The Collective Dimension of War

George P. Fletcher
Jens David Ohlin

DOI:10.1093/acprof:osobl/9780199757213.003.0008

Abstract and Keywords

This chapter examines the collective dimensions of war, including the notion of collective guilt that each citizen bears for the actions of its nation. It investigates the inherent right of legitimate defense recognized in Article 51 of the UN Charter with regards to collective self-defense by states against other states. The chapter also analyzes the distinction between collective self-defense and individual self-defense. It describes hypothetical situations to understand the topic. In addition, the chapter discusses collective crimes covered by the Roman Statute.

Keywords: war, collective guilt, collective self-defense, individual self-defense, collective crime, Roman Statute

By now it has become clear that self-defense comes into play at three distinct levels of legal argument. The standard point of reference is self-defense in domestic legal systems, against domestic crimes, and then there is the newly defined standard of self-defense against war crimes (and possibly other offenses) under the Rome Statute. These two dimensions of self-defense have roughly similar contours, as they are both
invoked by individuals to justify their apparent crimes of violence against other individuals or groups. In between these two forms of individual defense lies the commonplace but underexplored phenomenon of collective self-defense by states against other states (and nations against other nations). This is the inherent right of legitimate defense recognized in Article 51 of the United Nations Charter and discussed in previous chapters.

The term collective self-defense can be confusing because Article 51 uses the same term to refer to one state’s going to the aid of another. For the drafters of Article 51, individual self-defense means that the state attacked defends itself. Collective self-defense means that two or more states together fend off an attack. The better term for this situation might be “joint self-defense,” to indicate that two states, treated as individual actors, are joining forces to thwart a common enemy. An analogous sense of collective defense comes to the surface most clearly when states are obligated by mutual defense treaties such as NATO or the now-defunct SEATO to come to each other’s aid in the event of an attack. For this chapter, however, we should put aside these meanings of collective in the sense in which it is used both in the UN Charter and in regional security pacts.

For our purposes, the relevant sense of collective lies in the idea of group action, both for purposes of going to war and for purposes of selfdefense against aggression. When one nation attacks another, its aggression is collective; when the attacked nation defends itself, it also acts collectively. When the collective acts, the whole is greater than the sum of its parts. The nation and its army enjoy an existence of their own. The implications of collective action in the law of war are systematic and deep, as has been clear since the beginning of this book. If Adolph, acting in a military unit of the state Southland, attacks Belsky and other members of the same military unit representing Northland, this is an act of aggression by Southland against Northland. A hundred miles away, Northlander Chopin’s commander hears of the attack and orders his unit, including Chopin, to attack Southlander Detlef and his unit. Chopin kills Detlef. The way the aggression of Adolph (A) against Belsky (B) justifies the response by Chopin (C) against Detlef (D) is illustrated in Table 8.1.
The only way to comprehend the justifiability of C’s action is to embed it in a set of collective responses by Southland and Northland. B is attacked, and therefore C is entitled to respond. This makes no sense without a sense of collective identity that links the injury of one to the other’s right of response. The same is true on the other side. D must suffer only because as a soldier his fate is bound to the consequences of A’s aggression against B.

Benedict Anderson famously used the label “imagined communities” to describe the links between A and D, parallel to those between B and C.¹ The two may never have met; they may not even know of each other’s existence. But, in the typical case, they speak the same language, read the same newspapers, pray with the same translation of the Bible,² and revere the same set of national symbols. Their communities and their
<table>
<thead>
<tr>
<th>Army of Southland</th>
<th>Army of Northland</th>
</tr>
</thead>
<tbody>
<tr>
<td>A ➔</td>
<td>➔ B</td>
</tr>
<tr>
<td>D ➔</td>
<td>➔ C</td>
</tr>
</tbody>
</table>
identification with each other are not made up or fictitious, but a product of imagination in the positive sense. The important implication of collective thinking in the law of war is that neither A nor D is guilty of a crime. There would be no defense to their use of force under domestic legal systems, but here their injuring or even killing others is absorbed into the actions of the collective by the law of war. If anyone is guilty, the collective is guilty. A’s collective, the nation or state of Southland, might be guilty of a conspiracy to commit aggression. This was the crime charged against the German general staff, invented and punished for the first time at Nuremberg. D’s collective could be guilty of the same crime if the collective action of Northland is not classified as self-defense.

There are many puzzles in these claims. How is it possible that a soldier’s killing can be absorbed into the action of the collective and no longer count as a punishable homicide? In the conventional language of criminal theory, is A’s action either justified or excused? Or is it possible that an enemy soldier is not a legally protected interest—something like an outlaw or an animal, the killing of which requires neither justification nor excuse? The latter is probably the traditional law of war. The soldier is so completely identified with the collective that only the collective commits and suffers aggression. Francis Lieber formulated this view in Article 20 of his classic code:

Public war is a state of armed hostility between sovereign nations or governments. It is a law and requisite of civilized existence that men live in political, continuous societies, forming organized units, called states or nations, whose constituents bear, enjoy, and suffer, advance and retrograde together, in peace and in war.

But since the invention of war crimes—at least as early as the 1899 Hague Conventions—it has no longer been tenable to think of enemy soldiers as part of the collective mass, capable of being neither offender nor victim. The Hague Conventions strictly prohibit killing treacherously or using poison. Admittedly, in 1907 only states were responsible for these actions, but these prohibitions against certain forms of warfare are carried forward, word for word, in the Rome Statute, which imposes individual criminal liability. The victim
of a treacherous or poisonous killing was presumably always the individual soldier whose life was taken by these means.

When a soldier kills by these strictly forbidden means, he or she emerges from the mass and becomes an individual again. In ordinary fighting, then, we might think of the soldier as part of the collective; in the case of criminal aberrations from the ordinary, however, we must treat the soldier as an individual, accountable for his or her own crime. The problem of drawing the line between the collective and the individual is illustrated by the following two hypothetical takes on war and self-defense.

1. The Case of the Polish Farmer

Imagine German troops marching toward Warsaw after the Polish government has surrendered and ordered the army to lay down its arms. Suppose a farmer, standing by himself in the fields, sees the troops marching down the road in formation. He rushes to his barn, takes his rifle up to a window in the attic, and shoots at them as they pass. He kills three soldiers. Does the legitimating effect of warfare encompass these killings, which would otherwise be murder under both Polish law and German martial law?

One naturally has some sympathy for the Polish farmer defending his homeland. At first glance it would seem that he has the right to defend his country in any way he can against the unlawful aggression of the Nazis. But these sympathies find little warrant in international law. The reason lies in the principle of reciprocity, which governs the entire law of armed conflict. Although this concept was introduced in previous chapters, we have not yet fully charted its implications.

Note first that the Polish farmer has no claim of individual self-defense. The German soldiers are not attacking or threatening to attack him personally. The defenders of the Warsaw Ghetto were in a different situation, for they were subject to the constant threat of death and deportation. Also, concentration camp prisoners faced a constant threat of imminent death at any moment, and an attack against an enemy guard could be justified on the grounds of individual self-defense. But there is a difficult problem in this context of imminence, a concept discussed at length in previous chapters. Is every sleeping German soldier fair game, even for Jews fearful of genocidal liquidation? Would the situation be different for the Polish
farmer if he were Jewish? One might, for example, argue that any Jew in Poland in close proximity to Nazi troops was in danger of being arrested, deported, and gassed at Auschwitz. Furthermore, once a Jew is arrested by Nazi troops, his possibility for escaping, or defending himself with force, was minimal. The only chance for survival would be to avoid arrest in the first place. Under this theory, the shooting might be “immediately necessary,” in the words of the Model Penal Code, if not necessarily justified by virtue of imminence. Does this mean that every (p.181) Jew could claim individual self-defense as a justification for shooting a passing German soldier? This is a coherent and provocative argument, although it depends entirely on the facts on the ground at that time.

Furthermore, we rejected the standard of immediate necessity in chapter 7 during our discussion of preemptive war and argued in favor of retaining a renewed standard of imminence, based on the principle of reciprocity; that is, so-called rogue nations should be subject to the exact same standards as so-called lawful nations. In the case of the Polish farmer, we have the individual version of this collective dilemma. If we allow the Polish farmer to kill the German soldier, then reciprocity demands that we must allow the German civilian to kill and ambush an American GI in Germany. Should it matter that in one case the soldier is participating in an illegal war, and in the other the solider is fighting a lawful one? To answer this question, we must analyze the idea of reciprocity as it applies to the laws of warfare.

Let us assume for the moment that the Polish farmer is not Jewish. The German soldiers marching down the road present no risk to the farmer’s personal security. If the farmer is entitled to defend his country, it is only by virtue of his membership in the Polish collective exercising resistance against the German invasion—a resistance that lingered even after the official surrender. But the right to fight as part of a collective entails an exposure to risk. Suppose the German soldiers, in a military action, killed the farmer as they passed by. They would clearly be guilty of the war crime of intentionally killing civilians, a breach of the Hague Conventions. If soldiers today engaged in similar killings as
part of “a plan or a policy,” they would be individually guilty under the Rome Statute.8

The protection affirmed by the Geneva Conventions for civilians entails reciprocal duties on their part: they are not entitled to think of themselves as free agents acting on behalf of their country’s army. This would be true whether or not the government had already surrendered. Because the farmer is acting alone, independently of the army, the case falls outside the realm of collective activity that defines the law of war and reverts to a case that should be tried under domestic law.

This case is so difficult because we assume that the German invasion of Poland is illegitimate. Our sympathies are on the side of the Polish farmer, yet these sympathies have no bearing on the legal analysis of the case. The architectonic assumption of international law is that the right to go to war (jus ad bellum) has no bearing on the law applied in the course of war (jus in bello). The correct result under international law—as hard as it might be to swallow—is that the law of collective self-defense does not apply. The farmer is guilty of murder under domestic law.

(p.182) The critical point is that the farmer, acting alone—or even a group of partisans acting alone, however appealing their cause—cannot claim the rights of warfare, including the right of collective self-defense. This is the critical line between terrorism and warfare. Terrorists like Timothy McVeigh cannot claim the rights of war for the simple reason that they are not engaged in an armed conflict between organized military forces. The crucial point in this argument is demarcating the boundary between collective actions covered by the law of war and individual crimes punishable under domestic law. The Polish farmer falls on the side of individual action governed by domestic law.

This analysis has a direct bearing on the claims of Palestinian terrorists of a right to engage in treacherous and deceptive attacks on Israeli civilians, settlers on the West Bank, and Israeli soldiers both in Israel proper and in the occupied territories. If Palestinians could articulate a reciprocal exposure to risk, they might have a claim, but so far no defender of the Palestinian cause has been willing to state who is properly and legitimately at risk as a result of resistance against the settlers or the Israeli army. No one is willing to say
that the entire civilian population that applauds and supports suicide bombings is subject to reciprocal military action. Nor is any defender of the Palestinian cause willing to allow Israeli intelligence to identify the potential offenders against Israeli security—offenders who would be treated like combatants, subject to being killed in military action.

The question of targeted assassinations is another instantiation of the same problem. A recent Israeli Supreme Court decision addressed the issue of assassinations of suspected terrorists by Israeli Defense Forces in the West Bank and Gaza Strip. If we label the terrorists as criminals, they are subject to arrest but are not legitimate targets of assassination. But if we think of the terrorists as combatants, they are subject to assassination under the laws of war just like any enemy soldier. Justice Barak noted that terrorists are legitimate targets when they bear arms, but he concluded that they cease to be legitimate targets once they put down their weapons. In other words, a terrorist is a combatant only when he is acting like one; otherwise, he retains the protected status of the civilian.

