Amsterdam Center for International Law
University of Amsterdam

SHARED RESPONSIBILITY IN INTERNATIONAL LAW
RESEARCH PROJECT ON

RESEARCH PAPER SERIES

SHARES Research Paper 52 (2014)

The Global Financial Crisis and Collective Moral Responsibility

Seumas Miller
Charles Sturt University & Delft University of Technology

Cite as: SHARES Research Paper 52 (2014)
available at www.sharesproject.nl

Forthcoming in: André Nollkaemper & Dov Jacobs (eds.), *Distribution of Responsibilities in International Law* (Cambridge: CUP, 2015)

The Research Project on Shared Responsibility in International Law (SHARES) is hosted by the Amsterdam Center for International Law (ACIL) of the University of Amsterdam.

The Global Financial Crisis and Collective Moral Responsibility

Seumas Miller[*]

This Chapter is divided in four sections. In section 1 (Introduction: the problem(s)), I outline the nature of the problem to be addressed: collective moral responsibility for the Global Financial Crisis (GFC).[1] In section 2 (Collective moral responsibility), the key theoretical notion to be deployed, namely, collective moral responsibility is defined and defended.[2] In section 3 (Collective action problems), I identify the central role of collective action problems in the GFC, and provide an account of the specific type of collective action problems in question.[3] In the final section (Embedding collective responsibility), I explore the ways in which collective moral responsibility can be embedded functionally, structurally and culturally in relevant global financial institutions and markets. In so doing I rely on a mix of ethico-philosophical analysis and institutional description.

1. Introduction: the problem(s)

It is uniformly agreed that the GFC and its aftershock, the so-called Sovereign Debt Crisis (SDC), constitute the greatest global economic calamity since the Great Depression. The main aspects of the problem have included frozen credit markets; the sub-prime mortgage crisis; slow and inconsistent policy responses; escalating sovereign debt; and an unfolding global (or near global) recession. The crisis has involved major corporate investment and mortgage banking collapses and bailouts in the United States (US) (Lehman Brothers, Freddie Mac and

---

[*] Seumas Miller is a professorial research fellow at the Centre for Applied Philosophy and Public Ethics (an Australian Research Council Special Research Centre) at Charles Sturt University (Canberra) and the 3TU Centre for Ethics and Technology at Delft University of Technology (The Hague). All websites were last accessed on 5 June 2014.

[1] N. Dobos, C. Barry and T. Pogge (eds.), *Global Financial Crisis: The Ethical Issues* (London: Palgrave Macmillan, 2011). On the specifically economic and financial aspects of the GFC see P. Krugman, *The Return of Depression Economics and the Crisis of 2008* (New York: Norton and Company, 2008); and G. Soros, *The New Paradigm for Financial Markets: The Credit Crisis of 2008 and What it Means* (New York: Perseus Books, 2008).

[2] See, for example, vol. 30 (2006) of MSP, dedicated to 'Collective Responsibility', and, in relation to international law and institutions, P.A. Nollkaemper and D. Jacobs, 'Shared Responsibility in International Law: A Conceptual Framework' (2013) 34 MIJIL 359.

[3] For an influential rational choice perspective on this, see M. Olson, *The Logic of Collective Action: Public Goods and the Theory of Groups* (Cambridge: Harvard University Press, 1965). For criticisms see J. Elster, *The Cement of Society: A Study of Social Order* (Cambridge: CUP, 1989), Chapter 5 'Collective action and social norms', 186; and A. Sen, *Rationality and Freedom* (Cambridge: Harvard University Press, 2002).

Fannie Mae); United Kingdom (UK) (Northern Rock); and Europe (Fortis, Hypo). It is also having a devastating effect on home owners who cannot pay their mortgages (foreclosures); retirees whose pension funds have plummeted in value; employees whose jobs have been lost or are at risk in the recession; and taxpayers whose money is being injected into the banking system in vast quantities to rescue it.

Unethical, including imprudent, practices have been identified as being among the principal causes of the crisis. These practices include: first, reckless and predatory lending by banks; second, developing highly leveraged investment banks; third, the selling of toxic financial products, notably non-transparent packaged bundles of mortgages assessed by ratings agencies as high quality because the investment banks that packaged them had good risk assessment processes; fourth, massive frauds (e.g. Bernie Madoff's ponzi scheme); fifth, allowing the growth of unsustainable debt by governments and, indeed, whole economies; sixth, excessively loose monetary policy by central banks; and seventh, the negligence and/or complicity of legislators and regulators regarding all of the above.

While the crisis has evidently eased at the time of writing, the bad news regarding unethical behaviour, and accompanying financial risk, continues. Perhaps the most prominent recent inflection of the GFC, at least in its moral aspect, is the London Interbank Offered Rate (LIBOR) scandal in the international banking sector. LIBOR is a globally important benchmark calculated for ten major currencies, formerly administered by the British Bankers' Association (BBA) and published daily; it has been subject to manipulation by many, if not most, of the leading global banks.[4] The unfolding LIBOR scandal itself comes hot on the heels of post GFC money laundering scandals (e.g. HSBC); facilitating tax evasion through offshore accounts (e.g. UBS); and an ongoing series of rogue traders who have wreaked havoc (e.g. the so-called 'London Whale' at JP Morgan Chase).

In short, evidently banks and other financial service providers have not mended their unethical ways. Moreover, it seems that large-scale corporate collapses and corruption scandals in the global financial sector in general, and the global banking sector in particular, are a recurring phenomenon.[5]

---

[4] H.M. Treasury, 'The Wheatley Review of LIBOR: Final Report' (London, September 2012), at www.gov.uk/government/uploads/system/uploads/attachment_data/file/191762/wheatley_review_libor_finalreport_280912.pdf. LIBOR is now administered by the NYSE Euronext.

[5] See, for example: Krugman, *The Return of Depression Economics and the Crisis of 2008*, n. 1; F. Clarke, G. Dean and K. Oliver, *Corporate Collapse: Accounting, Regulatory and Ethical Failure* (Cambridge: CUP, 2003);

Given that this recurring phenomenon is massively harmful in its economic and social impact on mortgage holders, shareholders, investors, employees, retirees, and so on, it goes without saying that there is a need to address it. Moreover, it would appear that what is called for is a holistic approach which not only focusses on micro-institutional mechanisms, such as LIBOR, but also at some of the macro-institutional aspects of the banking sector that might bear on this and related ethical problems.

Central among these macro-institutional aspects is surely the phenomenon of global financial institutions that are 'too big to fail'.[6] Thus there were a number of bailouts of major banks and other financial institutions following the decision in 2008 to allow Lehman Brothers to fail; a decision which is thought to have virtually brought the international financial system to its knees. Importantly, for our concerns here, the phenomenon of banks that are 'too big to fail' has morphed into the phenomenon of banks that are 'too big to manage' and, indeed, 'too big to jail' or, less colloquially, 'too big to regulate'. For example, there is the recent case of the multinational bank, HSBC, and international money-laundering activities of criminal organisations, such as Mexican based drug cartels.[7] The latter were found to have used HSBC for this purpose over a 10 year period, resulting in a USD 1.9 billion fine for HSBC for failing to have in place effective anti-money laundering measures, and for failing to conduct due diligence on some of its account holders. Criminal negligence notwithstanding, HSBC retained its license to operate having in effect been deemed by the regulators 'too big to fail'. However, the inference that is being drawn from HSBC's retention of its license in these circumstances is that it is, in effect, too big to regulate.

The general proposition that the banks are beyond the reach of regulators – whether because they are too big to regulate and/or for other reasons (e.g. regulatory capture) – is further evidenced by the paucity of criminal convictions of senior bank personnel in this context of widespread and ongoing malfeasance in the global banking sector. For example, evidently the US Department of Justice has yet to successfully prosecute any bank personnel at the most senior levels for criminal behaviour, e.g. fraud.[8] It simply beggars belief that senior Wall

P. MacAvoy and I. Millstein, *The Recurrent Crisis in Corporate Governance* (Stanford: Stanford University Press, 2004).

[6] See, for example, US Attorney-General Eric Holder's answers to the Senate Judiciary Committee as reported in A.R. Sorkin, 'Realities Behind Prosecuting Big Banks', New York Times, 12 March 2013, at B1.

[7] J. Treanor and D. Rushe, 'HSBC to Pay 1.2 billion pounds over Mexico Scandal', The Guardian, 11 December 2012.

[8] M. Smith, 'The Untouchables', ABC News Four Corners, 18 March 2013, at www.abc.net.au/4corners/stories/2013/03/18/3715426.htm.

Street executives, including chief executive officers and board members, have not personally been engaged in various forms of criminal behaviour including, at the very least, criminal negligence.

In addition to structural reform, at micro, mezzo and macro levels, there is a need to address issues of culture, albeit these are closely related. For example, evidently is there a culture within the sector, or large parts of it, which is conducive to interest-rigging and, for that matter, other unethical practices. If so, structural redesign needs to go hand in glove with the reformation of the banking culture. Such reformation may well involve a process of professionalisation, or at least of occupational ethical acculturation.

