

Towards A New Transitional Justice Model: Assessing the Serbian Case

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TABLE OF CONTENTS

I.	INTRODUCTION	172
II.	A SURVEY OF TRANSITIONAL JUSTICE EPISODES	176
	A. <i>The Concept and Existence of the "Pact"</i>	177
	1. <i>Negotiated Pacts</i>	178
	a. <i>Negotiated Prior to Transition</i>	178
	b. <i>Negotiated in the Midst of the Transition</i>	180
	2. <i>Imposed Pacts</i>	181
	a. <i>Imposed by Old Regime</i>	181
	b. <i>Imposed by New Regime</i>	182
	3. <i>Absent or Broken Pacts</i>	183
	B. <i>Specific Types of Legal Institutions</i>	184
	1. <i>Regular (Domestic) Courts</i>	185
	2. <i>Special (Domestic) Courts</i>	186
	3. <i>Quasi-Judicial Institutions</i>	187
	C. <i>Putting the Pieces Together: A Typology of Transitional Justice Episodes</i>	189
III.	POLITICAL BACKGROUND OF THE SERBIAN CASE	192
	A. <i>The Domestic Legacy of the Milošević Regime</i>	192
	B. <i>Serbia After Milošević: 2000-2005</i>	193
	1. <i>Organized Crime's Infiltration of the Serbian Economy</i>	194

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	2. <i>Organized Crime’s Infiltration of the Serbian Security Services</i>	197
	C. <i>The ICTY and Political Instability in Serbia</i>	201
IV.	THE STRUCTURE OF THE SERBIAN LEGAL SYSTEM	202
	A. <i>The General Legal System</i>	202
	1. <i>A Civil Law System</i>	202
	2. <i>Structure of the Courts</i>	203
	3. <i>Initiation/Investigation of a General Criminal Case</i>	204
	B. <i>The Specialized Judicial Institutions</i>	206
	1. <i>War Crimes</i>	206
	a. <i>The Special Court for War Crimes</i>	206
	b. <i>The War Crimes Prosecutor’s Office</i>	207
	2. <i>Organized Crime</i>	207
	a. <i>The Special Court for Organized Crime</i>	207
	b. <i>The Organized Crime Prosecutor’s Office</i>	208
V.	THE ORGANIZATIONAL AUTONOMY OF THE SPECIAL COURTS	208
	A. <i>Organizational Autonomy of the Special Courts for War Crimes and Organized Crime</i>	209
	1. <i>Case Autonomy</i>	209
	2. <i>Budgetary Autonomy</i>	210
	B. <i>The Public Policy Objectives of the Special Courts</i>	211
	1. <i>Pursuit of Objectives by the Special Court for War Crimes, Counter by Government of Serbia</i>	212
	a. <i>Attempted Government Sabotage of the Day-to-Day Activities of the Special Court for War Crimes (The “Ovčara” Trial)</i>	212
	b. <i>Attempted Government of the Day-to-Day Activities of the Special Court for War Crimes (the “Hadžić” Affair)</i>	214
	c. <i>Attempted Government Sabotage of the Legislative Foundation of the Special Court for War Crimes</i>	215
	2. <i>Pursuit of Objectives by the Special Court for Organized Crime, Counter by Government of Serbia</i>	216
	a. <i>The “Đinđić” Trial</i>	216
	b. <i>Parliamentary Inquiry</i>	219
VI.	TESTING THE SERBIAN CASE	220
VII.	CONCLUSION	225

I. INTRODUCTION

Given the “third wave” of democratic development and entrenchment that has taken hold around the world within the past three decades,¹ the topic of how these transitioning societies cope with the legacy of atrocity and criminality that often accompany authoritarian rule has taken on a

1. See SAMUEL P. HUNTINGTON, *THE THIRD WAVE: DEMOCRATIZATION IN THE LATE TWENTIETH CENTURY* (Univ. of Okla. Press 1991).

fresh salience. The structural, ethical, legal, and political problems faced during such transitions have become the topic of a burgeoning “transitional justice” sub-field within Law and Political Science. This Article will survey the key episodes of transitional justice in various countries since the 1970s, and then apply the lessons gleaned to the transition of Serbia² during the first five years following the deposition of authoritarian ruler Slobodan Milošević in October 2000, and the subsequent establishment of democratic rule. The Serbian case of transitional justice, especially its first five years (2000–2005), is important because it demonstrates how the issue of accountability for past crimes within a society can often butt up against concerns over political stability in a country that is attempting to consolidate its new democracy. The way in which the process of transitional justice is undertaken in such environments raises questions that move beyond simply legal, and indeed, moral concerns over “justice” and “right versus wrong,” and instead raises more context specific concerns of institutional design and political stability. This Article will show that the empirical evidence demonstrates that the outcome of the transitional justice process a country undertakes, upon its political stability, needs to be taken into account when fashioning said process. There needs to exist some sort of common understanding between the various parties involved as to the procedures and the extent to which transitional justice will be undertaken. This argument takes away nothing from those who would cite to the necessity of holding accountable those who have committed past crimes, but rather argues that this noble concern over justice needs to be equally balanced with an understanding of the

2. The following should be noted: The Socialist Federal Republic of Yugoslavia (SFRY) was formed in 1945 and contained the six constituent republics of Serbia, Montenegro, Slovenia, Croatia, Bosnia-Herzegovina, and Macedonia. In 1991–1992, Slovenia, Croatia, Bosnia-Herzegovina, and Macedonia declared their independence from the SFRY, leaving only Serbia and Montenegro within the union, which they promptly reorganized (into a looser federal structure) and renamed as the Federal Republic of Yugoslavia (FRY). In 2003, Serbia and Montenegro dissolved the FRY and replaced it with the State–Union of Serbia and Montenegro (SCG) which was supposed to act as an even looser confederation, but in reality served as a vehicle for the de facto independence of both republics. Actual independence was achieved by both republics in late 2006 when the SCG was dissolved. This Article surveys the transitional justice process within Serbia during the 2000–2005 period. Although technically not an independent country and instead part of first the FRY, and then later the SCG, during this time period, the republic of Serbia was independent and quite separate from its sister republic of Montenegro in everything but name (with its own separate customs borders, currency, and judicial or political institutions).

political realities facing newly transitioning states. The points made here are not normative, but rather focus on the empirical question of what variable(s) ensure the success of the transitional justice processes a country may undertake. As the Serbian case of transitional justice during 2000–2005 shall demonstrate, if the balance between the need for justice and the desire for stability are not met, the result shall be a situation where both justice and stability suffer.

The Socialist Federal Republic of Yugoslavia (SFRY), formed in 1945, was a multi-ethnic state made up of six constituent republics: Serbia, Montenegro, Slovenia, Croatia, Bosnia-Herzegovina, and Macedonia. For much of its history, the country was ruled by the Communist dictator Josip Broz Tito.³ With Tito's death in 1980, the one unifying national leader that was essential for dealing with the financial collapse the country faced in the mid-1980s (as a result of not being able to pay its international debt) was no longer on the scene. In the first multi-party election allowed in the country in 1989–1990, nationalist politicians (not wedded at all to the idea of Yugoslavia) came to power in the republics of Serbia, Slovenia, Croatia, Bosnia-Herzegovina, and Macedonia. By 1991–1992, Slovenia, Croatia, Bosnia-Herzegovina, and Macedonia had declared their independence from the SFRY (leaving only the republics of Serbia and Montenegro remaining within Yugoslavia). While the nationalist President of Serbia, Slobodan Milošević, was willing to allow Slovenia and Macedonia to leave Yugoslavia, Croatia and Bosnia-Herzegovina, with their significant ethnic Serb minority populations, were not accorded the same privilege. The resulting civil war lasted until 1995 with numerous atrocities and war crimes committed by all sides. Realizing the value of the domestic organized criminal syndicates within Serbia, Milošević ceded large portions of the Serbian economy to the Serbian mafia in an effort to bust the United Nations (U.N.) sanctions that had been imposed on the country, and at the same time recruited their members to serve in his security services and fight in the civil war. Responding to the murderous excesses of this conflict, the U.N. Security Council, in 1993, established the International Criminal Tribunal for the former Yugoslavia (ICTY)⁴ to judge serious breaches of international humanitarian law committed in the territory of the former

3. See generally JOHN R. LAMPE, *YUGOSLAVIA AS HISTORY* (Cambridge Univ. Press 2000) (1996), for an excellent detailed history of Yugoslavia from the early 20th Century up until the late 1990s.

4. See S.C. Res. 827, U.N. Doc. S/RES/827 (May 25, 1993) (establishing the ICTY under the Security Council's Chapter VII powers, and determining that ethnic cleansing in the former Yugoslavia constituted a threat to international peace and security) [hereinafter ICTY].

Yugoslavia.⁵ Eventually, not only Milošević, but also a vast segment of the Serbian security and defense establishment found themselves either under investigation or under indictment by the ICTY. Within Serbia itself, even after the end of the civil war in 1995, Milošević continued to use the Serbian mafia to staff his security services and buttress his power. With the end of Milošević's rule in October 2000, the democratic opposition that took power found itself faced with the need to hold accountable the organized crime figures within the security services that had committed so many crimes both during the civil war and its aftermath, but in a way that would preserve the fragile political stability of the country.

The transitional justice mechanism the Government of Serbia adopted to address the crimes committed during Slobodan Milošević's authoritarian rule was to establish, in 2003, two specialized domestic courts—with accompanying independent prosecutorial offices—to investigate war crimes and organized crimes committed in the territory of the former Yugoslavia. Through an examination of these specialized portions of the judicial branch of the Republic of Serbia, specifically the War Crimes Chamber of the Belgrade District Court (Special Court for War Crimes)—including its independent Prosecutor's Office—and the Organized Crime Chamber of the Belgrade District Court (Special Court for Organized Crime)—including its independent Prosecutor's Office, up until 2005—this Article shall demonstrate how these judicial agencies eventually achieved near-complete structural autonomy from the Government of Serbia. In achieving this autonomy, these agencies were no longer embedded within the domestic Serbian political process and transformed instead into purely independent political actors. Structurally autonomous and no longer answering to the same constituency as the Government of Serbia, the Special Courts for War Crimes and Organized Crime came to develop their own public policy objectives that were in stark contrast to the stated goals and objectives of the Serbian Government. By the close of 2005, the ensuing political battle had directly resulted in an open feud between the Serbian Government and the Special Courts, during which the Special Courts found the Serbian

5. Note that in this context we are referring to the pre-1992 Socialist Federal Republic of Yugoslavia (SFRY) which consisted of all five of its now independent successor states, not the rump Federal Republic of Yugoslavia (FRY) which was formed in 1992 by the former constituent republics of Serbia and Montenegro.

Government blocking their attempts to bring criminal perpetrators to justice. The Serbian Government found the Special Courts (through their actions to bring such perpetrators to justice) threatening the fragile political stability of the state.

Part II of this Article will survey the various episodes of transitional justice throughout the world since the 1970s. The purpose of this survey is to formulate and then present a typology illustrating the wide range of available transitional justice mechanisms for societies dealing with the legacies of atrocity and criminality in the wake of a transition. Through an analysis of the typology, it will become clear that in order for a country's transitional justice process to achieve some measure of success, there needs to exist some sort of common understanding between the various parties involved as to the procedures and the extent to which transitional justice will be undertaken. Part III of this Article shall present a brief historical background of the mass atrocities and crimes that were committed in Serbia during the rule of Slobodan Milošević. Part IV of this Article will offer a general description of the Serbian legal system during the 2000–2005 period, as well as an in-depth description of the specialized judicial institutions created in 2003 to address the need for transitional justice in Serbia due to the atrocities and crimes committed during Milošević's rule of the country. Part V of this Article shall explore the work of Serbia's specialized judicial institutions up until 2005 and offer an assessment of the institutional factors that led to their inability to bring criminal perpetrators to justice and indeed threaten the fragile political stability of the state (through their actions). Part VI of this Article will return to the typology of transitional justice episodes and mechanisms presented in Part II and test the proposition gleaned from that typology (i.e. that in order for the transitional justice process undertaken by a country to achieve some measure of success, there needs to exist some sort of common understanding between the various parties involved as to the procedures and the extent to which transitional justice will be undertaken) against the Serbian case (c. 2000–2005).

II. A SURVEY OF TRANSITIONAL JUSTICE EPISODES

Since the late 1970s, a wave of scholarship studying how societies transitioning from authoritarian rule can cope with the legacy of atrocity and criminality committed during the previous regime has emerged. Through a survey of these episodes, a picture can begin to be pieced together of the various mechanisms for transitional justice available to newly transitioning states. As shall be seen, the picture that emerges in any transition situation is one in which two variables are always present.

The first variable is whether there exists a “pact” of some kind between the old authoritarian regime and the new regime dealing with the administration of justice for any crimes that may have been committed in the past. The second variable deals with the specific type of legal institution which is tasked with holding the old authoritarian regime perpetrators accountable. Through exploring both of these variables in detail, a typology illustrating the wide range of available transitional justice mechanisms can be presented.

A. The Concept and Existence of the “Pact”

The concept of a “pact” between old and new regimes in democratic transitions is nothing new. Within the sub-field of comparative politics in Political Science, numerous scholars have explored the negotiation process or “pact-making” that goes on between soft-line elements of authoritarian regimes and democratic oppositions in order to arrange an orderly transition where at least some of the priorities and concerns of the old regime will be taken into account.⁶

This traditional concept of “pact making” used by comparative politics scholars is quite different however from the way the term will be conceptualized here, in the context of transitional justice. The pact-making comparative politics scholars refer to is a broad formalized process where old and new regime elements come to explicit understandings regarding a comprehensive range of issues dealing with post-transition governance—everything from the distribution of power within the new regime to social compacts between various public and private economic groups (organized business, labor, etc.) and the state.⁷ The idea of pact-making in the transitional justice context presented here, on the other hand, is a much more focused concept. Here, the term refers to whether there exists some type of common understanding between the old and new regimes regarding the procedures and extent

6. See, e.g., GUILLERMO O'DONNELL & PHILIPPE C. SCHMITTER, *TRANSITIONS FROM AUTHORITARIAN RULE: TENTATIVE CONCLUSIONS ABOUT UNCERTAIN DEMOCRACIES* (John Hopkins Univ. Press 1993) (1986); HUNTINGTON, *supra* note 1; Terry Lynn Karl, *Modes of Transition in Latin America, Southern and Eastern Europe*, in *TRANSITIONS TO DEMOCRACY: COMPARATIVE PERSPECTIVES FROM SOUTHERN EUROPE* (Geoffrey Pridham ed., 1995).

7. Terry Lynn Karl, *Dilemmas of Democratization in Latin America*, 23 *COMP. POL. 1*, 9–11 (1990).

through which transitional justice will be undertaken. The use of the language “common understanding” is deliberate here. While pact-making in the transitional justice context can take the form of a written negotiated document (or series of documents) between the old and new regimes, it can also be much less formal. Indeed, the existence of a “pact” in the transitional justice context does not necessarily imply that old regime elements joined the new regime in negotiating it—as will be seen, pacts can be imposed by the new regime upon elements of the old if the new regime is strong enough to do so.

1. Negotiated Pacts

a. Negotiated Prior to Transition

These pacts are the result of negotiations between the authoritarian regime and the democratic opposition waiting in the wings *prior* to the actual regime transition. The results of these negotiations can take several forms.

