

# Transitional Justice and Political Goods

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Twenty-five years after the collapse of communism, the ghosts of yesterday remain very much alive. From Poland to the Balkans, various aspects of transitional justice have become part and parcel of a much broader political discourse touching on everything from political identity to regional integration. As in other parts of the world, in Eastern Europe the process of dealing with the human rights abuses of previous regimes promises to carry on for even longer than those regimes existed in practice. Transitional justice has already proven in the region to be anything but transitional.

This long-term nature of transitional justice and the extent to which it pervades other apparently unrelated policy spheres raise challenges to earlier theoretical work on the determinants of transitional justice policies. Central arguments in the literature focus on factors such as the relative power of new vis-à-vis old elites, the dominance and complicity of old elites' associates in new state structures, the nature of past human rights abuses, and societal fragmentation (for example, along ethnic or class lines). This chapter argues that all of these might help to establish the boundaries within which new elites shape transitional justice policies, but they do not fully account for the policies chosen. Here, I add one more piece to the complicated puzzle, arguing that political elites pursue transitional justice strategically, implementing popular programs only to the extent they do not interfere with the provision of other expected goods and services and pursuing even unpopular programs when they are perceived to facilitate the delivery of these expected goods.

I assess this argument based on media analyses and interviews with elites involved in transitional justice policies in Poland, Serbia, and Croatia.<sup>1</sup> The diversity of experiences during and after communism makes this group of cases a fruitful area to assess broad arguments derived from countries around the world. These cases vary in important ways, in particular with regard to the

nature and scope of repression, the regime change, and the transitional justice programs on the table. Poland is the quintessential Central European case, where the worst years of repression ended in the 1950s and the communists ultimately negotiated power away to an opposition group (Solidarity). Serbia and Croatia, by contrast, registered multiple periods of repression, the last and most violent one taking place after communism and involving victims regarded by the public as enemies. While calls for, and mechanisms of, transitional justice were almost exclusively domestic in the Polish case, they emanated largely from outside actors in the latter two.

### DETERMINING JUSTICE

Since World War II, political elites have struggled with the question of how to redress past human rights violations. For many transitional justice scholars, the decision of how to deal with the past (or not) is a function of the relative power of new political leaders vis-à-vis former leaders of the old regime. From an elite perspective, the path of political transition (negotiation or revolution) can influence the post-transition distribution of political power and, hence, the feasibility of various transitional justice policies. Following Huntington, proponents of this argument believe that where old elites have the power to direct change, they will in the process ensure for themselves amnesty and/or a strong enough hand in the new regime to ensure that transitional justice is weak or non-existent. Where members of the old regime are replaced by revolution, their weakness should result in much more aggressive forms of transitional justice.<sup>2</sup>

Proponents of the relative power theory, who define power more broadly by taking into account state structures, emphasize the continued presence in key power ministries of actors involved in earlier abuses. This, in turn, depends on the nature of the previous regime. In the South American context, the military is particularly relevant; in Eastern Europe, the police and secret services have received more attention. Their power, as an ostensibly cohesive, armed group, gives these actors the potential means to disrupt the transition; their complicity gives them a motive. Those applying an even broader definition of power, extending it to the level of societal support, argue that new elites avoid justice measures when they might inflame public opinion and increase instability, particularly where significant sectors of society were previously aligned with the old regime. Social structure (ethnic, religious, class) may preclude transitional justice if such policies could antagonize intra-societal relations. The role of memory and temporal as well as qualitative aspects of past abuses might set the parameters of activity. Accordingly, transitional justice is a function of

relative power, but society – not members of the former regime – determines what is feasible.<sup>3</sup>

These arguments are heavily focused on what Welsh calls the “weight of the past,” which in Central Europe includes such historical factors as level of communist-era repression (lower after 1956) and mode of transition (typically involving a significant role for the outgoing regime).<sup>4</sup> Some authors have noted that the most far-reaching lustration policies unfolded precisely in two states where the communist regime rapidly collapsed (Czechoslovakia and East Germany).<sup>5</sup> Others have contrasted otherwise similar states based on the level of communist-era repression, explaining that those facing more repression or fewer ways to oppose the old regime were inclined to more aggressively deal with the communist regime.<sup>6</sup> Like most analyses of post-communist transitional justice, some of these studies were focused largely on the single policy of lustration.

Not surprisingly, given the politicization of lustration, most scholars of post-communism also incorporate into their analysis the “politics of the present” – that is, the political setting, such as the political strength of post-communists, and contextual factors, such as fading memories and re-evaluations of the communist period. From this perspective, lustration laws depend on the ability to assemble pro-lustration coalitions in the legislature, sometimes by moderating policies to make them more politically feasible. In this vein, Callhoun claims that the adoption of liberal democratic values by post-communist states results in more lenient (thus more politically acceptable to former communists) lustration.<sup>7</sup> Others have found that lustration initiatives are more likely to come from those politicians who failed to fight the previous system and set out in the new one to prove their true anticommunist *bona fides*.<sup>8</sup> Still others play up the very politicization of transitional justice, portraying it as a contemporary game used by one set of politicians to weaken others.<sup>9</sup>

As the distinction between past and present is a false dichotomy in some contexts, some scholars have adopted a hybrid approach, showing how the two come together in ways that heavily influence transitional justice approaches. In a valuable study, Nalepa argues that new elites sometimes back away from lustration to avoid unearthing skeletons in their own closets (infiltration of communist-era dissident networks).<sup>10</sup> This may explain why in Poland and Hungary, where relatively more from communist-era opposition networks were recruited by the secret police, lustration came later than in the Czech Republic, which had fewer collaborators, meaning that former anticommunists taking power had fewer worries about embarrassing themselves.