I take it that a fundamental problem that needs to be addressed in relation to the above described ongoing cycle of banking scandals is widespread, unethical or imprudent behaviour amounting at times to institutional corruption. However, a principal contributing cause to institutional corruption is the existence of *collective action problems*. For example, excessive commercial competition between banks often leads to lax lending practices. As I have also argued elsewhere,[9] a principal remedy for institutional corruption driven or exacerbated by collective action problems consists in *institutionally* embedding (functionally, structurally and culturally) *collective moral responsibility*. Accordingly, in this Chapter my task is threefold: first, establish and defend an appropriate theoretical notion of collective moral responsibility and display its relationship to institutional responsibilities; second, establish and defend an appropriate theoretical notion of the collective action problems in play; and third, explore the ways in which collective moral responsibility can be institutionally embedded functionally, structurally and culturally in relevant global financial institutions and markets for the purpose of substantially reducing the forms of institutional corruption in question by way of addressing various identified collective action problems.

2. Collective moral responsibility

Collective moral responsibility is a species of moral responsibility. Here we need to distinguish *moral* responsibility (including collective moral responsibility) from *causal*

[9] S. Miller 'The LIBOR Scandal: Culture, Corruption and Collective Action Problems in the Global Banking Sector', in J. O'Brien and G. Gilligan (eds.), *Integrity, Risk and Accountability in Capital Markets: Regulating Culture* (Oxford: Hart Publishing, 2013), 111.

responsibility.[10] A person or persons can inadvertently cause a bad outcome without necessarily being morally responsible for so doing. Moral responsibility typically requires not only causal responsibility, but also an intention to cause harm or the knowledge that one's action will or may well cause harm, whether harm to persons or institutions or (more likely in the kinds of cases under consideration here) to both. We also need to distinguish moral responsibility for actions and moral responsibility for omissions, and retrospective from prospective moral responsibility.

All these distinctions in respect of individual moral responsibility are mirrored in the case of collective moral responsibility. Hence the various different but related questions that arise are, first, who are collectively morally responsible for the GFC by their acts or omissions?, and, second, who are collectively morally responsible for ensuring it does not recur? In this Chapter my primary concern is with the latter question, and this is the focus of the final section on institutionally embedding collective moral responsibility.

Collective moral responsibility is the moral responsibility that attaches to structured and unstructured groups for their morally significant actions and omissions. Thus an organised gang of thieves who carry out a million dollar bank heist, or a gang of bank employees who carry out a multi-million dollar interest-rigging fraud is said to be collectively morally (and, one might have expected, legally) responsible for the theft and fraud (respectively), and also for the resulting harm to those affected, e.g. depositors, investors.

In this section I will argue that collective moral responsibility is to be understood as joint moral responsibility: the joint moral responsibility of individual human actors engaged in morally significant joint actions. I will further argue that the notion of joint action can be enriched so as to encompass action in accordance with joint procedures (e.g. conventions), joint institutional mechanisms (e.g. benchmarks such as LIBOR) and, finally and importantly, organisational action, i.e. multi-layered structures of joint action. The upshot of this analysis

[10] And also from notions of accountability and liability. See Nollkaemper and Jacobs, 'Shared Responsibility in International Law: A Conceptual Framework', n. 2, at 365 et seq. for discussions of these notions in the international legal context. See also R. Pierik, 'Shared Responsibility in International Law: A Normative-Philosophical Analysis', in P.A. Nollkaemper and D. Jacobs (eds.), this volume, at ___; and L.A. Kornhauser, 'Incentives, Compensation, and Irreparable Harm', in P.A. Nollkaemper and D. Jacobs (eds.), this volume, at ___.

is that individual human actors are, at least in principle, collectively (jointly) morally responsible for morally significant organisational action.[11]

2.1 Collective responsibility as joint responsibility

Elsewhere I have elaborated and defended a relational account of collective moral responsibility; specifically, that of collective responsibility as joint responsibility.[12] On this view, collective responsibility is responsibility arising from joint actions and omissions. Roughly speaking, a joint action[13] can be understood thus: two or more individuals perform a joint action if each of them intentionally performs an individual action (or omission), but does so with the (true) belief that in so doing they will jointly realise an end which each of them has. On this view of collective responsibility as joint responsibility, collective responsibility is ascribed to individual human beings only, albeit jointly. Each member of the group is individually morally responsible for their contributory action, and also for the outcome of the set of actions. However, each is individually responsible for that outcome, *jointly with the others*; hence the conception is relational in character. Thus in our million dollar bank heist example, each member of the gang is responsible jointly with the others for the theft of the million dollars because each performed his contributory action in the service of that collective end (the theft of the million dollars).

Naturally, the contributory actions may differ greatly in respect of their importance in relation to the realisation of the collective. For example, in our bank heist scenario the contributory action of one of the look-outs might be far less important than that of the safe-blower; the action of one of the look-outs might be neither necessary nor sufficient for the success of the bank heist, whereas the action of the safe-blower is undoubtedly necessary for this outcome. This difference might be reflected in the share of the 'loot' each receives (supposing the heist is successful); the safe-blower's share would be much greater than that of the look-out.

A further point to be noted here is the distinction between an individual action which is constitutive of the joint action, and an action which is not constitutive but which,

[11] This theoretical standpoint is not to be confused with the view that organisations and other collective entities can be reduced to the individual human organisational actors and their individual actions. The latter view is surely incorrect.
[12] S. Miller, 'Collective Moral Responsibility: An Individualist Account' (2006) 30 MSP 176.
[13] S. Miller, 'Joint Action' (1992) 21(3) PP 275; and S. Miller, 'Intentions, Ends and Joint Action' (1995) 24(1) PP 51.

nevertheless, assists or otherwise facilitates the performance of the joint action. An example of the latter is the person who illegally sells the explosives to the safe-blower assists the bank heist, but might not have any interest in, or even specific knowledge of, the bank heist.

2.2 Joint action

The key notion of joint action underpinning collective responsibility can be construed very narrowly or more broadly. On the most narrow construal we have what I will call, *basic* joint action. Basic joint action involves two co-present agents each of whom performs one basic individual action, and does so simultaneously with the other agent, and in relation to a collective end that is to be realised within the temporal and spatial horizons of the immediate face-to-face experience of the agents. A basic individual action is an action an agent can do at will without recourse to instruments other than his or her own body. An example of a basic individual action is putting one's hand in the till and seizing a wad of banknotes; an example of a basic joint action is two people lifting a safe onto the back of a truck.

If we construe joint action more broadly we can identify a myriad of other examples of joint action. Many of these involve the intentions and ends of multiple institutional actors directed to outcomes outside the temporal and/or spatial horizon of the immediate experience of those actors, e.g., the members of a management team setting revenue targets and developing strategies in the context of a plan to grow their business over a five year period.[14]

We can further distinguish between two species of joint action, namely, joint behavioural action and joint epistemic action.[15] Unlike joint behavioural action, joint epistemic action is directed to (collective) epistemic ends, notably knowledge, e.g. members of a team of accountants seeking knowledge of the assets and liabilities of a company. As is the case with joint behavioural actions, participants in joint epistemic actions are collectively (jointly) morally responsible for morally significant joint epistemic actions, e.g. the members of a team of auditors from Arthur Anderson who conducted an unsuccessful audit by virtue of failing to unearth fraudulent 'special purpose entities' at Enron.

---

[14] S. Miller, *The Moral Foundations of Social Institutions: A Philosophical Study* (New York: CUP, 2009), Chapter 1: 'A Teleological Account of Institutions', 37; and Chapter 2: 'The Moral Foundations of Institutions', 56.

[15] S. Miller, 'Collective Responsibility and Information and Communication Technology', in J. van den Hoven and J. Weckert (eds.), *Moral Philosophy and Information Technology* (New York: CUP, 2008), 226.

Basic joint actions can also be distinguished from, what I will call, *joint procedures*. An agent has a joint procedure to x, if he x-s in a recurring situation, and does so on condition that other agents x. (Procedures are different from repetitions of the same action in a single situation, e.g., rowing or skipping.) Thus Australians have a procedure to drive on the left hand side of the road. Each Australian drives on the left whenever he drives, and he drives on the left on condition the other agents drive on the left. Languages consist in large part in joint procedures governing the use of utterance types; English language users utter the term, 'The City', when they intend to refer, and to be taken by hearers to be referring, to London's financial district. Moreover, joint procedures are followed in order to achieve collective goals, e.g. to avoid car collisions or communication. Joint procedures are in fact conventions.[16]

As will become evident below, it is important to make some further distinctions beginning with the distinction between conventions and social norms. Social norms are regularities in action involving interdependence of action among members of a group, but regularities in action that are governed by a moral purpose or principle.[17] For example, avoiding telling lies is a social norm. Some regularities in action are both conventions and social norms, e.g. driving on the left hand side of the road. Conventions and social norms are necessary elements of institutional action.

