutions. In principle, acts of revolutionary movements, mobs, etc., are not directly attributable to the state.⁴⁴ However, the conduct of an insurrectional or secessionist movement, which becomes the new government of a State, is considered an act of that State under international law.⁴⁵ This principle is rationalized by the fact that there exists continuity between the revolutionary movement and the new organization of the state.⁴⁶ Brownlie has questioned the validity of this rationale. He points out that the state is made responsible for the acts of a movement that was not a government at the material time and could not have drawn state responsibility upon itself.⁴⁷ Second, state responsibility arises from events that were beyond its control when they occurred.⁴⁸ Third, I may add, the principle of attributing acts of successful revolutionaries is at odds with the principle of state continuity. According to the state continuity principle, a revolutionary change of government generally does not free a state from its pre-revolutionary obligations.⁴⁹ With regard to this principle, the question of continuity in the leadership is irrelevant; with regard to the attribution principle, continuity of leadership suddenly becomes the decisive consideration. These doctrinal criticisms noted, the existence of the said principle in positive international law is undisputed⁵⁰ and must be

43. *Id.* at 188-89 (Separate Opinion of Judge Ago).

44. *Draft Articles on State Responsibility*, *supra* note 21, art. 10 comment. 2.

45. *Id.* art. 10 para. 1. The same rule applies where the insurrectional movement manages to create a new state in part of the territory of the pre-existing state. *See id.* art. 10 para. 2.

46. *See id.* art. 10 comment. 5.

47. BROWNLIE, *STATE RESPONSIBILITY*, *supra* note 9, at 178.

48. *Id.*

49. *See* Guido Acquaviva, *The Dissolution of Yugoslavia and the Fate of its Financial Obligations*, 30 *DENV. J. INT'L L. & POL'Y* 93, 104-07 (2002).

50. *See* BROWNLIE, *STATE RESPONSIBILITY*, *supra* note 9, at 178; I LASSA OPPENHEIM, *OPPENHEIM'S INTERNATIONAL LAW* 553-54 (Robert Jennings & Arthur Watts eds., 9th ed. 1992) (1905).

welcomed from a policy point of view. Human rights organizations, for instance, often find themselves confronted with the dilemma of whether to disregard atrocities committed by armed non-state actors, who are not bound by positive international human rights law, or to venture into the realm of international humanitarian law, a discipline concerned with curbing the excesses of warfare but not war—the very negation of human rights—itsself. Relying on the attribution doctrine, human rights activists can criticize a revolutionary or secessionist movement on the strength of the legal argument that, if the movement were to achieve its proclaimed agenda, its atrocities would become human rights violations attributed to the state it comes to govern.

Article 9 of the 2001 Draft Articles contains the fourth ground on which to attribute private acts:

The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact exercising elements of a governmental authority in the absence or default of the official authorities and in circumstances such as to call for the exercise of those elements of authority.⁵¹

The Iran-United States Claims Tribunal applied this doctrine to the conduct of Revolutionary Guards or “Komitehs.”⁵² These private actors fulfilled police functions during the Iranian Revolution in the absence of regular state authorities. The Commentary on the Draft Articles justified this attribution principle as an agency of necessity: Just as citizens have the right to collective self-defence in the absence of regular forces (*levée en masse*), they may assume governmental functions where government is absent.⁵³ Why a right of citizens against the state should justify obligations of the state towards other states remains to be explained, however. It seems that a better rationale for holding the state responsible is its failure to fulfil its functions.

This would make Article 9 a special case of state responsibility arising from failure to exercise due diligence (a case of strict liability to be exact), which brings us to the second doc-

51. *Draft Articles on State Responsibility*, *supra* note 21, art. 9.

52. *Yeager v. Iran*, 17 Iran-U.S. Cl. Trib. Rep. 92, 104 (1987).

53. *Draft Articles on State Responsibility*, *supra* note 21, art. 9 comment. 2.

trine under consideration here. The International Law Commission has not addressed this doctrine in its Draft Articles since this would require staking out substantive obligations of states rather than secondary rules of responsibility. While much remains unclear with regard to the principles governing this type of case, the basic principles have become firm. At a minimum, states are required not to knowingly allow anyone to use the state's territory to injure other states.⁵⁴ A special application of that principle is the responsibility of a state to ensure that (private) activities within its jurisdiction or control do not cause damage to the environment of other states or of areas beyond the limits of national jurisdiction.⁵⁵ With regard to private persons, international law requires states to exercise due diligence in order to prevent the injury of foreign nationals in their territory.⁵⁶ International human rights law knows an equivalent doctrine. For instance, the Inter-American Court of Human Rights has decided that the Inter-American Convention on Human Rights obliges states to exercise due diligence to prevent attacks on a person's life, physical integrity, or liberty.⁵⁷ Moreover, states are required to punish any violation of these rights and must attempt, if possible, to restore the right violated and provide compensation for damages resulting from the violation.⁵⁸

In particular, the application of the doctrine of state responsibility in the human rights context shows the tightrope contemporary international law has to walk. The modern state is expected to respect the basic freedoms of the human person. Accordingly, the state cannot be burdened with too ex-

54. *Corfu Channel* (U.K. v. Alb.), 1949 I.C.J. 4, 22 (April 9).

55. *Report of the United Nations Conference on the Human Environment Held at Stockholm, 5-16 June 1972*, Principle 21, at 7, U.N. Doc. A/CONF.48/14 (1972), reprinted in 11 I.L.M. 1416, 1420 (1972). See also *Trail Smelter* (U.S. v. Can.) 3 R.I.A.A. 1905, 1965 (1941).

56. BROWNLIE, STATE RESPONSIBILITY, *supra* note 9, at 161; *Youmans v. United Mexican States*, 4 R.I.A.A. 110, 114-15 (Mex.-U.S. Gen. Cl. Comm'n 1926); *Massey v. United Mexican States*, 4 R.I.A.A. 155, 162 (Mex.-U.S. Gen. Cl. Comm'n 1927).

57. See *Velásquez Rodríguez Case*, 1988 Inter-Am. Ct. H.R. (ser. C) No. 4 (July 29), at para. 166.

58. *Id.* See also *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, U.N. Human Rights Comm'n, 44th Sess., Gen. Cmt. 20 art. 7 para. 13, at 32, U.N. Doc. HRI/GEN/1/Rev.1 (1994).

tensive responsibility to curb and control private actions, lest it will have to encroach on these very freedoms.

III. THE ROMAN *JUS GENTIUM* AND MEDIEVAL LAW: RESPONSIBILITY OF THE COLLECTIVE

In Roman law and other ancient legal systems, the relation between human beings and a state was very different. In his classic work on ancient law, Sir Henry Maine points out that the smallest unit of ancient society was the family and not the individual.⁵⁹ Inside the family unit, connected by common subjection to the highest male ascendant, the individual was assigned a fixed status. From these basic units the state evolved in what Maine describes as “a system of concentric circles.”⁶⁰ The elementary group is the Family, its aggregation forms the House, the aggregation of Houses evolves into Tribes, and the Tribes collectively form the Commonwealth.⁶¹ Thus, the entire society of the state was conceived of as a single unit when it interacted with another entity. It was not a collection of individuals living in a state, as the contemporary state is. This thinking is reflected in Roman thought about state responsibility that can be found in the Roman legal order dealing with international affairs—the *jus gentium*.

The Romans never precisely defined the term *jus gentium* but referred to it as “the law observed by all mankind.”⁶² In fact, the term was used in different times to describe two distinct systems of law.⁶³ On the one hand there is the *jus gentium* that Roman jurists developed since the early days of the Republic. It characterizes a branch of private law separate from the Roman *jus civile*. This naturalist legal order, which the Romans believed to emanate from natural reason present in every human being, was applied to determine the legal affairs involving both Romans and non-Romans.⁶⁴ On the other hand, Roman writers, mainly historians, used the term *jus gen-*

59. HENRY SUMNER MAINE, *ANCIENT LAW: ITS CONNECTION WITH THE EARLY HISTORY OF SOCIETY AND ITS RELATION TO MODERN IDEAS* 104 (Dorset Press 1986) (1873).

60. *Id.* at 106.

61. *Id.*

62. THE *INSTITUTES OF GAIUS*, paras. 1, 2 (F. de Zulueta trans. 1985), quoted in RUBIN, *supra* note 6, at 12.

63. MAX KASER, *IUS GENTIUM* 3-6 (1993).

64. *Id.* at 10-11; RUBIN, *supra* note 6, at 12.

tium when they described the legal relations between the Roman state and other states. This legal order, like the civil law branch, is rooted in "natural reason."⁶⁵ The German word for public international law, *Völkerrecht* (peoples' law), derives from this aspect of *jus gentium*.⁶⁶ The same is true of the French *droit des gens*.⁶⁷

The latter type of *jus gentium* concerned itself mainly with questions of war and peace. Initially, the question of whether or not to go to war was governed by sacral law, the *jus fetiale*.⁶⁸ It required strict adherence to rituals, forms, and symbolic acts. The person acting for the *populus Romanus* acknowledged in an oath that Jupiter had the right of retribution if it turned out that the war was unjust.⁶⁹ Thus, one is not dealing with an international legal order, but rather with a municipal order concerning international affairs. When Rome extended its reach beyond Italy in the 2nd and 3rd centuries B.C., the sacral law was replaced by the secular order of the *jus gentium*.⁷⁰ Here, legal principles similar to the contemporary system of state responsibility developed. However, breaches of the law could result in only one consequence: The Romans considered war a tool that determined legal disputes between peoples. The *jus gentium* was the municipal instrument that determined whether the war was "just." Formally, a *bellum iustum* required repeated threats of war (*bellum denuntiari*) followed by a declaration of war by word and deed.⁷¹ Substantively, war could be waged only against a legitimate opponent (*iustum piunique bellum*) against whom a reason to go to war (*rerum repetitio*) existed.⁷² The phrase *rerum repetitio* refers to the illegal withholding of things or persons. Yet, hostile acts against Romans or Roman vassals were also considered reasons for war. So was the killing or injuring of Roman ambassadors.⁷³

65. RUBIN, *supra* note 6, at 12.

66. KASER, *supra* note 63, at 4, 23.

67. ARTHUR NUSSBAUM, A CONCISE HISTORY OF THE LAW OF NATIONS 135-36 (rev. ed. 1954).

68. KASER, *supra* note 63, at 25-26.

69. *Id.* at 26-27.

