

# Individual and Collective Moral Responsibility for Systemic Military Atrocity\*

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THERE are two kinds of killing in war: intended and unintended. Soldiers intend to, and may under the laws of war, kill those who pose a threat to them. Soldiers may not intentionally kill innocents. Indeed, soldiers ought to try, as much as they can, to avoid even accidentally killing non-combatants. Thus, perhaps as much as soldiers are trained to kill they are taught to avoid unnecessary killing of innocents. Limited, unintended killing of non-combatants (collateral damage) may be excused in the just war tradition and by the laws of armed combat if those deaths were the result of “necessary” military operations and efforts were taken to avoid unnecessary killing.

Intentionally killing non-combatants is considered an atrocity for which actors are morally responsible and legally culpable. When an atrocity is planned it is genocide, ethnic cleansing or terror bombing. Moral responsibility here belongs with individual perpetrators and commanders. Sometimes atrocities are isolated and limited, the act of an individual or a small group of soldiers who “lose it.” In the early morning of 19 November 2005 a twenty-year-old marine, Lance Corporal Miguel Terrazas, was killed by a roadside bomb in Haditha, Iraq. In response, US marines killed 24 Iraqi civilians, including children aged 14, 10, 5, 4, 3 and 1 over several hours as members of a thirteen-man unit, the 1st Squad of Marine Company K, Third Battalion Marines attacked and killed people in three houses and a taxi carrying four college students.<sup>1</sup> Here, moral responsibility clearly belongs to individual perpetrators. “Only a man with a gun to his head is not responsible.”<sup>2</sup>

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<sup>1</sup>Ellen Knickmeyer, “In Haditha, Memories of a Massacre,” *The Washington Post*, May 27, 2006, p. A1.

<sup>2</sup>Michael Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations* (New York: Basic Books, 1977), p. 314.

Some unintended killing is the foreseeable consequence of a pre-existing social structure — tactics, the choice of weapons, deeper attitudes of indifference, or the kind of war being waged. On 28 November 2006, United States soldiers found a roadside bomb in the Hamaniyah neighborhood of Ramadi, Iraq. The US soldiers observed “two insurgents” moving away from the bomb’s trigger site where they “took up positions on the roof of a house and observed the coalition forces clearing the explosive device.” The Pentagon described the incident this way:

As coalition forces cleared the bomb, the insurgents engaged the security element with small-arms fire. After establishing positive identification, coalition forces returned fire with small-arms and machine-gun fire. As the insurgents continued to engage the patrol, coalition forces returned fire with main-tank-gun rounds.

Coalition forces conducted an extensive search of the house and found one boy and five girls, ages ranging from infant to teenaged, dead. One woman injured at the scene refused treatment. According to local residents, the house was a known insurgent safe house. Officials believe one of the insurgents was wounded and other insurgents came to remove him from the scene.

“In a very tragic way, today reminds us that insurgents’ actions throughout Iraq are felt by all,” coalition spokesman Marine Lt. Col. Bryan Salas said. “Efforts are under way to coordinate and offer available assistance to surviving family members.”<sup>3</sup>

The five dead girls ranged in age from six months to ten years old.<sup>4</sup> US soldiers intended to kill the “insurgents” but did not intend to kill the children. The rules of engagement allowed soldiers to fire tank rounds into a civilian building in response to small arms fire. But does that mean that no one is morally responsible for the death of the girls?

I call these foreseeable and preventable killings of non-combatants “systemic” atrocities. How shall we understand moral responsibility for systemic atrocity? An account of moral responsibility for systemic atrocity that puts the onus on individuals is too thin. It abstracts soldiers from their situation. But who should be called to account in those cases? And, in the case of isolated and yet deliberate killing of civilians, is it merely the perpetrators and perhaps their commanders who should be blamed? Is the distinction between intended and unintended killing in war, and the moral responsibility we assign in each case, always so clear?<sup>5</sup>

This article makes two contributions and illustrates them with the case of US atrocities in Iraq. First, I introduce the concept of systemic atrocity. While some

<sup>3</sup>Armed Forces Press Service, “Coalition, Iraqi Forces Detain Terrorists; Iraqis killed in IED Attack,” *Armed Forces Information Service*, November 29, 2006; available at <http://www.defenselink.mil/news/NewsArticle.aspx?ID=2247> (accessed January 22, 2007).

<sup>4</sup>*Ibid.*

<sup>5</sup>I restrict my discussion to cases of atrocity and potential war crimes in combat situations. Systemic atrocity can occur in wars we consider either just or unjust.

might want to restrict the concept of military atrocity to intentional acts of deliberately targeting civilians in war, atrocity may be the unintentional albeit foreseeable consequence of policies and practices that are set by collective actors. In this sense, I am arguing that we ought to raise the moral bar of the doctrine of double effect where actions are considered morally excusable if the harm was unintended and not disproportionate.

Second, in describing collective moral responsibility, I distinguish organizational, state and public political levels of collective moral responsibility in terms of the roles of each collective. The identification of collective moral responsibility results from attending to the effects of social structure. It is important to recognize that moral responsibility is potentially found in individuals and collectives because our sense of the praise or blameworthiness of individual actions will depend on how we understand the moral context (and the moral structure) within which individuals act, and which is powerfully shaped by a social context that includes collectives. Further, the appropriate response to atrocity — whether we jail the perpetrator, make reparations, or make some other response such as changing the rules of engagement or the types of weapons that soldiers are issued — depends on how we understand moral responsibility. Moreover, how we act to prevent atrocities depends on our understanding of moral responsibility and the causes of atrocity.

## I. SYSTEMIC ATROCITY AND MORAL RESPONSIBILITY

Killing civilians may be a foreseeable, if unintentional, result of a military or political choice that was out of the hands of the individual “perpetrator.” For example, a civilian caravan leaving a village may be destroyed by gravity bombs because pilots were told to restrict their over-flight and bombings to such a high altitude that the ability to distinguish between combatants and non-combatants, or the accuracy of the weapons, was necessarily compromised. In fact, the political-military choice to bomb from high altitudes may lead to many such incidents. There was no conspiracy to kill civilians; in this case the atrocity was systemic — caused by structural forces, prior policy choices and institutional constraints. While individual moral agency exists, it cannot be understood outside the institutional contexts within which individuals act.

Systemic atrocities are thus both unintended and tragic. Tragically, actors have created effects opposite their intentions (*peripeteia*), not because of a fatal flaw in their individual character, such as hubris, but as a result of a social structure, for example, rules of engagement, which have compromised individual knowledge and agency. The cause of systemic atrocity is structural to the extent that collectives constrain individual choice and action, as well as psychological/cultural in the sense that individuals possess attitudes of indifference or contempt that are widely shared and that make it difficult to see systemic atrocity even as it is being produced. In other words, these are systemic

atrocities in the sense that they are produced not so much by individuals exercising their individual human agency, but by actions taken under the constraints of a larger social structure. Systemic atrocities are not intended and programmatic; they are unintended albeit probably foreseeable once we begin to look. In other words, “inadvertent” collateral damage can add up to systemic atrocity. In these cases, the doctrine of double effect can excuse too much and our category of acceptable “accidents” can be too large.

The norm is to call individuals to account for atrocity. Yet focusing blame on individuals, whether perpetrators or commanders, may obscure the fact that in modern (bureaucratic) states individuals rarely decide or act alone and with full autonomy. After all, soldiers, commanders and even political leaders act within a political context and, as Clausewitz said, for political ends: “War is simply a continuation of policy with the addition of other means.”<sup>6</sup> Individuals are acting as part of organized collectives for purposes that those collectives have presumably authorized and ordered; they act based on a social understanding of war and their particular role in that collective enterprise.<sup>7</sup> The autonomy of individual soldiers in a chain of command, and even the autonomy of the military itself, is limited; individual soldiers and the military organization as a whole are not permitted to question orders unless those commands are patently unlawful. Further, the social structure of prior policy choices, for example of which weapon to purchase, constrains individual human agency. Or as Aristotle suggests in the *Nicomachean Ethics*, some acts are “mixed” — both voluntary and involuntary — such as when someone throws goods overboard in a storm: “for in the abstract no one throws goods away voluntarily, but on condition of securing the safety of himself and his crew any sensible man does so.” Therefore “on some actions praise indeed is not bestowed, but pardon is, when one does a wrongful act under pressure which overstrains human nature and which no one could withstand.”<sup>8</sup>

In systemic atrocity, the act of atrocity is normalized. Foreseeable lethal consequences may be, to a certain extent, invisible or minimized as necessary. We don’t flinch at civilian deaths nor wonder too hard if they are necessary because civilian deaths are frequent and taken for granted. The invisibility and tendency to minimize systemic atrocity is all the more likely in a context where the dominant norm is non-combatant immunity. After all, no one (or at least no normal moral person) intends these civilian deaths. And it is possible in these cases to argue, as Paul Bergin, the lawyer for one of the US soldiers accused of committing an atrocity in Iraq has that even if regrettable, the civilian deaths his

<sup>6</sup>Carl Von Clausewitz, *On War*, ed. and trans. Michael Howard and Peter Paret (Princeton: Princeton University Press, 1976), p. 605.

