

## COLLECTIVE CRIME AND COLLECTIVE PUNISHMENT

George Fletcher emerges in his writing, as in his life, as a colorful and highly individual figure. The last thing one expects of him is the surrender of individual identity to an anonymous submersion in the collective. Yet doctrinally he is a collectivist. In his recent writings, he has been seeking to collectivize just about everything: action, responsibility, guilt, liability, self-defense, criminal punishment, international criminal law, action in war, war crimes, and so on.

It is, however, only in the final section of *The Grammar of Criminal Law* that Fletcher discusses collective guilt and the alleged collective nature of the crimes within the jurisdiction of the International Criminal Court (ICC).<sup>i</sup> Yet the penultimate sentence of the book promises that “in volume 2, in discussing specific crimes in international criminal law, I will address the way in which the collective guilt of nations and other groups should enter into the sentencing process of individuals charged with mass atrocities.” (339) And indeed a review of the tables of contents of volumes 2 and 3 confirms that war and the war-related crimes of international criminal law, both of which he understands in collectivist terms, will be the major preoccupations of these forthcoming volumes. The discussions of collective guilt and international criminal law therefore seem foundational to the Fletcher’s project as a whole. Yet the discussions in the *Grammar* do not break new ground but merely recapitulate ideas and arguments that he has stated and defended at greater length in other recent work.<sup>ii</sup> Because I will focus in this article on Fletcher’s collectivist orientation toward war and the crimes of international criminal law, I will refer more often to the more extensive discussions of

these issues in his other recent work than to the abbreviated discussions in the first volume of the *Grammar*. I think, however, that my arguments will be highly germane to Fletcher's larger project in the three volumes of the *Grammar*, and that some of the objections I will raise here will anticipate problems that will arise in the subsequent two volumes.

Before turning to war and international criminal law, it is worth observing how pervasive the collectivizing tendency has become in Fletcher's work. His recent discussions of self-defense continue to defend the account to which he has been attracted for decades, which holds that individual self-defense is not justified solely by the rights or inviolability of the individual victim but by the imperative of defending the collective and its legal order, since "an attack against one is an attack against all," so that a defense of one is also a defense of all.<sup>iii</sup> He argues that an "individualist" approach to the justification of individual self-defense is inferior to a "society-based" approach, partly because only the latter, he claims, can support a reasonable requirement of proportionality.<sup>iv</sup> While it is frequently claimed that the right of national or collective self-defense can be understood by analogy with the more fundamental right of individual self-defense, Fletcher seems to see national self-defense as more basic and thus reverses the traditional direction of the analogy, claiming that "the individual right of self-defense makes sense as an extension of the idea that nations can use force to maintain dominance over their own people and their own territory."<sup>v</sup>

Fletcher claims that domestic crime also has a collective victim, and that criminal punishment addresses the wrong, or harm, done to the collective rather than that done to the individual. He argues that "even if we subscribe to the importance of harm in

defining crime, and harm means harm to a victim, justice nevertheless require[s] abstraction from the particular victim. In a homicide case, the issue at stake is the value of life in general, not the life of the particular decedent. It would be odd to claim that it would be a lesser crime, in principle, to kill a bereft homeless beggar than to kill a mother of six.” The victims of crime cannot, therefore, appear in the criminal law as individuals but instead “must be understood as representatives of the public as a whole.” (260-61)

It is worth noting that the illustration that Fletcher gives here does not support this view of criminal punishment. We are not required to focus on the value of life in general rather than the values of individual lives to explain why the law treats the beggar and the mother as equal in standing as victims. For the concept of “the value of a life” can refer either to the value of the *contents* of the life or to the value of the *person* whose life it is. If we interpret the phrase in the second sense rather than the first, it becomes coherent and plausible to claim that an act of homicide causes an equal loss of valuable life irrespective of how good the contents of the life lost would have been for the individual victim.<sup>vi</sup> Much the same point could be made by saying that the criminal law grounds the prohibition of homicide in individual rights rather than in the value of life.

