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## ‘Responding to “Delinquent” Institutions: Blame, Punishment and Rehabilitation’

*The 3<sup>rd</sup> Workshop of the British Academy Network on Ethics, Institutions and International Relations, 12-14 May 2004*

The problem with trying to punish an institution that is judged to be ‘delinquent’ – whether the United Nations (UN), a ‘rogue state’, Shell Oil, or the US Army – might be understood as one of responding to an entity that (to invoke Edward, First Baron Thurlow’s 18<sup>th</sup> century account of the corporation) ‘has no soul to be damned and no body to be kicked’.<sup>1</sup> Yet this conundrum is only the tip of the proverbial iceberg when confronting both the conceptual and practical complexities of blaming, and attempting to respond to, formal organizations that are seen to fall foul of their moral responsibilities in international relations.

These complexities were considered by twenty scholars, representing sixteen different universities in North and South America and Europe, who met in New York last May for the final in a series of three workshops on ‘Ethics, Institutions, and International Relations’. The meeting – and the challenging debates and discussions that took place over two and a half days – were linked directly to two previous workshops, held in Cambridge, U.K. in November 2000 and Montreal, Canada in May 2002.

The first workshop, ‘Can Institutions Have Morals?’, sought to address the question of whether formal organizations such as states, nongovernmental organizations (NGOs), transnational corporations, and intergovernmental organizations can be considered moral agents – and, therefore, bearers of duties – in international relations. Tentative (and qualified) affirmative answers to this question, along with a generous Network Grant from the British Academy, provided the foundation for two further workshops. The second workshop, ‘Assigning Duties to Institutions: Debating Hard Cases’, explored whether some circumstances and types of organization provide particularly challenging problems for the claim that institutions can bear moral burdens. It gave us the opportunity to test theoretical frameworks posed at the initial meeting in the context of particular events (such as the 1994 genocide in Rwanda and the 1995 fall of Srebrenica) and in relation to specific collective actors (including the European Union, the International Criminal Court, and the UN).

The concluding workshop in this trilogy was hosted by Joel Rosenthal, overseas partner for the British Academy project, at the Carnegie Council on Ethics and International Affairs in Manhattan (during an early heat-wave that was a particular shock to the British participants). The purpose of this final workshop was to explore

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<sup>1</sup> Quoted in John C. Coffee, Jr., ‘No Soul to Damn: No Body to Kick’: An Unscandalized Inquiry into the Problem of Corporate Punishment’, *Michigan Law Review*, 79 (1981), 386-460 (p.386).

means of responding to institutions that are charged with having neglected their responsibilities. This theme follows logically from the suggestion put forth at the first meeting that institutions can coherently be understood to be moral agents, and from the numerous examples provided at the second conference of cases where collective actors have failed spectacularly to discharge the obligations deemed to accompany this status (and have thereby been branded 'delinquent').



From left: Nick Rengger (St Andrews), Joel Rosenthal (Carnegie Council), Kirsten Ainley (LSE), Toni Erskine (Aberystwyth), and Chris Brown (LSE)

Two simple propositions set the agenda for this final set of discussions. First, if certain institutions are capable of discharging specific duties (to respond to genocide, to avert famine, or to arrest environmental degradation, for example), but fail to do so, then we might blame them, or hold them to account, for the consequences of their particular acts of commission and omission. In such cases, it makes sense to think seriously about how to prevent future evasions of responsibility. Second, if existing institutions are *not* capable of discharging specific duties, one might consider imbuing them with the relevant capacities or providing enabling conditions an important endeavour. These propositions gave rise to a number of difficult questions that confronted participants at the New York workshop. Do some agents have duties to create, reform, rehabilitate or enable an institution to respond to ethical imperatives that would otherwise be left unmet? What constitutes a coherent, effective, and viable response in cases where institutions already have the capability to discharge duties but, nevertheless, evade them? How can an institution be punished in a way that does not effectively punish its constituents as individuals? What are alternatives to punishment in responding to delinquent institutions?