<sup>7</sup>See Mervyn Frost, “Constitutive Theory and Moral Accountability: Individuals, Institutions, and Dispersed Practices,” *Can Institutions Have Responsibilities? Collective Moral Agency and International Relations*, ed. Toni Erskine (New York: Palgrave, 2003), pp. 84–99.

<sup>8</sup>Aristotle, Book III of *The Nicomachean Ethics*, trans. David Ross (Oxford: Oxford University Press, 1980), pp. 48–9.

clients caused were legal. “They did [their job] honorably, they did it admirably. If they did want to kill these men, they could have and been within the rules of engagement.”<sup>9</sup>

Individual perpetrators are responsible for systemic atrocity, but because the cause of these deaths is in some degree structural, responsibility also lies with collectives. By collective, I mean an organized group with an identity and a decision-making structure. Relevant collectives have important roles (material and political) in the war system. As such, the collective can arguably be said to have moral agency.<sup>10</sup> There are interesting arguments about whether there can be such a thing as “collective” moral responsibility since it is individuals who act. I cannot resolve or even summarize all of those arguments here.<sup>11</sup> Rather, I assume that collectives exist and have some moral agency and thus can bear moral responsibility. To the extent that my arguments about moral responsibility for military atrocity are illuminating, they may suggest that the notion of collective moral responsibility is useful.

I discuss three levels of collective moral responsibility for military atrocity below that correspond to the relevant social structures that constrain and enable the individual soldier. The first level is organizational. Military organizations are responsible for training soldiers so that they do not commit atrocities, and the rules of engagement should be written so that atrocity is unlikely to occur. When the rules of engagement, the weapons available to soldiers, or military doctrine do not sufficiently allow for discrimination between combatants and non-combatants, the potential exists for systemic atrocity. In addition, when military organizations devalue “enemy” civilians, systemic atrocity, the intentional killing of civilians (under the rationale that such killing was necessary), and isolated incidents of soldiers “snapping”, may be more likely.

An account of collective moral responsibility cannot end at the organizational level however because, at least in democratic societies (and arguably also in authoritarian states), war departments usually do not start wars by themselves. Rather, militaries are, generally, acting at the direction of state authorities and therefore the state may also, in some cases, be morally responsible for the atrocities committed by individual soldiers or military organizations. The military has gone to war on the assumption that the war is legitimate, in other words, that the political leadership has attended to the moral questions of whether the war is just. Therefore, the state may be held

<sup>9</sup>Associated Press, “Accused GIs: We had Orders To Kill,” *CBS News*, July 21, 2006; available at <http://www.cbsnews.com/stories/2006/07/21/iraq> (accessed July 21, 2006).

<sup>10</sup>See Toni Erskine, “Assigning Responsibility to Institutional Moral Agents: The Case of States and ‘Quasi-States,’” *Can Institutions Have Responsibilities? Collective Moral Agency and International Relations*, ed. Toni Erskine (New York: Palgrave, 2003), pp. 19–40.

<sup>11</sup>See Virginia Held, “Group Responsibility for Ethnic Conflict,” *The Journal of Ethics*, 6 (2002), 157–78; Tracy Isaacs, *Moral Responsibility in Collective Contexts* (unpublished manuscript 2006) and Larry May and Stacey Hoffman, eds, *Collective Responsibility: Five Decades of Debate in Theoretical and Applied Ethics* (Savage, MD: Rowman & Littlefield, 1991).

responsible for atrocities when the state has begun an unjust war. Militaries also depend on a larger structure of mobilization and organization to supply the blood and treasure for their conduct of war. State mobilization makes war possible. Thus, the executive, legislative and judicial branches of a state may be morally responsible when the state fails to halt or change military practices that cause systemic atrocity.

There is also a political or public level of collective moral responsibility in procedurally democratic states. The citizens of the state have not commanded the atrocities, nor would they necessarily have done so. Yet by consenting and materially supporting the policies that led to systemic atrocity they are responsible to some degree; they have made the space for the commission of the atrocities by individuals and organizations or they have neglected to halt policies that lead to atrocity.

Again, to highlight collective responsibility is not to say that the individual soldiers who perpetrate atrocities are “innocent” or simply scapegoats. Individuals must choose whether to directly participate, to behave as passive (and complicit) bystanders, or to resist the commission of atrocity. But the actions of individuals should be seen in a wider moral context of the social structure. Soldiers were put in atrocity producing situations — ordered, on pain of court martial and imprisonment, to go to those places and do those things.<sup>12</sup> Thus, the structure of command and prior policy choices is a social structure that constrains individual moral agency.

## II. CAUSE AND BLAME

The assignment of the locus of moral responsibility in part depends on how one understands the cause of the atrocities. The most common theories suggest that deliberate killing or harm of unarmed civilians is so awful that the person who does so must be out of their right mind in some way — either criminally evil or, at least for the moment, literally insane. Others see atrocity as more likely in certain kinds of war, and yet others argue that the cause of atrocity is the nature of technological war itself.

U.S. political and military leaders argue that most U.S. forces behave within the law and with honor; incidents of atrocity are both “abhorrent” and aberrant. One case of alleged rape and murder by US forces in Iraq has been treated in this way. In Mahmudiya, Iraq on 12 March 2006 four soldiers manning a checkpoint outside a farmhouse 20 miles south of Baghdad apparently killed four civilians in their home. The soldiers are alleged to have changed their clothes before setting off to rape a 15-year-old girl in the house. The girl, her younger sister, and her

<sup>12</sup>When soldiers refuse, they are, indeed, court martialed. See John Kifner and Timothy Egan, “Officer Faces Court-Martial for Refusing to Deploy to Iraq,” *The New York Times*, July 23, 2006, p. 16.

parents were killed and the rape victim was set on fire. One soldier, former Private Steven Green, 21 has been charged with rape and murder in civilian court and characterized as mentally unstable.<sup>13</sup> Asked for comment about the Mahmudiya murder and rape case, White House spokeswoman, Dana Perino, said, “The president has full confidence in the military to investigate alleged crimes and to punish anyone convicted of abhorrent behavior that dishonors the proud traditions of our military. He will not comment on ongoing investigations so as not to prejudice the outcome; however, he believes that 99.9 percent of our men and women in uniform are performing their jobs honorably and skillfully and they deserve our full appreciation and gratitude.”<sup>14</sup> At a briefing in Baghdad, Brigadier General Donald Campbell made a similar argument. “While the bulk of our forces, 99.9 percent, serve with honor, there are a small number of individuals who sometimes choose the wrong path. While we understand the stresses and pressures inherent in combat operations, we cannot and will not accept behavior that is legally, morally, or ethically questionable.”<sup>15</sup> It must, therefore, be the bad apples or the mad apples that commit atrocities. In either case, whether soldiers are bad or simply snap under duress, responsibility lies with the individuals who commit the atrocities. Their superiors are not generally seen to be at fault.

Others argue that soldiers become bad when they are placed in bad situations. Some argue that counter-insurgency war, in particular, leads to brutality and sometimes to atrocity. “In cases where you fail to defeat the insurgency, you sometimes adopt out of frustration increasingly ruthless methods to try to defeat the insurgents.”<sup>16</sup> The psychiatrist Robert Jay Lifton argues that counter-insurgency war is almost necessarily an “atrocity producing situation — one so structured, psychologically and militarily, that ordinary people, men or women no better or worse than you or I, can commit atrocities.”<sup>17</sup> Lifton argues that the fault lies in both the individual soldiers and the “environment.” Lifton studied Nazi doctors and combat incidents like My Lai in Vietnam, where as many as 500 Vietnamese civilians were slaughtered by US soldiers in March 1968. In Vietnam, Lifton noted profound psychological changes in the soldiers who commit atrocity. “I believe they undergo a type of dissociation that I call doubling — the formation of a second self. The individual psyche can adapt to an

<sup>13</sup>F. Worth, “U.S. Military Braces for Flurry of Criminal Cases in Iraq,” *The New York Times*, July 9, 2006, p. 10.