## AN INSTITUTIONAL APPROACH

Each of these studies identifies individual pieces of the transitional justice puzzle that, on their own, are important but when taken together become much more powerful. Using these various arguments as building blocks, I apply an institutional lens in which transitional justice policies are a function of both the constraints and opportunities of empowered actors. Many of the preceding arguments represent the former. For instance, powerful old elites can be a threat to aggressive transitional justice, particularly when they have voting power in primary institutions, control the means of violence, or manipulate public opinion in the new system. Similarly, social schisms based on roles in the previous regime can limit available transitional justice policies. This is particularly true when empowered politicians believe they need the support of a constituency with strong views on justice in order to maintain power past the next elections. However, politics are dynamic, and while these variables may set the stage for transitional justice decisions, they do not, I argue, dictate their direction.

I follow the underlying assumption in the literature that most new political elites, those excluded from power under the former system and empowered under the new, democratic one, tend to want to pursue the most aggressive forms of transitional justice possible. I categorize these elites here as “post-oppositionists” – they are the one-time leaders of the opposition movement that preceded democratic breakthrough, who take power in the new democracy. Whether motivated by morality, pragmatism, or vengeance, those who argue for turning the other cheek tend to be outliers. Nevertheless, empowered proponents of transitional justice face various sources of (potentially conflicting) pressure for and against accountability policies, a function of past and present conditions. Moreover, they are much less likely to pursue forms of transitional justice that would ultimately endanger their political survival. At the end of the day, democratic leaders are accountable to constituents who expect government to provide essential goods and services. These political goods include everything from order, security, and civil liberties to anti-inflationary or pro-employment economic policies and international memberships (with their respective security or economic dividends). The provision of these goods, which is a central feature of political viability in a democratic state and features prominently in the good government literature, is critical to understanding how transitional justice plays out.

From a strategic perspective, political leaders concerned primarily with political survival must ensure that transitional justice policies are perceived by their constituents to further, or at a minimum not interfere with, the

provision of those goods they can influence. This is most important for those actors with the greatest constitutional powers, since these actors suffer most when constituent expectations and policy outcome are out of sync. Those “primary actors” tasked with running the state (such as a prime minister) will face considerably higher expectations than those more ceremonial, “secondary” leaders (such as the monarch or weak president in a typical parliamentary system). As I will show, in primary institutions transitional justice is largely dictated by the following bottom line: where justice is seen as an impediment to the delivery of goods it should be eschewed, where it is viewed as beneficial it should be pursued. Impediments are measured in perceived opportunity costs; even if transitional justice has very little monetary cost, it may be seen as politically costly if it is viewed as a policyholder preoccupation or if the public is antagonistic toward a chosen policy.

These public attitudes govern the relationship between political goods and transitional justice policies. While such policies can be seen as political goods in and of themselves (for example, if criminal enterprises are disrupted by charging members involved in former rights violations), they can also be seen as competing for critical resources otherwise available for other programs that may be seen by voters as more pressing. Where the public is neutral or in favor of retribution (whether a function of the “politics of the past” or “politics of the present”), elites must demonstrate that such accountability measures do not interfere with their provision of expected goods. Where the public is staunchly opposed to aggressive forms of transitional justice, such as criminal accountability, primary actors will only pursue such policies if they can explicitly link them to their ability to better provide these goods – in essence, buying their constituents off.

While transitional justice preferences of secondary actors, facing far fewer demands and expectations, are more difficult to predict and apparently less consequential for policy output, they can affect the transitional justice debate indirectly, by using agenda setting, issue linkages, and public political pressure to increase or decrease primary actors’ perceived costs of pursuing transitional justice. Introduction of transitional justice legislation or public statements, appeals, and campaigns by secondary actors might put primary actors on the defensive and force them to alter their policies. These pressures can ultimately result in the adoption of somewhat more or less aggressive policies than might be predicted by looking at primary actors alone.

By focusing on new elites’ calculations of what publics want and expect from them, this institutional argument allows us to consider a range of variables featured prominently in the literature, which help set new elites’ parameters of movement. In one country, transitional justice may face public

opposition due to high levels of complicity, in another it may be intimately linked to identity, and in a third the public may have little interest at all. In each case, the perceived public support will indirectly affect new elites' calculus of how much people are willing to pay for transitional justice. Structural constraints, including the explicit costs and the opportunity costs of a particular policy (which may in part result from the power old elites continue to wield), affect this calculus and help inform elites about what forms of transitional justice are politically feasible.

#### EVIDENCE FROM THE POST-COMMUNIST WORLD

The three cases explored here, Poland, Croatia, and Serbia, allow us to look for replication in a variety of contexts.<sup>11</sup> In some ways, these cases are broadly comparable. As noted earlier, all have faced issues of accountability in the context of radical political and economic reform, they share a legacy of relatively similar communist-era human rights abuses and the persistence of formerly abusive institutions in post-communist times, and citizens in these states share many political cultural traits. However, these cases also diverge in ways that provide for a very broad test of the arguments posited here. They differ by transition type as well as temporal and qualitative aspects of human rights violations, making them representative of post-communist diversity and instrumental in understanding similar problems outside of the communist world. While Jelena Subotic's chapter in this volume focuses on the politicized reinterpretation of certain elements of communist and pre-communist history in the post-communist period, I concentrate here on violations perpetrated during the wars in the 1990s.

My analysis is based primarily on media analyses and elite interviews. The first stage of research for each case involved an international media review, based on broad keyword searches on *LexisNexis* (for example, "criminal prosecution" and "Yugoslavia"). In the countries where international reporting or translations of local publications were insufficient to establish a timeline of the events and political context from the time of political change to the period of research (2005), I then conducted a local media analysis (in Serbia, I searched *Danas* and *Politika*; in Poland, I searched *Gazeta Wyborcza* and *Rzeczpospolita*). Next, I conducted semi-structured, open-question elite interviews to gauge elite perceptions for why specific policies were pursued or eschewed. Although I focus on criminal accountability in this chapter, the project included measures from condemnations and victim compensation to truth commissions and administrative cleansings. I interviewed (in each of the local languages) four types of actors directly concerned with human rights

developments in each state: members of the (former) opposition movements and current ruling elites, leaders of locally active non-governmental human rights organizations, representatives of foreign missions and intergovernmental organizations, and members of the (former) regime accused of rights violations. Interviewees were determined based on their position (in strong or weak institutions) and stance toward transitional justice. I also relied on the snowball method, requesting at the end of each interview names of actors prominent on both sides of the transitional justice debate, whom I also contacted. I conducted more than 150 interviews in the three countries, asking actors who were close to policy decisions what influenced the way these decisions were ultimately made.