We can also distinguish between joint procedures (in the above sense) and, what I will call, *joint mechanisms*.[18] Examples of joint mechanisms are the device of tossing a coin to resolve a dispute and voting to elect a candidate to office. Joint mechanisms are typically – but not necessarily – constitutive elements of social institutions[19] and when they are, they are joint institutional mechanisms.

In some cases, that these joint mechanisms are used might be a matter of having a procedure in my earlier sense. Thus, if we decided that (within some specified range of disputes) we would always have recourse to tossing the coin, then we would have adopted a procedure in my earlier sense. Accordingly, I will call such joint mechanisms, joint *procedural* mechanisms.

---

[16] S. Miller, *Social Action: A Teleological Account* (New York: CUP, 2001), Chapter 3: 'Conventions', 91.
[17] Ibid., Chapter 4: 'Social Norms', 123.
[18] Ibid., Chapter 5: 'Organisations, Agency, and Action', 160; and Miller, *The Moral Foundations of Social Institutions*, n. 14, Chapter 1: 'A Teleological Account of Institutions', 37.
[19] Miller, *The Moral Foundations of Social Institutions*, n. 14.

Joint mechanisms (and, therefore, joint procedural mechanisms) consist of: (a) a complex of differentiated but interlocking actions (the input to the mechanism); (b) the result of the performance of those actions (the output of the mechanism), and; (c) the mechanism itself. Thus a given agent might vote for a candidate. He will do so only if others also vote. But further to this, there is the action of the candidates, namely, that they present themselves as candidates. That they present themselves as candidates is (in part) constitutive of the input to the voting mechanism. Voters vote *for candidates*. So there is interlocking and differentiated action (the input). Further there is some result (as opposed to consequence) of the joint action; the joint action consisting of the actions of putting oneself forward as a candidate and of the actions of voting. The result is that some candidate, say, Jones is voted in (the output). That there is a result is (in part) constitutive of the mechanism. That to receive the most number of votes is to be voted in, is (in part) constitutive of the voting mechanism. Moreover that Jones is voted in is not a collective end of all the voters although it is a collective end of those who voted for Jones). However, that the one who gets the most votes – whoever that happens to be – is voted in, is a collective end of all (or nearly all) of the voters.

Joint mechanisms play a central role in institutional action and, as is the case with conventions and social norms, it is important for my purposes in this Chapter that they can be understood in purely individualist terms by recourse to my core notion of joint action. For in that case the participants in morally significant joint mechanisms are, at least in principle, collectively (jointly) morally responsible for the input and output of these mechanisms.

On this account of joint institutional mechanisms, to take LIBOR manipulation as an example, the various relevant bank submitters, traders and/or managers involved in some particular episode of LIBOR interest-rigging can be ascribed collective moral responsibility for this particular corrupt (joint) action, and for any (personal and/or institutional) harm that might result from it. Each is also individually responsible for his or her contributory individual action or omission, e.g. a manager who signed off on a particular submission.

Note that in most of the scandals in question, the network of joint actions and omissions can be quite wide and complex without necessarily involving all, or even most, personnel in a given institution. Moreover, some joint actions or omissions might be of greater moral significance than others, and some individual contributions, e.g. those of senior bank managers, of greater importance than others.

Further, responsibility for the cumulative damage done by an ongoing series of such episodes of corrupt action by numerous bank personnel from different institutions, and on multiple occasions might conceivably also be ascribed to the entire large group, albeit there are various barriers to fixing collective moral responsibility on large groups in which each member only makes a small causal contribution. In this connection let us consider organisational action and, specifically, layered structures of joint institutional action.

2.3 Organisational action as joint action

Organisations consist of an (embodied) formal structure of interlocking roles.[20] An organisational role can be defined in terms of the agent who performs certain tasks; the tasks themselves; procedures (in the above sense); and conventions. Moreover, unlike social groups, organisations are individuated by the kind of activity that they undertake, and also by their characteristic ends. Many organisations are also social institutions. Social institutions are organisations with a moral dimension by virtue of, for example, the authority relations they involve and the fact that their collective ends are also collective goods.[21] Thus governments have as a collective end the regulation of other institutions (a collective good), universities the end of discovering knowledge (a collective good), and so on.

A further defining feature of organisations is that organisational action typically consists in, what I have elsewhere termed, a *multi-layered structure of joint actions.*[22] One illustration of the notion of a layered structure of joint actions is a firm competing in a market place. Suppose at an organisational level a number of joint actions ('actions') are severally necessary,[23] and jointly sufficient to achieve some collective end. Thus the 'management action' of the home loans management team in a bank in setting the interest rates of the bank's home loans; the 'compliance action' of the bank's legal team in ensuring the loans and their associated lending processes are compliant with the relevant laws and regulations; and

[20] Miller, *Social Action*, n. 16, Chapter 5: 'Organisations, Agency, and Action', 160; and Miller, *The Moral Foundations of Social Institutions*, n. 14, Chapter 1: 'A Teleological Account of Institutions', 37; and Chapter 2: 'The Moral Foundations of Institutions', 56.
[21] Ibid., Miller, *The Moral Foundations of Social Institutions*, Chapter 2.
[22] Miller, *Social Action*, n. 16, Chapter 5: 'Organisations, Agency, and Action', 160; and Miller, *The Moral Foundations of Social Institutions*, n. 14, Chapter 1: 'A Teleological Account of Institutions', 37; and Chapter 2: 'The Moral Foundations of Institutions', 56.
[23] Here there is simplification for the sake of clarity. For what is said here is not strictly correct, at least in the case of many actions performed by members of organisations. Rather, typically some threshold set of actions is necessary to achieve the end; moreover the boundaries of this set are vague.

the ‘sales action’ of the home loans sales team in the provision of home loans in accordance with sales targets might be severally necessary, and jointly sufficient to achieve the collective end of maximising the bank’s profits from home loans. These ‘actions’ taken together constitute a joint action.

At the first level there are individual actions directed to three distinct collective ends: the collective ends of (respectively) setting the interest rates; ensuring compliance; and meeting home loan targets. So at this level there are three joint actions, namely, the members of the management team setting interest rates; the members of the legal team ensuring compliance; and the members of the sales team meeting sales targets. However, taken together these three joint actions constitute a single joint action. The collective end of this second level joint action is to maximise revenue from home loans; and from the perspective of this second level joint action, and its collective end, these (first level joint) constitutive actions are (second level) individual actions. I note that typically in organisations not just the nature, but the quantum of the individual contributions made to the collective end will differ from one agent to another.

Accordingly, given that ‘the action’ of (say) a bank in maximising its revenue from home loans in a given period is to be understood as a multi-layered structure of joint actions, and given this joint action is morally significant, then the various participants in it are collectively (jointly) morally responsible for its outcome. Here it is important to note that within the set of individuals who are collectively morally responsible for some outcome, the degree of individual responsibility that some have (jointly with others) might be greater than the degree of individual responsibility that those others have, e.g. managers will typically have a higher degree of individual responsibility than their subordinates. Indeed, if the contribution of some individuals is minute and they are only very indirectly connected to some morally significant outcome, then their degree of moral responsibility may well diminish to the point of non-existence.

Moreover, in the case of collusion between members of different organisations, some of the constitutive joint actions involved in the multi-layered structure of joint action may well be far less important than others. Additionally, in such cases, as elsewhere, we have to distinguish between lower level joint actions which are *constitutive* of some higher level joint action and lower level joint or individual actions which assist, fail to prevent or otherwise facilitate the higher level joint action in question, but which are not constitutive of it. For example, persons who are well aware that their colleagues are engaged in fraudulent activity but, nevertheless, fail to do their duty and report this activity may well be culpable in that they failed to contribute to the prevention of unlawful activity.

Further in some cases of collective moral responsibility no-one is *fully* morally responsible for the adverse outcome; rather each has a share, so to speak, of the collective moral responsibility in question. The GFC is a case in point. No single individual (or, for that matter, organisation) is *fully* morally responsible for the credit crisis, housing bubbles, near global recession and other constitutive elements of the GFC. This is, of course, not to say that no-one has *any* morally responsibility. On the conception of collective moral responsibility as joint moral responsibility, each member of the salient group in question must have *some* degree moral responsibility (jointly with the others).[24]

Naturally, multiple individuals could be collectively *causally* responsible for some adverse outcome without any individual having any *moral* responsibility. 19th century – as opposed to, say, 21st century – contributors to human induced harmful global climate change are a case in point; 19th century contributors did not know, and could not have known, the harm they were causing.[25] Moreover, even if a set of individuals do know that they are collectively causing harm, they may not be collectively moral responsible for that harm by virtue of not being able to organise themselves sufficiently to avert that harm, or at least unable to do so within the relevant time frame. This was arguably true in the late 1990s of government officials in relation to harmful human induced climate change, even if it is no longer true.[26]

Let us now turn to our second task, namely, that of identifying and analysing the type of collective action problem and associated perverse incentive structures implicated in the GFC.

