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# **Réka Varga: Collective responsibility for war crimes?**

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Pázmány Péter Katolikus Egyetem / Pázmány Péter Catholic University  
Budapest

<http://www.plwp.jak.ppke.hu/>

# Réka Varga\*

## Collective responsibility for war crimes?

*"There can be no reconciliation unless individual guilt for the appalling crimes of the last few years replaces the pernicious theory of collective guilt on which so much racial hatred hangs."*  
Hartley Shawcross<sup>1</sup>

### 1. Introduction

One great achievement in international law is the recognition of individual criminal responsibility,<sup>2</sup> as opposed to notions of collective guilt, collective responsibility or any forms of collective retribution.<sup>3</sup> It seems that different fields of international law – international humanitarian law, international human rights law and international criminal law –, although originating from different times, concepts and attitudes, mutually work toward an effective and enforceable international system of individual criminal responsibility.

In such a system, international humanitarian law provides the rules themselves, human rights law the frameworks of international and national accountability, and international criminal law, the “newest” element, the conditions for international enforcement should national efforts fail. Today we are still in a learning process of how to give effect to individual criminal responsibility on the international level: the establishment and experiences of international tribunals and the International Criminal Court (ICC), as well as experiences of national courts are all indicators of this learning process. Despite these achievements, discussions about collective guilt and collective responsibility are often on the agenda, even if only theoretically, with no apparent practical results.<sup>4</sup>

In a great thought-provoking article on this issue, George Fletcher discusses collective guilt regarding the four crimes over which the International Criminal Court has jurisdiction, namely aggression, genocide, crimes against humanity and war crimes.<sup>5</sup> He refers to these

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\* PhD, senior lecturer, Pázmány Catholic University, Budapest ([varga.reka@jak.ppke.hu](mailto:varga.reka@jak.ppke.hu)).

<sup>1</sup> Britain's Chief Prosecutor at the Nuremberg War Crimes Trials. in: “*Let the Tribunal do its Job*”, New York Times, May 22, 1996, at A17.

<sup>2</sup> „We all celebrate the emergence of a human rights regime that recognizes the rights of the individual as distinct from, and sometimes even in opposition to, those of the state. We recognize and celebrate the emergence of a parallel system of personal legal accountability. And we should, therefore, agree that, in this modern age of individual rights and duties, it is untenable to blame an entire polis—the whole citizenry—for the wrongs committed either by individual criminals or by a criminal government.” T. Franck, ‘Individual criminal liability and collective civil responsibility: do they reinforce or contradict one another?’, 6 *Washington University Global Studies Law Review* (2007) 567-574, at 569.

<sup>3</sup> Already after World War II, collective guilt was seen by many as primitive, irrational and bigoted. When the entire Dutch cabinet stepped down after failure to prevent or stop the Srebrenica massacres, this did not reflect negatively on the entire Dutch population. See T. O'Donnell, ‘Executioners, bystanders and victims: collective guilt, the legacy of denazification and the birth of twentieth-century transitional justice’, 25 *Legal Studies* (2005), at 632.

<sup>4</sup> In many writings collective responsibility means responsibility of a state or responsibility of criminal organizations or joint criminal enterprise. See for example K. Ainley, ‘Collective Responsibility for War Crimes: Politics and Possibilities’ Paper presented at the annual meeting of the “Theory vs. Policy? Connecting Scholars and Practitioners”, New Orleans Hilton Riverside Hotel, The Loews New Orleans Hotel, New Orleans, LA, Feb 17, 2010. Also available at: [http://www.allacademic.com/meta/p416608\\_index.html](http://www.allacademic.com/meta/p416608_index.html). Franck, however, makes a clear distinction between state responsibility and determination of people's collective guilt. See Franck, *supra* note 2, at 570-571. In the present article, however, the notion of collective responsibility is not meant to indicate state responsibility, rather the abstract responsibility of a state, nation or a group. This article does not seek to discuss the responsibility of (criminal) organizations either, although references to it are made below.

<sup>5</sup> G. P. Fletcher, ‘The Storrs Lectures: Liberals and Romantics at War: The Problem of Collective Guilt’, 111 *The Yale Law Journal* (May 2002).

four crimes as being collective in nature, because these are “deeds that by their very nature are committed by groups and typically against individuals as members of groups. Whatever the pretence of liberal international lawyers, the crimes of concern to the international community are collective crimes.”<sup>6</sup> Therefore he raises the question whether guilt for these crimes can also be collective<sup>7</sup> and argues that collective guilt is possible, even though collective guilt cannot necessarily be translated into the language of criminal law for the purpose of mitigating punishment or sharing the criminal responsibility.

In the present article I seek to examine the theoretical possibility of collective guilt and responsibility for only one of the four crimes covered by the Rome Statute, for war crimes; and intend to lay out that war crimes are not necessarily collective in nature and therefore the notion of collective guilt and collective responsibility does not necessarily apply for them. I will argue with the notion of collective responsibility for war crimes on two levels: on a more specific level looking at the specificities and elements of war crimes, and on a more general level looking at where the acceptance of the notion of collective guilt and responsibility would lead.

This latter aspect is significant because the ultimate aim of criminalizing acts of concern to the international community is to decrease their occurrence; any theory which undermines this effort would weaken the fragile system of international repression which was so cautiously built up in the recent decades by an interaction of different fields of international law.

## ***2. Are wars collective in nature?***

Fletcher, referring back to Rousseau’s explanation in the Social Contract of the two understandings of popular will, makes a distinction between the aggregative and associative understanding of “collective”: the popular will in the aggregative sense is a sum of the will of individuals (*la volonté de tous*), in the associative term it is the will of the society as an abstract entity (*la volonté generale*), abstracted from the individual will.<sup>8</sup> If we talk of collective guilt and responsibility, we obviously have to mean the associative understanding of collective. We then have to see whether war is collective in the associative term, in other words, whether war is an expression of the will of the abstract state or society or whether it is simply an add-up of individual wills and actions.

