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Moral responsibility for collective crime

Transitional justice in the former Yugoslavia

Crucial to the process of transition in the former Yugoslavia is responding adequately to the question of responsibility for crimes committed in the name of a collectivity, writes Nenad Dimitrijevic. However, collective moral responsibility is by no means an uncontested concept: even in collective crime, it can be argued, all that can be determined is the responsibility of the perpetrators, high-ranking officers, and political authorities. Surveying theories of collective responsibility, Dimitrijevic argues that collective responsibility is less a matter of individual or collective guilt than a sense of duty towards the victims and their community.

This text¹ is devoted to the analysis not of the past but of the present. However, the past bears immediate relevance for the understanding of my topic: the present I want to explore may be conventionally identified as the transition from a criminal regime to democracy. I will assume that the character of the criminal past rules out the very possibility of a new beginning *ex nihilo*, where the act of the regime change would be perceived as a watershed between a "then" and a "now". This implies that the legacies of the recent past cannot be simply eradicated and made irrelevant, either by a political choice of the new regime, or by a mere neglect. What was happening under the old regime has not disappeared. It has rather undergone a transformation. Having lost the capacity to act as officially sanctioned formative moments of social and political life, the old patterns nevertheless survive, retaining their ability to influence the present. Therefore, the real task is not to decide whether the evil past is to be reckoned with but to discover the character of its legacies and to choose fitting means of fighting them.

My focus will be on the question of collective responsibility. The question can be formulated in the following way: is it right to inquire about the responsibility of all individuals who belong to the group in whose name the crime has been committed? My approach to the problem will proceed in several steps. The first question will be whether reference to the concept of collective responsibility after a period of mass atrocities can be justified. I will argue that the answer depends on a combination of three factors: the nature of the old regime, the nature of the relationship between the regime and its subjects, and the nature of the crime committed. In section 1, after a brief introductory presentation of transitional justice, I will explicate the difference between regime crime and collective crime. The introduction of the category of collective crime will be followed by identification and a short analysis of its three stages. In section 2, I will argue that collective crime requires addressing the issue of moral responsibility. The normative reasons for this view will be sketched in the first section. The second section offers a short analytical account on the meaning of moral responsibility — the purpose of this digression is to identify dilemmas and objections that the idea of collective moral responsibility faces. In the third and final section, I will explicate a

sketch of the concept of collective moral responsibility appropriate for societies dealing with the mass crime of the recent past. Contrary to the prevailing view, I will argue that this category may — and indeed ought to — be conceptualized without the identification of a causal relation between each member of the group and the crime committed in her or his name. The core of the argument will consist of one specific understanding of the correlation between individual and collective identity in the aftermath of moral catastrophe.

What is collective crime?

1.1 Criminal regime and transitional justice

I define a regime as criminal on the basis of two criteria. The first criterion is the scope of the committed crime: mass murder, torture, persecution of whole groups of the population, forced deprivation, and destruction of property, are only the crudest forms of human rights violations and annihilation of human dignity that characterize actions of this type of regime. The second criterion is normalization of crime. This normalization has at least two important aspects. The first consists in ideological, legal, and political institutionalization of crime: the system of values, political arrangements, and legal norms are all shaped in a manner that allows, justifies, and renders routine the killing of those who are arbitrarily proclaimed as enemies. The second aspect of normalization appears as the support of the majority of the population for the regime and its practices. I will try to show how such normalization of crime creates moral consequences which — unless addressed through the acknowledgement of moral responsibility — remain as one of the most serious obstacles to the processes of the democratic transition and return to civilized normality.

This may also be interpreted as the claim that the consequences of the crime are such that neither the commitment to democracy, nor the establishment of democratic political and legal arrangements suffice for reaching the desired social, political, or cultural novelty. "Mastering the past" in such societies requires a complex system of institutions, mechanisms, and processes, which are usually referred to as transitional justice. Within the scope of this paper, transitional justice shall refer to a set of moral, legal, political, and social processes, measures, and decisions passed and implemented during the transition to democracy. The aim of such efforts is to remove the instruments, protagonists, and consequences of massive violence from public and social life, and to contribute to the creation of a community based on freedom, equality, human dignity, and respect for the right to diversity.

The complexity of transitional justice may be rendered more precise by pointing to three levels of responsibility for mass crime: criminal, political, and moral. With no intention to undertake a systematic consideration of these forms of responsibility, I will spotlight only the significant differences regarding their aims and scope.

After the fall of a criminal regime, the distinction can be made between immediate and derived aims of criminal responsibility. The first, immediate, or narrower aim may be summed up as the effort to implement retributive justice: everyone whose guilt has been established in a procedurally correct manner is to be punished proportionally to her or his share in the crime and its consequences.² Second, it is sometimes argued that in the aftermath of the mass crime, criminal responsibility has one additional, derived, or wider aim.

It consists in affirmation of the rule of law, which until recently did not exist. The old regime used to embody repudiation of the rule of law, which is why the new regime has to come up with completely new answers to questions concerning both the character of the legal system in the transitional period, and its place in a desired democratic system. This in turn determines the specific role of criminal responsibility. Its goal is not merely to punish perpetrators. It also aims at demonstrating commitment to values and procedures on which a very different relationship between individuals and political authority should be based in the future: "Going beyond conventional criminal law's role of affirming and protecting entrenched pre-existing values, what distinguishes transitional criminal measures is their attempt to instantiate and reinforce normative change."³

The category of political responsibility applies to the members of the old regime's political elite, primarily to those whose actions cannot be legally identified as criminal. The goal of political responsibility is to prevent the members of the old apparatus from taking part in the political life of a new community. It is usually argued that this special form of responsibility ought to be raised for two main reasons. First, many state officials participated in making political decisions that decisively shaped the character of the regime. Second, even those who engaged in seemingly neutral bureaucratic duties far from where decision-making took place expressed their loyalty by the very fact of staying in office — to all intents and purposes equalling tacit support for the regime's criminal actions.