---

[24] For arguments against collectivist theories of collective moral responsibility which allow the possibility of collective moral responsibility without any individual moral responsibility, or with collective moral responsibility above and beyond aggregate (and/or joint) moral responsibility, see S. Miller, 'Against the Moral Autonomy Thesis' (2007) 38(3) JSP 389; and S. Miller and P. Makela, 'The Collectivist Approach to Collective Moral Responsibility' (2005) 36(5) *Metaphilosophy* 634.
[25] See on historical contributions also H. Shue, 'Transboundary Damage in Climate Change: Criteria for Allocating Responsibility', in P.A. Nollkaemper and D. Jacobs (eds.), this volume, at ___; and C.L. Kutz, 'Shared National Responsibility for Climate Change: From Guilt to Taxes', in P.A. Nollkaemper and D. Jacobs (eds.), this volume, at ___.
[26] S. Miller, 'Collective Responsibility, Epistemic Action and Climate Change', in N.A. Vincent, I. van de Poel and J. van den Hoven (eds.), *Moral Responsibility: Beyond Free Will and Determinism* (Heidelberg: Springer, 2011), 219.

3. Collective action problems

A paradigmatic collective action problem is the so-called ‘tragedy of the commons’ scenario in which it is in the individual interest of each to continue to use some common resource, but it is not in the collective interest, at least in the long term; so the collective action problem is such that it has a perverse incentive structure leading to an outcome harmful to everyone.[27] Thus it is in the interest of each fishing boat to continue to catch fish, irrespective of whether others do so since it provides a livelihood. Indeed, the fisherman are in *de facto* competition with one another in that each is seeking over time to get a larger share of the total fish stock than his competitors. Unfortunately this behaviour, whether explicitly competitive or not, is not in the collective interest, at least in the long term, since eventually the stock of fish will be depleted to the point where no-one can make a living from fishing in the area in question.

As a response to this kind of problem, the fishermen might agree to a quota system whereby each restricts his catch to a certain amount thereby ensuring the long-term sustainability of fishing in the area.

3.1 Free-riding

However, such cooperative schemes give rise to the so-called ‘free-rider’ problem. It is in the individual interest of each to ignore his quota, if he can get away with it. Moreover, if compliance is not enforced, then each may well free-ride. Unfortunately, the consequence of large numbers of individuals free-riding is that the system collapses. The solution to the problem is, of course, to enforce compliance with the cooperative scheme. Indeed, over time if the scheme becomes entrenched, is subject to regulatory authorities, and then it becomes an institutional arrangement.

Unfortunately, enforcement is probably not a sufficient condition for compliance, although it is a necessary one. Notoriously, a population that does not for the most part want to comply cannot in the long term be forced to do so; there are simply too many opportunities for non-compliance and too few enforcers for this to be practicable. This is the Achilles heel of one-

[27] An earlier version of some of the material in this section appeared in Miller, ‘The LIBOR Scandal: Culture, Corruption and Collective Action Problems in the Global Banking Sector’, n. 9.

dimensional regulatory-enforcement models. Let us refer to this as the 'insufficiency of enforcement mechanisms' problem.

Moreover, the enforcement 'solution' simply elevates the initial problem to a different level. Specifically, why should the enforcer adequately enforce the quota system when it is not in his individual rational self-interest to do so, e.g. when he is bribed to look the other way, when he has a financial interest in specific fishing boats, or when he simply does not feel like making the effort? Why does the enforcer necessarily pursue the collective self-interest embodied in the quota system when it is not in his individual rational self-interest to do so? Within the rational self-interest model, the answer can only be that the enforcer's compliance with the requirements of his role is itself enforced; that is, a *meta*-enforcer is invoked. But irrespective of whether this meta-enforcer is an individual or a collective, the same problem will recur: who enforces the compliance of the meta-enforcer?

Moreover, the problem persists irrespective of whether the enforcer, the meta-enforcer and so on exist in a single, layered, hierarchical structure (e.g. a hierarchical bureaucracy), or under some non-unitary and relatively non-hierarchical arrangement (e.g. a cooperative scheme), whose enforcers are themselves subject to enforced democratic control. In the former case, the individual or group at the apex of the hierarchical structure is not itself subject to enforcement; this guard has no guard. In the latter case, the 'enforcement buck' stops with multiple enforcers ('the people'), notwithstanding that their own compliance with the cooperative scheme is enforced by the first level enforcers. There is, as it were, a circle of enforcement.[28] Unfortunately, the links in this and other 'circular' enforcement chains of rationally self-interested actors are weak and, therefore, not secure. For if the large and diffuse set of individuals ('the people') are to be rationally self-interested meta-enforcers, then they must themselves be appropriately organised and possessed of an effective enforcement capacity. But in that case there are competing enforcement regimes and hence no guarantee that the enforcement capacity of the first level enforcers who enforce the compliance of 'the people' will be effective. Let us refer to this regress problem of enforcement as the 'who guards the guards?' problem.

[28] J.B. Braithwaite, 'Cultures of Redemptive Finance', in J. O'Brien and G. Gilligan (eds.), *Integrity, Risk and Accountability in Capital Markets: Regulating Culture* (Oxford: Hart Publishing, 2013), 284 assumes that the problem of guarding the guards can be overcome with this notion of a non-hierarchical circle of enforcement.

3.2 Collective action problems in the global banking sector

Collective action problems are, I suggest, endemic in the global banking sector. At the micro-level there is the problem of excessive remuneration. Executives receive huge remuneration packages consisting in large part of bonuses. Yet empirical studies have consistently demonstrated that there is no significant correlation between large executive remuneration packages and executive performance as measured in terms of medium to long term profitability and/or share price (the favoured, if flawed, measure of performance).[29] In the absence of external regulatory or other intervention, competition among corporations for senior executives has driven up executive remuneration packages to extraordinarily high, and completely unjustified, levels. However, the competitive arrangement in question does not remotely approach the pure competition market model beloved by economists, in which neither buyers nor sellers can individually or collectively unduly influence the price at which goods are exchanged. Rather it takes place in the context of increased management power relative to shareholder – and board control – due in large part to a shift in share ownership from direct individual ownership to indirect share ownership, and to share ownership in the hands of institutional share funds and (relatedly) in corporate power structures (dominated by managers). Accordingly, the sellers (the managers) can collectively and overtime unduly influence (upwardly) the price at which their labour is sold to the buyers (the shareholders via their boards). Specifically, executive managers compete with one another for financial rewards within a competitive framework in which there is insufficient downward pressure on the overall level of those rewards from those who ultimately have to provide them (the shareholders). This is a collective action problem in which increased competition produces the perverse outcome of grossly inflated executive remuneration. And there is an additional perverse outcome. To the extent that there is a relationship between high executive remuneration and corporate performance, it is purely a relationship between remuneration and short term profits and share price and, to that extent, part of the problem rather than the solution.

At the mezzo and macro-institutional levels there are various collective action problems. For example, in the ‘good’ times, the banks engage in fierce competition for depositors’ funds and as lenders to homebuyers, investors and so on. This contributes to housing bubbles, speculative investor bubbles, over-leveraged banks and so on. Eventually, indeed predictably,

[29] S. Elaurant, ‘Corporate Executive Salaries – The Argument from Economic Efficiency’ (2008) 13(2) EJBEOS 35.

the bubble bursts. Investors 'sensing' the bubble is about to burst begin to sell en masse to a diminishing pool of buyers; stock prices collapse. Overleveraged investment banks, in particular, are at great risk from those who have borrowed heavily from them but are now unable to pay them back. In addition, depositors become increasingly nervous and banks fear a run on their deposits. Accordingly, in these 'bad times' it now becomes of critical importance to each bank that it is regarded as being safe and secure, especially relative to other banks. The banks are no longer competing with one another in what might be referred to as the 'profligacy stakes', but rather in what might be referred to as the 'probity stakes'.[30]

Note that the pursuit of individual self-interest in the 'profligacy stakes' is to some extent unavoidable by virtue of the fact that those banks who do not 'play the game' may well find themselves uncompetitive profit-wise and, hence, out of business. Note further that the pursuit of individual self-interest in the 'probity stakes' is also to some extent unavoidable by virtue of the fact that those banks who do not 'play the game' may well find themselves uncompetitive safety and security-wise and, hence, out of business.

The general form of the collective action problem is that each bank in pursuing its own rational self-interest, initially in the 'profligacy stakes' and latterly in the 'probity stakes', threatens the collective self-interest of the banking sector (not to speak of the economic system, more generally). How is this so? Why does the market mechanism not simply come into play? Why do not the weaker banks fail and the stronger banks pick up their residual business, as outlined in Economics 1? Part of the problem is that a run on one bank can lead to contagion, even if the damage arising from the failure of any one bank on its own would be containable. But the problem is far greater than this in the global banking sector. For it turns out that pretty much all of the leading banks in the global banking sector are 'too big to fail'. For example, according to the respected international body, the Financial Stability Board, there are no less than 29 banks that are 'systemically important financial institutions (SIFIs)'.[31] It follows that while the banks are in competition with one another at one level, at another level each requires every other *not* to fail on pain of systemic collapse. Hence, there is a collective action problem: the pursuit of individual self-interest is ultimately at odds with collective self-interest.