Fletcher’s starting point is that aggression, crimes against humanity, genocide and war crimes are collective in their character. He argues for this view by saying that war is a collective enterprise by its nature: as an example, the practice of taking and caring for prisoners testifies to the collective character of armed confrontation. According to his opinion, the nature of war entails that “[t]he person who goes to war ceases being a citizen and becomes a soldier in a chain of command.” Additionally, “war suppresses the identity of the individual soldier and insulates him or her from criminal liability; on the other hand, the international legal order now holds individuals accountable for certain forms of immoral and indecent treatment of the enemy. When an individual commits a war crime, he or she breaks out, at least in part, from the collective order of war and emerges as an individual guilty of violating a prohibition adopted in the international legal community.”<sup>9</sup>

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<sup>6</sup> Fletcher, *supra* note 5, at 1514.

<sup>7</sup> For another definition of collective crime: „Collective crime is an act committed by a significant number of the members of a group, in the name of all members of that group, with the support of the majority of group members, and against individuals targeted on the basis of their belonging to a different group.” N. Dimitrijevic, *Duty to Respond – Mass Crime, Denial and Collective Responsibility* (Budapest: Central European University Press, 2011).

<sup>8</sup> Fletcher, *supra* note 5, at 1509.

<sup>9</sup> Fletcher, *supra* note 5, at 1518.

As wars, by definition, are waged not between individuals but between states and/or non-state entities or groups, we can easily agree in general that war is collective in nature. At the same time we have to make a distinction between how a war is *started* and what acts are perpetrated *during* war, in other words, between aggression and war crimes and how much either of these is collective by nature. Namely, it may be possible to think of a situation where the nation as a whole demands the starting of a war against another nation by expressing public opinion and putting pressure on its leaders. Although this may easily occur, the public will may not always be behind the leaders: the United Kingdom entering the war on the side of the US against Iraq seems to be a good example where the leaders of the state went opposite the will of the people and lead the nation into a war which the nation itself apparently did not want.<sup>10</sup> So was this a war collectively fought by the British against Iraq?

Taking the Rwandan genocide as another example, a great number of persons were tried for committing genocide, and in the public mind, it was the “Hutus” collectively who were massacring the Tutsis, therefore the war seemed to be a collective conflict between the Hutus against the Tutsis. This was a rare event where it was not only a military force or a militia carrying out the violations, but included a great part of the population themselves as perpetrators.

When we talk about the responsibility of the Hutus in general – which sounds like collective responsibility –, looking at the criminal procedures, we realize that responsibility of “the Hutus” really means responsibility of those Hutus who actually took part in the massacres themselves. In this case we are finally not talking about an abstract collective responsibility, but about a case where a big part of the population not only supported the crimes being committed, but also actively took part in it. This, in the end, is not collective responsibility, but the individual responsibility of a large number of a group: an add-up of individual responsibilities.<sup>11</sup>

While looking at war as a general term we may not come to an obvious conclusion as to whether it embodies the associative or aggregative will of the collective, we are in a much easier position when it comes to examining individual acts. In such cases our only task is to establish whether it was a one-off act by a soldier (then there is no question of collective responsibility), or whether it represented the will of the society or state in the associative sense. In the latter case we have to go further and ask whether it was really the will of the society or only the will of a group of certain individuals who are leading the society but not representing the society’s associative will.

On the other hand, it would be difficult to imagine a situation where a nation as a whole in its associative sense demands and agrees with the committing of war crimes. This, of course, also depends on what kind of war crimes we consider. A nation as a whole may support that the enemy is “wiped out” – which cannot be a legitimate aim of war or particular actions during war –, but it is difficult to imagine how a whole nation may want the delay of

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<sup>10</sup> Investigations are currently undergoing in the UK about Iraq (the “Iraq war enquiry”), including the run-up to the invasion of Iraq. The investigation conducted so far supports that at least a bigger proportion of the nation did not support the war. For an update on the enquiry, see The Iraq Inquiry, available at: <http://www.iraqinquiry.org.uk/> (visited 2 February 2012)

<sup>11</sup> At the same time one has to acknowledge that genocide, *per definitionem*, often involves a whole group as perpetrators. Many writers therefore raise the question whether responsibility of criminal groups, such as the *Interahamwe*, would be the adequate response. “It is important to keep in mind that our claims apply to particular kinds of grave injustice, namely, those stemming from hatred of a group”. „[...] notions of criminal responsibility rooted in ideas of individual guilt do not provide good models for devising a sound legal and moral approach to genocide.” See: T. W. Simon, *The laws of genocide: prescriptions for a just world* (Westport: Greenwood Publishing Group, 2007), at 222 and 220 respectively. The responsibility of criminal organizations is, however, not the same notion as collective responsibility. Responsibility of organizations entail conditions such as active participation in the groups, the responsibility of its leaders, etc.

repatriation of prisoners of war. Until this point therefore it is certainly agreeable that it is *possible* that wars are collective in nature. However, as described below, we may come to a slightly different opinion when it comes to the results drawn from this statement.

### ***3. The Polish farmer: a case study***

Fletcher illustrates the conflict of collective and individual responsibility arising from three factors: (i) war being an alternative legal order, (ii) international law as a source of individual criminal responsibility and (iii) domestic law as a source of individual criminal responsibility, through the following example.<sup>12</sup>

A Polish farmer individually takes up arms against German troops invading his country and kills three German soldiers. In Fletcher's opinion, the farmer is guilty of murder under domestic law, because the farmer is acting alone, independently of the army, so the case falls outside the collective activity that defines the law of war. Fletcher's line of reasoning is that since an attack against a state is collective, a collective self-defence applies for the state that has been attacked, therefore the attacked state, acting through its army, has the right to fight back.

As the Polish farmer was not a representative of his army, he cannot invoke the collective right of self-defence and would have to rely, instead, on individual self-defence. As the German troops did not pose a threat to his personal safety, there was no individual self-defence situation. Fletcher therefore raises attention on the collective nature of the right to fight in order to lead to an understanding of the collective nature of the guilt that may appear once a war crime has been committed.

Thinking in terms of international humanitarian law, however, it may be observed that the basic argument in this line of reasoning does not correspond to the basic understanding and principles of the law of war. It may be true that war is collective by nature: an act or a series of acts of a single person representing no one but himself cannot be considered as war. However, the very basic principle of the law of armed conflict is the principle of distinction: distinction shall be made between combatants and civilians, the former being legal targets, the latter not.

