

## *Special Section – Politics and War: Ethics, Opinion and Logics*

# Collective Responsibility for Unjust Wars

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This article argues against Anna Stilz's recent attempt to solve the problem of citizens' collective responsibility in democratic states. I show that her solution could only apply to state actions that are (in legal terminology) unjustified but excusable. Stilz's marquee case – the 2003 invasion of Iraq – does not, I will argue, fit this bill; nor, in all likelihood, does any other case in recorded history. Thus, this article concludes, we may allow that Stilz's argument offers a theoretically cogent case for citizens' task-responsibility in democratic states (given the right conditions); it just so happens that few if any cases satisfy these conditions.

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### 1. Collective responsibility in democratic legal states

Impositions of collective responsibility remain a prevalent feature of international law and politics. For instance, Iraq was met with compensation demands totalling US\$52 billion following its invasion of Kuwait in 1990. The ensuing sanctions regime, which has been blamed for excess deaths running into the hundreds of thousands, provides a poignant illustration of the normative problem underlying impositions of collective responsibility. On the one hand, states nominally remain the subjects of these sanctions. But on the other hand, the burdens of the sanctions are routinely transferred to the state's citizens, who will rarely have had any significant say in forming the state's specific policies. This appears to clash with the moral conviction that ordinary citizens are, for the most part, innocent of their states' actions, and that persons can be held liable only for actions for which they are also responsible. For this reason, philosopher Michael Walzer (1992, p. 297) argues that international legal practice treats citizenship as 'a common destiny'. In a similarly dramatic turn of phrase, jurist and legal scholar Antonio Cassese (2005, pp. 6, 8) argued that collective responsibility displays the extent to which international law remains 'a primitive legal system', and indeed, the extent to which the international community remains a 'primitive society'.

One can certainly attempt to offer broadly prudential or consequentialist rationales for this practice: after all, someone must suffer the economic burdens of unjust wars, and it ought not be the citizens of the victim state. Only in rare instances could we hope to extract the requisite funds from the pockets of the politicians and generals directly responsible for the war. Therefore, the burden naturally passes on to the offending state's treasury. But this, for all practical purposes, is to pass the



burden on to ordinary citizens, who will either face increased taxes or get less back from the taxes they are already paying. This is certainly regrettable, but significantly less regrettable than any available alternative.

Recently, however, Anna Stilz (2011) has offered a different approach to the problem of collective responsibility.<sup>1</sup> Her argument attempts a partial vindication of the practice of holding citizens responsible for the actions of their states. The argument is meant to constitute a *vindication* in the sense that it offers properly moral rather than merely prudential or consequentialist grounds for this practice. Yet the vindication remains *partial* in the sense that it applies only to what Stilz calls democratic legal states, whereas the current legal practice applies in principle to all states without discrimination. Democratic legal states are those that satisfy the following three constraints: (1) *freedom* requires the state 'must grant a sphere of private freedom to its citizens' (Stilz, 2011, p. 202); (2) *equality* requires that 'each person be treated as a moral equal in the eyes of the state'; (Stilz, 2011, p. 202) and (3) *consultation* requires that 'citizens be consulted in the law-making process, that they be authors of the law they are asked to obey' (Stilz, 2011, p. 203).<sup>2</sup> However, even thus restricted, Stilz's account holds considerable interest. In particular, it allows us to raise and discuss the question of whether US and UK citizens should be held financially liable for the 2003 invasion of Iraq, a question that Stilz answers in the affirmative.

Ascribing collective responsibility for state actions to citizens is often thought to be problematic in light of the fact that modern states are involuntary associations. In response to this problem, Stilz introduces the democratic authorisation principle, according to which 'the will of the individual citizen is implicated in the acts of her state even though she did not consent to membership and even though she may disagree with the state's policies' (Stilz, 2011, p. 197). Stilz here distinguishes between task-responsibility and blame-responsibility.<sup>3</sup> Task-responsibility entails a moral duty to compensate for harms to which one may have made no causal contribution, and for which, accordingly, one carries no blame. Stilz's central thesis, inspired by Kant and the social contract tradition, is that in democratic legal states all citizens accrue task-responsibility for their state's actions in virtue of having given *hypothetical consent* to that state. According to Stilz, hypothetical consent is rooted in a person's rational volition: as a citizen of a democratic legal state, I 'necessarily authorize it – whether I agree to join it or not – since I require its system of law to secure me against others' interference' (Stilz, 2011, p. 200, emphasis in original).<sup>4</sup> On this basis, she argues that '[m]embership in a democratic legal state is sufficient to confer responsibility even in the absence of consent, voluntary affirmation, or further evidence of identification with the regime' (Stilz, 2011, p. 200).

