

## 11. Drone Warfare, Civilian Deaths, and the Narrative of Honest Mistakes

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### **Abstract:**

In this chapter, we consider the plausibility and consequences of the use of the term “honest errors” to describe the accidental killings of civilians resulting from the US military’s drone campaigns in Iraq, Syria, Afghanistan, and elsewhere. We argue that the narrative of “honest errors” unjustifiably excuses those involved in these killings from moral culpability, and reinforces long-standing, pernicious assumptions about the moral superiority of the US military and the inevitability of civilian deaths in combat. Furthermore, we maintain that, given the knowledge-distorting practices within the US military’s organizational structure, few if any civilian deaths from drone strikes meet the criteria of a genuinely morally excusing “honest mistake”. Instead, these accidental killings often reflect objectionable attitudes of relative disregard for the safety of civilians. These attitudes are, we argue, sufficient to warrant the attribution of blame and moral responsibility, both with respect to certain individual actions and with respect to the US military

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as an institution. In light of this, we propose incorporating a *Principle of the Moral Equality of Non-combatants* into military assessments of what counts as “acceptable risk” to civilians. This would go some way, we argue, to redressing the ongoing injustice inflicted on the victims of civilian killings by the failure of the US military and US political leadership to take moral responsibility for unjustified civilian deaths.

## Introduction

On 29 August 2021, a US drone strike in Kabul killed 10 Afghan civilians, including seven children. As reported by the *New York Times* in a series of articles in late 2021, this strike was one of many drone strikes that have mistakenly killed civilians.<sup>3</sup>

The causes of these mistakes are controversial.<sup>4</sup> Our goal here is not to further elucidate the causes of these drone strikes. Instead, in this chapter we focus on the legal and moral narrative of “tragic mistakes”<sup>5</sup> or “lawful but awful” outcomes, to use the military’s own parlance,<sup>6</sup> that has consistently accompanied media, military, and political reportage of civilian deaths from drone strikes. In what follows, we show how this narrative replicates and reinforces long-standing and entrenched assumptions about the moral superiority of the US military and the inevitability of civilian deaths in combat, and cultivates a denial of individual and collective moral and legal responsibility for civilian deaths. Drawing on the account of moral responsibility and blameworthiness developed in our book *War Crimes: Causes, Excuses, and Blame*,<sup>7</sup> we argue that

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<sup>3</sup> Khan 2021. Hidden Pentagon records reveal patterns of failure in deadly airstrikes. The New York Times, December 18. <https://www.nytimes.com/interactive/2021/12/18/us/airstrikes-pentagon-records-civilian-deaths.html>. Accessed 15 October 2022.

<sup>4</sup> For example, some commentators argue that a contributing factor to the high number of civilian deaths from US drone strikes are the targeting guidelines adopted by the US military. In particular, the US has refused to adopt the first First Additional Protocol (AP I) to the Geneva Conventions from 1977, which requires that belligerents “do everything feasible” (Article 57) to verify that targets are not civilians or civilian objects, and states that “in case of doubt whether a person is a civilian, that person shall be considered a civilian” (Article 50) (ICRC 1977). Instead, the US military “only acknowledges a duty to take feasible precautions in ‘good faith’ to avoid civilian casualties” (Rosen 2021. Tragic mistakes: Breaking the military culture of impunity. Just security, November 3. <https://www.justsecurity.org/79256/tragic-mistakes-breaking-the-military-culture-of-impunity/>. Accessed 15 October 2022.

<sup>5</sup> U. S. Central Command 2021. <https://www.centcom.mil/MEDIA/Transcripts/Article/2781320/general-kenneth-f-mckenzie-jr-commander-of-us-central-command-and-pentagon-pres/>. Accessed 15 October 2022.

<sup>6</sup> Rosen 2021. Tragic mistakes: Breaking the military culture of impunity. Just security, November 3. <https://www.justsecurity.org/79256/tragic-mistakes-breaking-the-military-culture-of-impunity/>. Accessed 15 October 2022.

<sup>7</sup> Talbert and Wolfendale 2019.

this narrative reflects and reinforces an unjustified and morally blameworthy acceptance of preventable civilian deaths. Put simply, due to the combination of knowledge-distorting practices within the military’s organizational structure and unique features of the drone program, few if any civilian deaths from drone strikes meet the criteria of a morally excusing “honest mistake”. In light of this, we propose incorporating a new principle—the *Principle of the Moral Equality of Non-combatants*—into decision-making procedures around acceptable risk to civilians as well as into military training and education around collateral damage mitigation. This would go some way, we argue, to redressing the ongoing injustice inflicted on the victims of civilian killings by the failure of the US military and US political leadership to take moral responsibility for unjustified civilian deaths. In our conclusion we consider the implications of our argument for the morality of enlisting in a military force that is known to engage in practices that impose morally blameworthy degrees of risk to civilians. Secondly, we explore the implications of our view for assessments of institutional and individual legal and moral culpability for collateral damage and consider concrete steps that may be taken to reduce the risks that US combat operations pose to civilians.

### **11.1. The Narrative of Honest Mistakes and the Acceptance of Civilian Casualties**

The narrative of “honest” or “tragic” mistakes is consistently used to describe cases of civilian deaths caused by drone strikes and is often accompanied by assertions that the US military is committed to protecting civilians. For example, a Pentagon investigation determined that the 29 August 2021, strike in Kabul “was an ‘honest mistake’”<sup>8</sup> and Pentagon spokesperson John Kirby

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<sup>8</sup> Borger 2021.

stated that: “No military in the world works as hard as we do to avoid civilian casualties”.<sup>9</sup>

Similarly, according to the *New York Times*:

Capt. Bill Urban, the spokesman for the U.S. Central Command, said that “even with the best technology in the world, mistakes do happen, whether based on incomplete information or misinterpretation of the information available. And we try to learn from those mistakes.” He added: “We work diligently to avoid such harm. We investigate each credible instance. And we regret each loss of innocent life”.<sup>10</sup>

The description of civilian deaths as honest mistakes in conjunction with the affirmation of the US military’s commitment to protecting civilian lives creates the impression that civilian deaths are unfortunate events for which no one is to blame. But, once we unpack the narrative of honest mistakes more carefully, we see that this narrative relies on a toxic combination of assumptions that combine to unjustifiably portray civilian deaths from drones as unavoidable accidents, thus relieving those involved of moral responsibility. By reinforcing and reflecting these assumptions, the narrative of honest mistakes entrenches what we argue in the following sections is a morally objectionable and unjustified denial of moral and legal culpability for civilian deaths caused by

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<sup>9</sup> Quoted in Rosen 2021. Tragic mistakes: Breaking the military culture of impunity. Just security. <https://www.justsecurity.org/79256/tragic-mistakes-breaking-the-military-culture-of-impunity/>. Accessed 15 October 2022.

<sup>10</sup> Khan 2021. Hidden Pentagon records reveal patterns of failure in deadly airstrikes. The New York Times, December 18. <https://www.nytimes.com/interactive/2021/12/18/us/airstrikes-pentagon-records-civilian-deaths.html>. Accessed 15 October 2022.

drone strikes. These deaths, we argue, are not the result of exculpating honest mistakes, but instead often result from biases and intentions that justify the attribution of moral blame.