A central aim of the workshop was to consider these questions in the context of practical cases in which institutions *are* blamed for what are understood to be grave derogations of duty. Such cases were not difficult to find. Indeed, the news story that dominated our stay in New York was of the alleged – and subsequently confirmed – abuse of Iraqis by American soldiers at the Abu Ghraib prison. This provided a timely and sobering example of exactly the type of “hard case” towards which our conceptual discussions have been directed. It reiterated the importance of addressing institutional as well as individual responsibility for harm and of acknowledging that relevant moral agents (and therefore coherent claims to moral responsibility) can exist simultaneously at both levels. It also highlighted the difficulty in determining what constitutes an adequate response to such transgressions. This particular case was

forcefully presented at the workshop by Kateri Carmola (Middlebury College, Vermont) in a discussion of ‘Abu Ghraib, the US Military and the Complications of Institutional Responsibility’. The rich selection of cases examined at the workshop also included the alleged culpability of Brown University in the grievous consequences of the slave trade – a case presented by Neta Crawford (Brown) that combines questions of institutional responsibility and historical injustice – and the problem of how to respond to delinquency in the context of sovereign debt repayment and international financial institutions, raised in a paper by Tom Hattori (City University of New York).

Perhaps most rewarding about this workshop was the degree to which we were able to build on the discussions of previous meetings. This does not, however, mean that the members of the network have achieved a consensus either on how to define all of the concepts central to this project or on the specific conclusions to be drawn from it. Chris Brown (LSE), for example, provides a sustained and important challenge to my somewhat stubborn commitment to defining groups as moral agents only if they possess sophisticated, integrated capacities for deliberation and action – criteria that I understand to entail, *inter alia*, the corporate identity and type of decision-making structure generally found in formal organizations. His (now published) workshop papers on the responsibilities of the ‘Great Powers’ and of ‘coalitions of the willing’ offer compelling examples of what he calls ‘informal’ agency (and, by extension, moral agency). Mervyn Frost (King’s College, London) takes this challenge further by imploring us to move away from a focus on agents and, instead, to evaluate ethically those ‘dispersed practices’ within which agents of various kinds are constituted.

Such disagreement is all to the good. It has both sharpened individual contributions to this collaborative project and enlivened discussions. It has, moreover, been accompanied by general agreement on the significance of some broad conceptual distinctions that have lent structure to our deliberations. The distinction between notions of *prospective* and *retrospective* responsibility (involving, respectively, *ex ante* assignments of duty and *ex post facto* ascriptions of blame and accountability) was emphasized at the first meeting by Onora O’Neill (Cambridge) and Christian Barry (Carnegie Council) and has been central to our discussions since. While individual participants in the network have been inclined to focus on one notion or the other, I do not think that anyone would deny that the two become intimately linked when dealing with practical problems of distributing duties or apportioning blame in international politics.

Another distinction – this one between different types of response to unmet obligations – provides a way of ordering the various responses to institutional delinquency addressed at the New York workshop. ‘Remainders of feeling’ are emotional responses, such as guilt, remorse, regret and shame; ‘remainders of action’ are rectificatory responses of action, the most prominent of which is punishment.<sup>2</sup> Two significant points were discussed throughout the workshop that relate to this distinction. First, while individual human moral agents are capable of those

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<sup>2</sup> This labelling of the distinction is taken from Onora O’Neill, *Towards Justice and Virtue: A constructive account of practical reasoning* (Cambridge: Cambridge University Press, 1996), p. 160. The concept of ‘remainders’ originally comes from Bernard Williams, ‘Consistency in Ethics’, *Proceedings of the Aristotelian Society*, Supplementary Volume XXXIX (1965), 103-124.