### *Serbia*

Slobodan Milošević, responsible for egregious human rights violations following the dismemberment of Yugoslavia, left office in the fall of 2000, when a democratic alliance dominated by two Serbian opposition parties, Vojislav Koštunica's Democratic Party of Serbia (DSS) and Zoran Djindjić's Democratic Party (DS), helped mobilize the population and oust Milošević. Despite Milošević's ouster, Serbia had a negotiated transition. Koštunica took control of the presidency and federal structures through an October 2000 "electoral revolution," but he became captain of a sinking ship (the federation), his position largely representative, secondary in authority to the prime minister's. The opposition consolidated power through the December 2000 republic elections, the product of negotiations with Milošević's associates. Djindjić subsequently became the Serbian prime minister, a primary institution responsible for running the day-to-day affairs of that government, representing 90 percent of Yugoslavia's population (with the remainder being accounted for by Montenegro). Yugoslavia's new leaders at both the federal and republic levels immediately faced external pressures to extradite alleged war criminals to the domestically unpopular International Criminal Tribunal for the Former Yugoslavia at The Hague (referred to here as the ICTY or The Hague).

The case of Serbia demonstrates the complicated nature of relative power explanations. According to a transition-based political elite argument, those who long opposed the Milošević regime (referred to here as post-oppositionists) should faithfully follow through on any (assumed) promises of amnesty that made the transition possible.<sup>12</sup> Electoral results, which left these post-oppositionists with control of 70 percent of parliamentary seats in the powerful Serb Republic, might cast doubt on this interpretation since

post-oppositionists emerged as a powerful force despite the negotiated transition. Nevertheless, state-structure proponents would also warn that the continued dominance of old regime associates over the police and military leaderships should be enough to stymie proponents of criminal justice. With citizens also largely opposed to justice for war crimes, most relative power considerations suggest criminal justice was off the table.

However, Serbian republic leaders under the first two post-Milošević governments transferred more than twenty mostly high-ranking indictees to the ICTY. The greatest threat to this process, according to interviewees involved, came not from members of the Milošević regime, but from President Koštunica, himself a post-oppositionist. Milošević's arrest and extradition led to the first open split in the post-oppositionist camp and brought federal (military) and republic (police) security structures into armed conflict. Still, Djindjić maintained his policy of sluggish cooperation with the ICTY until he was murdered in 2003, purportedly for this policy. When Koštunica became prime minister in 2004, Yugoslavia's cooperation with the ICTY was initially frozen, but it then suddenly found new life in the twelve "voluntary surrenders," largely regarded as handovers, in the last quarter of 2004 and first quarter of 2005.

Outside of their institutional settings, both Koštunica and Djindjić should have avoided cooperation with the ICTY between 2000 and 2003. Neither seemed personally in favor of the ICTY, Koštunica labeling it a "monstrous institution"<sup>13</sup> and Djindjić questioning the veracity of its indictments. Cooperation with the ICTY was unpopular and opposed by a majority of Serbs, who viewed charges against fellow Serbs as disproportionate to the evidence and overwhelmingly believed their brethren would not receive a fair trial in The Hague. Cooperation was risky, as was dramatically demonstrated by Djindjić's assassination. While post-opposition forces wanted to see Milošević and his cronies in prison, they envisioned more benign domestic trials for corruption (a crime against the Serb people) over international trials for war crimes (committed against non-Serbs).

Officials from the United States (U.S.) and the European Union (EU), by consistently advocating for ICTY cooperation throughout the first years of the post-Milošević transition, provided the great push for international justice.<sup>14</sup> Western leaders dangled the carrots of ICTY-conditional foreign aid and membership in Western institutions (especially the EU) as an enticement. Why did Western pressures convince Prime Minister Djindjić to cooperate (if cautiously) with The Hague, while they were ineffective with regard to federal President Koštunica? How did Koštunica influence events despite occupying such a weak office? And why did Koštunica alter his policies several months after becoming prime minister?



The answer to the first and last questions, according to Serbian political leaders, is that cooperation is largely determined by institutional incentives. Those who worked closest to Djindjić are adamant that the prime minister and others in his party wanted to see Milošević stand trial at home and only subsequently, when this became increasingly impossible, at The Hague.<sup>15</sup> They also recognized that without cooperation with the EU their political careers were in jeopardy. Without Western carrots, including favorable EU negotiations and billions of dollars of much-needed aid, Serbian governing elites would have been unable to move closer to fulfilling popular aspirations for conditioned policies such as EU entry and provide for basic services such as electricity.

In public, Djindjić and other government officials simultaneously expressed discomfort with the ICTY and framed arrests and extraditions as a step toward modernization and re-integration into the international community. “We do not have the luxury of losing needed economic aid for not collaborating with the court in The Hague,” he made clear.<sup>16</sup> Indeed, Milošević’s provocative extradition took place just days before an important donors conference valued at more than \$1 billion. Djindjić “didn’t do this only for the money, but that was a very concrete issue for a prime minister,” recalled one of his former advisors.<sup>17</sup> “Of course, financial support was important for us and the deadline for us really was a deadline,” added one of Djindjić’s deputies.<sup>18</sup>

The slow pace of cooperation with the ICTY was partly the effect of opposition from Djindjić’s greatest political rival, President Koštunica, who used anti-cooperation calls to differentiate his party from Djindjić’s. Based in a weak institution, Koštunica had much more to gain from populist anti-ICTY rhetoric than from Western aid. “It was Djindjić who was running the finances. Koštunica had absolutely no responsibility for running the country,” pointed out a former Djindjić advisor.<sup>19</sup> Without counter-pressure from the secondary institution, elites admit that costs of cooperation would have been significantly lower and cooperation may have been more forthcoming.<sup>20</sup>