### *11.1.1. The Assumption that Civilian Deaths are Inevitable*

Both international humanitarian law (IHL) and just war theory<sup>11</sup> operate on the assumption that some civilian deaths in conflict are inevitable. IHL requires combatants to take all feasible steps to ensure that the direct targets of military actions are legitimate military targets and to choose options that minimize foreseeable harm to non-combatants (even at some increased risk to combatants). But military actions that meet the principles of distinction, proportionality, necessity, and precaution are not war crimes even if civilians are killed as a result. As Marko Milanovic puts it, “the overall architecture of these rules, e.g., as written in AP I or the ICRC Customary IHL Study, would seem to imply that if (...) [these principles] are all respected the mistaken death of a civilian, however unfortunate, would not ipso facto violate IHL”.<sup>12</sup>

There are, of course, important questions to be asked about how the principles of distinction, proportionality, necessity, and precaution are to be interpreted.<sup>13</sup> But, what is important for our analysis here is how the supposed inevitability of civilian deaths is connected to narratives that

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<sup>11</sup> “Just war theory” refers to a historical and contemporary body of literature that discusses the conditions under which the resort to war is justified (*jus ad bellum*) and the moral constraints that apply to the conduct of war (*jus in bello*). While there are many disagreements within this tradition regarding both sets of criteria, there is broad agreement in traditional just war theory that collateral civilian deaths may be morally permissible if they are not directly intended and if they are proportionate to the importance of military goals to be achieved by the action in question. See “War” in the Stanford Encyclopedia of Philosophy (<https://plato.stanford.edu/>) for an overview of just war theory and its central debates.

<sup>12</sup> Milanovic 2020.

<https://www.ejiltalk.org/mistakes-of-fact-when-using-lethal-force-in-international-law-part-i/>. Accessed 15 October 2022.

<sup>13</sup> These questions are beyond the scope of this chapter, however. See Haque (2017 and 2011) for an overview of these issues.

excuse the institutions and individuals who cause those deaths from blame. If it is impossible to avoid harm to civilians in a conflict, then there is little motivation to question whether any specific incident of civilian deaths could have been avoided. As Neta Crawford argues: “incidental ‘collateral damage’ deaths are often understood as the tragic outcome of war—they are described as natural and framed as inevitable and certainly not the result of deliberate choices by individuals”.<sup>14</sup> But, as we discuss in more detail in Section 3, this narrative misrepresents the degree of control that the US military can and has exercised over the risks posed to civilians from US military actions. As Crawford explains, “the argument that ‘civcas’ [civilian casualties] were inevitable and unforeseeable is belied by the fact that when US rules of engagement or procedures changed, the incidence of civilian killing waxed and waned”.<sup>15</sup> And so, she argues, “many episodes of collateral damage are foreseeable, foreseen, and preventable, albeit strictly legal”.<sup>16</sup>

When uncritical acceptance of the view that civilian deaths are inevitable is combined with modern targeting technologies, like drones, that are described as “precise” and “humane”,<sup>17</sup> civilian casualties caused by these technologies are even more likely to be framed as unavoidable and thus as not challenging the US military’s claim to be a humane organization dedicated to protecting civilians. As Patricia Owens argues: “Alongside the basic laws of war, which allow for ‘collateral’ or unintended damage, and the over-selling of precision technology, such claims [of civilian deaths as accidental] are supported by widespread assumptions that the conduct of war for the West is becoming more ‘humane’”.<sup>18</sup>

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<sup>14</sup> Crawford 2013, p. 40.

<sup>15</sup> Crawford 2013, p. 157.

<sup>16</sup> Crawford 2013, pp. 40-41.

<sup>17</sup> Emery 2020, p. 5.

<sup>18</sup> Owens 2003, p. 596. To fully understand the narrative of honest mistakes, it must be understood as part of a long-standing and deeply embedded social and political narrative depicting the US (and the US military) as inherently more

As is apparent, then, the description of civilian casualties resulting from drone strikes as unavoidable accidents—“unintentionally consequential random happenings”, to use Owens’s phrase<sup>19</sup>—has significant implications for judgments of moral and legal responsibility for those deaths. If civilian casualties are unavoidable and unintentional and the US military is committed to protecting civilians, as is claimed, then, the thinking goes, all reasonable steps must have been taken to ascertain that the targets were not civilians and/or that any collateral damage would be minimal. So, there is no basis on which to say that a strike that killed civilians should not have gone ahead. This means that while it might be appropriate for the individuals involved in such a strike to express regret about the “tragic mistake”, feelings of guilt or shame that manifest an awareness of moral blameworthiness would be inappropriate.

This way of framing moral and legal responsibility for civilian deaths from drone strikes asks us to evaluate the knowledge and intentions of individuals involved in the strike. But this approach obscures the fact that a drone strike is a *collective* action resulting from the decisions and actions of many people operating in a complex and hierarchical institution, many of whom will only have specific and partial knowledge related to their role in the process. It is, therefore, likely to be true that any given individual involved in a drone strike did not know that civilians would be harmed—and so, when we adopt the framework of honest mistakes and the individualized approach to responsibility that it implies, moral responsibility disappears from the picture.

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humane and more civilized than its enemies. See Esch 2010 for examples of this narrative in relation to the war on terror.

<sup>19</sup> Owens 2003, p. 597.

But, as we explain in more detail in the following section, a plausible account of blame and honest mistakes reveals how the choices, actions, and intentions of those involved in the US drone program can reflect institutionally embedded as well as individually blameworthy forms of indifference to, and disregard for, the lives and wellbeing of the victims of drones strikes.

## 11.2. Moral Responsibility, Blame and Honest Mistakes

### 11.2.1 *Blame and Blameworthiness*

Given the diverse uses of “responsible” and its cognates, it is worth emphasizing that we are not primarily concerned with responsibility in the sense of *having a responsibility*, such as when a captain is said to be responsible for her ship and crew. Rather, we are concerned with responsibility in the sense of *being morally responsible for one’s actions and the consequences of one’s actions*.<sup>20</sup>

In our view, a person is morally responsible for their behavior if that behavior is attributable to them in such a way that they are praiseworthy or blameworthy for it, where this means being open to the responses and reactions typically involved in praise and blame.<sup>21</sup> What this usually requires is that the person’s behavior is explained by the moral quality of their will and intentions.<sup>22</sup>

Given the subject matter of this chapter, we will be concerned with blameworthiness rather than

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<sup>20</sup> In addition to distinguishing between *being* morally responsible and *having* a responsibility, moral responsibility should also be distinguished from mere causal responsibility. It may be that one needs to be causally responsible for an outcome in order to be morally responsible for it, but bearing such a causal relationship is not sufficient for moral responsibility: we cause a great many outcomes without being morally responsible for them.

<sup>21</sup> In defining moral responsibility in terms of openness to praise and blame, we follow many other accounts in the current literature. For overviews of contemporary accounts of moral responsibility and blame, see the articles on “moral responsibility” and “blame” in the *Stanford Encyclopedia of Philosophy*: <https://plato.stanford.edu/>.

<sup>22</sup> P. F. Strawson 1962 is the classic source for this influential perspective.

praiseworthiness. But when, and under what circumstances, is it fair to blame a person for their actions? What factors would excuse a person from blame when they have done something that would normally leave them open to blame? While there are circumstances that are generally agreed to be excusing conditions, such as when a person is coerced or suffers from a severe mental illness, there are many cases where there is disagreement about whether a person should be excused (or exempted) from moral blame.