This distinction also entails that civilians are not to take part in the hostilities, and if they want to, they should join their armies and then make themselves recognizable for the enemy as combatants. But civilians taking part in the hostilities in civilian clothes, not being distinctable, would undermine the concept of distinction and so it is prohibited, under certain conditions, under both international and domestic law: not because of a lack of self-defence situation, but because feigning protected status.

The point therefore that is missing from the above example of the Polish farmer seems to be that the starting point, or underlying consideration, in international humanitarian law (IHL) is the balance between military necessity versus humanitarian considerations, not self-defence. IHL acknowledges that there is military necessity in an armed conflict, therefore makes acts permissible which are otherwise, in peacetime, not permissible. Military necessity is therefore very different from the notions of collective or individual self-defence.

The question of self-defence is not relevant in IHL as it is in ordinary criminal law, although the results may at times be similar. If we would think in traditional domestic criminal law terms, self-defence would be an important factor when a soldier is faced with a civilian pointing a gun at him: in this case we could argue that the soldier would have the right to attack this particular civilian because the soldier (or anyone, for that matter) always has the right to self-defence.

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<sup>12</sup> Fletcher, *supra* note 5, at 1518.

At the same time, the IHL explanation to this situation does not derive from self-defence, but from the fact that the civilian lost protection because he was taking a direct part in hostilities.<sup>13</sup> In such a situation, according to the logic of IHL, it is not the existence of a self-defence situation that is to be examined to judge the legality of the soldier's act, but whether the civilian took a direct part in the hostilities or not.

We may easily realize the significance of the difference between the self-defence concept and the distinction concept in the example of deployment to the site of an attack: it has been mostly generally accepted that a civilian deploying to the place where he plans to attack is already considered as direct participation<sup>14</sup>, therefore he can be attacked, whereas someone going to a place of attack is definitely not invoking an imminent self-defence situation in ordinary criminal law terms.

The rationale of this difference can also be demonstrated through weighing the legality of an attack under the proportionality principle under IHL. Whereas the self-defence concept concentrates on an imminent threat to one's life and acknowledges proportionate reaction as legal; in addition, it also excuses disproportionate responses due to the understandable shock one experiences under such threat, the IHL logic concentrates on the prohibition of attacking civilians and the requirement of an attack – to be more precise, the civilian casualties – to be proportionate compared to the military advantage anticipated. Therefore not every legal attack under IHL would be legal under the self-defence concept<sup>15</sup>, and the other way around: not every legal or excusable act under self-defence would be legal under IHL<sup>16</sup>.

A further difference between the outcomes of the two concepts appears with respect to the legality of attacking soldiers: in an armed conflict, it is equally lawful to attack a sleeping soldier who actually does not pose any imminent threat to the enemy, as it is lawful to attack him while he is in active combat. Therefore, if our starting point in the understanding of IHL would be self-defence<sup>17</sup>, there would be different rules applicable to the party that attacks first in an actual combat situation, as usually the attacker is not in an imminent self-defence situation. Therefore it would be wrong to originate IHL rules from the concept of self-defence since that would result in a different outcome than that is put down in the IHL treaties.

Coming back to the case of the Polish farmer, one has to note that the only exception in IHL where a civilian becomes combatant if participates in the hostilities without being member of the army (or militant group) is *levée en masse*<sup>18</sup>, which entails that the civilian population in unoccupied territories, on approach of the enemy, has the right to take up arms spontaneously and is not to be punished thereof, if they haven't had the time to organize themselves, provided that they carry their arms openly, hence, are distinctable<sup>19</sup>.

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<sup>13</sup> Article 51 (3) Additional Protocol I: „Civilians shall enjoy the protection afforded by this Section, unless and for such time as they take a direct part in hostilities”.

<sup>14</sup> See International Committee of the Red Cross, *Interpretative Guidance on the notion of direct participation in hostilities under international humanitarian law* (May 2009, Geneva), at 67. Also available with the same title: 872 *International Review of the Red Cross* (2009)

<sup>15</sup> For instance in case a proportionate attack is carried out, resulting in the death of two civilians. In such a case the soldiers may not be under imminent threat (as required by the self-defence concept), therefore they may not be in a self-defence situation, while their action may be legal under IHL under the proportionality principle.

<sup>16</sup> A soldier cannot argue for the excusability of an excessive response the same way as it would be acceptable under self-defence: if a soldier is attacked, he may defend himself, but the legality of his reaction will be judged under IHL terminology, and not under the self-defence concept. For instance he cannot claim that due to the psychological shock (excessive response being excusable in case of self-defence) he bombed an entire house because he was shot at from that house. However it must be noted that self-defence, be it proportionate or not, cannot be used as an excuse for acts constituting violation of IHL.

<sup>17</sup> The present article does not discuss self-defence in the understanding of the right to go to war, i.e. *ius ad bellum*.

<sup>18</sup> Article 4 A (6) GC III and Article 50 (1) Additional Protocol I

<sup>19</sup> See Article 4 A (6) of Geneva Convention III

There are two interesting issues in *levée en messe*. One is the acceptance of the right of the civilian population in this case to participate in the hostilities, an act otherwise not foreseen under IHL<sup>20</sup>. One may translate this permission as a right to “collective” self-defence, but again, there are significant differences if we look at this case from a self-defence point of view and an IHL point of view. If we regard self-defence and the collective nature of the attack/counter-attack, we have to examine whether the farmer was actually in a self-defence situation. As long as he was not, he was not entitled to fight back. If there was a group of Polish farmers, the situation would be the same.

Under IHL rules, however, we must examine whether the enemy was approaching, whether the farmers had time to organize themselves, whether the taking up of arms was spontaneous and whether they carried their arms openly. The soldiers threatening them personally is not an issue under *levée en messe*. The criteria are, obviously, very different.

A further remarkable issue about *levée en messe* is the strict condition of carrying arms openly. This condition further supports the argument that the basic consideration is the principle of distinction rather than self-defence. That is to say, the obligation of distinction is such an initial factor in this rule that the lack of carrying arms openly may deprive of the right to combatant status.