This creates what amounts to a 9-to-5 rule. During the day, when they work as terrorists, they are subject to military attack as soldiers, but at night, when they go home for dinner, they must be arrested as criminals. The next question is whether Barak and the Israeli Supreme Court would be willing to accept the full consequences of their view. If the terrorists are combatants, then launching strikes against them should open the Israeli Defense Forces to a reciprocal risk; they, too, become legitimate targets. It is doubtful, however, that Barak or his colleagues on the Israeli high court would be willing to recognize a Palestinian right of self-defense on behalf of targeted Palestinian terrorists. This is proof of the breakdown of reciprocity.

Reciprocity is a demanding standard. Those who resist occupation do not accept it, but in the Palestinian case the Israelis themselves also resist the principle of reciprocity. They engage in targeted assassinations of Palestinian terrorist leaders, even though the targets might be praying in their home or sleeping in their bed. They claim that these terrorist leaders are combatants and therefore subject to the law of war, but they are not willing to accord them the rights of POWs. The law of war is rife with contradictions. Fewer and
fewer of those engaged in quasi-warfare today are willing to be bound, consistently, by the basic principles of honorable and reciprocal warfare.

The magic formula for those who want to have their cake and eat it, too—to attack civilians as though they were combatants but not to pay the price under the law of war—is the nefarious idea of the unlawful combatant. As mentioned in the introduction, the U.S. Supreme Court invented this term in 1942 to explain why a military tribunal could prosecute eight German saboteurs instead of treating them as prisoners of war.12 The concept lay quiescent until 9/11. Since then the Bush administration has pointed to the concept to explain its posture of nonreciprocal warfare. When combatants are unlawful, the argument goes, they are subject to the burdens of combatancy (they can be killed), but they have no reciprocal rights. This way of thinking—deeply embedded in the current mentality of the war on terrorism—exploits the conceptual gap between war and crime. The phrase unlawful combatant as used today combines the aspect of unlawful from the law of crime and the concept of combatant from the law of war. For those thus labeled, it is the worst of all possible worlds.

For those willing to reject the principle of reciprocity to support causes like those of the hypothetical Polish farmer or the real-life suicide bombers in Iraq and elsewhere, some reflection might be in order. States can play the same game of rejecting reciprocity in fighting their war on terror. They can target civilians by calling them unlawful combatants and ignore the rights that all combatants enjoy under the Geneva Conventions.13
2. The Case of the American Officer in IRAQ

Our general problem is staking out the boundary between collective and individual action. In the example of the Polish farmer, the appeal to collective action offered a way of defending acts that would otherwise be criminal. In some situations, the frontier between individual and collective action determines not whether the suspect is guilty or innocent, but the legal regime under which the defendant is guilty and what the punishment should be. A good example is a hypothetical case of an American officer in Iraq who falls in love with an Iraqi woman. When he is off duty and wearing civilian clothes, he enters a restaurant frequented by local people. There he encounters the brother of the woman he loves. They exchange words, the brother insults him, and a fight breaks out. The fight escalates, and the American pulls his service revolver and kills the Iraqi. Under the general principle of territorial jurisdiction, Iraqi law should apply. The problem is whether the killing is also a war crime and subject to prosecution at the International Criminal Court.

To focus on the interesting substantive question, let us concentrate for a moment on the jurisdictional issue. As of this writing, neither Iraq nor the United States has ratified the Rome Statute, but that would not prevent prosecution in The Hague if the Iraqi government felt that, due to American pressure, it was “unable” to carry out an investigation and prosecution. By filing a declaration in The Hague, the Iraqi government, as the government of the territory where the crime was allegedly committed, could accept jurisdiction of the court “with respect to the crime in question.” Thus, contrary to popular opinion and propaganda disseminated by opponents of the court, the failure of the United States to ratify the Rome Statute does not preclude the prosecution of American soldiers for war crimes committed abroad.

With the jurisdictional issue laid to rest, we can turn to the substantive issue of whether the American officer’s killing the Iraqi citizen under these circumstances would constitute the war crime of “wilfully killing” a civilian protected by the Geneva Conventions. The international law of willful killing is stunningly undeveloped. The term willful is not even translatable into the other official languages of the Rome Statute (it is typically rendered as “intentional”). Even under the English version we cannot be sure whether a killing provoked by insults or resulting from a love affair would be the
kind of heinous homicide signaled by the word willful. Let us suppose the killing was willful. That still does not settle the issue of substantive liability.

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.” It must be one of the “most serious crimes of concern to the international community as a whole” and be of “sufficient gravity to justify further action by the Court.” The facts that bear on this assessment are the status of the defendant as a military officer and the fact that he used his military weapon. It is also relevant, however, that the crime occurred when he was off duty, wearing civilian clothes, and eating in a local restaurant. The basic question is whether the case is so far removed from the actions of the military that the killing should be qualified as a purely private transgression, not subject to prosecution as a war crime.

The closest analogue to this problem in U.S. law is determining whether an action by a state employee, after hours or during his vacation period, is attributable to the state government. In one case, a teacher engaged in alleged sexual harassment while he was working at an overnight camp during the summer break. The court decided that this was not a violation that the state could be responsible for. The offensive action did not occur “under color of state law.” Similarly, if an off-duty police officer commits a rape, this action is not usually the action of the state. The Due Process Clause of the Fourteenth Amendment does not apply to this and other purely personal crimes. The useful idea of acting under color of law captures the distinction between the private and the public, between the isolated acts of individuals and the actions of the collective called the state. In the case of the American officer in Iraq, one might say the issue is whether he is acting “under color of war.” That is the proper way to approach the boundary between violations of domestic law and crimes against the law of war.

Admittedly, some thoughtful advocates of human rights argue that every crime committed by an occupying soldier against a civilian occurs under the color of war and constitutes a war crime. This would include every homicide, every theft, every rape, and, in the language of the statute, every “outrage upon
personal dignity,” however unrelated these acts might be to military operations and the war effort. This view is hard to accept. It seems far more consistent with the spirit of the Geneva Conventions and the Rome Statute to require that these acts be carried out in the name of the military—in the name, as it were, of the occupying army. Though the point is controversial, the better view seems to be that the homicide in the restaurant does not qualify as a war crime. The American officer is not acting in his role as a soldier, under the color of war. The dispute is purely personal.

To summarize the results of our two hypothetical cases: the first stands for the application of domestic law and the implication that the civilian may not invoke the collective right of self-defense recognized under the law of war; the second stands for the application of domestic law instead of the law of war crimes. In both cases, the individual acts on his own, not as an agent of the collective, and therefore the only applicable law is the domestic law regulating individual behavior.

These examples of individual action invite us to consider more precisely what we are denying when we extricate the Polish farmer and the American officer from the collective represented by their respective nations and armies. If they are individuals, then what does it mean for the nation or the army to act as a collective unit? To answer this question, we need to reflect on the genesis and structure of the Rome Statute.

3. Collective Crimes
The substantive crimes covered by the Rome Statute derive from three basic sources. The first is the Hague Conventions of 1899 and 1907, the second the Genocide Convention of 1948, and the third the Geneva Conventions of 1949, in particular, the Fourth Convention on the protection of civilians against the excesses of armed conflict. Of these three only the Genocide Convention even purports to impose direct criminal liability on the perpetrators of, and accomplices in, the five specified forms of genocide. The Hague and Geneva Conventions instead hold the contracting states accountable for breaches of the rules governing warfare. The Hague Convention imposes a duty on the responsible states to makes compensation to the states of the victims; the Geneva Conventions go further and impose on each High Contracting
Party the duty to enact penal legislation to punish grave breaches of the Convention,\textsuperscript{25} the details of which will concern us now.
A. Aggression and War Crimes

In 1996 the United States enacted legislation to punish such grave breaches, but limited the jurisdiction of U.S. courts to crimes committed by or against American nationals or by or against members of the U.S. military forces. In 2002, Congress changed the name of the offense to “war crimes,” for the first time introducing liability for war crimes into the U.S. system of legislation. All eight of the grave breaches, together with specific prohibitions in the Hague Conventions, are carried forward in Article 8 of the Rome Statute. Yet 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 (p.187) offenses. The concept of the war crime has undergone a transformation that is precisely the opposite of what is commonly believed.

The Hague Convention prohibits soldiers from engaging in specific forms of warfare, such as “employing poison,” killing or wounding “treacherously,” and employing “arms, projectiles, or material calculated to cause unnecessary suffering.” All of these offenses might be committed by a single soldier acting alone. Of course, under the Hague Convention, the soldier is not personally liable for a war crime. Indeed, the terms “crime” and “breach” are not used in the Convention; rather, “a belligerent party ... shall be responsible for all acts committed by persons forming part of its armed forces.” The remedy against a responsible belligerent is a claim for compensation. According to Article 3, liability attaches to the state of which the soldier is a national. In line with the traditions of international law, states are liable only to states. The state of nationality takes responsibility for a wayward soldier’s crime.

Building on Nuremberg and other post–World War II military trials, the Rome Statute purports to impose liability directly on the “natural persons” who commit war crimes. This is the genesis of international criminal law, which trains its gaze on individual punishment, as opposed to international law proper and its focus on the relations between nation-states. But paradoxically, the transition from the Hague Conventions (1907) to the Rome Statute (1998) has rendered the applicable
crimes collective in nature. This is a little known fact, but an elementary review of the law establishes the point.

Take a simple case of employing poison in warfare in violation of Hague Convention IV Article 23(a). Any individual soldier who uses poison in warfare violates the Convention. Today, a violation of the Rome Statute requires much more. Article 8 begins ambiguously by referring to all war crimes and then limits the concern of the International Criminal Court to those cases “in particular when committed as a part of a plan or policy or as part of a large-scale commission of such crimes.” Because no treaty has defined the term “war crimes,” we should look to the Rome Statute itself for a definition. But the Statute waffles and informs us only that prosecution will take place “in particular” when the violation is carried out in a way that reflects the collective policy of the army, the division, or the battalion.

This might be a good example of what the once fashionable French philosopher Jacques Derrida would call “deconstruction”: the text of the Rome Statute strives for individual responsibility, then undermines itself by stating the opposite of what it purports to hold. The drafters would like (p.188) to impose individual liability, but they all come from a tradition in which collectives—armies, and indeed nations—confront each other on the field of battle. Thus they extend one hand toward individual responsibility and with the other confirm the collective nature of warfare. When the federal criminal code punishes war crimes in 18 U.S.C. § 2441, we cannot be sure whether the relevant conception of the war crime is that of a single individual acting alone or, as suggested in the Rome Statute, the collective offense of a crime committed “as a part of a plan or policy or as part of a large-scale commission of such crimes.”

This ambivalence about the nature of war crimes runs more deeply in the law of war than one might imagine. In both the Hague and Geneva Conventions—precursors to the Rome Statute—the drafters cannot decide whether war crimes are the acts of single soldiers or of units of soldiers acting in cooperation. Reflect for a moment about the war crimes that are called grave breaches, listed in Article 147 of the Fourth Geneva Convention:
1. wilful killing,  
2. torture or inhuman treatment, including biological experiments,  
3. wilfully causing great suffering or serious injury to body or health,  
4. unlawful deportation or transfer or unlawful confinement of a protected person,  
5. compelling a protected person to serve in the forces of a hostile Power, or  
6. wilfully depriving a protected person of the rights of fair and regular trial prescribed in the present Convention,  
7. taking of hostages, and  
8. extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly.