Some authors argue that the various pressures involved in military training and culture (not to mention active combat) make it unreasonably difficult for military personnel to recognize the moral or legal status of various wrongful acts, such as torturing prisoners or killing civilians. Thus, supporters of this view argue, it may often be unreasonable to expect military personnel to refrain from these behaviors. If this view is correct, it may also follow that it would be unfair to hold military personnel morally or legally responsible, and to blame them, for engaging in the relevant wrongful (or illegal) conduct. For example, John Doris and Dominic Murphy argue that military training and culture can lead military personnel to see objectionable behavior as morally permissible and that it would therefore be unfair to hold them accountable for engaging in that behavior:

Our central conclusion is an unsettling one: *Perpetrators of atrocity typically occupy excusing conditions and are therefore not morally responsible for their conduct.* (...) many perpetrators manifest cognitive impairments that profoundly degrade their capacity for moral judgment, and such impairments, we shall argue,

preclude the attribution of moral responsibility.<sup>23</sup>

We grant that there might be cases (in and out of active combat) where it would be unreasonable to expect war crimes perpetrators to recognize the wrongfulness of their behavior and where perpetrators may sincerely believe that their actions are morally permissible. We argue, however, that this does not necessarily mean that such perpetrators are not blameworthy for their wrong and harmful actions.<sup>24</sup>

For example, imagine that, because of propaganda and acculturation into a particular military context and through no fault of their own, a combatant believes that it is permissible to torture prisoners of war. Perhaps this person believes that torture is necessary to achieve military and political goals that they regard as legitimate. Is this torturer morally responsible—are they blameworthy—when they intentionally and knowingly torture an enemy prisoner? In our view, the answer to this question can be found by considering whether it would be appropriate for the torture victim to blame their torturer. The appropriateness of the victim blaming the torturer will depend on the judgments and attitudes that the torturer expressed through their actions. If it is reasonable for the victim to interpret the torturer’s actions as expressing morally inappropriate disregard for the victim’s welfare, then moral blame seems appropriate. Note, though, that the appropriateness of the victim’s blaming responses is not necessarily affected by the causal story of how the torturer *acquired* their offensive judgments and attitudes, or by the fact that the torturer believes that torture

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<sup>23</sup> Doris and Murphy 2007, p. 26, emphasis in original; also see Doris and Murphy 2022. Doris and Murphy offer a clear application of this perspective to war crimes, but other philosophers have constructed related arguments that call into question the blameworthiness of individuals who, because of the environments in which they were raised, have difficulty recognizing the wrongfulness of, for example, racism and so cannot reasonably be expected to refrain from racist behavior; see, for example, Benson 2001, Levy 2003, and Wolf 1987.

<sup>24</sup> See Talbert and Wolfendale 2019, Chapter 5, “Blaming Perpetrators”.

is permissible. This is because neither of the factors just mentioned necessarily affect the moral significance, for the victim, of the judgements and attitudes expressed through the torturer's actions.

Simply put, the torturer's (perhaps sincere) belief in the permissibility of torture does not change the fact that their actions express disregard for, or indeed active hostility towards, the victim's basic welfare and moral standing. It is the torturer's lack of moral regard that makes blame appropriate. And if we think that a torture victim is justified in believing that they have been treated with morally inappropriate disregard, then we should also think that it is appropriate that they respond to the person who harmed them with the moral emotions that characterize blame and communicate the offense taken at such disregard. And this means that the perpetrator is blameworthy: they are open to moral blame.

Of course, not all harmful behavior is blameworthy. So far, we have argued that it is typically appropriate to blame a person when their actions express the kind of moral disregard that would make the responses involved in moral blame fitting. But there are cases where a person's harmful behavior does not necessarily express such disregard and, in those cases, blame would be inappropriate. So, for example, the fact that *A* accidentally harms *B* does not, by itself, prove that *A* is not appropriately concerned with *B*'s welfare and moral standing. But it does not follow from this that *all* accidental harms are therefore not blameworthy. Perhaps a person does not realize that their action will harm another, but their failure to realize this may stem from a criticizable lack of concern about the impact of their actions on other people—an idea captured in the concept of negligence. We might think that if a person who unwittingly causes harm had been appropriately

concerned with others' welfare, then they would have been aware of the potential consequences of their actions. Moral blame may thus be an appropriate response to unwitting and unintended harms of this sort.

The cases most interesting to us are those in which harm to civilians (or the extent of this harm) was unanticipated—these are the cases most often described as honest or tragic mistakes, as we explored in Section 11.1. This way of framing moral and legal responsibility for civilian deaths from drone strikes individualizes responsibility and focuses on the intentions and knowledge available to individual actors. In our account of blameworthiness, however, the fact that individuals involved in a drone strike may not intend to hit civilians, or may not know that civilians are at risk, does not settle the matter of blameworthiness. When civilians are unwittingly harmed, we may ask, for example, whether a (morally) sufficient effort was made to determine whether the proposed targets were in fact military targets, whether civilians were threatened by a proposed strike, and whether that effort indicates an appropriate degree of concern for avoiding harm to innocents. If the level of concern for avoiding harm is morally insufficient, then blame may be appropriate even in a case where harm is unwittingly caused. In addition, we must also consider how efforts to mitigate harm (and failures to make such efforts) shape, and are shaped by, features of the military institutional and organizational structure (including, for example, targeting guidelines) that impact the knowledge and moral awareness of individuals acting within the institution (a topic explored in Section 11.3).

### *11.2.2. Blame and Collateral Damage*

In this context, it is helpful to introduce material from Neta Crawford's important book *Accountability for Killing: Moral Responsibility for Collateral Damage in America's Post-9/11 Wars*. Crawford distinguishes three types of collateral damage in warfare.<sup>25</sup> First, there are "genuine accidents". These occur when civilians are harmed, but "[n]o one wanted the outcome and no one could have reasonably foreseen it".<sup>26</sup> Such cases are truly exculpatory. Though the issue of blameworthiness may arise in the context of even genuine accidents, we set aside such cases in what follows.

Of more interest to us, and to Crawford, are cases of the second form of collateral damage that she discusses: those instances in which harm to civilians was, while not precisely intended, not entirely unforeseeable. Here, Crawford refers to "systemic collateral damage". Harm to civilians is "systemic if the [military] organization's practices and beliefs are structured so that (...) accidents predictably recur"; if there is, in other words, a "structural context" in which "collateral damage becomes a normal [and anticipatable] accident".<sup>27</sup> Crawford says that in such cases we can speak not just of individual responsibility for harm to civilians, but also

(...) of organizational responsibility in the sense that such an outcome should have been foreseen because (...) [military operations of a given sort] frequently lead to

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<sup>25</sup> The third form of collateral damage that Crawford discusses is what she calls "foreseen proportionality/double effect killing". Here, "the civilian deaths were foreseeable, foreseen, and judged to be worth the military advantage that would result from an operation". According to the traditional doctrine of double effect, often relied upon in articulations of just war theory, "[t]hese deaths may be excused if they were an unintended consequence of a necessary military operation and if some effort was made to 'minimize' civilian casualties" (Crawford 2013, p. 10). As we noted in Section 11.1, such deaths are also judged to be legal within IHL if they meet the criteria of distinction, proportionality, necessity, and precaution. Because such cases, important though they are, don't fall into the category of mistakes, we will not discuss them here.

<sup>26</sup> Crawford 2013, p. 8.

<sup>27</sup> Crawford 2013, p. 9.

civilian harm—due to the rules of engagement, the choice of weapons, or conditions under which such operations are approved to take place.<sup>28</sup>

At first glance, such cases of incidental collateral damage may not seem to involve mistakes, since the harm to civilians is foreseen (or at least foreseeable) and thus these are not cases of “mistaken identity” whereby civilians are mistaken for combatants. Crawford’s point here is that background conditions (for example, the choice of weapons and rules of engagement) affect judgments regarding the likelihood and degree of collateral harm as well as judgments about the status of targets. As a result, erroneous assessments about the likelihood and severity of civilian harm are likely to occur, leading to excessive collateral harm. So, both excessive collateral damage (or incidental killings) can be the result of mistakes, as is revealed in the apologies sometimes issued by the military when such cases occur. That the military takes an apology to be warranted when military action causes unintended or unforeseen civilian deaths suggests that the military itself regards such cases as mistakes. And, as Crawford argues (and we agree), if these incidents result from attitudes and practices regarding estimates of collateral damage and target identification that increase the likelihood of such mistakes, these attitudes and practices are morally problematic.