Therefore we may conclude that the permissive acceptance of *levée en messe* does not derive from the acknowledgement of the right to collective self-defence of the civilian population in unoccupied territories, but should rather be seen as a practical derivation from the obligation of distinction, acknowledging that the population who is caught “by surprise” by the approach of the enemy, cannot join its armed forces to fight against it or organize the resistance simply due to a lack of time. Indeed, as the Commentary to the Geneva Conventions suggests, *levée en messe* can exist only for a short period of time, otherwise its *raison d’être* would vanish and the civilians taking up arms would simply be civilians taking a direct part in hostilities.<sup>21</sup>

It could therefore be argued that when deciding whether the Polish farmer acted rightfully, the decisive element should not be the existence of the threat to his personal security, i.e. the existence of an individual self-defence situation, but rather the conditions laid out by IHL, mainly the issue whether he could have been considered a *levée en messe*. The answer to this question is relatively easy: since he was acting alone, *levée en messe* cannot be applied to him<sup>22</sup>.

Coming back to the initial argument for collective responsibility in this particular case, the result we come to may be the same (the farmer acted illegally), however, the way that lead us here is completely different. While Fletcher’s line is that war being collective, only collectives (armies) can fight it, the IHL line is that it should be combatants fighting combatants only, otherwise civilians and other innocent persons would be harmed, therefore civilians loose protection if taking a direct part in hostilities because otherwise the principle of distinction would loose its credibility.

As a summary, although the result of the two examinations will be practically the same in case of one Polish farmer (self-defence – based: the farmer was not in a self-defence situation therefore attacking the soldiers was illegal; IHL – based: *levée en messe* can be applied only to “*en messe*”: a group of persons, therefore attacking the soldiers was illegal

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<sup>20</sup> Although IHL does not prohibit civilians taking part in hostilities, the „combat immunity”, namely the right for combatants to attack the enemy is restricted for combatants only. Therefore the logic of IHL starts from the presumption that combatants participate in hostilities, civilians don’t.

<sup>21</sup> J. S. Pictet (ed.), *Commentary to the III Geneva Convention Relative to the Treatment of Prisoners of War* (Geneva: International Committee of the Red Cross, 1960), at 68.

<sup>22</sup> According to the Commentary: „The provision is not applicable to inhabitants of a territory who take to the „maquis”, but only to mass movements which face the invading forces”. See *supra* note 19, at 67.

since the farmer was acting alone), we may come to two different results if we regard a group of Polish farmers (self-defence – based: no self-defence situation therefore the act is illegal; IHL – based: if those criteria which we have specified above are fulfilled, the act could be legal).

#### 4. What is collective will?

If we want to establish that war is an expression of the associative collective's will, we have to face questions such as what about those parties or people who oppose the war, who approved the war (was it the government, the parliament or the result of a referendum), did those who oppose the war have a chance to actually do something against it,<sup>23</sup> do those who did not do anything for the war also share responsibility,<sup>24</sup> or how far a member's obligation go to prevent injustice<sup>25</sup>. We should then also examine the individual acts in war and whether these are acts representing the associative collective will or whether these are simply expressions of the individual's will, against the will of the associative collective.

Collective guilt and responsibility presuppose collective will. But what is collective will? Does the will of the government or the army necessarily represent the collective will of the nation or the citizens? Does non-action of citizens of a state to stop atrocities carried out by their government or armed forces represent a collective will to actually commit the atrocities?<sup>26</sup> What if we are talking about a suppressive state and every expression of discontent is harshly punished? How far do the obligations of citizens go to "escape" collective guilt?

When we talk about collective guilt, we usually think of events such as the Nazi persecution of Jews, gypsies and other groups. But if we think of collective guilt in relation to other events we may be less sure: for example are citizens of the United Kingdom responsible for mistreatment of prisoners in Iraq? Although they may have expressed disagreement, did they do everything in their power to stop it? Could they have protested more? Did they actually have the power to stop it?

Furthermore, how can an entire nation be guilty? If the nation or most members of the nation actively contributed to the commission of the crimes, like in Rwanda, the collective guilt could be argued, but even in this case it was not *all* Rwandan Hutus who committed the crimes against Tutsis so the "collective" who are responsible would not be more than the sum of the individuals who did actually participate in the genocide. But would we establish collective guilt if the nation did not actively contribute but passively watched? How could a nation escape collective guilt in such a case and what would they have to do? Protest? How much and how? A member of the government or parliament can step down to protest but what

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<sup>23</sup> Mellema argues that unless a moral agent (a member of the collective) personally contributes to a state of affairs in some suitably weak sense, the person escapes membership in a collective that bears moral responsibility for it. See G. Mellema, 'Collective Responsibility and Contributing to an Outcome', 25 *Criminal Justice Ethics* (Summer/Fall 2006), at 17 and 20.

<sup>24</sup> Larry May examines the basis for the responsibility of the individual for deeds committed by the collective in three factors: (1) attitudes of the individual that makes harm more likely to occur, for example sharing racist attitudes, (2) failure to act both on the individual and collective level, (3) roles and positions of persons within their communities. See L. May, *Sharing responsibility* (Chicago: University of Chicago Press, 1992), at 1. and 5. May argues that individuals should bear responsibility for the collective, even if they did not participate in it directly and could not have prevented it.

<sup>25</sup> „If I fail to do whatever I can to prevent them, I too am guilty.” Karl Jaspers, *The Question of German Guilt* (New York: Capricorn Books, 1961), at 36.

<sup>26</sup> For a discussion on the responsibility of bystanders, see O'Donnell, *supra* note 3, at 636-637.



can the ordinary citizen do? What if protesting is harshly punished? What if it reaches no result? What if some protest stronger than others?<sup>27</sup>

What is even more remarkable is that the argument towards collective guilt can be turned to its reverse: making war crimes a collective action and therefore attaching collective guilt to it, one may come to the conclusion that if the nation cannot be held guilty of a crime than the persons acting on its behalf cannot be guilty either. Lewis notes the danger in relying too heavily on collective responsibility: in his, view, this is a way to the view that responsibility does not really exist, or at least well on the way to finding it easy to ignore.<sup>28</sup>

Fletcher takes the Sharon-case as another example. In the *Sharon*-case, a complaint was filed in 2001 in Belgium against Ariel Sharon and others, Sharon Israeli Minister of Defence at the time of commission of the crimes and Prime Minister at the time of the proceedings, for alleged crimes – war crimes, crimes against humanity and genocide – committed against Palestinian refugees in Lebanese refugee camps in 1982. The case was filed by victims of the massacre based on universal jurisdiction.

