

# Serbia After the Criminal Past: What Went Wrong and What Should be Done

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## Abstract

This article explores the relationship between the recent criminal past and the contemporary socio-political condition in Serbia. Basic assumptions employed are that the recent past is defined by collective crimes, this past has retained relevance after the regime change of October 2000 and that Serbia has thus far chosen the wrong methods for dealing with its criminal legacies. Due to the persistence of damaging political, cultural and moral attitudes about the past, the overthrow of Slobodan Milosevic has failed to bring about the necessary political and moral break. Thus, it is legitimate to explore alternative ways of coming to terms with the legacies of past crimes, including, as this article proposes, the establishment of a truth commission in Serbia.

## Introduction

This article explores the relationship between Serbia's recent criminal past and its contemporary social and political condition. The analysis employed is based on three assumptions. First, the period of rule by Slobodan Milosevic (1987–2000) is decisively marked by collective crimes, making it appropriate to identify this period as the criminal past. Second, the criminal past has retained relevance after the regime change of October 2000, and, therefore, any attempt to analyze the democratic transition in post-Milosevic Serbia must include an analysis of contemporary attitudes to recent crimes and to their legacies. Third, Serbia has thus far pursued the wrong methods for confronting this legacy of its criminal past. This prompts the exploration of alternatives, which I undertake in the final part of this article.

What is at stake in the Serbian situation is a difficult relationship between facts and their possible interpretations. First, there is disagreement about what really happened. This disagreement appears in many forms, the most obvious of which can be summarized in the questioning of what are presented as historical facts. For instance, until recently, many people in Serbia denied that mass killings took place in the Bosnian town of Srebrenica in August 1995. This literal denial was not necessarily due to a lack of knowledge of the facts.<sup>1</sup> Rather, it reflected the lack of readiness to publicly acknowledge facts that were privately known. Second,

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<sup>1</sup> Literal denial is the 'assertion that something did not happen or is not true.' Stanley Cohen, *States of Denial. Knowing about Atrocities and Suffering* (Cambridge: Polity Press, 2001), 6.

although the facts of this particular historical event have entered the public realm with such a force that the event itself cannot be denied anymore, there still remains room for interpretive denial.<sup>2</sup> Today in Serbia many people, whilst admitting that the Serbian army killed thousands of Muslim Bosnians in Srebrenica, argue that what happened was not a mass crime but rather a legitimate defense of national interests. Even more troublesome is that the denial of criminal, political, moral or material responsibility for the recent crimes appears to be at the core of the official attitude to Serbia's past.

But if the line between facts and their interpretation is so blurred, it may actually mean that those who argue that Serbs committed mass crimes – and that the legacies of those crimes are relevant for the prospects for democracy in Serbia – are simply wrong. Perhaps no mass crime took place at all. If the truth of this claim can be demonstrated through an interpretation of events, then there is no reason for us today to be burdened with the responsibility, or with any related considerations of transitional justice: Serbia did nothing wrong, and consequently all the country needs to do is to focus on the future requirements of democratic transition and consolidation and leave the past to historians.

Note how simple the question is: either there was or there was not a wrong committed. But note also that this is a practical question. The stance taken informs the prescribed actions at an individual, societal and political level. Furthermore, the answer informs the way Serbia is seen by others, and the way Serbs see themselves. What is at stake is the nation's identity.

So although the truth about the recent tragic events is not overly complex, a preliminary insight may be that risks of interpretation are not negligible. Cultural and political processes in Serbia demonstrate that the analytical question of what really happened is inseparable from the normative question of whether what happened should be evaluated as right or wrong, good or bad, just or unjust.

This article comprises four sections. In the first section I defend my three assumptions by offering an analytical summary of the essence of the recent past. I try to go beyond description by introducing the categories of mass crime, populist criminal regime and collective crime. In the second section I argue for the contemporary relevance of the criminal past. Legacies of the crimes are identified, and the argument is made that the overthrow of Slobodan Milosevic in October 2000 failed to bring about a political and moral break with the old regime. The claim is that this failure was due to the persistence of damaging political, cultural and moral attitudes toward the past. This claim is substantiated in the third section, where I argue that a democratic transition in Serbia has thus far been hampered by a tacit political decision not to challenge the ideological basis of the old regime and its criminal practices. This decision is not reducible to an attempt to 'close the books.' Rather, I will show that it is reducible to practical support for the legacies of the crime. In the fourth section I propose the establishment of a truth

<sup>2</sup> In the case of interpretive denial, 'the raw facts (something happened) are not being denied. Rather, they are given a different meaning from what seems apparent to others.' *Ibid.*, 7.

commission. The argument combines demands for practical political feasibility and for the morality and appropriateness of a transitional justice response.

## Mass Atrocities in Analytical Perspective

I assume that the character of the criminal past rules out the very possibility of a new beginning *ex nihilo*, in which the act of regime change would be perceived as a watershed transition from ‘then’ to ‘now.’ However, such an assumption is not beyond challenge. The Serbian attitude to the past is characterized by moral, cultural and political confusion.<sup>3</sup> The people, along with the political and cultural elite, admit to historical facts, but they apply wildly diverging patterns of judgment when evaluating these past events, and do so with a perspective informed by their own contemporary values and interests. The majority maintain that the recent mass killing of the non-Serbian population by Serbs does not mean that Serbs deserve blame.<sup>4</sup> If we bring together these two insights – that thousands of people were killed and that disagreement persists regarding both the historical and contemporary meanings of this fact – a guideline for theory may be that a combination of analytical and normative approaches is needed. I want to argue against the dominant attitude of denial. A complete presentation of the argument would require several steps. The first would consist of a historiographical reconstruction and accurate description of the chain of events; secondly, a set of analytical categories would be introduced with the aim of providing the description

