ABSTRACT:

Especially in the aftermath of the 20th century’s world wars, the structure and focus of modern human rights and humanitarian law have focused on the individual and individual responsibility for violence based on group affiliation. The resulting system of justice obsesses about individuals who must be held accountable for actions that may have specifically contributed to violence based upon group affiliation. Yet the system also remains indifferent to the community that extols inter-group violence, that gives permission for the violence, and that encourages individual acts which would have been impossible to carry out without the collusion of the communities on whose behalf individuals act. The international system of human rights and humanitarian law, the laws of war included, have the effect of protecting, even subsidizing, the creation and maintenance of social and political normative structures based on hatred of the ‘other’ while reserving responsibility for acts solely for individuals. National constitutional systems, for example the American constitutional system of human ‘rights’, function in essentially the same way.

This article explores the ramifications of this perverse construction of a global human rights edifice. It starts with an analysis of the structure of human rights and humanitarian law, exploring the ways in which the focus on individual responsibility frees communities from liability for actions which make individual behavior possible. The heart of the study focuses on a specific application of the current approach: the trial of Slobodan Milosevich for his own as well as for the crimes of the Serbian people.

The Milosevich trial provides a stark example of the subsidy effect of the current international law system of communal violence. The current international system obsesses over the leader and the perpetrator. Production of one or more individuals to stand in as proxy for inter-communal violence is all that is required to assure a benign neglect of the community itself that is treated as passive and powerless. Where inter-communal violence is grounded in foundational communal norms or outlooks, the effect of trials by proxy is to leave undisturbed the socio-cultural process, and the institutions sustaining the culture, on
which the violence was based. Cultural retraining – modern versions of de-Nazification –
when attempted at all, tend to be half-heartedly pursued, or are staged as one-time-only
event dramas to the local and international markets for those sorts of gestures. Through
the Milosevich trial the article seeks to unmask the inversions by which the modern system
of international law serves to protect local (national, ethnic, religious, racial, or other)
communities that are willing to offer their leaders to the world community as payment in
full for their (local) transgressions. The local community, and its cultural infrastructure for
the production of hate (and the subsidy of actions based thereon), is left intact, free to ‘act
out’ in other ways another day.

The indictment of Milosevich (and certain others) also well illustrates the political
dimensions of international human rights laws regimes. Prosecutorial discretion, in
particular, reinforces an understanding of the application of human rights laws in a way
that focuses principally on leaders (political usually but not always), and direct
perpetrators, but can leave others unaffected. The Milosevich trial provides an illustration
of the way in which international humanitarian law colludes with the now defeated
offending local community to preserve the productive value of the community – to
preserve the community’s valuable individual elements substantially intact – through a
ritualized (the trial) sacrifice of the community performed on the body of the individual
vested with the authority of the collective. The personification of the collective – usually the
state -- in the body of one or more individuals, and the ritual of condemnation performed
on the body of the individual standing in for the state, ensures the continuity of the
collective. In a world order created by and for the benefit of political, social, economic,
religious and ethnic collectives, this form of ritual punishment serves as an assurance that
the integrity of collectives themselves will not be threatened, even when a collective must
be disciplined for violating the rules of inter-communal relationships.

The article then focuses on collective punishment itself. It engages in a preliminary
analysis of one recent suggestion for the amelioration of communal insulation through
what certain sectors of the international community have labeled systems of ‘reparations.’
These are offered as an alternative or supplement to the current system of proxy
prosecutions of communities. These systems of communal responsibility may avoid the
great pitfall of traditional forms of imposing collective punishment on a community – that
outsiders cannot impose norms on an unwilling community whose norm generating
structures remain intact after conflict. Instead, communities must be induced to change
themselves. Raising the communal costs of violence producing norms may provide an
inducement. On the other hand, they pose a great danger. Collective punishment
traditionally has been the method of choice for the brutalization of minority populations
and less powerful political communities by their more powerful neighbors. In the West
there persists the belief that collective punishment was in part responsible for the warfare
that originated after 1871 and ended only with the dissolution of the Soviet Union at the end of the 20th century. Moreover, collective punishment tends to affect all of the individuals in the collective equally – irrespective of the nature of their participation in the bad acts of the collective. This problem is especially acute where the acts of violence were perpetrated through non-democratically elected governments. Still, at least to some extent, the principal of democratic accountability might be usefully applied in this context. For that purpose I draw on the current discussion of state responsibility for national debt incurred under prior non-democratic regimes, under which successor regimes (and the political community it represents) have maintained that the democratically elected successor regime ought not to be held responsible for the obligations of prior dictators. Consequently, for example, responsibility might be tied to a community’s willing participation in the cultivation, transmission or subsidy of inter-communal violence.

Still, traditional forms of collective punishment remain badly targeted and its forms crude and unfair. Traditional collective punishment targets people, property, land, and (sometimes) social organization. Its methods tend toward extermination, expulsion, collective imposition or confiscation, social reorganization or pacification aimed at political and economic institutions, or forced conversion. Thus, even reparations in its modern form may cause more harm than good when applied in equal measure to all members of the collective.

Yet the retargeting of collective punishment may solve the problem exemplified by the Milosevich trial, while avoiding the pitfalls and unfairness of traditional conceptions of collective punishment. The paper ends by suggesting that targeting culture may offer the most useful method of holding communities to emerging international standards of human rights in the production of ideas and the subsidy of action. Institutions of cultural production, as well as cultural production itself, seems to underlie the ease with which the leader can induce ‘the innocent’ to the most (in retrospect) violent acts. Within a cultural context, moreover, even the character of innocence, especially in connection with the cultural production of hatred, has been hotly disputed. All members of a community might be said to share a responsibility for the production and articulation of culture and cultural standards.

The 20th century has taught us the danger of constructing systems of law in which cultural power is free from restraint, individual acts are dissociated from communal incitement, and the cultivation of hatred is perceived as a protected value of international law. The rise in the late 20th century of the practice of communal trials by proxy leave offending communities free to continue to nurture the sorts of norms that make possible the incitement to, or justification of, future outbreaks of inter-communal violence. But it also serves as a mutual guarantee among communities that no community will ever be
threatened, as a collective, for its actions. Even when the most benign forms of collective punishment are attempted – the economic embargoes of Cuba, Israel, South Africa and Iraq at the end of the 20th century, for example – the form of action taken tends to target people, property or land, and leaves intact the cultural structures and institutions that subsidize violence. Legal structures built to contain the National Socialist menace are proving less than useful in containing the threat of cultural/ethnic and religious warfare that emerged from out of the last century to dominate this one. Collective responsibility, and collective obligation, under certain circumstances, might serve as useful a purpose as individual responsibility in responding to inter-communal violence. Forms of cultural production may be the key to overcoming the reluctance to punish a collective when ideas are converted to violent or subordinating action against others.