70. *Id.* at 28-29.

71. *Id.* at 29-30.

72. *Id.*

73. *Id.* at 30.

Polybius recounts a dispute between the Illyrians and Rome.⁷⁴ Ships operated by private Illyrian individuals had attacked a number of Italian trade ships and a Roman embassy was sent to the Illyrian ruler, Queen Teuta, to protest against this behavior. Faced with the charge, Teuta argued that Illyrian rulers did not prevent their subjects from taking plunder at sea. One of the Roman ambassadors responded ("with ample justification," Polybius finds) that the Illyrian state was responsible for punishing those who committed private wrongs and helping those who suffered them.⁷⁵ At first sight, this passage seems to suggest that the Roman conception of state responsibility was quite similar to the current principle of due diligence.

However, the law of embassy shows that the concept was an entirely different one. According to the *jus gentium*, ambassadors were considered immune (as in inviolable); their bodies were considered *sacrosanctus*.⁷⁶ Killing or injuring an ambassador was therefore considered an offence to the gods and the ambassador's people, which justified a war against the perpetrator's people. The latter could attempt to atone for the offence by extraditing the perpetrator (*deditio*). However, the injured state could decline to accept the *deditio*.⁷⁷ The right to choose between war and accepting the atonement remained with the injured state. Polybius reports that Leptines, a subject of King Demetrius of Greece, killed Gnaeus Octavian, a Roman legate.⁷⁸ As atonement, King Demetrius sent 10,000 gold pieces and extradited the murderer to Rome.⁷⁹ After some consideration, the Senate accepted the gold but decided not to accept the extradition of the murderer.⁸⁰ Instead, Rome kept the grievance open so as to make "use of the accusations when they wished."⁸¹ The legal principle the Senate's decision rests upon is remarkable. King Demetrius becomes responsi-

74. POLYBIUS, THE RISE OF THE ROMAN EMPIRE bk. II para. 8, at 118-19 (Ian Scott Kilvert trans., Penguin Books 1979).

75. *Id.*

76. KASER, *supra* note 63, at 33-34.

77. *Id.* at 34-35.

78. VI POLYBIUS, THE HISTORIES bk. XXXII para. 2, at 235 (W.R. Paton trans., G.P. Putnam's Sons 1927).

79. *Id.*

80. *Id.* bk. XXXII paras. 2, 3, at 235, 237-39.

81. *Id.* bk. XXXII para. 3, at 239.

ble not because he failed to take action after the private individual committed the murder. Instead, the sovereign is responsible solely by virtue of the fact that one of its members breached the *jus gentium*. The same principle also emerges in the writings of Livy, who recounts how Zeno desperately pleaded with T. Quinctius that the Romans not make the whole city of the Magnetes responsible for one man's madness.⁸² Nevertheless, Quinctius "bitterly reproached the Magnetes for their ingratitude and predicted the disasters which would quickly overtake them . . ."⁸³ Thus, the *jus gentium* reflects the relationship between state and subject in ancient society. State and subject are not separate units; they are regarded as a single collective.

The same principle of collective responsibility could also be found in the early Middle Ages. Municipal legal orders were tribal in character and remarkably similar to each other in content.⁸⁴ Concentric circles like the ones in ancient society characterized their inner order. Households formed villages, which then grouped into so-called hundreds. A very loosely organized duchy or kingdom was the outermost circle.⁸⁵ The Church or the Holy Roman Empire might have claimed symbolically to have authority over their constituencies, but not until the latter half of the 11th century did royal and ecclesiastical institutions make a real effort to alter the tribal and local character of the legal orders of Europe.⁸⁶ Thus, the real international legal order of the early Middle Ages was the law between tribes. Between tribes, the principle of collec-

82. TITUS LIVIUS (LIVY), *THE ROMANE HISTORIE* [THE HISTORY OF ROME] bk. 35 para. 31 (Canon Roberts trans., Ernest Rhys, ed., J. M. Dent & Sons, Ltd., London, 1924) (1589). This story is also related in ADOLF JESS, *POLITISCHE HANDLUNGEN PRIVATER GEGEN DAS AUSLAND UND DAS VÖLKERRECHT* [PRIVATE POLITICAL ACTS AGAINST FOREIGN SOVEREIGNS AND PUBLIC INTERNATIONAL LAW] 11 (1923). Jess also cites the taking of Helena by Paris, which led to the Trojan War, as proof of the existence of this principle in ancient law. *Id.* Jess notes that Ovid and Hesiod both remarked that a whole city had to atone for the bad deed of one bad citizen. *Id.*

83. LIVY, *supra* note 82, bk. 35 para. 39.

84. HAROLD J. BERMAN, *LAW AND REVOLUTION: THE FORMATION OF THE WESTERN LEGAL TRADITION* 52 (1983).

85. *Id.*

86. *Id.* See also HEINRICH KIPP, *VÖLKERORDNUNG UND VÖLKERRECHT IM MITTELALTER* [THE ORDER OF NATIONS AND PUBLIC INTERNATIONAL LAW DURING THE MEDIEVAL AGES] 68-97 (1950).

tive responsibility (*Sippenhaftung*) governed.⁸⁷ The medieval tribal state was regarded as a collectivity, whose members were responsible for the acts of any one member. The tribal bond sufficed to attribute an individual's action, wherever committed, to the state.⁸⁸ Had one member of the tribal entity killed or injured a member of another entity, the whole first entity was responsible and subject to retribution.⁸⁹ Whether the injury was inflicted with intent or by accident was irrelevant.⁹⁰ Retribution could be exercised by way of a blood feud, or the injured tribe could choose to conclude a treaty of atonement, which would provide for a sum of money (*wer* or *wergeld*) to be paid to the injured tribe.⁹¹

In the later Middle Ages, this principle gradually changed. As the units grew in size and had more individual members, the collective responsibility principle softened. The tribe could avoid collective responsibility by withdrawing community protection from the individual actor and evicting the person from the community.⁹² In theory, the collective responsibility principle still remained valid. However, the tribe was awarded the privilege of retrospectively removing the ground for its responsibility—i.e., the offender's membership in the tribe.⁹³ After being evicted from the tribal community, the offender became *vogelfrei*, or outlawed. This meant that anyone could kill him without having to fear a blood feud himself.⁹⁴

Only in the late Middle Ages did the principle of collective responsibility seem to fade and be replaced by doctrines similar to currently existing ones. Keen recounts an incident from 1446 in which Erard Capdorat, a subject of a French no-

87. See JESS, *supra* note 82, at 9.

88. *Id.* at 8-9; EAGLETON, *supra* note 13, at 76.

89. JESS, *supra* note 82, at 8-9; cf. BERMAN, *supra* note 84, at 54-55.

90. JESS, *supra* note 82, at 9.

91. *Id.*

92. *Id.* at 10. See also FREDERICK POLLOCK & FREDERICK WILLIAM MAITLAND, 1 THE HISTORY OF ENGLISH LAW 48 (2d ed. 1968). Pollock and Maitland note, with regard to British tribal law, that while it is uncertain whether the injured tribe initially had such a choice, at least from King Alfred's reign (871-899 A.D.) onward, the right to feud arose only after an attempt to attain *wergeld* had failed. *Id.* at 47.

93. JESS, *supra* note 82, at 10.

94. 1 POLLOCK & MAITLAND, *supra* note 92, at 47-48.

bleman, was robbed by subjects of the Duke of Burgundy.⁹⁵ Only after Capdorat failed to obtain justice in the courts of Burgundy did his lord award him a letter of marque authorizing him to take reprisal against the Duke or his subjects.⁹⁶ Thus, *deni de justice*, rather than collective injury, had become the justification for reprisal and the ground for responsibility.⁹⁷ According to Gentili, the notion that faults of individuals are not charged against a community also features in the writings of Baldus de Ubaldi (1327-1400).⁹⁸

IV. 17TH CENTURY ABSOLUTISM: RESPONSIBILITY AS THE KING'S FAULT

It would amount to the very over-ambitiousness Brownlie warns of to try to pinpoint when exactly the concept of collective responsibility was no longer followed as a legal principle. According to the paradigm that replaced the collective responsibility principle, only fault of the sovereign himself could give rise to state responsibility. Alberico Gentili's *De Iure Belli Liberi Tres* clearly retains thoughts of collective responsibility while introducing new ideas.⁹⁹ Gentili discusses just reasons for making war, which he categorized into two groups: natural reasons, in which a privilege of nature (e.g., the freedom of commerce) is denied, and human reasons, in which war is waged because a man-made law has been breached.¹⁰⁰ In principle, only acts of the sovereign or a nation give reason for just war. Gentili, Regius Professor of Civil Law at Oxford, took a very narrow view of what act was one of the state. Essentially only acts of parliament were acts of state, whereas he did not attribute actions of officials to the state.¹⁰¹ An act is public "when the state has deliberated upon it in legitimate assembly," but not "where it has been taken by a magistrate or even

95. M.H. KEEN, *THE LAWS OF WAR IN THE MIDDLE AGES* 222 (1965).

96. *Id.* at 222.