The crimes of international criminal law are, according to Fletcher, different from domestic crimes in that they not only have collective victims but are also perpetrated by collective agents. As Fletcher notes, “the crimes of concern to the ICC are connected one way or another with...war.” (333) And he agrees with Rousseau that war is “something that occurs not between man and man, but between States. ... A State can have as its enemies only other States, not men at all.”<sup>vii</sup> He therefore contends that for individuals, “war creates an alternative identity. The person who goes to war ceases, in part, to be an

individual and becomes a soldier in a chain of command. As Rousseau emphasized, in his alternative identity, the soldier is a mere servant of the state. He is not an autonomous agent... As Rousseau conceived of war, the only actors were states pitted against each other.” (334)

Yet the idea that the only legally recognized agents in war are states seems incompatible with the Rome Statute’s declaration in Article 25(1) that the ICC “shall have jurisdiction over natural persons.” International criminal law, in contrast to international law in general, thus holds individual persons rather than states accountable for the crimes within the jurisdiction of the ICC: namely, aggression, crimes against humanity, genocide, and war crimes. In this respect, the Rome Statute seems to move beyond the collectivist orientation of the Hague and Geneva Conventions to an explicit recognition of individual liability for crimes related to the resort to and conduct of war. Yet Fletcher claims that “something curious occurred in the nature of these offenses when they became the basis for individual liability at the International Criminal Court: they were subtly transformed into collective offenses.”<sup>viii</sup> It is his contention that the crimes prosecuted at the ICC, which “will be the major focus of volume 2” of the *Grammar* (332), “are collective crimes. It is true that as a formal matter only individuals are prosecuted, but they are prosecuted for crimes committed by and in the name of the groups they represent... The individual offenders are liable *because they are members of the hostile groups* that engage in” the commission of these crimes.<sup>ix</sup>

I will not dispute that three of the crimes prosecuted at the ICC – aggression, crimes against humanity, and genocide – are usually attributable to some form of collective agency. Whether these crimes *necessarily* involve collective agency, in the way that

aggression and genocide necessarily have collective victims, is a question I will not address here. What is surprising is Fletcher's claim that war crimes involve collective rather than individual agency. He offers two types of evidence in support of this view, one textual, the other a blend of the factual and the conceptual.

He cites two passages in the text of the Rome Statute that are supposed to show that war crimes are there conceived as collective acts. "The collectivist orientation is evident," he writes, "in the overriding commitment of the court that 'the most serious crimes of concern to the international community as a whole...not go unpunished.'" (333) He then notes further that "the Rome Statute...qualifies the definition of war crimes so that the International Criminal Court should take jurisdiction over war crimes 'in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes.' Thus an element of collective execution of the crime reenters the picture. In the final analysis, war crimes issue from armies gone awry. This is what makes their commission 'of concern to the international community as a whole.'" (335) Isolated acts by individuals are not what is of most concern the international community.

There is, however, a simpler and more plausible explanation and interpretation of the quoted passages from the Rome Statute. This is that the resources of the ICC are limited, so that the court must be selective in the cases it pursues. It cannot feasibly prosecute every reported instance of a war crime; therefore it will make most efficient use of its resources if it confines itself to the most egregious war crimes: namely, those that implicate military or political leaders because they are manifestations of a policy, or those that have caused harm on an unusually large scale. These are the war crimes that are of

greatest “concern to the international community as a whole” because their prosecution and punishment are likely to have the greatest expressive and deterrent significance.

An explanation of this sort is favored by William Schabas, who writes that the court must “be concerned not only with ‘the most serious crimes’ but also with the most serious criminals, generally leaders, organisers and instigators. Lower-level offenders are unlikely to attract the attention of a prosecutor whose energies must be concentrated, if only because of budgetary constraints.”<sup>x</sup> He goes on to observe that when the drafters proposed the qualifying clause in Article 8(1) quoted by Fletcher, “many States were opposed to any such limitation on the scope of war crimes, and only agreed to the provision if the words ‘in particular’ were included.” In other words, the phrase “in particular” was inserted precisely to block the inference that the conditions that follow it were to be understood as necessary conditions either of war crimes or of the eligibility of war crimes for prosecution by the ICC. Yet Fletcher claims that “the Rome Statute imposes several filters against the prosecution of routine crimes committed by individuals. The homicide *must* be part of a ‘plan or policy’ or constitute ‘part of a large-scale commission of such crimes.’”<sup>xi</sup>

Fletcher’s interpretation of the Rome Statute as treating all crimes within the jurisdiction of the ICC as collective crimes also seems to be directly contradicted by Article 25(3), which states that “a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person: (a) Commits such a crime, *whether as an individual*, jointly with another or through another person...”<sup>xii</sup> This seems to be an explicit recognition that an individual, acting in his or her capacity as an individual, can be guilty of a war crime.