<sup>3</sup> Perhaps the best illustration of this confusion is provided by the successive public opinion polls exploring the attitudes of the population toward war crimes and the International Criminal Tribunal for the Former Yugoslavia (ICTY). First, the percentage of people who admit to having heard about certain crimes being ascribed to Serbs is on the decrease. For instance, when interviewees were asked if they knew about the claim that the Serbian paramilitary units in 1992 committed atrocities against the Bosnian Muslim population in the town of Bijeljina, distribution of the affirmative answers was as follows: 53 percent (2001), 30 percent (2004), 27 percent (2005). Second, asking those aware of the claim if they believed in its truthfulness resulted in the following distribution of the affirmative answers: 30 percent (2001), 14 percent (2004), 14 percent (2005). The lack of confidence in the impartiality of the ICTY remains constant: in 2003, 2004 and 2005, 69 percent of interviewees believed that the Tribunal is biased against Serbs. See ‘Surveys,’ Belgrade Center for Human Rights, at [www.bgcenter.org.yu/index.php?p=236](http://www.bgcenter.org.yu/index.php?p=236) (accessed 19 December 2007).

<sup>4</sup> Denial of responsibility appears in both literal and interpretive forms. Its agents are political elites (both the ruling coalition and some oppositional parties), media, intellectuals and extreme right-wing organizations. For an example of the ruling elites’ relativist attitude to the legacy of past crime see the BBC interview with then-President of Yugoslavia in ‘The West morally obliged to pay for Yugoslavia’s reconstruction,’ *Newsnight*, 28 November 2001, at <http://news.bbc.co.uk/2/hi/events/newsnight/1685633.stm>. There exists a group of self-styled ‘patriotic media,’ heavily engaged in spreading and defending ‘the truth about the recent past’ (see for example the dailies *Kurir*, *Glas Javnosti*, *Politika*, the weekly newspaper *NIN* and many TV channels). Perhaps the most interesting intellectual forum focused on ‘defense of Serbian national interests’ is the web page of the academic journal *Nova Srpska Politicka Misao* [*New Serbian Political Thought*] at [www.nspm.org.yu](http://www.nspm.org.yu). Allegedly faithful to principles of analytical accuracy, academic impartiality and honesty, contributors to the NSPM forum are engaged in topics ranging from a demonstration of the continuous existence of an international conspiracy against Serbia (e.g., Dragana Matovic, ‘*Prostlost pred nama*’ [‘The Past in Front of Us’]), to a denial of the Srebrenica massacre (e.g., Aleksandar Pavic, ‘*Da li je genocid u Srebrenici prevara*’ [‘Was the ‘Srebrenica Genocide’ a Hoax?’]). Extremist organizations that either negate recent crimes or openly support them, advocate the politics of hatred toward other nations and ‘non-Serbian’ minorities (particularly homosexuals) and call for a new ‘holy war,’ include *Obraz* at [www.obraz.org.yu/eng/eng.htm](http://www.obraz.org.yu/eng/eng.htm); *Dveri Srpske* at [www.dverisrpske.com](http://www.dverisrpske.com); and *Vidovdan* at [www.vidovdan.org](http://www.vidovdan.org).

with explanatory power; and lastly, the need for a normative perspective would be defended and explicated.

Given present limitations of space, I will not undertake a historical review but will rather assume that the facts of the crimes referred to are known. I begin by focusing on the general analytical question: what do we have when we have mass atrocities? Contrary to many commentators who, upon exploring the universe of cases, argue that each historically known mass crime is distinguished by the contextual complexity, my claim is that such events share a tragic simplicity and transparency. What we have in all these cases are grave injustices; including mass murder, torture, sexual violence, persecution of whole groups of the population, forced deprivation and destruction of property. An attempt to refine this simple insight leads through a combined analysis of three factors: the nature of the regime; the nature of the relationship between the regime and its subjects; and the nature of the crime committed. The analytical summary offered below aims at introducing explanatory categories that would be of use for both a study of particular cases and a comparative study of mass atrocities and transitional justice. In the end of the section I will use this analytical framework to summarize the essence of Milosevic's regime as a populist criminal regime engaged in collective crimes.

In this text, I refer to a regime in which mass crimes take place as a criminal regime. The use of this terminology is based on the character of the crime. It is possible to isolate several constitutive features of mass crimes: their ideological justification; the role of the regime in criminal activities; the number of perpetrators and collaborators; the number of victims and the attitudes and behavior of bystanders. An important facet of these features is the normalization of crime, which in turn has at least two elements. The first consists in ideological, legal and political institutionalization of crime. The system of values, political arrangements and legal norms are all shaped in a manner that allows, justifies and renders routine the killing of those who are arbitrarily proclaimed as enemies. The second aspect of normalization is the support of the majority of population for the regime and its practices.

It is possible to differentiate between two types of criminal regimes. The first will provisionally be referred to as a 'repressive criminal regime.' It presupposes the effective independence of the regime from its subjects. This means that the regime does not count on the approval of its citizens for its criminal ideology and practices. In this case, the second constitutive element in the normalization of such crimes is missing. Such a regime requires 'mere' obedience, which is secured by the wide-scale, arbitrary and unpredictable threat and use of coercion. The goal is to bring those subjects who are not direct targets of crime into a state of submission, in order to effectively prevent their resistance to criminal practices. An example would be the so-called 'dirty war' in Argentina during the reign of the military regime from 1976 to 1983. Crimes committed by this type of regime can be labeled 'regime crimes.'

My focus in this article will be on the second regime type, which can be termed a populist criminal regime. It differs from the previous in that it relies on the support of its citizens. The essential quality of its relationship with its citizens

is not repression, but rather populist integration, which includes a high level of ideological and practical agreement about crime. Nazi Germany and Serbia under Milosevic's rule are examples of this regime type. Crimes committed by these regimes can be identified as 'collective crimes'; acts committed by a significant number of group members in the name of all group members and against individuals identified as 'outsiders.'<sup>5</sup> This type of crime cannot be committed by an individual, a random group or a collective understood as a mere sum of its members. It presupposes the collective intention to perpetrate a particular type of misdeed, collective awareness about the nature of the intended misdeed, organized effort to realize the intention (i.e., to carry out the chosen criminal action) and, finally, collective awareness about its consequences. The construction of collective crime unfolds in three stages, which, taken together, form a peculiar implicit pact between the regime and its subjects.