97. *Id.* at 226.

98. ALBERICO GENTILI, *DE JURE BELLI LIBRI TRES* [THREE BOOKS ON THE LAW OF WAR] 99 (John C. Rolfe trans., Clarendon Press 1933) (1612). Gentili refers to Baldus, *Consilia* I. cdxxxix and Alciati, *Consilia* III. vii.

99. *See id.*

100. *Id.* at 86-98.

101. *Id.* at 103.

by the entire populace in a different way as the result of some hasty resolution."¹⁰²

On the contrary, "the faults of individuals are not charged against a community, as every one knows . . ." ¹⁰³ However, "the state, which knows because it has been warned, and which ought to prevent the misdeeds of its citizens, and through its jurisdiction can prevent them, will be at fault and guilty of a crime if it does not do so."¹⁰⁴ So far, Gentili seems to have broken completely with the medieval conception of collective responsibility and accepted the idea that only the sovereign himself can incur responsibility for the state. However, the notion of collective responsibility is still visible. Gentili argues that a reason for a war exists "in instances in which a private individual has done wrong and his sovereign or nation has failed to atone for his fault."¹⁰⁵ At another point in his work he contends that a state commits "a sin of omission . . . when a community fails to make good the delinquency of its individual members."¹⁰⁶ Effectively, Gentili created an obligation to punish or extradite an offender. However, the language reveals that his thought is still influenced by medieval legal conceptions. The community is in principle responsible for its member's deed, but it can atone for the deed by taking actions against the individual perpetrator: "Satisfaction ought to have been made to the [injured state] for what had been done [by a private individual], either by inflicting punishment for the crime in question or by surrendering the one who had committed it; otherwise war could be made upon the whole state."¹⁰⁷ Thus, Gentili laid the academic foundation for the principle today referred to as "*aut dedere aut judicare*."¹⁰⁸

102. *Id.*

103. *Id.* at 99.

104. *Id.* at 100.

105. *Id.* at 99.

106. *Id.* at 104.

107. *Id.* at 100.

108. *See id.* at 100. It must be noted that the Latin original of Gentili's work does not use the phrase "*aut dedere aut judicare*" specifically. *See* GENTILI, *supra* note 98, at 162 ("Satisfaciendum suit Romanis quod factum suisset, *aut poena soluta criminis, de quo agebatur: aut eo dedito, qui deliquerat alioqui inserri universitari bellum possit.*") ["The Romans will be satisfied with what will be done, whether the punishment not linked to the criminal act, that we mentioned, or release him, that will make other criminal acts in other places and will be able to bring war at any time."] (emphasis added).

Grotius further distanced himself from the notion of collective responsibility. For Grotius, responsibility in international law meant responsibility of the sovereign as a natural person. He did not write that states, nations, or peoples were liable. Instead kings were legally responsible.¹⁰⁹ To him, responsibility between private persons arose from fault.¹¹⁰ He transferred the same thought to the responsibility of the sovereign: "The liability of one for the acts of his servants without fault of his own does not belong to the law of nations . . . but to municipal law . . ." ¹¹¹ Accordingly, the concept of attribution is unknown to Grotius. Kings "are not liable if their soldiers or sailors have injured friends contrary to orders . . ." ¹¹² The same seems to apply to other persons vested with public authority. Grotius considered a case in which privateers to whom rulers had issued letters of marque and reprisal "had seized the property of friends, had abandoned their native land and were wandering at sea without returning even when recalled . . ." ¹¹³ Grotius argued that the sovereigns were not liable for the acts themselves because, *inter alia*, "they themselves had not been the cause of the wrongful freebootery, and that they had not had any share in it . . ." ¹¹⁴

While the doctrine of attribution was unknown to him, he laid the foundation for the present concept of responsibility due to lack of due diligence. According to Grotius, the sovereign could become complicit in the crimes of individuals through the principles of *patientia* and *receptus*.¹¹⁵ Under the principle of *patientia*, responsibility ensues if a community or its rulers know of a crime committed by a subject, but fail to prevent it if they can and should do so.¹¹⁶ With regard to his privateering example he argued, for instance, that the rulers were not responsible for renegade privateers because they

109. See HUGO GROTIUS, 2 DE JURE BELLI AC PACIS [ON THE LAWS OF WAR AND PEACE] bk. II ch. XVII § XX, at 436 (Francis W. Kelsey trans., William S. Hein & Co. 1995) (1646).

110. *Id.* bk. II ch. XVII § 1, at 430 ("That fault creates the obligation to make good the loss.").

111. *Id.* bk. II ch. XVII § XX, at 437.

112. *Id.*

113. *Id.*

114. *Id.*

115. See *id.* bk. II ch. XXI § II, at 523.

116. *Id.*

"had also forbidden by laws that friends should be harmed; that they had not been bound by any law to require a bond"117

The principle of *receptus* requires the ruler either to punish or to extradite those who have taken refuge from justice in his realm if he wants to avoid responsibility for their crimes.¹¹⁸ The same duty applies where his subjects commit a crime against a foreign sovereign or subjects.¹¹⁹ Thus, in the privateering example, Grotius considered that the King was required to "punish the offenders as guilty, in case they could be found, or surrender them; [and] in addition [he] should see to it that the property of the freebooters should be rendered liable."¹²⁰

Grotius's thoughts are reflected in the works of a number of other 17th century writers. Only five years after Grotius's death, Richard Zouche, Gentili's successor at Oxford, published his main work on international law under the title *Juris et Judicii Feccialis, Sive Juris inter Gentes et Quaestionum de Eodem Explicatio*.¹²¹ Zouche also regarded state responsibility to be the responsibility of the sovereign. He approved of Grotius's opinion that the prince is not liable for the acts of his servants without fault of his own and cited the Dutch writer's privateering example in support of this view.¹²²

However, he seems to have rejected the aspect of "*receptus*" according to which crimes of refugees from justice are imputed to the sovereign. Zouche cited the example of the Macedonian King Perseus, who gave refuge to murderers of Roman vassals.¹²³ When the Romans charged that the crimes were now imputable to Perseus, he replied that he considered the terms "unfair" but would abide by them if Rome also extradited Macedonian criminals.¹²⁴ According to Zouche, Perseus

117. *Id.* bk. II ch. XVII § XX, at 436.

118. *Id.* bk. II ch. XXI § III, IV, at 526-527.

119. *Id.* bk. II ch. XXI § III, at 526.

120. *Id.* bk. II ch. XVII § XX, at 436.

121. RICHARD ZOUCHE, AN EXPOSITION OF FECCIAL LAW AND PROCEDURE, OR OF LAW BETWEEN NATIONS, AND QUESTIONS CONCERNING THE SAME (J.L. Briery trans., Thomas Erskine Holland ed., Carnegie Institution 1911) (1650).

122. *Id.* § V(1).

123. *Id.* § V(2).

124. *Id.*

exclaimed: "And in heaven's name what avails it that exile should be open to a man, if the exile is nowhere to find a home?"¹²⁵ Perseus expelled the perpetrators nevertheless, though Zouche did not clarify whether that was done due to a sense of legal obligation or purely out of political savvy.¹²⁶ The latter is probable, since Zouche explicitly argued that there is no duty to extradite criminals to the place of the crime, unless a treaty exists.¹²⁷

Samuel Pufendorf was also a professed follower of Grotius. According to Pufendorf, a state could not be held responsible for the acts of its citizens, "for no matter how much a state may threaten, there is always left to the will of citizens the natural liberty to [injure foreign states or nationals]."¹²⁸ Citing Grotius, Pufendorf contended that a state was responsible only in so far as it was culpable of *patientia* or *receptus*.¹²⁹ According to Pufendorf, there is a legal presumption that the state can prevent a private injury "unless its lack [of fault to prevent the injury] be clearly established."¹³⁰ In this regard, his writing differs from Grotius. As will be discussed later, writers of the late 19th century created a similar presumption in order to justify rules of attribution of which neither Grotius nor Pufendorf knew.

By taking into account the changed relationship between individual and state, the radical shift from the medieval system of collective responsibility to a system of fault-based responsibility of the king becomes understandable. The medieval state was a tribal unit, which had single human beings as members. On the contrary, Grotius and his successors were writing at the

125. *Id.*

126. *Id.*

127. *Id.* § V(3).

128. SAMUEL PUFENDORF, 2 DE JURE NATURAE ET GENTIUM LIBRI OCTO [EIGHT BOOKS ON LAW OF NATURE AND OF PEOPLE] 1304 (C.H. Oldfather & W.A. Oldfather trans., Clarendon Press 1934) (1688).