<sup>14</sup>David S. Cloud and Kirk Semple, “Ex-G.I. Held in 4 Slayings and Rape in Iraq,” *The New York Times*, July 4, 2006, p. 1; Associate Press, “U.S. Veteran Charged in Rape-Killing in Iraq,” *International Herald Tribune*, July 3, 2006; available at: <http://www.iht.com/articles/2006/07/03/news/iraq.php> (accessed January 22, 2007).

<sup>15</sup>DoD News Briefing with Brig. Gen. Campbell from Baghdad, Iraq; available at: <http://www.defenselink.mil/transcripts/2006/tr20060602-13166.html> (accessed January 24, 2007).

<sup>16</sup>Andrew Krepinovich quoted in Mark Mazzetti, “Military Memo: War’s Risks Include Toll on Training Values,” *The New York Times*, June 4, 2006, p. A10.

<sup>17</sup>Robert Jay Lifton, “Haditha: In an ‘Atrocity-Producing Situation’ — Who is to Blame?,” *Editor & Publisher*, June 4, 2006.

atrocities-producing environment by means of a sub-self that behaves as if it is autonomous and thereby joins in activities that would otherwise seem repugnant.”<sup>18</sup>

While he analyzes individual psychology Lifton also emphasizes that soldiers do not randomly come upon an atrocity producing situation, but are put there by their political leadership. At root, Lifton argues, an ideological vision provides the conditions for an atrocity producing situation: “What ultimately drives the dynamic is an ideological vision that equates Iraqi resisters with ‘terrorists’ and seeks to further justify almost any action against them.” Counterinsurgency wars and wars of occupation are “particularly prone to sustained atrocity” when the conflicts are “driven by profound ideological distortions.” Thus Lifton argues that we must distribute moral responsibility more widely and look up the chain of command.

To attribute the likely massacre at Haditha to a “few bad apples” or to “individual failures” is poor psychology and self-serving moralism. To be sure, individual soldiers and civilians who participated in it are accountable for their behavior, even under such pressured conditions. But the greater responsibility lies with those who planned and executed the war in Iraq and the “war on terrorism” of which it is a part, and who created in policy and attitude, the accompanying denial of the rights of captives (at Abu Ghraib and Guantanamo) and of the humanity of civilians (at Haditha). . . .<sup>19</sup>

Lifton continues, “Psychologically and ethically, responsibility for the crimes at Haditha extends to top commanders, the secretary of defense, and the White House. Those crimes are a direct expression of the kind of war we are waging in Iraq.”<sup>20</sup> When Lifton says the crimes are a “direct expression of the kind of war” the US is fighting, he also hints at another cause for the atrocities, and thus another level of moral responsibility, implying that there is something wrong with the policy itself.

For Kurt Baier, responsibility may lie with the culture itself. Baier notes a tendency to put the blame for the My Lai massacre on a primary perpetrator, Lieutenant William Calley. Yet Baier suggests that responsibility also lies with those who created the cultural and political context for My Lai. “Let us assume that there is a certain attitude toward the lives of others, particularly those of other cultures, which is not uncommon among soldiers anywhere, and that under the sort of pressure to which Calley was exposed, this attitude leads almost inevitable toward war crimes.” In his view, the “sovereign people” may share responsibility.

Those who put victory above everything else, who at most pay lip service to international law, who would cover up war crimes, who can see no difference

<sup>18</sup>*Ibid.*

<sup>19</sup>*Ibid.*

<sup>20</sup>*Ibid.*

between unavoidable killings of non-combatants and deliberately executing them to avoid inconvenience, who advocate methods of indiscriminate mass killing and destruction — these are on the way to adopting the attitude I mean. Those who see the connection between this attitude and the proneness to war crimes under conditions of strain, yet themselves adopt that attitude and encourage it in others, fail in their internal responsibility and I believe can be said to bear a share — collectively a not inconsiderable share — of the responsibility for My Lai.<sup>21</sup>

Stanley Hoffmann suggests an even broader indictment by arguing that there are moral problems “posed in almost every modern war, and especially in wars of counter guerrilla activity, antisubversion, pacification, etc.” Hoffmann asks: “Can one really distinguish between what is militarily ‘required’ by the daily military operations, and the commission of war crimes like My Lai. . . . Can one say that these were indeed totally unnecessary, and that therefore whoever was in command that day is clearly guilty? Or aren’t wars of that sort almost necessarily going to lead to war crimes, almost by their essence, because of the obliteration of any clear distinction between combatants and non-combatants?”<sup>22</sup> For Hoffmann, these are open questions. Hoffmann does not go so far as to say that all war leads to war crimes, only that counter-insurgency war tends to. “If you are dealing with a war like the Vietnamese or Algerian wars, almost by definition the attempt to control an uncertain civilian population will involve not only violations of the rules of war, but even more, violations of the provisions that are supposed to protect the civilians.” Hoffmann sees a continuum of potential for war crimes in war: “one can assert that this kind of a war or perhaps all modern war in its full technological dimensions leads inevitably to war crimes, and that one has only the choice between abstaining from war altogether or committing war crimes on a more or less massive scale.”<sup>23</sup>

For Hannah Arendt, there is no question that all war leads to atrocity; the only questions are who is responsible and who is held to legal account. Arendt argues that it is only victor’s justice that keeps the winners out of the dock and narrows our understanding of war crimes to only the most extreme cases of what she called “gratuitous brutality” and inhumanity.

For the truth of the matter was that by the end of the Second World War everybody knew that technical developments in the instruments of violence had made the adoption of ‘criminal’ warfare inevitable. It was precisely the distinction between soldier and civilian, between army and home population, between military targets and open cities, upon which the Hague Convention’s definitions of war crimes rested, that had become obsolete. Hence it was felt that under these new conditions

<sup>21</sup>Kurt Baier, “Guilt and Responsibility,” *Collective Responsibility: Five Decades of Debate in Theoretical and Applied Ethics*, ed. Larry May and Stacey Hoffman (Savage, MD: Rowman & Littlefield, 1991), pp. 197–218 at pp. 216–7.

<sup>22</sup>Stanley Hoffmann, *Duties Beyond Borders: On the Limits and Possibilities of Ethical International Politics* (Syracuse: Syracuse University Press, 1981), p. 87.

<sup>23</sup>*Ibid.*, p. 87.

war crimes were only those outside all military necessities, where a deliberate inhuman purpose could be demonstrated.<sup>24</sup>

If all modern war produces atrocity, why is one act of killing an atrocity and another, which also results in death or maiming, not? As Richard Wasserstrom argues, “the laws of war are not a rational, coherent scheme of rules and principles.”<sup>25</sup> The massacre of the Melians by the Athenians, and the even more brutal slaughter at Carthage by the Romans, indicate that views about killing innocents have evolved. In those cases there was no question, as Cicero put it, that “in time of war law is silent.” Indeed, although some formerly common practices of war are now outlawed, such as raping women or turning captives into slaves, not long ago both were considered legitimate. So today, it is only a social convention, not a logical distinction that suggests bombing cities is less atrocious than killing individual unarmed civilians.

### III. KINDS AND LEVELS OF MORAL RESPONSIBILITY

The moral agency that we usually attribute to individuals is limited in the context of war. War is a social activity, not the result of the uncoordinated acts of isolated individuals. Thus, in some respects, war is just the opposite of Adam Smith’s economic hidden hand, where the uncoordinated choices of individuals in response to market conditions create an outcome.<sup>26</sup> Rather, in war, individuals act, but in the context of highly structured organizations and for political ends. By definition, war would be impossible for individuals to undertake alone, and outside the social context of war the individual’s acts would not have the same meaning. This interdependence of action and the social or public nature of war suggest that responsibility must be understood at both the individual and collective level, akin to Aristotle’s understanding of “mixed” agency.

The idea of individual moral responsibility rests on the belief that individual perpetrators of war crimes and their commanders have both free will and can exercise their agency effectively. By contrast, at the root of collective moral responsibility is the notion that individuals are rarely, if every, completely free to act. There are some acts, such as war, which cannot be undertaken alone; the individual is both empowered by acting within a social organization, and constrained. Thus, organizations and organized collectives, such as the state and the public, can have both direct and indirect causal responsibility for the acts of individuals. In a sense, these collectivities are both agents and structures that

<sup>24</sup>Hannah Arendt, *Eichmann in Jerusalem: A Report on the Banality of Evil* (New York: Penguin Books, revised edn, 1977), p. 256.

<sup>25</sup>Richard Wasserstrom, “Conduct and Responsibility in War,” *Collective Responsibility: Five Decades of Debate in Theoretical and Applied Ethics*, ed. Larry May and Stacey Hoffman (Savage, MD: Rowman & Littlefield, 1991), pp. 179–195 at p. 184.