Moral responsibility focuses on normative discontinuity with the bad past. The preliminary argument is that organized moral reflection on the true character and consequences of the past is indispensable in order to explain the normative disassociation of the society from ideology and criminal practices of the former regime, and in order to affirm a value system appropriate to democracy.⁴ This is not a moralist stance based upon exaggerated moral indignation directed at the crime, its perpetrators, and their society. It is better read as the position of practical morality, which is both backward looking and future oriented.⁵ Moral responsibility is meant to point to the fact that in the criminal regime the vast majority of people have effectively renounced valid and accepted standards of distinction between right and wrong, good and bad, just and unjust. Hence, the task of transitional justice should consist not in creating new or better standards of moral behaviour but in bringing to everyone's attention a sense of the type of condition in which basic civilized values were all of a sudden rendered irrelevant.⁶ Decent people of today ought to know how it became possible for decent people of yesterday to participate in, support, or tolerate the worst kind of crime. This may also be expressed by the claim that the character of mass crime, the scope and manner of involvement of both the rulers and the subjects, and the consequences of crime, require that society in transition focuses on the re-affirmation of the sense of justice lost in the preceding period.⁷

All three forms of responsibility are necessary in the processes of transitional justice. Criminal and political responsibility will not suffice, even if one agrees that their scope and aims reach beyond retributivism, in other words, that they are also capable of bringing about significant moral insights. Due to the character of crime and its consequences, the question of moral responsibility requires separate treatment. In addition, moral responsibility will need a different conceptualization. Theories of individual moral responsibility are incapable of fully addressing the complexity of the problem of collective crime — it is therefore necessary to introduce the category of collective moral

responsibility. Before trying to defend this view, I should explain my understanding of collective crime.

1.2 How collective crime is different from regime crime

Collective crime is committed by a significant number of members of a group, in the name of all members of that group, and upon individuals identified as a target on the basis of their belonging to a different group.⁸ The category of "collective crime" differs from the category of "regime crime" ("state crime").⁹ This distinction is derived from a more basic one between two types of criminal regime. The first, which can provisionally be called a populist criminal regime, relies on the support of its subjects: the essential quality of its relationship with subjects is not repression, but rather their integration into the regime, which includes a high level of ideological and practical agreement about crime. Therefore, I will define crime committed by this type of regime as "collective crime". Nazi Germany and Serbia under Milosevic's rule provide examples. The second type of regime could be called a "repressive criminal regime". This presupposes the effective independence of the regime apparatus from its subjects. In our context, this means that the regime does not count on the approval of criminal ideology and practices by the subjects. Such a regime requires "merely" loyalty, understood as obedience, which is secured by a wide-scale, arbitrary, and unpredictable threat and use of coercion. Crime by this type of regime I label "regime crime". An example is the Soviet Union under Stalin.¹⁰

There is one important issue we can probably raise in the case of collective crime, but not in the case of regime crime. This concerns the collective responsibility of members of the group in whose name the crime has been committed. Controversies about possible responsibility of Germans for the Holocaust have remained in the limelight of academic and political debates, in Germany and beyond. The same goes for the question of the responsibility of Serbs for the crimes committed against Albanians, Croats, and Bosnians in the 1990s, during the wars in the former Yugoslavia. On the other hand, the issue of possible collective responsibility of the subjects of the Soviet regime for Stalin's crimes is rarely addressed. The discussion here is limited to the perpetrators, regime officials, and "ordinary people" whose actions were clearly causally linked to regime crime. "Milder" forms of support, in which the causal relationship with the crime cannot be established — such as voting for the regime, expressing public support for it, refraining from action in situations in which acting may have prevented a particular crime or have mitigated its consequences — are not regarded as sufficient reasons for raising the question of responsibility.

How can this distinction in approaching the question of responsibility be explained in terms of the difference between the two types of regimes, and the corresponding difference between the two types of crime? What does it mean to say that the question of collective responsibility may plausibly be raised only in case of collective crime, which in turn is possible only under a populist criminal regime? Viewed from the perspective of these questions, we could observe that Stalin's regime implemented only one of the two outlined aspects of normalization of crime: ideological, legal, and political institutionalization of violence directed against the group designated as enemy. The second aspect — interiorization of the perverted value system, its norms and institutions by the regime's subjects — was never really achieved. The regime settled for an illusion of voluntary loyalty, while in practice it needed obedience, which was ensured by instruments of repression. Besides, the attribute of enemy, albeit

derived from ideological, seemingly transparent class distinction, was in reality such that practically all subjects considered themselves potential victims. This is precisely why under Communism it was virtually impossible to create a situation that would eventually result in collective crime. Therefore, the first summary inference is that collective crime can be committed only under a criminal regime whose ideological patterns the majority of population have agreed to and in which both aspects of normalization of crime are present. In the next section I will try to clarify further the meaning of collective crime.

1.3 The construction of collective crime

Collective crime cannot be committed by an individual, a random group, or a collectivity understood as the mere sum of its members. It presupposes the collective intention to commit a particular type of crime, collective awareness about the nature of the intended crime, organized effort to realize the intention (to perform the chosen action), and collective awareness about its consequences. The construction of collective crime unfolds in three stages, which, taken together, form a peculiar implicit pact between the regime and its subjects.

The first stage could be identified as the *preparation of collective crime*. It requires both ideological mediation and legal–political institutionalization. Ideological mediation includes practical measures of political and cultural propaganda aimed at integrating the subjects into an organic whole, within which any relevance of their individual identities will effectively be cancelled. The regime will demand unconditional loyalty to the proclaimed ideological values and goals. This will be formalized through legal and political institutionalization of arrangements that define binding distinctions between allowed and forbidden, good and bad, right and wrong. An integral part of this demand for internalized and institutionally formalized loyalty will be the requirement that the subjects consciously and unquestionably accept the basis of legitimation and the institutional patterns of crime. The very act of expressing support for crime means agreeing to de–subjectivization.

The second stage consists of *criminal action*. Historical knowledge informs us that criminal regimes carefully prepare and coordinate the execution of crime. The murky rationality of this project implies the planning of a peculiar "division of labour": both the formulation of goals, and the manner of their realization count on different forms of complicity on the part of the subjects. This is where the conditions of voluntary loyalty and de–subjectivization are to undergo the most serious test. The subjects are not expected to be mere accomplices to, or supporters of, the criminal actions of the regime. They are expected to demonstrate a specific kind of moral loyalty which will be interiorized, and then manifested, in an attitude that whatever the regime is involved in, and whatever the subjects act as accomplices to, is politically justifiable and morally right.