As Crawford observes, collateral damage often results from “a morally troubling pattern of failing to correct procedures that lead to foreseeable and foreseen death or valuing military necessity and force protection ... over civilian life”.<sup>29</sup> What makes these tradeoffs “morally troubling” is that they may indicate a lack of appropriate concern for civilian life. As Crawford notes, “how much

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<sup>28</sup> Ibid.

<sup>29</sup> Crawford 2013, p. 29.

we care [about the lives of civilians] will determine the amount of risk citizens ask soldiers to take in war to see that they [i.e., civilians] are protected”,<sup>30</sup> so we may infer something about a military’s degree of care for civilians from the policies and strategies (such as those discussed in Section 11.1) that it adopts.

Even more relevant for our account of blameworthiness is Crawford’s suggestion that attitudes of “contempt” toward enemy civilians contribute to institutional structures that facilitate collateral damage by making “it difficult to see systemic collateral damage even as it is being produced”.<sup>31</sup> Crawford also seems to approve of C. A. J. Coady’s suggestion that “a good deal of accidental killing of enemy civilians in war exhibits a culpable lack of concern for their lives and safety”.<sup>32</sup>

Most of the civilians killed in the US’s recent drone campaigns have been, we shall assume, “innocent” in the sense that they were not legitimate targets of wartime violence. As mentioned earlier, IHL and just war theory may both excuse the incidental killing of innocent people under certain conditions (e.g., in cases of military necessity where the harm to civilians is proportionate to the value of the military goal to be achieved by the attack in question). This means that rules of engagement that allow for such incidental killings are not *necessarily* objectionable. However, sometimes the killing of innocent people may result from adhering to rules of engagement that express a lack of appropriate moral concern for, or even contempt for, those killed. In such cases, both the rules of engagement and the killings themselves invite the morally offended responses

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<sup>30</sup> Crawford 2013, p. 29.

<sup>31</sup> Crawford 2013, pp. 345-46.

<sup>32</sup> Coady 2009, p. 206.

involved in moral blame. And this may be true whether the deaths of innocent people were foreseen (and taken to be justified by military necessity) or not.

So, the question for our purposes is whether the US military's procedures for determining the acceptability of targets and for authorizing strikes manifest a blame-grounding lack of concern at the individual and/or the collective/institutional level. Put simply, do these policies represent a perspective that *cares enough* about the lives of enemy civilians, or does it represent a morally reprehensible (and blame grounding) perspective on the matter? It is worth noting that the standard for what counts as "caring enough" should not be one that entails that *no* civilians are killed. One may care enough about not harming innocents—enough to meet a standard of moral probity—without this ensuring that no civilians are killed: genuine, excusable accidents may happen even if one cares as much as one morally ought to about avoiding them.

Thus, the notion of "caring enough" should be given more substantive content. As a starting point we shall propose a *Principle of the Moral Equality of Non-combatants* (henceforth "Principle of Moral Equality") as a basis for articulating the moral framework that we argue should be used to assess the blameworthiness of civilian casualties, whether caused by mistaken identity or by mistaken projections of collateral harm. This principle states that, other morally relevant factors being equal, all non-combatants should be considered to have an equal claim to not being harmed. Specifically, non-combatants in Afghanistan, Iraq, Syria, and elsewhere have as much claim to not being harmed as non-combatants in the United States, and these claims should be honored with equal scrupulousness in both cases. While this principle does not tell us exactly how much concern the US military should devote to avoiding harming Iraqi or Afghan non-combatants, it does suggest

that this level of concern should at least not be less than what US military planners would accept as appropriate if US civilians were at risk from enemy military operations. A different, and perhaps more demanding standard might suggest that US planners should show the same regard for enemy civilians as they would show for US civilians if it were the latter who would suffer the collateral consequences of US military activity. However, as we will argue, even measured against the more lenient standard described in the text, current US attitudes and policies fall far short of what is required.

In *Accountability for Killing*, Neta Crawford suggests something similar:

Do we care about them as much as we care about our own civilians? Usually not. But should we care about them as much? The presumption here is that those civilians in distant countries where the United States is fighting ... are just as presumptively innocent as civilians in the United States. They deserve as much care as we would want to be taken with our own lives.<sup>33</sup>

So, we should ask: What degree of restraint and precision, what degree of certainty, would we demand if US civilians were in the crosshairs? Is this the degree of concern for the welfare of civilians reflected in the policies governing US operations abroad? If not, then these operations are not in conformity with the Principle of Moral Equality and are, we suggest, *prima facie* morally suspect. In particular, these operations may be taken to express the US military's lack of appropriate moral concern for those affected by its policies and actions, which provides grounds

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<sup>33</sup> Crawford 2013, p. 29.

for attributing moral blameworthiness to the US military as an institution and to many individuals within it.

If current US military operations do not meet the standard of concern for non-combatants required by the Principle of Moral Equality, then blaming responses would be appropriate. But to whom, or to what, should these responses be directed? In order to better understand when and under what conditions blame would be appropriate, we must examine the conditions under which those involved in the drone program form and act on decisions regarding the targets of drone strikes.

### **11.3. Are honest mistakes possible in the US drone program?**

In the above section, we outlined the theory of moral blameworthiness that motivates our claim that unintentional or accidental civilian deaths that are caused by drone warfare may be blameworthy even when the individuals involved do not intend to harm civilians. Here, we focus specifically on the features of the drone program, and the military institution in general, that mitigate against the likelihood that civilian deaths caused by drone strikes could meet an honest mistake standard that excuses those involved from moral blame, such as the standard outlined in the Rome Statute, to be discussed below.

In IHL and in just war theory, collateral civilian deaths are war crimes only if those deaths are disproportionate to the military advantage gained by the action in question, and/or if insufficient

precaution was taken to minimize the risks to civilians.<sup>34</sup> As Adil Haque explains, IHL requires that:

Armed forces are first to distinguish between civilian and enemy combatants; then to direct attacks only at enemy combatants and not combatants; then to plan and carry out attacks in a manner that avoids or at least minimizes harm to civilians; and finally to refrain from attacks that would cause disproportionate harm to civilians in relation to the military advantage the attacks would achieve.<sup>35</sup>

But, while IHL imposes a demanding standard on combatants in terms of their duties to avoid harming civilians (one that is consistent with our Principle of Moral Equality), a failure to meet this standard only meets the legal criteria of a war crime in the Rome Statute in limited circumstances. Firstly, Article 8(2)(b)(i) states that only intentional attacks against the civilian population or against civilians who are not directly taking part in hostilities constitute a war crime.<sup>36</sup> Thus, as Adil Haque argues, the “Rome Statute imposes no criminal liability on combatants who recklessly or negligently fail to distinguish civilians or combatants”,<sup>37</sup> even though such actions clearly fall far short of the positive duty to avoid civilian harm outlined in IHL. Secondly, to be guilty of the war crime of causing excessive incidental civilian death, the perpetrator must intentionally launch an attack:

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<sup>34</sup> Obligatory precautionary measures include not only taking steps to ensure (as much as possible) that there are few, if any, civilians or civilian targets in the area of the attack, but also that the means and methods of warfare used in the attack are not unlawful due to imposing a high risk of indiscriminate effects.