Fletcher's second reason for claiming that war crimes are collective acts is that at least most of the "grave breaches" identified in the Geneva Conventions and cited again in the Rome Statute – for example, deporting a person, compelling a person to serve in the forces of a hostile power – are acts that cannot be done by a single person acting alone. They are instead "deeds that by their very nature are committed by groups" (332) – despite the suggestion of Article 25(3) that they can be done by individuals. But the second of Fletcher's claims does not follow from the first – that is, that an act cannot be done by a single individual does not entail that it must be a collective act. That it takes the action of various people, some of whom may act in an official capacity, to deport a person does not mean that the individual acts of these people together constitute a collective act. And even in cases in which the individual acts do compose a collective act, the collective agent need not be the state, the nation, the army, or even the embassy. The relevant collective may be nothing more than a tiny group of conspirators, one or more of whom occupy positions that give them the legal power to have a person deported.

Fletcher does not offer an analysis of collective action to support his views about collective crime in war. He does, however, write at length about collective guilt. It is one of the central themes of his recent work that collectives, and nations in particular, can be bearers of guilt. This is presumably an indirect way of discussing collective criminal action, since it would seem that there cannot be collective guilt in the absence of collective wrongdoing, or collective crime.

What are the bases, conditions, or criteria of collective guilt? Surprisingly, Fletcher says relatively little about this. He does suggest one way in which an entire population may become implicated in the crimes of the leadership: by acquiescence or omission.

No dictator rules in a vacuum. To muster power he must enjoy the support of the military, the implicit emotional consent of business leaders and professionals, and the tolerance of the public as a whole. In the face of a dissenting public incessantly banging on pots...or marching in the streets..., no dictator can maintain power. The failure to protest generates a basis for holding the public at least partially responsible for the ongoing dictatorship [and thus presumably for its crimes as well].<sup>xiii</sup>

This passage invites a number of comments. First, it seems excessively optimistic. Although nonviolent resistance can be even more effective than violence in a variety of contexts, its potential for success depends on certain conditions. In an extremely impoverished country in which the army is well paid, a dictator may flourish quite well with virtually no popular support at all, so that even widespread expressions of dissent have little practical significance. Recall the joke about Somoza: he enjoyed the support of virtually the whole of the National Guard. The Nicaraguan people generally, including the business leaders and professionals, had been united against him for quite some time before it became possible to overthrow him as a result of the withdrawal of US support under Carter. And no one banging pots, no matter how many of them there might have been, would have survived for long in Stalinist Russia.

Second, why should responsibility for the acts of a government lie solely or even primarily with the citizens whose government it is? The natural answer is of course that

it is their government and thus acts with their consent, in their name, on their behalf, and in their interests. Yet these claims may be false, even when they are asserted by the government itself. As in the case of the Somoza regime, the government may be illegitimate, ruling by force with the support of a foreign power. In such a case, many of the citizens of the foreign power may have greater responsibility for the acts of the illegitimate government than its own citizens do.

And there are other types of case in which citizens of other states may have greater responsibility for the wrongful acts of a government than its own citizens do. Suppose that a totalitarian state has wrongfully invaded a neighboring state. Its own citizens are subject to violent repression for the slightest expressions of dissent; hence the costs of protest within the country are prohibitive. Only exceptionally heroic people will protest, and they are too few to have any effect. But there is a powerful state whose economic support is vital to the totalitarian state. This powerful state is a democracy and thus a mass protest by its citizens would be without significant cost for them and would have a high probability of success in forcing a stop to the aggression. But suppose they do nothing. They seem *more* responsible by omission for the wrongful action of the totalitarian state than the citizens of that state are.