Therefore, Serbia’s pro-transitional justice elites calculated that unpopular pro-ICTY policies could be trumped by other, especially economic, measures.<sup>21</sup> Parties favorable to transitional justice were not alone in this calculation. When the nature of goods appeared sufficient to win public acquiescence, even Serbia’s most adamant opponents to cooperation submitted. Subsequently, Prime Minister Koštunica, who as president had opposed cooperation with the “despicable”<sup>22</sup> ICTY, orchestrated twelve “voluntary surrenders,” largely regarded as handovers, in late 2004 and early 2005.<sup>23</sup>

Koštunica’s dramatic policy change, a case of strategic conversion, responded to an EU deadline for the start of negotiations that would bring

Serbia one step closer to EU entry. Like his predecessors, Koštunica went out of his way to explain cooperation with the ICTY as “necessary” for entry into the EU.<sup>24</sup> According to his deputy, handovers to the ICTY were “in the interest of our county.”<sup>25</sup> Cooperation with the Tribunal remained unpopular and there is no indication that Koštunica had become a Hague convert, but he, like Djindjić, altered his own strategic preferences, gambling that delivery of key goods would outweigh the unpopular decisions used to purchase them. Also similar to Djindjić, Koštunica strived to use international pressures to secure goods that among his potential electorate made up for the sins used to purchase them. The idea was not to simply weather public opposition but to use the increased availability of popularly demanded goods to minimize or even reverse it.

### *Croatia*

One year before Milošević was deposed, a loose coalition of six opposition parties defeated the late Croatian strongman Franjo Tuđman’s nationalist party in the 1999 “electoral revolution.” In the run-up to those elections those opposing Tuđman’s regime vowed to increase cooperation with the ICTY in order to secure Croatia’s accession to the EU, so cooperation seemed likely when they began the year 2000 in solid control of the government and parliament. In an interview with the foreign press soon after he assumed the premiership, Ivica Račan affirmed that “we will certainly accelerate the process of cooperation with The Hague.”<sup>26</sup>

The change in Račan’s attitude only makes sense from an institutional viewpoint. In 2000–2003, Croatian post-oppositionists (those who had opposed the Tuđman regime and the 1990s wars) controlled the presidency (a secondary institution), the cabinet, and 65 percent of seats in parliament (both primary institutions), but were unwilling or unable to systematically carry out transfers of Croatian criminals to the ICTY or other criminal forms of justice – in stark contrast to relative power predictions. Instead, they pursued a spotty policy of criminal accountability (whether cooperation with The Hague or domestic criminal trials), avoiding activities that could be interpreted as unpatriotic by voters or Račan’s ruling coalition, representing the 1999 opposition parties which were unified only in their pro-Western, anti-war, and anti-Tuđman policies. In contrast to public support relative power arguments, Croatian leaders were afraid not of confronting a divided and potentially violent Croatia but of humiliating Croats with a reassessment of their recent war years. As in Serbia, political strategy and personality politics, filtered through formal institutions, explain many of the transitional justice decisions

taken in Croatia. And as in Serbia, society created the political landscape on which all of this played out.

Račan and other leaders of the former democratic opposition, like their counterparts across the border in Serbia, claim to personally have wanted to see war crimes violators punished – claims that nearly all interviewees from civil society backed up. They also realized that society was unprepared to allow this to happen on a large scale or at high levels at home, leaving The Hague as the only place where justice could succeed. If Račan sounded like a true internationalist in the foreign press just after coming to power, his enthusiasm for cooperating with the ICTY was far more bridled on the domestic stage, where political leaders understood that most Croats felt they were victims, not perpetrators, of war crimes, and those who defended Croatia were heroes. “The general approach here is that Croatia was attacked by Serbia and we had a right to defend ourselves,” summarized the parliamentarian who drafted Croatia’s ICTY cooperation law.<sup>27</sup>

As in Serbia, Croatian authorities faced diplomatic pressure for cooperation from the United States and the EU, a club most Croats hoped to join. Unlike in Serbia, however, foreign pressures on Croatia lacked focus and salience. Diplomatic pressure was diffusely dealt with the various war-related rights violations that continued to exist, so apart from pressing for cooperation with the ICTY, Westerners demanded Serb refugees’ right of return and greater transparency for domestic war crimes trials of primarily ethnic Serbs. More importantly, the nature of the goods Račan was offered in return for cooperation (a distant EU membership) made the benefits of cooperation a difficult sell to constituents looking for concrete, immediate gains. In contrast to Serbia, there was no mention of Hague conditionality in the run-up to talks on \$250 million in assistance from the International Monetary Fund. U.S. aid to Croatia was raised from \$12 million under Tudjman to a still-meager \$20 million under Račan, conditional on the Croatian government’s cooperation with the ICTY and the return of Serb refugees. The EU officials admitted that while funding was theoretically contingent on political conditions, they lacked the unity to engage in the complicated task of pulling funding. Intra-Union cleavages hurt the EU’s credibility, convincing many politicians and constituents in Croatia that the ICTY issue “will just blow over,” as several interviewees put it. This left Račan without the tools necessary to use foreign carrots and sticks to convince Croatian constituents that criminal justice was in their best interest.

As a result, and despite his own preference for criminal trials, Račan primarily played anti-Hague cards in public. Upon taking office, he promised to balance Croatia’s “international obligations” with his duty to respect “the

right to freedom and actions which secured (the state).”<sup>28</sup> He attacked the ICTY sentences and resisted the Tribunal’s demands to the point that his government just narrowly escaped Security Council condemnation. Račan warned the ICTY to avoid equalizing Serbian and Croat guilt, thus supporting the widely held view that the majority of war crimes were carried out by Serbs and not Croats. As Croatia’s former United Nations representative explained, “Definitely no one was a saint, but Milošević was the devil.”<sup>29</sup> Račan assured Croats repeatedly that he had a strong record of non-compliance with ICTY demands for extraditions and would never accept indictments dealing with Croatian offenses.