It belongs to a larger article to explain what is wrong, more generally, with attempts to ground collective responsibility in hypothetical consent.<sup>5</sup> My aim here is merely to point out that Stilz's analysis does not yield the results she is looking for. Even if we grant to Stilz the appeal to hypothetical consent, her argument would apply only to state actions that are (in legal terminology) *unjustified but excusable*. Stilz's marquee case – the 2003 invasion of Iraq – does not, I will argue, fit this bill, nor does any other case I know of. Thus, this article concludes, it may well be that the

democratic authorisation account offers a theoretically cogent case for citizens' task-responsibility in democratic legal states (given the right conditions); it just so happens that no case satisfies these conditions.

## 2. Political mandate and the limits of citizen responsibility

Stilz develops her account in part by considering a hypothetical objection which, if successful, would nip her argument in the bud. This objection would start by granting to Stilz the cogency of the democratic authorisation account, but then move to observe that the cases of putative liability under consideration all involve one state transgressing on the rights of another state (e.g., unjust war). From this observation, the objection might develop as follows:<sup>6</sup>

1. a state's mandate derives from the rights of its citizens;
2. no citizen ever had the right to transgress on the rights of others in this way;
3. therefore, no such right was ever transferred from citizen to state and no such right forms part of the state's mandate;
4. therefore, the state is acting outside its mandate when instigating an unjust war;
5. therefore, citizens ought not, on Stilz's own model, be held task-responsible for unjust wars. Task-responsibility would accrue only when the state is acting to protect the rights of its citizens. This is its mandate. This mandate in no way authorises a state to instigate an unjust war.

Stilz believes this objection is misguided, but in a way that can help reveal important ideas underlying the democratic authorisation account. For according to Stilz, a state can be acting within its mandate even when it acts illegally.<sup>7</sup> This can happen when a state, in spite of its transgression, is nonetheless acting on 'a reasonable interpretation' of the basic rights of its citizens, that is, the very rights that it is instituted to uphold and protect (Stilz, 2011, p. 201).<sup>8</sup> Citizens' task-responsibility in democratic legal states is extinguished only when the state action in question '*clearly and obviously* fails to interpret' its citizens' basic rights (Stilz, 2011, p. 200, emphasis in original). Thus, in determining whether citizens are collectively responsible for an unjust war,

'we should not ask: did the citizenry actually have the right to undertake such a war, on the best interpretation of their rights? Instead we ask: was this war undertaken in accordance with an authoritative judgment that citizens had moral reason to accept?' (Stilz, 2011, p. 201)

To illustrate how this might play out in practice, Stilz asks us to imagine that an evil dictator has acquired weapons of mass destruction (WMD) and has immediate and credible plans for using them against us. In this case – Case 1 – we would be entitled, she argues, to move pre-emptively to stop the dictator from using these weapons against us. This may be correct, but is clearly of no help to Stilz. While the idea of pre-emptive strikes remains controversial on moral and legal grounds, we can allow that they may be justified in extreme cases (I will return to this topic later). The point to note, of course, is that *if* Stilz is right about this, then the question of citizens' liability would not arise at all in Case 1, for the simple reason that no wrong has been committed. When pre-emptive strikes are justified, they do

not constitute aggression, but rather a justified response to a first aggression from the other party.<sup>9</sup> Liability does not ensue in such cases any more than it would for ordinary self-defensive wars.

Presumably, then, Stilz has in mind a relevantly different scenario, as is suggested by her claim that a state may remain authoritative even when it is acting on a *mistaken judgement* (Stilz, 2011, p. 201). Thus, for Case 2, assume that a democratic legal state receives intelligence of the same sort as above, scrupulously checks the intelligence for veracity and completeness, and then moves to strike pre-emptively. Unlike the first case, however, it turns out that in spite of its best efforts, the intelligence was false. Arguably, given the factual situation, the intended pre-emptive strike now constitutes wrongful aggression. (In this sense, whether an action is justified is determined not by whether the motivating beliefs are justified, but whether the motivating beliefs are true.) Stilz now asks whether citizens of the democratic legal state can be held task-responsible for the costs (human and other) of this transgression. Her answer is yes. The state acted on a reasonable interpretation of its citizens' rights (the right of self-defence), and the action was further reasonable in that it was based in good faith on objectively credible intelligence. In this sense, the state acted within its mandate even though, as a matter of fact, it ended up violating another state's sovereign rights. Thus, citizens of democratic legal states can be task-responsible even for unjust wars.