All of these offenses are repeated, in almost precisely the same language, in Article 8(2)(a) of the Rome Statute. But is it coherent to treat these violations of the Geneva Conventions as crimes committed by individuals acting alone? We can do this, if we so choose, with regard to the first three grave breaches: willful killing, torture, and causing great suffering. But what about deportations? How does a single soldier, acting alone, deport an enemy soldier? Deportation is not simply chasing someone into another country. It requires a legal process, an entire apparatus of judgment and enforcement. One individual “deporting” another is a practical impossibility.

(p.189) The same is true about all the other grave breaches except the last, the unnecessary destruction of property, which an individual soldier can certainly do by himself or herself. But try to imagine an individual embedded with a unit compelling someone to serve in the unit, or depriving him of a fair trial, or taking a hostage all by himself.

These breaches are collective for two reasons. It might be the case that the breach is possible only with the complicity of military or governmental officials—for example, depriving someone of a fair and regular trial. In other cases, the individual cannot act alone because the event is public and other members of the unit must either endorse or reject the wayward action—for example, taking hostages. One way to resolve this tension is to approach these crimes with the
understanding that although some may occur on the front lines, on the sole basis of individual initiative, others occur only when commanded and organized from above.

The other crimes of concern to the proposed International Criminal Court are all connected in one way or another with the concept of war. Let us think first about the crime of aggression. Though the United Nations still cannot agree on a formal definition, the concept of aggression serves a critical function in the entire structure of war and self-defense. The concept of aggressive war triggers the right of the attacked state to exercise collective self-defense. There are problems in defining the threshold of intrusion that should constitute aggression, as there remains a dispute about the relevance of “just cause” to designating aggression a crime. But despite these uncertainties, there is no doubt about the collective nature of the offense; the paradigm is one state’s army marching across the territory of another. If a single Arab American tourist throws rocks at Israeli military installations, that is an act of vandalism, not an act of aggression. The group dimension of aggression carries with it the suggestion of recurrent and committed battle with aims of conquest, or at least of settling some political dispute.

The word aggression is normatively loaded. It implies that there is no adequate justification for the use of force. In this respect it resembles terrorism, about which there can also be much debate regarding violence “for a good cause.” In a recent British decision, the House of Lords concluded that aggression was illegal under customary international law and overturned earlier British decisions that argued that the crime’s contours were so contested that it could not be considered an international offense. The House of Lords declined to provide an exact formulation for what counts as aggression, preferring instead to rely on the historical precedent of Nuremberg. Although the charge of conspiracy to commit aggressive (p.190) war was controversial in 1945, it nonetheless resulted in a prosecution. Consequently, if the crime was sufficiently defined in 1945 to allow for an international prosecution, it would be incredible to insist that the crime had somehow become less defined during the intervening years. This argument liberated the Lords from providing a full definition of the crime, but the task of
providing a definition still remains for the international community. However the definition is finally resolved, aggression will serve as a conclusory label identifying a collective crime against the international order.

For the purposes of criminal liability, however, a clear definition of collective aggression will hardly solve the problem of individual liability. Assuming that the German invasion of Poland would satisfy any reasonable definition of aggression, it could not have been the case that every German soldier who participated in the invasion was guilty of a criminal offense. The hurdle is not only the practical difficulty of prosecuting millions; the deeper problem is that wars are not fought by collections of individuals who might be held liable for their conduct. Wars are fought by armies trained to fight under a unified command. Their effectiveness depends on inculcated discipline and sanctions imposed for disobedience. The collective army might be liable for aggression, but nothing about the guilt of individuals follows from this charge.

The tension between collective and individual responsibility poses a number of serious historical questions. Why did the Geneva Conventions use such obviously collective categories, such as “wilfully depriving a protected person of the rights of fair and regular trial”?\(^{35}\) No single person can do this alone; if there is a deprivation of a fair trial, there might be hundreds or thousands collaborating in what they believe is a legitimate practice (e.g., depriving the detainees in Guantánamo Bay of a hearing). The Rome Statute carries forth this language without recognizing the problem of specifying who can be liable for committing the offense. The Hague and Geneva Conventions could use formulae of this sort because their purpose was not to impose individual criminal liability but to hold states accountable for not having prevented the collective activity.

It is important to remember that the charge levied against the general staff in Nuremberg was not aggression, but conspiracy to engage in aggressive war as a crime against the peace. The common law concept of conspiracy captured the collective dimension of the German leadership. There can, of course, be a conspiracy to wage war without an ensuing war, but in fact the concept of collective leadership used in Nuremberg was applied after the application of an effort to identify those responsible.
As there are problems with holding every soldier liable in a collective act of aggression, the same quandaries arise in many war crimes. Take, for example, the newly drafted war crime of an occupying power “transfer[ring] directly or indirectly ... parts of its own civilian population into the territory it occupies.” This provision amended and broadened a provision of the Geneva Convention that applied only to direct transfer of a population. The obvious political purpose of the amendment at the Rome Convention in 1998 was to stigmatize the Israeli settlements of the West Bank. Difficult issues confound the question of whether the subsidized settlements of the West Bank constitute transfer, which one would think was supposed to describe a forcible relocation of persons. There seems to be no basis, in legal practice or legal theory, to hold the settlers themselves liable for a war crime.

To review these points about aggression and war crimes, the issues of individual and collective responsibility are confounded by two factors. First, the historical transition from the Hague and Geneva Conventions to the Rome Statute has, malgré tout, intensified the collective dimension of war crimes. Second, many of the terms of the Hague and Geneva Conventions were (and are) collective in nature, whether they are discussed that way or not. Both of these factors elicit an element of international criminal responsibility that has yet to receive appropriate notice and analysis.

The practical implication of this argument is that it casts radical uncertainty on criminal liability for war crimes under 18 U.S.C. § 2441. When offenses are collective in nature but only individuals are prosecuted, the field is wide open to prosecutorial discretion. This is obviously not a sound situation when seeking to develop a law of war crimes that conforms to the principles of legality and nullum crimen sine lege (no punishment without prior legislation).
B. Crimes against Humanity and Genocide

When we turn from aggression and war crimes to the third category—crimes against humanity—the collective nature of the required action is again apparent on the face of the statute. The specified crimes, which include murder and rape, must be “part of a widespread or systematic attack directed against any civilian population.”\(^\text{40}\) Of course, it might be technically possible for a single individual, without the aid of an organization, to carry out a “widespread or systematic attack.” Perhaps the Unabomber, Ted Kaczynski, came close to meeting this standard. But the Rome (p.192) Statute makes it clear that individuals acting alone cannot commit crimes against humanity. The “widespread or systematic attack” must be “pursuant to or in furtherance of a State or organizational policy to commit such attack.”\(^\text{41}\) The words could not be clearer. In our view, the phrase “organizational policy” should inform the interpretation of war crimes.

In light of the history of crimes against humanity, this was to be expected. The origin of the concept lies in states’ systematic abuse of their own citizens. When the Nazis committed atrocities against Polish Jews, they committed an international offense against Poland. When they tortured and murdered their own people, they committed no offense then recognized by international law.\(^\text{42}\) Thus the Nuremberg tribunal had to recognize a “crime against humanity” in order to prosecute the Nazi leaders guilty of murdering German Jews. From the very beginning, therefore, the aim was to censure the way dominant cultures sometimes persecute minorities in their midst.

The fourth category, genocide, is a spin-off from crimes against humanity. Nuremberg was, of course, in large part about genocide, but the concept had yet to become entrenched in international legal discourse.\(^\text{43}\) The Genocide Convention of 1948 represented a major step in the development of individual criminal responsibility, and it was a stimulus to claims of universal jurisdiction as well.\(^\text{44}\) The structure of the Genocide Convention is carried forward in the Rome Statute, Article 6. More than any other statutory formulation, Article 6 appears to be aimed, at least nominally, at individuals. Genocide is committed by those who engage in one of five specified actions against groups with the prohibited purpose, defined as the “intent to destroy, in whole or in part, a national, ethnical, racial, or religious group, as such.” It looks
as if a single individual, acting alone, could have this intention. Suppose a Sinophobe is walking down the street in New York. He kills the first two Chinese people he sees, with the intention of destroying the Chinese people, at least in part. Technically, he has committed genocide. Did the drafters of the Genocide Convention really mean to target this kind of case?

Our shared understanding of genocide, based on the historical paradigm of Auschwitz, derives from deep-seated group hostility. The essence of the Holocaust was one nation seeking to eliminate another. Some individuals were especially guilty and therefore properly subject to prosecution for murder, but the collective “eliminationist” background informed and directed their actions. In the final analysis, our intuitive understanding of genocide should help guide our interpretation of the statutory definition.

(p.193) This shared intuitive understanding of genocide both expands and restricts the literal definition. According to the terms of the Statute, the prohibited intention must be directed toward a “national, ethnical, racial, or religious group.” But if one large group of people seeks to eliminate another, the words “national, ethnical, racial or religious” may fall short of our intuitive understanding of genocide on the ground. In the case of bloody conflict between the Hutus and the Tutsis, for example, the differences are arguably not national, racial, or religious, and it is not clear whether the word “ethnical” captures their historical socioeconomic differences. Yet neither the United Nations nor the international community at large has had qualms about applying the crime of genocide to the Hutus’ persecution of their rival group. The reason that the international community can respond so clearly to collective persecution in Rwanda is that the motivating force behind the law is not the letter of the 1948 treaty defining genocide, but a historical paradigm of killing in order to eliminate a genos from the human species.

Our point has been made. Despite the ambitions of the Rome Statute to impose liability on natural persons, the drafters in fact had in mind collectives meeting on the field of battle. They conceived of collectives engaged in aggression, in the “plans or policies” necessary for war crimes, in the “widespread or systematic” abuse characteristic of crimes against humanity, and in the collective hatreds that stimulate crimes of genocide. Perhaps the drafters were simply too wedded to the idea of...
collective confrontation in warfare to conceive of totally individualistic crimes at the level of international criminal law. Whatever the reason, we have a body of law that clearly deconstructs itself. At one level it purports to address individual legal accountability. At every other level, though, it accentuates the role of collective action in bringing about the crimes of “concern to the international community.”

4. The Relevance of Guilt

If we know that collectives confront each other in warfare and in committing the crimes within the jurisdiction of the International Criminal Court, we need to ponder another elusive question: Which collective enters the field of battle? Who is present when an individual is killing civilians or torturing prisoners? The traditional answer to the first question is that the entire nation goes to war. Lieber understood this clearly when he stressed that nations must “enjoy, and suffer, advance and retrograde together, in peace and in war.”47 This collectivist understanding of the nation at war (p.194) expressed the Romantic urgings of early nineteenth-century thinkers who sought the fulfillment of their personal and national quest for glory by seeking out the field of military honor.48

The Geneva Conventions took a major step in separating the fighting forces from the nation they represented. The idea that civilians were “protected persons” implied that they were not at war, and they should not be vulnerable to attack in the same way as the military. Some observers go so far as to suggest that in the war between Germany and the United States, the U.S. army was bound to protect the lives of German civilians as much as they were to pay heed to the lives of Americans on the sidelines of battle.49 But once we say that only the army and the government constitute the collective at war, then we can begin to subdivide even further. This is why we, as a nation, were so confused about who was responsible for the torture in Abu Ghraib. Was it just the torturer’s unit, the army in general, all military personnel, the Defense Department, the government as a whole, or indeed the entire American population who were responsible for having allowed the military to escape scrutiny? Like an accordion, the field begins with an individual and expands to include the entire nation.
How do we know where to stop? How do we define the relevant collective?