<sup>35</sup> Haque 2011, p. 520.

<sup>36</sup> Rome Statute, Article 8(2)(b)(i).

<sup>37</sup> Haque 2011, p. 521.

(...) in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated.<sup>38</sup>

So, this means that the perpetrator must know that the attack will cause “clearly excessive” civilian harm, intend (nonetheless) that the attack go ahead, and then launch the attack.

But in practice, the difficulty of ascertaining whether a commander knew that a military attack would result in clearly excessive civilian harm (relative to the foreseen military advantage) *and* intended to carry out the attack in light of that knowledge has meant that, since the Rome Statute, few (if any) individuals have been prosecuted, let alone found guilty, for causing excessive incidental civilian death. Instead, defendants charged with this crime can plead a mistake of fact defense. As Article 32(1) of the Rome Statute states, lethal force against civilians or civilian objects resulting from an honest mistake of fact may not be culpable when the mistake of fact negates the mental element required by the crime.<sup>39</sup> This is essentially the view expressed by the judges in the *Hostage* case, when the US military tribunal acquitted Lothar Rendulic of the devastation in northern Norway on the grounds that “the conditions, as they appeared to the defendant at the time were sufficient on which he could honestly conclude that urgent military necessity warranted the decision made”.<sup>40</sup>

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<sup>38</sup> Rome Statute Article 8(2)(b)(iv).

<sup>39</sup> Rome Statute Article 32(1).

<sup>40</sup> Quoted in Naqvi, Chapter XX, volume, p. 7.

While an ‘honest mistake’ defense may initially seem reasonable, Adil Haque argues that the Rome Statute’s requirement that a defendant possesses both intent and knowledge “with respect to every material element of the relevant war crime” means that “even an *unreasonable* mistake of fact regarding the civilian status of those attacked or killed will negate the required mental states of intent or knowledge”.<sup>41</sup> So, a combatant who does not try very hard to ascertain if the proposed targets of an attack are military targets or whether civilians will be collaterally harmed, and a combatant who does not “even pause to consider whether an attack will likely harm civilians” will both “lack the required mental state [for the war crime] and must be acquitted”.<sup>42</sup> The upshot is that defendants who act on mistaken factual beliefs about the degree of collateral harm likely to be caused by a military action will be exonerated even if they failed to take *reasonable* steps to ascertain the facts. Similarly, a defendant who failed to be aware of the likely collateral harm caused by a military action because they were indifferent to the welfare of innocent people would also be exonerated. As Haque puts it, this effectively “eviscerates the principle of discrimination [between combatants and civilians]”.<sup>43</sup>

In part because of the leniency with which the honest mistakes defense has been applied, Yasmin Naqvi argues that the most plausible interpretation of the Rendulic Rule involves both a subjective test (did the defendant sincerely hold the belief in question?) and an objective or “reasonable commander” test (was the defendant’s belief reasonable, given the information available to them,

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<sup>41</sup> Haque 2011, p. 529, emphasis in original.

<sup>42</sup> Haque 2011, p. 546.

<sup>43</sup> Haque 2011, p. 521. Haque’s proposal in response to this problem is the creation of a War Crime of Negligent Killing which would criminalize actions that cause harm to non-combatants where the perpetrator (or perpetrators) “was aware or should have been aware of the factual circumstances that established the protected status [of the potential targets of the attack]” (2011, p. 568), and the inclusion of recklessness in the mental elements of the War Crime of Willful Killing (2011, p. 567). Such a proposal would be consistent with the Principle of the Moral Equality of Non-Combatants that we propose.

and did they make a good faith effort to check the accuracy of that information?).<sup>44</sup> In order for a commander to be found guilty of the war crime of excessive incidental civilian harm, the prosecution must show that the commander's belief that their action would not cause excessive collateral harm relative to the expected military advantage of the action was either dishonest (not sincerely held) and/or unreasonable (a belief that a reasonable commander would not hold given a good faith attempt to ascertain reliable available information).<sup>45</sup>

This brief summary of the treatment of honest mistakes in the Rome Statute reveals the challenges facing attempts to prosecute a commander who orders a military action that causes excessive harm to civilians. Deciding whether a targeting error was based on an honest, let alone reasonable, belief requires a difficult (perhaps impossible) investigation into the subjective and objective bases of the defendant's belief in the circumstances in which they were acting. An additional problem, as we noted in Section 11.1, is that focusing on the bases of an *individual* combatant's beliefs distracts us from the fact that their beliefs occur in the context of, and because of, the decisions, intentions, and knowledge of many other individuals who are acting within a hierarchical institution. As Crawford argues, "systemic collateral damage is produced more at the institutional level than at the individual level".<sup>46</sup> Thus, focusing on individual responsibility can lead us to ignore or discount

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<sup>44</sup> Naqvi argues that the judges' reasoning in the *Hostage* case (and similar reasoning in later IHL cases involving reference to the Rendulic rule) shows a close link between the "reasonable commander test" and the defense of "mistake of fact" (Naqvi, Chapter XX, p.1). See Milanovic 2020 for an alternative view, arguing that IHL requires that mistakes of fact need only be honest, but not necessarily reasonable, in order to be exculpatory: <https://www.ejiltalk.org/mistakes-of-fact-when-using-lethal-force-in-international-law-part-i/>. Accessed 15 October 2022.

<sup>45</sup> The subjective and objective tests might appear to be closely related, in that the more objectively unreasonable a defendant's belief, the harder it might be to credit that the belief is sincerely held. But this is not necessarily a warranted inference—it is certainly possible that a person might sincerely hold a belief that is objectively unreasonable.

<sup>46</sup> Crawford 2013, p. 43.

the institutional factors that shape individual decisions and the context in which they are made. In contrast, “[a]ttending to the moral agency of an organization (...) highlights how it is that certain outcomes were not inevitable or accidental, but created by the organization’s beliefs, structures, procedures, and effects on individuals”.<sup>47</sup>

Because the wider institutional context in which decisions are made is ignored, it is possible that a commander’s belief in the accuracy of their information regarding projected collateral harm and expected military advantage may be both reasonable *and* honest. However, it may nonetheless be true that if they had had access to the full scope of information and decision-making procedures that shaped the context in which they acted, they would have formed a different belief. Given the circumstances in which they made their decision (including time constraints and other factors), it may *not* be reasonable to expect them to have formed different beliefs. Thus, even a commander’s reasonable and honest belief in the accuracy of the information on which they acted might nonetheless lead to instances of unjustified civilian harm. Collective decisions, policies, and procedures regarding targeting can and do combine in ways that mean that “many episodes of collateral damage are foreseeable, foreseen, and preventable, albeit strictly legal”.<sup>48</sup> Yet, when the focus of the law, the military, the media, and political leaders is solely on the individual(s) who are causally closest to instances of civilian deaths, the broader context vanishes and responsibility

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<sup>47</sup> Crawford 2013, p. 344. The upshot of Crawford’s argument, and one that we agree with, is that “moral responsibility for [unintended collateral harms] should be shared among individuals and institutions” (2013, 43). However, an important concern with widening the focus of responsibility to include institutions and collective agents is that it is harder to see what blaming an institution means in practice whereas, in cases of individuals, the implications of holding a person accountable for their actions are often reasonably clear. In our final section, we will briefly discuss what form *blaming/holding accountable the US military* might take.

<sup>48</sup> Crawford 2013, p. 40.

for these deaths disappears. This represents a serious and ongoing injustice to the many victims of drone attacks.