---

[30] Profligacy means wasteful excess. Probity means completely honest and upright.
[31] Financial Stability Board, 'Financial Stability Board reports to G20 Leaders on progress in implementing financial regulatory reforms', Press Release ref. no: 61/2011, 4 November 2011, at www.financialstabilityboard.org.

The existence of this collective action problem as a problem for the banks, in particular, is obscured by the fact that governments have been prepared to step in and save those banks 'too big to fail'. This does not demonstrate that there is no collective action problem but, at best, that there is a solution at hand. In fact, of course, this 'solution' is unacceptable. In the first place, it constitutes an abandonment of the market mechanism whenever it suits the banks: the so-called 'privatisation of profit' but 'socialisation of debt'. In the second place, it may not actually be a solution, however attractive it might be to the banks in the short term; it might simply be a way of hand-balling the problem onto reserve banks and, thereby, generating a sovereign debt crisis from which everyone, including the banks, may ultimately suffer.

The problem of guarding the guards has a specific form in the global banking sector and there is a problem not only with the regulators (the guards) *per se*, e.g. in respect of the intensity and effectiveness of their enforcement activities, but also with the governments who frame the regulations (the legislatures).

National governments and (relatedly) regulators have an ambiguous role when it comes to global markets, including global financial markets. For national governments and their regulators are to some extent partisan, and (understandably) seek to look after the economic interests of their own industries and businesses, including their own financial and banking sector (e.g. the 'City' in the case of UK regulators). Moreover, in the absence of a uniform set of global regulations and a single global regulator with real authority, regulators operating at a national level can be played off against one another by multinational corporations.

In the case of the global banking sector, regulation and integrity assurance are ultimately in the hands of national governments. However, national governments and their regulatory authorities are not simply umpires, they are also players in the financial – and, more generally, corporate – 'game'. For example, the UK government and its financial regulator (formerly the FSA) cannot be expected to regulate entirely impartially in the interests of ethical ends and principles, given the substantial interest the UK government has in ensuring that the London-based UK corporate and financial sector retains, and increases the benefits accruing to it from global financial markets.

In short, the 'guards' in the global financial sector, *viz.* national governments and their regulators, confront a collective action problem which compromises their independence and, as a consequence, partially undermines their capacity to function as guards.

Another kind of collective action problem in the global financial sector arising at the macro-level arises from the capacity for powerful nation-states to distort the normal workings of markets – themselves a social institution of sorts[32] – and thereby creating collective action problems and associated perverse incentive structures.[33] For instance, Martin Wolf argues that China, other Asian exporting countries and the oil exporting economies have pegged their exchange rates to the US dollar and, as a consequence, their currencies have not been re-valued upwardly leading to a reduction in their exports and an increase in their imports. Rather these economies have accumulated vast surpluses which they have in turn invested in the US, in particular. The US economy has responded to the availability of large amounts of cheap cash by going on a borrowing binge. However, in the absence of sufficient opportunities for investment in US infrastructure and other projects in, so to speak, Main Street, the US banking system artificially created opportunities for investment in sub-prime mortgages, securitisation and the like. Successive US governments encouraged this process, since it seemed to provide an almost limitless supply of cheap housing, cheap consumer goods, and a booming stock market. In short, the glut in savings was used to fuel speculative booms in housing and other sectors of the US economy. Inevitably, of course, the boom was followed by a bust: the Global Financial Crisis.

Whether or not Wolf's account is correct, it does draw attention to an important category of collective action problems in the global financial sector, namely, those largely created by national governments (as opposed to ones which governments and their regulators have failed to prevent or curtail).

International public institutions such as the International Monetary Fund (IMF) and the European Union (EU) are implicated in some of these collective action problems in respect of their roles as supervisors and/or regulators. Perhaps the IMF has been overly influenced by free market doctrines, such as the efficient markets hypothesis and, as a consequence, was less helpful before, during, and after the GFC than otherwise might have been the case. Moreover, notwithstanding its supra-national status, the EU, in particular, has arguably been a source of *additional* collective action problems, as opposed to a solution to pre-existing ones. For example, it has provided a straightjacket for debtor nations such as Greece who as a result of using a common currency with their trading partners, such as Germany, cannot devalue

[32] Miller, *The Moral Foundations of Social Institutions*, n. 14, Chapter 1: 'A Teleological Account of Institutions', 37; and Chapter 10: 'The Business Corporation', 277.
[33] M. Wolf, *Fixing Global Finance* (Baltimore: John Hopkins University Press, 2008).

their currency and, thereby, reduce their imports and increase their exports. Indeed, it is claimed that the creation of a currency union (the Eurozone) without simultaneously creating a fiscal union and various other centralising features was a collective action disaster waiting to happen. According to Paul Krugman: '[m]embers of a currency area, it turns out, should have high integration of bank guarantees, and a system of lender of last resort provisions for governments as well as (…) high labour mobility (…) and fiscal integration. The euro area has none of these.'[34]

3.3 Collective action problems and collective moral responsibility

Let me now turn to the analysis of these various collective action problems and the role that collective moral responsibility might play in their amelioration.

As a preliminary to my own analysis we must first identify the deficiencies in the rational choice model standardly used to explicate such problems. The rational choice model assumes rational self-interested individuals in competition with one another. This is fine as far as it goes. However, as Amartya Sen and others have argued, it is far from being the whole of the story.[35] Specifically, it does not leave room for rational individual action performed in the collective self-interest and/or in accordance with socially engendered moral principles and purposes;[36] yet the latter are ubiquitous features of human collective life, including in the economic sphere.

Importantly, this one-sided fixation with individually rational self-interested action eliminates the possibility, in effect, of finding a solution to collective action problems of the kind in question. This can be seen in the failure to find solutions to the problems described above of the 'insufficiency of enforcements mechanisms' and of 'who guards the guards'. As Elinor Ostrum quipped in relation to the title of Mancur Olson's famous rational choice monograph, *The Logic of Collective Action*: '[i]t should have been called, *The Logic of Collective Inaction*'.[37]

---

[34] P. Krugman, 'Revenge of the Optimum Currency Area', New York Times, 24 June 2012.
[35] Sen, *Rationality and Freedom*, n. 3.
[36] See J. Elster, 'Rationality and Social Norms', in J.E. Fenstad, I.T. Frolov and R. Hilpinen (eds.), *Logic, Methodology and Philosophy of Science VIII – Proceedings of the Eight International Congress on Logic, Methodology and Philosophy of Science Moscow 1987* (Amsterdam: Elsevier, 1989) 531.
[37] At a presentation she gave at Delft University of Technology in June 2010 at which I was present.

What is needed at this point is the acceptance that individual human agents can, and often do, engage in action-determining reasoning from collective goals and interests to individual actions: collective goals and interests to which members of social groups and organisations are strongly committed. Importantly, such acceptance does not imply any commitment to an irreducibly collective agent (or irreducibly collective reasoner). Indeed, any such commitment would simply be the application of the rational choice model at the collective rather than the individual level and, as such, would not provide a solution to the problem at hand but simply elevate it to the higher level. Nor does it necessarily imply some ultimate individually rational self-interested reason which motivates the possession of the collective goals and interests in question; rather collective goals and interests may well in many cases function as ground-level explanations of behaviour.

On this view of individual reasoning from common goals and collective interests to their own individual action, what is called for is a conception of an individual human agent *qua member of a social group or organisation*, e.g. qua banker. In short, the individual internalises the collective goals and interests of the social group or organisation to which he or she belongs. Crucially, these collective goals and interests can, and often do, transcend the role occupant's prior and limited, individually rational self-interested, goals and interests. Moreover, the collective goals and interests in question can, and often are, embraced by the individuals involved on the grounds that they are desirable from an impartial or, at least, collective standpoint. This capacity of individuals to reason from, and act in accordance with, collective goals and interests is not without its problems. For example, the collective goals in question might be inherently morally problematic (e.g. those of the Third Reich), or the collective interest of the members of an organisation in question might be at variance with the interests of the wider society (e.g. the members of an investment bank with a business model based on constructing and on-selling toxic financial products).

In order to get an understanding of reasoning of individual agents acting qua members of a social group or organisation engaging in joint action to realise a collective end which is also a collective good, it might be helpful to remind ourselves of the basic structure of means/end reasoning. Roughly speaking, individual means/end reasoning proceeds in the following manner.

First, identify the end that one has. Second, identify the means to that end. Third, perform the action which is the means to the end.[38] Notice that here ends are not necessarily goods or benefits; they are simply ends.

In the case of cooperative schemes – involving as they do, joint actions directed to collective ends – matters are more complicated. But here is a rough summary of such reasoning.