The International Court of Justice delved into this matter in 2007 when Bosnia argued that Serbia—as a state—should be held legally responsible for the genocide against Bosnian civilians at Srebrenica. Although this might seem obvious, the ICJ case was the first time that the World Court considered state responsibility for genocide, as opposed to mere criminal liability for individuals involved in planning the genocide. The ICJ concluded that any acts performed by a “state organ” are attributable to the state as a whole, according to basic principles of state responsibility under customary international law. As a specific application of this general principle, acts of genocide by a state organ could be attributed to an entire state and yield collective responsibility under international law. The result of such collective liability would include a responsibility to make financial reparations for the damage.

Although the ICJ recognized the basic principle of collective responsibility for genocide, it declined to hold Serbia directly responsible for the genocide at Srebrenica. The court concluded that under the Genocide Convention Serbia was responsible only for failing to prevent the genocide and for failing to cooperate with the International Criminal Tribunal for the Former Yugoslavia for refusing to hand over key suspects, including Ratko Mladic. In an incredible act of myopic legal reasoning, the court held that General Mladic’s actions could not be attributed to the Serbian army, according to the internal law of Serbia, or to any other official organ of the Serbian government. The court concluded that Mladic’s actions could be attributed only to Republika Srpska, despite the fact that the general may indeed have been “administered” from Belgrade and even received a promotion to colonel general from Belgrade.

In a blistering dissent, the court’s vice president noted that Serbia’s involvement in the genocide was supported “by massive and compelling evidence.” He also worried that the “inherent danger” of the majority’s approach was that it would give states “the opportunity to carry out criminal policies through non-state actors or surrogates without incurring direct responsibility.” Finally, the dissent also pointed—with incredulity—to the majority’s argument that genocidal intent could not be attributed to the Serbian people because their
desire for a Greater Serbia, in the words of the majority, “did not necessarily require the destruction of the Bosnian Muslims and other communities, but their expulsion.” One might have said the same thing about the German desire for a Jewish-free Europe.

The general point of the dissent was that you cannot attribute actions to the state in exactly the same way that you attribute actions to individuals at a regular criminal trial. One ought to be more sensitive to general patterns of conduct. Although this is anathema in a regular criminal trial, where the conduct of individuals is at stake, the dissent is correct to point out that it seems much more appropriate where the culpability of an entire state is at issue. The court failed to draw even the most basic inferences from the facts on the ground in Bosnia. Perhaps these factual connections would have been easier for the ICJ to accept if Slobodan Milosevic had not died before his trial ended at the tribunal. His premature death robbed the world of a binding judgment against him for genocide. Nonetheless, there was sufficient evidence presented at Milosevic’s trial, and the ICJ should not have needed a final judgment in order to accept that evidence.56 It is hard to deny that there is sufficient connection to a state organ when the individual in question is the head of state.

Even assuming that the ICJ was correct in concluding that Serbia should escape legal responsibility at The Hague for the Srebrenica massacre, this would not end our analysis. Surely, there is some greater responsibility here, even in cases where genocide cannot be attributed to the state through the customary rules on state responsibility. We have an intuitive sense that a greater collective responsibility is at work, although locating and identifying that sentiment is rather difficult.

Our best guide is an assessment of collective guilt. Surely more than the individual perpetrators are guilty, but it is not easy to construct (p.196) the relevant community or collective that must stand up and claim responsibility for wrongful actions. Perhaps we can further our analysis by considering another example of collective responsibility for individual wrongs, one closer to home and requiring greater introspection. Some might say that in cases like Abu Ghraib
the relevant question is not guilt, but shame. Maybe both
sentiments are appropriate.

Seeing the photographs of humiliation in Abu Ghraib, many of
us felt acute shame in being part of a nation that could go to
war with righteous ideas and end up replicating, if not
aggravating, the abuses of the rogue state we called our
e\n
Shame is a sentiment of the heart, often a function of
irrational reactions to the gaze of others. Those with physical
deformities may feel shame about their body. Even parents
and children can, irrationally, feel shame about the behavior and
sometimes the mere presence of the other.

Guilt is a more rational sentiment, based more on what we do
than who we are. Neither the vast majority of U.S. soldiers nor
Americans as individuals have done anything wrong in Iraq
(apart from the invasion itself), and thus might balk at
allegations of collective guilt for the atrocities. Yet in other
cases of collective action, we willingly affirm collective guilt
and a shared duty to make reparations. This was the widely
accepted approach toward German liability for the Holocaust,
and there are many who urge the same approach toward
America’s responsibility for slavery.

One way to think about guilt versus shame is to begin with the
response that fits our sentiment of responsibility. Guilt
represents a debt. The proper response to such a debt is to
suffer punishment or to pay reparations to the victims. Shame
invites a retreat from the public eye. If you are ashamed, you
do not expose yourself to punishment, nor do you extend your
hand in a gesture of repair. When you are ashamed, you
cannot bear the critical gaze of others: you hang your head
low. Though former Secretary of Defense Donald Rumsfeld
proposed compensation to the victims of abuse at U.S. military
hands, it is hard to see this offer as expressing either guilt or
shame; it seemed more like an effort to buy silence. If
compensation were coupled with a finding of high-level
American wrongdoing, we would get closer to an act of
atonement.

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. If only the army or a political party feels this guilt, then these sentiments point to a different collective consciousness. This may be too solipsistic for some, but it does capture the idea that when a collective feels shame—or its opposite, pride—it has taken ownership of the actions in question.

The dark side of collective guilt, particularly as perceived by others, is that the attribution of guilt often provides grounds for collective punishment. This is particularly evident in Middle Eastern politics today. Indeed, in the Israeli-Palestinian conflict, collective action and collective punishment seems to be all there is. In the heat of that conflict, it is difficult to be seen as an individual, as someone who is simply doing his or her thing not as an Arab or a Jew, as a Muslim, Christian, or ultra-Orthodox Jew, but simply as a solitary man or woman who happens to live in this part of the world. There are many parts of the world that reveal a similar group consciousness—India and Pakistan, Northern Ireland—and they stand in sharp contrast to the liberal idea that the only true units of action in the world are individuals, not groups. In the Middle East, it is difficult to kill a member of the “other side” simply on grounds of personal hatred. Every killing implicitly invokes a confrontation between Palestinians and Jews, or between Islamists and settlers, or between terrorists and civilians.

This phenomenon makes the Middle East a fitting arena for reflecting on the issues of collective guilt and collective punishment. When a suicide bomber attacks Israeli children, Jews consider the entire Palestinian population guilty, directly or indirectly. When Jews move into the West Bank, establishing new settlements, Palestinians accuse the entire Jewish nation of taking Palestinian land and creating facts on the ground that impede the creation of a Palestinian state. This reciprocal perception of the other side’s collective guilt fuels the endless cycle of violence that has tragically dispelled dreams of peace in the region. The two nations, Jews and Palestinians, are reduced metaphorically to single agents struggling against each other.

Beginning in September 2000 under the pressure of the second Intifada, many otherwise sober and rational American Jews lost their sense of proportion and began advocating...
collective punishment of Palestinians. On the assumption that it takes a village—literally—to create a suicide bomber, Alan Dershowitz started proposing various ways of penalizing the entire village, including destruction of all the houses in the area. In his own words:

Israel’s first step in implementing this policy would be to completely stop all retaliation for five days. Then it would publicly (p.198) declare precisely how it would respond in the event of another terrorist attack, such as destroying empty houses in a village used as a base for terrorists, and naming the village in advance. The next time the terrorists attack, the village’s residents would be given 24 hours to leave, and then the Israeli troops would bulldoze the houses.57

Dershowitz’s colleague, the Washington lawyer Nathan Lewin, went further and proposed the death penalty for the entire family of the suicide bomber. Lewin brazenly invoked the precedent of Amalek as a biblical warrant for collective punishment.58 Both of these sophisticated, liberally trained lawyers sense that their proposals seem outrageous to others; therefore, both guard their flanks with some traditional legal arguments of individual responsibility. Dershowitz shifts subtly from collective punishment to punishment for causal complicity in the acts of terrorists. There is no doubt that particular individuals who aid and abet the commission of terrorist acts—by providing money or weapons, counseling or encouragement—should be guilty as accessories to the murder. As to the handlers, who convince young men and women that by killing innocent children they acquire a place in Heaven, the maximum punishment would be appropriate. But it is not clear how far we should stretch the idea of complicity to sweep up the “good” Palestinians who implicitly endorse suicide bombings but take no active steps to facilitate such attacks, or to family members who do nothing but share a bloodline.

To buttress his argument for Palestinian complicity, Dershowitz relies heavily on a case in which men in a bar who cheered on a group of rapists are presented as potentially complicitous in the rape itself.59 Dershowitz says that in such a case there is nothing wrong with thinning out the criteria of complicity so long as “the consequences imposed on the [accessories] are proportional to their complicity.”60 That is, if you actually raped the victim, you might get twenty years; if
you held her down, ten years; and if you merely cheered on the primary offenders, you might get a year in jail. This is absolutely correct, even though the U.S. legal system and many others hold that all aiders and abettors may be punished to the same degree as the actual perpetrators.61

Bear in mind that the law of complicity is firmly grounded in liberal criteria of individualized justice; it has nothing to do with collective punishment. The latter only comes into play when an entire village might suffer the destruction of its houses, whether or not the residents (p.199) were directly complicitous in a particular act of terror. And even if they are theoretically supportive of a suicide bomber in their midst, Dershowitz hardly envisions a time-consuming, individualized trial of each person who might lose his or her home under the plan. The leap from the collective guilt of the village to its collective punishment would be automatic.

To alleviate the obvious injustice of punishing innocent individuals as well as the guilty, Dershowitz claims that the prior warning generates a new basis for blaming those who suffer:

The policy and its implications will be perfectly clear to all the Palestinian people: whenever terrorists blow themselves up and kill Israeli citizens, they also blow up a house in one of their villages. The destruction is entirely their own fault, and it is entirely preventable by them.62

Note the moves made in this argument. First, the intervening agency of the Israeli army drops out of the picture. The image is one of self-destruction. The criminal becomes the agent of his own punishment. But here the “criminal” consists of many different people who may or may not be the same as those who suffer the destruction of their homes. Dershowitz’s argument becomes plausible—if it is plausible—by collapsing an entire nation into a single actor and then eliminating the Israeli army as the intervening agent. In the rhetoric of self-destruction, “terrorists” choose the punishment of their fellow nationals. Thus Dershowitz tries to justify indiscriminate devastation by an advance warning.

The law of war has taken pains to guard itself against these sorts of maneuvers. If people heed these warnings, the attacking military would become a cheap way of terrorizing
and destabilizing the population. They would repeatedly warn
and rarely attack. Ultimately, the argument for collective
punishment in this scheme is not justice but deterrence. The
same is true of Lewin’s rage-filled fantasies of hanging entire
Palestinian families. From the Kantian perspective, wherein all
rational beings must be treated as ends in themselves,
deterrence is a violation of human dignity because it
represents the use of a condemned person merely as a means
to achieve the end of social protection. (When individuals are
punished to deter future crime, the punishment has little to do
with the intrinsic nature of the criminal or his crimes, but
more to do with how we might benefit society by making him
an example; this is precisely the style of reasoning forbidden
by Kant’s notion of the Kingdom of Ends.)