In any case, it is doubtful whether responsibility or guilt by omission, either by the citizens of the state or by the citizens of another, more powerful state, is genuinely collective. Suppose there are active dissenters who courageously protest in public and even withhold taxes to avoid any complicity in the aggression. Do they share in the collective guilt? Do children?

Fletcher's answer, I think, would be that the guilt of the collective does not entail individual guilt on the part of every member. He writes elsewhere of aggression by an army that "the collective army might be liable for aggression, but nothing about the guilt of individuals [in that army] follows from this charge."<sup>xiv</sup> Similarly, a nation as a whole may be guilty of aggression even though individual dissenters who are members of that nation are not.

Yet if some individual members of a collective are guilty while others are not, what is the point of speaking about collective guilt? Why not seek instead to identify the guilty individuals and to determine the extent of their guilt? I will return to this question of the cash value of collective guilt shortly.

One worry that Fletcher has about his own notion of collective guilt is that it seems to imply that guilt can be inherited by one generation from another. On this issue he seems to be inconsistent. At one point he says that Karl Jaspers was right to reject the idea that guilt can be transmitted from one generation to another.<sup>xv</sup> Yet at other points he seems to embrace this idea, as it seems to follow from his claim that nations themselves can be bearers of guilt together with the fact that nations endure over many generations. "The idea that guilt passes from generation to generation," he writes, "expresses...the consequence of attributing guilt to the nation rather than to particular individuals," as he himself does. "Children, after all,...feel pride about the achievements of their forebears. It follows, it seems, that their identity with the nation should extend to the downside as well as the upside of communal life."<sup>xvi</sup>

This argument presupposes a subjective criterion for collective guilt. Suppose that such a criterion is right and that it can be rational to feel pride in the achievements of

one's ancestors. It still would not follow that guilt could be inherited from one's ancestors. Pride contrasts with shame, not guilt. If one can rationally feel pride in the deeds of one's ancestors, it may follow that one can rationally feel shame for their deeds as well. But nothing follows about the rationality of feeling guilt for their deeds. Collective identity might be a rational basis for collective shame without being a basis for collective guilt.

In any case, collective pride is frequently irrational – far more often, in fact, than most of us recognize. Sometimes the basis of collective identification is arbitrary, as in the case of people who, in earlier psychology experiments, developed manifest in-group bias toward others who, they were falsely told, shared with them a tendency to over- or underestimate the number of dots flashed on a screen.<sup>xvii</sup> In other cases in which there is a reasonable basis for collective identification, there may be no rational basis for collective pride in the acts of only some members. A couple of decades ago, a young woman from the Midwest won several gold medals at the Olympics. I was then living in her home town, whose citizens swelled with pride and walked a bit taller while she was in the news. But it would be absurd to suppose that their mere residence in her town gave them any reason to think better of themselves because of her achievements.

Fletcher not only presupposes but also explicitly endorses a subjective criterion of collective guilt. He writes:

If we are trying to determine the collective that is expressed in the actions of going to war and committing crimes in the name of that war, then a shared sense of guilt might be the most rational guide to an assessment of those collective actions. If the nation feels guilt for its actions, this is a clear sign

of a collective consciousness that it was the nation that had gone to war and had also engaged in the atrocities for which it is blamed.<sup>xviii</sup>

If this were right, it would lead to intractable indeterminacies in practice, for a sense of guilt is never universal within large collectives, and we would be left wondering what to conclude when some proportion of nation felt guilt while the remainder did not. But a subjective criterion of collective guilt cannot be right, for thinking it so, or feeling that it is so, cannot make it so. A wholly misplaced sense of guilt, even if widely or universally shared, cannot constitute the reality of collective guilt, just as *not* thinking it so, or thinking it not so, cannot make it not so. It would be absurd to suppose that a group of conscienceless people, acting wrongfully in a coordinated way, with all their wills concerted, would be exempt from guilt if none of them felt any guilt, either individual or collective. The criteria of guilt are objective.