### 3. Justifications and excuses

Although this is never made explicit in her argument, it appears that Case 2 invokes the distinction between justifications and excuses in legal theory. That is, Stilz's argument is best understood in terms of the claim that citizens can be task-responsible for state actions in cases where those actions are *excusable*, though not ultimately *justified*. Not just any mistake is compatible with the state retaining authority.<sup>10</sup> It must be an excusable mistake, one that arises from 'a reasonable interpretation of [its citizens'] rights' (Stilz, 2011, p. 201).

The justification–excuse distinction is reasonably well understood in domestic law.<sup>11</sup> Standard analyses affirm that an excusable action must be based on a reasonable belief (i.e., that the agent must be epistemically blameless).<sup>12</sup> The paradigm example involves an 'innocent aggressor', for example, a deranged person menacingly brandishing a gun. As it turns out, the gun is unloaded and the person is harmless. Nonetheless, even though one's justification for self-defensive action would hinge on the *truth* of one's beliefs about the person's potential for harming, the excusability of the action would hinge merely on one's *justification* for the belief itself. It is a matter of contention how well the justification–excuse distinction maps on to anything in international law.<sup>13</sup> However, we can grant Stilz's argument here, since our focus is squarely on assessing what consequences her argument would have for the collective responsibility of citizens of democratic legal states in such cases.

Thus, and as we saw above, the right conclusion to draw in Case 1 is that the state would be justified in acting pre-emptively, and accordingly, that no question of liability would arise. In Case 2, however, the state would *not* be justified, since the putative justification was based on false intelligence. Nonetheless, the action may

still be excusable, if the state sincerely and blamelessly believed that it was acting on diligently researched intelligence, which, if it were correct, would supply the justification. Crucially, an excuse exempts a transgressor from criminal prosecution, but not from liability for damages.<sup>14</sup> In this sense, it would seem that Stilz has a *prima facie* plausible claim that citizens of democratic legal states can be held task-responsible for unjustified-but-excusable actions of their state.

#### 4. The invasion of Iraq was not excusable

Does this help secure Stilz's conclusion? I think not. Let us first apply the analysis to the 2003 invasion of Iraq, the only case that Stilz cites in her favour, and then move to consider the broader question of whether any case fits the description.

No doubt, pre-emptive self-defence, assumed to constitute a legitimate extension of the inherent right of self-defence recognised in the UN Charter Art. 51, was at the heart of the public case for the Iraq invasion. We can start by focusing on the widely cited 45-minute strike capability claim, since this would best resemble the scenario that Stilz is working from.<sup>15</sup> If it were the case that this constituted the best and scrupulously researched intelligence at the time, and this was the true motivating grounds for the invasion, then Iraq might be a case in point. That is, if the 45-minute strike capability claim were true, and it was known that the Iraqi regime had immediate plans to deploy these weapons, then the initial strikes (if not the subsequent invasion) might have been justified. But if so, then questions of liability would not arise, at least not in the way that Stilz envisions.<sup>16</sup>

By contrast, if the sincerely held belief concerning Iraq's 45-minute strike capability turned out to be false, it is still possible that the pre-emptive strikes might be *excusable*, thereby giving rise to liability issues in precisely the way that Stilz contends. The question, then, is whether in fact the 45-minute strike capability claim was sincerely believed by the political decision-makers and also constituted the best and scrupulously researched intelligence on the matter. It is now widely accepted that it was not.<sup>17</sup> Thus, even conceding Stilz's claim that the question of mandate is settled not by whether 'the citizenry actually have the right to undertake such a war', but rather by whether the war 'was undertaken in accordance with an authoritative judgment that citizens had moral reason to accept', we should conclude that the American and British governments acted outside their mandate in invading Iraq in 2003.<sup>18</sup>