In the case of Spain’s transition (c. 1975–1979) out of the authoritarian Franco Regime, the transition process was initiated by Francisco Franco’s death in 1975. The succeeding government, headed by the newly crowned King Juan Carlos I and Prime Minister Adolpho Suarez Gonzalez, sought to establish a common understanding between both Francoist and opposition groups regarding the administration of transitional justice in the new transition Regime. Prime Minister Suarez Gonzalez sought this common understanding through negotiations on two fronts: with the Military authorities on the one hand and opposition political parties on the other. Obtaining the agreement of the Military authorities was important; the Military high command was loyal to the Francoist political system and thus in a position to seriously influence (for better or worse) the transition process.⁸ In September 1976, Prime Minister Suarez Gonzalez, with the assistance of King Juan Carlos I, was able to obtain the support of the Military high command through a guarantee that, in any future regime, the Military authorities would not be purged and instead remain in place, with any future reforms to the Military following the established legal principles.⁹ As with the Military, obtaining the agreement of the opposition parties was also key, as the

8. Paloma Aguilar, *Justice, Politics, and the Memory of the Spanish Transition*, in *THE POLITICS OF MEMORY: TRANSITIONAL JUSTICE IN DEMOCRATIZING SOCIETIES* 106–08 (Alexandra Barahona de Brito et al. eds., 2001).

9. Jose Maria Maravall & Julian Santamaria, *Political Change in Spain and the Prospects for Democracy*, in *TRANSITIONS FROM AUTHORITARIAN RULE: SOUTHERN EUROPE* 71 (Guillermo O’Donnell et al. eds., 1986).

opposition parties (especially the Communists) were very adept at mobilizing their supporters into public protests and strikes.¹⁰ Prior to the multi-party June 1977 elections, Prime Minister Suarez Gonzalez was able to negotiate the entry of the opposition parties into the (formerly) one-party political system in exchange for them dropping any demands for the future prosecution of Francoist era political and military authorities for atrocities and crimes committed by the old Regime.¹¹ The culmination of these negotiated pacts with the Military and opposition parties was the ratification, in October 1977 by the newly elected democratic parliament, of a “full-stop” amnesty law that prevented any trials of members of the old Francoist Regime.¹²

In the case of South Africa’s transition (c. 1991–1995) out of the authoritarian Apartheid Regime of the Afrikaner dominated National Party (NP), the transition process was initiated by the NP Government itself—which set out to negotiate a gradual transition with the opposition African National Congress (ANC)—starting in 1990 when the ANC was unbanned and its leader, Nelson Mandela, released from prison. The following year, multi-party talks between the NP and ANC began. Negotiations, which dragged on for two years, hinged on the ANC’s demand for free and multi-party elections and the NP’s desire to secure a position for itself in the new post-Apartheid South Africa (a desire that was tied in large part to an amnesty for the apartheid era political crimes committed by the NP Government and its supporters).¹³ In 1993 an agreement was reached on an interim Constitution which, in its epilogue, contained a provision for “National Unity and Reconciliation” that established the basis for amnesty for political crimes (i.e. those committed on behalf of or in furtherance of the Regime) committed during the Apartheid era. Following multi-party elections in 1994, the new ANC-led Government set out to put the amnesty provision of the 1993 Interim Constitution in place through the *Promotion of National Unity and Reconciliation Act*.¹⁴ Section 3 of the Act established an amnesty

10. *Id.* at 84.

11. *Id.*

12. Aguilar, *supra* note 8, at 102–03.

13. Richard A. Wilson, *Justice and Legitimacy in the South Africa Transition*, in *THE POLITICS OF MEMORY: TRANSITIONAL JUSTICE IN DEMOCRATIZING SOCIETIES 193–94* (Alexandra Barahona de Brito et al. eds., 2001).

14. Promotion of National Unity and Reconciliation Act 34 of 1995, *available at* <http://www.info.gov.za/view/DownloadFileAction?id=71008> (last visited Sept. 21, 2009).

scheme whereby, in exchange for a full recounting of the facts, a person that had committed politically motivated apartheid era crimes could receive amnesty.

b. Negotiated in the Midst of the Transition

These pacts are the result of negotiations between the new democratic regime in power, and elements of the former authoritarian regime at some point *after* the actual democratic regime transition.

In the case of Argentina's initial transition (c. 1983–1987) out of the authoritarian Military Junta that had ruled the country since taking power in 1976, the transition process was initiated by the Junta's loss of popular support following Argentina's 1982 defeat in the Falklands War. The speed at which the Junta fell from power, coupled with the complete collapse of its public support, left little opportunity for the Junta to negotiate a transitional justice pact with the opposition (which itself was divided).¹⁵ The succeeding democratic government of President Raul Alfonsin proceeded to begin pursuing transitional justice through active prosecutions of high level Military officers, which culminated in the trial and conviction of five of the original nine Junta leaders (two of which, General Videla and Admiral Massera, were sentenced to life imprisonment).¹⁶ The general dissatisfaction within the officer corps unleashed by this process led to discontent in the military ranks when more junior officers began to be targeted for prosecution.¹⁷ Although the Alfonsin Government tried to mollify these dissatisfied elements in the Military through *The Full Stop Law* in December 1986 (which put a thirty day time limit on filing future criminal prosecutions), the Military was still not appeased.¹⁸ The culmination of this general dissatisfaction within the Military, especially amongst the more junior officers, was a military uprising during Easter of 1987 led by Lt.-Col. Aldo Rico. The demands of the rebelling officers, which included full amnesty (for crimes committed during the Junta's Regime) and the suspension of current trials, were negotiated directly with President Alfonsin himself (who met with the rebelling officers personally), and soon put into effect by the Alfonsin Government. Current trials were suspended, and in June 1987

15. LUIS RONIGER & MARIO SZNAJDER, *THE LEGACY OF HUMAN RIGHTS VIOLATIONS IN THE SOUTHERN CONE: ARGENTINA, CHILE, AND URUGUAY* 56–58 (Oxford Univ. Press 1999).

16. Kathryn Sikkink & Carrie Booth Walling, *Argentina's Contribution to Global Trends in Transitional Justice*, in *TRANSITIONAL JUSTICE IN THE TWENTY-FIRST CENTURY: BEYOND TRUTH VERSUS JUSTICE* 306–07 (Naomi Roht-Arriaza & Javier Mariezcurrena eds., 2006).

17. *Id.*

18. RONIGER & SZNAJDER, *supra* note 15, at 69–70.

when the Government submitted an amnesty law (*The Law of Due Obedience*) to the Argentine Congress, the Congress, feeling under pressure by the Military, passed it.¹⁹ The law granted all military officers with the rank of Lt.-Col. and below amnesty for any human rights violations committed during the Junta's Regime.²⁰ The status quo provided by *The Full Stop Law* and *The Law of Due Obedience* would remain in effect in Argentina until 2003.²¹

2. *Imposed Pacts*

Unlike the negotiated pacts described above, these pacts are not the result of negotiations between authoritarian regimes and their democratic oppositions. Rather, these pacts are imposed by one party over the other. This usually occurs when one party (either the old regime or democratic opposition) has significantly more power over the other, and can consequently impose its desired pact—outlining the extent of the transitional justice process. The weaker party, although not necessarily satisfied with the pact, being in the weaker position has no choice but to accept it.

a. *Imposed by Old Regime*

In the case of Chile's initial transition (c. 1989–1999) out of the authoritarian Pinochet Regime, the transition process was initiated by Augusto Pinochet's voluntary resignation from power in 1989 (after losing a plebiscite on the prolongation of his rule). Dictating the transition process from a position of strength, the Pinochet Regime placed several key constraints on the succeeding democratically elected government of President Patricio Aylwin to pursue transitional justice. These constraints consisted of the following: (1) the 1980 Constitution promulgated by the Regime and the “authoritarian enclaves” contained

19. *Id.* at 91–94.

20. *Id.*

21. It should be noted however that *The Full Stop Law* and *The Law of Due Obedience* were later found not to apply to the kidnappings and identity charges of the children of leftist activists disappeared by the Regime. Also it should be noted that in a 1995 decision, the Argentine Federal Court of Appeals held that although *The Full Stop Law* and *The Law of Due Obedience* precluded criminal prosecutions, they did not prevent judicial investigations and court proceedings in order to ascertain the truth of what happened to murdered or disappeared people. See Sikkink & Walling, *supra* note 16, at 314–16.

within it; (2) the *1978 Amnesty Law* that had been passed by the Regime; and (3) the fact that the Chilean judiciary was still staffed by members appointed by the old Regime. The first constraint, the 1980 Constitution, was riddled with so-called “authoritarian enclaves” that severely curtailed the powers of the new Aylwin Government. The Military enjoyed its own budget, separate from that of the state, and autonomous from state oversight; the Military had the power to appoint Senators to the Chilean Congress’ upper house;²² and the Military’s National Security Council (composed of the Heads of the various Armed Force Branches) placed the military in a position to monitor the actions of the civilian administration.²³ The second constraint, the *1978 Amnesty Law*, had granted a “full-stop” pardon to all state security officials that had committed crimes between September 1973 and March 1978.²⁴ The third and final constraint was the fact that the judiciary was filled with Pinochet-era appointees, which meant that the Aylwin Government was faced with a judicial branch that had cooperated with the Military during the old Regime and were thus loath to act against it now that the Regime had been replaced.²⁵ Responding to a challenge to the *1978 Amnesty Law*’s constitutionality, the Chilean Supreme Court ruled in August 1990 that the Law was indeed constitutional—quashing any pending investigations.²⁶ Unable to amend or override the *1978 Amnesty Law* because of the blocking power of the military-conservative dominated Chilean Senate, and stymied by the courts, the Aylwin Government found its options for transitional justice constrained by the structures the previous Pinochet Regime had put in place to protect its interests.

b. Imposed by New Regime

In the case of Rwanda’s initial transition (c. 1994–present) out of the ethnically Hutu-dominated Regime of Juvenal Habyarimana, the transition was initiated by the Hutu Regime’s military defeat (following its estimated massacre of 500,000 to 800,000 ethnic Tutsi Rwandans, as well as sympathetic Hutus) by the Tutsi dominated rebel group, the Rwandan Patriotic Front (RPF). Owing to the fact that its political position had been assured by its military strength, the new RPF Government was able to dictate the process through which transitional

22. Which, together with the conservative Senators within that chamber, gave the conservative forces in the country the power to block any legislation that they did not like.

23. RONIGER & SZNAJDER, *supra* note 15, at 91–94.

24. David Pion-Berlin, *The Pinochet Case and Human Rights Progress in Chile: Was Europe a Catalyst, Cause or Inconsequential?*, 36 J. LAT. AM. STUD. 479, 483 (2004).

25. RONIGER & SZNAJDER, *supra* note 15, at 95–96.

26. Pion-Berlin, *supra* note 24, at 494.

justice would be undertaken in Rwanda. The new Regime's former adversaries, owing to their military defeat, had no choice but to accept the pact if they wished to return to Rwanda (from the crowded refugee camps in eastern Congo many had fled to) and resume their lives. The pact the RPF imposed was one in which returning Hutu combatants would have to attend Ingando Camps.²⁷ These camps served to promote Hutu-Tutsi reconciliation through indoctrinating their participants with RPF propaganda.²⁸ The Ingando Camps run for returning combatants lasted from several weeks into months, and were a condition for the discharge of ex-combatants into society.²⁹ Once discharged, ex-combatants were given aid packets (containing household supplies, transport to one's home village, and food rations).³⁰ The majority of lecturers at Ingando Camps were RPF Government representatives—the lectures themselves consisting of how the mentality of the previous Hutu Government was mistaken, how the ethnic distinctions between Hutu and Tutsi were colonial era inventions, and how the RPF Government was achieving great things for the country.³¹ Participation in Ingando Camps was the imposed condition the RPF Government placed on its former Hutu adversaries who wished to re-integrate into Rwandan society.

3. *Absent or Broken Pacts*

As was the case in Argentina during its initial transition (c. 1983–1987), there can be situations where transitional justice pacts between old and new regime elements are absent. There can also be cases, however, where previously implemented pacts are broken.

In the case of Argentina after 2003, the democratic Government of President Nestor Kirchner was able to break the transitional justice pact negotiated between the Alfonsín Government and the Military in 1987 with the promulgation of *The Law of Due Obedience*. Relying on an argument couched in international law (the Kirchner Government had

27. Note that while here only the experiences of Hutu ex-combatants at Ingando Camps is discussed, Ingando Camps were not only reserved for Hutu ex-combatants. All Rwandan citizens were expected to attend these camps at some point in their lives.

28. Chi Mgbako, Ingando *Solidarity Camps: Reconciliation and Political Indoctrination in Post-Genocide Rwanda*, 18 HARV. HUM. RTS. J. 201, 202 (2005).

29. *Id.* at 209–10.

30. *Id.* at 210–11, n.72.

31. *Id.* at 213–14, 218.

recently implemented, by decree, Argentina's ratification of an international convention prohibiting the granting of amnesty for war crimes and crimes against humanity) and a domestic push in the country itself to hold accountable the perpetrators of crimes during the Junta's Regime, the Government was able to maneuver the Argentine Congress into repealing both the *The Full Stop Law* and *The Law of Due Obedience*.³² Shortly thereafter, in 2005, Kirchner appointees to the Argentine Supreme Court helped sway the Court in declaring both *The Full Stop Law* and *The Law of Due Obedience* unconstitutional.³³

In the case of Chile after 1999, the first step into breaking the transitional justice pact imposed by the authoritarian Pinochet Regime on its successors was made by the courts. In June 1999, relying on a complicated legal argument which held that the *1978 Amnesty Law* could not apply to disappeared persons,³⁴ the Chilean Supreme Court (upholding a lower court verdict) held the *1978 Amnesty Law* did not apply to such cases.³⁵ The Chilean Supreme Court was able to rule in such a fashion because it was no longer dominated by Pinochet era appointees. The Court had seen a rapid turnover in membership from 1997 to 1998 when the Chilean Congress passed a constitutional amendment putting a mandatory retirement age of seventy-five on justices and expanded the composition of the Court to twenty-one members.³⁶ The parties on the left had been able to gain the support of the more conservative parties in the Chilean Senate in order to pass the amendment because the conservative parties, eyeing future presidential elections, wished to distance themselves from disreputable symbols of the authoritarian past (i.e. the Pinochet appointee dominated Supreme Court).³⁷

B. Specific Types of Legal Institutions

Legal institutions can take many shapes and forms besides the simple stand-by of a court. Any institution backed by the power of the state and charged with dispensing some sort of legal judgment—whether a judgment against a specific person or persons, or a judgment interpreting

32. Sikkink & Walling, *supra* note 16, at 313–19.

33. *Id.* at 317.

34. The concrete result of this argument being that kidnappings were viewed as still (in the absence of a body) technically in commission and thus beyond the 1973–1978 time frame covered by the *Amnesty Law*.

35. Pion-Berlin, *supra* note 24, at 483.

36. *Id.* at 500.

37. *Id.* at 500–01.

a point of law or fact—can be classified as a legal institution. The type of legal institution that is tasked with implementing transitional justice is an important variable to grasp. This being said, there is nothing to prevent countries undertaking transitional justice to use more than one type of legal institution to do so—as will be seen.

1. Regular (Domestic) Courts

This legal institution is the simplest and most familiar—the regular everyday criminal and civil courts of a country.