129. *See id.* (meaning "sufferance" or "reception"). Pufendorf's compatriot and contemporary, Johann Wolfgang Textor, also argued that the sovereign incurs responsibility for acts of individuals only through fault of his own. *See* 2 JOHANN WOLFGANG TEXTOR, SYNOPSIS OF THE LAW OF NATIONS 142 (John Pawley Bate trans., Carnegie Institution 1916) (1680) ("If [legates] come to harm . . . by an act of [the King's subjects] which the King could have checked yet allowed to be done, the King is bound to recoup them their loss.").

130. PUFENDORF, *supra* note 128, at 1304.

height of absolutism. All political power in these states was supposed to be vested in the sovereign. The Peace of Westphalia had laid the foundation for the modern territorial state.¹³¹ Yet, king and state were identical—“*l'état c'est moi*” as Louis XIV of France supposedly quipped.¹³² Accordingly, Grotius, who dedicated *De Jure Belli Ac Pacis* to his patron, Louis XIII of France,¹³³ found it easy to conceive of the area of law, which is today the law of state responsibility, as a law between natural persons.

One may ask why the sovereign was not held responsible for all actions occurring in his territory, given that his power was deemed to be absolute. Two reasons account for that. One stems from the continued influence of the *jus gentium*. Writers in the 16th and 17th centuries regularly relied on the Roman sources of *jus gentium* to form their opinions.¹³⁴ However, because these sources were concerned primarily with private law and not with international affairs, these authors quite indiscriminately applied concepts of Roman private law to seemingly analogous international situations.¹³⁵ Grotius was no exception. He applied the Roman legal principle of “*qui in culpa non est, natura ad nihil tenetur*” both to torts between individuals and responsibility between sovereigns.¹³⁶ Whether the subject was a petty criminal or a king was of no relevance to him, and this led him to misrepresent the position of the Roman *jus gentium* on the international level.

Assuming that the sovereign fully controlled his lands and subjects also would have been practically unrealistic. Grotius wrote *De Jure Belli Ac Pacis* in 1623 and 1624, while the Thirty Years' war was raging.¹³⁷ Thus, it comes as no surprise that he finds that kings cannot be expected to control all actions of their mercenary armies abroad. “In truth we could not avoid utilizing the services of wicked men, that otherwise an army cannot be collected,” he reasoned in support of his concept of limited responsibility.¹³⁸ Even after the war, when Zouche and

131. NUSSBAUM, *supra* note 67, at 115.

132. THE OXFORD DICTIONARY OF QUOTATIONS 428 (4th ed. 1992).

133. NUSSBAUM, *supra* note 67, at 105.

134. *See id.* at 13.

135. *Id.* at 12.

136. *See* EAGLETON, *supra* note 13, at 210.

137. NUSSBAUM, *supra* note 67, at 105.

138. GROTIUS, *supra* note 109, bk. II ch. XVII § XX, at 436-37.

Pufendorf were writing, the factual power of the ruler only (and at best) extended to the political realm. In the religious sphere, Martin Luther had freed the human being from the bondages of membership in the universal church and turned him into an individual in front of God.¹³⁹ Calvin's teachings, which legitimized interest-based lending and encouraged profit-oriented activity, laid the foundation for the rise of a middle class and the economic liberation of the individual citizen.¹⁴⁰ Sir Henry Maine has characterized the shift from ancient to modern society as one from *status* as the key legal paradigm to *contract*, from family dependency to individual obligation.¹⁴¹ With this shift members became individuals and the state no longer could be expected to assume full responsibility for these individuals' actions.

Yet, the remnants of the pre-Westphalian international legal order still are detectable. To Grotius, the king was responsible for controlling the actions of his *subjects* and not the actions occurring within his lands. This differs from the current position, which requires a state to control actions in its territory. It is a reflection of the fact that the pre-Westphalian state was a tribal, and not a territorial, unit. Only in the 19th century would these remnants be overcome and the concept of due diligence based on territorial, rather than personal, control emerge.

V. 18TH CENTURY: (RE-) EXPANSION OF STATE RESPONSIBILITY

The 18th and 19th centuries were characterized by a gradual (re-) expansion of state responsibility. The replacement of the king with the state as the subject of international law slowly

139. See Harold J. Berman & John Witte, Jr., *Legal Philosophy in Lutheran Germany*, 62 S. CAL. L. REV. 1573, 1579-92 (1989).

140. For a general discussion of Calvinism's relationship to the development of modern merchant capitalism and the economically productive middle-class subject, see R.H. TAWNEY, *RELIGION AND THE RISE OF CAPITALISM* 102-32 (1948). See also MAX WEBER, *THE PROTESTANT ETHIC AND THE SPIRIT OF CAPITALISM* 99-128 (Talcott Parsons trans., Charles Scribner's Sons 1976). The Calvinist departure from the medieval Catholic prohibition on interest is exemplified in Tawney's work by an unnamed 17th century statement by a British "divine" that Calvin "deals with usurie as the apothecarie doth with poyson." TAWNEY, *id.*, at 106.

141. MAINE, *supra* note 59, at 139-41.

took hold in the writings of the 18th century publicists and allowed them to develop new doctrines of responsibility.

Building on Grotius's writings, Christian Wolff, who wrote his main work, *Jus Gentium Methodo Scientifica Per Tractatum*, in 1749,¹⁴² was one of the writers expanding the doctrines of responsibility. Wolff reiterated the Grotian concept of due diligence. The state ought not to allow any of its subjects to injure foreign nationals.¹⁴³ If an injury nevertheless occurs, the ruler is required to compel the offender to repair the loss or, where a criminal act is concerned, punish the offender.¹⁴⁴

This being said, an action of a single citizen is not itself imputable to the nation because "one citizen and an entire nation are not one and the same person, as is self-evident."¹⁴⁵ One should note that, unlike Grotius, Wolff juxtaposed "citizen" and "nation," rather than "subject" and "king." At the same time, Wolff is the first writer to introduce the doctrines that we today conceive of as doctrines of attribution or imputability. In this way, he managed to overcome the Grotian equation of ruler and nation, not only in his formal choice of words, but also in substance. This seems remarkable given that Wolff has been aptly described as "an apostle of absolutism."¹⁴⁶ Yet, the specific form of state absolutism to which he adhered was the enlightened absolutism represented by the Prussian King Frederick the Great.¹⁴⁷ Whereas absolute monarchism, as pronounced by authors like Jacques-Benigne Bossuet, legitimized the sovereign by the divine will of God,¹⁴⁸ Frederickian absolutism justified the ruler's position as one of a necessary servant to state and people.¹⁴⁹ The majesty of the state stands above that of the ruler. Thus, Wolff was able to conceive of the state as an entity separate from the king. As an

142. 2 CHRISTIAN WOLFF, *JUS GENTIUM METHODO SCIENTIFICA PERTRACTATUM* [ARGUMENT ON SCIENTIFIC METHODOLOGY REGARDING THE PRINCIPLES OF LAW APPLICABLE TO ALL PEOPLE] (Joseph H. Drake trans., William S. Hein & Co. 1995) (1764).

143. *Id.* § 317.

144. *Id.* § 318.

145. *Id.* § 314. *See also id.* § 315.

146. NUSSBAUM, *supra* note 67, at 153.

147. *Id.* at 150-51.

148. JACQUES-BENIGNE BOSSUET, *POLITIQUE TIRÉE DES PROPRES PAROLES DE L'ÉCRITURE SAINTE* [POLITICS DRAWN FROM THE VERY WORDS OF HOLY SCRIPTURE] 46-51 (Patrick Riley ed. & trans., Cambridge Univ. Press 1990) (1709).

149. *See* Berman & Witte, *supra* note 139, at 1598-99, 1604-05.

abstract entity it can and must have organs. The German writer developed the notion of attribution by adoption, which the International Court of Justice applied in the Tehran case:¹⁵⁰ According to Wolff an act is imputed to the ruler of a state—and “consequently . . . to the nation itself”—if the ruler ratifies or approves the act of the individual.¹⁵¹ Wolff also seems to be the first writer to accept that a state could be responsible for the acts of individuals it employs as its agents without there being the need of fault on behalf of the ruler himself:

The acts of a private citizen are not the acts of the nation to which he is subject, since they are not done as by a subject or so far as he is a subject. . . . The situation is different if he acts by order of the ruler of the state, whom he obeys as a superior.¹⁵²

The last sentence of the quoted section could mean that responsibility is assumed because the specific act was done “by order” of the ruler. In that case, one would not deal with a case of agency but with one of responsibility for an intentional act of the ruler himself. However, if that were the case the second half of the sentence would be inexplicable. It is more sensible to assume that Wolff meant that acts are imputable solely because a general order-obedience relationship (i.e., a relation of agency) exists between the ruler and the individual. The latter alternative also corresponds with references to agency in other parts of Wolff’s work. For instance, Wolff argues that promises made by minor authorities in war are binding upon the state if the promise remains “within the limits of [the minor authority’s] mandate, or of the function entrusted to it”¹⁵³

To Wolff’s successor in thought, Emmerich de Vattel, responsibility did not mean obligations between sovereign kings either. In his main work of 1758, *Le Droit de Gens*,¹⁵⁴ he writes: “of the observance of justice between *nations*” [emphasis ad-

150. See *supra* note 34, and accompanying text.

151. 2 WOLFF, *supra* note 142, § 314.

152. *Id.* § 315.

153. *Id.* § 772.