It might be protested that a 45-minute strike capability would make for an extremely restrictive criterion of legitimate pre-emption. This is true, of course, but will not help Stilz's case. I have focused on Britain's 45-minute strike capability claim because it was salient in the public debate and because it would, if correct, supply the kind of justifying condition that Stilz's argument requires. No doubt, one may entertain more capacious criteria for what constitutes 'imminent attack' – days or even weeks, maybe. (One's criterion of imminence cannot be *too* capacious, however, or one will lose sight of the crucial addendum that the pre-emptive measures also satisfy a criterion of necessity or last resort.) Stilz nowhere says what she takes to be the limits of justified pre-emptive self-defence. We can assume, though, that if her discussion is to resonate at all with current moral and legal

discussions, it must firmly distinguish *pre-emptive strikes proper*, which justifiably aim to stop an attack that is already under way, from merely *preventive strikes*, which unjustifiably aim to prevent a potential adversary from building a threat potential in the first place.<sup>19</sup> The internal logic of Stilz's Kantian contractarian argument further reinforces the case for a narrow criterion. She insists that the state acquires its mandate from individuals who are motivated to protect the rights of all human beings. We should expect such individuals to choose rules that impose tight restrictions on their state's powers to violate the rights even of outsiders: as Stilz notes (2011, p. 201), a state retains authority only in so far as citizens have *moral* reason to accept its judgements.

These constraints noted, it should be clear that roomier interpretations of legitimate pre-emption will be subject to essentially the same analysis. No good case was ever made that Iraq satisfied even a significantly wider criterion of legitimate pre-emption. The crucial question is whether the US and UK governments were epistemically blameless in their intelligence gathering. Colin Powell's subsequent retraction of evidence presented to the UN Security Council in February 2003 as well as George Tenet's *mea culpa* on spurious intelligence claims that Iraq had attempted to purchase uranium from Niger are among the strong indications that this was not the case.

If this is correct, then the invasion of Iraq was neither justified nor excused (at least not on grounds of pre-emptive self-defence – more about which shortly). In the cold light of the facts, then, we should conclude that the American and British governments in no way acted on 'a reasonable interpretation' of their citizens' rights. Accordingly, both states acted outside their mandates and the democratic authorisation account provides no grounds for assigning task-responsibility to their citizens.

Of course, none of this rules out that the invasion of Iraq might have been justified on other grounds than pre-emptive self-defence, say, on the basis of the international community's legitimate interest in removing rogue dictators from power or, more narrowly, on the grounds of Iraq's flagrant non-compliance with a long series of UN resolutions. But none of this strengthens Stilz's case for the task-responsibility of US and UK citizens: as above, if the war was justified on these or any other grounds, then questions of citizens' liabilities simply do not arise.

## 5. (Probably) no unjust war was ever excusable

However, one might still think that Stilz's account can offer an important and potentially very useful justification for impositions of collective responsibility even if the 2003 invasion of Iraq falls outside its scope. I will end by casting doubt even on this weaker conclusion. It may well be that Stilz's argument offers a theoretically cogent case for citizens' collective responsibility in democratic legal states (given the right conditions); but in all probability, no case on record satisfies these conditions. Obviously, a full argument for this conclusion would require what this article cannot provide, namely an exhaustive investigation of the historical record. Instead, I will restrict myself to offering some general considerations that seem to speak strongly in the conclusion's favour. The problem is not simply that Stilz's account applies, by design, only to democratic legal states, and that, on a global

scale, such states remain a rarity to this day. Rather, the more general reason why unjustified-but-excusable violent actions should be significantly less common in inter-state affairs than under domestic law is that state actions typically operate on a much larger time frame than the actions of human individuals do. Individual agents may be faced with threat scenarios requiring split-second responses. This consideration weighs heavily in determining culpability. By contrast, state actions typically unfold over hours, days and weeks. This imposes a significantly higher threshold of epistemic blamelessness for states than for individual agents. And epistemic blamelessness, as we have seen, is a precondition for legal excuse.