The third stage of collective crime is the *joint acceptance of its consequences*. If the crime has been presented as politically legitimate and morally right, then the implicit pact between the regime and its subjects will require that the consequences of the crime are also acknowledged as legitimate and right. This formulation may appear as merely tautological, or it could be argued that it delineates an obvious, almost technical consequence of the joint participation in the crime. However, this stage is critically important for the proper comprehension of the problem of moral responsibility. Let it be emphasized that this acceptance of consequences does not equal acceptance of

responsibility for the crime. An analysis of the German and Serbian cases would demonstrate something that is almost self-comprehensible: during the criminal regime both rulers and ruled behave as if no crime has taken place at all. This attitude is directly derived from the ideological presentation and institutional formalization of the criminal action as a good: the ruling ideology and valid institutional arrangements leave no room for the explication of such activity as criminal, in other words in breach of the law. Neither can it be publicly proclaimed as morally bad. But the official truth is in this case still nothing more than an institutionalized lie, and not a very powerful one: it cannot possibly hide the fact that the "good action" consists in the killing of some people. Ideology can only say that those "others" do not deserve to live, or that "our" action is an act of necessary defence — it cannot, and it will not, negate the fact of killing. And one cannot possibly assume that both the regime and "good subjects" were unaware of the true character of this "good action". In other words, the fact that there may be no political and social space for these actions to be declared criminal does not imply the absence of clear consciousness about their character. On the contrary, we can assume that there exists knowledge about the facts, but that for some reason this knowledge does not result in the explicit comprehension of their character and consequences. The regime decided, and its supporters agreed, to turn the ultimate evil into the criterion of a politically and morally good action. This is the core of the moral problem, and its actuality is not limited to the time-span of the old regime.

Collective moral responsibility

2.1 Normative approach to the problem

What does the claim that this moral problem is not limited to the criminal past mean? A short answer would be that this moral problem survives the regime change and confronts — albeit in a different form and with a different force — the period of transition. One notes a kind of terrifying amoral chronology: people who, prior to the crime, lived in keeping with minimum moral standards, readily agreed to take part in, support, or at least tolerate the crime once the criminal regime came to power. Once the regime was overthrown, they went back to civilized normality, as individuals who clearly understand the moral standards of decent society and accepted them as their own. In what follows, I will try to give a detailed account of how fostering tolerance for such a situation creates a political culture of affirmation of the bad past. I believe that "bystanders" and "fellow travellers" of the old regime, that particular "silent majority" that during the period of crime preferred strategies of support, silence or denial, rationalizing them as a preference for "normal life", must realize the immorality of their behaviour and its consequences. Departing from the offered definitions of the criminal regime and collective crime, I am especially interested in one aspect of the problem of legacies. What is to be done with people who cannot be morally blamed? To repeat: can all members of the group in whose name the crime was committed be held responsible? Could we perhaps identify one set of conditions whose fulfilment would lead to the conclusion that each member of the group should be rendered responsible for everything that the criminal regime has done in the name of the group?¹¹ Can there be collective responsibility, and especially can there be collective responsibility beyond blame?

Legal and political responsibility does not qualify. Can we speak of collective moral responsibility? A simple and intuitive starting point for justifying it may be formulated as follows: there is something deeply disturbing and wrong in indifference to the recent sinister past on the part of individuals who share their

group and communal identities with perpetrators of the crime. If we, in whose name the killing was done, claim that the book of the past should be closed, that we should all simply focus on building a better future, we are not merely saying that the past is irrelevant, but also that injustices committed in our name are irrelevant too.¹²

At the same time, we know this question may cause both unease and resistance. There can be objections of principle, arguing for example that the thesis about collective moral responsibility is conceptually and logically untenable. The most powerful objection is that of methodological individualism, which asks how someone who did not take part in crime, who did not support them, who cannot be held accountable even for inactivity, in other words someone who did nothing legally punishable and nothing morally wrong, can still be held morally responsible. Taken a step further, this objection implies that responsibility for an action is always a causal relation that can be individualized. Therefore, even in collective crime, we can only distinguish criminal, commanding and political responsibility of perpetrators, superior officers, and political authorities.¹³

Objections may be contextually specific: for instance, the claim that criminal responsibility, political responsibility, and material compensation for victims fulfils all requirements of transitional justice. It is then argued that the question of the moral responsibility of the group would lead only to an "opening of old wounds", deepening of multiple societal and political divisions, imposing collective responsibility on the group, and — in the final analysis — preventing society a whole from dealing with the numerous imperatives and challenges of the transition in an organized and efficient way. What we need in the period of transition, says this objection, is not a backward looking but a forward-looking perspective.

In an effort to justify the question of collective moral responsibility, I start from the assumption that in the case of collective crime we need to think of three relevant categories of agent. As opposed to an "ordinary" crime, one confronts not only the victim and the perpetrator, but also the group in whose name the crime has been committed. The question of possible collective moral responsibility is potentially relevant primarily because of those who belong to the last category, and, within this category, because of those who neither took part nor were accomplices in the crime, those who did not issue orders, including those who did not support the criminal regime in any way.

This distinction between three types of agent is derived from the following morally relevant features of collective crime: the number of perpetrators, the number of victims, the role of political authority, the ideological foundation of the crime, the manner in which the victims were chosen, the character of response of the majority of subjects to the crime and its justification, and, finally, the grave moral and political consequences that occurred. In view of these features, an exclusive focus on the individual perpetrator, her or his culpability or political responsibility — accompanied by the exploration of the harm done to the victims — cannot be carried out by transitional justice. First, in the case of mass crime it is often difficult to individualize criminal and political responsibility and to distinguish perpetrators from collaborators. Second, criminal and political justice do not suffice to overcome the social and cultural consequences of evil, because they fail to obtain a clear picture of the society in which the most drastic violations of human rights were made possible through broad endorsement of a perverted value system, and through the complicity, collaboration, or "passive support" of many, ranging from those

at the top of government to "ordinary people".¹⁴ Third, we may assume that the consequences of the crime are such that they have somehow affect *every person* in whose name these were committed.