In South Africa's transition (c. 1991–present) out of the authoritarian Apartheid Regime of the Afrikaner-dominated National Party (NP), there were two specific types of legal institutions utilized to implement transitional justice—one being the regular everyday criminal courts of the country. Recall that the *Promotion of National Unity and Reconciliation Act* had set out a procedure through which people having committed apartheid-era political crimes could apply for amnesty.³⁸ Those who did not apply for amnesty could then be held criminally liable for their apartheid-era political crimes. The prosecution of such people fell to the regular South African courts and the National Prosecuting Authority (NPA), the country's sole prosecutorial authority per the South African Constitution.³⁹ As the country's sole prosecutorial authority, the NPA possessed the discretion to either prosecute suspected perpetrators or to agree to plea bargains where the suspects would plead guilty to lesser charges.⁴⁰ The NPA decided whether to enter into a plea deal with suspected perpetrators by determining whether the suspected perpetrators had made a full disclosure and cooperated with the investigation; whether the crime was political in nature; the personal circumstances of the suspected perpetrators (e.g. remorse); the health of the suspected perpetrators; and the level of seriousness of the offense.⁴¹

As discussed earlier, Argentina implemented transitional justice through its regular criminal courts, both during its initial transition (c. 1983–1987) up until the process was halted by the pact reached between

38. Promotion of National Unity and Reconciliation Act, *supra* note 14.

39. S. AFR. CONST. 1996, Ch. 8, § 179(2).

40. *Id.*

41. National Prosecuting Authority of South Africa, *Prosecutions Policy and Directives Relating to Prosecution of Offences Emanating from Conflicts of the Past and Which Were Committed on or Before 11 May 1994*, promulgated 1 Dec. 1995, Appendix A, Sections C(a)–(h).

the Alfonsín Government and the Military resulting in *The Full Stop Law* and *The Law of Due Obedience*; and then later after 2003 when the Argentine Congress (followed two years later by the Supreme Court) overturned both the *The Full Stop Law* and *The Law of Due Obedience*.

Similarly, in the case of Chile after 1999—after the *1978 Amnesty Law* was declared unconstitutional by the Chilean Supreme Court—the door was opened for Chile to implement transitional justice through its regular criminal courts.

In Rwanda's transition (c. 1994–present), there were two specific types of legal institutions utilized to implement transitional justice—one being the regular everyday criminal courts of the country. Shortly after taking power in 1994, the RPF Regime began arresting thousands of people under suspicion of participating in the genocide that had been perpetrated by the old Habyarimana Regime. By 1996 over 120,000 people, nearly 2% of the country's population, were languishing in prison awaiting trial.⁴² Needless to say, the ability of the country's judicial system to absorb such a high number of defendants was limited, resulting in a large backlog of cases as thousands spent years waiting in prison for the cases to reach trial.⁴³

2. *Special (Domestic) Courts*

These legal institutions are courts that have been specifically established to implement transitional justice, segregated from a country's regular courts. These “special” courts can either closely resemble the regular domestic criminal or civil courts of their country, or can be institutionally designed to appear quite different.

As was discussed earlier, one of the transitional justice schemes utilized during Rwanda's transition (c. 1994–present) was criminal trials in the country's regular courts, with the sheer number of cases backlogged in the country's regular court system leading to thousands of defendants stuck in prison awaiting trial. To cope with this backlog, the RPF Regime chose to utilize a second transitional justice scheme aside from the country's regular courts. The scheme chosen was a “special” type of domestic court, created specifically to deal with the mass atrocities committed by the old Regime in 1994. These special courts, called Gacaca courts, utilized a streamlined judicial procedure based on indigenous, rather than western, legal traditions. The Rwandan parliament

42. Timothy Longman, *Justice at the Grassroots? Gacaca Trials in Rwanda*, in *TRANSITIONAL JUSTICE IN THE TWENTY-FIRST CENTURY: BEYOND TRUTH VERSUS JUSTICE 208–09* (Naomi Roht-Arriaza & Javier Mariezcurrena eds., 2006).

43. *Id.*

passed the statute setting up the Gacaca courts in October 2000, with the courts beginning operation in June 2002.⁴⁴ Gacaca courts operated within the rural communities that make up the country. Each community of 100 to 500 families elected a set of nineteen “judges” who were then given a short thirty-day course in basic legal procedure.⁴⁵ The nineteen judges within the community or cell would then appoint representatives to the sector panel, who would then appoint representatives to the district panel, who would then, in turn, appoint representatives to the provincial panel.⁴⁶ Gacaca courts could impose punishments ranging from banishment to thirty years imprisonment.⁴⁷ Gacaca judges would prepare indictments through consultation with their communities,⁴⁸ whose members would then take part in the trial as witnesses testifying against the accused.⁴⁹ With the exception of the crimes of planning or organizing murder and rape, which were reserved for the regular Rwandan criminal courts, Gacaca courts were authorized to try all manner of crimes from murder to causing bodily harm.⁵⁰

3. *Quasi-Judicial Institutions*

Quasi-judicial institutions are legal institutions that usually do not possess the power to impose criminal sanctions on an individual or set of individuals, but do have (similar to courts) a fact-finding component to them.

As was discussed earlier, one of the transitional justice schemes utilized during South Africa’s transition (c. 1991–present) was criminal trials in the country’s regular courts. Recall that the *Promotion of National Unity and Reconciliation Act*⁵¹ set out a procedure through which people having committed apartheid-era political crimes could apply for amnesty. Those who did not apply for amnesty then could be held criminally liable for their apartheid-era political crimes. If one decided to potentially avoid trial and instead apply for amnesty, then one

44. *Id.* at 210–12.

45. *Id.* at 211.

46. *Id.*

47. Christopher J. Le Mon, *Rwanda’s Troubled Gacaca Courts*, 14 HUM. RTS. BRIEF 16 (2007).

48. Longman, *supra* note 42, at 211, 217.

49. *Id.*

50. Le Mon, *supra* note 47, at 17.

51. *Promotion of National Unity and Reconciliation Act*, *supra* note 14.

did so through a quasi-judicial body set up by the *Promotion of National Unity and Reconciliation Act* known as the Truth and Reconciliation Commission (TRC). The TRC was composed of seventeen commissioners, chosen directly by the South African President, who were empowered to record and investigate apartheid era abuses, grant amnesty to perpetrators in exchange for a full disclosure of the truth behind the crime, and assist victims through obtaining information about individual cases.⁵² The work of the TRC was accomplished through three staffed Committees, a Human Rights Violations Committee investigating human rights violations which occurred between 1960 and 1994, an amnesty Committee that considered amnesty requests, and a Reparation and Rehabilitation Committee that sought to formulate proposals for dealing with the rehabilitation of victims.⁵³ Those seeking amnesty would be granted it as long as the crime fell between 1960 and 1994; the crime was political in nature and not committed for any personal gain or malice; and the full facts (as well as chain of command) of the crime in question were revealed. Those seeking amnesty did not have to express any remorse.⁵⁴ Interestingly, as part of its mandate to establish the truth behind apartheid era crimes, the TRC had the power to subpoena witnesses to testify before it.⁵⁵

In addition to pursuing transitional justice through its regular courts between 1983 and 1987 and 2003 to present, Argentina also utilized a national commission of inquiry, known as CONADEP, which was set up by President Alfonsín in December 1983 and tasked with ascertaining the fate of the thousands of Argentineans who had disappeared during the Junta's Regime. CONADEP interviewed thousands of victims and families of victims in order to discover the fate of the disappeared. Although it received no support from the Military, whose members refused to offer testimony to the Commission, CONADEP was able to formulate a fairly clear picture of the Military's direct role in the crimes committed by the Junta.⁵⁶ CONADEP released the results of its inquiry in September 1984, in a highly publicized report entitled *Nunca Mas*.⁵⁷ Due to the failure of the Military to cooperate with it (CONADEP did not possess the power to subpoena witnesses), *Nunca Mas* could not offer a conclusion regarding the fate of all the disappeared, but it was able to collect specific information on a number of cases and paint a

52. Wilson, *supra* note 13, at 204–05.

53. *Id.* at 207.

54. *Id.* at 209.

55. *Id.* at 205–06.

56. RONIGER & SZNAJDER, *supra* note 15, at 59, 62.

57. *Id.* at 62.

general overall picture of the Military's tactics of repression and torture during the Junta's Regime.⁵⁸ On the flip side, the publication of *Nunca Mas* served to further enflame the Military officer corps and further cemented their dissatisfaction with the Alfonsín Government.⁵⁹

As was detailed earlier, prior to 1999, Chile found its options for transitional justice severely curtailed by the pact the Pinochet Regime had managed to impose on its democratic successor. One area however, prior to 1999 and the breaking of that pact, where the old Regime was unable to constrain its successor was in the quasi-judicial arena where, in April 1990, President Aylwin established a National Commission of Truth and Reconciliation (Rettig Commission) to investigate violations of human rights (resulting in death) that occurred in Chile between 1973–1990.⁶⁰ The main task of the Commission was to formulate a general understanding of the methods and reasons behind the human rights violations that occurred during the Pinochet Regime.⁶¹ Although it received no support from the Military, whose members refused to offer testimony to the Commission (the Commission did not possess the power to subpoena witnesses), the Commission was able to construct a determination regarding several thousand victims who had either disappeared or died.⁶² The Commission's well received Report, released in March 1991, revealed to the country the depths of the crimes committed by the Pinochet Regime. Although the Military disagreed with the conclusions of the Rettig Commission's Report, it did not view them as a threat to its standing.

C. Putting the Pieces Together: A Typology of Transitional Episodes

By way of the review conducted above of the various episodes of transitional justice around the world since the 1970s, a clear picture begins to emerge. Through an analysis of the various mechanisms for transitional justice available to newly transitioning states, and an assessment of the two identified variables present in any transition

58. *Id.*

59. *Id.* at 63–64.

60. *Id.* at 97–99.

61. Jorge Correa S., *Dealing with Past Human Rights Violations: The Chilean Case After Dictatorship*, 67 NOTRE DAME L. REV. 1455, 1465 (1992).

62. *Id.* at 1466–67.

situation: (1) the existence of a “pact” between the old authoritarian regime and the new regime dealing with the administration of justice for any crimes that may have been committed in the past; and (2) the specific type of legal institution tasked with bringing old authoritarian regime perpetrators to account—the following typology of transitional justice episodes (and available mechanisms) can be presented.

FIGURE 1: A TYPOLOGY OF TRANSITIONAL JUSTICE EPISODES

INSTITUTION					
		Regular Courts	Special (domestic) Courts	Quasi-Judicial	No Prosecution
	Yes	Rwanda South Africa	Rwanda	Chile (1) South Africa	Spain Argentina (1.5) Chile (1)
PACT					
	No	Argentina (1) Argentina (2) Chile (2)		Argentina (1)	
Key:	Spain = 1975-1979 Argentina (1) = 1983-1987 Argentina (1.5) = 1987-2003 Argentina (2) = 2003-present Chile (1) = 1989-1999 Chile (2) = 1999-present South Africa = 1991-present Rwanda = 1994-present				

Looking at the various transitions cases and their place on the typology, the following empirical conclusions can be drawn:

First, it seems clear that transitional justice pacts, a common understanding between the old and new regimes regarding the procedures and extent through which transitional justice will be undertaken, do matter. Where a pact is in place that recognizes the need for a robust transitional justice process, as in Rwanda and South Africa, the process goes much smoother. Where a pact is in place that seeks to limit available options for transitional justice as in Spain, Argentina (1.5), and Chile (1), the risk of the process endangering political stability is lessened because the parties are unable or unwilling to take the process

beyond that which is acceptable to one another. This reality is clear enough in comparing Spain, Argentina (1.5), and Chile (1) with Argentina (1) and its back and forth conflicts between the Alfonsín Government and the Military. While it is true that Argentina (2) and Chile (2) also did not possess pacts, but were relatively stable politically, they can be distinguished from Argentina (1). In both Argentina (2) and Chile (2), there was an initial transitional justice pact at the start of the transition that was later broken when the power dynamics (between the old regime and new) began to shift away from relative equilibrium (give and take) towards a massive advantage for one side over the other. In Argentina (2), the Kirchner Government could count on both a global imperative towards human rights, as well as the strong domestic support of the populace, to repeal both the *The Full Stop Law* and *The Law of Due Obedience* and break the old pact. Similarly in Chile (2), the widening discredit of the old Pinochet Regime by 1999 prompted even the conservative political block in the Chilean Senate to rally behind the Frei Government in its move to reform the Supreme Court and break the old pact. In Argentina (1) on the other hand, the transitional justice process initially began without a pact and thus both sides, the Alfonsín Government and the Military, were unsure of what the limits of acceptability to either party were.

Second, the typology presented makes clear that the specific type of legal institution tasked with putting the transitional justice mechanism into action do not matter a great deal. The relative success or failure of transitional justice is dependant on the existence, or lack thereof, of a clear transitional justice pact. The type of specific legal institution tasked with putting the transitional justice mechanism into action does not make a significant difference in either its success or failure. Take for example using regular courts to implement transitional justice. In Rwanda, South Africa, Argentina (2), and Chile (2), where there existed either a transitional justice pact, or there once existed one that was later broken, transitional justice via the regular courts proceeded relatively smoothly. In Argentina (1), on the other hand, where the transitional justice process initially began without a pact, transitional justice via the regular courts was a disaster.

This is not to say that the specific model of legal institution used to put the transitional justice mechanism into action is of no importance, rather, it is of no importance when it comes to analyzing the potential success or failure of transitional justice in a specific context. Indeed, as

just one example, there have been numerous debates between various transitional justice scholars regarding either the advantage of criminal prosecutions (of alleged old regime crimes) over quasi-judicial truth commissions,⁶³ the unique advantage truth commissions possess over other alternatives,⁶⁴ or of the relative advantages certain truth commissions such as the South African TRC (with its power of subpoena and ability to offer amnesty conditioned on the cooperation of alleged perpetrators) have over other models. These debates are valid and useful in helping us assess the relative strengths and weaknesses of institutional models, but they do not assist us in understanding why transitional justice is successfully pursued in some contexts, but not in others.

Armed with the seeming empirical proof that the existence, or lack thereof, of clear transitional justice pacts during the initial stages of transition directly affect the success or failure of transitional justice, we can move forward and attempt to test this proposition on a current case—that of Serbia during the 2000–2005 period.

III. POLITICAL BACKGROUND OF THE SERBIAN CASE

Starting in earnest in May of 1989, and finally ending in 2000, the rule of strongman Slobodan Milošević over Serbia was, to say the least, disastrous. Enflaming ethnic and religious nationalism, Milošević helped engineer the break-up of the formerly multi-ethnic Yugoslavia into the six successor states.⁶⁵ Making use of the potent Serbian nationalism that had been repressed under four decades of Communist rule, Milošević and his fellow travelers in Croatia and Bosnia-Herzegovina unleashed the bloodiest conflict to emerge in Europe since the end of World War II.

A. The Domestic Legacy of the Milošević Regime

Within the domestic Serbian scene, the damage Milošević inflicted was no less severe. Various organized crime syndicates, nurtured by the Milošević Regime as a useful tool for busting U.N. imposed economic sanctions of the early-1990s, gained a controlling influence over the Serbian economy, which they continued to hold during the 2000–2005 period. These syndicates, urged on by the Regime, would often form

63. See, e.g., Juan E. Mendez, *In Defense of Transitional Justice*, in *TRANSITIONAL JUSTICE AND THE RULE OF LAW IN NEW DEMOCRACIES 1* (A. James McAdams ed., 1997).

64. See, e.g., José Zalaquett, *Balancing Ethical Imperatives and Political Constraints: The Dilemma of New Democracies Confronting Past Human Rights Violations*, 43 *HASTINGS L.J.* 1425, 1433 (1992).