154. EMMERICH DE VATTEL, *THE LAW OF NATIONS* (Joseph Chitty trans., Gaunt 2001) (1758).

ded].¹⁵⁵ Nations he defines—undoubtedly influenced by Hobbes—as “bodies politic, societies of men united together for the purpose of promoting their mutual safety and advantage by the joint efforts of their combined strength.”¹⁵⁶ His writings are still rooted in the *jus gentium*—as the title of his work suggests. According to Vattel, international law originates from the “law of nature.”¹⁵⁷ Unlike Grotius, however, he realized that:

A state or civil society is a subject very different from an individual of the human race; from which circumstance, pursuant to the law of nature itself, there result, in many cases, very different obligations and rights; since the same general rule, applied to two subjects, cannot produce exactly the same decisions, when the subjects are different. . . . There are cases, therefore, in which the law of Nature does not decide between state and state in the same manner as it would between man and man.¹⁵⁸

Nevertheless, he seems unable to detach himself from the basic paradigm stemming from the private branch of the *jus gentium* that assigns responsibility only where there is fault. Unlike Wolff, he states nowhere that actions of officials are attributable to the nation. Instead, his starting point is again the sovereign. Vattel writes that “the sovereign ought not to suffer the citizens to do an injury to the subjects of another state . . . and this, not only because no sovereign ought to permit those who are under his command to violate the precepts of the law of nature.”¹⁵⁹ If he tolerates injurious private action, “he does no less injury to that nation than if he injured it himself.”¹⁶⁰ Vattel clarified:

[A]s it is impossible for the best regulated state, or for the most vigilant and absolute sovereign, to model at his pleasure all the actions of his subjects, and to confine them on every occasion to the most exact obedience, it would be unjust to impute to the

155. *Id.* bk. II ch. IV §§ 63-70, at 160-61.

156. *Id.* prelim. § 1, at liv.

157. *Id.* prelim. § 6, at lvi.

158. *Id.* prelim. § 6, at lvi-lvii.

159. *Id.* bk. II ch. VI § 72, at 162.

160. *Id.*

nation or the sovereign every fault committed by the citizens.¹⁶¹

From Wolff he takes over the concept of attribution by adoption.¹⁶² Vattel forms one new doctrine. A nation is generally responsible for the crimes of its citizens, he argues, “when, by its manners, and by the maxims of its government, it accustoms and authorises its citizens indiscriminately to plunder and maltreat foreigners, to make inroads into the neighbouring countries &c.”¹⁶³ Accordingly, he deems retributive action of all nations against the Uzbek nation and the states of Barbary, which he terms “*ces repaires d’écumeurs*,”¹⁶⁴ as justified. The idea introduced by Vattel still resounds in the ILC’s Draft Articles. Where the Draft Articles hold a state responsible for the actions citizens undertake “in the absence or default of the official authorities,”¹⁶⁵ one is not really dealing with “an agency of necessity” but with a failure to organize the manners and maxims of government appropriately.

Vattel also recognized a principle, stated by Grotius, that requires the sovereign to effect reparation of damages caused by a subject, to punish the offender, or to extradite him.¹⁶⁶ It must be noted in this regard that some legal practitioners of the time, who already grounded their argument in legal positivism, demanded less than an absolute duty to effect reparation. A report of the British Law Officers from 1753 regarded reprisals against unlawful prize taking at sea as only justified “in case of violent injuries, directed or supported by the State, and justice absolutely denied, in *re minime dubio* by all the

161. *Id.* bk. II ch. VI § 73, at 162.

162. *Id.* bk. II ch. VI § 74, at 162 (“But, if a nation or its chief approves and ratifies the act of the individual, it then becomes a public concern; and the injured party is to consider the nation as the real author of the injury, of which the citizen was perhaps only the instrument.”).

163. *Id.* bk. II ch. VI § 78, at 164.

164. EMMERICH DE VATTEL, *LE DROIT DES GENS OU PRINCIPES DE LA LOI NATURELLE* [THE RIGHT OF PEOPLES OR PRINCIPLES OF NATURAL LAW] 313 (Carnegie Institution 1916) (1758).

165. *Draft Articles on State Responsibility*, *supra* note 21, art. 9.

166. VATTEL, *supra* note 154, bk. II ch. VI § 77, at 163. Interestingly enough, Vattel makes reference to the conduct of the Roman Senate in the case of Leptines and King Demetrius, referred to *supra* notes 78-81 and accompanying text. He finds that “the conduct of the Senate was highly unjust, and only worthy of men who sought but a pretext to cover their ambitious enterprises.” VATTEL, *supra* note 154, bk. II ch. VI § 77, at 163.

Tribunals and afterwards by the prince. Where the judges are left free, and give sentence according to their conscience, though it should be erroneous, would be no ground for reprizals."¹⁶⁷

VI. THE 19TH AND EARLY 20TH CENTURIES: THE EMERGENCE OF THE CURRENT SYSTEM

Not until the late 19th and early 20th centuries were the full range of doctrines that are currently conceived of as the law of responsibility for individual acts developed. The law freed itself from historical baggage stemming from Roman and Medieval conceptions. Even though they wrote over 100 years after the Peace of Westphalia, Wolff and Vattel's concept of responsibility still had not shed the old notion of the state as a tribal unit, defined by personal membership, rather than a territorial entity. Vattel regarded the state as responsible only for acts of its citizens and not for those of foreigners operating within its territory.¹⁶⁸ Wolff explicitly stated: "In order that doubt may not arise, on the ground that an observance of the law of nature to be encouraged by the ruler of the state applies only to citizens, but is not to be extended to foreigners . . ."¹⁶⁹

In the 19th century this changed. The British writer Sir Robert Phillimore, who first published his *Commentaries upon International Law* between 1854 and 1861,¹⁷⁰ found that a state has to control not only the actions of its citizens, but also all actions emanating from its territory:

In all cases where the territory of one nation is invaded from the country of another—whether the invading force be composed of the refugees of the country invaded, or of subjects of the other country, or of both—the Government of the invaded country has a right to be satisfied that the country from which

167. *Report of the British Law Officers, on the Rules of Admiralty Jurisdiction, &c. in Time of War*, 20 BRIT. & FOREIGN ST. PAPERS 889, 892-93 (1832-1833). For a discussion of the report's positivist foundation, see RUBIN, *supra* note 6, at 63-64.

168. See the wording used, for instance, in VATTEL, *supra* note 154, bk. II ch. VI § 72, at 162.

169. 2 WOLFF, *supra* note 142, § 317.

170. ROBERT PHILLIMORE, *COMMENTARIES UPON INTERNATIONAL LAW* (T. & J.W. Johnson 1854-1861).

the invasion has come has neither by *sufferance* nor *reception* (*patientia aut receptu*) knowingly aided or abetted it. She must purge herself of both these charges; otherwise . . . the invaded country is warranted in redressing her own wrong¹⁷¹

Phillimore makes reference to Grotius in support of his opinion.¹⁷² Yet, Phillimore's position is really a blend of the Grotian fault-based conception of law and the modern notion of the territorial state. On top of that, he limited the practical relevance of the fault requirement by creating a presumption, which the potentially responsible state has to purge.¹⁷³

Phillimore's compatriot, William Edward Hall, took a similar position: "Prima facie a state is of course responsible for all acts or omissions taking place within its territory by which another state or the subjects of the latter are injuriously affected."¹⁷⁴ However, the state can escape responsibility by showing that it acted without fault (i.e., without intent or negligence) or that there exists no causal link between its negligence and the injury.¹⁷⁵ While Hall did not manage to extricate himself from the old *jus gentium* requirement of fault, he nevertheless created doctrines of agency and attribution. To achieve this result he used a legal fiction: The state is responsible for the acts of its administrative officials and its naval and military commanders. Because these persons carry out state policy as well as government orders and act under the immediate and disciplinary control of the executive, their acts are presumed to be sanctioned by the state.¹⁷⁶ The agents' actions are attributed to the state until the latter has disavowed them and, where necessary, punished the offenders.¹⁷⁷ In any case, the government has to make reparation for injuries incurred prior to the disavowal.¹⁷⁸

171. ROBERT PHILLIMORE, 1 COMMENTARIES UPON INTERNATIONAL LAW 316-17 (3d. ed., Butterworths 1879).

172. *Id.* at 318-19.

173. *Id.* at 317.

174. WILLIAM EDWARD HALL, A TREATISE ON INTERNATIONAL LAW § 65, at 193 (2d ed. 1884).

175. *Id.* § 65, at 193-94.

176. *Id.* § 65, at 194.

177. *Id.*

178. *Id.*

Hall acknowledged that his fiction of avowal does not really fit as far as judicial officials are concerned, since judges enjoy a large degree of freedom from executive control.¹⁷⁹ While the state can therefore not be expected to stop the injury, it is nevertheless under a secondary obligation to give compensation.¹⁸⁰ Hall could not elucidate why there should be compensation even though the necessary element of fault is lacking. With regard to private persons outside of the state machinery, his reasoning is again on firm ground. The state becomes responsible only if it fails to prevent, repress, or punish injurious acts of private persons (not only citizens!) within its territory.¹⁸¹ Conversely, the state exercises due diligence if it "honestly gives so much care as may seem to an average intelligence to be proportional to the state of things existing at the time."¹⁸²

Lassa Oppenheim's concept of state responsibility resembled Hall's in many respects. Oppenheim, whose treatise on international law was first published 1905-06,¹⁸³ also seemed to be unable to detach himself from the leftovers of the absolutist legal order of kings. He contended that state responsibility necessitates fault in the form of intent or negligence.¹⁸⁴ Oppenheim distinguished between original and vicarious responsibility. The former, which gives rise to "international delinquency," is incurred for a state's own actions, i.e., acts of members of the government and acts of lower agents or private individuals at the command or authorization of the government.¹⁸⁵ In so far as lower agents or private individuals are concerned, it is presumably the command (or authorization), rather than the act itself, which gives rise to state responsibility. This would befit Oppenheim's contention that acts of

179. *Id.* § 65, at 194-95.