When we consider whether and under what conditions “honest mistakes” would be a fair description of at least some, if not all, civilian killings, we must look at how the relationships between available knowledge, intention, and individual action are constructed and constrained in a complex hierarchical institution such as the US military and in the context of the drone program. This analysis will require that we reconsider how legal and moral responsibility is conceptualized in relation to wrongful cases of civilian harm.

### *11.3.1. Knowledge and Intention in the Military Institution*

In the military, as in most large complex organizations, responsibility for decisions, tasks, and actions is divided amongst many individuals, all of whom possess different degrees of knowledge and intention relative to the roles they occupy. This means that when we consider what any given individual in the military institution knows, does not know, and should be expected to know, we must look at how knowledge is distributed, made available, compartmentalized, suppressed, and shaped by the nature of the military institution and the contexts of military operations.

Säde Hormio identifies several ways in which an organization might gain, lose, or lack knowledge. An organization might lack knowledge because of “ignorance about facts or (...) from the suppression of knowledge”.<sup>49</sup> An organization might recognize that it is ignorant of some facts but

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<sup>49</sup> Hormio 2018, p. 8.

understand how to gain knowledge of those facts (“knowable recognized unknowns”<sup>50</sup>); it might possess knowledge it does not realize it possesses (“unknown knowns”<sup>51</sup>); and it might think it possesses knowledge but be mistaken (errors arising from “inaccuracy, confusion, uncertainty or incompleteness”<sup>52</sup>).

Here, we focus first on how errors can occur within the US military’s drone program; afterwards, we consider how the category of “knowable recognized unknowns” applies to cases where military personnel responsible for planning and executing drone attacks fail to seek out easily accessible information that is directly relevant to the legality and morality of drone attacks. For example, personnel may fail to seek out information about the impact of drone warfare on communities living under drone surveillance, and information about problems with algorithmic targeting. As will become apparent, both errors and knowable recognized unknowns have implications for the proper assessment of moral and legal responsibility for unintended civilian deaths.

### *11.3.2. Errors and the Suppression of Knowledge*

What kind of knowledge would personnel involved in carrying out a drone strike be likely to possess about the target of the strike? If drone operators engage in long-term surveillance of a potential target, they may have intimate access into the daily lives of those they surveil.<sup>53</sup> However, this does not mean that drone pilots are in the best position to know whether the people they surveil are legitimate targets. Because of the broad definition of legitimate targets used by the US military

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<sup>50</sup> Hormio 2018, p. 10.

<sup>51</sup> Ibid. What Hormio has in mind here is institutionally shared knowledge that is often “embedded in routines and collective practices”, and that may not become apparent until, for example, a person retires (2018, 10).

<sup>52</sup> Ibid.

<sup>53</sup> Coeckelbergh 2013, p. 95.

in planning and executing drone attacks,<sup>54</sup> a person or object who appears to be a non-combatant on surveillance footage (in their appearance, dress, demeanor, and behavior) may nonetheless be selected as a target by the algorithms and targeting policies used by military officials in charge of planning drone strikes. This seems to have been the case in the August 29, 2021, Kabul bombing. The Pentagon investigation into the bombing attributed the mistake to an incorrect “interpretational assessment” of the footage, which tracked a white Toyota Corolla over several hours: “The drone operators saw what they expected to see, assuming that the white Toyota in their sights was the same as the one they had been tracking”.<sup>55</sup>

The knowledge that a drone pilot possesses regarding the status of targets will come from the reports or orders they receive and not (or very rarely) from their first-hand assessments. Typically, drone pilots do not develop target-selection policies, or select targets, themselves. Like other “front line” military personnel, the drone pilot’s role is to carry out their orders rather than to assess the moral status of these orders. Thus, drone pilots are unlikely to question the orders they receive. As a result, it may well be the case that, from their subjective perspective, a drone pilot honestly believes that a target they are asked to strike is a military target and/or that the attack won’t cause

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<sup>54</sup> As Emily Rosen argues, citing the 2016 US Department of Defense Laws of War Manual:

... the U.S. military uses far broader criteria to determine which individuals are “formally or functionally” part of a non-State armed group, an approach that allows individuals who perform a wide range of non-military functions for the group to be targeted continuously. In the U.S. view, evidence of formal membership in an armed group may include “accessing facilities, such as safehouses, training camps, or bases used by the group,” “traveling along specific clandestine routes used by the group,” or “traveling with members of the group in remote locations or while the group conducts operations”. (Rosen 2021. Tragic mistakes: Breaking the military culture of impunity. Just security.<https://www.justsecurity.org/79256/tragic-mistakes-breaking-the-military-culture-of-impunity/>. Accessed 15 October 2022.)

<sup>55</sup> Borger 2021. “Honest mistake”: US strike that killed Afghan civilians was legal – Pentagon. *The Guardian*, 4 Nov. <https://www.theguardian.com/world/2021/nov/04/us-afghanistan-strike-killed-civilians-legal-pentagon>. Accessed 15 October 2022.

excessive civilian harm Their belief may also be reasonable, if the standards of the Rendulic Rule are applied, and if the pilot (or the commander ordering the strike) could not reasonably be expected to devote the time and resources necessary to verify a target identification. But the objective reasonableness of the pilot's belief (and thus whether the belief is fully exculpatory) will depend on the ways in which judgments about legitimate and illegitimate targets are formed higher up the chain of command.

We have good reason to doubt that judgments about the status of the targets of drone programs and predictions about degrees of probable collateral harm are reliably tracking morally defensible assessments of the objective's targetability and/or the impact of an attack on civilian targets. This is for several reasons, some of which relate to broader patterns of the suppression of knowledge in complex, hierarchical organizations like the military, and others which relate specifically to the tools and assumptions that are used to determine the status of targets of drone strikes.

### *11.3.3. Suppression and Denial of Knowledge in the Military*

As Hormio notes, organizations might suppress or deny knowledge that “is too painful to acknowledge, or (...) does not fit with [the organization's] worldview”.<sup>56</sup> For example, knowledge of widespread sexual harassment and assault in military training institutions and bases has been covered up and minimized,<sup>57</sup> as have reports of war crimes such as torture and murder committed by soldiers against civilians and detainees.<sup>58</sup> Similarly, it is now well-documented<sup>59</sup> that numerous

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<sup>56</sup> Hormio 2018, p. 16.

<sup>57</sup> Wood & Toppelberg 2017

<sup>58</sup> See, for example, IGADF 2020.

<sup>59</sup> Khan 2021. Hidden Pentagon records reveal patterns of failure in deadly airstrikes. The New York Times, December 18.

<https://www.nytimes.com/interactive/2021/12/18/us/airstrikes-pentagon-records-civilian-deaths.html>.

cases of civilian killings resulting from US drone strikes were improperly investigated by the military and frequently covered up. Such practices of hiding or distorting information about wrongful civilian killings from drone strikes is an example of an organization “introduc[ing] a condition (through denial, secrecy, or taboo) (...) which made it difficult for employees to acquire true belief about the wrongness of being involved in some particular collective action”.<sup>60</sup> Because of these practices, drone pilots and many others involved in the drone program are denied the information they need to form true beliefs about the impact of the drone program on civilians, and thus about the sincerity of the US military’s stated commitment to minimizing risk to civilian lives.