That noted, we can easily specify situational parameters under which Stilz's account *would* apply: high-stakes crisis situations with high potential for human costs, or where even limited first strikes will significantly impair a state's defences against a second wave of attacks. While there have been many such situations in the last, say, 100 years, I know of not a single case where a state has launched a pre-emptive attack based on objectively credible intelligence which subsequently turned out to be false. Israel's first strike in the Six Day War is sometimes thought to constitute a case of this kind. In the lead-up to the war, Israel was under credible threat on several fronts. While the initial costs of waiting for first strikes to occur might have been limited, this would have effectively decimated Israel's ability to defend against subsequent attacks. Thus, Walzer (1992, pp. 82–85) has argued that Israel's first-strike strategy was justified as a case of legitimate pre-emption. This assessment is controversial, as one would expect,<sup>20</sup> but that is precisely not the point here. As in the analysis above, if Israel's pre-emptive attack was justified, then the question of liability would not arise in the form that Stilz envisions. By contrast, if it was not justified, there appears to be little in the historical record that suggests the basis for an excuse: as Walzer (1992, p. 85) goes on to concede, the strikes were undertaken 'not only in the absence of a military attack or invasion but in the (probable) absence of any immediate intention to launch such an attack or invasion'. It is worth taking note of the underlying dialectic here: the greater the scope one's theory allows for pre-emptive self-defence, the less room it leaves for the possibility of excuses.

While these reflections are clearly insufficient to show that there has never been a case that satisfies Stilz's conditions, they strongly suggest that such cases will be exceptionally rare at best. Accordingly, I conclude that Stilz's argument fails to explain why citizens of democratic legal states are generally task-responsible for the unjust international actions of their states. Considered in the abstract, Stilz's case for assigning such task-responsibility might be a cogent one; it just so happens that few if any cases fall within its purview.

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## Notes

- 1 A similar account can be found in Parrish (2009).
- 2 Parrish (2009, pp. 142–144) offers an illuminating discussion of how or to what extent such an account can also apply to non-democracies. We may note, though, that nothing in Stilz's account seems to dictate that democratic legal states (so-called) must necessarily be democracies, unless the consultation criterion is expanded to stipulate that democratic election is the only form of consultation that counts. Thus, for instance, it is natural to assume that what Rawls (1999) calls 'decent hierarchical societies' (whose definition closely mirrors Stilz's definition of democratic legal states) could also fall within its purview.
- 3 The terminology is due to Goodin (1995).
- 4 See Parrish (2009, pp. 128–141) for a similar line of reasoning.
- 5 In addition to Parrish (2009), similar proposals can be found in Miller (2007) and Pasternak (2011).
- 6 'Might,' since what follows is fleshed out in rather more detail than Stilz provides (cf. Stilz, 2011, p. 199).
- 7 As Crawford and Watkins point out (2010, p. 287), current international legal practice attributes all actions of public functionaries to the state, irrespective of whether these actions are *intra* or *ultra vires* (i.e., within or without the mandate given to the functionary in question). As Stilz clearly recognises, however, it is vital to the democratic authorisation account that this distinction be observed.
- 8 See Parrish (2009, p. 149) for a similar formulation.
- 9 Cf. Cassese, 2005, pp. 357–363; Fletcher and Ohlin, 2008; Walzer, 1992, pp. 82–85.
- 10 Cf. Stilz's stipulation that the war be 'undertaken in accordance with an authoritative judgment that citizens had *moral reason* to accept' (Stilz, 2011, p. 201, emphasis added).
- 11 See, for instance, the *Model Penal Code*, section 3.04.
- 12 Cf. Gardner, 2007, p. 87; Greenawalt, 1986, p. 91.
- 13 Cf. Fletcher and Ohlin, 2008, pp. 115–116.
- 14 Cf. Botterell, 2009, p. 176.
- 15 *Iraq's Weapons of Mass Destruction: The Assessment of the British Government*, aka the 'September Dossier'.
- 16 Questions of liability for war crimes and other *jus in bello* transgressions might still arise, even if there was just cause for the war. Since the ratification of the *Rome Statute* in 1998, however, these are increasingly recognised as matters of individual liability under international criminal law, and so bear little trace of the kind of collective responsibility under discussion here.
- 17 Consider, for instance, the scandal following BBC journalist Andrew Gilligan's claims that the dossier was 'sexed up' for the purposes of garnering public support for the war.
- 18 The preceding discussion is indebted to Fletcher and Ohlin (2008, pp. 170–174).
- 19 On this, see Crawford, 2003; Fletcher and Ohlin, 2008; Luban, 2004; McMahan, 2004; Miller (2008); and several essays in Shue and Rodin (2007). Notoriously, the 2002 US National Security Strategy document muddles this distinction (cf. Buchanan, 2006, p. 8 n. 5; Kaufman, 2005, p. 23 n. 2; Luban, 2004, pp. 218–221; Miller, 2008, p. 49).
- 20 For a recent example, see Coady, 2008, pp. 100–102.

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