<sup>26</sup>Although the behavior of individuals in markets is also driven by norms and constrained by preexisting social structures, my point is that war is a collective enterprise for a social purpose.

enable, constrain and shape individual action. The presumption that soldiers must obey civilian commanders may circumscribe the willingness of soldiers or their ability to question orders that they can foresee will lead to (unintentional) civilian deaths.<sup>27</sup> Further, organized collectives have certain responsibilities that derive from their roles. These role responsibilities include the obligations to approve or authorize actions and to prevent actions that are wrong or are likely to result in wrong.

Most of the attention to moral responsibility for military atrocity and war crimes is focused on what individuals do on the battlefield itself and it is appropriate to begin an account of moral responsibility there. During combat, soldiers should observe the traditional just war and international law imperatives of discrimination and proportionality. Soldiers who deliberately violate those rules should be called to account, as should those bystanders and commanders who fail to halt wrongful acts as they are occurring. The notion of individual responsibility of both perpetrators and commanders was developed over several centuries in both European and American treaty and domestic law and is no longer disputed.<sup>28</sup> But if we consider responsibility for what happens before and after incidents of military atrocity (prospective responsibility and retrospective responsibility), the locus of moral responsibility widens beyond the individual on the battlefield.

Prospective moral responsibility is the duty of actors to perform the roles expected and required. A focus on prospective responsibility for atrocity in war suggests that we examine the actions and decisions taken before combat begins, but which shape the nature of combat. Before combat, there is the duty to prepare to fight war justly. For example, this means that soldiers must be trained by military organizations to avoid harming civilians and must be given weapons that minimize the risk to non-combatants. We should avoid putting people in situations where they are more likely to commit atrocities; this is the responsibility of both states and military organizations.

Retrospective responsibility is the duty to take on the obligations that come from a failure to prevent harm — the duty to halt the harm and make repair. Specifically, if the conduct of war results in moral wrongs, the state, and in some cases the public, can be held morally responsible for negligence, in other words, the failure to change practices that will likely result in future wrongs. There is

<sup>27</sup>Paul Cornish and Francis V. Harbour, "NATO and the Individual Soldier as Moral Agents with Reciprocal Duties: Imbalance in the Kosovo Campaign," *Can Institutions Have Responsibilities? Collective Moral Agency and International Relations*, ed. Toni Erskine (New York: Palgrave, 2003), pp. 119–137.

<sup>28</sup>The idea of command responsibility was articulated much earlier than Nuremberg and Tokyo however. See Leslie C. Green, "War Crimes, Crimes Against Humanity, and Command Responsibility," *Naval War College Review* (Spring 1997) L (#2); available at <http://www.nwc.navy.mil/press/Review/1997/spring/art2sp97.htm> (accessed January 22, 2007). On post-Nuremberg trends, see Steven R. Ratner and Jason S. Abrams, *Accountability for Human Rights Atrocities in International Law: Beyond the Nuremberg Legacy* (Oxford: Oxford University Press, 2<sup>nd</sup> edn, 2001).

also arguably a public and state duty to make reparations after wrongs have been committed that the state and the public could and should have prevented or halted.

International law on questions of collective responsibility is in constant development.<sup>29</sup> My point here is not to argue international law, but to use it to illustrate what we sometimes think about moral responsibility. For instance, although Nuremberg allowed that organizations (political and corporate) could be declared criminal, it was individuals that were tried.<sup>30</sup> The Nuremberg and Tokyo war crimes tribunal precedents framed the principles of command responsibility and constructive knowledge according to which commanders can and should be held responsible for the actions of their subordinates if they knew, or should have known, that the laws of war were being violated. But the argument here about systemic atrocity and collective responsibility is that there are situations where command responsibility is more diffuse and the constraints of social structure were the “cause” of the acts which produced widespread civilian killing. In these cases, individual agency was strongly shaped by social structure; the social forces at work (peer pressure, training, the institutionalization of norms, the imperative to obey commands) are like Aristotle’s storm at sea. I suggest three levels of collective moral responsibility for war crimes: organizational, state and political.

### A. ORGANIZATIONAL RESPONSIBILITY

The idea of organizational moral responsibility rests on the fact that individuals in complex institutions such as the armed forces do not act alone. Rather, individuals work within a chain of command where they are responsible both up the chain to their superiors, including their civilian commanders, and down the chain to their subordinates. Bureaucratic organizations that can be said to have moral agency, and hence moral responsibility, include autonomous corporations, organizations within organizations (such as an army or navy inside a war department), and international organizations such as the United Nations.

Bureaucratic organizations can have tremendous assets and power although that power is usually focused on the performance of a few specific tasks, such as making war, conducting diplomacy, or supervising the construction of bridges. Organizations have the power to collect and distribute information, to develop useful knowledge, to communicate and coordinate action, and to

<sup>29</sup>See, for instance Nina H. Jørgensen, *The Responsibility of States for International Crimes* (Oxford: Oxford University Press, 2000); and Andrew Clapham, “The Complexity of International Criminal Law: Looking Beyond Individual Responsibility to the Responsibility of Organizations, Corporations and States,” *From Sovereign Impunity to International Accountability: The Search for Justice*, ed. Ramesh Thakur and Peter Malcontent (New York: United Nations University Press, 2004), pp. 233–52.

<sup>30</sup>See Peter Maguire, *Law and War: An American Story* (NY: Columbia, 2001).

socialize their members.<sup>31</sup> As Robert Jackson, the Chief Prosecutor at the Nuremberg Trials said in his opening statement, “whatever else we must say of those who were the authors of this war, they did achieve a stupendous work in organization.”<sup>32</sup> The enabling power of organizations and of organization is more than the sum of the capacities of the individuals.

But more than having, in some cases, awesome power that individuals may deploy, military organizations, like all organizations tasked with complex and sustained action, have several characteristics that limit the autonomy and power of the individual actors who work within them. Specifically, organizations such as the military are characterized by defined hierarchies that restrict not only the autonomy of actors lower in the hierarchy, but also restrict the knowledge available to individual actors about their purposes and the intended and potential unintended consequences of their actions. Thus, to some degree, it is possible for actors at either end of the hierarchy to say, they just “did not know.” As Paul Cornish and Francis Harbour argue, communication is essential but sometimes lacking. “As an agent of an institution, individuals owe the organization feedback about the effects of decisions made further up the line. If the institution discourages them from doing anything but mechanically following orders, it is cutting itself off from the benefits of direct experience and expertise. . . . If we do not encourage individuals to ask the right questions then institutions will blindly commit wrongful acts.”<sup>33</sup>

Further, organizations function according to routines and standard operating procedures that constrain and orient the actions of those who implement the policies. The choice of military doctrine and tactics is generally taken at the organizational level; it is usually the case that no single individual develops these rules, strategies and tactics, and no single individual carries them out. The choice of strategies, tactics and rules of engagement determined at the organizational level also depends, in part, on organizational culture.<sup>34</sup>

To the extent that military doctrines and training structure how individuals act, the choice of doctrines can be moral or immoral. Rules of engagement and criteria for escalation are an example. When an air force chooses a strategic bombing campaign, decides to purchase weapons, and trains crews to engage in strategic bombing attacks that are likely to endanger and kill many non-combatants, the air force as an organization is morally responsible. Moral responsibility then arises out of the collective’s ability to foresee the immoral

<sup>31</sup>See Lynn Eden, *Whole World on Fire: Organizations, Knowledge, and Nuclear Weapons Devastation* (Ithaca: Cornell University Press, 2004).

<sup>32</sup>Jackson quoted in Maguire, *Law and War*, p. 159.

<sup>33</sup>Cornish and Harbour, “NATO and the Individual Soldier,” p. 134.

<sup>34</sup>On military organizational culture, see Jack Snyder, *The Ideology of the Offensive: Military Decision Making and the Disasters of 1914* (Ithaca: Cornell University Press, 1984); Barry Posen, *The Sources of Military Doctrine: France, Britain and Germany Between the Two Wars* (Ithaca: Cornell University Press, 1984); Elizabeth L. Kier, *Imagining War: French and British Military Doctrine Between the Wars* (Princeton: Princeton University Press, 1997).

consequences of single acts or perceive how a policy can lead to systemic atrocity. “The appropriate test . . . appears, therefore, to be what the leaders ought to have known or foreseen about the policies and programs under their authorship, direction or control. It is on this question, and not on the question of their motives, that attention ought to have focused. . . .”<sup>35</sup> Thus, it might not be the case that soldiers intend to kill innocent civilians, but the options available to them — which are structured by their training in tactics, the choice of strategies, and the purchase and deployment of weapons — may cause them to kill non-combatants. “The intention of an act is implied in the structure of the act, and not in some moment of psychological clarity in the actor.”<sup>36</sup> In these cases, the possibility for the commission of systemic atrocity exists. Further, the organization is responsible to the extent that it does not have effective procedures to evaluate actions from a moral and legal perspective.