Furthermore, there is no evidence that the violent reprisals on
the West Bank have had much of a deterrent effect on
terrorists and suicide bombers. On the contrary, punishment
perceived to be unjust has the effect of increasing the
solidarity and resentment of those who suffer and, ultimately,
the effect of augmenting resistance rather than decreasing it.

But neither the argument of complicity nor the shift to
deterrence can assuage our sense of injustice about blaming
and punishing the collective for crimes actually carried out by
individuals. This leads us to suspect 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.

To round out the picture, however, we should consider the way
Palestinians attribute collective guilt to Jews and Israelis, and
how they then justify the collective punishment of all Jews as a
proper response. Hamas and other right-wing Palestinian
terrorist groups regard all Israelis, and probably all Jews, as
guilty of the great sin of settling the country and defeating the
combined Arab armies in the War of Independence. The
continued presence of the Jews on Palestinian ancestral land
recreates the crime in every generation and seems to
represent an ongoing humiliation to Arab honor. It is not
surprising that the Muslim world has become a fertile market
for all lies manufactured against the Jews, from early Christian
myths to the latter-day Protocols of the Elders of Zion. Israel’s
partnership with the United States only exacerbates the image of Jews as exercisers of uncanny powers, able to conquer and manipulate the world’s media and financial systems.

The idea that Jews act as a corporate body obviously has its origins in the Book of Matthew, where the Roman governor Pontius Pilate decides to deliver Jesus to his death, and yet as a Roman and as an individual, he is able to wash his hands of guilt and attribute the entire decision to the Jewish crowd: “And all the people answered and said, ‘His blood be on us and on our children’” (Matthew 27:25). However large this crowd might have been, it surely did not include all the Jews then living, not to mention the Jews of future generations, and yet all the Jews then living and not yet born are implicitly held accountable as a corporate entity for the behavior of this crowd outside the palace of Pontius Pilate. The words of the crowd, “and on our children,” are fashioned to entail liability for future generations.

(p.201) Holding the Jews liable as a corporate body is no different from the way the Jews hold Amalek guilty across the generations for some mythical crime committed against Moses in the desert—attacking from the rear, according to Deuteronomy 25:18. Fortunately, we no longer know who the members of the tribe of Amalek are. If we did, those who take the commandments of the Bible seriously would face an embarrassing moral problem as to whether they were under a duty to continue to wage war against Amalek.65

The example of Amalek illustrates an important difference between collective guilt and a declaration of perpetual war. In the case of the Jews, the statement “His blood be on us” seems to be a self-attribution of guilt. There is no declaration of war against the Jews in Matthew, merely an ideological foundation for holding Jews forever guilty, both collectively and individually, for Christ-killing. But the notion of guilt is not used in connection with Amalek.66 This is a case of a war declared in perpetuity, never subject to a peace agreement.67

The major puzzle behind these attributions of collective guilt is the scope of the group regarded as guilty. Even if the Jews in front of the house of Pontius Pilate had said “His blood be on us,” what are the implications for the guilt of all Jews then living in Jerusalem, all Jews living then in the world, or indeed all Jews for generations thereafter? Even if there was some
collective guilt deriving from the actions of the Jews, how far should the net be cast? This is no easy question, but it is indeed the same question we encounter in trying to assess collective guilt for war crimes in modern warfare. Who is guilty for the abuses of Abu Ghraib? Only those who actually administered the torture, the superiors who tolerated the development of their culture of abuse, the entire U.S. army in Iraq? Or does the guilt spread even further and taint all Americans for having supported, or at least tolerated, the ill-conceived war that generated these excesses of sadism?

To make some progress on this issue we must consider the development of collective guilt in Western thought. The Bible is a suggestive place to begin.

5. Guilt as Collective Pollution
Interestingly, the biblical terms for crime and punishment are closely related. Thus a debate persists about what Cain was actually saying when he appealed to God, “My avon is more than I can bear” (Genesis 4:13). The same word avon can be translated as either “iniquity” or “punishment.”\(^{68}\) Our entire understanding of Cain as a person depends on this word. The translation “punishment” leads to the traditional view that Cain grovels before God to save his life. He cannot own up to the evil of this deed. The alternative translation dignifies Cain by having him recognize the enormity of his offense and confess before God that he cannot bear it; it comes close to an admission of guilt.

As it is first used in Genesis, the concept of guilt, or asham, carries the same multiplicity of functions. It is interwoven in a story told, intriguingly, three times, as if one telling would not make the point. The pattern is always the same: one of the forefathers of the Jewish people is about to enter a foreign land, where he suspects that the “barbarians” will kill him and take his wife. Therefore, Abraham (twice) and Isaac (once) revisit the same deception: each tells a foreign potentate that his wife is, in fact, his sister. In all three cases something happens to inform the potentate that either he or a man of his court is about to commit adultery.

In the first version, Abraham (then called Abram) passes off Sarah (then called Sarai) as his sister to the Egyptian pharaoh, who takes her into his court. Plagues then descend upon “Pharaoh and his household” as a sign that a sexual sin has
occurred or is about to occur. The sin is disclosed very much as it is in Sophocles’ play *Oedipus Rex*, by a manifestation of natural disorder. Pharaoh quickly realizes that something is wrong in the natural order and confronts Abram with his lie. Note the nature and scope of the taint of adultery: it affects the entire household, but apparently not the entire village or county. The collective guilt is limited, it seems, to those who might come into contact with Sarai and be tempted to sleep with her.

In the later retelling of the same basic story (with Abram renamed Abraham and a potentate named Abimelech), the truth of sexual sin is realized not by a plague but by God coming to the king in a dream and saying, “You are to die because of the woman that you have taken, for she is a married woman” (Genesis 20:3). In this retelling it is not clear how many people are affected by the pollution, other than Abimelech himself. In the third telling, when Abraham’s son Isaac passes off his wife, Rebecca, as his sister, a king (also named Abimelech) discovers the lie when he sees them engaging in affectionate behavior that would be incest if they actually were brother and sister. Assuming that they are not incestuous siblings, Abimelech confronts Isaac, exposes the lie, and then says, “What have you done to us? One of the people might have lain with your wife, and you would have brought guilt [asham] upon us” (Genesis 26:10).

(p.203) It is worth noting how the epistemology of discovery changes across the three stories. In the first, pharaoh concludes from the aberrance in nature that there must be a sexual abnormality in the kingdom. In the second story Abimelech learns of the potential sin because the voice of God comes to him in a dream. In the third story Abimelech uses his own eyes and common sense to discover that something is untoward. There is an increasing secularization and humanization of the process, and the same process is found in the treatment of guilt itself. At the beginning guilt is collective, objective, and a stain upon the land. It can be cleansed only by a guilt-offering in the temple (Leviticus 5:6, 15-16, 18-19, 25).

Yet the nature of guilt does not quite evolve in line with the epistemology of its discovery. In the first story, the guilt is understood as something like a stain on the household. In the second story, when God comes to Abimelech in a dream to warn him of the impending adultery, Abimelech responds that
he is personally innocent in his heart (she told him that she was Abraham’s sister) and pleads, therefore, not only for himself but for his entire “righteous nation” (Genesis 20:4). Similarly, in the third telling, Abimelech accuses Isaac of bringing guilt “upon us,” on his own people—implicitly not just on Abimelech, and apparently not at all on Isaac or Rebecca (Genesis 26:10). The guilt arises not from the culpability or deed of the offender but solely from the consequence: the participation in adultery. And the guilt attaches collectively to the entire nation represented by the person who engages in sinful intercourse with a married woman.

This is how the notion of guilt makes its appearance on the biblical stage. In those places where you would expect to find it—after Adam and Eve eat the forbidden fruit, after Cain kills Abel, after Ham abuses his father, Noah—the concept is absent. Adam and Eve feel shame, and Cain complains that his sin (or punishment) is too great for him to bear. But none of these characters prior to Abraham mentions possible guilt for his or her misdeed.

The remedy for guilt, in the way the term is used in the Hebrew Bible, is to bring a sacrifice. The sacrifice cleanses the stain. Remarkably, the word used repeatedly in chapter 5 of Leviticus to describe a whole range of polluting events and the appropriate sacrificial response is also asham (Leviticus 5:6, 15–16, 18–19, 25). These sacrifices, called “guilt sacrifices,” atone for various polluting events, such as touching an unclean animal (Leviticus 5:2). The prescription is to bring a guilt sacrifice to atone for guilt; the same word is used both for the cleansing act and the stain. The interplay here between the remedy and the deed recalls the controversy about translating the word that Cain uses in his complaint that something about his fratricide is too difficult to bear. Some think that he is referring to the punishment, others to the crime itself. This easy interchange of the negative and the positive, the contamination and the decontamination, reveals the tight conceptual connection between the two.

The hypothesis seems safe that the ancient world understood these concepts in a different way from our own understanding. In contemplating whether Oedipus feels guilt or shame for his fated patricide and incest, it is often said that the Greeks at the time of Sophocles did not distinguish between the two concepts. There are signs of both in the play. When Oedipus
discovers his crime, he craves punishment as though he were guilty in the modern sense, but the method of his self-inflicted punishment—putting out his eyes and going into exile—resonates with shame. He cannot bear to see others looking at him.

Although the ideas of guilt and shame are interwoven in Athens, they are distinct in Jerusalem. The biblical text recognizes a culture of shame in the story of Eden and a distinct understanding of guilt and guilt-sacrifices in Leviticus. Even in Athens, there are clear differences between Sophocles and Aristotle, who was born a century later than the playwright. *The Nicomachean Ethics* continues to be a guide to the general theory of responsibility, enabling us to understand the concept of guilt as it is used in the modern sense.\(^{71}\)

The ancient sense of guilt as pollution is still with us. It is expressed in the conceptual connection between contamination and decontamination. The form that this connection takes today is the belief that a guilty act requires punishment, and the metaphors that we use to discuss retributive punishment carry forward the principle of decontamination. We share the Hegelian faith that punishing a wrongdoer vindicates the Right against the Wrong or validates the norm against those who would undermine it. In this way of thinking, the crime pollutes the moral order and the punishment serves to restore the law and the world as it should be.

In the modern approach to guilt, the focus is not on pollution but on the feelings of those who are guilty. The shift is from guilt’s external impact on the world to the inner, human experience of guilt. Unexpectedly, the book of Genesis is a powerful source for this subjective understanding of guilt, and a careful reading of the Joseph story reveals that the subjective perception of guilt has a more ancient vintage than we might ordinarily think.\(^{72}\)

The saga begins with a built-in conflict between Joseph and his ten elder brothers. Jacob, their father, loves Joseph the most, and when some (p.205) brothers receive more love than others, as Abel was favored by God, one can always expect enmity between them. The conflict among the sons of Jacob becomes more acute when Joseph relates two dreams, which his brothers interpret as fantasies of domination over them.\(^{73}\)
The Collective Dimension of War

The brothers conspire to kill Joseph and then throw him into a pit. Reuben protests the plan and suggests that they merely leave him to die. This they do and then sit down to break bread, as though they are celebrating Joseph’s demise. At that point, Judah sees a caravan of Ishmaelites approaching and realizes that it might be better to sell Joseph to the voyagers rather than kill him. (Apparently, it does not occur to him that selling their brother into slavery is also a wrong that they would have to conceal from Jacob and others.) Before the brothers can realize Judah’s plan, a band of Midianites passes by. One of the groups (the text is ambiguous on this point) lifts Joseph out of the pit and sells him to one of the passing caravans headed for Egypt. Reuben discovers that Joseph has been taken and tears his clothes in distress. To cover up their crime, the brothers then dip Joseph’s coat—Jacob’s gift of love—in the blood of a slaughtered goat and take it to Jacob as proof of Joseph’s death. The traveling merchants sell Joseph into the service of an Egyptian named Potiphar.