The first stage is the preparation for collective crime. It requires both ideological mediation and institutionalization. Ideological mediation includes practical measures of political and cultural propaganda aimed at integrating the subjects into an organic whole, within which their autonomous identities are effectively suppressed and unconditional loyalty is demanded for the regime's proclaimed ideological values and goals. This institutionalization occurs through authoritative arrangements and practices that define binding distinctions between allowed and forbidden, good and bad, right and wrong.<sup>6</sup>

The second stage consists of criminal action. Historical knowledge informs us that criminal regimes carefully prepare and coordinate the execution of crimes. The murky rationality of this project implies the planning of a peculiar 'division of labor': both the formulation of goals and the manner of their realization count on different forms of complicity on the part of the subjects. This is where the requirement of voluntary unconditional loyalty undergoes its most serious test. The subjects are not expected to be mere accomplices to, or supporters of, the criminal actions of the regime. They must demonstrate a specific kind of moral loyalty which is internalized and then manifested in an attitude of unquestioning support for whatever the regime is involved in. As a result, citizens believe that whatever acts they are accomplices to are politically and morally justifiable.<sup>7</sup>

The third stage of collective crime is the joint acceptance of its consequences. If the criminal action is presented as politically legitimate and morally right,

<sup>5</sup> Linda Radzik, 'Collective Responsibility and Duties to Respond,' *Social Theory and Practice* 27 (2001): 456.

<sup>6</sup> This institutionalization is sometimes formal, like in the case of Nazi Germany, where governmental bodies, political organizations and legal system were established as instruments of the racist ideology. Alternatively, it can be informal, like in the case of the Serbian regime under Milosevic, where democratic institutions were created only to serve as a façade for criminal practices based on the ideology of extreme nationalism. For a distinction between formal and informal institutions see, Peter Hall and Rosemary Taylor, 'Political Science and the Three New Institutionalisms,' *Political Studies* 44 (1996): 936–57.

<sup>7</sup> See, for example, Larry May, 'Metaphysical Guilt and Moral Taint,' in *Collective Responsibility. Five Decades of Debate in Theoretical and Applied Ethics*, ed. Larry May and Stacey Hoffman (Lanham: Rowman & Littlefield, 1991); Barel Lang, *Act and Idea in the Nazi Genocide* (Chicago: The University of Chicago Press, 1990).

then the implicit pact between the regime and its subjects will require that its consequences are also acknowledged as legitimate and right. It is important to note that such an acceptance of the consequences does not equate with the acceptance of responsibility for crime. Analyses of the German and Serbian cases show that, under a criminal regime, the majority of the ruled behave as if no crime is taking place at all.<sup>8</sup> Despite full awareness of the character of actions directed against ‘enemies,’ subjects willingly abide by the official pattern that rejects the description of such actions as criminal.

The case of Serbia fits this model. The stage was set for the perpetration of collective crimes through the promotion of a distinctive populist strategy of nationalism based on resentment and centered around the myth of a ‘higher-order national unity.’ This was then supported by the continuous fabrication of ‘enemies’ against whom ‘we’ must unite. The inherently chauvinistic image of the victimized innocent nation was presented as reality, in order to produce a new reality. The complex machinery of nationalist indoctrination was set in motion to produce the basis for massive ethno-political mobilization and homogenization. Political propaganda, creation of stereotypes, manipulation through media, education, science and popular culture were the most important techniques for the internalization of this ideology. The principal practical tasks consisted of inventing and imposing a false (that is, nonexistent) national identity based on the mythical concept of the nation as the ‘natural community’ and creating a political, social, cultural and psychological perception of the present as a state of chaos, terror and fear. In this new reality, no individual, social or political existence outside the framework of the imposed image of the nation was allowed. Secondly, the political obligation of every individual was resolutely framed by the character of ‘the historical mission,’ articulated by the founders of the nation.<sup>9</sup>

The next step involves shaping an attitude of hatred toward those identified as ‘others,’ and, in doing so, liberating individuals from civilizational constraints in order to create an enabling environment for aggressive war and mass murder to take place and be accepted as justified. Serbian nationalism presented the myth of the nation’s honor and dignity wounded in the past. Mass crimes were widely accepted by the subjects, but this does not mean that the majority directly participated in, or actively supported these acts. Many people chose the position of silence, understood as self-interested tolerance of injustice (i.e., of moral indifference in the face of the suffering of others).<sup>10</sup> This indifference was shaped by their readiness to subscribe to the institutionalized lie which normalized Serbia’s mass crimes.

<sup>8</sup> See, for example, Richard Bessel, ed., *Life in the Third Reich* (Oxford: Oxford University Press, 1987); Nebojsa Popov, ed., *Road to War in Serbia* (Budapest: CEU Press, 1996).

<sup>9</sup> Nenad Dimitrijevic, ‘Words and Death. Serbian Nationalist Intellectuals 1986–1991,’ in *Intellectuals and Politics in Central Europe*, ed. Andras Bozoki (Budapest: CEU Press, 1999).

<sup>10</sup> For the meaning and importance of moral indifference of subjects under a criminal regime see, Rainer Baum, ‘The Holocaust: Moral Indifference as the Form of Modern Evil,’ in *Echoes from the Holocaust. Philosophical Reflections on a Dark Time*, ed. Alan Rosenberg and Gerald Myers (Philadelphia: Temple University Press, 1988).

## After Regime Change: Legacies and Political Choice

A Serbian regime change in October 2000 opened up the possibility of a transition from an authoritarian state to a constitutional democracy. Today, eight years on, we witness the failure of this transition.<sup>11</sup> Serbia remains a closed society, governed by the imposed beliefs of the ruling elite rather than by public general norms which would be equally applicable to all members of the community. The character of the legal and political system; the relationship between the individuals and the state; economic processes; ideological patterns and prevailing cultural values all reveal a regime and a society that has lost its direction. Why is this?