180. *Id.*

181. *Id.* § 65, at 195.

182. *Id.* § 65, at 196.

183. See Nussbaum, *supra* note 67, at 247.

184. LASSA OPPENHEIM, INTERNATIONAL LAW § 154, at 212 (2d ed. 1912). Interestingly, Oppenheim considers an act of right or self-defence to be one without fault. See *id.* Articles 20-27 of the Draft Articles on State Responsibility deal with such cases under the category of "circumstances precluding wrongfulness," since they do not require fault. *Draft Articles on State Responsibility*, *supra* note 21, arts. 20-27.

185. OPPENHEIM, *supra* note 184, §§ 149-50, at 207-09. We would today refer to the said individuals as *de facto* agents.

lower agents do not cause original responsibility of the state if these are acting outside their authority (i.e., *ultra vires*).¹⁸⁶ Likewise, acts of government members do not cause original responsibility if they act only in their private capacity. As far as "original responsibility" is concerned, Oppenheim's position mirrored the Grotian one, except that the king was now replaced by "government members acting in [their official] capacity."¹⁸⁷

Yet, Oppenheim went beyond Grotius by creating the new category of vicarious responsibility. Vicarious responsibility is the new branch Oppenheim grafted onto the historic stem of responsibility. It replaces Grotius's *patientia* and *receptus*. Oppenheim faced great difficulties in his attempt to effectively create a system of attribution, while purporting to retain the concept of fault. Under the principle of vicarious responsibility the state may be held responsible for certain acts of its "agents . . . subjects, and . . . of such aliens as are for the time living within [its] territory."¹⁸⁸ The state is vicariously responsible for all acts of its officials and soldiers, because they are under its disciplinary control and their acts are thus *prima facie* acts of state.¹⁸⁹ The state has to "disown and disapprove" of such acts by "expressing its regret or even apologizing" to the injured state and even then it has to pay damages.¹⁹⁰ Thus, Oppenheim also employs the legal fiction of *culpa in vigilando*: The state is deemed to have culpably failed to exercise its disciplinary power if one of its organs steps out of line. Consequently, he is in the same predicament as Hall as far as judicial decisions are concerned. Oppenheim can only contend that "in case of such denial or undue delay of justice by the Courts as is internationally injurious, a State must find means to exercise compulsion against such Courts. And the same is valid with regard to an obvious and malicious act of misapplication of the law" ¹⁹¹ With regard to other miscarriages of justice, he has to say that "matters become so complicated that there is hardly a peaceable way in which the injured State can

186. *Id.* § 153, at 211.

187. *Id.*

188. *Id.* § 149, at 208.

189. *Id.* § 163, at 218.

190. *Id.*

191. *Id.* § 162, at 217.

successfully obtain reparation . . . unless the other party consents to bring the case before a Court of Arbitration.”¹⁹²

His argument with regard to private acts of heads of state is also weak. Oppenheim reasoned that heads of state are not subject to the jurisdiction of municipal courts or any other kind of disciplinary control.¹⁹³ At the same time, only states have obligations under international law. Thus, an injured state cannot hold a head of state personally responsible under municipal nor international law. This “makes it a necessity for the Law of Nations to claim a certain vicarious responsibility from States for internationally injurious acts committed by their heads in private life.”¹⁹⁴ His argument is similar with regard to vicarious responsibility for the private acts of diplomats, whose immunity shields them from municipal procedures.¹⁹⁵ With regard to acts of private persons, Oppenheim restates the usual due diligence principle (prevent where possible, punish, compel to pay damages).¹⁹⁶

It comes as a surprise that Hall and Oppenheim purported to retain the concepts of fault and the related concept of excluding *ultra vires* acts from responsibility, while they went to great lengths to create objective state responsibility. As stated earlier, the concept of fault is based on two premises Grotius made.¹⁹⁷ First, Grotius viewed responsibility as the responsibility among kings. Second, since kings were natural persons Grotius applied the *jus gentium* requirement of fault to them.

When Hall and Oppenheim were writing, the absolutist ideology that led Grotius to equate state and king was long overcome. Henry Wheaton, as an American untainted by absolutist European ideas, had made it clear that “the peculiar objects of international law are those direct relations which exist between nations and states.”¹⁹⁸ References to kings and princes used by earlier writers he explains as mere figures of speech:

192. *Id.*

193. *Id.* § 158, at 215.

194. *Id.*

195. *Id.* § 160, at 215-16.

196. *Id.* §§ 164-66, at 221-22.

197. See discussion of Grotius, *supra* notes 109-136 and accompanying text.

198. HENRY WHEATON, ELEMENTS OF INTERNATIONAL LAW § 19, at 26-27 (George Grafton Wilson ed., William S. Hein & Co. 1995) (2d ed. 1866).

Wherever, indeed, the absolute or unlimited monarchical form of government prevails in any State, the person of the prince is necessarily identified with the State itself: L'Etat c'est moi. Hence the public jurists frequently use the terms sovereign and State as synonymous. So also the term sovereign is sometimes used in a metaphorical sense merely to denote a State, whatever may be the form of its government, whether monarchical, or republican, or mixed.¹⁹⁹

Oppenheim's work, written when his home country's monarch already had lost most of its power, reflects this shift away from Grotius's first premise. Original responsibility cannot only be incurred through acts of the head of state, but also through acts of each member of government.

However, he is still unable to depart from Grotius's other basic premise. Oppenheim still clings to the fault requirement, which Grotius claimed to have derived from the *jus gentium*, even though the respect for this source of law had steadily declined from the 17th century onwards. As early as 1612, Suarez had redefined the meaning of the *jus gentium*.²⁰⁰ Suarez argued that the private law part of the *jus gentium*, which states observe within their borders, be called "civil law," while the term *jus gentium* should refer to an international legal order derived from custom and not natural reason.²⁰¹ While Suarez's critique was mostly disregarded by his successors,²⁰² the attack Joseph Story levelled against the *jus gentium* in his *Commentaries on the Conflict of Laws* (1834) was influential.²⁰³ To justify the formulation of non-substantive rules today known as private international law, Story demolished the

199. *Id.* Notably, the section is not contained in the first edition of his work. See HENRY WHEATON, *ELEMENTS OF INTERNATIONAL LAW* § 1, at 51 (Carey, Lea & Blanchard 1836), where Wheaton merely states: "The subjects of international law are separate political societies of men living independently of each other, and especially those called sovereign states."

200. See RUBIN, *supra* note 6, at 50-51 (quoting and analyzing FRANCISCO SUAREZ, *DE LEGIBUS, AC DEO LEGISLATORE* [ABOUT LAW AND GOD AS A LEGISLATOR] bk. II ch. XIX paras. 2, 6, 8, bk. II ch. XX, para. 1 (G.I. Williams et al. trans., Carnegie Endowment 1944) (1612).

201. *Id.*

202. See RUBIN, *supra* note 6, at 51-52 (noting that 17th century scholars generally preferred the theory of "objective" natural law).

203. JOSEPH STORY, *COMMENTARIES ON THE CONFLICT OF LAWS* ¶ 26 (Arno Press 1972) (1834). See also RUBIN, *supra* note 6, at 134.

idea that the *jus gentium* could provide transnational, substantive rules of law.²⁰⁴ Of course, natural law and *jus gentium* did not cease to exist in legal thought.²⁰⁵ Hall was a naturalist after all. Still, one may think that a professed positivist like Oppenheim²⁰⁶ would feel obliged to cling to a *jus gentium* doctrine even if it brought about the need to operate with unwieldy legal fictions. Later writers would take even windier argumentative routes to reconcile the principle of fault with the desired result of objective responsibility for all acts of agents. Hatschek, for instance, conjures a *culpa in eligendo* to expand the ambit of responsibility: Even where agents act *ultra vires*, the state is at fault when it is careless enough to choose as organs those who would injure foreign states or nationals.²⁰⁷

Oppenheim's German contemporary, Heinrich Triepel, was the first to clearly break with Grotius.²⁰⁸ Triepel was a positivist.²⁰⁹ Though he showed some interest in borrowing from Roman law concepts,²¹⁰ he resisted doctrines of the *jus gentium* such as the notion that there exist international crimes based on natural law.²¹¹ Triepel restated pre-existing legal doctrine in so far as he contends that the state is responsible where it fails to exercise due diligence.²¹² However, he broke new ground with respect to attribution by way of agency. To him the state was responsible for all actions of organs it vested with public tasks, regardless of whether they acted *intra* or *ultra vires*.²¹³ Rather than tackling the traditional doctrine, Triepel conceded that "juristically" *ultra vires* acts are not acts of state. He defended this position simply by pointing to state practice

204. STORY, *supra* note 203, ¶ 26; RUBIN, *supra* note 6, at 134-35.

205. See RUBIN, *supra* note 6, at 136, 138-49.

206. See OPPENHEIM, *supra* note 184, §§ 15-18, at 20-25.

207. JULIUS HATSCHKEK, VÖLKERRECHT: ALS SYSTEM RECHTLICH BEDEUTSAMER STAATSAKTE [PUBLIC INTERNATIONAL LAW: AS A SYSTEM OF LEGALLY RELEVANT STATE ACTS] 386 (1923).