First, agent A has end e, and agent B also has end e, and so does C etc. Moreover, A has end e only on condition that B has end e, and so on. Second, A and B and C etc. believe that e cannot be achieved other than by A, B, C etc. each performing some action x.[39] Third, A, B, C etc. each has the true belief that each other has performed, is performing, or will perform x, and these beliefs are a matter of common knowledge. Four, A, B, C etc. each performs. Notice once again that here ends are not necessarily goods or benefits; they are simply ends.

Now let us consider means/end reasoning in relation to ends which are also regarded as goods or benefits.

First, agent A comes to have e as an end for the reason that he regards e as a good or benefit, G. Second, agent B has end e, and agent C also has end e, and so does D etc. A, B, C etc. have e as an end for the reason that they regard e as a good, or benefit, or as a means to some other good or benefit. Note that here A has end e only on condition that B has end e, and so on. So e is a collective end.

Second, if A and/or B etc. have competing ends, e overrides the other ends, and does so by virtue of the greater importance that A and B attach to the goods or benefits that the realisation of e will bring.

Third, A and B and C etc. believe that e cannot be achieved other than by A, B, C etc. each performing some action x.

Fourth, A, B, C etc. each has the true belief that each of the others has performed, is performing, or will perform x, and these beliefs are a matter of common knowledge.

Fifth, A, B, C etc. each performs x.

[38] Or at least conclude that one ought to perform the action x. See Miller, *Social Action*, n. 16, Chapter 4: 'Social Norms', 123.
[39] Or at least that each x-ing is the best means to realising e. Here the notion of a best means is fully determined by the end e, e.g. that x is better than (say) y, because x more fully realises e.

I suggest that this is the basic structure of practical means/end reasoning in joint actions performed to produce what are mutually believed to be benefits or goods. Moreover, this basic structure does not change in the case of complex joint actions, such as those constitutive of joint institutional mechanism (e.g. the LIBOR mechanism), and crucially for our purposes here, those constitutive of organisational action (e.g. actions of officers, managers, employees in a corporation in a market).

Viewed from this perspective, the solution to collective action problems is joint action, typically an enforceable cooperative scheme, in which there is a collective end, the realisation of which removes or at least curtails the collective action problem. Notice that for the kinds of collective problems under discussion here, namely, collective action problems in the global finance sector, the enforceable cooperative schemes in question are *institutional* arrangements (of which more in the final section). Moreover, this collective end is a collective good and, as such, has motivational force for the participants in the joint action. Naturally, individualist self-interest remains a problem and, as stated, enforcement is an additional requirement. However, framing the issue in this manner enables us to see: first, collective self-interest and/or a collective good may in fact be constitutive of individual self-interest (e.g. a banker's individual self interest is constituted in part by his participation in and contribution to the realisation of the collective ends of the bank which employs him); second, collective self-interest and/or collective goods may in fact override individual self-interest; third, individual self-interest does not necessarily dominate collective self-interest and/or collective goods (e.g. the success of his bank might be more important to a bank manager than his own pay packet); and fourth, in cases where collective self-interest and/or collective goods have motivational force which is overridden by individual self-interest enforcement is *necessary*; however, enforcement is *not sufficient* for compliance given the above-elaborated problem of the insufficiency of enforcement mechanisms. In relation to no. 4 above, I note that given the motivational role of collective self-interest and/or collective goods, enforcement does not have to be sufficient for compliance.

Finally, I note that framing collective action problems in this manner allows us to offer at least a partial solution to the problem of guarding the guards. Here there are three relevant points to be made. First, the individual enforcers are themselves engaged in joint action to realise a collective end which is a collective good to which they are, at least *pro tanto*, committed, namely, that of ensuring the compliance of participants with the requirements of the cooperative scheme(s). Accordingly, qua *bona fide* enforcers they are motivated by collective self-interest and/or this proximate collective good, as well as by individual self-interest. Second, the enforcement team is itself a participant in, and contributor to, the larger collective end of the cooperative scheme(s), be it an organisation or industry, in which they enforce compliance; so they have this further collective self-interest and/or collective good as motivating factors. Third, enforcers are in fact dependent on the cooperation of the majority of those whose compliance they enforce. Indeed, enforcement is itself a joint action of sorts between the enforcers, on the one hand, and the broad mass of those whose compliance with the larger cooperative scheme is required, on the other. Consider in this connection that combating fraud is dependent on the co-workers of fraudsters reporting the latter's fraudulent activities.

4. Institutionally embedding collective moral responsibility in the global banking sector

Having provided accounts of collective moral responsibility and collective action problems it is now time to turn to the matter of institutionally embedding collective responsibility in relevant global financial institutions and markets.[40] As already mentioned, this is primarily an exercise in respect of prospective, as opposed to retrospective, moral responsibility. As such, it requires that matters of institutional redesign, implementation and ongoing compliance be attended to. Notice also that for this purpose I understand social institutions to have three fundamental dimensions, namely: function (collective ends, normatively understood), structure, and culture.[41]

The generic solution to this kind of collective action problems in question is at least in part, as we saw with the tragedy of the commons over-fishing example, an enforced cooperative scheme: enforced cooperative schemes are one important way to embed collective moral responsibility in institutional settings suffering from harm inducing collective action problems.

[40] Earlier versions of some of the material in this section appeared in S. Miller 'Global Financial Institutions, Ethics and Market Fundamentalism', in N. Dobos, C. Barry and T. Pogge (eds.), *The Global Financial Crisis: Ethical Issues* (London: Palgrave Macmillan, 2011) 24; and Miller, 'The LIBOR Scandal: Culture, Corruption and Collective Action Problems in the Global Banking Sector', n. 9.
[41] Miller, *The Moral Foundations of Social Institutions*, n. 14.

Thus in relation to the micro-institutional problem of excessive executive salaries, presumably the relevant cooperative scheme to be designed and implemented could be the enforced removal of bonuses or at least an enforced cap on bonuses. As far as the mezzo and macro-institutional problems are concerned, the cooperative schemes in question would consist in more stringent enforceable measures such as capital to lending ratios, disclosure requirements, and new institutional devices (e.g. in relation to global benchmarks such as LIBOR), but also a return to past institutional arrangements (e.g. the segregation of retail from investment functions).

However, enforced cooperative schemes cannot be the whole of the solution because of the abovementioned problem of the insufficiency of enforcement mechanisms, and that of guarding the guards. In relation to the former problem, developing and maintaining an ethical culture – one that takes its collective moral responsibilities seriously – is an important part of the solution. In relation to the latter, matters are more difficult. However, removing lopsided power structures, e.g. banks that are too big to regulate, creating or redesigning independent agencies, such as the IMF and World Bank, and credit rating agencies,[42] and mobilising consumers and clients, e.g. by way of class actions, are surely part of the answer. In each case they are part of the answer because they have the potential to both strengthen the hand of the enforcers and also hold them to greater account. On the other hand, certain collective action problems created by powerful nation-states, such as the US and China, cannot be solved merely by strengthening the hand of enforcers.

4.1 Institutionally embedding collective moral responsibility

Before proceeding further it is important to clarify the notion of institutionally embedding collective moral responsibility in relation to collective action problems. It is also important to further clarify the relationship between individual and collective *moral* responsibility, on the one hand, and individual and collective *institutional* responsibility on the other. In doing so the relevant notion of the *distribution of individual moral responsibilities* in the context of the

[42] Credit rating agencies were found to be conflicted in relation to toxic financial products since they were funded by the very investment banks whose product they were assessing.

forms of collective moral responsibility in question will come into view.[43] As noted above, our concern here is principally with prospective rather than retrospective moral responsibility.

Prior to the establishment of an institutional arrangement of the kind in question (an enforceable cooperative scheme) there is typically a collective moral responsibility to deal with some collective action problem, be it over-fishing or reckless and predatory lending in the retail banking sector. Moreover, those who have this collective, i.e. joint, moral responsibility, are quite often multiple and diverse, e.g. bankers; regulators; members of the legislature; and borrowers. However, since the design and implementation of the institutional 'solution' to the problem has not yet taken place, the collective moral responsibility of these agents is relatively inchoate and, as a consequence, the accompanying individual moral responsibilities unspecified.

But once the specific institutional arrangement – the enforceable cooperative scheme – has been designed and implemented matters are different. There is now not only a collective end which is a collective good, e.g. the cessation of reckless and predatory lending, but a specific institutional means to achieve this end, such as strictly applied lending criteria for home loans, and an enforcement mechanism, for instance a banking regulator with stringent oversight and disciplinary powers. Importantly, the institutional rights and duties of the role occupants in this enforceable cooperative scheme, e.g. those of a bank loans officer, have been specified in a manner that (presumably) ensures the scheme achieves its collective end. In short, the original somewhat inchoate collective moral responsibility to solve the collective action problem has been discharged by means of an institutional arrangement, namely, an enforceable cooperative scheme.