For example, the decision to purchase and deploy a cluster bomb is taken at the organizational level and constrains individual soldiers. The possession of the bomb enables its use and may simultaneously entail an opportunity cost in situations where some other weapon or action may not be chosen. Cluster bombs disperse bomblets widely, and some models have high “dud” rates. Duds, the munitions that do not explode on impact, remain live and dangerous, left to be found and inadvertently detonated by unwary civilians. Thousands of cluster bombs were used by NATO in the 1999 Kosovo war and by the US in Afghanistan in 2001–2002 leading to hundreds of civilian casualties.<sup>37</sup> When cluster bombs cause widespread civilian casualties moral responsibility resides at the organizational level.

Finally, professional organizations have their own norms and culture from within which it can be hard to see another way of behaving. There can be intense pressure to follow the dominant patterns, and groupthink — excessive pressure to conform — may develop.<sup>38</sup> Finally, many organizations such as corporations and government bureaucracies have a “life” that is larger and longer than the lives of individuals. Thus, individuals enter into the corporation or organization that has a legacy of belief, policy and practice. Some military organizational cultures might have attributes that make it more or less prone to atrocity or more or less able to see a cluster of “accidents” and collateral damage as systemic atrocity.

<sup>35</sup>Wasserstrom, “Conduct and Responsibility in War,” p. 194.

<sup>36</sup>Oliver O’Donovan, quoted in Nigel Biggar, “Christianity and Weapons of Mass Destruction,” in Sohail Hashmi and Steven P. Lee, *Ethics and Weapons of Mass Destruction: Religious and Secular Perspectives* (New York: Cambridge University Press, 2004), pp. 168–99 at p. 177.

<sup>37</sup>Human Rights Watch, “Off Target: The Conduct of the War and Civilian Casualties in Iraq,” (New York: Human Rights Watch, 2003), p. 103.

<sup>38</sup>Irving Janis, *Victims of Groupthink: A Psychological Study of Foreign-Policy Decisions and Fiascos* (Boston: Houghton Mifflin, 1972).

## B. STATE RESPONSIBILITY

International treaty and customary law sometimes implicitly assumes collective responsibility for state action. For example, the International Law Commission of the United Nations composed a “Draft Declaration on Rights and Duties” in 1949 that enumerated some of the duties of states.<sup>39</sup> The responsibility of states for their behavior in war is not well established since most of the laws of war focus on individual accountability. However, it is possible to distinguish at least two kinds of moral responsibility in international law for states with respect to atrocity. States may bear direct responsibility for intentional atrocity or the state may bear indirect moral responsibility as bystander to atrocity.

The moral responsibility of the role of bystander has been widely acknowledged. For example, in the Genocide Convention, Article VIII states “Any Contracting Party may call upon the competent organs of the United Nations to take such action under the Charter of the United Nations as they consider appropriate for the prevention and suppression of acts of genocide or any of the other acts enumerated in article III.”<sup>40</sup> In the case of the 1994 Rwandan genocide France and the US have been criticized for not simply abandoning Rwandans in the face of genocide, but, in the case of the US, interfering with efforts to halt the genocide. While it did not acknowledge the ways the US obstructed international action, President Clinton’s “apology” to Rwandans in March 1998 alluded to both state and international moral responsibility:

all over the world there were people like me sitting in offices, day after day after day, who did not fully appreciate the depth and the speed with which you were being engulfed by this unimaginable terror. The international community, together with nations in Africa, must bear its share of responsibility for this tragedy as well. We did not act quickly enough after the killing began. We should not have allowed the refugee camps to become safe haven for the killers. We did not immediately call these crimes by their rightful name: genocide.<sup>41</sup>

Since Rwanda, there has been a move to widen the scope of the state’s moral obligation as a bystander. Specifically, the International Commission on Intervention and State Sovereignty, charged by UN Secretary General Kofi Annan with developing standards for humanitarian intervention, argued for a re-characterization of notions of sovereignty, “from sovereignty as control to

<sup>39</sup>Available at: [http://untreaty.un.org/ilc/texts/instruments/english/draft%20articles/2\\_1\\_1949.pdf](http://untreaty.un.org/ilc/texts/instruments/english/draft%20articles/2_1_1949.pdf) (accessed January 22, 2007).

<sup>40</sup>Convention on the Prevention and Punishment of the Crime of Genocide, UNGA Resolution 260 (III) December 1948. Article III lists the following as punishable: genocide; conspiracy to commit genocide; direct and public incitement to commit genocide; attempt to commit genocide; and complicity in genocide.

<sup>41</sup>“Promoting Peace,” NewsHour with Jim Lehrer, 25 March 1998; available at: [http://www.pbs.org/newshour/bb/africa/jan-june98/Rwanda\\_3-25a.html](http://www.pbs.org/newshour/bb/africa/jan-june98/Rwanda_3-25a.html) (accessed October 01, 2006).

sovereignty as responsibility in both internal functions and external duties.”<sup>42</sup>

Thinking of sovereignty as responsibility, in a way that is being increasingly recognized in state practice, has a threefold significance. First, it implies that the state authorities are responsible for the functions of protecting the safety and lives of citizens and promotion of their welfare. Secondly, it suggests that the national political authorities are responsible to the citizens internally and to the international community through the UN. And thirdly, it means that the agents of state are responsible for their actions; that is to say, they are accountable for their acts of commission and omission. The case for thinking of sovereignty in these terms is strengthened by the ever-increasing impact of international human rights norms, and the increasing impact in international discourse of the concept of human security.<sup>43</sup>

The International Commission on Intervention and State Sovereignty then proposes that when states fail to protect their citizens from genocide, or themselves commit genocide, other states have a responsibility to act to protect. “The substance of the responsibility to protect is the provision of life-supporting protection and assistance to populations at risk. This responsibility has three integral and essential components: not just the responsibility to react to an actual or apprehended human catastrophe, but the responsibility to prevent it, and the responsibility to rebuild after the event.”<sup>44</sup>

While more controversial and less clearly articulated in international law, there is a tradition of understanding states as the bearer of responsibility for atrocity. For example, the principle of state responsibility for atrocity is implicitly asserted when states are required to make reparations for unjust wars, such as when Germany was obliged to make reparations following World War I and World War II and when Iraq was obliged to make reparations to Kuwait for its 1990 invasion.<sup>45</sup> The legal responsibility of states for violations of the norm of non-combatant immunity is currently being debated by international lawyers and is the subject of draft articles for state responsibility.<sup>46</sup> The Draft Articles on “Responsibility of States for Internationally Wrongful Acts” of 2001, makes explicit recognition of the state as at least a legally responsible actor, and implicitly assumes that states can be held morally responsible for wrongful acts.<sup>47</sup> When states commit wrongs, according to the draft articles, they are first obliged to cease the act, then obliged not to repeat it. Further, the state is obliged to make

<sup>42</sup>International Commission on Intervention and State Sovereignty (ICISS), *The Responsibility to Protect* (Ottawa: International Development Research Centre, 2001), p. 13.

<sup>43</sup>*Ibid.*, p. 13.

<sup>44</sup>*Ibid.*, p. 17.

<sup>45</sup>See Jørgensen, *The Responsibility of States for International Crimes*, pp. 9–11, 24–5.

<sup>46</sup>United Nations International Law Commission (ILC) Draft Articles on “Responsibility of States for Internationally Wrongful Acts.” *Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 10 (A/56/10)*; available at: <http://www.un.org/law/ilc/> (accessed January 22, 2007). The ILC report to the United Nations also contains commentaries on the draft articles.

<sup>47</sup>ILC Draft Articles on “Responsibility of States for Internationally Wrongful Acts.”

“full reparation for the injury caused.”<sup>48</sup> Importantly, the draft articles retain legally relevant distinctions among different levels of legal responsibility, rather than collapsing all responsibility to the state level: individuals, even when “acting on behalf” of the state, and international organizations, may still be held responsible for wrongs.<sup>49</sup> Further, although the word is not used in the draft articles, the notion seems to be that to be wrongful, the act must be intentional.