Therefore, although Croatia received a much smaller list of Hague indictments than Serbia, Račan fought the international community in almost every case. On a rare occasion when the ICTY demanded handovers of two Croatian generals (Rahim Ademi and Ante Gotovina), Račan at first refused, then conceded only after a personal visit by the ICTY Chief Prosecutor Carla del Ponte and a one-month wait, by which time Gotovina allegedly had been allowed to escape. In 2002, Račan refused to hand over General Janko Bobetko on health grounds. Račan was ultimately credited with encouraging the surrender of just two indictées, Pasko Ljubicic and Rahmi Ademi.

The distance and intangibility of their country’s entry into the EU made it extraordinarily difficult for Croatian elites to convert cooperation with the ICTY into readily consumable political goods at home. Račan, whose government was destabilized after he encouraged the generals to surrender, was weary of facing an anti-ICTY Croatian electorate if his government ever collapsed while extraditing national heroes. Račan was primarily concerned that his inability to demonstrate that cooperation with the ICTY was necessary would hurt him in the “battle for neutrals,” that is, the moderate Croats who may have supported his policies but were wary of attacks on the war period.<sup>30</sup>

When Račan did cooperate, he attempted to use international carrots and sticks much as the Serbs (more successfully) did. Without the same clear ties between cooperation and political goods, Račan had to stretch. He warned of international isolation as a result of non-cooperation and sometimes struggled to create the appearance of threats (economic sanctions) that were in fact absent.<sup>31</sup> For the most part, outside of occasional crises related to a particular suspect, Račan worked to keep ICTY cooperation at the more mundane level and out of the public eye. With little to gain and much to lose from an open policy of cooperation, he agreed, for example, to some document handovers but publicly held his ground on “unacceptable” ICTY requests.<sup>32</sup>

According to interviewees, including Račan himself, Račan desperately wanted to cooperate and privately expressed frustration that even domestic

non-governmental organizations supportive of transitional justice were insufficiently active for him to convince constituents that cooperation was right.<sup>33</sup> More importantly, Račan lacked the tools to show these constituents that Croatia and Croatians would ultimately gain from cooperation. As a result, Račan acted counter to his own preferences for aggressive justice and openly balked at Western demands for compliance. Particular episodes of compliance partly ensued because President Stjepan Mesić, protected by his weaker powers and constitutionally dictated term in office, adopted a more forceful pro-ICTY stance that helped win over a few supporters and lessened the bite of Račan's pro-justice moves, including transferring documents and people, to The Hague.

As in Serbia, when the nature of the goods appeared sufficient to win over public acceptance, even Croatia's most adamant opponents to transitional justice were converted. This occurred in 2005, one year after Ivo Sanader, an ardent nationalist who had orchestrated a 2001 protest in defense of General Gotovina, became prime minister. His cabinet faced a crisis when EU officials finally delivered a concrete sanction, indefinitely postponing accession negotiations until Croatia demonstrated resolve to capture Gotovina. Faced with the responsibility of crushing Croatia's EU aspirations, Sanader saw he had more to gain in the long term from cooperation than obstruction. As such, he ceased hoping aloud for Gotovina's voluntary surrender and became an active proponent of Gotovina's handover, freezing the general's assets and even promising he would personally arrest and extradite him if given the chance.

To supporters, Sanader was a selfless politician, promising on Croatian Radio that his actions were about "the future of Croatia" and risking the nationalist backlash that led to his party's major defeat in the 2005 local elections.<sup>34</sup> As Sanader said: "My government is entirely oriented towards solving the last outstanding issue" – meaning unblocking EU negotiations.<sup>35</sup> By December, Gotovina was in The Hague, thanks in part to Croatian intelligence, and EU negotiations had resumed. The gamble proved to be a wise one; in the 2007 elections, Sanader's party came out stronger than it had four years earlier (winning 36.6 percent as opposed to 33.9 percent of the electoral vote), and he held onto the premiership.

### *Poland*

While the cases of Serbia and Croatia highlight how foreign actors can influence the availability of political goods and thereby affect opportunities and even policy preferences of domestic elites, most post-repressive states are neither subject to international judicial mechanisms nor faced with aid

conditionality based on transitional justice policy. Poland, where one-time anticommunists from the Solidarity movement (referred to here as post-oppositionists) faced practically no international pressure in the transitional justice sphere, is a more typical case. Solidarity activists and Communist Party leaders negotiated Poland's transition to democracy in 1989, making Poland the first European country to abandon communism. In the process, former communists guaranteed themselves a place in the new government and 65 percent of seats in the primary, lower house of parliament (Sejm). Post-oppositionists were left with 35 percent of the Sejm and total control in the freely contested secondary, upper house of parliament (Senate).

Given the exclusively domestic nature of accountability influences, the relatively weak institutional strength of post-oppositionists and the unreformed nature of Poland's communist repressive apparatus, relative power proponents should expect Poland's new elites to avoid harsh transitional justice. Nevertheless, just two months after assuming power on promises of economic and political reform, post-oppositionists launched a truth process designed to prosecute former communist leaders. Immediately after the regime change, the anticommunist opposition forces were unified in their quest for aggressive transitional justice. Within several months, however, an institutional schism arose. Senators struggled to keep transitional justice on the agenda, while Sejm members strived to moderate Senate policies in order to ensure support from former communists and their allies for economic reforms demanded by voters. The result was, after 1989, a more watered down transitional justice policy.

Although a minority in the constitutionally powerful Sejm, the Solidarity leaders forced former communist legislators to accept a truth process that led directly to criminal investigations of communist decision-makers. The Special Commission to Investigate the Ministry of Internal Affairs was tasked with analyzing more than 100 unsolved deaths attributed to the security services and other Ministry departments during the 1980s. Power constraints forced the Sejm's Solidarity minority to limit the legal powers of the Commission and allow former communist representatives to serve on working groups that conducted the Commission's inquiries. Nevertheless, as Solidarity leader Bronislaw Geremek noted, the Commission was a major step toward ensuring that communist "crimes should be punished."<sup>36</sup> The Commission's findings were used directly for disciplinary action or, in 88 cases, sent to public prosecutors for further investigation and possible trial. While the problem of building cases for crimes committed years earlier contributed to a dearth of convictions, the political will of the anticommunist Solidarity to pursue transitional justice initially proved stronger than rigidly defined power

constraints indicate. Not only did outnumbered Solidarity representatives in the Sejm not draw back from the former communists, but they also investigated the communist general who continued to head the Ministry of Internal Affairs.