65. I.e., Slovenia, Croatia, Bosnia-Herzegovina, Serbia, Montenegro, and Macedonia.

irregular paramilitary units and take part in the worst excesses of the Yugoslav civil war. Milošević's theory of rule involved not asserting his control over the Serbian state, but rather gradually destroying those Serbian institutions guaranteeing the rule of law and replacing them with an informal network of Socialist Party of Serbia (SPS) cronies and organized criminal syndicates.⁶⁶ Milošević was able to retain control not by exerting absolute control over the institutions of the state, but rather through bypassing and subverting the institutions of the state. It is with this legacy of eviscerated state institutions and parallel underground centers of power that Serbia had to contend with during the 2000–2005 period.

B. Serbia After Milošević: 2000–2005

On October 5, 2000, with the election of Vojislav Koštunica to the Federal Presidency, the long and disastrous rule of Slobodan Milošević came to an end. Milošević was unseated, in large part, due to the fact that the often factitious Serbian opposition had finally united into one block, the Democratic Opposition of Serbia (DOS), and chosen Koštunica, a moderate nationalist, as its common presidential candidate. In December of 2000, the change in regime was solidified when DOS swept to power in Serbian Parliamentary elections, and Zoran Đinđić, one of the prime leaders in DOS and Koštunica's campaign manager, became Prime Minister of Serbia. In the next year, DOS began to fracture as two camps began to emerge: moderate nationalists, looking more towards the nonaligned movement for inspiration (rallying around Koštunica and his Party, the Democratic Party of Serbia or DSS), and a more "liberal" group looking firmly to the West for inspiration (rallying around Đinđić and his Party, the Democratic Party or DS). With the dissolution of the Federal Republic of Yugoslavia into the State-Union of Serbia-Montenegro in February of 2003, Koštunica was temporarily sidelined when his job of Yugoslav Federal President was eliminated.

In the Serbian Parliamentary elections held in December of 2004, the fractured DOS government, headed by Đinđić's Democratic Party (DS), was booted out of office due to various corruption scandals and allegations. Alarmingly, the Serbian Radical Party (SRS), an unapologetic

66. See ADAM LEBOR, MILOŠEVIĆ: A BIOGRAPHY 158–59, 263–64 (Bloomsbury 2002).

fascist offshoot of Slobodan Milošević's Socialist Party of Serbia (SPS), won the majority of mandates contested (82 out of 250). The new Government coalition that took over, with Vojislav Koštunica as the new Prime Minister of Serbia, was composed of an unstable grouping of parties headed by Koštunica's DSS,⁶⁷ who had nothing in common save for their desire to prevent the Radicals (SRS) or Democratic Party (DS) from assuming power. The Government did not even possess a majority of the 250 seats in the Serbian Parliament, and as such was forced to rely on the votes of the Socialists (SPS), Slobodan Milošević's Party, to govern.⁶⁸ The result of this alliance was the steady appointment of former Milošević Regime officials into deputy positions within the various ministries. This fractured Koštunica Government would last until 2007.

1. Organized Crime's Infiltration of the Serbian Economy

With the imposition of U.N. economic sanctions in 1992 and 1993,⁶⁹ the Serbian economy, already weak from the legacy of Communist mismanagement in the 1980s, was dealt a final deathblow. Economically closed off from the rest of the world, Serbian society became impoverished and, thanks to Milošević, increasingly criminalized.

To cope with the lack of goods brought about by the sanctions regime, a parallel economy, nurtured by the Milošević, soon sprang up. Entrenched in already existing Communist-era smuggling and black market networks, this parallel economy, run by organized criminal elements, soon gained a commanding foothold over the economy of the state—all personally overseen by Milošević. The state sponsorship of organized criminality had a long history in Yugoslavia/Serbia. In the 1980s, the Yugoslav State Security Services had co-opted the country's gangsters and transformed them into informal criminal temps.⁷⁰ Passports were provided, and in exchange for being allowed to go abroad and steal as much as they wanted or could, the criminals performed tasks directed by their overlords back in Belgrade (such as

67. Vojislav Koštunica's moderately nationalist Democratic Party of Serbia (DSS), the technocratic Group of 17 Plus Party (G17+), and the monarchist New Serbia/Serbian Renewal Movement Coalition (NS/SPO).

68. The SPS, at the time still led formally by Slobodan Milošević, even though he was in detention in the Hague, where he was being tried by the ICTY on charges of war crimes and genocide, had won a respectable twenty-two mandates in the December 2004 parliamentary elections.

69. See S.C. Res. 757, U.N. Doc S/RES/757 (May 30, 1992); S.C. Res. 787, U.N. Doc. S/RES/787 (Nov. 16, 1992); S.C. Res. 820, U.N. Doc S/RES/820 (Apr. 17, 1993).

70. LEBOR, *supra* note 66, at 216.

targeted assassinations of political dissidents).⁷¹ Milošević then had a good base from which to work, and he utilized it to the hilt. The gangsters smuggled in enough oil, durable goods, and food to keep the Regime afloat, and in turn they were given a free hand to slowly co-opt and take over large segments of the banking and manufacturing sectors.⁷²

With the complete lifting of U.N. sanctions in 2001, the control organized criminal groups exerted over the Serbian economy was no longer centered on sanctions-busting, but was rather more nuanced in nature, though no less intrusive. Utilizing the excellent black market networks that they developed in the 1990s, organized criminal groups in Serbia exerted the lion's share of their control over the Serbian economy via smuggling consumable and durable goods under the noses of the customs authorities,⁷³ selling the items, and keeping the untaxed profits.⁷⁴ This so-called "gray economy" was rampant in Serbia during the 2000–2005 period and contributed directly to the chronic debt facing the Serbian state (due to lost customs revenue). The "gray economy" also cemented the unrivalled control of organized crime over economic life and development in the country. The monies obtained by organized criminal groups from their activities in the "gray economy" were laundered through offshore companies registered in Cyprus, the Seychelles, Liberia, and the British Virgin Islands.⁷⁵ The accounts of these companies were located mostly in banks that had head offices in countries near Serbia (such as Austria, Hungary, Slovenia, etc.), with the money being returned to Serbia through imported goods (for sale in the "gray economy") or investments in the Serbian privatization process⁷⁶ and real

71. *Id.*

72. U.S. Dep't of State, *The New Class Revisited: Belgrade's Mafia War Heats Up as Sanctions-Busting Affords Huge Profits*, (July 6, 1994), ¶ 8 (unclassified department cable, on file with the U.S. Department of State, Washington D.C.).

73. The Serbian economy at the time was highly dependant on imports, mostly in consumer goods. The reasons behind this dependence stemmed from the fact that Serbia's technology levels (within the manufacturing sector) were some nineteen years behind EU countries and seven years behind developing countries. This lead to Serbian commodities being overpriced, while the domestic demand for imported goods was in conflict with the sustainable operational limits of the economy. Dejan Berković, *Bananas & Cigarettes*, *CORD*, May 2005, at 26–27.

74. U.S. Dep't of State, *Narcotics and Financial Crime in Serbia*, (Dec. 19, 2003), ¶¶ 5–6 (unclassified department cable, on file with the U.S. Department of State, Washington D.C.).

75. *Id.* ¶ 6.

76. I.e., the public auction of formerly state-owned industries.

estate market.⁷⁷ The tentacles of organized crime ran deep within this activity, with various Government officials seemingly in on the process.⁷⁸

The Koštunica Government, leery of going against the powerful vested organized criminal elements that controlled the economy, was careful in its approach to the “gray economy” and the rampant money laundering which accompanied it. Seeking an accommodation rather than a confrontation, the Government, in January 2005, introduced a Value Added Tax (VAT) of 18% (on goods and services), to replace the 20% sales tax in place up to that point. In theory, the implementation of a VAT would serve to reduce the “gray economy” by improving tax administration and revenue collection. In reality, the Government was exceedingly careful not to go after mafia affiliated businesses and interests.⁷⁹ Indeed, the Government vigorously enforced the VAT on small private interests, but made sure to leave the large segments of the mafia-controlled manufacturing center alone.⁸⁰

In 2002, the then federal Yugoslav Parliament paid lip service to combat the rampant money laundering occurring in the country by passing the *Law on Money Laundering*.⁸¹ In theory, the *Law* targeted money laundering by specifically criminalizing the depositing of any monies into the Serbian financial system that had been acquired through illegal activity, including money derived from the “gray market” economy. The *Law* required numerous government and private entities⁸² to identify persons opening an account or “establishing any other kind of lasting business cooperation with the client,” and report on every transaction exceeding CSD 600,000.⁸³ Criminal penalties for money laundering violations ranged from six months to eight years imprisonment.⁸⁴ To enforce the *Law*, the Federal Parliament established a special office within the Ministry of Finance, the Federal Commission for

77. Interview with Jerry Rowe, Special Advisor, U.S. Dep’t of Treasury, Office of Technical Assistance, in Belgrade, Serbia (Apr. 11, 2005).

78. In two of the better known cases from the 2000–2005 period, Zoran Janjušević, a former security advisor to the Serbian Prime Minister, and Nemanja Kolesar, former director of the National Bank of Serbia’s Rehabilitation Agency, were placed under investigation for their alleged involvement in the laundering of money through offshore accounts in several financial safe haven countries.

79. Interview with Confidential Source, in Belgrade, Serbia (Apr. 4, 2005).

80. *Id.*

81. *Law on the Prevention of Money Laundering*, OFFICIAL GAZETTE OF THE FRY, No. 53/2001.

82. These government and private entities included: commercial/savings banks and other financial credit institutions; the postal savings bank, the post office and other commercial enterprises; foreign exchange bureaus, casinos, pawnshops, and national lottery organizers; and all government entities, including the National Bank of Serbia. *Id.* art. 4.

83. *Id.* arts. 5–7.

84. *Id.* art. 27.

the Prevention of Money Laundering, since renamed the Serbian Administration for the Prevention of Money Laundering.⁸⁵ Despite the name, the Administration did not act to prevent money laundering by seizing assets (it was not a law enforcement agency). Rather, the Administration, staffed by just seventeen people, acted as a sort of informal clearinghouse for collected financial information.⁸⁶ The Administration's effectiveness in deterring money laundering lay in its utilization by other government agencies and bodies. At the request of other government agencies and bodies, the Administration collected information on financial transactions and used it to determine whether money laundering was actually taking place and nothing more.⁸⁷ The Administration had no power to initiate investigations on its own. From its establishment in 2002, and through 2005, the Administration's utilization by other government agencies and bodies was nonexistent. The financial tentacles of Serbia's organized criminal groups ran deep, and given their continued virtual monopoly over security services, to oppose their interests openly did not seem to be in the interests of the Serbian state.

2. *Organized Crime's Infiltration of the Serbian Security Services*

Not content having unleashed his organized crime partners into the Serbian economy; Milošević soon realized that he could also utilize organized criminals as a fighting force in the Yugoslav civil war. The incentive for the organized criminal gangs was the freedom to plunder and pillage, as well as the continued blind look at their increasing control of the Serbian economy. With the end of the Yugoslav civil war, these organized criminal groups began to infiltrate the state security services, much as they had previously infiltrated the Serbian economy.

The epitome of the nexus between the organized criminal groups and state security services could be seen in the story of the Serbian Ministry of Interior's (MuP) Special Operations Unit (JSO). The JSO, or "Red

85. Despite its initial name, the Commission only really had jurisdiction in Serbia (and not the sister constituent Republic of Montenegro), hence the change of name.

86. The type of financial information collected included suspicious transactions information covered by the *Law on the Prevention of Money Laundering*. Interview with Tatjana Durašinović, Head of Int'l Relations Dep't, Serbia Administration for the Prevention of Money Laundering, in Belgrade, Serbia (Apr. 11, 2005).

87. *Id.*

Berets,” were formed on Milošević’s order on May 4, 1991 at the start of the Yugoslav civil war. Jovica Stanišić, the Chief of the Serbian State Security Service (RDB), and Franko “Frenki” Simatović, an RDB operative, organized the Unit.⁸⁸ Milošević created the Unit because he did not fully trust the military, an institution of the old multi-ethnic Yugoslavia. The RDB on the other hand was part of the Serbian Ministry of Interior (MuP), and therefore could be solidly relied upon. Although administrated by the RDB, the Unit initially had neither an official name, nor legal status.⁸⁹ This was done for two reasons. First, as the Unit was composed almost solely of criminals with economic ties to the Regime, Milošević wanted to hide its formal ties to the state as much as possible. Second, because Milošević used the Unit as his “strike force” in the wars, giving them the green light to commit war crimes of every kind (including murder, rape, and pillage), he did not wish to be associated with their actions lest he too be branded by charges of war crimes.⁹⁰ With the conclusion of the civil war in 1995, Milošević decided to formalize the Unit, making it a brigade-ranked military unit with three hundred active duty and seven hundred reserve soldiers. Now officially part of the Serbian Ministry of Interior (MuP), and led by the Belgrade underworld criminal Milorad “Legija” Ulemek, the Special Operations Unit (JSO) was born.

Under Legija’s leadership, the JSO became Milošević’s personal praetorian guard. The Unit received the best equipment available (e.g. armored humvees, artillery, helicopters), and its members received salaries far above those paid to the regular military or police. The JSO was funded in part from criminal sources, receiving a cut of the Regime’s profits from smuggling gas and cigarettes, later actually taking part in the smuggling process itself.⁹¹ In return for such largesse, the JSO did Milošević’s dirty work, organizing the assassinations of prominent Regime dissidents such as former Yugoslav President Ivan Stambolić and publisher Slavko Čuruvija; the JSO also attempted an assassination of the prominent opposition leader Vuk Drašković.⁹² By the late 1990s, it was increasingly impossible to distinguish the organized criminal groups brought into the state security services by Milošević, and the state security services themselves.

88. U.S. Dep’t of State, *A Short History of the Red Berets*, (Mar. 31, 2003), ¶ 2 (unclassified department cable, on file with the U.S. Department of State, Washington D.C.).

89. The Unit was simply known as “Frenki’s Boys” (Frenkijevci). *Id.* ¶ 4.

90. This strategy however did not work as in May of 1999 Milošević was indicted by the ICTY for war crimes.

91. U.S. Dep’t of State, *A Short History of the Red Berets*, *supra* note 88, ¶ 9.

92. *Id.* ¶ 11.

With the fall of the Milošević Regime, the infighting within the victorious democratic opposition served the organized criminal elements within the state security services well. Too divided and weak to confront such forces, the democratic opposition tried to co-opt them instead. As such, after the new DOS coalition took power, the privileged status and power of Milošević's security apparatus, including the JSO, continued as before.⁹³ In fact, the new democratic authorities used the JSO to arrest Milošević himself in June of 2001. It was a JSO helicopter that transported Milosevic to the North Atlantic Treaty Organization (NATO) base in Tuzla (Bosnia), from where he would be transported to the ICTY's detention center in the Hague.⁹⁴ The JSO could no longer be said to be a part of the state security apparatus; it was the state security apparatus—all controlled by the organized criminals who staffed it, and taking orders from Serbia's top mafia leader Milorad "Legija" Ulemek, the JSO commander. At this point the JSO was virtually indistinguishable from Serbia's top mafia gang, the Zemun Crime Gang, as the two organizations shared members, information, and activities.⁹⁵ Indeed, the JSO operated a veritable state within a state, controlling a magazine, "Identitet,"⁹⁶ and various other syndicates.⁹⁷

The height of the JSO's power, and by extension the Serbian mafia, came in November of 2001 when, alarmed by the Government's continued cooperation with the ICTY, Legija directed the JSO to mutiny against the then Serbian Government (headed at the time by Prime

93. Indeed, it was during this period, that the JSO became even more brazen than it had ever been under the Milošević Regime. Legija acted with public impunity, burning down a Disco in Kula (near the JSO's barracks) because of a financial dispute with its owner (threatening to shoot any firefighter who dared try to put out the blaze); shooting up the Štupica nightclub in downtown Belgrade; and blowing up a rival's road building company with plastic explosives. *See id.* ¶ 16.