This is the end of the passage recounting the tale of crime and betrayal. It is worth noting that no one except the dissenter Reuben acts as an individual in this story. It is a fraternal collective that throws Joseph into the pit and, later, lifts him out. The brothers function as a unit. Even when Reuben protests, he speaks in the first person plural.74 The next segment of the saga traces Joseph’s rise to political power in Egypt. When he meets his brothers again, at least a decade later, he is the “governor of the land.” With a famine in Canaan, Jacob sends ten of the brothers, excluding the youngest, Benjamin, to find food in Egypt. When they encounter Joseph, the ten bow down to him without recognizing him, but Joseph both recognizes them and recalls his dream.

There then follows a conversation that leads to the brothers’ recognition of their guilt for the way they conspired to kill and abandon their brother—one of the most remarkable interactions in the corpus of biblical literature (Genesis 42:6–21). Joseph stages both a conversation and a physical environment that leads his brothers to understand the moral dimension of facts they had long known. The first step in the interaction is Joseph’s accusing the brothers of being spies. It is hard to know whether Joseph himself believes the charge to be true or whether he is testing his brothers.75 Joseph himself is acting as the officer of a state; his accusation of spying is
designed to find out whether the brothers are the same or whether they identify themselves as a family rather than a nation. The brothers defend themselves by claiming that they are “the sons of one man in Canaan.”

The problematic aspect of the brothers’ response to the spying charge is the seemingly gratuitous addition to their claim to be all the sons of one father: “The youngest is now with his father, and one is absent.” This admission gives Joseph the opportunity to stage a dramatic recreation of one brother being absent. First, he suggests that the brothers send someone from their group to fetch their brother Benjamin. This proposal is never pursued. Instead, after holding them in custody for three days, Joseph suggests that they leave one of their collective in Egypt and return, as a group of nine, to fetch Benjamin.

At this point the brothers are moved to confess. Great moral insights rarely arise from easily identified factors, but we can point to factors that separately or in combination might have generated the brothers’ realization that they had committed a great wrong: (1) their spending three days in confinement, which somehow brought home to them the experience of Joseph in the pit; (2) Joseph’s playing on their incompleteness as a set of brothers, first by insisting that they bring Benjamin to Egypt, then suggesting that they send home to fetch him, and finally requiring that one be left behind while the others seek to complete their number; and (3) Joseph’s reminding them of their moral conscience, stressing that he himself is a “man of God.” Though we do not know why the breakthrough ultimately happened, the beauty of the text enables us to see that only collectively could the brothers come to this realization.

But what, precisely, do they feel guilty about? Not about the supposed death of Joseph, nor throwing him into the pit with the intention of either killing him or letting him die. According to their own words, their guilt attaches to having heard and ignored his cries of anguish. Thus the guilt is displaced from the pollution to the act causing the pollution and, finally, to the victim’s pleas to avoid committing the act. This subtle relocation of the guilt could either be trivial or profound. The trivial version derives from the way the brothers use their declaration of guilt to explain their current misery: “We saw the anguish of his soul when he pleaded with us and we did
not grasp it, and therefore our anguish has come over us” (Genesis 42:21). Thus they explain their anguish as a consequence of having ignored someone else’s anguish. Emphasizing the second part of the passage converts their confession of guilt into a tactical mistake about controlling their personal fate. They realize that they could have avoided their current predicament—the psychological affliction of guilt—if only they had acted. This transforms the sentiment of guilt into something closer to regret.

A more profound interpretation of this event requires that we import some basic concepts from the philosophical literature on freedom of the will. By analogy to the idea of second-order volitions as the mechanism for regulating and resisting first-order impulses, we should think of guilt as a second-order failure to resist our baser impulses. It is understandable that the brothers would want to kill one of their own who sought to rule over them, but they should have resisted their base homicidal impulses. Their second-order volition should have been to heed Joseph’s appeal for compassion. It does not matter much whether that appeal is implicit in Joseph’s humanity or is articulated as cries for help. The point is that the brothers did not hear it.

The metaphor of hearing correlates with actions producing guilt. We hear the voice of conscience rather than read an image of conscience in our mind, and thus it makes sense for the brothers to associate hearing with understanding the moral dimension of their actions. Further, Jewish theology emphasizes hearing over sight in the relationship with God. This is evident in Moses’ confrontation with God on Mount Sinai and in the liturgical demand on Israel to hear and understand that God is one. By contrast, Christianity emphasizes the sense of sight and the role of images, particularly of Jesus on the cross, in sustaining faith.

Significantly, the confession occurs as a collective event, as evidenced by the brothers speaking to each other before they declare their collective guilt. The impact of their confession appears to dispense with the need for punishment, for Joseph hears them and he cries (Genesis 42:24). The confession itself prepares the group for the reconciliation that occurs several chapters later.
The Joseph story has much to teach us about the theory of collective guilt. Even though they experience guilt subjectively, the brothers remain a well-defined collective. They confess to each other with a clear sense of inclusion and exclusion. This sense of well-defined contours eluded us in our earlier investigations of guilt on the national level. The problem is whether there is any way to express a national consciousness of guilt comparable to the brothers’ awareness that they constitute a collective that has engaged in wrongdoing and that, as Lieber would have put it, they must “enjoy, and suffer, advance and retrograde together, in peace and in war.” Yet our inquiry into collective pollution and guilt in the biblical context does not resolve our major concern, which is to delineate the circle of collective guilt in cases of war crimes, torture, and other major atrocities. Where shall we look to get a better feel for collective guilt (p.208) in modern warfare? Perhaps the relatively modern subjective sentiments of guilt and shame might be a better guide to the collective that stands together and takes the blame for wartime atrocities.
6. Reviving the Romantic Solution
In our ongoing quest for the correct unit for positing collective
guilt in warfare, we are torn among the possibilities of locating
responsibility and guilt at the level of the individual soldier,
the military unit, the army as a whole, the governing political
party, or the nation that has gone to war. The Romantic
tradition has a distinctive suggestion, one that is worth taking
seriously because the other advocates of collective guilt are
unable to concur on the relevant matrix of social organization.
Perhaps we must recognize that, after all, it is the nation that
goes to war.

As we argued in chapter 6 when we discussed the rights of
nations, the nation is defined by its organic cultural bonds: its
language, its history, and sometimes its religion. The critical
fact about national life is that the cultural bonds of language
and history create a way of life that is unique and
irreplaceable. In international law today we take the claims of
national existence more seriously than ever. The law of
genocide is designed primarily to avoid the killing of entire
cultural entities. The cultivation of self-determination since
World War I has largely been based on the idea that each
nation has an inherent right to govern itself. In chapter 6 we
used this evidence, among other facts, to show that nations
have a right of legitimate defense. But these ascriptions are a
two-way street: if the nation has the right to live and to govern
itself, then it arguably has the duty to stand collectively
responsible for crimes committed in its name.

These ideas about the ontology of nations come more easily to
some cultures than to others. Readers of the Bible have no
difficulty recognizing the primacy of tribal nations in drawing
the lines of identity and loyalty. Western European history was
dominated by national identities for several hundred years.
But the relevance of being Spanish, French, or German is now
threatened from above and below—from above by the identity
claims of being European, and from below by the local
communitarianism of the Gael, the Breton, and the Corsican,
to name a few. The conflicts from above are replicated in the
Muslim world, where nation-states seek to establish their
primacy relative to the claims of pan-Arab and pan-Islamic
solidarity over questions such as the U.S. invasion of Iraq and
the future of the Palestinian people. The struggle from below
is played out in (p.209) Africa, where nations of Nigerians and Kenyans struggle for coherence in competition with loyalties owed to the Ibu and the Kikuyu.

In many respects we live today in the afterglow of the Romantic fascination with the nation as the relevant unit of glory in the dramas of international conflict. Of course, the Romantic movement of the early nineteenth century took many different forms. For most English poets of the period, the new emphasis was on the self and the spirit as they connected with nature. The banner was Wordsworth’s dictum that poetry is “the spontaneous overflow of powerful feelings.” Yet a decade later Wordsworth was celebrating the Convention of Cinta, which allied British and Spanish troops against Napoleon. This was an ecstatic moment, bestowing upon the English soldier a chance for heroic greatness.

The German Romantic movement had a more specific agenda, for it saw itself as engaged in a dialectic with the universalist claims of the French Enlightenment. As Isaiah Berlin brilliantly argued, Johann Georg Hamann (1730–88) was a critical figure in the early German reaction against the French claim—very like the American faith today—that all human beings everywhere are essentially alike. Though he was friends with his fellow resident of Königsberg, Immanuel Kant, Hamann rejected the special province of reason and urged instead an antirational emphasis on holistic religious experience. Though the organism was one, the world was cast in provinces, unbridgeable units of national experience.

In the course of the nineteenth century, the Romantic movement had an impact not only on German music and philosophy but also on the course of German law. Savigny argued against codification in his famous monograph of 1814 on the ground that, although the French thought they had found the universal approach to law in the *Code civil*, the German nation would have to evolve on its own and find its distinctive path among the legal cultures of the world. These artistic, philosophical, and legal themes interwove in the late eighteenth and early nineteenth centuries to generate a movement—a family of related views—that emphasized feeling over rationality, particularity over universality, and the impulses of genius over the predictability of normal life. In this skein of antirational sentiments, both the individual and the
collective triumphed. Feelings became critical, and feelings about the nation, in particular, became the lodestar of international politics.

Germany’s central role in this history set the stage for its national tragedy and the postwar preoccupation with collective German guilt. In the wake of the Holocaust, German intellectuals had no place to hide. As some of the best reflections on nineteenth-century Romanticism were written in Germany, some of the best assessments of collective guilt for the Holocaust also found expression in German. Among the latter we should refer to Karl Jaspers’s classic work, *The Question of German Guilt*.\(^8\)

Jaspers wrote immediately after the war, when there was a widespread tendency to regard the Germans as collectively guilty for all aspects of the war and to impose collective punishment by limiting the future development of German society.\(^\) Surprisingly, Jaspers comes out in favor of the idea of collective guilt but opposed to German guilt as an instantiation of the idea. To reach this conclusion, he situates the problem in a larger framework of four kinds of guilt: criminal, moral, political, and metaphysical.

Criminal guilt is the most familiar embodiment of the concept. There seem to be close associations between crime and guilt, on the one hand, and between guilt and punishment, on the other.\(^\) The term for guilt across Western languages (*culpabilité*, *Schuld*, *vina*, *asham*) is used uniquely in criminal law. We are familiar with the common law institutions of guilty pleas and guilty verdicts. The notion of innocence as expressed in the presumption of innocence is closely tied to the same concept. It is not exactly on point to say that someone who does not commit a tort or does not breach a contract is innocent. The term is part of a particular complex of ideas, including guilt and punishment, framed only by the criminal law.