208. See HEINRICH TRIEPEL, DROIT INTERNATIONAL ET DROIT INTERNE [INTERNATIONAL LAW AND MUNICIPAL LAW] ch. I § 3, at 27-61 (René Brunet trans., 1920). See also EAGLETON, *supra* note 13, at 211.

209. TRIEPEL, *supra* note 208, ch. I § 3, at 27-61.

210. *Id.* ch. I § 8, at 210-13.

211. *Id.* ch. I § 3, at 326-27.

212. *Id.* ch. I § 13, at 331.

213. *Id.* ch. I § 13, at 345-46.

and the practical need for security in international relations.²¹⁴

Substantively, Anzillotti—also a staunch positivist—took the same position as Triepel, but he addressed the doctrinal problems with greater care and vigour. It is his work that forms the spine of the reports his compatriot, Roberto Ago, eventually submitted to the ILC.²¹⁵ According to Anzillotti, the state is responsible solely because it has acted contrary to objective law.²¹⁶ He rejects the requirement of fault, which the Italian jurist correctly identified as being rooted in the *jus gentium*.²¹⁷ The abstract entity of the state cannot formulate a will and thus it could only incur fault through its officials.²¹⁸ Thereby, the weakness of the legal fictions of *culpa in eligendo* and *culpa in vigilando* become obvious. The highest functionaries of government are not nominated to their positions by other officials, nor are they subject to control by other officials.²¹⁹ Moreover, Anzillotti points out that generalized systems of recruiting public officials render the idea that there was fault in recruiting the official an awkward legal fiction.²²⁰

Anzillotti reasoned that the state is responsible for all acts of its agents, because it had issued a legal guarantee that other states would not be injured by acts emanating from its sphere of activity.²²¹ This guarantee applies regardless of whether the agent's acts exceed his powers, as long as he acts in his official role. Not only does this save third states from the arduous task of ascertaining which acts were *intra vires* and which were not;

214. *Id.* ch. I § 13, at 346.

215. For a detailed analysis of Anzillotti's contribution to the law of state responsibility and his influence on the Ago reports see Pierre-Marie Dupuy, *Dionisio Anzillotti and the Law of International Responsibility of States*, 3 *EURO. J. INT'L L. [E.J.I.L.]* 139, 143 (1992).

216. Anzillotti, *supra* note 16, at 14.

217. Regarding the fault theory, Anzillotti says: "Une opinion fort répandue, et qui certainement ses racines dans l'influence exercée jadis par le droit romain sur la science du droit des gens" ["A widely held opinion, and one which certainly has its roots in the former influence of Roman law on the science of the law of nations"]. *Id.* at 287.

218. *Id.*

219. *Id.*

220. *Id.*

221. *Id.* at 290.

international law also avoids prescribing how a state is to set up its internal system and control its agents.²²²

Following Anzillotti's seminal work, only one currently advocated doctrine developed: the idea that the state is responsible for actions of successful revolutionary movements.²²³ It has been pointed out that this doctrine is at odds with general concepts of state responsibility.²²⁴ Accordingly, the revelation that this doctrine is not grounded in the writings of distinguished publicists but was developed by the case law of arbitral tribunals and diplomatic practice comes as no surprise. It remains to be seen whether, in the context of Western colonialism and economic imperialism, the doctrine reached its peak during this period. The law of state responsibility was extended because Western governments vigorously asserted diplomatic protection, backed up by military power, for transnational business operations penetrating Asia, Africa, and Latin America at the time.²²⁵

Hall and Oppenheim both consider state responsibility in the face of activity by revolutionary movements, but neither holds states governed by successful revolutionaries responsible for the revolutionary movement's prior acts. According to Hall, a state is not responsible for injuries foreign nationals incur from rioters, mobs, or revolutionary movements.²²⁶ In these situations, foreigners enter the state at their own risk because a government cannot control such actors. Responsibility only ensues if "it can be shown that a state is not reasonably well ordered."²²⁷ Moreover, Hall argues, citizens are not indemnified for injuries suffered from civil commotions and the state is not bound to do more for foreigners than for its subjects.²²⁸ He does not distinguish between successful and failed revolutionary movements. Oppenheim takes the same position (though he adds that a state has the duty to punish the rioters and must compel them to pay damages, where possi-

222. *Id.* at 289.

223. BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW*, *supra* note 8, at 457.

224. *Id.* at 436-41, 449-57.

225. HENRY J. STEINER ET AL., *TRANSNATIONAL LEGAL PROBLEMS* 338 (4th ed., 1994) (1968).

226. HALL, *supra* note 174, § 65, at 198-99.

227. *Id.* § 65, at 199.

228. *Id.*

ble).²²⁹ In 1900, the Institute of International Law proposed to extend the law by way of treaty.²³⁰ A state was supposed to assume responsibility for injuries incurred during a riot, an insurrection, or a civil war if these acts were specifically directed against foreigners or were a breach of the laws of war.²³¹ However, the injured state was barred from holding the state responsible for acts of insurrectionary movements as long as it recognized the latter as a belligerent.²³² The proposed rules did not hold the state responsible for acts of successful revolutionary movements.²³³

Instead, this principle was mentioned in some official exchanges at the end of the 19th century.²³⁴ It was authoritatively developed by a series of arbitrations, which involved European and U.S. nationals who had incurred losses during the Venezuelan revolutions of the 1890s. The *French Company of Venezuelan Railroads Case*,²³⁵ which the French-Venezuelan Claims Commission decided in 1905, concerned *inter alia* losses the Company incurred when revolutionary activity hampered its railroad construction activity.²³⁶ The umpire held that the respondent was responsible for the acts of a revolutionary movement since the revolution was successful without giving reasons or citing authority for his opinion.²³⁷ Two years earlier, the American-Venezuelan Commission confirmed the "well-established rule of international law" arguing that the revolutionaries' acts "are to be regarded as the acts of a *de facto*

229. OPPENHEIM, *supra* note 184, § 167, at 222-24.

230. *See id.* § 167, at 224-225 (quoting the proposed règlement).

231. *Id.*

232. *Id.*

233. *Id.*

234. *See* Letter from Mr. Harding et al. (Oct. 21, 1861), in 2 INTERNATIONAL LAW OPINIONS 254-55 (Arnold Duncan McNair ed., 1956); Letter from William Atherton et al. (July 12, 1863) in *id.*, at 255-56; Letter from Mr. Phillimore (Feb. 16, 1863) in *id.*, at 256-57. In the quoted diplomatic exchange, which took place during the U.S. Civil War, British and U.S. officials agreed that the Confederates succeeded in creating a separate state, the said state would assume responsibility for the acts of the Confederate army. For references to other diplomatic exchanges see EAGLETON, *supra* note 13, at 147-48 n. 67.

235. French Company of Venezuelan Railroads, 10 R.I.A.A. 285 (Fr.-Venez. Mixed Cl. Comm'n 1905).

236. *Id.* at 288.

237. *Id.* at 354.

government."²³⁸ A third case, decided a year later, referred as authority only to a judgement of the U.S. Supreme Court (*Williams v. Bruffy*), which held that governmental acts of a successful revolutionary movements are valid.²³⁹ Subsequently, the principle was taken up by arbitral tribunals and publicists²⁴⁰ and has crystallized into a rule of positive law.

VII. CONCLUSION: WHERE IS THE LAW OF STATE RESPONSIBILITY HEADING?

The history of the law of state responsibility is a dynamic one. It reflects how human beings conceived their community and the community of others. The ancient and medieval collective was replaced by the absolute ruler, which then had to give way to the modern constitutional state. The law of state responsibility always adapted more or less swiftly to each momentous change in the nature of the state and its relations with its members.

Bearing this historical dynamism in mind, one has to ask where the law of state responsibility will go in the years to come. After all, we might be currently witnessing another momentous shift in the international order as well as in the relation between state and individual. Mathews has forcefully argued that the end of the Cold War not only shifted the balance of power between states but had wider repercussions on the Westphalian order—an order which designated the state to be the primary source of power in international politics and law.²⁴¹ She depicts the recent power shift as a medievalization of international relations. The Westphalian order, consisting of only one layer of states, is replaced increasingly by a multi-layered system similar to the feudalist medieval European em-

238. Dix Case, 9 R.I.A.A. 119, 120 (U.S.-Venez. Mixed Cl. Comm'n 1903).

239. Bolivar Railway Company, 9 R.I.A.A. 445, 453 (Gr. Brit.-Venez. Mixed Cl. Comm'n 1903). The Commission's decision refers to *Williams v. Bruffy*, 96 U.S. 176 (1877). See also *Underhill v. Hernandez*, 168 U.S. 250, 253 (1897).

240. Puerto Cabello and Valencia Railway Company, 9 R.I.A.A. 510, 513 (Gr. Brit.-Venez. Mixed Cl. Comm'n 1903); *Pinson v. United Mexican States*, 5 R.I.A.A. 327, 353 (Fr.-Mex. Cl. Comm'n 1928); EAGLETON, *supra* note 13, at 147; *Conference for the Codification of International Law*, League of Nations Doc. C.75 M.69 1929 V (1929), reprinted in 1 Y.B. Int'l L. Comm'n 223, U.N. Doc. A/CN.4/SER.A/1956/Add.1.