94. *See supra* note 90.

95. *See* U.S. Dep't of State, *The Serbian Government Targets Organized Crime Gang* (Mar. 13, 2003), (unclassified department cable, on file with the U.S. Department of State, Washington D.C.); *Đinđić Assassination: Serbian Police Roundup Continues* (Mar. 17, 2003), (unclassified department cable, on file with the U.S. Department of State, Washington D.C.); U.S. Dep't of State, *Legija Surrenders*, (May 4, 2004) ¶ 4 (unclassified department cable, on file with the U.S. Department of State, Washington D.C.).

96. In whose pages Legija would rant and rave against Government cooperation with the ICTY, glorify the JSO, and issue threats with impunity. *See* U.S. Dep't of State, *A Short History of the Red Berets*, *supra* note 88, ¶ 21.

97. *Id.* ¶¶ 20–21.

Minister Zoran Đinđić).⁹⁸ The main goal of the mutiny was to intimidate the Government into changing course and not arresting and extraditing ICTY indictees.⁹⁹ Elements of the JSO blocked traffic on the main Belgrade highway and demanded the dismissal of the Interior Minister, and both the director and deputy director of the Serbian State Security Service (RDB). Prime Minister Đinđić appeared to initially concede to the JSO's demands. Although Đinđić did not dismiss the Interior Minister, Dušan Mihajlović, he did replace both the director and deputy director of the RDB, and appointed prominent JSO leader Milorad Bračanović as deputy RDB director. In March of 2003, rumors began to circulate that Đinđić was getting ready to resume his cooperation with the ICTY and arrest and extradite known war criminals indicted by the Tribunal. On March 10, 2003, the JSO-controlled magazine, "Identitet," published an editorial in which it warned Đinđić that he would be killed if he resumed cooperation with the ICTY. On March 11, 2003, Prime Minister Đinđić was assassinated by a long-range shot to the chest as he exited his official car to enter the Serbian Government building. Prime Minister Đinđić's murder could, in part, be seen as a direct result on the inherent weakness of the institutions of the state he served.¹⁰⁰

In late March, Legija and other JSO members were officially indicted for the murder of Prime Minister Đinđić. Legija promptly "disappeared," and would not be "found" until May 2004. The JSO was disbanded, but most of its members were simply transferred into a new brigade within the Ministry of Interior (MuP), the Gendarmerie (SAJ).

The nefarious control and influence of the Serbian mafia over the security services of the state, and thereby over the state itself, continued after the assassination of Prime Minister Đinđić. Radovan Karadžić and

98. See U.S. Dep't of State, *Three ICTY Indictees Go to the Hague; Secret Police Unit Revolts* (Nov. 13, 2001) (unclassified department cable, on file with the U.S. Department of State, Washington D.C.).

99. The interest of the JSO/Serbian mafia in whether the Serbian Government cooperated with the ICTY or not was simple, many of the Unit's senior leadership, including Legija, feared that the ICTY would at some point indict them for war crimes committed in the Yugoslav civil war, just as it had indicted Milošević. They had made a tactical deal with the Government that once Milošević was surrendered to the ICTY, no more indictees would be arrested and extradited, now they wanted to underlie this point. *Id.* ¶ 4.

100. Commenting on the political factors that led to the assassination, journalist Miloš Vasić stated "it is humiliatingly obvious that the assassination of Zoran Đinđić was directly connected with Serbia's 'non-state' character, whereby conditions meant it was not possible to precisely identify the state. In conditions like that it is not known who has the right to employ instruments of physical force and who doesn't. . . moreover, reliable rules did not exist to separate what is permitted from what is forbidden." MILOŠ VASIĆ, *ATENTAT NA ZORANA ĐINĐIĆA* 293 (Narodna Knjiga 2005).

Ratko Mladić,¹⁰¹ the two most wanted indictees on the ICTY's list remained at large throughout the 2000–2005 period, nearly a decade after their initial indictments for war crimes, crimes against humanity, and (in the case of Mladić) genocide. During this period of time, there was strong evidence to suggest that not only were these two wanted fugitives in the territory of Serbia, but they were also being protected by the state security services.¹⁰² At the time, the then Foreign Minister, former opposition leader Vuk Drašković, stated that the state security services not only knew where Karadžić and Mladić were, but were also actively hiding and protecting them.¹⁰³

C. The ICTY and Political Instability in Serbia

During the 2000–2005 period, the biggest political conflict in the country was centered around the issue of cooperation with the ICTY. Under both International¹⁰⁴ and domestic Serbian law,¹⁰⁵ the Government of Serbia was required to find, arrest, and extradite to the ICTY any indicted persons residing within its territory. After the assassination of Prime Minister Zoran Đinđić and the subsequent December 2004 Serbian Parliamentary elections, which Đinđić's DOS Coalition lost, the new Serbian Government of Vojislav Koštunica categorically refused to extradite any indictees to the ICTY. The new Koštunica Government feared that any forced physical transfer of indictees to the ICTY would represent a danger to Serbia's fragile democracy.¹⁰⁶ The powerful organized criminal elements, already in control of vast sectors of the economy and security establishment, would correctly view the forced extradition of ICTY indictees as an assault on their interests. With the seemingly limitless resources their control of the economy guaranteed

101. The respective wartime "President" and "Generalissimo" of Serbian forces in Bosnia-Herzegovina.

102. In July 2008, Karadžić was finally apprehended in Belgrade and extradited to the ICTY. Mladić still remains at large.

103. See Daniel Dombey & Eric Jansson, *Serbian Authorities 'Know Where Mladic is Hiding' War Crimes*, FINANCIAL TIMES, Apr. 5, 2005, § Europe, at 7.

104. See S.C. Res. 827, U.N. Doc. S/RES/827 (May 25, 1993).

105. See *Law on Cooperation with the International Criminal Tribunal for the former Yugoslavia*, OFFICIAL GAZETTE OF THE FRY, No. XX/2002.

106. Dušan Stojanović, *AP Interview: New Serbian Prime Minister Says Extraditing War Crimes Suspects Not a Priority*, ASSOCIATED PRESS, Feb. 21, 2004, § Int'l News.

them, as well as a willingness to use violence against the state (note the assassination of Prime Minister Zoran Đinđić), and significant support from a Serbian public suspicious of the ICTY's "anti-Serb bias," the danger posed seemed a very real one indeed.

As a response to this dilemma, the Koštunica Government sought to undertake the bare minimum of cooperation with the ICTY. The Government's stated policy was thus not to arrest ICTY indictees, as was required under international and domestic law, but to rather encourage their "voluntary surrender" to the authorities. By formulating this position, the Government sought to strike a strategic transitional justice pact with the mafia-dominated security services, pledging not to forcibly extradite anyone to the ICTY in exchange for voluntary cooperation. Those who voluntarily surrendered were given state guarantees on their behalf to the ICTY, ensuring their pre-trial release. Though it faced widespread international criticism for this stance, the Koštunica Government justified itself by arguing that such action would bode better for the stability of the country.¹⁰⁷

IV. THE STRUCTURE OF THE SERBIAN LEGAL SYSTEM

A. *The General Legal System*

1. *A Civil Law System*

The Serbian legal system employs the continental civil law system (as opposed to the Anglo-Saxon common law scheme). As such, legislation has more legal significance than past judicial decisions. In countries employing the civil law system, courts are, in theory, strictly limited to the application of legislation. Court decisions naturally involve interpretation, but the interpretation is not precedent that is binding on future courts that must consider the same legislation.¹⁰⁸ The premise is that courts look at legislation anew, and in a vacuum, each time they consider a law.¹⁰⁹

107. See *Koštunica: Government Does Cooperate With ICTY*, V.I.P. DAILY NEWS REPORT, Nov. 22, 2004. The Prime Minister was quoted as giving the following statement: "Cooperate [with the ICTY] we must and cooperate we shall, until we have fulfilled all requests. However, this cooperation can be conducted in various ways, not just in one. There is no one form that has been prescribed, there are various forms—you know what I'm talking about. On top of this, one also needs to take into account the stability of institutions in the country." *Id.*

108. John H. Crabb, *Introduction to SERVAIS & MECHLYNCK, LES CODES ET LES LOIS SPECIALES LES PLUS USUELLES EN VIGUEUR EN BELGIQUE* 3 (John H. Crabb trans., Kluwer Law & Taxation 1982) (1975).

109. *Id.* at 3.

In reality, however, similar decisions made by earlier courts are important and persuasive authority, though, of course not controlling.¹¹⁰ Legal precedence then is not entirely disregarded. Within civil law countries, courts will often informally look to previous decisions made by earlier benches, even though they are not legally required to do so. The idea that civil law courts can employ decisions that are completely and wholly independent of each other is a myth.¹¹¹ Such informal measures can sometimes lead to a codification of sorts within the system. For example, there has evolved in the jurisprudence of certain civil law countries a legal principle called *jurisprudence constante*. *Jurisprudence constante* holds that when five judicial decisions regarding a similar subject reach the same result, they acquire the status of *written authority*.¹¹² Such a status does not mark the decisions as controlling precedent, but it does cement their position as persuasive authority.

2. Structure of the Courts

Structurally, the court system of Serbia is composed of municipal courts, district courts, and a *Constitutional Court of Serbia*.

The courts of Serbia are held to be “autonomous and independent” in their work.¹¹³ Judges have life tenure¹¹⁴ and are immune from punishment for opinions given out in the passing of a judgment.¹¹⁵ Trials are open to the public, unless such access may corrupt minors or endanger state secrets.¹¹⁶

In practice, the Serbian judiciary was susceptible to political influence during the 2000–2005 period.¹¹⁷ Parliament could recall members of the judiciary at any time, and was unafraid to make strategic use of this threat.¹¹⁸ Reactionary and corrupt judges from the Milošević era still

110. *Id.* at 4.

111. Interview with Sima Avramović, Professor of Law, Univ. of Belgrade, in Belgrade, Serbia (Oct. 9, 2003).

112. Crabb, *supra* note 108, at 4.

113. THE CONSTITUTION OF THE REPUBLIC OF SERBIA, art. 96 (1990–2006).

114. *Id.* art. 101.

115. *Id.* art. 96.

116. *Id.* art. 97.

117. U.S. Dep’t of State, *Serbia Human Rights Report 5* (Oct. 2003) (draft report, on file with the U.S. Embassy, Belgrade, Serbia).

118. Interview with Stefan Lilić, MP, Parliament of the Republic of Serbia, in Belgrade, Serbia (Oct. 10, 2003).

occupied positions of power, with about half of the judicial pool still being composed of Milošević-era appointees.¹¹⁹ Inefficiency and poor communication between the judicial and political branches led to a backlog of cases, a situation exasperated by the lack of alternative dispute resolution channels.¹²⁰

3. *Initiation/Investigation of a General Criminal Case*

A criminal case in Serbia begins with a police inquiry, which can be undertaken by the police independently or at the request of a prejudiced party.¹²¹ The police inquiry is under the nominal control of the Public Prosecutor (the equivalent of a state district attorney or U.S. Attorney in the United States).¹²² It is on the basis of this inquiry that the Public Prosecutor decides whether to initiate criminal action or drop the inquiry.

If the decision is made to initiate a case, the Public Prosecutor shall make a formal request to an investigative magistrate to conduct a more detailed investigation.¹²³ In his or her formal request to the investigative magistrate for a more detailed investigation, the Public Prosecutor will detail what evidentiary procedures the investigative magistrate is to undertake in his or her investigation.¹²⁴ Though the investigative magistrate must perform these evidentiary procedures, he or she is not limited by them, and can in fact investigate further if he or she feels it is warranted.¹²⁵ It is important to note that the investigative magistrate is a full judge, and can thus order hearings, collect evidence, and place people in detention.¹²⁶ At the end of the investigation, the investigative magistrate submits his or her findings to the Public Prosecutor.¹²⁷

119. U.S. Dep't of State, *Serbia Human Rights Report*, *supra* note 117, at 17.

120. *Id.*

121. *Criminal Procedure Code of the Republic of Serbia*, art. 225.

122. *Id.* art. 158.

123. *Id.* art. 239.

124. I.e., what documents should be subpoenaed, which witnesses should be called in to give evidence, etc.

125. Zoran Stojanović et al., *Criminal Law (Yugoslavia)*, in *INT'L ENCYCLOPEDIA OF LAWS (CRIMINAL LAW)* ¶ 574 (R. Blanpain & M. Colucci eds., 1993) (2008).

126. *Id.* ¶ 33.

127. One of the biggest problems in this process is the issue of admissibility of evidence obtained by the police during the pre-trial proceedings. Only evidence obtained by the investigative magistrate is admissible at trial. For example, even if a suspect confesses to the police right after the commission of a crime, with his attorney present, not only is that confession inadmissible but also all the circumstances about that confession are also inadmissible. Hence a prosecutor could not put the police officer to which a confession was made to on the stand and ask him or her anything about the alleged confession. The only time the confession or any other sort of evidence would be admissible would be if it were given to the investigative magistrate in the proper form, during his or her investigation of the case. As such, typically, by the time the investigation gets to this phase, the suspect has

At this point the Public Prosecutor can do one of three things: (1) he or she can, based on the findings presented by the investigative magistrate, lay charges and issue an indictment; (2) he or she can, based on the findings presented by the investigative magistrate, declare a *nonsuit* (a *nonsuit* can be thought of as a dismissal of charges, or rather a refusal to prosecute);¹²⁸ or (3) he or she can ask the investigative magistrate to gather specific directed evidence.¹²⁹

If the Public Prosecutor decides to lay charges and issue an indictment, the case is brought before a presiding judge in the competent jurisdiction. The presiding judge may repeat the investigation of the investigative magistrate (i.e. investigation of the crime scene, etc.) if he or she wishes, but is obliged to re-interview all of the listed witnesses.¹³⁰ At this point the criminal suspect under indictment can appeal his indictment to the *Special Panel* within the court in question.¹³¹ This *Special Panel*, made up of the court's senior judge and two junior justices, will then decide on the suspect's appeal. If the *Special Panel* upholds the indictment, the trial is set to begin.

The trial itself is presided over by a panel of three judges (consisting of either one professional judge and two lay judges, or three professional judges). The President of the *Panel* (i.e. the presiding judge) leads the trial. The trial begins with the reading of the indictment, then arraignment, followed by the interrogation and questioning of the defendant, and finally, the presentation of evidence.¹³² The defendant can choose to present his defense at any time during the trial. The role of the presiding judge is an active one, as it is the presiding judge who decides who testifies and when (the parties may only suggest witnesses); also, when witnesses take the stand, it is the presiding judge who first interrogates them, followed by the prosecutor, victim, defense attorney, and defendant.¹³³ All questions, however, are directed to the court, not to the witness being interrogated.

had plenty of time to change his or her mind about confessing and think up a better story. See *Criminal Procedure Code of the Republic of Serbia*, art. 346; Stojanović et al., *supra* note 125, ¶¶ 33, 502.

128. *Criminal Procedure Code of the Republic of Serbia*, art. 228.

129. I.e., questioning a specific witness, mapping out the scene of the crime, etc. See Stojanović et al., *supra* note 125, ¶¶ 573–74.