Notice that whereas each institutional role occupant has an *individual* institutional responsibility, e.g. (to revert to the fishing scenario) that of each fisherman to meet his quota, it is the combination of all the contributing institutional actors, for instance the individual fishermen and regulators of the fishing industry, that realises the collective end of the enforceable cooperative scheme. Accordingly, each institutional actor is not only discharging his individual institutional responsibility (e.g. by meeting his quota), each is also (simultaneously) doing his or her part to jointly discharge the *collective* institutional

[43] For more detail in relation to the following discussion see Miller, *The Moral Foundations of Social Institutions*, n. 14, Chapter 2: 'The Moral Foundations of Institutions', 56; Chapter 4: 'Collective Moral Responsibility', 120; and Miller, 'Collective Moral Responsibility: An Individualist Account', n. 12.

responsibility of the cooperative scheme (e.g. to act jointly to reduce the quantum of fish caught so as to enable sustainable fishing).

Moreover, these individual and collective *institutional* responsibilities are *also* individual and collective *moral* responsibilities; or, at least, they are if we assume the cooperative scheme in question realises a collective good; does not involve any rights violations; is fair and reasonable; and so on. Thus, in the banking scenario the individual institutional responsibility of the loans officer to strictly apply the home lending criteria is also an individual moral (epistemic) responsibility. Moreover, the development of an appropriate set of such criteria, neither overly permissive nor overly restrictive, is a joint moral (epistemic) responsibility of the relevant bank personnel. Again, the collective institutional responsibility on the part of supervisory banking staff in multiple banks and on the part of bank regulators and other enforcers – discharged by way of each discharging their individual institutional supervisory and enforcement responsibilities jointly with the others – is also a collective (i.e. joint) moral (behavioural) responsibility.

It should now be evident what is meant by institutionally embedding collective moral responsibility. For the original somewhat inchoate collective moral responsibility, and its accompanying unspecified individual moral responsibilities, have now been transformed by way of an institutional arrangement into a collective moral responsibility with specific content, and an accompanying set of well specified individual moral responsibilities (the moral rights and duties definitive of the constitutive institutional roles).

The notion of collective moral responsibility in play here, i.e. joint moral responsibility, applies vertically as well as horizontally. It applies horizontally in so far as there are multiple coordinated morally significant joint actions of individuals at the same organisational level or in an unstructured group. It applies vertically in so far as the collective moral responsibility in question involves the joint actions of individuals at different levels in hierarchical organisations, e.g. loan officers and their supervisors. Here there is a need to recall the conception outlined in section 2 above of organisational action as multi-layered structures of joint action. This conception makes possible the ascription of collective (joint) moral responsibility to members of an organisation engaged in organisational action. Likewise, the related conception of a joint procedural mechanism outlined in section 2 makes possible the ascription of collective (joint) moral responsibility to participants in various sub-institutional mechanisms, such as the LIBOR benchmark setting process.

Further that the distribution of individual *moral* responsibilities in an institutional arrangement which is an enforceable cooperative scheme mirrors the distribution of individual *institutional* responsibilities in that scheme. Roughly speaking, each discharges his or her individual moral responsibility in so far as he or she discharges his or her individual institutional responsibility. Moreover, in doing so each contributes to discharging – jointly with the others – the collective moral responsibility (which mirrors the collective institutional responsibility of the scheme).

Accordingly, the notion of the distribution of individual moral responsibilities typically in play is not essentially a quantitative one. So in general it is misleading to assume that there is some quantum of collective moral responsibility which is to be distributed by analogy with (say) the distribution of a stack of cement bags among a team of labourers in a loading bay – each labourer being required to load some minimum number of bags so as to ensure the whole stack is loaded. Rather the distribution of responsibilities is to be thought of more in terms of the notion of a division of labour.

Nevertheless, in such contexts of collective institutional and moral responsibility some individual institutional and moral responsibilities are more important than others; some participants have a responsibility to make a greater contribution than others. For example, the occupant of a position of institutional authority typically has – other things being equal – a greater extent of individual institutional and moral responsibility for institutional outcomes than one of her subordinates.

In general, whereas any given participant in such an institutional cooperative scheme is only partially morally responsible for the realisation of the collective good realised by the scheme, each is, nevertheless, fully morally responsible for their own individual contribution. However, this is not necessarily the case. For example, a subordinate may have diminished individual moral responsibility for his institutional action which has untoward moral consequences, if he carried it out under a (lawful) instruction from a superior

Let us now proceed to a discussion of how collective moral responsibility might be institutionally embedded in the global banking sector. The discussion takes place in the context of our threefold distinction between the function, structure and culture of institutions. Moreover, a variety of enforceable cooperative schemes will be countenanced. That is, a variety of institutional arrangements which embed collective moral responsibility in relation to particular collective action problems in the global finance sector will be mentioned.

4.2 Function

The problem of guarding the guards has a specific form in the global banking sector and there is a problem not only with the regulators (the guards) *per se*, e.g. in respect of the intensity and effectiveness of their enforcement activities, but also with the regulations themselves, and hence with the governments who frame the regulations (the legislatures).

It is one of the principal tasks of those who design and oversee the market system, including governments and – under the direction of governments – regulators, to ensure that the ultimate purposes (function) of banks are in fact achieved. However, if one looks, for example, at the objectives of many regulators one typically finds only limited aims (e.g. to reduce crime and protect consumers), and procedural concerns (e.g. to promote competition and efficiency). There is little or no reference to the ultimate ends of markets in general, i.e. the outcome the invisible hand is supposed to bring about, and of the banking sector in particular. Rather the image of regulation of a free market is one in which regulators are umpires whose sole job is to impartially enforce the rules of the game. But in games, the pleasure of playing aside, there is only one end, namely, winning, and this is an end pursued by the players not the umpires. But here the analogy between markets and games breaks down. Markets, unlike games, have an end beyond 'winning'; they have ultimate, as opposed to proximate, ends. In the case of markets, 'winning', e.g. making a profit, is only a proximate end and, as such, a means to a further and larger purpose.

On the teleological account of organisations and markets elaborated in detail elsewhere,[44] the latter are essentially complex structures of joint action and, as such, have collective ends; normatively speaking, these ends are collective goods.[45] Presumably, financial institutions are no different from any other social institution in this respect. That is, there is a need to identify collective ends which are collective goods and, as such, provide the *raison d'etre* for their existence. However, evidently in the case of the financial services sector in particular, the

[44] Miller, *The Moral Foundations of Social Institutions*, n. 14, Chapter 1: 'A Teleological Account of Institutions', 37.
[45] Ibid., Chapter 2: 'The Moral Foundations of Institutions', 56.

prior fundamental ethical question as to the ultimate institutional ends of this sector remains unanswered or is, at least, contested. Yet without an answer to this question governments, regulators and policy makers cannot give rational direction to the financial services sector. They cannot, for example, determine whether or not the financial services sector is doing its job or whether it has become bloated and economically dysfunctional (as many commentators now claim) by virtue of, for example, ceasing to serve the interests of the 'real' economy (so-called Main Street).

Importantly, the regulatory 'system', i.e. the national and international network of enforceable cooperative schemes for the financial services sector is also without direction; it does not know what ends other than harm reduction and the promotion of efficient markets it is seeking to embed in its target institution – the financial services sector. The implication of this for our conception of enforceable cooperative schemes solving collective action problems is that the specific collective ends of those schemes remains underspecified and, therefore, so to an extent does the content and scope of the rules to be enforced; after all, these rules must in part be determined by the purposes of the cooperative scheme.

Consider in this connection, for example, the purposes of corporate financial service providers in capital markets. Let us accept what is agreed on all hands to be the case, namely, that they have as *a* purpose to maximise shareholder value. But suppose, as argued above, that this is merely a proximate end or purpose and that these financial service providers have some further, indeed ultimate, purpose to which this proximate purpose is merely a means. Let us posit that this ultimate end is to make an adequate quantum of capital available at reasonable costs to productive firms.[46] Qua ultimate institutional purpose, the provision of capital to productive firms at reasonable costs gives direction to governments, regulators and policymakers in their various roles, albeit it can only usefully do so if it is further elaborated.

4.3 Structure

As we have seen, the collective responsibilities of industries to realise their institutional purposes, including the collective responsibilities of banks and other financial service

[46] J. Coffee suggests as much in a paper entitled, 'Law and the Market: The Role of Enforcement' presented at the 'The Dynamics of Capital Market Governance: Evaluating the Conflicting and Conflating Roles of Compliance, Regulation, Ethics and Accountability' Workshop held at the Australian National University on 14-15 March 2006 (on file with the author).

providers, typically consist of highly dispersed individual responsibilities that attach to individual persons within firms; individual firms within the industry; institutions outside the industry; and so on and so forth. The collective responsibility, for example, to lower the cost of capital is not one that can be discharged by any one, or even a small group, of market actors within a given capital market. Given the diffuse character of such collective responsibilities – and its attendant incentive structure – many industries, financial service providers included, will not discharge these collective responsibilities and, as a consequence, these industries will not adequately realise their institutional purposes. Hence the need (and resultant responsibility) on the part of governments, in particular, to intervene to adjust these incentive structures and, if necessary, to design-in appropriate institutions or sub-elements thereof.