Despite these reservations, let us grant for the sake of argument that nations can be the agents of unjust wars and of crimes committed within wars, and thus can be the bearers of guilt for those acts. What follows? One's immediate thought is that if there is collective crime, there ought also to be collective punishment. There is some discussion of this in Fletcher's recent work, much of which gives the impression that he disapproves of collective punishment. For example, he criticizes Alan Dershowitz's proposal that Israel should identify a Palestinian village that has at some point been "used as a base for terrorists" and threaten, without bluffing, to destroy that entire village in response to the next terrorist attack, though without killing its residents. Yet his criticisms of Dershowitz focus on two points that have nothing to do with collective guilt. He notes, first, that Dershowitz's argument appeals to claims drawn from the law of complicity, which have

no application in the case of an entire village, and, second, that Dershowitz tries to locate sole responsibility for the destruction of the village with the terrorists who would act in defiance of Israel's threat, as if Israel would make no contribution to the destruction of the village at all. Both these criticisms are cogent but they leave it entirely open that the destruction of a Palestinian village could be justified by appeal to collective guilt. And indeed, while Fletcher concludes that none of Dershowitz's arguments "can assuage our sense of injustice about blaming and punishing the collective for crimes actually carried out by individuals," he suggests that there is more to be said – in particular, "that behind these rationalizations for collective punishment lurk deeply held sentiments of collective guilt. The proponents of collective punishment assume that Palestinians are guilty as a collective for nurturing a culture that takes pride in suicide bombers. This is not an unreasonable assessment of the way the entire culture contributes to the actions of a few."<sup>xix</sup>

In this concluding passage, Fletcher thus suggests that there could be a justification for collective punishment based on collective responsibility for a culture that sanctions terrorism and nurtures terrorists, despite our uncomfortable sense, possibly fallible, that it would be unjust to punish people for acts committed by others. He does seem to reject the kind of collective punishment that "implies the arbitrary punishment of some people not for what they have done but simply because they are members of the same group."<sup>xx</sup> Yet he seems to think that his notion of collective guilt can underwrite a practice of collective punishment directed against the collective itself rather than against individuals, and certainly not directed against *all* the individuals who together constitute the collective. This view seems at least implicit in certain passages, such as the one quoted

earlier to the effect that the liability of the army does not entail the guilt of the soldiers who compose it, and in this passage about inherited guilt: “If the nation bears guilt...and...has a life greater than its constituent members, then the guilt would seem to pass to the next generation – not necessarily to individuals but to the nation as a whole.”<sup>xxi</sup>

Fletcher does not explicitly discuss the possibility of punishing a nation itself, as a bearer of collective guilt, without punishing individual members of the nation who are not individually guilty. Perhaps there is good reason why this idea does not come up for discussion: namely, that it seems quite impossible to punish the nation as a whole in a discriminate way, that is, in a way that harms only those individual members whose acts have made a sufficient contribution to the collective crime to make them guilty as individuals.

Fletcher’s notions of collective crime and collective guilt raise a parallel problem about national defense if we think, as I do, that the basic *moral* justification for defensive action in war appeals to responsibility for a wrong whose prevention or correction constitutes a just cause for war. If a nation as a whole is guilty of a wrong that provides a just cause for war, what basis is there, other than a merely conventional one, for distinguishing between legitimate and illegitimate targets of defensive attack? Could we concoct a notion of a defensive attack against the nation as a whole, or as a collective, that is somehow directed against, or not intended to harm, those members of the collective who are not individually guilty? Again, there is no discussion of this possibility in Fletcher’s work, perhaps for good reason. Yet the idea that a nation as a whole can perpetrate and be guilty of a collective crime leaves it mysterious not only why

*any* form of collective punishment seems unjust when some individuals are not individually guilty, but also how there can be a requirement of discrimination in war.

As I have noted, Fletcher is not much concerned with defending collective punishment and not concerned at all with the idea of collective liability to defensive action. He finds the practical relevance of his view about collective guilt in a surprising place: in the mitigation of individual guilt. He argues that collective guilt may function to mitigate individual guilt in the way that provocation mitigates guilt in the common law of homicide. “If a nation bears guilt for the homicidal tendencies of its people,” he suggests, “then individual perpetrators should arguably be less guilty and their punishment should be mitigated. As the provoked killer is guilty only of manslaughter [rather than murder], the killers who act in the name of the nation should – if the analogy holds – be liable for a mitigated offense.”<sup>xxii</sup> As I noted at the beginning of this paper, this promises to be a central theme of volume 2 of the *Grammar*.