In the wake of electoral victory, political parties united under the banner of the Serbian Democratic Opposition enjoyed significant popular support for their agenda of comprehensive democratic reconstruction. Still, the situation was complex. On the one hand, the 'standard' economic, legal and political imperatives of a transition were taking place. But this particular transition had another dimension, a consequence of the collective crimes committed in the name of the Serbian national identity. Today it can be argued that the failure of Serbia's transition is not primarily due to poor choices in institutional design or incomplete implementation of that design. The basic source of the political conflict which led to the dissolution of the Serbian Democratic Opposition soon after the regime change was not merely disagreement over the future but rather the relationship to the criminal past. The new democratic actors did not succeed in reaching even minimal levels of agreement in their interpretation of the past and transitional justice policies. Somewhat schematically, one can identify three basic types of attitudes to the past that appeared after the regime change.

The first can be labeled the 'opportunistic pacification of the past' or 'the strategy of continuity with nationalism.' Its ideological core was formed by calls for the defense of national identity and dignity. It minimized or completely denied war crimes committed by the old regime by insisting on a balance of 'our possible responsibility for war' and the 'responsibility of the other side' – and further affirmed the historical stereotype of the Serbian nation as a victim. This strategy was focused on resistance to removing the notorious officials of the former regime, obstructing reformist projects in parliament and effectively protecting the indicted war criminals (coupled with a questioning of the lawfulness of the International Criminal Tribunal for the Former Yugoslavia (ICTY)).

A seemingly opposed approach to the past was offered by a political option that can be termed the 'quasi-pragmatic orientation to the future,' or a strategy of 'closing the books.' It was formulated within the anti-war liberal movement during the last months of Milosevic's rule. The basic assumption was that the removal of the old regime, the establishment of democratic procedures and of a market economy, coupled with the ending of hate speech, would be sufficient

<sup>11</sup> A failed transition denotes a post-authoritarian regime which is incapable of stabilizing political, legal and economic institutional arrangements, successfully managing the questions of group and communal identities or effectively protecting basic rights.

for the transformation of Serbia from a corrupt nationalist regime to a decent democratic polity. Debates over the past and attitudes toward it were rejected as a moralistic obsession which stood in the way of rational strategies aimed at achieving democratic normalization.

The third strategy was focused on what its actors understood as the proper sequencing of steps. It was embodied in the reformist political position and actions of the first post-Milosevic prime minister, Zoran Djindjic, and his Cabinet. Pragmatically oriented toward the design and implementation of economic and political changes in a space significantly narrowed by inherited societal conditions and impediments created by political opponents, the reformists never denied the need for confrontation with the past. However, they maintained that institutional stability should come first. This government made an important contribution to forging a break with the past by its resolute policy of cooperation with the ICTY. Nevertheless, it failed to realize the full moral and political weight of the past. This became tragically obvious in March 2003, when Prime Minister Djindjic was assassinated by a paramilitary unit of the old repressive regime, which, despite its notorious participation in war crimes, continued to exist under the new dispensation.

The first strategy – that of continuity with the nationalism of the past – won out. This was due to the combination of a blockade of institutional reforms and the preservation of the core nationalist ideology. Serbia is one of a handful of transitional countries that even many years after the regime change have failed to commit to changes to its old constitutional system. A comparative analysis shows that the process of transition typically opens with constitutional revisions that aim to reform political institutions, establish the rule of law and guarantee the primacy of basic rights.<sup>12</sup> Serbia is in this regard an exception, as a country that preferred to simply keep its authoritarian constitutional setup intact.<sup>13</sup> This inactivity was justified by a discourse of ‘legalism.’ The exact origin of this term is not clear,<sup>14</sup> but it should be differentiated from the term ‘legality,’ which points to the generality and transparency of the legal system and to the duty of both

<sup>12</sup> See, for example, Andrew Arato, *Civil Society, Constitution, and Legitimacy* (Lanham: Rowman & Littlefield, 2000). For a theoretical argument about the importance of proper timing in a constitution-making process see, Bruce Ackerman, *The Future of Liberal Revolution* (New Haven: Yale University Press, 1992).

<sup>13</sup> The new Constitution of Serbia was enacted in November 2006. The constitutional text was drafted in haste behind the closed doors of the parliamentary constitutional committee and then immediately put to a referendum – effectively depriving citizens of any possibility of being informed about the content of the draft. The political background for this move was clear. Announcing the beginning of the constitution-making process, then-prime minister Vojislav Kostunica emphasized that ‘we need a new Constitution in order to define Kosovo as an integral part of Serbia . . . In this way we will send to everybody an unambiguous message that the state of Serbia is in all discussions about the status of Kosovo bound only and exclusively by what is written in its Constitution’ – ‘Kosovo kao deo Srbije u ustavu,’ [Kosovo as a Part of Serbia in the Constitution’] *B92 On-Line News*, 12 September 2006, <http://www.b92.net/info/vesti>.

<sup>14</sup> The analysis that follows shows that the interpretation of the concept of ‘legalism’ in Serbia does not fit Judith Skhlar’s understanding of this category as ‘the ethical attitude that holds moral conduct to be a matter of rule following, and moral relationships to consist of duties and rights determined by rules.’ Judith Skhlar, *Legalism: Law, Morals and Political Trials* (Cambridge, MA: Harvard University Press, 1964), 1.



government and citizens to always act in accordance with law. Understood in this sense, legality is a feature of the modern concept of constitutionalism, which provides for depersonalized, neutral and responsible state authority and for the effective protection of basic rights. Legalism in post-Milosevic Serbia stands for the exact opposite; as the ideological basis for a practice in which personalized, partial and irresponsible state authority creates the conditions for socio-political insecurity and the routine violation of basic rights. In Serbia, legalists are those who identify themselves as defenders of the legal system in a political context in which the law is corrupted by the practices of illegal behavior. Consequently, they claim to be in opposition to those political actors who do not abide by law. However, an impartial view of the recent Serbian 'battle for legalism' demonstrates that its essence is not the commitment to constitutionalism and the rule of law. Rather, its essence is defined by its purpose: to publicly denounce political opponents as lawbreakers. In this strategy, the identification of political opponents comes first. In the next step, 'legalism' is used as a political tool to accuse opponents of anti-legal behavior. In a word, 'legalism' functions as a political instrument of disqualification. Although rooted in an ideology of 'care for the people' in the manner of 19th-century romantic nationalism, the legalists have failed to realize that after a criminal past this particular traditionalism is incompatible with the demands of the rule of law. In trying to reaffirm 'traditional values,' 'national honor and dignity,' 'our genuine identity' and the like, they have become instruments of the institutional and ideological legacies of resentment nationalism.