Eventually, the Belgian courts refused the case, as a consequence of strong Israeli and US pressure. The case brought huge attention because it was raised in a state that had no link with the alleged perpetrator, the scene of the crimes or with the victims, therefore was a case of ‘pure’ universal jurisdiction.<sup>29</sup> Fletcher is of the opinion 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>30</sup>

We can come to two conclusions from such a statement: (i) if we cannot suppose that the entire Israeli nation was guilty than the individual responsibility of the agent vanishes, (ii) they share responsibility: the agent and the nation. Both conclusions can be dangerous and go directly opposite one of the greatest developments in international law, individual criminal responsibility.

If we were to accept that an agent of a state can only be responsible for an international crime if the nation as a whole can be held responsible than this could be an easy way out for agents from responsibility. If we were to accept that responsibility is shared between the agent (individual) and the nation, then again we hit non-answerable questions such as how much the nation is guilty and what would be the proportion of guilt shared.

Fletcher further argues that whatever responsibility Sharon bore for the massacre in Lebanon, his responsibility is shared with that of his nation and therefore mitigated because he was acting as agent of the state. But how can one be sure about this? Talking in general terms, what if it is the individual will of the agent of the state to wipe out another group of people? What if this is his own personal belief and he uses the state he is representing to execute his plan and so the plan becomes state policy? How can we prove the difference?

And again, what result would such an approach have and where would such a theory lead? If we stick to individual responsibility in our example, the agent can escape

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<sup>27</sup> For similar questions see J. McMahan, ‘Collective Crime and Collective Punishment’, *Criminal Justice Ethics*, (Winter/Spring 2008), at 7.

<sup>28</sup> H.D. Lewis, ‘The Non-Moral Notion of Collective Responsibility’, in P. A. French (ed), *Individual and Collective Responsibility* (Cambridge: Schenkman Books, 1998), at 130.

<sup>29</sup> For an analysis of the case, see D.R. Hurwitz, ‘Universal Jurisdiction and the Dilemmas of International Criminal Justice: The Sabra and Shatila Case in Belgium’, in D. Hurwitz, M. L. Satterthwaite, D. Ford (eds.) *Human Rights Advocacy Stories*, (Foundation Press, 2009) and Amnesty International, *Universal Jurisdiction: Belgian Court has Jurisdiction in Sharon Case to Investigate 1982 Sabra and Chatila Killings* (2002), available online at <http://www.amnesty.org/en/library/info/IOE53/001/2002/en> (visited 6 February 2012).

<sup>30</sup> G. P. Fletcher, *Romantics at War* (New Jersey: Princeton University Press, 2002), at 65.

responsibility if he steps down from office before the acts are committed, but if he doesn't step down, it makes it his own individual responsibility.

### ***5. If wars are collective in nature, could this result in collective responsibility for war crimes?***

While we may accept that in war a soldier is not acting on his or her own behalf but on behalf of the state, the point of the concept of individual criminal responsibility is exactly not to let such individuals hide behind the state's "will" or behind orders given by superiors in the name of the state. A state is only an abstract entity which cannot hold criminal liability; therefore it is unacceptable that individuals could commit atrocities in the name of the abstract state without any consequences.

Fletcher argues that the crimes under the Rome Statute are collective, because 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>31</sup> If we look at the nature of war crimes, we may come to the conclusion that this statement can easily be contested. Namely, it is argued that offenders are prosecuted for crimes committed by and in the name of the groups they represent. While this may sound correct for genocide and crimes against humanity where a specific intent (this can also be the intent of one person only, although it is difficult to imagine such a case) or the widespread or systematic nature of the act are constitutive elements of the crimes, these elements could make them "collective" in nature.

War crimes, on the other hand, can easily be committed out of a purely individual intent: someone wanting to loot an enemy civilian for his own benefit or behaving in an inhumane way with detainees out of personal cruelty. These acts can well be committed without a state intent being in the background. Naturally state intent may be in the background for example in case of torturing of prisoners to gain information, but it would be simplistic to say that all war crimes are part of a state policy.

The Rome Statute says: "[t]he Court shall have jurisdiction in respect of war crimes *in particular* when committed as part of a plan or policy or as part of a large-scale commission of such crimes."<sup>32</sup> (emphasis added). McMahan argues that the reason for the formulation "in particular" is not the collective nature of the crimes but rather the limited resources of the ICC and the intention to deal with 'big' cases. Would this be otherwise and would the collective (state) element be required for war crimes, it would include corresponding conditions in the elements of war crimes.<sup>33</sup> If we go through the elements of war crimes, it becomes apparent that none of them include any reference to the requirement of collectivity, systematic nature or any similar condition. That is why it is easy to agree with McMahan, having to add that crimes committed and explained as state policy are particularly dangerous because the perpetrators are hiding behind the state policy so it is increasingly important to prosecute them individually to make sure that everyone thinks twice before executing or forming such state policy.

The 'defence' of the collective element with respect to war crimes, saying that they had been committed in the name of the group the perpetrators represent and thus the individual's responsibility shall be diminished with that of the collective, is actually a reverse argument of the superior order defence. In the superior order defence, the subordinate is trying to defend himself from criminal liability by saying that he was given orders by his

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<sup>31</sup> Fletcher, *supra* note 5, at 1525.

<sup>32</sup> See Article 8 (1) of the Rome Statute of the International Criminal Court.

<sup>33</sup> J. McMahan, 'Collective Crime and Collective Punishment', *Criminal Justice Ethics* (Winter/Spring 2008), at 5-6.

superior. Such a defence has, rightly, not been acceptable at and since the Nuremberg Tribunal.<sup>34</sup>

In the case of the “collective” defence, the leader (or superior) is defending himself by saying that he only executed the will of the group. As much as the law says in the superior order case that the subordinate shall not carry out illegal orders, the superior shall also not carry out an illegal “mandate” coming from the collective. In such a case the will of the collective, even if illegal, would remain to be a will without action. The justification is also similar: in the superior order case the soldier defends himself by saying he did not actually want to carry out that act, and in the “collective” defence case the superior may also say it was not his will, but the will of the collective. This is why it was so important not to accept the superior order defence and this is why, in my opinion, it is equally important not to accept the “collective defence” either.