130. *Id.* ¶ 637.

131. *Id.* ¶ 613.

132. *Id.* ¶¶ 634–41.

133. *Id.* ¶¶ 632, 636.

B. *The Specialized Judicial Institutions*

1. *War Crimes*

The eight war crimes trials held in Serbia from 1996 to 2003 revealed a conspicuous weakness in Serbia's ability to prosecute war crimes within its domestic courts.¹³⁴ The assassination of Prime Minister Zoran Đinđić on March 12, 2003 by suspected Mafia and security service elements prompted a public call for a crackdown on the criminal activity that had flourished in the country since the Milošević Regime. This renewed pressure resulted in the Serbian Parliament establishing various government bodies through special legislation in July 2003: the Special Court for War Crimes, the War Crimes Prosecutor's Office (the Special Court for War Crimes independent Prosecutor's Office),¹³⁵ the Special Court for Organized Crime, and the Organized Crime Prosecutor's Office (the Special Court for Organized Crimes independent Prosecutor's Office).¹³⁶

a. *The Special Court for War Crimes*

The Special Court for War Crimes was composed of: the President of the Court; two investigative magistrates who, in conjunction with the prosecutors, conducted investigations and collected evidence that was then admissible at trial; five trial judges; and staff. Trial judges and investigative magistrates were seconded from other courts in Serbia and served for a fixed four-year term.¹³⁷ They could not be removed save for a complex recall procedure requiring the support of at least two-thirds of Parliament. Technically, the Special Court for War Crimes was simply a chamber of the Belgrade District Court.¹³⁸ In practice however, the Special Court was functionally distinct from the Belgrade District Court. The Special Court employed its own administrative and security staff, and operated out of its own building, located miles away from the Palace of Justice, the headquarters of the Belgrade District Court.

134. See U.S. Dep't of State, *Serbia's Capacity to Try War Crimes One Year After Creation of the Special Court* (Aug. 24, 2004) (unclassified department cable, on file with the U.S. Department of State, Washington D.C.).

135. See *Law on Organization and Jurisdiction of Government Authorities in Prosecuting Perpetrators of War Crimes*, OFFICIAL GAZETTE OF THE REPUBLIC OF SERBIA, No. 67/2003 [hereinafter *War Crimes Law No. 67/2003*].

136. See *Law on Organization and Jurisdiction of Government Authorities in Suppression of Organized Crime*, OFFICIAL GAZETTE OF THE REPUBLIC OF SERBIA, No. 42/2002 [hereinafter *Organized Crime Law No. 42/2002*].

137. See *War Crimes Law No. 67/2003*, *supra* note 135, art. 10.

138. *Id.*

b. The War Crimes Prosecutor's Office

The War Crimes Prosecutor's Office was tasked with bringing to trial perpetrators of War Crimes committed within the territory of the former Socialist Federal Republic of Yugoslavia (SFRY), regardless of the citizenship of the perpetrator or victim. The War Crimes Prosecutor's Office was composed of a Head Prosecutor,¹³⁹ four deputy Prosecutors, and staff. The Prosecutor's Office was an independent state agency, and operated out of the building of the Special Court for War Crimes. The Serbian Parliament elected the Special Prosecutor for War Crimes for a fixed four-year term.¹⁴⁰ He could not be removed save for a complex recall procedure that required the support of at least two-thirds of Parliament. The Special Prosecutor chose his deputy Prosecutors, who served at his leisure.¹⁴¹ The Special Prosecutor, as the head of an independent state agency, was entitled to have an independent bank account for which donations could be taken. Aside from investigating cases on its own initiative, one of the primary focuses of the War Crimes Prosecutor's Office was to accept cases transferred to it (to be henceforth tried domestically) by the ICTY,¹⁴² and to further investigate those cases in conjunction with the investigative magistrate in order to raise the indictment.

*2. Organized Crime**a. The Special Court for Organized Crime*

The Special Court for Organized Crime was composed of the President of the Court; three investigative magistrates who, in conjunction with the prosecutors, conducted investigations and collected evidence that would be admissible at trial; twelve trial judges; and assorted staff. Trial judges and investigative magistrates were seconded from other courts in Serbia and served for a fixed two-year term.¹⁴³ As with its counterpart in War Crimes, the Special Court for Organized Crime was technically a chamber of the Belgrade District Court.¹⁴⁴ In practice however, the

139. Commonly referred to as the Special Prosecutor for War Crimes.

140. See *War Crimes Law* No. 67/2003, *supra* note 135, art. 5.

141. *Id.*

142. See *infra* Part V.A.1.

143. See *Organized Crime Law* No. 42/2002, *supra* note 136, art. 13.

144. *Id.*

Special Court for Organized Crime operated separately from the Belgrade District Court. The Special Court employed its own administrative and security staff, and operated out of its own distinct building, rather than from the Palace of Justice, the headquarters of the Belgrade District Court.

b. The Organized Crime Prosecutor's Office

The Organized Crime Prosecutor's Office was tasked with bringing to trial perpetrators of organized criminal activity committed within the territory of the Republic of Serbia. The Prosecutor's Office was composed of a Head Prosecutor,¹⁴⁵ five deputy Prosecutors, and staff. Unlike the War Crimes Prosecutors, the Organized Crime Prosecutor's Office functionally operated under the Belgrade District Prosecutor's Office, who in turn, was under the Republic Prosecutor's Office.¹⁴⁶ In order for a case to be within the jurisdiction of the Special Prosecutor for Organized Crime, the Special Prosecutor had to certify a case as an organized crime case.¹⁴⁷ The Special Prosecutor had wide latitude in deciding whether to certify a case as "organized crime."¹⁴⁸ It was only with the Special Prosecutor's certification and the subsequent agreement of the Republic Prosecutor for Serbia (Attorney-General) that a case could be transferred to the Special Court for Organized Crime.

V. THE ORGANIZATIONAL AUTONOMY OF THE SPECIAL COURTS

The near complete organizational autonomy (from the domestic government structure) of the Special Courts for War Crimes and Organized Crime transformed these agencies into free agents within the

145. Commonly referred to as the Special Prosecutor for Organized Crime.

146. The Special Prosecutor for Organized Crime was not elected by the Parliament to a fixed term, like the War Crimes Prosecutor, but was appointed by the Republic Prosecutor (Attorney General) to a fixed two year term. Also, unlike the War Crimes Prosecutor, the Special Prosecutor for Organized Crime and his deputies were not an independent prosecutor's office, but were organizationally and hierarchically under the Belgrade District Prosecutor's Office. All of the Organized Crime Prosecutors were "borrowed" from their native prosecutor's office (namely the Republic Prosecutor's Office or District Prosecutor's Office) and hence could be removed by not being re-elected to their "original" positions. *See Organized Crime Law* No. 42/2002, *supra* note 136.

147. *Id.* art. 2. Article 2 defined organized criminal activity to include the following list of crimes (when committed in an organized manner): offenses against the constitutional order of the state, offenses against international humanitarian law, counterfeiting and money laundering, the illicit production and sale of narcotics, the illicit trade of arms, illicit (black market) trade in general, human trafficking, robbery, aggravated theft, offering and/or accepting bribes, extortion, and kidnapping. *Id.*

148. *Id.* art. 6.

domestic Serbian polity; separate and autonomous from the domestic governmental structure, they were no longer subject to the same constituencies and constraints of their fellow government agencies. As independent institutional players in the process, with their own separate constituencies to answer to (i.e. the ICTY and international community as a whole), the Special Courts for War Crimes and Organized Crime emerged as direct competitors to the Government of Serbia's attempt to establish a unitary political policy and strategy in regards to (a) cooperation with the ICTY; and (b) negotiating with the powerful organized criminal groups that continued to control the Serbian security services.

A. Organizational Autonomy of the Special Courts for War Crimes and Organized Crime

Through their institutional structural designs, the Special Courts became autonomous institutions, no longer embedded within the domestic Serbian government.

1. Case Autonomy

Unlike the vast majority of national domestic prosecutors and courts, the Serbian Special Courts for War Crimes and Organized Crime possessed considerable autonomy and freedom in deciding which cases to pursue.

In the case of the Special Court for War Crimes, this autonomy came in part from depending on a non-domestic actor for its cases—the ICTY. Under a procedure known as the Rule 11 Transfer,¹⁴⁹ the ICTY was empowered, if it so chose, to transfer cases, either in the investigative stage or with the indictment(s) already laid, to national courts in the former Yugoslavia.

In the case of the Special Court for Organized Crime, this autonomy came via the certification process by which the Special Prosecutor was permitted to initiate and investigate whatever cases he so chose.¹⁵⁰ This was of great advantage to the Special Prosecutor as it provided him with

149. So called because such case transfers are initiated under Rule 11 *bis* of the ICTY's Rules of Procedure and Evidence. *See Rules of Procedure and Evidence of the International Criminal Tribunal for the Former Yugoslavia*, U.N. Doc. IT/32/Rev. 3 (Jan. 30, 1995), Rule 11.

150. *See supra* Part IV.B.2.

the ability to go after only those organized criminal groups he deemed vulnerable enough for prosecution.

2. *Budgetary Autonomy*

Technically speaking, the Special Courts depended upon the Serbian Parliament for their yearly operating budgets.¹⁵¹ In reality, both institutions solicited the grand majority of their budgets from numerous international governmental and non-governmental aid agencies. During the fiscal years of 2004 and 2005, the United States alone allocated USD \$12 million for funding criminal justice initiatives in Serbia (with a large portion of this amount going directly to the Special Courts). The budgetary alliance with the international community allowed the Special Courts a measure of independence unheard of within any other judicial institutions in the world.¹⁵² In this regard, the Special Courts were unique in their ability to avoid the influence of other policy makers within the domestic governmental system, a common problem that any typical judicial institution in the world has, no matter how “independent” it is.¹⁵³ As a result of this budgetary autonomy, the Special Courts were free to actively work for and promote their political policy objectives, free from any government influence or input.

151. See *War Crimes Law* No. 67/2003, *supra* note 135, art. 20; *Organized Crime Law* No. 42/2002, *supra* note 136, arts. 20–21.

152. Interview with Sam Nazzaro, Resident Legal Advisor, U.S. Embassy, Belgrade, in Belgrade, Serbia (Dec. 8, 2004).

153. For a small sampling of the vast literature on this point, see, for example, Robert A. Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 J. PUB. L. 279 (1957) (where the author claimed that, in the U.S., the courts generally supported and upheld the major policies of the dominant national alliance); Martin Shapiro, *Political Jurisprudence*, 52 K.Y. L.J. 294 (1964) (where the courts are described as part of the apparatus of the state); BRUCE ACKERMAN: WE THE PEOPLE: FOUNDATIONS (Harv. Univ. Press 1993) (1991) (where the author describes the state of affairs in the U.S. as a “constitutional regime” where the legislative and executive branches, together with the courts, political parties, and voters form a matrix in which constitutional decisions are adjudicated); Shannon Ishiyama Smitley & John Ishiyama, *Judicial Activism in Post-Communist Politics*, 36 LAW & SOC’Y REV. 719 (2002) (where the authors describe a matrix of institutional factors that affect the relative “independence” of courts); MARK TUSHNET, *THE NEW CONSTITUTIONAL ORDER 1* (2003) (where the author presents an argument, similar to that of Ackerman, which states that courts form a part of a wider “regime”—Tushnet defines a “regime” as “a reasonably stable set of institutions through which a nation’s fundamental decisions are made over a sustained period, and the principles that guide those decisions”).

B. The Public Policy Objectives of the Special Courts

The Special Courts for War Crimes and Organized Crime answered to a different constituency than the Government of Serbia. Far from answering to the voting-age population of Serbia or the mafia-dominated security services, as the Serbian Government did, the Special Courts, by virtue of their near complete structural autonomy from the Government of Serbia, increasingly relied on the international community for financial support, and the ICTY or independent initiative for cases. Traditionally, the degree of independence, or lack thereof, of judicial institutions can be understood as a result of the amount of such independence the “elected” agencies of government are willing to accept.¹⁵⁴ In this context, it is cooperation not competition that drives the relationship.¹⁵⁵ This cooperation, however, is born out of a commonality of interests, an ideal that is shattered when structural autonomy breeds competition amongst co-equal actors.

The Special Courts were completely autonomous, and as such, the different public policy conclusions reached by the Special Courts, versus those reached by the Government of Serbia, were, above all, an institutional phenomenon based on the constituencies the parties were associated with. In the case of the Government of Serbia, it was the pressure exerted upon it by the mafia-dominated state security services that resulted in the Government striking a strategic transitional justice pact with said security services, pledging not to forcibly extradite anyone to the ICTY in exchange for voluntary cooperation.¹⁵⁶ In the case of the Special Courts, on the other hand, it was the will of the international community and the ICTY that colored their actions. The motivations at work here were purely structural. During this period of time, the Government of Serbia did not solely consist of reactionaries who viewed ICTY indictees as Serbian heroes, and the powerful Serbian organized crime gangs that continued to exert an unhealthy influence over the state as not to be tampered with. In much the same vein, the

154. See, e.g., TOM GINSBURG, JUDICIAL REVIEW IN NEW DEMOCRACIES: CONSTITUTIONAL COURTS IN ASIAN CASES 67–76 (2003) (where the author describes courts as “strategic” actors looking to “dialogue” with the elected branches in an effort to maximize their power); Keith E. Whittington, *Legislative Sanctions and the Strategic Environment of Judicial Review*, 1 INT’L J. CONST. L. 446 (2003).

155. Whittington, *supra* note 154, at 446.

156. See *supra* Part III.C.

staff and personnel of the Special Courts did not solely consist of western-oriented liberals who wanted to see perceived war criminals, and the mafia that harbored them, brought to justice. The motivations were instead based purely more on structural factors. At the time, one could find many western oriented technocrats within the Government of Serbia, such as deputy Prime Minister Miroljub Labus, who in theory believed in full ICTY cooperation, but accepted that the current political climate in Serbia did not allow for this.¹⁵⁷ Along the same vein, within the highest levels of the War Crimes Prosecutor's Office, one could find people like Special Prosecutor Vladimir Vuckčević, who was by all accounts doing an excellent job at his post, but who was also well-known as the prosecutor who, in the late 1990s, tried to cover up the Milošević Regime's role in the infamous "Grmec" case in which eleven people were killed in a 1995 factory explosion involving the illegal production of rocket fuel by Regime-supported mafia groups.

1. Pursuit of Objectives by the Special Court for War Crimes, Counter by Government of Serbia

The War Crimes Prosecutor's Office and the Special Court for War Crimes pursued their objective of opposing the Government of Serbia's stance on ICTY cooperation by actively coordinating with the ICTY on the initiation of the process of extradition for Serbian citizens indicted by the Tribunal. The Government of Serbia countered with tactics of its own, increasing public distrust of both institutions.

a. Attempted Government Sabotage of the Day-to-Day Activities of the Special Court for War Crimes (The "Ovčara" Trial)

Up until the close of 2005, there was only one trial, the so-called "Ovčara" trial, before the Special Court for War Crimes. The trial concerned the actions that took place outside of the Ovčara farms, on the outskirts of the Croatian town of Vukovar, at the close of the battle for the town in 1991.¹⁵⁸ At the end of the battle, some two hundred Croatian civilians, many of them patients from Vukovar's hospital, were tortured and later executed by Serbian military and para-military forces. The case was originally transferred to the Special Court from the ICTY in the investigative stage, with the War Crimes Prosecutor's Office then

157. *Labus: Cooperation with ICTY Should Move Forward By the End of the Year*, V.I.P. DAILY NEWS REPORT, Nov. 23, 2004.