I do not dispute that states can be held morally responsible as both bystanders and knowing perpetrators of atrocity in the senses suggested by existing international law. But, states should also be held accountable for systemic atrocity. In other words, the state should be held morally responsible for the unintentional but nevertheless foreseeable atrocities that result from its choice to undertake a particular kind of war or to fight using particular rules of engagement, weapons or tactics. The argument for moral responsibility at the state level may be even stronger in the case of democracies because, at least in democratic societies (and arguably also in authoritarian states), military organizations and war departments do not begin wars without the authorization of civilian authorities. Militaries are, generally, acting at the direction of state authorities. While some wars can be just — for instance, those undertaken in self-defense — some wars are unjust in their cause or unjust in their conduct. In these cases, moral responsibility for unjust acts rests with the political system. And in democracies the moral responsibility at the state level for atrocities can be distributed quite widely to include not only the executive branch, but the legislative branch or even the judiciary.

### C. POLITICAL/PUBLIC RESPONSIBILITY

At the political or public level, collective moral responsibility depends on the public having certain roles and obligations in democratic states. At this level, the citizens who pay taxes and otherwise consent to or perhaps even demand war are morally responsible for atrocities because it is their role in a democracy to prevent those atrocities, or at least try to halt them. The citizens of the state have not commanded military atrocities, nor would they necessarily have done so. Yet, by supporting the policies of, for instance, a war of aggression or a preventive war that led to the atrocities, they have condoned the atrocities on some level; they have made the moral space for the commission of the atrocities by individuals.

Public or political moral responsibility applies most clearly to procedurally democratic states where it can be said that a responsive democracy is actually functioning or could actually function. As Stanley Hoffmann argues, “citizens, especially in democratic countries, and especially in the so-called informed public

<sup>48</sup>*Ibid.*, Article 31.

<sup>49</sup>Article 57 of the Draft Articles on “Responsibility of States for Internationally Wrongful Acts” refers to the responsibility of international organizations and Article 58 refers to individual responsibility.

should feel responsible for allowing their leaders to let the imperative of victory, or the excuse of military necessity, override all other considerations — even when the citizens have reason to believe that the leaders have deceived them by promising peace.”<sup>50</sup>

Democracies function (more or less well) to shape and direct the formation of opinion and policies, and to check the authority and actions of a state that has run amuck. A state that is nominally democratic (by which I mean, it has contested elections) could have a poorly functioning “public sphere.” Public spheres are the space for reasoned and critical debate within and — to an increasing degree — across states. The public sphere is the place outside the official institutions of the state where citizen deliberation, argumentation and political organization occurs. Public spheres can be more or less open.<sup>51</sup> The press, the citizens in their associations, and the intellectual class associated with universities may fail to or be unable to engage in discourse, debate and political mobilization. This failure or inability of publics to deliberate, organize and act may be caused by ignorance, fear, apathy or a general decline in the habits and infrastructure of the public sphere.<sup>52</sup> The political public has a prospective duty to constrain the state. Later, the moral failure of the state’s executive and deliberative bodies establishes a retrospective moral responsibility for the public to act. Stanley Hoffmann argues that, at a minimum, citizens ought to retire the political leadership and military command in those cases.<sup>53</sup> In any case, the first moral responsibility of the people in a formal democracy is to reinvigorate the apparatuses of the public sphere so that the democracy can begin to function.

David Estlund also argues for an active democratic public but for different reasons. Such a public can provide moral cover, he suggests, to soldiers who are following orders in an unjust war. Specifically, he claims that if soldiers are acting on the basis of “free, open, and often adversarial epistemic forum of political deliberation,” they can be forgiven for following orders in an unjust war that is undertaken as the result of an “honest mistake.” Recalling the “Charge of the Light Brigade,” Estlund argues that “soldiers who ‘do and die’ as their country asks of them are under no darker moral cloud than every other citizen of the country which has, despite its best efforts, mounted an unjust war.”<sup>54</sup>

<sup>50</sup>Hoffmann, *Duties Beyond Borders*, pp. 90–1.

<sup>51</sup>See Jürgen Habermas, *The Structural Transformation of the Public Sphere* (Cambridge: MIT Press, 1989); and Craig Calhoun, ed., *Habermas and the Public Sphere* (Cambridge: MIT Press, 1992).

<sup>52</sup>We cannot assume that citizens in authoritarian states either support or oppose a particular policy. In most cases, we simply cannot know their considered views. If the majority of the public in an authoritarian state supports policies that lead to war crimes, they may be held morally responsible. If they oppose those policies but cannot do so effectively enough to change them, they cannot be said to be morally responsible for the atrocities.

<sup>53</sup>Hoffmann, *Duties Beyond Borders*, p. 91.

<sup>54</sup>David Estlund, “On Following Orders in an Unjust War,” *Journal of Political Philosophy*, this issue.

The correlation between the acts of atrocity and any one individual member of the public is diffuse and indirect. Individual citizens in a democratic state have relatively little power. To be able to affect government, individuals must aggregate their will through associations; they must organize. Members of the public who have roles associated with the proper functioning of a public sphere — such as members of the political press or intellectuals — are more directly responsible. It is not enough to claim that, “I didn’t vote for those guys.” The public is responsible for halting systemic atrocity by calling on the other relevant collectives (the military and the state) to act, and also responsible for making reparations. In some cases in Iraq the US military does pay a small amount in compensation for Iraqi civilian deaths and serious injuries.<sup>55</sup> But this is essentially an ad hoc response; a more comprehensive program of public apology and reparations authorized by the state and paid for through public taxes should be devised in cases where systemic atrocity occurs.

On the other hand, I reject the argument, even in cases where there has been widespread citizen support for genocide, that every member of the public is morally responsible for atrocity. That is too extreme. Not everyone in the state has the political power to act or to organize. Powerless individuals — the weak, the young, the poorly educated and the politically disenfranchised poor — can hardly be held morally responsible for the acts of state that cause atrocities to be committed.

It follows from this that no one should take the notion of collective political moral responsibility to the extreme that some terrorists do when they seek to justify and excuse their attacks on civilians with the argument that all citizens are directly responsible for the actions of the state.<sup>56</sup> Terrorists erase the distinction between combatants and non-combatants by collapsing the idea of political and moral responsibility and thereby seek to justify targeting the population that we normally call innocent civilians.<sup>57</sup> Arguments about group or collective responsibility that do not recognize distinctions can lead to endless cycles of revenge killings, genocide and mass atrocity. They lead too easily to ideas of collective guilt and collective punishment.

Terrorists might argue that hurting the civilian population is the only way to get the state to change the policies that, they argue, injure the terrorists or those on whose behalf they claim to be acting. This is a utilitarian argument that presumes terrorism works. I am arguing that all those who can act in a democracy are morally responsible, in an indirect way, for the state’s behavior. The public ought to act to affect the state’s policies so that those policies do not

<sup>55</sup>David S. Cloud, “Compensation Payments Rising, Especially by Marines,” *The New York Times*, June 10, 2006.

<sup>56</sup>On the terrorist’s argument that we are all responsible, see Jessica Stern, “Al Qaeda, American Style,” *The New York Times*, July 25, 2006, p. A25.

<sup>57</sup>Terrorists make other excuses for terrorism that are equally unpersuasive. See Michael Walzer, “Terrorism: A Critique of Excuses,” in Walzer, *Arguing about War* (New Haven: Yale University Press, 2004), pp. 51–66.

result in the commission of atrocities. But again, the moral responsibility of the public is indirect and the public's indirect moral responsibility is not a license to vitiate either the combatant/non-combatant distinction or the duty to protect non-combatants.

#### IV. COLLECTIVE RESPONSIBILITY AND SYSTEMIC ATROCITY IN IRAQ

There is little debate about the appropriateness of assigning individual responsibility for atrocities and war crimes with respect to Iraq. The question is: how far does moral responsibility, with or without legal accountability, extend? I do not have space here to consider state and public responsibility and will restrict my discussion of collective responsibility in this case almost exclusively to the organizational level.

The US military has both implicitly and explicitly recognized prospective moral responsibility at the organizational level. Two examples illustrate how the US has taken organizational responsibility for protecting non-combatants. During the planning phase of the Iraq war, every potential target in Iraq was evaluated by military Judge Advocates for compliance with the laws of war before it was placed on the Joint Target List.<sup>58</sup> Prior to deployment in Iraq, soldiers were trained in rules of engagement that respect non-combatant immunity and the US military undertook to inform soldiers of the laws of war. Indeed, some of this training is a direct and indirect response to atrocities committed by US troops in Vietnam; after Vietnam explicit directives for institutionalization and training in the laws of armed combat were devised and implemented.<sup>59</sup> In May 2006, Department of Defense procedures were updated and a new directive reiterated the US commitment to institutionalizing compliance with the laws of war.<sup>60</sup>

Both retrospective and prospective moral responsibility at the organizational level was also implicitly acknowledged when General Chiarelli ordered all personnel in the Iraq theater to undergo retraining in "core warrior values," including non-combatant immunity, in June 2006. The proper enactment of "core warrior values" was understood as a key component of what it means to

<sup>58</sup>Colin Kahl, "Rules of Engagement: Norms, Civilian Casualties, and U.S. Conduct in Iraq," unpublished manuscript, 2006, p. 8.