Moral guilt may coincide with criminal guilt, but it need not do so. As Jaspers uses the term, the realm of morality focuses our attention on the inner quality of the deed, but not in the way we are accustomed to think today. Jaspers would say that those who act under duress or personal necessity—namely, those who may be morally and legally excused in the conventional understanding of those terms—are still morally
guilty if they could have avoided the act. Thus Dudley and Stephens, the sailors shipwrecked at sea who consumed a cabin boy to survive, made themselves morally guilty, even though many commentators today would say that they should have been excused under the law. No one blames them for submitting to overwhelming pressure, but they could have exercised heroic capacities to abstain from cannibalism and risk death by starvation. Their failure to do so was enough for them to be morally guilty, though the Crown commuted the sentence to six months in prison.

Both political and metaphysical guilt are beyond the moral category of the avoidable. They attach even in cases of living under dictatorships, where it is not humanly possible to avoid the inhuman actions of those in charge. Political guilt is borne by each person in a political community merely by virtue of being there and being governed. As Jaspers puts it in a disarming sentence: “Es ist jedes Menschen Mitverantwortung wie er regiert wird” (Everybody is co-responsible for the way he is governed). According to this view, the citizens of Stalinist Russia and fascist Germany were politically responsible for the actions of their leaders. They were coresponsible, along with the dictatorial parties, for their political life. It is not clear whether this shared responsibility derives from the unrealized ability to overthrow the dictator or follows simply from the fact that, as Jaspers put it, this is the political realm in which ich mein Dasein habe (“my existence is lived out”). On the latter theory, political guilt derives from identification with the society and one’s presence in it at that time. Locke referred to this as tacit consent.

The argument for political guilt based on personal history resembles Freud’s account of why we bear responsibility for the evil impulses of our dreams: “Unless the content of the dream … is inspired by alien spirits, it is part of my own being.” For the sake of effective therapy, we must accept our dreams as our own. The argument appeals to our desire for coherence and authenticity in our personality. The same demands of consistency require us to recognize that we are part of the culture that has nourished us. The theme of alienation runs throughout both Freud and Jaspers. We should not treat our dreams as alien to us, and we should not be aliens in our own land. This is the best way to understand
Jaspers’s claim that we accept co-responsibility for the way we are governed.

Jaspers thinks of metaphysical guilt as arising from solidarity with other human beings. The failure to rescue even with no prospect of success generates this form of existential guilt. As Jaspers describes the German situation, “We did not go into the streets when our Jewish friends were led away; we did not scream until we too were destroyed.... We are guilty of being alive.” Metaphysical guilt goes beyond all other forms of guilt. As Jaspers argues, “Someplace between human beings there is room for the unconditional proposition that either we live together or we do not live at all.”

These propositions bring to mind a Talmudic analysis of sacrificing one to save many. As the case is put, a Jewish caravan is surrounded by an enemy force. The enemy says, “Give us one of you as a hostage, or we kill everyone in the caravan.” The rabbis conclude that the duty of the members of the caravan under these circumstances is to die together rather than arbitrarily to identify one of their number as a hostage. Of course, this flies in the face of what many a utilitarian would decide. This example illustrates Jaspers’s point that there are some situations in which the solidarity of human beings requires them to endure the same fate. Suppose the travelers remain passive as the enemy troops approach the caravan and arbitrarily pick a hostage. If they resist, they will all be killed. But failing to resist, failing to die, they become, as Jaspers claims, metaphysically guilty for the death of their compatriot.

But where does the duty of solidarity stop? Claims of metaphysical guilt are presumably limited to a particular cultural situation and therefore stop short of the universal guilt advocated by Father Zosima in The Brothers Karamazov. If everyone is guilty for everything, then everyone is also innocent. The distinction loses its bite.

These arguments for political and metaphysical guilt offer a qualified defense of collective guilt. Jaspers defends the idea that some groups can be charged with political or metaphysical guilt, but he takes a strong stand against the idea that nations as such can bear guilt of this sort. He denies the guilt of the German people (as opposed to Hitler and his party) for the war and the Holocaust on the ground that the
German nation has no clear contours. There is no way of knowing who is included and who is not, who is at the core of the nation and who is at the periphery. He does not deny that some people possess more or less of certain national characteristics, but nationality is a scalar—rather than categorical—concept. It is not like being male or female, but more like being tall or short. You can have more or less Germanness in your sense of identity, but there is no fixed level in this variable identification that defines someone as a German in his heart. There are many different Germans; no single identity can be reduced to a composite German. As he writes, “An entire nation [Volk] cannot be reduced to a single individual. A nation cannot suffer heroic tragedy. It cannot be a criminal; it cannot act morally or immorally. Only individuals in the nation can do these things.”

The clincher in Jaspers’s rejection of German guilt is his reliance on anti-Semitism as the paradigmatic charge of collective guilt. It is irrational, he claims, to hold Jews liable in eternity because two thousand years ago a specific set of Jews in Jerusalem collaborated with the Romans in crucifying a man who later was called the Messiah. There is no doubt that anti-Semitism had its roots, in part, in centuries of calumny against Jews as Christ-killers. If we now understand this kind of undifferentiated indictment of a nation as irrational and bigoted, he argues, we should not repeat the mistake by charging all Germans with the crime of the Holocaust. Rhetorically and logically, Jaspers’s point compels our attention. To ascribe irreducible, associative national guilt to the Germans is to repeat the intellectual indecency of anti-Semitism.

We must also remember that collective guilt is reciprocal. It is not simply the loser or the rogue nation that suffers from the collective guilt associated with its actions. The complicated psychological structure that we have charted in this chapter is independent of one’s status as the justified or unjustified party in a military conflict. What is done in the name of the citizen includes not just the launching of a war, but also one’s conduct during the war—two logically independent elements of the law of war, as we have demonstrated in previous chapters. Why else would Americans argue so passionately about the extraordinary renditions and secret torture prisons operated by the CIA, or the invasion of Iraq? It is precisely because so much is at stake, not just for
the nation but for ourselves as citizens, if we conclude that these actions are unjustified. It is not just the other who can suffer from collective guilt.

This examination of the collective dimension of guilt brings us full circle, back to our original discussion of the collective nature of crimes defined by the Rome Statute. The origins of collective guilt go back at least as far as the Bible, if not further, reemerged with vigor during the nineteenth century and its Romantic fascination with nationhood, and were central to German discussions about war guilt for the Holocaust. What emerges from these discussions is the central truth that our lives are embedded within a larger culture, and when our actions are performed in the name of that culture, they carry with them implications for our brethren. It is, of course, to overstate the point to call this “blood guilt,” as it was during the Romantic era. We are not arguing for a return to the offensively racial or reductively ethnic notions that guided this period. But so, too, is it an exaggeration to so cling to the Enlightenment commitment to the individual that one forgets the cultural and national significance of one’s actions. There is an undeniable connection between the individual and the collective when arms are taken up in defense of the state. It is therefore inevitable that, as we noted at the beginning of this chapter, the Rome Statute defines war crimes, crimes against humanity, and genocide as collective crimes. This is a more refined and sophisticated attempt to chart these connections, with the use of legal concepts, than the broad brushstrokes offered by the Romantic era. The project of international criminal law is, indeed, an attempt to bridge these very two aspects of warfare, the individual and the collective. The goal of international criminal justice is to apportion criminal blame to individuals for actions that are always pursued with the collective in mind, by loyalty to either a flag, a constitution, a political ideal, or, in more racist situations, a particular ethnicity.

(p.214) Furthermore, this undeniable connection between the individual and the collective dimension of war explains why the analogy between individual and national self-defense has been so fruitful. The basic structure of legitimate defense is similar in the individual and collective realms for the very reason that both are tightly woven together in the very nature of warfare, where defense of self, defense of others, and defense of the nation all come together on the battlefield.
What would be considered a purely private criminal action in peacetime becomes, in war, a collective action, triggering the machinery not just of criminal law but also of international law itself, for these crimes are truly of concern to the international community as a whole.

Notes:

(2.) *Id.* at 39–40.

(3.) See Bates’s assertion in *Henry V*: “We know enough if we know we are the king’s subjects. If his cause be wrong, our obedience to the king wipes the crime of it out of us.” William Shakespeare, *Henry V*, Act IV, Scene 1, in *The Oxford Shakespeare* (Oxford: Oxford University Press, 1914).


(5.) Fourth Hague Convention (1907), Art. 23(a) (poison) and 23(b) (treachery).

(6.) A similar incident is discussed in Marcel Ophuls’s film, *The Sorrow and the Pity* (TV Rencontre, 1971).


(8.) Rome Statute Art. 8(1) (“when committed as a part of a plan or policy or as part of a large-scale commission of such crimes”). This is described as a “grave breach under all the Geneva Conventions.” William J. Fenrick, *War Crimes*, in Otto Triffterer, ed., *Commentary on the Rome Statute of the International Criminal Court* 173, 182 (Baden-Baden: Nomos, 1999), and if it met the other conditions it would violate Art. 8(2)(a)(i) of the Rome Statute.

(9.) *See Decision by the High Court of Justice Regarding the Assassinations Policy of the State of Israel* (December 14, 2006).
(10.) The relevant provision here is Article 51(3) of the Additional Protocol Relating to the Protection of Victims of International Armed Conflicts (1977), Protocol I to the Geneva Conventions of 1949 (“Civilians shall enjoy the protection afforded by this section, unless and for such time as they take a direct part in hostilities”).


(12.) See Ex parte Quirin, 317 U.S. 1 (1942).


(14.) This is called the principle of complementarity under Rome Statute Art. 17(1).

(15.) Rome Statute Art. 12(2)(a), Art. 12(3).

(16.) Id. § 8(2)(a)(i).

(17.) See, e.g., Statut de Rome de la Cour pénale internationale, Art. 8 (translating “wilful killing” as l’homicide intentionnel); Estatuto de Roma de la Corte Penal Internacional, Art. 8 (translating “wilful killing” as el homicidio intencional).

(18.) Rome Statute § 8(1).

(19.) Id. § 5, § 17(1)(d).

(20.) D.T. v. Ind. Sch. Dist., 894 F.2d 1176, 1186 (10th Cir. 1990).

(21.) We have received guidance on this issue from Professor Antonio Cassese of Florence, Italy, formerly president of the International Criminal Tribunal for the Former Yugoslavia, in particular during conversations in early July 2001 in Paris.
Professor Cassese is passionately committed to the view that all homicides committed by members of the occupying force constitute war crimes.

(22.) Rome Statute Art. 8(2)(b)(xxi).

(23.) See Fourth Geneva Convention Art. 6 (“The Occupying Power shall be bound, for the duration of the occupation, to the extent that such Power exercises the functions of government in such territory, by the provisions of [specifically mentioned] Articles of the present Convention”).

(24.) There is no reason to classify the crime as a war crime just because we might be skeptical of justice in an Iraqi court under U.S. occupation. A court-martial proceeding against the American officer would also be possible. See 10 U.S.C. 817. Furthermore, failure of the United States to adequately supervise or punish a large number of soldiers guilty of wrongdoing might change the analysis and invoke issues of command responsibility.

(25.) Fourth Hague Convention (1907), Art. 3; Fourth Geneva Convention Art. 146.


(27.) Hague IV (1907), Art. 23(a), 23(b), 23(e).

(28.) Id. Art. 3.

(29.) Id. The compensation is presumably owed to the belligerent party of which the victim was a national.

(30.) Lieber refers to various crimes against domestic law but to only one crime against the law of nations—namely, taking and selling slaves from conquered troops. See Lieber Code, Art. 58. The Hague Convention of 1907 does not use the word “crime” at all.