158. Vukovar is a small town in the region of Croatia known as Slavonia. For many years this region was primarily inhabited by Serbs. Slavonia was the scene of fierce, often brutal fighting during the Yugoslav civil war.

expanding the investigation.¹⁵⁹ The result was an initial indictment of eight persons in December 2003 for violations of the laws of war. The trial opened in March 2004 against six defendants. Soon thereafter, in May 2004, new indictments were raised against twelve more defendants. By the end of 2005, there were seventeen defendants standing trial in the Special Court. The majority of these defendants were Serbs that were members of either the Serb-dominated Yugoslav People's Army (JNA), or the Vukovar Territorial Defense Force (a militia comprising the Serb residents of Vukovar).

The Government of Serbia was relentless in applying pressure on the Special Court during the "Ovčara" trial. Actively seeking to conceal the truth, the Government pressured the prosecution into shifting the blame for the actions that took place at the Ovčara farms not on the JNA, whose officer corps during the 2000–2005 period continued to be dominated by (ICTY) indicted war criminals, but rather on the Vukovar Territorial Defense Force.¹⁶⁰ Up until former JNA members began to give evidence, the trial focused solely on determining what each of the defendants were doing the day the victims were taken from the Vukovar Hospital to the Ovčara farms under JNA escort.¹⁶¹ A clearly intimidated prosecution team strenuously avoided posing any questions about JNA officers and the events precipitating the transfer of the victims from Vukovar Hospital to the Ovčara farms.¹⁶² In contrast to the affected prosecution, the presiding Special Court judge, Vesko Krstajić, refused to be intimidated and sought to establish the truth of the JNA's actions in Ovčara. When JNA members took the stand to give evidence, Judge Krstajić was persistent in establishing what they did and what they omitted to do in the face of the clear intention of the Vukovar Territorial Defense to execute the prisoners. It was only through the persistent questioning of Judge Krstajić that the JNA's role in the planning and premeditation of the crimes committed at the Ovčara farms was established.

159. For more insight into the process whereby the ICTY can transfer some of its cases to the Special Court for War Crimes, *see supra* Part V.A.1.

160. Interview with Confidential Source, in Belgrade, Serbia (Jan. 9, 2005).

161. The JNA was mentioned only in the context of establishing whether the buses used to transport the prisoners were civilian or military vehicles.

162. No questions were posed, for example, regarding the JNA barracks, to which the victims were briefly brought before they were transported to the Ovčara farms.

b. *Attempted Government Sabotage of the Day-to-Day Activities of the Special Court for War Crimes (The “Hadžić” Affair)*

Between 2003 and 2005, when the ICTY issued an indictment against a Serbian citizen, the usual procedural process involved the indictment being first delivered to the State-Union Ministry of Foreign Affairs, and then delivered to one of the investigative magistrates of the Special Court for War Crimes. The investigative magistrate would issue an order for the indicted party to appear, but it was up to the Ministry of Interior (MuP) to enforce that order; inevitably this was never done.¹⁶³ This lack of cooperation led to competition in the media as each side issued condemnation of the other.¹⁶⁴ At times, the competition between the two agencies went beyond the trading of barbs in the newspapers and turned into truly destabilizing behavior. A typical case in point was that of ICTY indictee Goran Hadžić.¹⁶⁵ On July 13, 2004 at 9:30 a.m., the ICTY delivered the indictment for Hadžić to the State-Union Ministry of Foreign Affairs.¹⁶⁶ At approximately 3:00 p.m., six hours after its initial delivery, the State-Union Ministry of Foreign Affairs forwarded Hadžić’s indictment to investigative magistrate Miroslav Alimpić of the Special Court for War Crimes.¹⁶⁷ At approximately 4:29 p.m. Hadžić was photographed by U.N. War Crimes Investigators¹⁶⁸ leaving his villa with a travel bag.¹⁶⁹ Hadžić has never been seen again. It seems someone in the Serbian Government tipped off Hadžić. Suspicion naturally centered on the State-Union Ministry of Foreign Affairs, which sat on the indictment for six full hours, and the Ministry of Interior (MuP), which would have been tasked with arresting Hadžić. Both of these institutions, however, immediately accused the Special Court for War Crimes of tipping off Hadžić.¹⁷⁰ The end result was a war of words that played out for several weeks, in which various government officials and ministries tried to pin the entire affair upon the Special Court for War Crimes. What was happening could be seen as an attempt by the

163. Interview with Confidential Source, in Belgrade, Serbia (Oct. 1, 2004).

164. See Court: *Police Not Following Orders, Fail to Arrest Hague Indictees*, V.I.P. DAILY NEWS REPORT, Oct. 28, 2004.

165. Hadžić, a wartime leader of the self-declared breakaway Serb republic of Krajina, had been accused of war crimes and crimes against humanity during the 1992–1993 conflict in Croatia.

166. Marlise Simons, *Tribunal Detectives Pursue War Criminals in the Balkans*, N.Y. TIMES, Jul. 25, 2004, at 3.

167. Interview with Andrea Simić, Resident Legal Advisor Assistant, U.S. Embassy, Belgrade, in Belgrade, Serbia (Dec. 8, 2004).

168. U.N. War Crimes Investigators have no right to arrest fugitives, only monitor their movements. See Simons, *supra* note 166.

169. *Id.*

170. Interview with Andrea Simić, *supra* note 167.

Government of Serbia to sever the tie of the Special Court for War Crimes with its constituencies in the international community and ICTY. Whether the Government was successful in doing this is debatable; what is not debatable is the damage that was done to its own institutional stability in the process.¹⁷¹

c. Attempted Government Sabotage of the Legislative Foundation of the Special Court for War Crimes

The special legislation authorizing the Special Court for War Crimes and the War Crimes Prosecutor's Office (the Special Court for War Crimes independent Prosecutor's Office)¹⁷² was adopted in July 2003. The legislation served as the legal framework for the investigation, prosecution, and adjudication of war crimes cases committed within the territory of the former Yugoslavia.

In the fall of 2004, as the result of concerted international pressure, the Ministry of Justice established a working group of eminent legal scholars and practitioners, including representatives from the Special Court itself,¹⁷³ to examine the legislation one year after its ratification, and propose amendments to enhance its efficiency. The working group met twice in November of 2004 and adopted a comprehensive series of amendments designed to facilitate the efficient prosecution of war crimes cases in the Republic of Serbia.

Due to pressure from the Ministry of Justice, the Serbian Parliament passed only a partial list of the working group's amendments, completely ignoring those proposals designed to effectively enhance the ability of the Special Court to do its work, the intent being to attempt to damage the Special Court via a concerted assault on its legislative framework. Specifically, the working groups proposed amendments to set stringent criteria for judicial appointments to the Special Court;¹⁷⁴ and its amendment

171. To date, Hadžić is still at large and, along with Ratko Mladić, is the only ICTY indictee still not in the custody of the Tribunal.

172. *See supra* Part IV.B.1.

173. The working group was comprised of the following five members: Dr. Goran Illić, Professor of Law, Belgrade University School of Law; Judge Siniša Vazić, President of the Special Court for War Crimes; Mr. Bogdan Stanković, deputy Special Prosecutor War Crimes; Mr. Branko Nikolić, Legal Advisor to the Organization for Security and Cooperation in Europe; and Mr. Branko Cosić, observer representing the Ministry of Justice.

174. The proposed criteria being twelve years experience with criminal cases, professionalism and diligence, for appointment as the President of the Special Court for

requiring the “consent” of the Special Prosecutor for War Crimes in the appointment of the Head of the Special Police for War Crimes (as opposed to his “opinion”), were rejected.

2. *Pursuit of Objectives by the Special Court for Organized Crime, Counter by Government of Serbia*

The Organized Crime Prosecutor’s Office and the Special Court for Organized Crime pursued their objective of opposing the Government of Serbia’s stance on ICTY cooperation, and the understanding reached between the Government of Serbia and the organized crime-dominated security services, by actively investigating and indicting suspected mafia and organized criminals (the majority of whom had ties to the profiteering and criminality that was actively initiated during the Milošević Regime and continued throughout the 2000–2005 period). The Government of Serbia countered with tactics of its own, designed to hinder the work of the Special Court.

a. *The “Đinđić” Trial*

At the close of 2005 there were fourteen cases before the Special Court for Organized Crime, with many more under investigation. The most notable case was the trial of the alleged assassins of the late Serbian Prime Minister Zoran Đinđić. The initial indictment was raised against some forty-four persons in August 2003. Eventually the trial was severed in two, with the fifteen most senior defendants (including JSO Commander Legija)¹⁷⁵ charged directly with the assassination of the late Prime Minister.¹⁷⁶ The trial commenced in December 2003, with the main defendant, Legija, still at large. The Government’s clear vision for the trial was not a rational search for the truth behind the assassination of a Prime Minister by the security services he tried to face down, but rather a showpiece designed to exonerate the same mafia-dominated security services. The Government was determined not to make the same mistake as the late Prime Minister and provoke the organized crime elements within the security services.¹⁷⁷ Such concerns for institutional stability, however, did not characterize the actions of the Special Court for Organized Crime. No longer embedded within the domestic political

War Crimes; and ten years experience with criminal cases, professionalism and diligence, for appointment as a Judge in the Special Court for War Crimes.

175. See *supra* Part III.B.2.

176. As opposed to the remaining defendants who were held on lesser charges such as conspiracy, murder, and kidnapping.

177. Interview with Confidential Source, *supra* note 163.

process by virtue of its autonomy, the Special Court sought to establish the truth behind the Prime Minister's assassination. The result was conflict, as the Government sought to immunize the damage caused by the Special Court's uncontrolled actions.

Government interference with the judicial processes of the trial began at the very onset. In one of his first interviews to the press, newly appointed Interior Minister Dragan Jočić cast doubts upon the entire investigation into the assassination, questioning the professionalism of the Special Prosecutor for Organized Crime.¹⁷⁸ Trading barbs in the press was put aside in favor of direct intimidation when, on April 20, 2004, trial proceedings were interrupted by about a half-dozen men appearing in the courtroom wearing t-shirts bearing the emblem of the disbanded JSO (a snarling wolf's head). The men observed the proceedings and left after the first adjournment, but not before intimidating witness Milan Veruović.¹⁷⁹ It was later established that the men were in fact former members of the JSO and current active duty members of the Gendarmerie.¹⁸⁰ Given that only one month before, one of the prosecution's main witnesses, Kujo Krijestorac, had been murdered,¹⁸¹ the intimidating presence of the former JSO and current Gendarmerie members in the courtroom was a clear message from the security services. This message was later echoed by Interior Minister Jočić when, instead of taking action against the men, he defended the wartime record of the JSO, and dismissed the characterization of the young men's appearance at the trial as a conspiracy.¹⁸²

178. See *Dragan Jočić: Nova istraga ubistva Đinđića*, BLIC, Apr. 10, 2004. The Minister of Interior was quoted as giving the following statement: "The police will simply have to reinvestigate everything concerning Đinđić's murder. Down to every detail. I wouldn't confine myself to the trial itself . . . The [Special] Prosecutor's task is to dig deep and set the police on the right course, that of the police to do their job thoroughly . . . I'm also puzzled by the fact that the proceedings have dragged on for so long. They have degenerated into something that shouldn't be allowed to go on and on." *Id.*

179. Veruović told reporters afterwards that he took the appearance of the men as a form of pressure: "I took it as indicating that they are still out there. They existed before my testimony and they will continue in existence after it." L. Čolić & D. Gavrilović, *Skandal traži odgovornost*, GLAS JAVNOSTI, Apr. 22, 2004.

180. *Milan Veruović: Pretio Mi Zvedan Jovanović*, DANAS, Apr. 26, 2004.

181. According to police reports, Krijestorac was killed late at night as he was parking his car. The murder weapon was a pistol fitted with a silencer. See Z. Uskoković, *Jedno oružje, a dva motiva*, VECERNJE NOVOSTI, Mar. 10, 2004.

182. See *'Beretke' još funkcionišu kao 'vučji čopor'*, BLIC, Apr. 24, 2004. The Minister of Interior was quoted as giving the following statement: "[T]he trial is open to

The surprise “surrender” of the main defendant of the trial, former JSO Commander Legija, provided the Government with further opportunity to manipulate its proceedings. On May 2, 2004, at approximately 9:00 p.m., after nearly fourteen months on the run, Legija calmly approached the Gendarmes guarding his home and surrendered. Reports later surfaced that he decided to surrender to the Gendarmerie because he knew that he could trust them, as his old friend Goran “Guri” Radosavljević commanded it, and it was composed mostly of his old men from the JSO.¹⁸³ Over the next several hours Legija allegedly met in private with Interior Minister Jočić and his deputy, Public Security Department Head Miroslav Milošević (another old friend).¹⁸⁴ Reportedly, it was during these meetings that it was decided what testimony Legija would give at the trial in order to deflect the blame of Prime Minister Đinđić’s assassination away from the mafia-controlled security services.¹⁸⁵ In his subsequent testimony before the Special Court,¹⁸⁶ Legija tried to point the finger of blame on Prime Minister Đinđić’s assassination on former cabinet ministers and MI6 (The British Secret Service), never once mentioning the Serbian state security services or the organized criminal groups that dominated them.

As the trial progressed, and more and more evidence came to light detailing the iron grip of power organized criminal groups held over both the Serbian economy and Serbian security services, the Government became ever more committed in its attempts to manipulate the proceedings. In perhaps its most brazen attempt, the Government (through Interior Minister Jočić and Secret Service Head Rade Bulatović) attempted to convince a key at large (at the time) defendant, Dejan “Bagzi” Milenković¹⁸⁷ to offer perjured testimony in return for immunity.¹⁸⁸

the public . . . As to the t-shirts, they signify an attitude towards the unit [the JSO] and its methods. After all, that unit earned a reputation of being unbeatable in combat during the war. The attitude of these young men . . . manifests a measure of attachment and enthusiasm, so I wouldn’t call that a new conspiracy at all.” *Id.*

183. U.S. Dep’t of State, *Legija Surrenders*, *supra* note 95.

184. Interview with Confidential Source, in Belgrade, Serbia (Feb. 28, 2005). In comments made to the weekly newsmagazine *Vreme* on January 20, 2005, Miroslav Milošević opined that Legija probably wasn’t guilty at all and should be acquitted. See Dejan Anastasijević, *Afere: Pravosudni udar*, VREME, Jan. 20, 2005.

185. In the words of former cabinet minister Dragan Veselinov: “Legija did not give himself up because he was tired and his protection fell off, but because he had a deal with someone in the Serbian Government. Someone is shielding him. So far [then Prime Minister] Koštunica himself has been the principle protector of the secret service chiefs . . . Legija’s surrender to the authorities is part of a plot to scuttle the trial of Đinđić’s murderers[.]” *Veselinov: štitnici u Vladi Srbije*, DANAS, May 5, 2004.