Fletcher argues that it is unjust to prosecute individuals for their role in what he believes to be collective crimes in isolation from these individuals’ relation to the collective. Commenting on Belgium’s effort to prosecute Ariel Sharon for crimes against humanity because of his role in the massacres of Palestinians in the Sabra and Shatila camps in Lebanon in 1982, Fletcher writes that “the worst part of this tendency toward universal jurisdiction is the belief that if Sharon had been guilty of a crime against humanity, he could have been judged and sentenced in abstraction from the nation in whose name he acted as military commander. Belgium was not in a position to judge or even to think about the complicity of the entire Israeli nation in any crime Sharon might

have committed.”<sup>xxiii</sup> Fletcher’s suggestion is that whatever guilt Sharon bore for the massacres was mitigated by his having acted as official agent of the nation of Israel.

But what is the precise explanation of the mitigating force of acting as an agent of a collective? Fletcher canvasses an earlier case in which an agent of the KGB who had carried out assassinations in Germany was judged by the German Supreme Court to bear diminished liability because he acted in the capacity of an agent of a collective, the KGB.<sup>xxiv</sup> Yet this case does not provide the right model, according to Fletcher, for explaining the supposed reduction of Sharon’s guilt. For the KGB was complicit in the assassin’s action by virtue of having commanded it. The relation between this collective entity and the perpetrator is treated by the law as causal, but the relation between Israel and Sharon’s action was not causal and hence cannot count as complicity. Fletcher then argues that what a collective such as Israel may be guilty of is the establishment of a culture in which an agent such as Sharon may be deprived of the ability to understand the wrongness of his action. The guilt for the massacres must therefore be distributed between the two: the collective and the perpetrator who acted as its agent.<sup>xxv</sup>

This view of the mitigating function of collective guilt is held by Fletcher to have wide applicability. He claims that “this conception of distributed guilt should have had a bearing on the sentencing of Eichmann; it should have influenced our perception of the crime committed by Timothy McVeigh; it should have come into play when the East German border guards were put on trial for doing what the ideology of their society preached [shooting East Germans who sought to flee across the wall to West Germany].”<sup>xxvi</sup> There are, however, serious problems with these claims. McVeigh was not acting in accordance with norms or values prevalent in his culture. And the case of

the German border guards seems to be a case of complicity, like the case of the KGB assassin, rather than a case involving collective guilt, since they were acting under orders and not in accordance with the values accepted in the culture but suppressed by the government.

Even in the case of Sharon this explanation makes little sense, given that there were a great many people in Israel, probably the vast majority, who had been exposed to the same “cultural influence” as Sharon but had no difficulty perceiving the wrongness of his exploiting his position of command to facilitate massacres of innocent people. Sharon was hardly an “accidental offender whose actions bespeak the mentality of the crowd.”<sup>xxvii</sup>

Yet Fletcher identifies another mitigating factor in Sharon’s case: the intervening agency of the Lebanese Phalangist militias that were the immediate perpetrators of the massacres. “The mitigation of Sharon’s guilt,” he writes, “was based on the perception that the Phalangists were active and autonomous actors who bore a full share of guilt, thereby implicitly reducing Sharon’s.”<sup>xxviii</sup> It may seem that Fletcher is here assuming that guilt for the massacres is a zero-sum matter, but he explicitly denies this. Rather, Sharon’s guilt is diminished because he is merely an accessory to the crime rather than the perpetrator.

Fletcher thus identifies two principles of mitigation in what he considers to be collective crimes: first, that the guilt of the collective mitigates that of the individual who acts in some sense as its agent, and, second, that the guilt of an individual who commands or facilitates the commission of a crime is mitigated by the intervening agency of the perpetrator. In the case of the Soviet assassin, the implications of these two principles are

that the guilt of the KGB officers who ordered the assassinations is mitigated both by the collective guilt of the Soviet nation that sustained the culture in which they operated, and by the intervening agency of the assassin, while the guilt of the assassin was mitigated both by the collective guilt of the Soviet nation and by the complicity of the KGB.