But this is still a predominantly normative view. In order to be able to offer a more reliable concept of collective responsibility, analytical considerations must be introduced. First, and briefly: *what is responsibility?*

2.2 Responsibility in analytical perspective

Responsibility is a faculty of an agent without which there can be neither praise nor blame for an action. In a conventional reading, it is a category that determines the causal relationship between the subject, her or his actions, and the consequences of those actions. Responsibility, therefore, is a subjective feature which consists in accountability for actions one performs and for the consequences those actions bring about, for which an agent can be justifiably rewarded or punished. For a proper dealing with moral responsibility we need categories of "moral agent" and "morally significant action". The moral agent is a person who disposes of the ability to judge, and of the capacity to control her or his actions. Morally significant actions are those based on certain standards of right, good, and just.

An individual possessing these subjective features can be considered responsible in two basic ways. First, she or he will be considered a "responsible agent" or bearer of "assumptive responsibility" or "agent responsibility": responsibility for future behaviour. Secondly, she or he will be considered responsible for all actions committed and for their consequences, or "causal responsibility".¹⁵ Expressed differently, this is the difference between being morally responsible (being a moral agent), and being morally responsible (for actions and their consequences).

The causal relationship between the subject, her or his actions, and the consequences that occur has two aspects: objective and subjective. Objective causality is easy to establish: for instance, if in a porcelain store I break a valuable Chinese vase, there will be an agent, an action, and a consequence. But the subjective moment of causality creates some difficulties. If an act — in my case, the breaking of the vase — can be ascribed to me, I will be held responsible for the consequence only if it can be demonstrated that I performed my action freely and consciously.

Two elements of subjective responsibility are introduced here. The first element is a specific human quality: the ability to judge, to distinguish between right and wrong, good and bad, permitted and forbidden. But this feature does not suffice. I may be able to see that breaking the vase was wrong, but what if someone pushed me? Subjective responsibility therefore requires an additional feature: *freedom of choice*. I am responsible if I was in the position to freely chose how to behave, if I was free to decide whether to break the vase or not.

Why is it important in our context to note the difference between these two elements of subjective causality? The first element — the faculty of judgment — is a subjective individual quality, existing prior to, and independently of, the act itself. My ability to judge, if I possess it, renders me responsible for all my past, present, and future actions. If this is truly a faculty inherent in every mature, mentally able person, then an important conclusion follows: ability to judge is context-independent. In other words, no external context, however difficult it may be, can possibly deprive me of it. This is not an abstract

insight: historical knowledge informs us that subjects of criminal regimes often invoke "given circumstances" in their defence, claiming that grave conditions under the old regime effectively denied them the ability to distinguish good from evil. It is argued here that the overall political, social and cultural condition rested on the confusion of the good and evil, on the official, widely accepted proclamation of evil as the supreme good -consequently, the individual was effectively denied moral autonomy. However, if we accept the definition of the faculty of judgment, then this form of denial emerges as wholly unacceptable: circumstances do not nullify our ability to judge.¹⁶

But the situation with freedom of choice is different. It depends not only on our subjective faculty of judgement, but also on the context in which our action takes place. In the above example, if someone threatens me with a gun and orders me to smash the vase, I will most likely do so, although I am fully aware that such an act is objectively wrong and that it will produce punishable consequences. But given that I was effectively denied freedom of choice — I acted under compulsion — the question is: am I to be held responsible for the consequences that occurred? Compulsion, understood as the extreme form of the external pressure on my behaviour,¹⁷ deprives me of that peculiar aspect of autonomy that we designate as freedom of choice, leaving that aspect of my autonomy designated as ability to judge intact. The question then is whether my behaviour is immune to moral judgment.¹⁸ In other words, am I in this situation still a moral subject whose actions in morally important situations yield morally important consequences?

The problem gains momentum when we note that there are actions which seem — at least in the absence of a direct physical threat — voluntary, but in which the subject, faced with specific circumstances, does not follow her or his own sense of morally correct behaviour. Let's imagine a morally responsible individual under the Nazi regime, a man who perfectly comprehends the regime's criminal nature and its moral corruption, who knows what is going on around him, and who opposes it deeply. Still, he will not do what a responsible individual in normal circumstances is expected to do. For example, he will not dare to hide his Jewish neighbours, although he is well aware that their deportation is only a matter of days. He knows that his attempt at rescuing them could be discovered (for instance, because the third neighbour, a Nazi and anti-Semite, is suspicious of his loyalty to the regime), and that if discovered, both he and his family would be sent to the concentration camp. He feels that, objectively, he has no freedom of choice. In these situations, which Aristotle calls "mixed", we are confronted with the question of the criterion of assessment of moral behaviour. Aristotle's standard for this assessment is defined by the idea of a "reasonable person".

Sometimes the act is done through the fear of something worse, or for some admirable purpose; eg if a tyrant who has a man's parents and children in his power were to order him to do something dishonourable on condition that if he did it their lives will be spared, and if he did not they would be put to death: in these cases it is debatable whether the actions are involuntary or voluntary. A similar difficulty occurs with regard to jettisoning cargo in bad weather. In general, no one willingly throws away his property; but if it is to save the lives of himself and everyone else, any reasonable person will do it. Such actions are mixed, although they seem more like voluntary than involuntary ones; because at the time that they are performed they are matters of choice, and the end of an

action varies with the occasion..."¹⁹

Therefore, in a situation which "overstrains human nature", when every choice, abstractly speaking, seems morally wrong,²⁰ a man who puts his own safety and the safety of his loved ones ahead of the elementary good of those less close to him chooses one of the two inevitable evils. Aristotle claims this situation and this action go beyond the classical dichotomy of right and wrong, which is otherwise inherent in the conceptual determination of moral responsibility. Such a person deserves neither praise nor punishment. In such situations only forgiveness is possible: it is only possible to exempt the person from moral responsibility for her or his action and its consequences.²¹