Similar questions were raised when thinking about the forms of liability during the Nuremberg Tribunals. In order to overcome difficulties of proof, evidence and a big number of defendants, an attempt was made to determine criminal liability for acts committed by others based on membership in a *criminal organization*. However, due to the recognition that individual criminal responsibility requires personal culpability, it was accepted that mere membership in an organization was not enough in itself to base criminal responsibility for acts committed by (other) members of the organization, it also required knowledge of the criminal purpose or acts of the organization and that the person *voluntarily joined the group* or committed the acts himself. Even in this form, this solution remained to be strongly contested.<sup>35</sup>

Worth to note that a further development of the notion of criminal organization was the Prevention of Terrorism Acts in the United Kingdom<sup>36</sup>, which stipulated that law makes certain organizations illegal and thus making mere membership a criminal offence. Here, however, the criminal offence stands not for certain acts committed by the organization but for membership alone. In such cases knowledge of criminal purpose of the organization or the commission of criminal acts was obviously not a condition for criminal liability of the member. These measures against the Irish Republican Army were then further developed by subsequent other counter-terrorism acts throughout the world following the 9/11 attacks, the examination of which extends the framework of the present article.

The above referred form of liability in the Nuremberg Tribunals can be seen as similar to the collective responsibility of a group, but is based on completely different logic and is more a form of indirect responsibility, therefore can not be considered as a form of collective responsibility.<sup>37</sup> The difference lies in that the above form of responsibility requires that the person is free to decide whether to join the group or not, which is not a choice one can make with regard to being a citizen or national of a country.<sup>38</sup>

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<sup>34</sup> Nuremberg Charter, Article 8: „The fact that the Defendant acted pursuant to order of his Government or of a superior shall not free him from responsibility, but may be considered in mitigation of punishment if the Tribunal determines that justice so requires.”

<sup>35</sup> See M. Boot, *Nullum Crimen Sine Lege and the Subject Matter Jurisdiction of the International Criminal Court, Genocide, Crimes Against Humanity and War Crimes* (Cambridge/Antwerp/Portland: Intersentia, School of Human Rights Research, 2002), at 300.

<sup>36</sup> Prevention of Terrorism (Temporary Provisions) Act 1989 (repealed), available online at: <http://www.legislation.gov.uk/ukpga/1989/4/contents> (visited 6 February 2012)

<sup>37</sup> The ICTY Statute and the decision in the *Tadić* case also foresee the element of common design as a form of accomplice liability. This form of liability went so far in the *Tadić* case that the Appeals Chamber held that criminal liability exists for acts that are not part of the common plan if it was foreseeable that members of the group would commit such acts and the accused willingly took that risk. However, these provisions „cannot be interpreted as including a concept of collective responsibility.” See Boot, *supra* note 33, at 292 and 302.

<sup>38</sup> Significant discussions over conditions of holding an individual responsible for mere participation in a criminal organization unfolded exactly around this issue: whether there are escape routes for coerced and

The notion of responsibility of criminal organizations is therefore not to be confused with collective responsibility: in the case of responsibility of criminal organizations the member of the organization was aware of the criminal objective and joined voluntarily; and was thus not simply a member of a group or organization in the name of which persons or groups committed the atrocities.<sup>39</sup> Simon argues for a need for responsibility of organizations by indicating that “participants belonged to organizations, whose structures proved critical to carrying out genocide or a grave injustice.”<sup>40</sup>

This, however, requires that such participants were not simply members of the group but were active members of it, contributing to the commission of atrocities. This is an enormous difference between responsibility of organizations and collective responsibility in that in the latter case merely being a member of the group would be enough for the responsibility of the members.<sup>41</sup> To put it bluntly, the difference is similar to that of the responsibility of the SS and the entire German nation.<sup>42</sup>

In the case of collective responsibility, we therefore again come back to the question how a citizen escapes collective responsibility if it was not his own will to be the part of the “group” at all. Obviously thinking about renouncing citizenship is not an answer to this question. Therefore accepting the rationale of responsibility of criminal organizations or members of such organizations is not the same as accepting the rationale of collective responsibility.

Similarly, thinking about guilt and responsibility for the My Lai massacres, many ask who was actually to blame for these obvious violations. Baier makes a sharp contrast between guilt and responsibility, claiming that Lt. Calley may have been guilty of murdering people at My Lai, but he was definitely not the (only) one responsible.<sup>43</sup> But again, the author runs into asking how far society may be held responsible for these acts and what the criteria for such responsibility are.<sup>44</sup> He finally comes to the conclusion that members of the society can escape collective responsibility by formulating objections or engaging in civil disobedience, furthermore, even those who agreed with the war may escape collective responsibility since they may not have agreed to the commission of war crimes.<sup>45</sup>

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ignorant members of the organization. In the end, the Tribunal examined the criminality of the organizations and gave leeway for individuals on grounds of their role in the organization. As for background and discussions on the development of responsibility based on participation in criminal organizations at Nuremberg, see: T. W. Simon, *The laws of genocide: prescriptions for a just world* (Westport: Greenwood Publishing Group, 2007), at 227-234. Simon earnestly criticises the views that strongly stick to individual criminal responsibility and argues for the need to establish organizational responsibility. “[...] the failure even to consider organizations as criminal in contemporary debates over war crimes tribunals supports the claim that we have learned the wrong lessons from Nuremberg.” See Simon, at 233.

<sup>39</sup> This question raises the issue of objective responsibility as well. For a discussion on objective responsibility, see B. J. Gellér, *Nemzetközi Büntetőjog Magyarországon, Adalékok egy vitához* (Budapest: Tullius Kiadó, 2009), at 192-193.

<sup>40</sup> Simon, *supra* note 36, at 240.

<sup>41</sup> Mellema, on the other hand, argues that no one is a member of the collective unless he/she has done something or omitted to do something that warrants membership in the collective. See G. Mellema, ‘Collective Responsibility and Contributing to an Outcome’, *25 Criminal Justice Ethics* (Summer/Fall 2006), at 17.

<sup>42</sup> „Organization responsibility occupies a more realistic and more defensible middle position between [...] holding an entire nation morally responsible and Nuremberg Tribunal’s ultimately holding only a few leaders criminally guilty. Whatever the complicity of the nation’s population might be, atrocities on a mass scale are carried out, generally, not by the population as a whole but through organizations within a nation state.” See Simon, *supra* note 36, at 242.