Secondly, and of particular relevance to military operations, “organisations sometimes deprive individuals of their capacity to make good moral judgments by fragmenting available information”.<sup>61</sup> In the military, subordinates in the chain of command are rarely, if ever, given reasons or explanations for the orders they receive. A drone pilot will typically not know why a particular person is selected as a target for a drone strike. Nor are they likely to have access to the reasons why particular targeting guidelines are used or how judgments about acceptable risk to civilians are made. Yet, such information is clearly relevant to whether or not a particular strike (and the degree of risk that strike poses to civilians) is morally justified. Such fragmentation of information need not be morally problematic in and of itself—arguably, it is necessary for the efficient functioning of large-scale, complex, hierarchical organizations. However, when fragmentation of information is combined with the denial or obfuscation of the true scale of civilian killings resulting from drone strikes, it contributes to moral distortion at the level of decision-

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Accessed 15 October 2022.

<sup>60</sup> Hormio 2018, p. 17.

<sup>61</sup> Hormio 2018, p. 22.

making regarding drone attacks and makes it extremely difficult for those involved to form reasonable beliefs that a strike is morally permissible.

#### *11.3.4. Knowable Recognized Unknowns*

In addition to the problems of denial, distortion, and fragmentation of knowledge, an organization may be blameworthy for failing to address knowable recognized unknowns that are relevant to the organization's primary focus or *ethos*. Hormio defines an organization's *ethos* as encompassing the "central questions and practical matters that are vital to the purpose of the group (...) and the answers it has collectively accepted to be its view".<sup>62</sup> Questions about "what should fall within the *ethos* of an organization" are "a normative matter" and are subject to change and negotiation depending on the organization's focus and practices.<sup>63</sup> What are the knowable recognized unknowns relevant to ensuring that the US's stated commitment to minimizing civilian casualties is realized in the operation of the drone program? Such knowable recognized unknowns must include not only ascertainable facts about whether possible targets of drone strikes are combatants or noncombatants, but also facts about the broader impact of drone warfare on civilian welfare in the communities under drone surveillance, and facts about potential problems with targeting algorithms. As Crawford explains:

Military organizations, which procure the weapons that increase the chance of indiscriminate killing, or which approve strategies or rules of engagement that can be foreseen to cause great civilian harm, and which shape the moral atmosphere

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<sup>62</sup> Hormio 2018, p. 13.

<sup>63</sup> Hormio 2018, p. 14.

and frames of reference for soldiers, are organizationally responsible for setting up the conditions for the killing of innocents or for protecting them.<sup>64</sup>

For example, despite the language of “precision” that accompanies drone warfare, and repeated claims that the US military is committed to preventing harm to civilians, there is little evidence that the US military has considered the broader, and extremely harmful, impact of drone surveillance on civilian lives.<sup>65</sup> Yet, this harm has been well-documented and publicized since at least 2012 in a report from New York University and Stanford Law schools, which outlines the devastating psychological and physical trauma that living under drone surveillance inflicts on all those in a community, not just the intended targets.<sup>66</sup>

Additionally, despite extensive and compelling literature on the problems of algorithmic and confirmation bias,<sup>67</sup> the use of algorithms to ascertain potential targets has rarely been questioned. This holds true particularly in relation to what is known as “signature strikes” that use patterns of behavior to predict hostile intent.<sup>68</sup> Indeed, confirmation bias and the issues of bias in target selection appear to have been another factor in the 29 August 2021 Kabul drone strike. In the wake of the Pentagon’s investigation into the strike, Lt. Gen. Sami D. Said, Inspector General of the US Air Force, “blamed a series of assumptions, made over the course of eight hours as U.S. officials

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<sup>64</sup> Crawford 2013, p. 316.

<sup>65</sup> Because of the traumatic effects of living under drone surveillance, the philosopher Harry van der Linden argues that “drones are in their psychological impact indiscriminate weapons” (2016, p. 351).

<sup>66</sup> International Human Rights and Conflict Resolution Clinic at Stanford Law School and Global Justice Clinic at NYU Law School 2012. Living under drones: death, injury, and trauma to civilians from US drone practices in Pakistan.

<https://law.stanford.edu/publications/living-under-drones-death-injury-and-trauma-to-civilians-from-us-drone-practices-in-pakistan/>. Accessed 15 October 2022.

<sup>67</sup> Bachini and Lorusso 2018; Benjamin 2019; Cummings 2012.

<sup>68</sup> Wolfendale 2021, pp. 14-16.

tracked a white Toyota Corolla through Kabul, for causing what he called ‘confirmation bias’”.<sup>69</sup> Yet, the killing of people based purely on biased and highly unreliable computer-predicted assumptions about the meaning of their behavior is taken for granted to such an extent that it is rarely deemed worthy of comment. As Elke Schwartz explains, “set against a background where the instrument is characterised as inherently wise, the technology gives an air of dispassionate professionalism and a sense of moral certainty to the messy business of war”.<sup>70</sup>

Regardless of the intentions and knowledge of the personnel who order and carry out US military drone strikes, it is unlikely that civilian deaths caused by these strikes, either from mistaken identity and/or excessive collateral harm, can meet the criteria of an honest mistake. This is because of the way these deaths are made possible by organizational choices and practices that distort, deny, and ignore morally relevant knowledge. Insofar as these choices stem from a lack of appropriate moral concern for civilians affected by drone strikes, the so-called “mistakes” resulting from these choices are not *honest* mistakes and so those involved are not absolved from blame. The evidence that the choices in question here *do* stem from a lack of appropriate concern comes from our proposal—expressed in the Principle of Moral Equality—that the US military should conduct itself with respect to enemy civilians with the same degree of care and concern that it would demand were US civilians the potential victims of military actions.

If the US military cared about avoiding civilian casualties to the degree that it ought to (and to the degree that it claims to), then it is plausible to suppose that it would have addressed the institutional

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<sup>69</sup> Cooper and Schmidt 2021. Video showed at least one child near the site minutes before the strike in Kabul. The New York Times, November 3. <https://www.nytimes.com/2021/11/03/us/politics/drone-strike-kabul-child.html>. Accessed 15 October 2022.

<sup>70</sup> Schwarz 2018, p. 88.

features that create consistent failures of knowledge that make avoidable and unjustified civilian deaths likely to occur. For it certainly seems plausible that the US military, the US political leadership, and members of the US public in general, would interpret similar failures on the part of enemy forces (where such failures led to preventable US civilian casualties) as evidence of a culpable lack of respect for, or a blameworthy indifference to, the lives of US civilians.

#### **11.4. Conclusion**

In this chapter, we have considered how policies and tactics concerning the targeting of drone strikes, as well as inadequacies in how the US military collects and disseminates information related to these strikes, increases the risk of mistakenly killing (and otherwise harming) civilians in areas where US drone campaigns are conducted. Furthermore, we have argued that if these mistaken killings—and the failures that make them likely to occur—stem from a lack of appropriate regard on the part of the US military for non-US civilians, then the US military as an institution is morally blameworthy for these killings. In other words, civilian killings resulting from mistaken identity and/or from failures to predict excessive civilian harm cannot be regarded as blameless “honest mistakes”. As for evidence that these mistakes, and the policies and tactics that lead to them, stem from a blame-grounding lack of appropriate regard, we have suggested (with our Principle of Moral Equality) that a morally adequate level of regard for non-US civilians would be the level of regard that US military and political leaders would demand be shown to US civilians by foreign militaries. Yet, the US military does not seem to show the degree of regard for non-US civilians that it would demand for US civilians. After all, the US government and military would surely not find that appropriate regard for US civilians was compatible with a foreign government leaving in place known deficiencies that predictably and regularly led to the killing of

these civilians. In the rest of this concluding section, we will take stock of what the foregoing might mean for those who enlist in the US military, and we will consider the implications of our view for the legal status of actions that cause unintended civilian harm, as well as concrete steps that the military might take (and that it plans to take) to reduce the risks that its operations pose to civilians.