In contrast to the solid support Solidarity leaders in both houses of parliament gave to the Commission, within one year the question of criminal accountability provoked an institutional split. In the fall of 1990, senators began pressing for an extension of the mandate of the Chief Commission for the Investigation of Hitlerite Atrocities (Główna Komisja or the GK) to include all communist-era crimes through 1989. By the time the GK had been expanded into the Commission for the Prosecution of Crimes against the Polish Nation, the Sejm had severely limited its authority to only those communist-era rights violations committed up to 1956. Senators fought restrictions until the end, when one acknowledged the political reality: "It is literally a miracle that this bill passed at all."<sup>37</sup>

Evidence suggests that the divergence in preferences was influenced by attention to economic conditions. The investigative commission was launched in the summer of 1989, before Solidarity members in the Sejm needed the support of communist legislators to produce expected goods (economic reform legislation). By the time the GK legislation was introduced, Sejm anticommunist members needed political good will from their communist colleagues to guarantee the continuity of economic reforms already underway. By limiting justice to pre-1957 rights violators (mostly dead or retired), they hoped to minimize the risk of legislative deadlock in this and other critical spheres. With little impact on the provision of these goods, senators had no political stake in this process.

A broader survey of the transitional justice debate from this period provides additional evidence that Sejm members were more focused on the political goods side of transitional justice. In 1991, for example, the Sejm rejected a Senate rehabilitation and compensation bill that nullified politically motivated criminal sentences issued between May 1943 (when Stalin created a Polish army under General Zygmunt Berling) and 1989. Senators, who did not have to pay for policies that would spring from the law because they had no responsibility for the budget, considered their version of the bill an indirect attack on the entire communist period. They argued: "If we accept the date of December 31, 1956, then we *ex cathedra* state that after this date there was no repression, there were no illegitimate sentences and there was no communist system."<sup>38</sup> As with the GK legislation, Sejm members slashed the scope of the bill to 1944–1956, ostensibly fearing that streamlining payments for all communist-era victims could threaten the stability of Poland's extraordinarily

fragile economy. Many worried about voter reactions to an expanded bill since, one Sejm member noted, “Compensation would have come at the expense of taxpayers. If this were to come from [former Internal Minister Czesław] Kiszczak’s personal income, that would be another story.”<sup>39</sup>

According to relative power logic, we might have seen an expansion of criminal accountability after former anti-communist oppositionists consolidated their grip on power (1991–1993). This did not occur for several reasons. Apparently most important was the crumbling of the Solidarity umbrella, which led to political instability, as evidenced by the hasty rise and fall of governments, and encouraged post-opposition elites (who could be subject to elections at any moment) to focus on economic reforms perceived to be most valuable for voters. The Jan Olszewski cabinet (1991–1992) fell due to its transitional justice initiatives, including the publication of a list of public officials who had allegedly served as communist-era secret police informants. It was not until center-right forces reasserted control of parliament in 1997 (following four years when the house was controlled by former communists), that they launched a bill to authorize the new Institute of National Remembrance (which absorbed the GK) to investigate and prosecute crimes committed up to 1989. Of course, taking back power from former communists opened up the possibility of more aggressive justice. Not coincidentally, though, this was also a time of relative prosperity, when Poland was hailed as Central Europe’s “tiger” economy. Less burdened with demands for creating beneficial economic conditions than they had been in 1991, post-oppositionists had more room to maneuver.

Solidarity did not come to power in 1989 on a campaign to right past wrongs. However, at a time when most communist regimes in the region continued to rule, it took the Polish anticommunist opposition forces just two months to launch aggressive criminal investigations against still-powerful former communist officials. Few anticommunists today recall fearing that the old communist regime members would halt democratization as a result of transitional justice. However, many, particularly those in the Sejm, recount keeping one eye on their constituents throughout. Soon anticommunist legislators in the Sejm focused on economic reforms and reversed course in the transitional justice debate. Unconstrained by the need to provide core political goods, the senators ensured that transitional justice remained on the table between 1989 and 1991, thus leaving Sejm leaders the task of toning down the legislation most offensive to the former communists. This period of diminished transitional justice continued between 1991 and 1993, when the anti-communist opposition forces consolidated their power. Only in 1997, once post-oppositionists and other members of the center-right took control of the



state during an economic upturn, did they resume pursuing transitional justice in earnest.

## DISCUSSION

Analytical approaches to transitional justice focused on relative power arguments provide a useful set of potential constraints for decisions and outcomes but would benefit from a broader framework. Politics is in part about avoiding risk but also about gaining advantage. Transitional justice policies are rarely conducted in isolation and should be analyzed in the context of other policy issues. The saliency of particular policies and their impact on the transitional justice debate depends on the institutional forum. Primary actors, who depend on the provision of goods to maintain office, should see transitional justice against this backdrop and act accordingly. The power of the institutional argument in the three divergent cases described here demonstrates a need to reconsider the determinants of transitional justice in post-repressive states.

The case of the former Yugoslavia demonstrates how institutions impact relationships and shape political strategy. In Serbia, the opposition took the helm of a country emerging from a decade of war, where unreformed military and police forces complicit in previous atrocities made transitional justice risky from a relative power perspective. Nevertheless, republic leaders in the primary institution (first Djindjić and later Koštunica) gambled that western goods exchanged for cooperation with the ICTY would convince an overwhelmingly anti-ICTY electorate that they had performed optimally. As the leader of a secondary federal institution, Koštunica could not profit early in the transition from this cooperation since he would get no credit for the goods – whose distribution was out of his hands – that it brought to Yugoslavia. He therefore objected to it, thereby increasing Djindjić's political costs. Djindjić's utility of cooperation was measured in the number of voters who could be wooed to his DS as a result of largely material improvements. President Koštunica, whose institutional authority made it impossible to take credit for such material gains, pursued a populist strategy of anti-cooperation to win support for his DSS.