emotional responses to unmet obligations that would fall within the first category, it seems unrealistic to expect that institutional moral agents can be similarly moved. The *members* of an institution might feel guilty when the institution commits a transgression (the citizen of a state might feel guilty that her state engages in an unjust war), but it would seem an unhelpful anthropomorphism to suggest that an institution itself experiences this response. Chris Brown and Cornelia Navari (Birmingham) each engaged with the relationship between the ‘guilty consciences’ of individual actors and questions of institutional responsibility; Kirsten Ainley (LSE) invoked the point that only human agents can experience emotions in her argument for identifying the appropriate target of response to institutional delinquency in a limited ‘executive group’. Second, even if institutions are not capable of moral emotions, they are, arguably, capable of deliberating and acting in a way that is analogous to (most) individual human actors. In other words, responses to unmet obligations in the form of ‘remainders of action’ make sense when talking about institutional moral agents. Although alternatives to punishment tend to be neglected within both moral philosophy and the study of international relations, the following ‘remainders of action’ are just a sample of those addressed at the workshop as possible responses to institutional delinquency: restitution, reparation, compensation, atonement, apology, reform, forgiveness and rehabilitation.

Despite the attention given to these alternatives to punishment, some participants embraced a more punitive approach to the problem of delinquent institutions. In a bold statement that demonstrates both this approach and a clear focus on the notion of retrospective responsibility, Tony Lang (St Andrews) declared that ‘punishment is *the* reason for talking about responsibility’. (He and I amicably agreed to disagree on this point.) What punishment would involve was variously articulated. Frances Harbour (George Mason) suggested that some forms of institutional punishment might be analogous to capital punishment and involve the elimination or total reconstitution of an organization. Howard Adelman (Princeton and York, Canada) defined institutional punishment in terms of ‘de-legitimation’. Punishment of some institutional actors charged with delinquency, namely states, can also be conceived in terms of a military response. In the context of this discussion one needs to return to the question of how punishing an institution can avoid either directly or indirectly ‘kicking the bodies’ of (often innocent) individual human actors. Indeed, on the possible detrimental consequences of punishment at this level, Lyn Dobson (Edinburgh) noted the ‘intermediary nature’ of institutions. ‘We *can* punish institutions’, she argued, ‘but it may be self-defeating to try to do so because the institutions have beneficiaries whom we may harm by harming the institution.’ This takes us beyond sole consideration for the institution’s constituents when talking about the effects of institutional punishment on individual human actors to concern for third parties that depend on its continued functioning. Her proposed solution is to promote ‘institutional pluralism’ – thereby making it possible for institutions to substitute for one another in cases where it is necessary to sanction those deemed delinquent.

This project has benefited from different forms of ‘institutional pluralism’ – found in the plurality of valuable perspectives and disciplinary backgrounds represented at the workshops and in the plurality of supporting bodies that have made them possible. In addition to a British Academy Network Grant, the group has received two Workshop Grants from the International Studies Association (ISA), a grant from McGill University, and support from the Carnegie Council on Ethics and International

Affairs, Clare Hall College, Cambridge, and the Centre of International Studies, Cambridge. Moreover, and perhaps most significantly in terms of initiating this collaborative project, the first workshop was made possible by a BISA Special Workshop Grant. I would like to express my sincere thanks to BISA for providing this important source of funding.

Papers from the first two workshops have been published in the following: a special section of *Ethics & International Affairs*, Vol. 15, No. 2 (2001); *Can Institutions Have Responsibilities? Collective Moral Agency and International Relations* (Palgrave Macmillan, 2003); and, *Assigning Duties to Institutions: Debating Hard Cases*, Special Issue of *Global Society*, Vol. 18, No. 1 (2004).<sup>3</sup>

Although this marks the end of the three-part workshop series, this project will continue at future meetings and conferences. Some of the papers and positions that have resulted from the Ethics, Institutions and International Relations Network will be presented at a panel and roundtable in March 2005 at the ISA conference in Hawaii.

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<sup>3</sup> For a complete list of articles and book chapters that have resulted from the workshop series, please contact Toni Erskine at [tae@aber.ac.uk](mailto:tae@aber.ac.uk).)