#### *11.4.1. The Moral Risk of Joining the Military*

As we have discussed above, the hierarchical nature of the military profession and features of the drone program are emblematic of the kinds of fragmented and faulty knowledge structures outlined by Hormio. While there is always going to be a degree of “moral risk”<sup>71</sup> for someone who decides to enlist in the military, this risk is higher when it is known that the US military has routinely displayed a blameworthy lack of regard for the lives and welfare of enemy civilians, particularly if an individual is interested in military service related to the drone program.

Considering the problems that we have discussed above, we suggest that any person who is contemplating joining the military has a moral duty to assess whether the military and the political leadership is committed to acknowledging and addressing the problems of fragmented and faulty knowledge and has demonstrated a commitment to taking responsibility for the unintentional killing of civilians. There have been promising developments in this respect, such the publication

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<sup>71</sup> “Moral risk” refers to the risk that a person’s choices can lead them to be involved in, or complicit in, the commission of morally blameworthy actions. Of course, moral risk is not limited to the decision to enlist in the military—many everyday choices (such as buying clothing produced in sweatshops) can make a person (perhaps unwittingly) complicit in morally blameworthy practices. But the degree to which someone is blameworthy for such choices will depend on a complex range of factors, including the information that they had access to regarding the impact of their choices, as well as whether other choices were reasonably available to them. That said, while we cannot control or eradicate moral risk, arguably if someone is aware that a choice could have extremely morally serious consequences (such as the deaths of innocent people), then they are particularly likely to be taking a serious moral risk.

of *Civilian Harm Mitigation and Response Action Plan* (CHMR-AP),<sup>72</sup> which outlines several objectives geared towards minimizing civilian harm, including the establishment of a Civilian Protection Center of Excellence.<sup>73</sup> Of course, it remains to be seen how effectively these proposals will be implemented. It should also be noted that this plan does not acknowledge or refer to the importance of (as we have argued) identifying the broader negative consequences for the “civilian environment” of living under drone surveillance. In the meantime, if a person knows (or has good reason to believe) that, by joining a particular organization, they will lack access to (and even be denied access to) morally relevant information about the actions in which they will take part, they run the risk of moral culpability for choosing to join that organization.

#### *11.4.2. Punishing and Preventing Unintended Civilian Harm*

How could the Rome Statute be reformed to better protect civilians, and to more accurately reflect the stringent duty to minimize harm to civilians that is codified in IHL? One possibility would be to introduce a strict liability standard, under which military strikes that kill civilians unintentionally and that fail to meet standards of proportionality would automatically incur a finding of liability.<sup>74</sup> However, we agree that there are significant objections to such a proposal. For one thing, it might be hoped that a finding of liability would reliably track the presence of fault, and strict liability standards are at odds with this hope since they impose liability regardless of fault.

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<sup>72</sup> Department of Defense 2022. *Civilian Harm Mitigation and Response Action Plan*. <https://media.defense.gov/2022/Aug/25/2003064740/-1/-1/1/CIVILIAN-HARM-MITIGATION-AND-RESPONSE-ACTION-PLAN.PDF>. Accessed 15 October 2022.

<sup>73</sup> A couple of additional initiatives mentioned in the CHMR-AP are noteworthy given the issues we have raised in this chapter. First are those initiatives that emphasize the importance of acquiring a “robust understanding of the civilian environment—including (...) infrastructure, essential services, and systems on which civilian life depends”, which “can improve the commander’s ability to distinguish non-adversarial aspects of the operational environment (...)” (2022, 9). Also of significant importance is the goal of “[i]ncorporat[ing] deliberate and systemic measures to mitigate the risks of target misidentification”, which “includes addressing cognitive biases, such as confirmation bias” (2022, 15).

<sup>74</sup> Owens 2005, pp. 603-606.

In addition to our suggestion of the adoption of a Principle of the Moral Equality of Non-combatants, a second response is to explore more carefully the ways in which the military can take responsibility for unintentional civilian deaths. This is a process that would not only require significant changes to the policies and procedures that govern targeting in the drone program,<sup>75</sup> such as the changes proposed in CHMR-AP, but also significant changes in how the military institution communicates publicly about such cases and educates military personnel about the need to take all feasible steps to protect civilians from harm. In relation to how the military publicly discusses cases of civilian killings, we have already argued that approaches that minimize or erase individual responsibility, as the narrative of honest mistakes does, are morally problematic. In addition to failing to recognize the ways in which these cases arise from complex collective actions (and failures to act), these approaches fail to do justice to the victims of drone strikes by erasing moral blameworthiness from the picture. An alternative approach in such cases is for the military to publicly take responsibility for these deaths by accepting that moral blame is appropriate (without necessarily assigning that blame to a particular person) and responding with actions and words that recognize and honor the moral harm inflicted on the victims of drone strikes. Taking responsibility and accepting warranted blame for unintended killings involves more than simply acknowledging that such killings were unintended and offering compensation (a practice that, in relation to torts offenses, reflects a recognition of harm caused, but not moral culpability).<sup>76</sup> The

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<sup>75</sup> Crawford outlines a series of proposals for such changes in Chapter 9 of *Accountability for Killing*. Notably, while some of her proposals are similar to those outlined in the CHMR-AP, others go beyond those proposals. For example, she urges the retirement of “weapons and practices [such as the use of landmines and cluster munitions] that are difficult to use in a discriminate way and are likely to cause foreseeable harm [to civilians]” (2013, 469).

<sup>76</sup> Haque 2011, 559.

US practice of paying monetary compensation<sup>77</sup> to family members of civilians killed in drone strikes is insufficient to reflect the moral gravity of harms caused by blameworthy practices that distort and hide relevant knowledge of attacks on civilians and that reflect a lack of regard for civilian lives. Instead, we argue that the military (and US political leaders) should publicly accept blame for such killings, and publicly offer apologies to the families and communities of the victims of these killings.

There is precedent for such forms of taking responsibility. In 2010, Vice Admiral William McRaven personally apologized to the surviving family members of a drone strike that killed five innocent people by offering two sheep to the family—an act that, according to the cultural norms of the region, signified a request for forgiveness.<sup>78</sup> Admirable though this example is, however, it falls far short of the substantive institutional and cultural changes and public acknowledgement of blame that is warranted by the scale of unintended civilian killings over the last decades.

The moral debt owed to the many civilians killed over the last decades warrants an institutional commitment to ensuring that military personnel of all ranks internalize and understand the significance of the prohibition against harming civilians. Military personnel must also understand their duty (encoded in IHL) to take all feasible precautions to avoid harm to civilians, even when doing so might increase the risk of harm to military personnel. One way we think this could be done is by framing military ethics education on this issue around the Principle of the Moral

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<sup>77</sup> See Eric Schmitt (2021), “U.S. Pledges to Pay Family of Those Killed in Botched Kabul Drone Strike,” <https://www.nytimes.com/2021/10/15/us/politics/kabul-drone-strike-victims-payment.html>, accessed 16 October 2022.

<sup>78</sup> Nick Schifrin and Aleem Agha (2010), “U.S. Vice Admiral Apologizes for Afghan Deaths,” <https://abcnews.go.com/WN/Afghanistan/special-forces-apologize-afghan-civilian-deaths-sheep/story?id=10320603>, accessed 16 October 2022.

Equality of Non-combatants. Incorporating this principle explicitly into military ethics education at all ranks would require military personnel to imagine what they would tolerate were US citizens' lives on the line. Such an empathetic thought experiment would force the recognition that there is no justifiable moral or legal basis for treating non-US civilians with less moral regard than US civilians deserve.

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