There is, however, a third form of mitigation that is implied by Fletcher's account but that he does not explicitly discuss. This is that in cases of this type, the guilt of the collective is mitigated as well both by the intervening agency of the agent or agents in positions of command and by that of the immediate perpetrators. In the case of the massacres at Sabra and Shatila, the varieties of mitigation work in the following way. The nation of Israel exercises what Fletcher considers a noncausal influence on Sharon, thereby mitigating his guilt. In his position of command, Sharon is complicit in the action of the Phalangists, thereby mitigating their guilt, just as the guilt of the KGB mitigates that of the assassin. But the intervening agency of the Phalangists also mitigates Sharon's guilt, and the collective guilt of the Israeli nation is mitigated by the intervening agency of both Sharon and the Phalangists. The mitigation of guilt therefore comes full circle; there is mitigation of guilt all around. Sharon's guilt is doubly mitigated by the collective guilt of the nation of Israel and the intervening agency of the Phalangists. The Phalangists' guilt is mitigated by the complicity of Sharon. (It would have been doubly mitigated by the collective guilt of Israel had they been Israel forces. Presumably on Fletcher's view their guilt is further mitigated instead by the collective guilt of the Lebanese Christian community, of which they were members.) And, finally, the collective guilt of Israel is doubly mitigated as well, first by the intervening agency of Sharon and again by the intervening agency of the Phalangists.

Though Fletcher denies it, this looks like a zero-sum account of guilt, according to which when one agent takes a share, the shares of other agents diminish correspondingly. As Fletcher is well aware, the number of participants in a crime can increase indefinitely without any individual's guilt diminishing at all. Each can be fully guilty no matter how many there are. That Sharon saw himself as acting not in his private capacity but on behalf of the nation of Israel, and that he was himself a product of Israeli culture – these facts do nothing, in my view, to mitigate his individual guilt. These same types of condition may obtain in domestic crime without having any mitigating effect. In ordering the murder of business rivals, for example, a Mafia don may see himself as acting on behalf of and for the good of the Family, of whose culture he may be a loyal product. But we do not treat these facts as having deprived him of the ability to understand either the wrongness or the criminality of murder. Nor does his acting vicariously through willing subordinates mitigate or dilute his guilt. That would be too easy a way to avoid a charge of murder. Similarly, if Sharon intended the slaughter of the Palestinians, if he could not do the job himself, if he could count on the Phalangists but not necessarily on Israeli forces to do the job thoroughly, and in particular if he thought he could count on people with theories like Fletcher's to allocate most of the blame to the Phalangists, I see no grounds for mitigating his guilt for the killings. I do not claim that all of these suppositions are true – I do not know whether Sharon intended a massacre to occur – only that if they are, Sharon's guilt is undiminished by his use of the Phalangists to achieve his ends.

There is already altogether too much mitigation of legal liability for criminal action in war. A single act of murder in domestic society is treated as a serious matter by the

law. For a variety of reasons – retribution, social defense, deterrence, and so on – it is held to be of great importance to bring the murderer to account. When an unjust war is fought, the result may be the wrongful killing of many millions of innocent people – murder millions of times over – but who is ever brought to account? The civilian citizens of the state that initiated the unjust war are not legally liable and are generally not thought to be morally responsible either. In law, the combatants who fought the war are not guilty of any crime provided they fought within the limits defined by the law of *jus in bello*. And what of the political and military leaders who made the crucial decisions about whether to fight the war and how to fight it? The case of Ariel Sharon is hardly atypical: an Israeli commission of inquiry found that he was not criminally responsible for the massacres he oversaw and he was subsequently elected Prime Minister of Israel. In short, when unjust wars are fought and vast numbers of innocent people are slaughtered, it usually turns out, by some sort of legal alchemy, that no one is responsible, no one is guilty, no one is liable, and no one is punished – a happy outcome for all those whose guilt is reciprocally diminished by that of others until there is none left for anyone at all.

In his opening speech at the Nuremberg trials, Justice Jackson, the US Chief Prosecutor, observed that “under the law of all civilized peoples,” it has been “a crime for one man with his bare knuckles to assault another. How did it come that multiplying this crime by a million, and adding fire arms to bare knuckles, makes it a legally innocent act?”<sup>xxix</sup> Fletcher has tried to provide an answer, but I believe that Jackson’s challenge remains unanswerable.