This reasoning may look vulnerable inasmuch as it seems to create the possibility for denial and self-exculpation of those who simply agreed to be loyal to the criminal regime. This objection can be avoided only by the most exact possible identification of the context that practically nullifies freedom of choice. Therefore, the idea of a "reasonable person" makes sense only insofar as it is accompanied by a reliable description of the type and extent of coercion under which the individual cannot avoid behaving in a manner that under normal circumstances would be identified as morally wrong:

These boundaries are set by the actual state of the world, and whether the agent is steering in this context. To steer *actual* behaviour in the *actual* world, one must have a reasonably accurate conception of the conditions of the world which serve as the context within which he steers. This is not to require *absolute* accuracy, for none of us would meet this condition. Rather, it is to require a "reasonably" accurate conception of the world; one which displays an ability to recognize one's circumstances, and appreciate them.²²

Situations in which freedom of choice is effectively denied are those in which the agent has no control over her or his actions and the consequences which she or he knows will occur, and of whose character she or he, as an autonomous person, is fully aware. In criminal law this would be the argument against individual criminal responsibility for an action that has produced a punishable consequence. It looks as if there is no reason to reject this argument in the analysis of other forms of responsibility. First, I cannot be responsible for an action unless there is causal relation between that action and its consequences. Second, even if there is such causal relation, I will not be responsible if it can be demonstrated that I had no control over my action, that is if a particular consequence resulted from my being forced to act against my knowledge of consequences and my moral conviction. In short, it seems as if moral responsibility (both individual and collective) always presupposes the fulfilment of all conditions that determine its notion: unless all subjective or objective moments of responsibility are present, the agent shall not be considered responsible. Does this hold in the case of collective crime?

3.3 Collective responsibility beyond causality

If I want to demonstrate that collective moral responsibility for collective crime is indeed a sustainable concept, I would have to show either that each mentally capable member of the group in whose name the crime has been committed had freedom of choice, that is — had the possibility to prevent the occurrence of the crime or to mitigate its consequences, or that moments of causality and control are of no importance whatsoever when it comes to moral

responsibility for this type of crime. If I managed to prove the former — for example, that *each and every* German during the Nazi regime failed to act in a way that was not only appropriate to the given situation, but also realistically possible — this would indeed be collective responsibility, albeit only as a sum of the individual responsibilities. This is known as "distributive collective responsibility". However, in the case of collective crime this option should be rejected, simply because it is not plausible to claim that all individuals under a totalitarian regime could have disposed of freedom of choice.

This leaves us with the second option,²³ which in itself looks vulnerable. How can one possibly defend the claim that moral responsibility of a collectivity can exist without elements of causality and control?

Doubts are many. Not only is it necessary to show that my not taking part in the crime, or my inability to prevent it, will not free me from responsibility. We must also respond to the basic objection of methodological individualism: ascribing responsibility to a group is meaningless. Anything that can be said about a group, or anything that can be ascribed to it, is always reducible to the individuals of whom the group consists. Any action we identify as "collective" must have been performed by individuals and therefore any consequence of any action can be ascribed exclusively to individuals. Perhaps it is possible and even useful to identify a collection of individuals as a group. It may even be possible to distinguish the qualities that differentiate one group from another. But from here it does not follow that a group is an entity with its own identity, in other words that it is an entity capable of an action that could be recognized as the group action. Finally, collective responsibility leads to morally unjustifiable inferences: we first identify a group, then we observe that one or more individuals from the group committed a crime, then we blame the group as a whole, which finally practically means that we assign blame to each and every individual who belongs to the group. Ascription of blame to a person is done on the basis of belonging only, not on the basis of the morality of her or his action.

In order to respond to this objection, it is first necessary to redefine the question of the subject of responsibility. A claim that a group, under specific conditions, may be treated as person, as agent with its own subjectivity, is not altogether new. Today, both theory and practice routinely recognize the quality of an agent to many a group. Therefore, the question may be rephrased: which qualities should a group possess in order to qualify as a political, legal, moral subject, ie to be recognized as a responsible agent? The easiest case is when the group is defined as a legal entity. If, for instance, a building collapses, the architect, all engineers, chief of construction, workers — in short, everyone who can be identified as being involved in the construction process — will be held individually responsible. But the construction company as a whole will also be held responsible. This is the case of corporate responsibility, which informs us that responsibility of a legally defined group cannot be reduced to a mere sum of its members' responsibilities. Being legally defined as an entity capable of action, such a group becomes a responsible agent.

This brings us to the question of whether assumed responsibility (being a responsible agent) is the necessary condition of causal responsibility, which in turn may be rephrased in the following way: can only the persons, in other words clearly defined agents, be responsible for criminal acts and their consequences? An affirmative answer has been defended above. Therefore, from here the following conclusion may be derived: that so-called "random collections" — legally unstructured constellations of individuals — cannot be

agents of the collective responsibility. For example, when a gang robs the bank, one does not talk about collective responsibility of the gang, but rather about the different degrees of individual responsibility of its members.²⁴

But how to approach the question of the responsibility of ethnic or racial groups for ethnically or racially motivated and legitimized crime? These groups are not legal subjects. Do they then lack the quality of assumed responsibility, ie the quality of subject (person, agent), on the basis of which they might be considered causally responsible? An affirmative answer seems to stem from the insight that these groups lack the capability to act *as groups*. If this objection is accepted, the only way to affirm the principle of collective responsibility would consist in identifying the institution which represents the group. This is the path chosen by Chandran Kukathas. In his defence of collective responsibility, he suggests that it is through institutionalization that a group becomes a clearly structured association. This would solve the foundational problem of allocation of responsibility — clear determination of its agents:

Associations are groups which comprise individuals whose relations are ordered in such a way as to require them to recognize the authority of some person or persons to take decisions on behalf of the group as a whole [...] Responsibility lies with the institutions, not with the individual persons — although, to be sure, individuals can be held responsible for not performing their institutional duties, or obstructing others from carrying out theirs.²⁵

Kukathas swiftly notes that the basic weakness of this approach is that it seems to lead all too easily to identifying the state as the responsible agent for ethnically or racially legitimized mass crime. Mere identification of state institutions as casually responsible for the past injustices trivializes injustice and at the same time it is likely to create among citizens a diffuse feeling of undeservedly imposed burden of collective guilt. Kukathas's response suggests that a liberal democratic state should "de-nationalize" processes of dealing with the past, through the communication of the state with various actors in civil society and by organizing and coordinating some sort of deliberative forum about the past.²⁶

The conclusion of Kukathas's valuable analysis of collective responsibility still remains incomplete. First, he pays little attention to the conceptualization of deliberative processes that would ideally lead each citizen towards interiorizing the sense of responsibility. Second, the very focus on the question of legal and political institutionalization of the agent of responsibility may in the case of collective crime be misleading. I will try to propose an alternative path of analysis.