Ultimately, Koštunica's political gamble paid off, a fact that DS members explain as Western betrayal. "We did not have clear support from the West," commented one DS leader. "[Voters said] 'You are traitors, but you are bad traitors. Where is the money, where is the western way of life?'"<sup>40</sup> Still, as Prime Minister Koštunica subsequently adopted policies similar to Djindjić's when he was faced with similar utility calculations. The sluggish pace of the

cooperation with the ICTY initiated by Djindjić continued even after Koštunica became prime minister, when he was forced to balance institutional incentives to ensure expected goods and a political reputation built on rejecting pressures from external actors who held those goods.

The same dynamics played out in Croatia. However, there a basic deficit in political goods that could be used to sell compliance with the ICTY caused the first post-Tudjman prime minister to balk at cooperation. By taking aim at anti-Hague sentiment, President Mesić may have lessened the burden on Prime Minister Račan, but only marginally. Račan's compliance was painstakingly slow, although he and others close to him claim he preferred to do more. Just as Račan was unwilling to take the political risk of cooperation with nothing clear to gain from such a policy, his successor, Sanader, found that changing conditions and positions left him with relatively more to gain from the cooperation he so long and so vigorously opposed. Sanader's gamble on EU accession over the protection of a local military hero proved to be politically judicious.

The Yugoslav cases may be a prototype for a new era of transitional justice where international actors play a greater role in what have traditionally been domestic policies. However, the institutional argument provides new insights even where international pressures are absent. In her chapter, Subotic finds that in Serbia and Croatia justice for communist-era crimes, a time that attracted significantly less foreign attention, was also highly politicized. The Polish domestic justice process shows the influence of institutions. From a relative power perspective, the Polish anticommunist opposition forces – who came to power through negotiation, held only a minority stake in the primary institution, and had few links with the post-communist bureaucracy – should have turned away from criminal prosecutions. However, they rapidly (and almost unanimously) pursued criminal accountability until the fate of popularly demanded economic reforms eroded cross-institutional solidarity. As predicted by the institutional argument, Sejm members who initially demonstrated pro-accountability preferences pursued transitional justice only insofar as it was compatible with the provision of goods, while senators sought to keep harsh transitional justice on the agenda. The result was an abortive course of criminal accountability.

The public played a different role in each case. In Poland, where voters were relatively neutral with respect to transitional justice, primary actors adjusted their own preferences to ensure delivery of goods came first; secondary actors, whose hands were not on the economic wheel, pressed a pro-justice position without risking voter impatience. Where voters were antagonistic to transitional justice (as in Serbia and Croatia), primary actors pursued accountability

only when they knew it could be readily traded for those goods useful in convincing their publics it was worthwhile. This position was, in turn, partly influenced by the activities of secondary actors. In no case did the level of public support directly dictate policy.

Determined relative power proponents might read each of these cases as affirmations, not rejections, of their argument. In Poland, for example, one could reinterpret the power of the anticommunist opposition forces as stemming from their success in the first semi-free elections – where they won every seat they could contest. The former communists then projected power outward, ruling it prudent to approve limited criminal accountability today rather than face more extensive investigations if Solidarity won the next elections. However, this focus on *potential* rather than *actual* power is precisely one ingredient missing from the current literature, one that involves the extended time horizon/strategic thinking I bring to the debate. In hindsight, we see that economics more than transitional justice (as might be predicted by relative power theories) dominated the attention of the former anticommunist forces after they consolidated power in 1991. Only after center-right forces returned to govern during a period of relative economic prosperity (1997–2001) did they strengthen criminal accountability legislation that had been deliberately weakened in 1991. The economic dimensions of transitional justice that facilitated delayed criminal justice in Poland may partly account for long-term pressure for prosecutions of the sort seen in Chile, where early amnesties gave way to a desire to reopen the books.

The case of Serbia offers space for a more poignant attack on the institutional argument. There, post-oppositionists took power in the Serbian Republic only after negotiations that gave way to elections in December 2000, when they were ultimately the victors, with 70 percent of parliamentary seats. Elite-level relative power hypotheses would indicate just this sort of process would take place. However, this argument undermines the mechanism involved (there was no outright revolution, but rather a negotiated transition to elections), running counter to expectations generated by state structure or public support relative power explanations – both of which would predict lenient forms of transitional justice. This line of thinking also does not account for why President Koštunica abandoned his stance upon becoming the prime minister accountable to a parliament that had proportionally more members of the old elite than when Djindjić was in power.

This chapter has focused on elite perceptions of constituent demands and what political actors must do to stay in power. While weak parties and a lack of strong voter allegiances undermine electoral accountability, the fundamental

lesson here is that political elites play the accountability game *as if* they were operating in a fully functioning democracy. In their attempts to pursue or counter transitional justice policy, they act within institutionally defined borders with the expectation that their behavior may expedite voter support for their party or slow down support for other parties. In Serbia and many other states in transition, leaders defined the transitional justice debate more than parties. Djindjić and Koštunica appear to represent, speak for and act for their party colleagues in the transitional justice sphere. In Poland, decisions were also made by political elites, perhaps with more internal debate, though party discipline was quite high in the 1989–1991 Sejm as a result of what Geremek called “this feeling of solidarity, that we were on the same side.”<sup>41</sup> In Croatia, Račan constantly struggled to maintain the backing of a diverse coalition, making his preferred policies even more difficult to implement. In each case, decisions were made at the top echelons and were heavily affected by the policy’s perceived costs and benefits.