<sup>43</sup> K. Baier, ‘Guilt and Responsibility’, in L. May and S. Hoffmann (eds), *Collective responsibility: five decades of debate in theoretical and applied ethics* (Savage, MD: Rowman and Littlefield Publishers, 1991), at 203.

<sup>44</sup> Baier, *supra* note 41, at 209-210.

<sup>45</sup> Baier, *supra* note 41, at 216.

When breaking down collective responsibility to the individual, we thus run into cases where the innocent individual would also share the responsibility of those who are not innocent.<sup>46</sup> And so finally, we come to a similar conclusion: we may want to say in general that collective responsibility exists, but when we try to break it down and go into details, we are left with no meaning to it.

Therefore we may conclude that although wars are indeed collective in nature, it does not follow that war crimes are also collective in nature. While it may be easy to imagine some war crimes as being an articulation of a collective will, neither the formulation of the grave breaches in the Geneva Conventions and their Additional Protocols, nor war crimes listed in the Rome Statute include any required elements of collectivity.<sup>47</sup>

## 6. What's the point?

The reason individuals were directly made subject to criminal liability under international law was to ensure that international law cannot be neglected through hiding behind the abstract's will by persons responsible for states' legislation or for government orders given to individuals. While Kelsen held that international offences were attributable to the state only<sup>48</sup>, and in earlier times obeying government orders resulted in that individuals remained immune from criminal prosecutions, the Nuremberg Charter<sup>49</sup> and subsequent international instruments<sup>50</sup> expressly established that the official capacity of defendants was not an accepted ground to excuse them from criminal responsibility. While the immunity of a person because of his official capacity is not exactly the same question as collective responsibility, it shall be realized that criminal responsibility was brought down to the individual's level precisely because acts, in the end, are committed by individuals.

Some experts argue that there is an excess of responsibility for war crimes as opposed to individual responsibility, in that not only the person who actually perpetrated the act should be held responsible, but also those who created an environment and scheme in the framework of which such atrocities had been committed.<sup>51</sup> One can fully agree with such an opinion in the case of certain kinds of war crimes, noting, that this does not establish collective responsibility as such, it rather places a responsibility on the individual in a different form or means a different mode of liability – be it command responsibility or responsibility based on the notion of joint criminal enterprise – to persons other than those who actually, directly carried out the acts.<sup>52</sup>

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<sup>46</sup> „Concluding from these cases that the innocent somehow share in the wickedness of the guilty would be foolish. (...) [e]ven the most ardent defenders of collective responsibility must concede that these arguments are fallacious. Once again, moral responsibility belongs essentially to the individual.” See G. F. Mellema, *Collective Responsibility* (Amsterdam – Atlanta: Editions Rodopi B.V., 1997), at 36-37.

<sup>47</sup> See also M. Boot, *supra* note 33, at 304.

<sup>48</sup> H. Kelsen, ‘Collective and Individual Responsibility for Acts of State in International Law’, *Jewish Yearbook of International Law* (1948), at 226. and 230-231.

<sup>49</sup> Nuremberg Charter, Article 7: „The official position of defendants, whether as Heads of State or responsible officials in Government Departments, shall not be considered as freeing them from responsibility or mitigating punishment.”

<sup>50</sup> See Article 7(2) of the Statute of the ICTY, Article 6(2) of the Statute of the ICTR and Article 27(1) of the Rome Statute of the ICC

<sup>51</sup> See for example Ainley, *supra* note 4, at 6-7.

<sup>52</sup> The view that this is a specific form of liability was underlined in the *Tadić* case: „[The ICTY statute] does not exclude those modes of participating in the commission of crimes which occur where several persons having a common purpose embark on criminal activity that is then carried out either jointly or by some members of his plurality of persons. Whoever contributes to the commission of crimes by the group of persons or some members of the group, in execution of a common criminal purpose, may be held to be criminally liable.” See *Prosecutor v Tadić*, Appeals Chamber, Judgment of 15 July 1999, para 190

“International criminal law has been regarded as controversial and innovative precisely because it makes individuals liable for infractions of international law’s most fundamental norms. The International Military Tribunal at Nuremberg declared in its final judgement that the hideous crimes under investigation were committed ‘not by abstract entities but by men’.”<sup>53</sup> It was exactly the acknowledgement of individual criminal responsibility that was such a landmark step at the Nuremberg tribunals, following the similar provision of the Treaty of Versailles.<sup>54</sup>

The Draft Code of Offences against the Peace and Security of Mankind, drafted by the International Law Commission in 1951, also foresaw individual criminal responsibility for offences against the peace and security of mankind, and it did so exactly after the events in relation to which collective responsibility is most often cited.<sup>55</sup> The Nuremberg Charter did not only accept individual criminal responsibility, but also negated the possibility of defence on the ground of having been acted as Head of State or a government official or under the orders of the government or a superior.<sup>56</sup> Principle IV adds: “provided a moral choice was in fact possible to him”. This means that if the person had no choice but to commit the acts (e.g. whether he had the possibility to refuse the order or he put his own life in imminent risk if he did so) he may escape liability.

So then how can we talk about collective responsibility if in fact law recognizes that it is possible that certain individuals did not have another choice? This question can only be answered on the individual’s level by judging whether he had a choice or not to not commit the acts. But if we start looking at the motives and possibilities of individuals, we cannot talk about collective responsibility anymore.

Whereas discussions on collective moral or social responsibility do have their places<sup>57</sup>, if we would accept that there are collective wrongdoings and collective guilt in any kind of criminal terms, what would be the next step? A wrongdoing must be punished, but by whom and who would be punished? Collective wrongdoing would call for a collective punishment of a state or certain groups of people which is very difficult to prove and to imagine in international law. Would that not lead to an indiscriminate punishment that would further tension?<sup>58</sup> What body would establish the collective responsibility of an entire state or group based on what criteria? Under what circumstance could certain individuals, not agreeing with collective will and belonging to that group, escape such a responsibility? How could we avoid that such a body is politicized? With the UN’s inability to respond to gross violations due to a lack of interest of states the UN would undoubtedly not be fit for such a task. Although politics surround the International Criminal Court as well, in the end, persons are hoped to be prosecuted based on purely legal basis, in accordance with the rule of law.