Deprived of a legitimate constitutional system and of a minimum value consensus, post-regime change Serbia entered into a political battle for the diffuse support of 'the people.' In such a context, the reformists were forced to adjust their projects to the limitations imposed by the rudimentary façade of statehood inherited from the preceding period. In this struggle for legitimacy, within the framework defined by the dominant collectivist political culture, attempts to justify reforms through the liberal constitutionalist discourse were defeated by a legitimizing pattern that relied on deeply rooted tribal nationalism.

## Living in the Past

The question of what happened in the recent past is followed by the question of whether what happened matters today. I have tried to demonstrate that the answer is affirmative. On the one hand, the regime change introduces substantially new elements, both in terms of dismantling the old political, social and cultural patterns, and in terms of creating new patterns over the ruins of the old regime. Still, institutions and values, actors and specific events, which used to shape our lives before the change, do not simply disappear in its wake. Rather, they turn into a set of features we conventionally identify as legacies. The very use of the term 'legacies' suggests that the old economic, political, cultural and ideological patterns may no longer determine our present reality that the old elites may have lost their positions, that certain types of events are unlikely to be repeated, but that they are

all, in some manifestation, still present. Consequently, we cannot simply disregard them. We need to understand the role these elements played in the recent criminal past, as well as the exact manner and shape in which they persist today, in order to effectively choose strategies for addressing them. Finally, we need to establish a clear normative stance regarding the past, so as to prevent a resurgence of the values of the old regime.

In a distinct way, this also holds true for transitions from a criminal past. Mass crimes of yesterday are directly relevant for the way we live today. Injustices done in the name of the group to which we belong have created consequences that cannot be erased by an act of political will, either from our history, or from our present. This is a simple analytical insight. But, on the other hand, an analysis of the Serbian case shows that neither the crimes nor their consequences are mere objective facts – they are subject to interpretation which is always undertaken from a contemporary perspective. This interpretation can be right or wrong, depending on the normative stance taken.

The normative stance behind the practical–political attitude to Serbia’s recent past is the assumption that the mass crimes committed by Serbs were both politically and morally justifiable. The ensuing interpretation has created disastrous consequences. A look at Serbia today shows that political, social and cultural dynamics in this country have been decisively shaped by political and societal silence about the crime. This silence functions as the refusal to acknowledge the true character of what is known to have happened. As a consequence, since the assassination of Prime Minister Djindjic, the worst legacies of the past have resurfaced, including a denial of any involvement by the Serbian regime in the crimes committed in Bosnia, Croatia and Kosovo; a preservation of the destructive core of tribal nationalism disguised as the affirmation of ‘genuine traditions’ and ‘true identity’; a promotion of war criminals to the pedestal of national heroes and a rise in xenophobic attitudes amongst the general population.<sup>15</sup> In a word, the refusal to reflect on the past has greatly contributed to the political and normative confusion, which has effectively brought transition to a halt. Both citizens and political elites are prisoners of the past.

Of course, only a minority of political and social actors would explicitly support the old regime and the outcomes of its rule, but an analysis of the political processes and the prevailing value orientations reveals a continuity and reproduction of what are essentially the same institutional and ideological patterns. The present is based on regressive, anti-civilizational attitudes to the past, which can be summed up as the avoidance of any responsibility for the crimes committed in the name of the Serbian nation. Moral responsibility has been vehemently denied, the question of political responsibility has been shunted and a refusal to accept the criminal responsibility of those who stand accused before the ICTY has become a measure of patriotism. Public discourse is colonized by the authoritarian friend/foe pattern, with foes being those individuals and organizations who argue that the book of

<sup>15</sup> See supra n 3 and 4.

the past should not be closed and who insist that the road to democracy for Serbia requires both condemnation of past crimes and the explicit renunciation of the legacies of tribal nationalism.

Contemporary Serbia is rebuilding itself from the ruins of the communist and nationalist regimes of yesterday. Today's rulers seem to believe that a democratic structure can be erected by using the old and broken foundations of previous regimes. This feeble imitation of a democratic transition is due to the elites' efforts to keep the country in the past. This does not contradict the claim that Serbia refuses to deal with its past. The past that today's elites defend has never actually been. It is only a chimera that shapes and defends a new version of the ideology of mythic nationalism.<sup>16</sup> It is founded on the idea that 'in a land without history, the future is controlled by those who determine the content of memory, who coin concepts and interpret the past.'<sup>17</sup> This is a revisionist political program: recent atrocities are to be interpreted in a manner that smoothly integrates them into a new representation of the national identity. Once the instruments of the official discourse are put in place, any attempt to question the results of this ideological engineering is declared as a betrayal of the national interests.

Let us not forget that this ideological revision concerns crimes committed in the name of the Serbian nation. Such a falsifying enterprise, comparative experience teaches us, can never fully succeed. But in the Serbian case it has had profound effects. The society is deeply divided as a direct result of the war, its perception and the political abuse of its effects. The wall of silence built around the recent past only fosters a situation in which there are too many people who are either incapable or unwilling to distinguish between right and wrong. The line between the truth and lies about the past is unclear, and lies are thus easily translated into a manipulative political discourse. Instead of recognizing the true victims of the crimes, those in power have preserved the old narrative about the victimized Serbian nation. This ideology of victimization continues to serve as a repository of right-wing political options, including everything from Serbian liberal nationalism to Serbian street fascism.