We could try to focus our attention on the way in which collective crime marks and changes the identity of the group in whose name it has been committed. In her analysis of the question of German responsibility for Nazism, Hannah Arendt writes that collective responsibility requires meeting two conditions: first, that I, as a member of the group, am held responsible for something I did not do; second, that membership in the group is involuntary.²⁷ In other words, I would be responsible for what was done in the name of the group and my responsibility would rest on my membership in that group: what has been done in the name of the group, has been done in my name as well. The element of "involuntary membership" underlines the difference from being a member of a

type of group that exists as an organized entity on legal grounds, because membership in the latter is typically voluntary. On the other hand, nations and races are pre-political and pre-legal groups, membership of which is involuntary.

From this elementary insight stems the powerful intuitive objection that membership in an involuntary group cannot be morally relevant in itself. Collective responsibility of a group for a crime committed in its name must, hence, be founded on some other moral considerations. Therefore, we should go back and analyze the meaning of Arendt's first criterion — the responsibility of a group's member for something she or he did not do — and examine how it is relevant to involuntary membership.

Larry May insists that in answering this question we cannot simply presuppose that a group is a responsible agency, for this would undermine the principle of personal autonomy. He develops a "social-existential" concept of joint responsibility in order to establish the criteria on the basis of which each individual should take her or his share of responsibility for collective crime. We are in no position to choose our ethnic or racial identity, but in concrete situations we *can* decide how to respond to the concrete challenges this membership imposes. If the crime is committed in the name of nation, all its members have the duty to take a morally adequate stance towards the crime.²⁸ This concept comes close to a kind of universal individual responsibility that is however more than the sum of responsibilities of all members. Agents of this responsibility are not abstract citizens, but persons taken existentially, who each for herself and together with others asks about "the vision of our place in the world".²⁹ Given our different individual attitudes towards past crime, forms of responsibility will also differ, ranging from responsibility for clearly determinable morally wrong views (racism, for instance), to "metaphysical guilt", devoid of any causal responsibility — these individuals will be held responsible only on the grounds of their membership in a group, on the basis of their shared identity with the perpetrators. In other words, May advocates a dispersion of responsibility within the community. However, his account of "metaphysical guilt" fails to explain why individuals to whom a morally wrong action cannot be ascribed still remain exposed to blame. The problem Kukathas raises — allocation of responsibility — is inconsistently resolved, insofar as May, while applying different criteria of responsibility, fails to thematize fully the character of the relation between the individual and the group as the foundation of responsibility. His existentially understood individuals are tainted by guilt for actions they took no part in.

Headway can be made here only if responsibility is disassociated from blame. But how are we to do this? I want to claim that an effort to conceptualize collective moral responsibility for collective crime must answer two questions: first, the character of the group identity; second, the character of the crime from the perspective of the group identity.

I will try to explain this by focusing on nation. Obviously, nation is not a "random collection". This group possesses both objective and subjective elements of identity. There is common history, inter-generational co-existence, common language, common tradition, common memory or oblivion, all that which we sometimes briefly identify as common culture. This culture also embodies a value-system that informs us of a minimum set of standards for distinguishing between good and bad, right and wrong. These standards exist as societal norms.³⁰ If we accept the already established position of various institutionalist theories, according to which institutions

embrace not only legally structured organizations, but also formal and informal "rules of the game", including a system of values,³¹ it may be inferred that nation is a group that is both institutionally and morally clearly structured. In other words, nation is a group with a clearly determined identity.

An objection is likely to be made at this point: as opposed to legally determined collectivities, a nation is not yet a person, or agent, or more precisely — it is not capable of acting *as nation*. The institutions that structure a nation are mainly informal. We cannot invoke the state as the formal institutional framework of nation, for both empirical and normative reasons. Empirically, not every nation has its state, while at the same time many states are multinational. Normatively, personification of a nation would lead to a collectivist attitude, in which there would be no room for individual autonomy. The baseline of this objection reads that nation is a legally indeterminable entity. Lawyers would say that nation has no legal capacity. It cannot be said that "the nation did this or that". Therefore, a nation cannot be a responsible agent.

How to respond to this? First, I will reiterate that here we must take up the question of a group's identity and the character of crime from the perspective of that identity. Is the group's identity such that the crime committed in its name necessarily makes each of its members responsible? My answer to this question is affirmative. If a nation is a group that, among other things, relies on certain common values, then a crime committed in the name of this nation is a violation of such values. The values in question do not belong simply to the nation as a collectivity. These are, at the same time, the values of each and every member of the nation: this is precisely why we talk about common values. This is not to say that members of a nation do not have their own individual normative standards, nor that individual morality should be judged only by the normative standards of the group. But, again: a nation is a group of people bound by multiple ties, among which an important place belongs to normative standards of behaviour in society. In the case of collective crime, a nation fell below a certain moral threshold, defined by the nation's own rules, customs, values, by what we generally regard as the way of life.³² This fall, this systematic violation of the minimum rules of civilized inter-personal communication, has at least two important aspects. First, its principal victims are human beings whose only sin consists in their belonging to another group. Second, by having fallen into collective crime, the group has deprived itself of the normative standards necessary for its own survival as a civilized community. Taken a step further, this may imply that as a result of the collective crime, each member of the nation falls into some kind of the "state of nature": this reference to the Hobbesian condition may not be entirely meaningless, at least to the extent that it implies a situation in which every individual would have to reconstruct her or his own normative standards of behaviour. But this would be an unsustainable situation, simply because the number of individual normative standards could equal the number of group members. There never was such a society, or such an ethnic group. And it is precisely this argument that could be taken as the foundation of collective moral responsibility: in the aftermath of collective crime, we are faced with the imperative of reconstructing the moral coordinates of our life together.