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<sup>53</sup> G. Simpson, *Law, War and Crime, War Crime Trials and the Reinvention of International Law* (Cambridge: Polity Press, 2007), at 55.

<sup>54</sup> For more on the Nuremberg and Tokyo Tribunals and their heritage, see E. Greppi, ‘The evolution of individual criminal responsibility under international law’, 835 *International Review of the Red Cross* (1999), at 533-536.

<sup>55</sup> See Greppi, *supra* note 52, at 539-540.

<sup>56</sup> Principles III and IV, „Principles of International Law Recognised in the Charter of the Nuremberg Tribunal and in the Judgement of the Tribunal”, adopted by the International Law Commission of the United Nations, 1950, see also Greppi, *supra* note 52, at 535.

<sup>57</sup> May argues that in case individuals would have a feeling of shared responsibility for what their communities are doing, this could prevent many wrongdoings. See May, *supra* note 22, at 8-9. This, however, is part of a socio-ethical, not legal, consideration.

<sup>58</sup> O’Donnell notes that in a post-conflict situation the ascription of collective guilt would negate the possibility of reconstruction or rehabilitation. She sees the danger in tempting to consider that large-scale problems need large-scale solutions and thus synonymising large-scale with sweeping or indiscriminate. See O’Donnell, *supra* note 3, at 634

Another remarkable aspect is the lack of mechanisms in international law for holding a state responsible for war crimes *vis-à-vis* a victim. If we put responsibility for violations of the law of war in contrast with violations of human rights, we come to an interesting observation. In case of war crimes there is an institutionalized individual criminal responsibility and no institutionalized state responsibility (in other words there is no specific court to establish state responsibility for grave violations of IHL), while in the case of human rights violations there is both institutionalized individual and state responsibility.

Let's think of two examples. If a war crime is committed, an individual may be held responsible either in front of a national or an international court. Although we speak of the responsibility of a certain state for violating IHL treaties, this is not an institutionalized legal category, only in the general understanding of state responsibility for any violation of international law. For a human rights violation we either have an individual accountable in front of a national court (e.g. for slander against good name) or a state in front of an international body, such as the European Court of Human Rights (ECtHR).

There is no similar mechanism establishing state responsibility for war crimes as the ECtHR does for human rights violations *vis-à-vis* an individual. The reason would be that the original idea of human rights is that the state should not abuse its powers against the individual so it is understood to be a protective measure given to the citizen against the state. Therefore the ECtHR is to hold states responsible *vis-à-vis* claims of individuals. There is no such mechanism for war crimes, partially because it is not self-evident that war crimes are committed by states.

At the same time, holding states responsible for human rights violations has only partially been effective. Human rights law also lacks the sharp teeth of a more effective mechanism. As Simpson puts it, “[t]he move to individual responsibility, then, in international criminal law, (...) has also been hailed as a way of giving human rights law the bite it was thought to lack”.<sup>59</sup> Höffe adds, that “the difference between citizens and aliens no longer applies because the term ‘crime,’ both public and private, was not focused on citizens but on human beings.” Thus, a system of human rights or a universal human criminal law was already evident in Roman times, though admittedly only regarding an objective not a subjective conception of law. “Whether morality, arson, theft or damage to property” were concerned, in all of these questions, Romans merely sought “the ethical responsibility and not the personal status of the perpetrator”.<sup>60</sup>

So what's the point in recognizing the notion of collective guilt and responsibility for war crimes? While individual criminal responsibility has a result in that an individual can be held criminally liable and be punished, a collective cannot bear criminal responsibility therefore collective responsibility would be a theoretic notion with no practical results or consequences, even more, it could divert attention away from individual responsibility.<sup>61</sup> So what purpose would the acceptance of the notion of collective guilt or collective responsibility serve? State policy is formed and executed by individuals and since the state is an abstract entity, the best solution there is, is to catch the individuals. If in the end there is not one individual willing to execute a cruel state policy fearing criminal punishment, we have reached our goal.

Law and enforcement should work together and law can only be effective if it can be enforced. International law generally suffers from a lack of top-down enforceability. The measures available in international law to enforce its rules are weak, hazy and not effective. It

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<sup>59</sup> Simpson, *supra* note 51, at 57.

<sup>60</sup> O. Höffe: ‘Moral Reasons for an Intercultural Criminal Law. A Philosophical Attempt’, 11:3 *Ratio Juris*, (September 1998) 206-27, at 210.

<sup>61</sup> „Once a group is identified as collectively responsible for a harmful situation, we forget about the individual actions which lead to this situation.” Mellema, *supra* note 44, at 37.

is precisely individual responsibility under international criminal law that makes international norms enforceable. This notion is a rare but welcome constraint on national sovereignty.<sup>62</sup>

This question gets particular relevance today as the International Criminal Court starts functioning. It is concentrating on punishing individuals and it puts the primary responsibility of prosecution on national courts who are also dealing with individuals. This system is hoped to result in an increased activity of prosecution of war crimes around the world, both on the international and national level. Moreover, to look at a broader picture, collective responsibility would not help peace-process either. To stigmatize a whole nation as guilty in committing a crime is a seed for further violence and hostilities.<sup>63</sup>

Furthermore, it seems there is anyway too much mitigating factor for crimes committed in war and mostly only a small proportion of the real perpetrators are held responsible.<sup>64</sup> So it seems neither correct nor helpful to engage in a discussion over collective responsibility, because “[o]nly individualized justice could ensure the relevance and meaningfulness of international law. Abstract entities were out, flesh and blood human beings were in”.<sup>65</sup>

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<sup>62</sup> See Simpson, *supra* note 51, at 55.

<sup>63</sup> „An important idea behind the notion of individual criminal responsibility for certain conduct is to avoid stigmatizing a particular group of people as criminal, including, for instance, a particular party to an armed conflict, as this may make future peace and reconciliation more difficult to achieve.” See Boot, *supra* note 33, at 304.

<sup>64</sup> “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?” See McMahan, *supra* note 25, at 11. See also: “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 the guilt of others until there is none left for anyone at all.” See McMahan, *supra* note 25, at 11.

<sup>65</sup> Simpson, *supra* note 51, at 56-57.