A nationalist ideology focused on a false perception of the past has been used as the basis for the contemporary Serbian political regime. However, contrary to the expectations of those who attempt to distort reality, the past refuses to disappear. The lack of acknowledgment of, or reflection upon, collective crimes remains the primary cause for Serbia's failure to achieve democracy and civilized normalcy.<sup>18</sup> I use the term 'civilized normalcy' here to refer to the capacity of citizens of a political

<sup>16</sup> Duncan Bell, 'Mythscape: Memory, Mythology, and National Identity,' *British Journal of Sociology* 54 (2003): 63–81.

<sup>17</sup> Michael Stürmer, 'History in a Land Without History,' in *Forever in the Shadow of Hitler? Original Documents of the Historikerstreit*, ed. James Knowlton and Truett Cates (NJ: Humanities Press, 1993), 16.

<sup>18</sup> On 26 February 2007, the International Court of Justice found that the Government of Serbia was not directly responsible for the Srebrenica genocide during the Bosnian war, but did find that it failed to meet its obligations under the 1948 Genocide Convention by not acting to prevent the actions of the Bosnian Serbs. The implications of this decision for future actions of the Serbian government remain to be seen.

community to distinguish between basic moral categories of right and wrong, and to act in accordance with the precepts of justice.<sup>19</sup> Membership in a political community implies, among other things, certain common values, being part of a collective bound by multiple ties, including normative standards of behavior in society. In the case of collective crime, the collective of co-nationals fall below a certain moral threshold, which is defined by the collective's own rules, customs, values and patterns of action that are generally regarded as a way of life.<sup>20</sup> By committing, supporting or simply tolerating collective crime, the members of the collective effectively renounce the normative standards of a civilized community. This is the major moral consequence of a criminal past.

## Looking Back in Order to Move Forward: the Case for a Truth Commission

The question then remains: how do we return to a state of civilized normalcy? I argue that the right interpretation of the sinister past and its consequences requires starting from the following simple normative position: what happened is of such significance and impact that it ought not to be left to oblivion. What does this mean?

Let me reiterate the most important fact of the Serbian context: injustices of the recent past are crimes committed by Serbs against Albanians, Croats and Muslim Bosnians. These people were targeted because of their 'non-Serb' identity. This is certainly a very painful and humiliating reality for every member of the Serbian nation. Facts about past events generate defense mechanisms, ranging from refusal to know or to care, to false justification or relativization of crime. In such a context, those who oppose transitional justice measures insist that it would be counterproductive to 'open old wounds,' alleging that this would only further divide a society still seeking a fragile democratic consensus. Confrontation with the past involves serious risks, the most prominent being further political destabilization. Nevertheless, these risks do not challenge the feasibility of dealing with the past; rather, they require searching for the right approach to it. This approach would combine moral reflection and political action.

A clear break with the recent past is the core precondition for a new Serbian beginning. This new beginning requires not only coming to terms with the facts of past crimes, but also meeting moral requirements through an unambiguous, non-instrumental reflection on the past. This reflection should focus on the following issues: public acknowledgment of the character of the crime; the meaning of civilized normalcy after a criminal past and the substance of Serbia's national identity. Instead of accepting the present nationalist ideology that attempts to remodel history by falsifying events, continuities and traditions, Serbs must demonstrate that

<sup>19</sup> Jürgen Habermas, 'Warum ein Demokratiepreis für Daniel J. Goldhagen? Eine Laudatio,' *Die Zeit*, 12 (1997), <http://www.zeit.de/archiv/1997/12/historie.txt.19970314.xml> (accessed 18 December 2007).

<sup>20</sup> David Cooper, 'Responsibility and the System,' in *Individual and Collective Responsibility: Massacre at My Lai*, ed. Peter French (Cambridge, MA: Schenkman, 1972).

post-conflict continuity with the past is neither morally acceptable nor politically viable. The specific goal of 'looking back' is two-fold. First, to understand the motivational patterns of the crime or to re-create

a sense of the type of situation in which these things [moral standards] may suddenly be at stake, the temptations that may lead one to betray them and the circumstances and entanglements that make otherwise virtuous people start acting viciously.<sup>21</sup>

Second, this reflective understanding should inform a 'change of mentality . . . which could leave yesterday's self-perceptions behind.'<sup>22</sup>

Only after such moral insights can we properly direct our attention to the future-oriented requirements of transitional justice. Political action should focus on the acknowledgment of the crime and institutionalization of criminal, political and moral responsibility. Given that one of the gravest legacies affecting the majority of Serbian citizens today is a lost sense of justice,<sup>23</sup> I propose the establishment of a truth commission. The principal task of this body would be to focus on the reconstruction of basic moral standards of right, good and just.

It is possible to foresee serious objections being raised to any proposal for the establishment of a truth commission in Serbia. The most important of these would likely challenge the feasibility and legitimacy of this institution in the present Serbian context. Everything described above – cultural legacies, prevailing emotional and ideological attitudes to the recent past, a poorly institutionalized regime, ruling elites that base their legitimacy on a denial of past wrongs – points to the lack of socio-political readiness and capacity to undertake comprehensive measures to redress past injustices. Indeed, the record of transitional justice in Serbia is disastrous. Domestic courts that deal with war crimes are so inefficient that they raise doubts about their independence from politics; the reigning attitude toward the ICTY is one of open animosity; indicted war criminals are at large and there are strong indications that they are protected by the police and army; an attempt to establish a previous truth commission has failed and, finally, the majority of citizens prefer to remain silent about the past.