But the argumentative trouble herein is that in ascribing moral responsibility to a nation we are simultaneously ascribing moral responsibility to each of its members, including those who have done nothing morally wrong. An answer may arise from several insights into the way collective crime becomes integrated into the individual identity of each member of the group: first,

collective crime was committed by some members of a nation, in the name of all members of that nation; second, the crime was committed through invoking the core of national identity — the nation's basic values, customs, norms, traditions, and interests; third, the crime is a grave falsification or practical compromising of national identity. At stake is the fall below a certain civilizational minimum, which in the practice of the life together was known and accepted prior to the crime and which the vast majority of the members of the group had already interiorized at the time of the crime.

This fall below the civilizational minimum directly targets the moral integrity of each member of the group, independently of her or his personal attitude towards the crime. The foundation of my responsibility becomes simply the identity I share with the perpetrators. It is *only by coincidence* that I am a member of a nation, but the crime was *consciously and systematically* committed in my name. From here, it follows that the contingent nature of my national identity is revoked by the conscious intention and action of those who proclaimed my national name as the very reason for killing the people of another name. In other words, the contingent nature of my national identity dissolves, because the crime committed in my name is, in a particular sense, the ultimate fact: the ideological foundation, the character and the scope of the crime are such that it penetrates my individual identity.

If this holds good, collective moral responsibility can be understood as the duty of all members of the group to take a moral stance towards the crime that was committed in their name. This is sometimes called the "duty to respond".³³ This duty has two aspects, or two addressees. The first addressee is the victims and their community. The second addressee is us, the members of the group in whose name the crime was committed.

It is our duty to address the victims and their community. In doing so, we publicly admit and accept a fact which we privately know very well: that the killing was carried out in our name. It is the victims' right to expect this public utterance from all of us, and not only from those causally responsible for their suffering. Why? Because evil was inflicted on them, and their human dignity was violated in the name of all of us. I may have distanced myself from it, I may have resisted, but the victims and their beloved ones do not know this, nor do they have a duty to know. The fact that my inclusion in the ideological pattern of the crime rested on ideological manipulation and institutionalized lie, to which I perhaps consistently opposed, ceases to be of any importance in the face of what has been done. Once the innocent people were killed, the lie expressed in my name ceased to be a mere lie: it has become a fact. This is why the mere fact of my identity yields the victim's right to demand from me an unambiguous, public demonstration of rejection of the crime.

Hence, my moral burden is neither individual guilt, nor my share in collective guilt, nor moral blame, but a sense of duty towards the victims and their community. This is not a symbolic, one-time act, but rather a process of addressing the victims. Most probably this process should take as long as the victims feel what Linda Razik calls "reasonable fear".³⁴ This "reasonable fear", as the victim's attitude towards me and my group, could be expressed as follows:

Even if I believe you did not kill with your own hands, I don't know how you feel about the people who did. I don't know if you encouraged or approved of them. I don't know whether you will act like they did in the future. So I am afraid of you. If

you apologize, if you express regret, I will have less reason to be afraid, and maybe we can find a way to live in peace together.³⁵

In short, a powerful reason for joint responsibility of all members of the group consists in the insight that the victims, even if they are not prone to collectivizing guilt, keep reminding us of the link between our collective identity and the crime. If we understand responsibility in an etymological sense, as a duty to respond, then the community of victims becomes the first addressee of the response to the question of how and why the collective crime, an act hardly comprehensible to any normal person, became a reality.³⁶

This does not mean labelling the group, nor ascribing to it collective guilt or collective blame. Moral responsibility is a practical category, which thematizes the possibility of a civilized life in the aftermath of catastrophe. This brings us to its second aspect, where moral responsibility is understood as a special type of relationship among the members of the group in whose name the crime was committed. Its principal point should not be condemnation, ascription of guilt, paving the way for official apologies, nor even reconciliation. It should instead be understood as the reconstruction of the motivational patterns of behaviour that in the recent past led to a massive violation of human rights and universal moral values. The evil past must be subject to moral reflection by all individuals belonging to the nation, because this past was decisively stamped by moral corruption, by the loss of the capacity to distinguish between good and evil. What reigned in the preceding period can be identified as the culture of the practical affirmation of evil. The practical–political objective of reflection on collective responsibility would be to enable citizens to regain their recently and severely damaged capacity to distinguish between right and wrong, just and unjust.³⁷ If such a goal is not accomplished, the liberal values proclaimed by the proto–democratic regime change can easily slide into ritual facade without any legitimizing and practical authority. This is a collective problem, at least to the extent that we all want to live in a decent society.

¹ This text owes much to discussions with my students in the PhD seminar "Transitional Justice", held at Central European University, Budapest, in Autumn 2005. Otieno Isaack, Oana Lup, Nkwachukwu Orji, Serhiy Pukas, and Aleksandra Wyrozumska will recognize issues that we discussed. In addition, I am indebted to Svetlana Gavrilovic, Obrad Savic and Lino Veljak for their valuable assistance. Of course, the usual disclaimer holds: the responsibility for the final outcome rests exclusively on the author.

² One familiar attempt at overcoming retributivism and its concept of "just desserts" consists in claiming that the aim of the punishment is to overcome the evil by reaffirming the behaviour legally determined as right. Critics of this view will find it difficult to understand how yesterday's wrongdoings can be overcome by today's punishment — this is especially the case with the mass crime.

³ R. Teitel, *Transitional Justice*, Oxford: Oxford University Press 2000, 66.

⁴ M. Arenhövel, *Demokratie und Erinnerung. Der Blick zurück auf Diktatur und Menschenrechtsverbrechen*, Frankfurt und New York: Campus Verlag 2000, 26.