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<sup>i</sup> George P. Fletcher, *The Grammar of Criminal Law: American, Comparative, and International*, volume 1: *Foundations* (New York: Oxford University Press, 2007), section 8.6. I will hereafter refer to this book simply as the *Grammar*. All parenthetical page references in the text are to this book.

<sup>ii</sup> See, in particular, George P. Fletcher, *Romantics at War* (Princeton: Princeton University Press, 2002), hereafter *RW*, and George P. Fletcher and Jens David Ohlin, *Defending Humanity: When Force is Justified and Why* (New York: Oxford University Press, 2008) hereafter *DH*. The latter is coauthored with Fletcher's colleague, Jens Ohlin, but all the material from that book to which I will refer either has been articulated by Fletcher elsewhere or constitutes an elaboration of, or is at least consistent with, claims he makes elsewhere, including in the *Grammar*. I will write as though the ideas in *Defending Humanity* were attributable to Fletcher alone, though this is a fiction I adopt purely for brevity of exposition.

<sup>iii</sup> George P. Fletcher, *Rethinking Criminal Law* (Boston: Little, Brown, and Co., 1978), p. 869.

<sup>iv</sup> *DH*, pp. 58-62. Also see George P. Fletcher, "Punishment and Self-Defense," *Law and Philosophy* 8 (1989): 201-215. Fletcher seems to think that the individualist approach must exclude the aggressor's interests from the proportionality calculation but that the society-based approach must include them on the ground that the aggressor is "another member of the same society of independent selves, with interests that cannot be

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ignored, even if he acts wrongfully.” (*DH*, p. 60) But there is no reason why an individualist approach cannot take account of the aggressor’s interests, provided they are appropriately discounted for his liability.

<sup>v</sup> *DH*, p. 59.

<sup>vi</sup> See Jeff McMahan, *The Ethics of Killing: Problems at the Margins of Life* (New York: Oxford University Press, 2002), p. 241.

<sup>vii</sup> Jean-Jacques Rousseau, *The Social Contract*, in *Social Contract: Essays by Locke, Hume, and Rousseau*, translated by Gerard Hopkins (Oxford: Oxford University Press, 1947), pp. 249-50.

<sup>viii</sup> *DH*, 186-87.

<sup>ix</sup> *RW*, pp. 45 and 70. Emphasis added.

<sup>x</sup> William A. Schabas, *An Introduction to the International Criminal Court*, second edition (Cambridge: Cambridge University Press, 2004), p. 29. This book includes the full text of the Rome Statute of the International Criminal Court as an appendix.

<sup>xi</sup> *DH*, p. 184. Emphasis added.

<sup>xii</sup> Emphasis added.

<sup>xiii</sup> *RW*, p. 159.

<sup>xiv</sup> *DH*, 90. It is possible that Fletcher would not accept the extension of this reasoning to the relation between a civilian collective and its individual members, since he holds that the exemption of individual combatants from responsibility for the action of the collective of which they are agents is a special case.

<sup>xv</sup> *RW*, p. 147.

<sup>xvi</sup> Ibid., pp. 142-43.

<sup>xvii</sup> Henri Tajfel, "Experiments in Intergroup Discrimination," *Scientific American* 223 (1970): 96-102.

<sup>xviii</sup> *DH*, pp. 196-97.

<sup>xix</sup> Ibid., pp. 197-200.

<sup>xx</sup> *RW*, p. 156.

<sup>xxi</sup> Ibid., p. 143.

<sup>xxii</sup> Ibid., p. 158.

<sup>xxiii</sup> Ibid., p. 65.

<sup>xxiv</sup> Ibid., pp. 161-62.

<sup>xxv</sup> Ibid., pp. 167-78.

<sup>xxvi</sup> Ibid., p. 176.

<sup>xxvii</sup> Ibid., pp. 174 and 178.

<sup>xxviii</sup> Ibid., p. 163.

<sup>xxix</sup> Quoted in Andreas L. Paulus, "Peace Through Justice? The Future of the Crime of Aggression in a Time of Crisis," *Wayne Law Review* 50 (2004): 1-35, p. 4.