What could be a realistic approach to this situation? The first alternative concedes the power of the present situation, i.e., accepts that the official ideological revision of the past and the culture of silence are simply too powerful to be challenged. The best remaining alternative, therefore, is to look forward – to focus on 'standard' imperatives of democratic transition – as if nothing extraordinary happened in the recent past. The major weakness of this kind of realism has already been explained; legacies of past crimes are among the constitutive features of the post-Milosevic situation. Thus, Serbia simply cannot avoid dealing with the past. It follows that the second alternative promotes institutions and processes of transitional justice. To

<sup>21</sup> Jeremy Waldron, 'Superseding Historic Injustice,' *Ethics* 103 (1992): 5.

<sup>22</sup> Jürgen Habermas, 'Die neue Intimität zwischen Kultur und Politik,' in *Die nachholende Revolution* (Frankfurt am Main: Suhrkamp, 1990), 17.

<sup>23</sup> Jonathan Allen, 'Balancing Justice and Social Unity: Political Theory and the Idea of a Truth and Reconciliation Commission,' *The University of Toronto Law Journal* 49 (1999): 315–53.

be realistic in the given context, a truth commission project must demonstrate the capacity to motivate people to confront the past. The commission should make it clear that its task would not be to attribute collective guilt; crimes would be treated as acts of the regime and not of the nation. If this is achieved, the people might be motivated to acknowledge the facts without automatically activating psycho-social defense mechanisms. The commission would aim at destroying the current ideological matrix that continues to present these crimes as a 'legitimate defense of Serbian national interests.' Its task would be to demonstrate that the old regime was actually engaged in serious, massive and systematic violations of human rights. If the Serbian people understood that ruthless mass crime was committed in their name, it could act as a strong incentive for a viable confrontation with the past, because it would release the ordinary people from the moralistic pressure of collective guilt, while simultaneously giving everyone the opportunity to face his own moral responsibility for supporting the old regime.

In addition, several more specific feasibility objections deserve mention. The first is based on the comparative experience of truth commissions. The argument is that, for both practical and principal purposes, commissions are generally established immediately following a regime change.<sup>24</sup> In this regard, Serbia is confronted with the problem of delay; too much time has passed since the regime change, rendering the formation of a truth commission pointless. It is true that in March 2001 the President of the Federal Republic of Yugoslavia (Serbia and Montenegro) established the State Commission for Truth and Reconciliation. However, this body never enjoyed the necessary support of the state, and its only contribution was the drafting of some highly questionable internal documents before finally ceasing to exist in 2003 when the Federal Republic of Yugoslavia was transformed into the new State Union of Serbia and Montenegro. So, it could be argued that Serbia, an independent state since 2006, already had a truth commission, that the work of this body ended in failure, and that today, eight years after the regime change, there is no point in repeating the experiment. Second, in many cases perpetrators were citizens of other countries (Serbs in Bosnia and Croatia), organized into different Serbian military units that were not under the direct control of the Belgrade regime. Third, documents and other sources of information about many of the crimes are often only found outside Serbia. If the task of a commission is not only to identify, but also to document violations of human rights, it may follow that the impossibility of accessing data and listening to perpetrators, supporters and witnesses living in foreign countries, presents additional arguments against the very possibility of such a body.<sup>25</sup>

Do these arguments uphold the claim that a truth commission is not feasible in today's Serbia? The argument of delay may be correct in suggesting that the

<sup>24</sup> For a reliable comparative analysis of truth commissions see, Priscilla Hayner, *Unspeakable Truths: Confronting State Terror and Atrocity* (New York: Routledge, 2001).

<sup>25</sup> Vojin Dimitrijevic, 'Izgleđi za utvrđivanje istine i postizanje pomirenja u Srbiji' ['Prospects for the Establishment of Truth and Achievement of Reconciliation in Serbia'], *Rec* 62 (2001): 72–73.

optimal moment for the establishment of a commission has been missed. Still, let me reiterate that the democratic transition in Serbia has failed, and that this failure is due to the socio-political refusal to confront the criminal past. In many important regards Serbia is today closer to the past than it was in October 2000, and this is why the mere number of years that separates us from the moment of the regime change is not, in itself, sufficient to warrant the dismissal of the option of a truth commission. Similarly, the second and third feasibility objections can be realistically seen as contextual constraints that do not speak against a truth commission, but require adjustment of its tasks. I propose that in the Serbian case the commission deal with cases of human rights violations committed during the period of conflict in the former Yugoslavia.<sup>26</sup> Specifically, it would focus on the crimes committed by the Milosevic regime and the self-proclaimed Serbian political units in Bosnia and Croatia. Its task would include dealing with both the crimes committed by the 'official' military and police units of these entities, and those committed by various Serbian paramilitary groups. Vojin Dimitrijevic disagrees with the above proposal, arguing that

such a body must not deal with the events that occurred in what are now foreign countries, nor should it even investigate the responsibility of the Serbs and their leaders for such events, because the state would once again usurp the right to represent Serbs beyond the borders of the current state.<sup>27</sup>

I believe that this objection could be overcome if a future commission focused on those crimes in what are now foreign countries can be causally linked to the Milosevic's regime.<sup>28</sup> For example, although the city of Sarajevo was not bombed or held under siege by the Milosevic-controlled Yugoslav army, there is sufficient evidence to presume that both this army and the Serbian regime actively aided the military machinery of the Bosnian Serbs which did so, and that in Serbia there are documents and witnesses to this effect. The same holds true for the mass murder in Srebrenica, and for many other atrocities committed in Bosnia-Herzegovina and Croatia.

The second type of objection questions the legitimacy of a truth commission in the Serbian context. It is based on the insight that the establishment and activities of most of the known commissions were justified primarily by their capacity to correct injustices inflicted upon victims. A public, documented statement about the victims and their suffering is supposed to reach the following goals: to reintegrate them, actually or symbolically, into the community from which they were excluded by the criminal acts; to reaffirm their human dignity; to offer a chance to the perpetrators, supporters and by-standers of the criminal regime to reflect upon their responsibility for the suffering of the innocent; to transform private knowledge

<sup>26</sup> The scope of authority and procedural rules of this body would have to avoid overlaps with criminal courts, because dealing with the question of criminal responsibility is not the task of a truth commission.