186. Given on June 14–16, 2004.

187. A gangster affiliated with the Zemun Crime Gang.

188. The sole reason the entire affair came to light is due to the fact that the Special Police for Organized Crime (UBPOK) were able to intercept a telephone call between

b. Parliamentary Inquiry

In March 2004, Serbian Parliament MP Željko Ivanji, a prominent leader of the G17 Plus political party (a key member of the ruling Government coalition), told the media that his party would propose the establishment of a “Committee of Inquiry” to analyze the actions of the Special Court for Organized Crime in investigating Prime Minister Đinđić’s assassination.¹⁸⁹ According to Ivanji, the purpose of the Committee would not be to “undermine” the actions of the Special Court, but rather to clear the reputations of any members of the state security services the Special Court had “unwittingly” besmirched.¹⁹⁰ Due to political infighting between the parties composing the ruling Government coalition, the proposed Committee was never established,¹⁹¹ but its attempted establishment, however, represented another serious attempt by the Government of Serbia to bring the structurally autonomous Special Court for Organized Crime under some form of governmental oversight. The episode was important not because of what Parliament set out to do—given the Special Court’s structural autonomy and budgetary independence there was little if any action the proposed “Committee of Inquiry” could have taken against it—rather the episode was important because it highlighted the pull and hold the state security establishment had over the executive institutions of the state.¹⁹² By

Bagzi and his attorney, Biljana Kajganić, in which the offer was made. In the conversation attorney Kajganić advised her client that she made a deal with the “old buddies,” ensuring that Bagzi would be given immunity in exchange for offering perjured testimony. Attorney Kajganić went on to tell Bagzi that Interior Minister Jočić had immediately accepted the deal, while Secret Services Head Bulatović had to first consult with “those above him” before he could also accept the offer. The only condition for obtaining immunity would be for Bagzi to say that he had organized a murder pursuant to the order of Ljubiša Buha Čume (Čume was one of the prosecution’s key witnesses in the trial, and this would discredit his testimony). Responding to Bagzi’s reluctance to state something that was not true, his attorney told him the following: “Who asks you what is the truth? The truth is what I agreed to be the truth. Hey, these two guys are the most powerful people in this state, you fool!” Interview with Confidential Source, in Belgrade, Serbia (Sept. 15, 2004). Subsequently news of this affair was leaked to the media, and transcripts of the intercepted telephone call appeared in the weekly newsmagazine *Vreme*. See Miloš Vasić, *Prisluškivanje Dejana Milenkovića Bagzija: Saradnici, advokati i stari drugari*, VREME, Sept. 9, 2004.

189. The mandate proposed for this Committee was quite broad, and would have granted it the authority to look into the investigations of murders committed before and after October 5, 2000.” See *Recite Ljudi istine*, VECERNJE NOVOSTI, Mar. 10, 2004.

190. *Id.*

191. See V. Nikolić, *Istraga i “sablja” na proveru*, GLAS JAVNOSTI, Mar. 10, 2004.

192. In the words of one observer, the proposed “Committee of Inquiry” was little

acting against the interests of the established stakeholders within the system, the Special Court for Organized Crime was provoking them into action.

VI. TESTING THE SERBIAN CASE

Having now gone over, in precise detail, the Serbian case of transitional justice (c. 2000–2005), we can begin to attempt to test the new case against the empirical findings that were revealed in Part II above, i.e. that the existence, or lack thereof, of clear transitional justice pacts during the initial stages of transition directly affect the success or failure of transitional justice. To begin, let us fit the Serbian case into the typology presented at the close of Part II above.

FIGURE 2: A TYPOLOGY OF TRANSITIONAL JUSTICE EPISODES
(WITH THE SERBIAN CASE)

INSTITUTION					
		Regular Courts	Special (domestic) Courts	Quasi-Judicial	No Prosecution
	Yes	Rwanda South Africa	Rwanda	Chile (1) South Africa	Spain Argentina (1.5) Chile (1) Serbia (Gov't as a whole)
PACT					
	No	Argentina (1) Argentina (2) Chile (2)	Serbia (Special Courts)	Argentina (1)	
Key:	Spain = 1975-1979 Argentina (1) = 1983-1987 Argentina (1.5) = 1987-2003 Argentina (2) = 2003-present Chile (1) = 1989-1999 Chile (2) = 1999-present South Africa = 1991-present Rwanda = 1994-present Serbia (Special Courts) = 2000-2005 Serbia (Gov't as a Whole) = 2000-2005				

more than a “plant foisted by the Secret Service (BIA) and State Security Service (RDB) on inexperienced people, such as those from G17 Plus [i.e. Željko Ivanji].” *See id.*

It is only when the Serbian case is fitted into the typology that its truly unique characteristics are revealed. The Serbian case cannot be treated as one case and must instead be split into two. Due to their unique structural autonomy vis-à-vis the Serbian Government, the Special Courts must be considered as a separate case from the Serbian Government. Consider how the transitional justice pact negotiated between the security services and the Serbian Government had no bearing on the Special Courts. As structurally autonomous institutions answering to constituencies different from the Government of Serbia, the Special Courts were able to pursue their own objectives independent from the pact struck between the Government and the security services. Despite the unique nature of the Serbian case, however, the empirical findings that were revealed in Part II above still hold true, namely that the existence, or lack thereof, of clear transitional justice pacts during the initial stages of transition directly affect the success or failure of transitional justice. The transitional justice process undertaken by the Serbian Special Courts were a complete failure. At every turn, the Special Courts found their actions vigorously opposed by both the Serbian Government and the security services.

The importance of these findings reverberate beyond the unique Serbian case and instead rather point to a need to move beyond the current simplistic assumptions within the Law and Political Science literature on the role of courts and judicial institutions in democratic transitions. Within the literature the generally positive effect of independent judicial institutions on democratic development is accepted as given, and distinctions are constantly presented between the relative “strengths” of the institutions of emergent democratic states. These states have either “strong” or “weak” institutions. “Weak” institutions, it is deduced, produce instability and prevent the emergence of a stable democratic polity. The assumption is then presented that the institutionalization of the Rule of Law¹⁹³ will strengthen “weak” institutions by helping the new democratic state: (1) initiate a clear break with the past; and (2) develop a legal culture which will impress upon state actors the idea that the defined legal bounds of the system (whatever they may be), are sacrosanct and

193. I.e. establishing and maintaining the submission of the state to clearly defined rules and parameters that are applicable to all parties, regardless of status.

cannot be transgressed.¹⁹⁴ Independent judicial institutions are judged as key actors in the institutionalization of the Rule of Law.¹⁹⁵ Where the existing literature falls short is in its assumption that the contrast between institutions in newly emergent democracies is always one based on their relative “strengths.” If institutions are “weak,” they need only be made stronger via the institutionalization of the Rule of Law through, in part, an independent judiciary.¹⁹⁶ Such a simplified account however may not always explain why democracy consolidates itself in some places and not in others. There can be much more to institutions than relatively simple classifications of “strength” and “weakness.”

Is an alternative conceptualization possible? A few scholars, most notably Owen M. Fiss, have begun to question whether such faith on judicial independence, at the expense of analyzing other factors into the equation, is perhaps misplaced. As Fiss explains it, in conducting their analysis, scholars “insist that the judiciary be independent of other government institutions,” but fail to grasp that the judiciary itself “is part of the state, exercising the state’s coercive power and dedicated to fulfilling the state’s purpose.”¹⁹⁷ The concept of judicial independence then is a bit of a misnomer, for the courts themselves are part of the state apparatus. Once one begins to envision this new understanding of where courts stand in relation to the other institutions of the state, the conception of unqualified judicial independence as a singular guarantor of democracy becomes more problematic:

Political insularity enables the judiciary to act as a countervailing force within the larger governmental system. In the context of a dictatorship, conflict or the very possibility of conflict between the judiciary (if it is allowed to exist) and the ruling powers is all to the good—the more political insularity the better. The situation is more complicated, however, when the judiciary is part of a democratic regime. Then, so I will argue, we must optimize rather than maximize independence. In contrast to impartiality, it is simply not true that the more insularity the better, for a judiciary that is insulated from the popularly controlled institutions of government—the legislative and executive branches—has the power to interfere

194. See generally Alejandro M. Garo, *Nine Years Transition to Democracy in Argentina: Partial Failure or Qualified Success?*, 31 COLUM. J. TRANSNAT’L L. 102 (1993); R.F. Utter & D.C. Lundsgaard, *Judicial Review in the New Nations of Central and Eastern Europe: Some Thoughts From a Comparative Perspective*, 54 OHIO ST. L.J. 559 (1993); Christopher M. Larkins, *Judicial Independence and Democratization: A Theoretical and Conceptual Analysis*, 44 AM. J. COMP. L. 605 (1996); A.P. Melone, *The Struggle for Judicial Independence and the Transition Towards Democracy in Bulgaria*, 29 COMMUN. & POST-COMMUN. STUD. 231 (1996).

195. See e.g. EDWARD SCHNEIER, *CRAFTING CONSTITUTIONAL DEMOCRACIES: THE POLITICS OF INSTITUTIONAL DESIGN* 199–220 (Rowan & Littlefield 2006).

196. *Id.*

197. Owen M. Fiss, *The Right Degree of Independence*, in *TRANSITION TO DEMOCRACY IN LATIN AMERICA: THE ROLE OF THE JUDICIARY* 56 (Irwin P. Stotzky ed., 1993). See also *supra* notes 153–155.

with the actions or decisions of those institutions, and thus has the power to frustrate the will of the people. An independent judiciary can be a threat to democracy.¹⁹⁸

In the view of Fiss then, far from guaranteeing democracy, unqualified judicial independence can act as a threat to democracy. The independence of judicial institutions then constitutes a true quandary, for complete independence can create a direct threat to democracy, but at the same time a complete lack of independence gives one courts that are completely subservient to the other political actors within the system. Such an extreme in the opposite direction is problematic in of itself because it leaves a situation with no mechanism at all to hold political actors accountable. One way to overcome this conundrum of balancing between judicial institutions with too much independence on the one hand, and too little on the other, is to shift focus onto the larger idea of judicial autonomy as opposed to qualified versus unqualified judicial independence. Fiss himself seemingly takes the first steps towards making this distinction in his call to “optimize rather than maximize” the idea of judicial independence in relation to democratic stability, and his understanding of courts themselves as part of the apparatus of the state. The distinction between judicial impartiality (seen as a positive force) and judicial insularity (seen as a negative force) Fiss makes are, if taken one step further to their most logical conclusion, the start of an analysis that seeks to separate the idea of judicial independence from that of judicial autonomy.

The idea of separating the concept of judicial independence from that of judicial autonomy is a new one. Indeed, as a survey of current and past scholarship reveals, quite often the two concepts have been considered as one in the same and thus interchangeable at will.¹⁹⁹ In reality however,

198. *Id.*

199. See e.g., Felipe Saez Garcia, *The Nature of Judicial Reform in Latin America and Some Strategic Considerations*, 13 AM. U. INT'L L. REV. 1267, 1286 (1998) (Where the author defines “judicial independence” as a function of the degree of “judicial autonomy” a court /judicial body possesses); Shannon Ishiyama Smithey & John Ishiyama, *Judicious Choices: Designing Courts in Post-Communist Politics*, 33 COMMUN. & POST-COMMUN. STUD. 163, 165 (2000) (where the authors created a conceptualization of judicial independence that had as its key aspect the notion of “political insularity”); Pilar Domingo, *Judicial Independence: The Politics of the Supreme Court of Mexico*, 32 J. LAT. AM. STUD. 705, 734 (2000) (where the author uses the term “judicial autonomy” to explain the recent political reforms that have enabled the Supreme Court of Mexico to emerge from the shadow of the executive branch and demonstrate an independent decision making function); Brian J.M. Quinn, *Vietnam's Continuing Legal Reform*:

as Fiss began to make clear in his distinction between judicial impartiality and judicial insularity, the two concepts refer to very different ideas. Judicial independence refers to the idea of a judiciary that is impartial in its decision making, has its decisions respected by the other institutional actors within the system, and is free from interference from said institutional actors.²⁰⁰ Judicial autonomy, on the other hand, refers to the degree to which a judiciary is embedded within a larger governmental structure. The more embedded a judiciary is, the more interdependent it is on the other branches or agencies of government in order to function. Under this understanding, one can see how the federal judiciary in the United States could be characterized as both highly independent and not at all autonomous. The federal judiciary in the United States is independent because its decision making is not visibly tilted towards one set of interests or actors over others, its decisions are respected and enforced by the other institutional actors within the system, and the other institutional actors within the system cannot interfere in said decision making. The federal judiciary in the United States is not at all autonomous because it is a part of the larger governmental structure and is inter-dependent upon said structures. The federal judiciary in the United States must engage in cooperation with the other branches of government in order to function—in this sense it is not an autonomous body. In the words of scholar John Ferejohn:

The forms of institutional dependence of the judiciary in the United States are myriad: the Constitution gives Congress the authority to create (or not create) federal courts other than the Supreme Court, to create and regulate their jurisdictions, to decide how many federal judges there will be and how many will sit on each federal court, to appropriate funds for the courts, to enact rules of court procedure, to create alternative systems of courts under Articles I and IV, to insulate state court decisions from review, and of course to override certain kinds of judicial decisions. The President is given the authority to appoint judges (with Senatorial approval), to set part of the courts' agenda (by deciding which cases to bring and how to pursue them), and to execute (fully or not) court rulings.²⁰¹

Judicial autonomy then is a direct measurement of the degree of collaboration from the other branches or agencies of government the judiciary requires in order to function. For the purposes of the main

Gaining Control Over the Courts, 4 ASIAN-PACIFIC L. & POL'Y J. 355, 375 (2003) (where the author interchanges and lumps together the terms “judicial independence” and “judicial autonomy” in describing the attempts of the lower provincial courts in Vietnam to resist attempts by the Supreme Court in Hanoi to assert more control over their functions).

200. Larkins, *supra* note 194, at 608–12; Matthew Stephenson, *Judicial Independence: What It Is, How It Can Be Measured, Why It Occurs*, <http://www.worldbank.org/publicsector/legal/judicialindependence.htm> (last visited Sept. 21, 2009).

201. John Ferejohn, *Dynamics of Judicial Independence: Independent Judges, Dependent Judiciary*, <http://www.usc.edu/dept/law/symposia/judicial/pdf/ferejohn.pdf> (last visited Sept. 21, 2009).

themes and issues explored in this Article, the existence of a transitional justice pact can be seen as one indication that the judicial actors (as part of the larger state apparatus as a whole) are wedded to the same public policy goals as the other institutions of the state. Where transitional justice pacts either do not exist; or where through a unique convergence of political space and institutional design judicial actors achieve a form of judicial autonomy that allows them to ignore the prerogatives of the other institutions of the state, a situation emerges where the balance between the need for justice and the desire for stability cannot be met—the end result then being a situation where both justice and stability suffer.

VII. CONCLUSION

Through a review of the key transitional justice episodes around the world since the 1970s, a typology (underlining the various mechanisms of transitional justice available for transitioning states) was fashioned. This typology revealed an important empirical finding, i.e. that the existence, or lack thereof, of clear transitional justice pacts during the initial stages of transition directly affect the success or failure of the forthcoming transitional justice process. The type of specific legal institution tasked with putting the transitional justice mechanism into action did not particularly matter (in measuring the overall success or failure of the process), as long as a transitional justice pact between the various groups involved in the transition was in place. When applied to the unique case of transitional justice in Serbia during the 2000–2005 period, the empirical finding highlighted the importance of the existence of a transitional justice pact to the success of transitional justice in a specific context held true. The Serbian case further highlighted how the current assumptions within the Law and Political Science literature on the role of courts and judicial institutions generally in democratic transitions, need to be rethought in a way that begins to make the distinction between the inter-related yet different concepts of judicial independence and judicial autonomy. Transitional justice pacts help ensure that the balance between the need for justice and the desire for stability in any transitional justice situation are met. The existence, during the initial delicate stages of a transition, of a clear common understanding as to the procedures and extent to which transitional justice will be undertaken, helps ensure that neither party will take the process beyond that which is acceptable to the other.