⁵ This position is *essentially* backward–looking. The forward–looking aspect of the moral argument can be expressed as the claim that there can be no normal democratic future without confronting the immorality of the past. But I also believe that our moral duty to confront the past is fully independent of our future–oriented considerations. This will be elucidated in the concluding section of the paper.

- ⁶ J. Waldron, "Superseding Historic Injustice", *Ethics*, 103, 1992, 5.
- ⁷ J. Allen, "Balancing Justice and Social Unity: Political Theory and the Idea of a Truth and Reconciliation Commission", *University of Toronto Law Journal*, Summer, 1999, 335.
- ⁸ This definition is taken from Linda Radzik: "Collective Responsibility and Duties to Respond", *Social Theory and Practice*, Vol. 27, No. 3, 2001, 456.
- ⁹ I am grateful to Obrad Savic for a thought-provoking discussion which yielded a distinction between regime crime and collective crime.
- ¹⁰ I am aware that both designations may easily look not merely imprecise, but confusing as well. Does not every criminal regime rest on an unpredictable and arbitrary use of coercion? If this is true, does it not follow that the identification of the first type of the regime is insufficient, since it fails to include coercion, while the identification of the second type is insufficient because it refers only to the obvious? As to the latter type, it is in addition well known that it does not rest on naked violence, but also on a massive ideological manipulation and distorted presentation of reality, imposed by the regime on the subjects. However, while these points are certainly accurate, they do not necessarily question the proposed distinction. Criminal regimes differ one from another, and the above classification presents an attempt to offer their possible classification, departing from the type of crime, ie from the type of involvement of the regime and its subjects in crime.
- ¹¹ J. Raikka, "On Disassociating Oneself from Collective Responsibility", *Social Theory and Practice*, Vol. 23, No.1, 1997, 93.
- ¹² C. Kukathas, "Responsibility for Past Injustice: How to Shift the Burden", *Politics, Philosophy & Economics*, Vol. 2, No. 2, 2003, 172.
- ¹³ For a brief overview of basic arguments of methodological individualism and for useful criticism, see: R. Downie, "Responsibility and Social Roles", and P. French (ed.), *Individual and Collective Responsibility: Massacre at My Lai*, Cambridge, Mass.: Schenkman 1972, 66.
- ¹⁴ D. Dyzenhaus, "Justifying the Truth and Reconciliation Commission", *The Journal of Political Philosophy*, Vol. 8, No. 4, 2000, 473.
- ¹⁵ K. Baier, "Guilt and Responsibility", in: P. French, op. cit., 49.
- ¹⁶ H. Arendt, *Eichmann in Jerusalem. Report on the Banality of Evil*, Harmondsworth: Penguin, 1977, 294–298.
- ¹⁷ For the classical exposition of the problem, see: Aristotle, *The Nicomachean Ethics*, London: Penguin, 1976, 112: "An act is compulsory when it has an external origin of such a kind that the agent or patient contributes nothing to it."
- ¹⁸ T. May, *Autonomy, Authority and Moral Responsibility*, Dordrecht: Kluwer, 1998, 27. The rest of this section is guided by Thomas May's reading.
- ¹⁹ Aristotle, op. cit., 112.
- ²⁰ T. May, op. cit., 66.
- ²¹ Aristotle, op. cit., 113: "In some cases, however, the action, though not commended, is pardoned: viz. when a man acts wrongly because the alternative is too much for human nature, and nobody could endure it."
- ²² T. May, op. cit., 69.

- ²³ Of course, there are many other theoretical approaches to collective responsibility. Except for those mentioned below, I leave them unthematized, because none of them addresses the problem posed in this paper.
- ²⁴ For a discussion on the possible collective responsibility of "random collections" see: V. Held, "Can a Random Collection of Individuals be Morally Responsible?", *The Journal of Philosophy*, Vol. 67, No. 14, 1970; S. Bates, "The Responsibility of 'Random Collections'", *Ethics*, Vol. 81, No. 4, 1971; D. Miller, "Distributing Responsibilities", *The Journal of Political Philosophy*, Vol. 9, No. 4, 2001.
- ²⁵ C. Kukathas, op. cit., 181.
- ²⁶ *Ibid*, 185–186.
- ²⁷ H. Arendt, "Collective Responsibility", in: J. W. Bernauer (ed.), *Amor Mundi*, Boston: Martinus Nijhoff Publishers 1987, 45.
- ²⁸ L. May, *Sharing Responsibility*, Chicago: The University of Chicago Press 1992, 148; L. Radzik, op. cit., 463.
- ²⁹ L. May, op. cit., 2.
- ³⁰ I assume without further elaboration that these values are both ethical (pertaining to a group-specific idea of the good life), and moral (comprising universally valid standards of right). I also assume that ethical values of a nation are in accordance with universal(izable) moral standards.
- ³¹ Cf. classical readings: D. North, *Institutions, Institutional Change and Economic Performance* (Cambridge: Cambridge University Press, 1990); J. March and J. Olsen, "The New Institutionalism: Organizational Factors in Political Life", *American Political Science Review*, Vol. 78, No. 3, 1984; P. Hall and R. Taylor, "Political Science and the Three New Institutionalisms", *Political Studies*, XLIV, 1996.
- ³² D. Cooper, "Responsibility and the System", in: P. French (ed.), *Individual and Collective Responsibility: Massacre at My Lai*, Cambridge, Mass.: Schenkman, 1972, 88–90.
- ³³ L. Radzik, op. cit., 465.
- ³⁴ *Ibid*, 466.
- ³⁵ *Ibid*.
- ³⁶ "A little more thoughtfulness among the principal perpetrators and a little less moral indifference among the bystanders were all that stood between life and death for millions of victims." R. Baum, "Holocaust: Moral Indifference as the Form of Modern Evil", in: A. Rosenberg and G. Myers (eds.), *Echoes from the Holocaust. Philosophical Reflections on a Dark Time*, Philadelphia: Temple University Press 1988, 53.
- ³⁷ J. Habermas, "Warum ein Demokratiepreis für Daniel J. Goldhagen? Eine Laudatio", *Die Zeit*, 12/1997.