<sup>59</sup>See for example the Department of Defense Directive 5100.15, "DoD Law of War Program," 5 November 1974 (reissued 10 July 1979 and 9 December 1998).

<sup>60</sup>Department of Defense Directive 2311.01E, "DoD Law of War Program," 9 May 2006. This directive names the organizations within the Department of Defense that are responsible for following relevant international law, including the 1949 Geneva Conventions Relevant to the Protection of Civilian Persons in Time of War. The directive provides specifically, in paragraph 5.11.1, that Combatant Commanders, "Institute programs within their respective commands to prevent violations of the law of war and ensure that their commands' plans, policies, directives, and rules of engagement are subject to periodic review and evaluation, particularly in light of any violations reported." DoD contractors were also named as subjects of the directive.

be a professional soldier and a professional military organization. This is the meaning of the statement, quoted earlier, by US General Chiarelli that, "As military professionals, it is important that we take time to reflect on the values that separate us from our enemies."<sup>61</sup>

The implicit assumption of retrospective collective moral responsibility at the organizational level was evident when US commanders in Iraq modified the "escalation of force" procedures at military checkpoints in Iraq in early 2006. "Escalation-of-force incidents typically involve a U.S. soldier giving a verbal warning or hand signal to a driver approaching a checkpoint or convoy. The situation escalates if the driver fails to stop, with the soldier firing a warning shot, and then shooting to kill."<sup>62</sup> The problem was that many civilians were being killed at checkpoints in Iraq, some of which were established quickly and without warning. In 2005, the US military documented an average of seven deaths per week at checkpoints where US soldiers had fired upon and killed Iraqi civilians, apparently mistaking them for suicide bombers.<sup>63</sup>

General Chiarelli identified the large number of civilian deaths at checkpoints as a *military* problem because it created resentment and hatred that fueled the insurgency in Iraq. "We have people who were on the fence or supported us who in the last two years or three years have in fact decided to strike out against us. And you have to ask: Why is that? And I would argue in many instances we are our own worst enemy."<sup>64</sup> Chiarelli said U.S. soldiers were killing and injuring fewer Iraqi civilians in 2006 in so-called escalation-of-force incidents at checkpoints and near convoys than they did in July of 2005, when officials first started keeping statistics. Chiarelli argued that if fewer civilians were killed in escalation of force incidents at checkpoints, "I think that will make our soldiers safer."<sup>65</sup> So in this case, the organization recognizes that its moral duty to avoid non-combatant deaths coincides with its practical interest in reducing the causes for Iraqis to join or support insurgent activity. Collective responsibility was exercised because it was not simply the actions of individual soldiers at checkpoints which caused the problem; these soldiers were acting as instructed in situations they did not themselves make. The problem was the rules for escalation of force, which required review and in this case a change, at the organizational level.

<sup>61</sup>"Operational Commander in Iraq Orders Core Values Training," *American Forces Information Services, News Articles*; available at: <http://www.defenselink.mil/cgi-bin/dlprint.cgi> (accessed January 24, 2007).

<sup>62</sup>Nancy Youssef, "Commander: Fewer Civilians Dying," *Philadelphia Inquirer*, June 22, 2006; available at: <http://www.philly.com/mld/inquirer/2006/06/22/news/nation/14872541.htm> (accessed June 22, 2006).

<sup>63</sup>Alastair Macdonald, "US Troops Kill Fewer Iraqis After New Guidelines," *The Boston Globe*, June 25, 2006; Thom Shanker, "New Guidelines Aim to Reduce Civilian Deaths in Iraq," *The New York Times*, June 21, 2006.

<sup>64</sup>Youssef, "Commander."

<sup>65</sup>*Ibid.*

But, even as the US attempts to limit collateral damage, rules of engagement and US military doctrine have created the potential for systemic atrocity where the foreseeable deaths of civilians can be considered normal and acceptable. During the major combat phase of the Iraq war in 2003, two-thirds of the munitions dropped from aircraft were precision-guided in some way and Defense Secretary Donald Rumsfeld was reportedly required to authorize any airstrike where it was estimated that more than thirty civilian casualties were likely.<sup>66</sup> This was certainly an effort to limit “collateral damage.” On the other hand, the process was not so successful at limiting civilian casualties in more fluid situations, where the targets, namely Iraqi military and political leaders, emerged quickly. Human Rights Watch found in its investigations that “many of the civilian casualties from the air war occurred during U.S. attacks on senior Iraqi leadership officials.”<sup>67</sup> Human Rights Watch noted that, “every single attack on leadership failed” and argued further that, “the intelligence and targeting methodologies used to identify potential leadership targets were inherently flawed and led to preventable deaths.”<sup>68</sup>

A US military operation on 15 March 2006, in Ishaqi, a town north of Baghdad, illustrates how the rules of engagement can cause systemic atrocity. On that day US troops attempted to capture and kill a number of terrorists in a house that US intelligence indicated was being used as a safe house. The US military came under fire and engaged in a firefight. According to US Major General William Caldwell, “As the enemy fire persisted, the ground force commander appropriately reacted by incrementally escalating the use of force from small arms fire to rotary wing aviation, and then to close air support, ultimately eliminating the threat.”<sup>69</sup> The US used at least one AC-130 gunship in their assault on the house.

As many as thirteen people were killed by US forces in Ishaqi. One of those deaths was of the suspected terrorist Ahmad Abdallah Muhammad Nais al-Utai, or Hamza. Another person, Uday Faris al-Tawafi suspected of making roadside bombs, was also killed. The other deaths — of six adults and five children — were called collateral damage by the US military.<sup>70</sup> “The investigating officer concluded that possibly up to nine collateral deaths resulted from this engagement, but could not determine the precise number due to collapsed walls and heavy debris.”<sup>71</sup> Major General Caldwell, who reported the results of an

<sup>66</sup>Human Rights Watch, “Off Target,” p. 19.

<sup>67</sup>*Ibid.*, p. 22.

<sup>68</sup>*Ibid.*, p. 22.

<sup>69</sup>Caldwell quoted in John D. Banusiewicz, “Probe Clears Coalition Forces of Wrongdoing in March 15 Raid,” *American Forces Information Services News Articles, US Department of Defense*, June 3, 2006; available at: [http://www.dod.mil/news/Jun2006/20060603\\_5320.html](http://www.dod.mil/news/Jun2006/20060603_5320.html) (accessed January 25, 2007).

<sup>70</sup>Tom Regan, “Marines Cleared in Iraqi Deaths in Ishaqi,” *The Christian Science Monitor*, June 2, 2006; available at: <http://www.csmonitor.com/2006/0602/dailyUpdate.html> (accessed January 22, 2007).

<sup>71</sup>Caldwell quoted in Banusiewicz, “Probe Clears Coalition Forces of Wrongdoing in March 15 Raid.”

official US investigation of the incident, disputed allegations that US troops executed the family that was living in the house. Indeed US forces were accused by local Iraqis of deliberately shooting the eleven people in a house before blowing up the building.<sup>72</sup> Rather, Caldwell said, “The investigation revealed the ground force commander, while capturing and killing terrorists, operated in accordance with the rules of engagement governing our combat forces in Iraq.”<sup>73</sup> Caldwell acknowledged that there was considerable concern about how the US military was behaving in Iraq. “Temptation exists to lump all these incidents together,” he said. “However, each case needs to be examined individually.”<sup>74</sup>

But what if we do add the individual cases up? Two conclusions emerge. First, Iraqi civilian deaths in situations similar to those of Ishaqi are commonplace. “To learn from Haditha is to learn to notice not just the alleged massacres but the steady stream of civilian deaths that for too much of this war have remained invisible.”<sup>75</sup> Second, the deaths of civilians in these sorts of situations are foreseeable and probably in many cases preventable. Collateral damage was inevitable during the initial stages of the US war and it was frequent.<sup>76</sup> Collateral damage has become more likely since the end of major combat operations in May 2003. Because the US is engaged in a war of occupation against an insurgent resistance that lives in houses on the ubiquitous battlefield, there is no reliable way to discriminate between combatants and non-combatants.