Micro, mezzo and macro-institutional structural problems also need to be addressed if the collective moral responsibility for combating institutional corruption and other harms is to be adequately discharged. These problems include specific institutional conflicts of interest, e.g. in relation to LIBOR, but also macro structural aspects of the various collective action problems that are in play. Evidently, the corruption-inducing collective action problems arising from commercial competition between the investment arms of banks in a market context in which there is an overriding imperative to maximise profit, and in which many of these banks are 'too big to fail' looks to be too great to be overcome, other than by substantial institutional redesign. The redesign in question would involve splitting the investment from the retail arm of banks to form two separate institutions[47] – or, at the very least, iron-clad segregation within one institution, if that is possible – and 'downsising' banks 'too big to fail' and, therefore, 'too big to regulate'.

This is not to deny that there are the standard market incentives and disincentives in place which (respectively) encourage ethical behaviour and discourage unethical behaviour especially, but not exclusively, among independent financial advice providers. These incentives do exist and they are strengthened by greater emphasis on appropriately communicated disclosure, enhanced financial literacy of consumers/clients, and the like.

Nevertheless, market incentives and disincentives are heavily influenced by the particular (as it were) macro-institutional structure of the market in question and, in the case of the financial

[47] Perhaps in accordance with the so-called 'Volcker Rule' originally within the Dodd-Frank Wall Street Reform and Consumer Protection Act, 111th Congress (2009-2010), H.R.4173, but subsequently watered down.

service industry in many countries, that structure is characterised by a small number of large, vertically integrated, organisations. Moreover, functionally, these organisations are market actors driven by the profit motive. It follows that the pervasive culture in these organisations will be reflective of this function and structure, and will not be sufficiently responsive to the relevant normative purposes and ethical principles.

Naturally, these national macro-institutional frameworks and their constitutive function(s), structure, and culture(s) are not immutable. National governments and regulators can introduce reform across the whole spectrum of their national financial products and services sector. Here there is a need for a focus on specific 'fit for purpose' regulation and integrity regimes for product manufacturers, bankers, and financial advisors alike.

At the global level, as we have seen, matters are somewhat more problematic and, of course, in some cases the global and the national are not easily separated. Nevertheless, perverse incentive structures arising from collective action problems at the global level can be addressed by recourse to interventions that reconfigure the incentive structures.[48] Such interventions can take the form of solving jurisdictional problems in global settings, and increasing enforcement options and/or the intensity of enforcement. Thus Joseph Stiglitz suggests that '[a]ny country in which the corporation (or the substantial owners of the corporation) has assets should provide a venue in which suits can be brought or in which enforcement actions to ensure payment of liabilities can be undertaken. The corporation may incorporate where it wants, but this should not make it any less accountable for its actions in other jurisdictions.'[49]

In addition, he suggests global widening of the possibility of class action in relation to corporate price-fixing. While obviously of great importance, these jurisdictional and enforcement methods are not always sufficient. Other options are themselves market based, e.g. reduce supply of a product or service by factoring in real costs (and requiring that they be paid), reduce demand for a product by high sales tax, or limiting availability. Some of these options involve ambitious innovations to the market system itself, including the global financial system. For example, Stiglitz has proposed a radical extension of the concept of Special Drawing Rights to create a new global reserve currency that would help stabilise

[48] See S. Rose-Ackerman, *Corruption and Government: Causes, Consequences and Reform* (Cambridge: CUP, 1999) for a variety of types of prescription, including adjusting incentive structures, in relation to corruption.
[49] J.E. Stiglitz, *Making Globalization Work: The Next Steps to Global Justice* (New York: Penguin, 2006), at 206-8. Stiglitz has other suggestions in this regard.

financial markets and also make reserves available for wealth creation projects in impoverished countries, increasing literacy, reducing poverty-related diseases, addressing global warming and other ‘ultimate’ market ends.[50]

4.4 Culture

Whether or not the members of some organisation internalise the *desirable* ends and principles of an organisation – as opposed to undesirable ones – is in part a matter of institutional culture. Institutional culture is in turn dependent on the extent to which the collective moral responsibility to achieve desirable ends, and eschew corrupt practices, is embedded in the organisation by way of explicit institutional mechanisms (e.g. formal continuing education programmes in professional ethics; whistleblower protection schemes; and remuneration systems that do not encourage excessive risk taking), and implicit practices (e.g. managers who acknowledge their mistakes; and employees who are unafraid to voice their concerns).

If, on the other hand, the prevailing ethos or culture of an organisation, and perhaps even ideology or central elements of a sector, downplays desirable institutional goals and other ethical considerations in favour of the pursuit of individual self-interest, then it should hardly surprise when individual self-interest overrides compliance with ethical principles, even ones enshrined in the law. This is no doubt especially the case in a context of high temptation and opportunity, on the one hand, and low risk of detection and conviction, on the other, e.g. LIBOR manipulation by bank traders motivated by large bonuses in a context of an oversight body with a structural conflict of interest.

The point here is not necessarily that the majority of individuals themselves engage in corrupt or unethical practices, but rather that in certain cultural or ideological contexts they may well refrain from reporting or otherwise preventing a minority from doing so. Many key elements of integrity systems such as ethics codes, codes of practice, education programs and the like, do not exist for the most part directly to prevent or deter the few people who are wrongdoers from doing wrong, but rather to ensure that the many are intolerant of the wrongdoing of the few. In this context it is perhaps worth pointing out that most fraudsters are detected and convicted as a consequence of the disclosures of their colleagues.

[50] Ibid., Chapter 9: ‘Reforming the Global Reserve System’, 245.

An important potential engine of ethico-cultural education in the context of large, hierarchical organisations driven by commercial interest is the 'professionalisation' process at the occupational level.[51] Here we need to bear in mind that many occupations are not, and ought not to become, professions in the traditional sense of that term. In such cases the analogue of full-blown professionalisation is, what might be termed, occupational ethical acculturation: a process involving many of the elements of professionalisation but stopping short of, in particular, the conferring of professional independence (and corresponding liability) characteristic of the traditional professions.

The process of occupational ethical acculturation in large banking organisations would consist in such things as the establishment for the occupational group in question of an independent occupational association, the creation and utilisation of codes of ethics, ongoing professional ethics education, reward and remuneration systems designed to realise the ultimate institutional purposes of the organisation, rather than to maximise short term profits and share prices (or line the pockets of executive managers), establishment of complaints processes conducted by the association, independent (of management) and well-resourced anti-corruption units within the banking organisation itself, appropriate whistle-blowing legislation (including legal protections) and the like. Such measures can assist in the generation and maintenance of a culture of collective moral responsibility and, not the least, one that is intolerant of corruption.

A marked feature of the GFC is the extent to which traditional 'gate-keeper' professions, such as lawyers and auditors, have been implicated in corruption scandals. Evidently, there is a need to reinvigorate these professions and strengthen their independence of management and commitment to their core professional values. Elsewhere,[52] I have set forth a range of measures in this regard.

Another area that might be looked at is the full professionalisation of occupations that have not traditionally been professions. Given the nature of some of the problems identified in the banking sector, e.g. conflation of lending and *de facto* selling roles, perhaps there is a need to establish the profession of banker (or at least extend the range of ethical and legal duties). Such a process of professionalisation might include, crucially, attaching to (relevant

[51] See A. Alexandra and S. Miller, *Integrity Systems for Occupations* (Aldershot: Ashgate, 2010). This is, of course, not to exclude other relevant measures, such as flatter, more democratic, management structures.
[52] Ibid.

categories of) bankers a fiduciary duty grounded in the vulnerability of the needy, e.g. home buyers, and so on.

Still other options are based on the importance of reputation to the self-interest of market actors. For example, a reputational index (comprised of objective indicators of ethical 'health') could be constructed, an ethics audit conducted (by an independent body) – the results of which would give a comparative picture of the various firms in the industry – and these results promulgated.[53] Given the sensitivity of many actors in the financial services industry to reputational risks, notably lack of trust on the part of customers/clients in the integrity of bankers or in the independence of financial advisors, this is arguably a potentially significant additional tool in ensuring the collective moral responsibility of those individuals and institutions.

5. Conclusion

In this Chapter I have done the following: first, established and defended the theoretical notion of collective moral responsibility as joint moral responsibility, and displayed its relationship to institutional responsibilities; second, offered and defended a normative theoretical account of the collective action problems in play in the GFC and their possible solutions which is wider than that provided by rational self-interested actor models; and third, explored the ways in which collective moral responsibility can be institutionally embedded functionally, structurally, and culturally in relevant global financial institutions and markets for the purpose of substantially reducing the forms of widespread imprudent, unethical and corrupt behaviour in question by way of addressing various identified collective action problems.

[53] For further details on this and other reputational devices see ibid., Chapter 5: 'Ethical Reputation Indexes and Ethics Audits', 99.