<sup>27</sup> Dimitrijevic, *supra* n 25 at 73.

<sup>28</sup> The establishment of these causal links would not be the task of the commission. It would rely on the evidence collected by domestic and international criminal courts.

about crimes into public acknowledgment and recognition, thus delegitimizing the discourse of 'ignorance' and, according to the oft-quoted observation by Michael Ignatieff, 'reducing the number of lies that can be circulated unchallenged in public discourse.'<sup>29</sup> In this regard, an obvious problem is that many criminal actions that can be ascribed to the Serbian regime were committed outside of the Serbian borders, targeting individuals and groups who were not citizens of Serbia. This seems to challenge the possibility of a direct communication between victims and perpetrators. If the acknowledgment of the moral equality of victims and their full reintegration into society comprises a core goal of truth commissions, does it follow that the impossibility of direct communication with the victimized population challenges the need for such a body?

If commissions are principally focused on acknowledging suffering in internal conflicts and achieving a measure of national unity by demonstrating special care for victimized co-citizens, then the Serbian case does not fit. Indeed, what would we gain by examining crimes committed in part by foreign citizens, against foreign citizens, on foreign soil? A possible answer combines the above offered insights of moral reflection with some contextual constraints.

How does moral reflection support the case of a truth commission? I think that comprehensive thinking about the past should lead to the insight that more than a diffuse attempt to gain societal acknowledgment of the crime is needed. The gravity of the past requires a systematic effort to master its memories. In other words, we need an institution that serves as a framework for an organized confrontation with injustices committed in the name of the nation. In a previous text,<sup>30</sup> I argued in some detail, following Jonathan Allen's argument, that the main goal of this body can be summarized as an intention to implement transformative justice.<sup>31</sup> The object in need of transformation is a political culture which tolerates and supports injustice inherited from the previous period. A truth commission could focus on contributing to a change in the prevailing immoral attitude and to an affirmation of civilized normalcy, by examining and publicly presenting the nature and justification of violence committed by the previous regime. It is possible today – without going beyond the borders of our country – to reconstruct an adequate number of facts about these past crimes. Current empirical research also makes it clear that a large number of citizens of this country are aware that crimes did take place and that they were committed 'on our behalf.' The only thing lacking is the moral and political will to take the step from private knowledge to public acknowledgment and recognition. The general goal of a truth commission would be to take this step. At the same time, this body would have two specific tasks: to talk to the victims and their communities and to open deliberation about the criminal past within our community. I see these as two aspects of our collective

<sup>29</sup> Michael Ignatieff, 'Articles of Faith,' *Index on Censorship* 5 (1996): 113.

<sup>30</sup> Nenad Dimitrijevic, 'Justice beyond Blame: Moral Justification of (the Idea of) a Truth Commission,' *Journal of Conflict Resolution* 50 (2006): 368–82.

<sup>31</sup> Allen, *supra* n 23.



moral responsibility. The fact that victims are not members of our polity does not obliterate our moral duty toward them. Given that the crimes were committed in the name of the Serbian nation as a whole – i.e., the human dignity and integrity of victims were violated in the name of all Serbs – none who belong to this collective can avoid the moral duty to address the victims and their community. Responsibility, understood etymologically as the duty to respond, would attend to victims' 'reasonable fear' that

even if I believe you did not kill with your own hands, I don't know how you feel about the people who did. I don't know if you encouraged or approved of them. I don't know whether you will act like they did in the future. So I am afraid of you. If you apologize, if you express regret, I will have less reason to be afraid, and maybe we can find a way to live in peace together.<sup>32</sup>

Technically, this would require that a truth commission invites as witnesses the people who survived concentration camps, those who were wounded by firing squads, mothers whose innocent children were deliberately killed, women who were raped, those forcefully evicted from their homes. They would be asked to share with us the stories of their suffering, to tell us how the consequences of this suffering affect their lives today and explain their attitudes toward the perpetrators and the Serbian nation as a whole. We would have the duty to listen to them. Perpetrators and supporters would also be invited to share their versions of the events described by victims. Specifically, they would be required to step out of their official roles at the time of the crime and to tell us about their individual human attitudes to the events.

The purpose of all these accounts would be twofold. First, the proceedings would be completed with a commission report that would acknowledge the suffering of the innocent victims and the immorality of the crimes committed. This would need to be phrased as a message which collectively acknowledges the misdeeds and serves as an apology to every victim, to each member of the victimized community and to the community as a whole. This is a necessary step in the process of restoring human dignity to victims. Second, the work of this body and its report would provide ordinary members of the Serbian nation with an incentive to reflect on the ultimate human horror of the crimes committed on their behalf. They would be invited to understand that the committed crimes were not a 'legitimate defense of Serbian national interests.' A combination of factual knowledge and its moral interpretation would be needed in order to demonstrate that the old regime was actually engaged in a massive and systematic violation of human rights that culminated in an administrative massacre.<sup>33</sup> Additionally, the commission's report would be required to clarify the moral meaning of the prevailing pattern

<sup>32</sup> Radzik, *supra* n 5 at 465.

<sup>33</sup> On the question of the ability of a truth commission to change perceptions and attitudes, see for example, James Gibson, *Overcoming Apartheid. Can Truth Reconcile a Divided Nation* (New York: Russell Sage Foundation, 2004), especially chs 4–6; and *Truth Commissions: A Comparative Assessment. An Interdisciplinary Discussion Sponsored by Harvard Law School Human Rights Program and World Peace Foundation*, ed. Henry Steiner (Cambridge, MA: World Peace Foundation, 1997).

of behavior and attitudes under the old regime. As a Serb, I can attest to the truth that yesterday, the majority of us were willing to abandon basic human decency and support barbaric injustices. We did not become decent human beings again because of a regime change. Rather, we have to decide to pursue fairness and justice, and to make them part of our identities. We need to understand and acknowledge who we were yesterday, in order to be treated as civilized human beings today.