The tragedy of systemic atrocity is further illustrated by the Pentagon’s attempt to avoid civilian casualties. On the one hand, the dramatic increase in the use of “smart” bombs by the US in both the Afghanistan and Iraq wars, as compared with earlier US wars, indicates an organizational preference to minimize civilian deaths as much as it does a desire to actually hit a military target.<sup>77</sup> As United States Major General Jeffrey Riemer, commander of the Air Armaments Center at Elgin Air Force Base argued, “The incredible precision of the munitions we’ve developed helps to ensure collateral damage is kept to a minimum.”<sup>78</sup> Yet the US apparently does not collect data on the collateral damage that results from aerial bombardment. We simply cannot know whether and to what extent this effort to minimize civilian casualties is successful. We

<sup>72</sup>BBC News, “New ‘Iraq Massacre’ Tape Emerges,” June 2, 2006; available at: [http://news.bbc.co.uk/2/hi/middle\\_east/5039420.stm](http://news.bbc.co.uk/2/hi/middle_east/5039420.stm) (accessed January 22, 2007).

<sup>73</sup>Caldwell quoted in Banusiewicz, “Probe Clears Coalition Forces of Wrongdoing in March 15 Raid.”

<sup>74</sup>*Ibid.*

<sup>75</sup>Sarah Sewell, “Blinded by Haditha,” *The New York Times*, June 13, 2006, p. 23.

<sup>76</sup>See Melissa Murphy and Carl Conetta, “Civilian Casualties in the 2003 Iraq War: A Compendium of Accounts and Reports,” Project on Defense Alternatives, May 21, 2003; available at: <http://www.comw.org/pda/0305iraqcasualtydata.html> (accessed January 22, 2007).

<sup>77</sup>About two-thirds of the bombs dropped in the first phase of the war in Iraq in 2003 were precision-guided as compared with the 1991 Iraq war when 8 percent of the bombs dropped were precision-guided. In the Kosovo air campaign of 1999, one-third of all bombs used were precision-guided.

<sup>78</sup>Riemer quoted in Valerie Trefts, “Precision-Guided Munitions Play Key Role,” *Spacewar*, June 21, 2006; available at: [www.spacewar.com/reports/Precision\\_Guided\\_Munitions\\_Play\\_Key\\_Role.html](http://www.spacewar.com/reports/Precision_Guided_Munitions_Play_Key_Role.html) (accessed January 22, 2007).

cannot know whether those deaths are preventable by some change in targeting or procedure. If the United States examined its use of aerial bombardment in Iraq, it might find that its emphasis on “smart bombs” (for example, laser and GPS guided weapons) over “dumb” gravity bombs has not minimized civilian casualties to the degree that was hoped.<sup>79</sup>

It is at this level that organizational moral responsibility blends with state and public responsibility for atrocity in Iraq. In this spirit Andrew Bacevich argues that we need to think more broadly and deeply about moral responsibility.

Who bears responsibility for these Iraqi deaths? The young soldiers pulling the triggers? The commanders who establish rules of engagement that privilege “force protection” over any obligation to protect innocent life? The intellectually bankrupt policymakers who sent U.S. forces into Iraq in the first place and now see no choice but to press on? The culture that, to put it mildly, has sought neither to understand nor to empathize with people in the Arab or Islamic worlds?

There are no easy answers, but one at least ought to acknowledge that in launching a war advertised as a high-minded expression of U.S. idealism, we have waded into a swamp of moral ambiguity. To assert that “stuff happens,” as Defense Secretary Donald H. Rumsfeld is wont to do whenever events go awry, simply does not suffice.<sup>80</sup>

Thus, even if individuals and the military organization can be faulted for their conduct in Iraq, moral responsibility does not end there because military organizations sit within a larger context of collective moral responsibility. When the Pentagon fails to examine how its standard operating procedures could be causing “unnecessary” collateral damage, then the state, including the legislature, is morally obliged to order that an evaluation be conducted. When the state fails to act, the public must call for action. When the public fails to act, other publics must act to call the US to account.<sup>81</sup>

## CONCLUSIONS AND POLICY IMPLICATIONS

Atrocity is too often a feature of war. Atrocity can be isolated, ad hoc, and limited to the work of an individual or a small group of soldiers. Responsibility for this sort of criminal atrocity belongs to individual perpetrators and sometimes to their commanders. Sometimes atrocity is planned and programmed; it is genocide, ethnic cleansing, or terror bombing. Moral responsibility for war crimes that are planned or a deliberate strategy belongs with individuals. It was not always understood to be so. In her study of the 1963 trial of Adolf Eichmann, Hannah

<sup>79</sup>See Marco Sassoli, “Targeting: The Scope and Utility of the Concept of ‘Military Objectives’ for the Protection of Civilians in Contemporary Armed Conflicts,” *New Wars, New Laws? Applying the Laws of War in 21st Century Conflicts*, ed. David Wippman and Matthew Evangelista (Ardsley, NY: Transaction, 2005), pp. 181–210.

<sup>80</sup>Andrew J. Bacevich, “What’s an Iraqi Life Worth?,” *The Washington Post*, July 9, 2006, p. B1.

<sup>81</sup>Lack of space prohibits discussing the moral responsibility of international bystanders.

Arendt observed “the reluctance evident everywhere to make judgments in terms of individual moral responsibility.”<sup>82</sup> It is fair to say, after Nuremberg, Yamashita, Eichmann and Milosevic, little such reluctance remains. But a focus on individuals can lead us to miss systemic atrocity and the opportunity to reduce its occurrence. Collective, systemic forces constrain individual agency and ought to direct us to look at collective processes and at the potential for collective moral responsibility. As Arendt imagined, “It is quite conceivable that certain political responsibilities among nations might someday be adjudicated in an international court; what is inconceivable is that such a court would be a criminal tribunal which pronounces on the guilt or innocence of individuals.”<sup>83</sup> By suggesting that the dominant framework of assigning individual responsibility is inadequate, I do not wish to suggest that the notion of collective responsibility absolves individuals of their moral duties.

But the phenomenon of systemic atrocity is different. Systemic atrocity is difficult to see as atrocity; rather the incidents of systemic atrocity are often seen as unavoidable accidents or tragedies. And the moral responsibility for systemic atrocity is as complex as the causal responsibility for it. Systemic atrocity is more anonymous but it can be foreseen. Individuals can act, or fail to act, to make the collective take notice and change the behaviors and attitudes that produce systemic atrocity. But to the extent that individual moral agency is shaped by, constrained by, and constituted in social institutions, we make an analytic and indeed moral mistake if we ignore the structural features of moral agency.

Aristotle’s storm constrains, but it also makes it hard to see. How is it that we have missed systemic atrocity in Iraq? Why did it take the US military so long to see the “unnecessary” deaths at checkpoints? How is it that the rules of engagement allow tanks to be fired into homes in response to small arms fire? Part of the inability to recognize systemic atrocity may simply be a failure to look at the big picture, to do the math. The complex causal chains that lead to these deaths may be hard to follow. Or it could be that moral blindness may be more comfortable than seeing the truth. Robert Lifton’s work on perpetrators has shown that dissociation and psychic numbing were common features of the perpetrators of the Holocaust.<sup>84</sup> More perniciously, a lack of empathy may blind a people to the fact that civilian deaths are ubiquitous and preventable. Racism on the part of both the Japanese and Americans created the conditions for both deliberate and systemic atrocity in the Pacific theater of World War II. As John Dower shows in his study of the role of racism in that war, “atrocities and war crimes played a major role in the propagation of racial and cultural stereotypes.

<sup>82</sup>Arendt, *Eichmann in Jerusalem*, p. 297.

<sup>83</sup>*Ibid.*, p. 298.

<sup>84</sup>See Robert J. Lifton and Erik Markuson, *The Genocidal Mentality: Nazi Holocaust and Nuclear Threat* (New York: Basic Books, 1990), p. 199.

The stereotypes preceded the atrocities, however, and had led an independent existence apart from any specific event.”<sup>85</sup>

The fact that both criminal and systemic atrocities are a persistent feature of war suggests that collective moral responsibility is an essential frame. Until we address the collective features that produce systemic atrocities, it is unlikely that they will end. Until we acknowledge that systemic atrocity is not new, and that memory of collective responsibility for atrocities is incomplete, the potential for tragedy — for systemic atrocity — will remain. In this case, blaming (or absolving) individuals is misleading; it is impossible in some cases for individuals to avoid killing non-combatants. But that does not mean that we should simply absolve everyone involved. Rather, it means that collectives should act to reduce the likelihood of systemic atrocities and avoidable accidents by reviewing and revising the choice of weapons and rules of engagement. And it means that collectives must apologize and make repair when systemic atrocity occurs.

<sup>85</sup>John Dower, *War Without Mercy: Race and Power in the Pacific War* (New York: Pantheon Books, 1986), p. 73. Galtung argues that aspects of culture, such as a theory of a superior race, can be used to legitimate violence. Johan Galtung, “Cultural Violence,” *Journal of Peace Research* 27 (1990), 291–305.