241. Jessica T. Mathews, *Power Shift*, 76.1 FOR. AFF. 50, 50 (1997).

pires, in which power was distributed between various layers of noblemen with the emperor having only partial control over his lands.²⁴² Today, states more and more share their power with international organizations but even more importantly with non-state or transnational, sub-state actors. Multinational corporations, strengthened by free trade and privatization, achieve annual turnovers that dwarf the gross domestic product of developing countries and can wield enormous economic power. Transnational networks of NGOs force countries to adopt new rules of international law such as those embodied in the Ottawa Treaty against landmines. The Republic of Vanuatu even decided to turn its entire representation at international conferences over to an NGO with expertise in international law.²⁴³ Armed non-state groups also take advantage of the opportunity to control territory that is left unprotected by weak states and then seek to expand their power even further.

As one could expect with regard to its history, the law of state responsibility is beginning to react to this power shift. In a 1999 judgement, the Appeals Chamber of the International Criminal Tribunal for Yugoslavia (ICTY) concerned itself with a question of state responsibility.²⁴⁴ In order to determine whether Tadic had committed war crimes against civilians protected by the Geneva Convention IV of 1949,²⁴⁵ the Tribunal had to determine whether an international conflict existed in Bosnia after the Yugoslav national army formally withdrew from the armed conflict in May 1992. This would be the case only if the Army of the Republic of Srpska could be regarded as a *de facto* agent of the Federal Republic of Yugoslavia (FRY).²⁴⁶ In principle, the Court affirmed the “effective control” principle of the Nicaragua case.²⁴⁷ But it felt compelled

242. *Id.* at 61.

243. *Id.* at 55.

244. Prosecutor v. Tadic, IT-94-I-A, paras. 80-162 (Int’l Crim. Trib. for the Fmr. Yugoslavia, Appeals Chamber, July 15, 1999), available at <http://www.un.org/icty/tadic/appeal/judgement/tad-aj990715e.pdf>.

245. Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Geneva Convention IV].

246. Prosecutor v. Tadic, IT-94-I-A, para. 87 (Int’l Crim. Trib. for the Fmr. Yugoslavia, Appeals Chamber, July 15, 1999), available at <http://www.un.org/icty/tadic/appeal/judgement/tad-aj990715e.pdf>.

247. *Id.* at paras. 100-45.

to alter the test in one important aspect. In the *Nicaragua Case*, the ICJ held that actions of the Contras were attributable to the United States only if the individual members of the Contra group were given specific instructions by the United States.²⁴⁸ Conversely, the ICTY held that specific instructions were not necessary. If a state has overall control over an organized and hierarchically structured group, then all acts of its members are attributable to the state when there is specific control of the individual and when the individual acts contrary to specific instructions.²⁴⁹ The Court's political rationale is sound. Where non-state actors assume traditional state functions, one must ensure that states cannot avoid state responsibility by simply replacing *de jure* with *de facto* agents.

Nevertheless, the judgement has been subjected to ample criticism. Judge Shahabuddeen, a former ICJ judge, who presided over the Appeals Chamber in Tadic, disagreed with the opinion and dissented.²⁵⁰ He argued that the Court did not have to determine whether Yugoslavia effectively controlled the perpetrators.²⁵¹ The Court only had to determine whether there was an international conflict.²⁵² This would be the case if the Army of the Republic of Srpska was a *de facto* agent of the FRY.²⁵³ Whether Yugoslavia was responsible for the acts of individual perpetrators was irrelevant for the purposes of the case at hand.²⁵⁴ In this regard, Shahabuddeen nevertheless noted *per dictum* that Yugoslavia might have a duty to exercise due diligence and must therefore prevent members of its *de facto* agent from certain actions.²⁵⁵ However, ultimately he did

248. Military and Paramilitary Activities (Nicar. vs. U.S.), 1986 I.C.J. 14, 64-65 (June 27); see also *id.* at 188-89 (Separate Opinion of Judge Ago).

249. Prosecutor v. Tadic, IT-94-1-A, para. 120 (Int'l Crim. Trib. for the Fmr. Yugoslavia, Appeals Chamber, July 15, 1999), available at <http://www.un.org/icty/tadic/appeal/judgement/tad-aj990715e.pdf>.

250. *Id.* paras. 4-32 (Separate Opinion of Judge Shahabuddeen).

251. *Id.* paras. 16, 18 (Separate Opinion of Judge Shahabuddeen).

252. *Id.* para. 18 (Separate Opinion of Judge Shahabuddeen).

253. *Id.* para. 7 (Separate Opinion of Judge Shahabuddeen).

254. See *id.* para. 18 (Separate Opinion of Judge Shahabuddeen).

255. *Id.* para. 20 (Separate Opinion of Judge Shahabuddeen).

not say anything with regard to the issue.²⁵⁶ The Commentary to the 2001 Draft Articles also criticizes the Tadic decision.²⁵⁷

However, recent state practice supports the Tadic jurisprudence. The international community has accepted the legality of the U.S. military action not only against Al-Qaeda but also against the Taliban regime in Afghanistan as a legal act of self-defence pursuant to art. 51 of the U.N. Charter.²⁵⁸ This implies that the Afghan *de facto* regime was held responsible for the acts of the non-state actor. No state may knowingly allow its territory to be used to injure other states because it is assumed that it has effective control over the non-state actors operating within its territory.²⁵⁹ This principle makes it possible to hold the Taliban responsible for actions of the Al-Qaeda organization, which had its main base within the Taliban's realm of control.²⁶⁰ However, a terrorist cell, whose members were operating outside of Afghan territory, carried out the attacks of September 11, 2001. The Taliban were unable to control the individuals that eventually carried out the attacks. That the Taliban were nevertheless held responsible confirms

256. *Id.*

257. *Draft Articles on State Responsibility*, *supra* note 21, art. 8 comment. 5; *cf.* Shabtai Rosenne, *The Perplexities of Modern International Law*, in 291 RECUEIL DES COURS 9, 127-28 (2001) (implicitly criticizing this decision).

258. *See* G.A. Res. 56/220, U.N. GAOR, 56th Sess., 91st mtg., U.N. Doc. A/RES/56/220 A-B (2001) (reaffirming the condemnation of the use of Afghan territory for terrorist activities); G.A. Res. 56/1, U.N. GAOR, 56th Sess., 1st mtg., Agenda Item 8, U.N. Doc. A/RES/56/1 (2001) (stressing that "those responsible for aiding, supporting or harbouring the perpetrators, organizers and sponsors of such acts will be held accountable"); S.C. Res. 1378, U.N. SCOR, 56th Sess., 4415th mtg., U.N. Doc. S/RES/1378 (2001) (supporting international efforts to root out terrorism, and condemning the Taliban "for allowing Afghanistan to be used as a base for Al-Quaida [sic]"); S.C. Res. 1373, U.N. SCOR, 56th Sess., 4385th mtg., U.N. Doc. S/RES/1373 (2001) ("Reaffirming the inherent right of individual or collective self-defence Reaffirming the need to combat by all means, in accordance with the Charter of the United Nations, threats to international peace and security caused by terrorist acts Reaffirming the principle . . . that every State has the duty to refrain from organizing, instigating, assisting or participating in terrorist acts in another State or acquiescing in organized activities within its territory directed towards the commission of such acts").

259. *Corfu Channel (U.K. v. Alb.)*, 1949 I.C.J. 4, 22 (April 9).

260. Some have questioned whether the Taliban actually had effective control over the Al-Qaeda organization. *See, e.g.*, Marc A. Drumble, *Victimhood in Our Neighborhood: Terrorist Crime, Taliban Guilt, and the Asymmetries of the International Legal Order*, 81 N.C.L. REV. 1, 36 (2002).

the holding in *Tadic*: State control over an organized and hierarchical group suffices to attribute actions of individual unit members to the state even where the state does not have control over such individuals.

The question looming behind all this is whether changing the details of state responsibility will suffice or whether another paradigm shift is necessary in the event that the current trend towards shifting power away from the state intensifies. The law cannot indefinitely set off the relocation of functions to the non-state sector by burdening weak states with increased duties of due diligence and an ever-increasing ambit of state responsibility. Currently, much stock is placed in developing the international duties of individuals through international criminal law. Yet, it seems that organized non-state entities and not individuals are the ones accumulating power. It is doubtful whether singling out members of such entities and threatening them with criminal responsibility will be a successful strategy for controlling the entities themselves. Perhaps international law will have to develop more direct obligations resting on non-state entities. This paradigm shift is less novel or dramatic than it may seem since such obligations already exist in international humanitarian law²⁶¹ and in international maritime law.²⁶² It is worth noting that the most startling and horrifying display of power by a non-state actor, the attacks of September 11, 2001, has caused states to attempt to regain power. It remains to be seen whether this attempt will be successful. If it is not, one must consider adapting the law of responsibility by changing its paradigms yet another time. As has been shown, there are plenty of historical examples for such paradigm shifts.

261. See, e.g., Geneva Convention IV, *supra* note 245, art. 3; see also G.A. Res. 263, U.N. GAOR, 54th Sess., Annex I, at 16, U.N. Doc. A/RES/54/263 (2001).

262. See International Convention on Civil Liability for Oil Pollution Damage, Nov. 29, 1969, 970 U.N.T.S. 3, 9 I.L.M. 45 (1970).