(31.) On the relationship between aggression, unlawful force, and the “inherent right of self-defense,” see chapter 3.

(32.) See U.N. GA Res. 3314 (defining aggression).

(33.) See R v. Jones, 2006 UKHL 16. The appellants in the case were arrested for demonstrating against the Iraq war and argued that the war’s illegality under international law
provided them with an affirmative defense against the charge of trespassing. Although the House of Lords agreed that aggression was a violation of customary international law, they concluded that the international prohibition against aggression was not incorporated into British domestic law and that the appellants could not appeal to an international crime to ground their criminal law defense.

(34.) The House of Lords noted that aggression was established as a violation of the international order as far back as the Pan-American Conference of 1928 and the Kellogg-Briand Pact.

(35.) Rome Statute Art. 8(2)(a)(vi). The major commentaries seem to be indifferent to this problem.

(36.) Id. Art. 8(2)(b)(vi).

(37.) The use of force is implicit in the other half of Article 8(2)(b)(viii), which prohibits "deportation or transfer of all or parts of the population of the occupied territory within or outside this territory."

(38.) But see Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 ICJ Rep. 136.

(39.) This principle is recognized in the Rome Statute Art. 22. Note that Art. 22(2) provides that "in case of ambiguity, the definition shall be interpreted in favor of the person being investigated, prosecuted or convicted."

(40.) Rome Statute Art. 7(1).

(41.) Id. Art. 7(2)(a).

(42.) The problem is similar to the relationship between the individual states and American citizens before the enactment of the Fourteenth Amendment in 1868. Prior to the Civil War, states could abuse their own citizens (reduce them to a state of slavery, etc.) provided they did not deny to citizens of other states the "privileges and immunities" accorded to the citizens of their own. U.S. Const. Art. IV, Sec. 2., Cl. 1. The Fourteenth Amendment shifted the focus from the protection of citizens to the protection of persons. U.S. Const., Amend. XIV ("nor shall
any State deprive any person of life, liberty, or Property, without due Process of law; nor deny to any person within its jurisdiction the equal Protection of the laws”.

(43.) The term, referring to “the killing of a people,” was coined by Rafael Lemkin in 1944.

(44.) The Belgian experience is instructive. In early June 2001, a Belgian court convicted four Rwandans, including two Catholic Hutu nuns, of complicity in the murder of seven thousand Tutsis seeking refuge in their monastery. The Economist noted that “this was the first time that a jury of citizens from one country had judged defendants for war crimes committed in another.” See Judging Genocide, Economist, June 16, 2001, special section. The jurisdiction of the Belgian court was based on Article 7 of the Law of June 16, 1993, as amended on February 10, 1999, granting Belgian courts jurisdiction over genocide, as defined in the Genocide Convention, regardless of where the offense occurred, or by whom, or against whom the offense was committed. See also Beth Van Schaack, In Defense of Civil Redress: The Domestic Enforcement of Civil Rights Norms in the Context of the Proposed Hague Judgments Convention, 42 Harv. Int’l L.J. 141, 145 (2001).


(47.) See Lieber Code § 20.

(48.) For an extensive analysis of these Romantic impulses, see Fletcher, Romantics at War, as well as chapter 6 in this volume on humanitarian intervention (defending the Romantic conception of nationhood).

(49.) See Walzer, Just and Unjust Wars, at 172–75.

(50.) See Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide
(Bosnia and Herzegovina v. Serbia and Montenegro), 2007 ICJ 91 (February 26, 2007).

(51.) This customary rule is also reflected in Article 4 of the International Law Commission’s Articles on State Responsibility.

(52.) The Genocide Convention requires signatories (including Serbia) to take all necessary steps to prevent genocide and to punish (or extradite) all individuals responsible for genocide.

(53.) See Bosnia v. Serbia, § 388 (“The Court notes first that no evidence has been presented that either General Mladić or any of the other officers whose affairs were handled by the 30th Personnel Centre were, according to the internal law of the Respondent, officers of the army of the Respondent—a de jure organ of the Respondent. Nor has it been conclusively established that General Mladić was one of those officers; and even on the basis that he might have been, the Court does not consider that he would, for that reason alone, have to be treated as an organ of the FRY (Federal Republic of Yugoslavia) for the purposes of the application of the rules of State responsibility”).

(54.) See Bosnia v. Serbia, § 387 (“The Applicant has shown that the promotion of Mladić to the rank of Colonel General on 24 June 1994 was handled in Belgrade, but the Respondent emphasizes that this was merely a verification for administrative purposes of a promotion decided by the authorities of the Republika Srpska”).

(55.) See Dissenting Opinion of Vice-President Al-Khasawneh, § 3. The vice president also criticized the court for failing to demand access to Serbia’s records from the Supreme Defense Council, which might have further established a direct link to the Serbian government.

(56.) See Amended Indictment, Prosecutor v. Milosevic, Case No. IT-02–54-T (April 21, 2004), § 32 (alleging a campaign of genocide against Bosnian Muslims).

(57.) Dershowitz, Reasonable Doubt, at 177. For a more recent rendering of Dershowitz’s position, see his Preemption: A Knife That Cuts Both Ways (New York: W. W. Norton, 2007).
(58.) The Jews attribute a war crime, perhaps the first recorded crime, to the tribe of Amalek. They attacked the Jews from the rear when the Jews were “famished and weary.” Deuteronomy 25:18. Nathan Lewin, *Deterring Suicide Killers*, Sh’ma: A Journal of Jewish Responsibility, May 2002, at 11–12.

(59.) This is the Fall River rape case, made famous by the film *The Accused*.

(60.) Dershowitz, *Reasonable Doubt*, at 176.


(62.) Dershowitz, *Reasonable Doubt*, at 177.

(63.) *Id.* at 179.

(64.) Kant, *Legal Theory*, § 57.

(65.) Exodus 17:16: “The Lord will have war with Amalek from generation to generation.” The discussion of a struggle between the descendants of Amalek and the people called Jews (rather than Hebrews) begins in the book of Esther, written in the early eighth century BCE.

(66.) A possible exception is Numbers 24:20: Amalek is described as a first among the nations but with a fate of “everlasting perdition.”

(67.) We are indebted to Dr. Zvi Blanchard for this point.

(68.) Some translations of the Bible translate *avon* as “punishment,” others as “sin” or “crime.” The problem is well summarized in *Etz Chayim* [*Tree of Life*: *Torah and Commentary*, edited by David Lieber, 27 n.13 (Philadelphia: Jewish Publication Society of America, 2001) (comment on the editor’s choice of the word “punishment”).

(69.) Sophocles, *Oedipus Rex*, edited by Stanley Appelbaum, translated by George Young (Mineola, N.Y.: Dover 1991). The text is not clear whether the pollution derives primarily from the patricide or the incest. The following lines of the Chorus suggest that the incest is at least a major factor: “Time found thee out—Time who sees everything—Unwittingly guilty; and
arraigns thee now consort ill-sorted, unto whom are bred sons of thy getting, in thine own birthbed, O scion of Laius’s race.” *Id.* at 43.


(74.) Compare Reuben’s later speech in Genesis 42:22 (“Did I not tell you, ‘Do no wrong to the boy’? But you paid no heed. Now we must give an accounting for his blood”).

(75.) With his usual political insight, Westermann points out that spying is a characteristic feature of nations, not of families. See Westermann, *Die Joseph-Erzählung*, at 73. In the first translation of the Bible into German, Martin Luther opted for a different term altogether. He translated the Hebrew term as *Kundschafter*, which means something like “investigator.” *Die Heilige Schrift*, 1 Mose 42:9 (Gideon ed. 1967).
(76.) The Westermann thesis explains this response, but it seems strained nonetheless. Individuals and informal groups do, in fact, spy on each other. A totally different interpretation of the accusation might begin with the motive that Joseph attributes to the spying, namely, “to see the nakedness of the land.” The French Jewish translator Andre Chouraqui captures the sexual dimensions nicely in his translation: “Vous etes venus pour voir le sexe de la terre.” *La Sainte Bible*, entete 42:12 (Paris: Desclée de Brouwer, 1989). The sexual association is missing in Luther’s translation, where the passage is rendered as the “investigators” coming to see “where the land is open.” *Die Heilige Schrift*, at 42:12. The sexual overtones of the word “nakedness” suggest an analogy with the earlier intervention of the brothers—the “sons of Jacob”—to reclaim their sister Dinah from the house of Shechem. Whether or not that rescue was deceitful and improper, the brothers demonstrated their loyalty to members of their clan. By suggesting sexual overtones to the mission of his ten brothers, Joseph might be betraying his own yearning for them to have come to take him home as they had schemed and fought to hold onto Dinah. Rabbi David Silber suggested this interpretation.

(77.) *See* Genesis 42:21 (“And they said to one another, But we are guilty [asham, in the adjectival plural form ashemim] concerning our brother”).

(78.) Some English translations unfortunately translate asham as “punished” simply because, as we noted, when guilt is understood as pollution, the decontaminating sacrifice is also called asham or guilt. *Etz Chayim*, at 260 n.21.

(79.) *See* Harry G. Frankfurt, *Freedom of the Will and the Concept of the Person*, in *The Importance of What We Care About* 20 (New York: Cambridge University Press, 1988). *second-orderattitudes*


(81.) The right of self-determination is explicitly recognized in Article 1 of the International Covenant on Civil and Political Rights (“All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural


(85.) Frederick Charles von Savigny, Of the Vocation of Our Age for Legislation and Jurisprudence, translated by Abraham Hayard (Delran, N.J.: Legal Classics Library, 1986)


(87.) Walter Russell Mead, In the Long Run: Keynes and the Legacy of British Liberalism, Foreign Affairs, January–February 2002, at 199, 203 (referring to “the notorious Morgenthau Plan, which would have reduced postwar Germany to a pastoral economy”).

(88.) Whether punishment of the guilty is always necessary is one of the issues raised by the Joseph story, discussed in section 5 of this chapter.


(90.) Dudley & Stephens, at 288 n.17.

(91.) Jaspers, The Question of German Guilt, at 31. The translation in the text is our own. Ashton prefers “under whose order I live.”

(93.) Jaspers, *The Question of German Guilt*, at 72.

(94.) Id. at 32. The translation is again our own. Ashton writes, "Somewhere among men the unconditioned prevails—the capacity to live only together or not at all."

(95.) *Jerusalem Talmud*, Tractate Terumot 8:4. According to the analysis in this passage, if the aggressor names a particular suspect and threatens to kill the travelers if he is not turned over, it is permissible to surrender him to save the caravan. The assumption is that if the authorities name a suspect, they have reasonable grounds to believe that he is guilty of some wrongdoing. Also, if the suspect is named, the guilt of choosing the victim does not fall upon the caravan.


(98.) Jaspers, *The Question of German Guilt*, at 41. The translation in the text is our own. Ashton prefers: “One cannot make an individual out of a people. A people cannot perish heroically, cannot be criminal, cannot act morally or immorally; only its individuals can do so.”

(99.) It might be possible to sustain a view of collective guilt that avoids this unfortunate conclusion. Such a view would require “non-transitive associative guilt”; that is, nations are guilty for their past actions but this fact alone entails nothing about the guilt of today’s citizens. See George P. Fletcher, *The Storrs Lectures: Liberals and Romantics at War: The Problem of Collective Guilt*, 111 Yale L.J. 1499, 1549 (2002).