In each of these cases, transitional justice was a function of multiple phenomena. Transitions, like justice processes, are messy and there is no one overriding determinant. The point of this chapter is to highlight the significance of one important theoretical explanation that has long been ignored. As I have demonstrated in each of these cases, the positions of old elites, former state actors and societal attitudes all mattered, because they established the parameters within which political elites saw room to maneuver. The logic of the institutional argument presented here helps to incorporate the three and redefine them less as sole, even competing, causal mechanisms than as critical intermediaries that play a role in a more complicated process. Neither is transitional justice simply about economics, as these cases might suggest. Instead, it is best seen as a function of political opportunities, where economics and various strands of relative power are important, but not the sole, influences on the path of justice.

This chapter has focused on events that transpired over the first fifteen years after the fall of communism. Twenty-five years on, these processes continue to play out in fits and starts. Looking at transitional justice from a more global perspective, this is no surprise. Transitional justice is rarely a one-time occurrence. It is a process that is born and matures in various phases and shapes as opportunities emerge over time. While this chapter has focused on criminal accountability, the same determinants can be traced to other forms of transitional justice, including victim rehabilitation, truth commissions, and lustration. In various countries of Central and Eastern Europe, new opportunities that emerge in the future will inevitably lead to new and renewed transitional justice processes.

## NOTES

1. This chapter is based on my book, which also included Uzbekistan and analyzed determinants of seven major types of justice (cessation of abuses, apologies/condemnations, rehabilitation/compensation, truth commissions, administrative cleansings, criminal prosecutions of lower-level functionaries, and criminal prosecutions for those with command authority). Brian Grodsky, *The Costs of Justice: How New Leaders Respond to Previous Rights Abuses* (Notre Dame, IN: University of Notre Dame Press, 2010).
2. For example, Alexandra Barahona De Brito, Carmen Gonzales-Enriquez, and Paloma Aguilar, eds., *The Politics of Memory: Transitional Justice in Democratizing Societies* (Oxford: Oxford University Press, 2001), 11 and 162; Jamal Benomar, "Justice after Transitions," in *Transitional Justice: How Emerging Democracies Reckon with Former Regimes*, ed. Neil J. Kritz (Washington, D.C.: United States Institute of Peace Press, 1995), 31–41; Samuel Huntington, *The Third Wave: Democratization in the Late Twentieth Century* (Norman: University of Oklahoma Press, 1991), 230–231; Luc Huyse, "Justice after Transition: On the Choices Successor Elites Make in Dealing with the Past," *Law & Social Inquiry* 20, no. 1 (1995): 63; Guillermo O'Donnell and Philippe C. Schmitter, "Tentative Conclusions about Uncertain Democracies," in *Transitions from Authoritarian Rule: Prospects for Democracy*, eds. Guillermo O'Donnell, Philippe C. Schmitter, and Laurence Whitehead (Baltimore, MD: Johns Hopkins University Press, 1986), 28; Terence Roehrig, *The Prosecution of Former Military Leaders in Newly Democratic Nations* (Jefferson, NC: McFarland, 2002), 199; Daniel Sutter, "Settling Old Scores: Potholes Along the Transition from Authoritarian Rule," *Journal of Conflict Resolution* 39, no. 1 (1995): 121; Jose Zalaquett, "Balancing Ethical Imperatives and Political Constraints: The Dilemma of New Democracies Confronting Past Human Rights Violations," *Hastings Law Journal* 43, no. 1425 (1992): 1432.
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4. Helga A. Welsh, "Dealing with the Communist Past: Central and East European Experiences after 1990," *Europe-Asia Studies* 48, no. 3 (1996): 419–420.
5. Natalia Letki, "Lustration and Democratization in East-Central Europe," *Europe-Asia Studies* 54, no. 4 (2002): 537; Grazyna Skapska, "Moral Definitions in Constitutionalism in East Central Europe: Facing Past Human Rights Violations," *International Sociology* 18, no. 1 (2003): 199–218; Welsh, "Dealing with the Communist Past," 415.
6. John P. Moran, "The Communist Torturers of Eastern Europe – Prosecute and Punish or Forgive and Forget," *Communist and Post-Communist Studies* 27, no. 1

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7. Noel Calhoun, “The Ideological Dilemma of Lustration in Poland,” *East European Politics and Societies* 16, no. 2 (2002): 494–520.
  8. Andrzej S. Walicki, “Transitional Justice and the Political Struggles in Post-Communist Poland,” in *Transitional Justice and the Rule of Law in New Democracies*, ed. A. James McAdams (Notre Dame, IN: University of Notre Dame Press, 1997), 190–193; Kieran Williams, Brigid Fowler, and Aleks Szczerbiak, “Explaining Lustration in Central Europe: A ‘Post-Communist Politics’ Approach,” *Democratization* 12, no. 1 (2005): 30.
  9. Despina Angelovska, “The Failure of Macedonian Post-Communist Transitional Justice: Lustration, between Cleansing and Parody,” in *Transitional Justice and Civil Society in the Balkans*, eds. Olivera Simić and Zala Volcic (Springer, 2013), 56; Robert C. Austin and Jonathan Ellison, “Post-Communist Transitional Justice in Albania,” *East European Politics & Societies* 22 (2008): 383; Csilla Kiss, “The Misuses of Manipulation: The Failure of Transitional Justice in Post-Communist Hungary,” *Europe-Asia Studies* 58, no. 6 (2006): 927.
  10. Monika Nalepa, “Captured Commitments: An Analytic Narrative of Transitions with Transitional Justice,” *World Politics* 62, no. 2 (2010): 348.
  11. For more on the role of foreign pressure in the Serbia and Croatia cases, see Brian Grodsky, “Exploring the Schelling Conjecture in Reverse: ‘International Constraints’ and Cooperation with the International Criminal Tribunal for the Former Yugoslavia,” *European Journal of International Relations* 17, no. 1 (2011): 121–143.
  12. While an outright promise of amnesty was apparently never offered, one actor involved in Milošević’s arrest told me that he coyly promised Milošević he would be transferred to a local prison and not to the Hague, at least “at this moment.” See author interview with Cedomir Jovanovic, February 3, 2005, Belgrade.
  13. “Vojislav Koštunica, Moderate Nationalist and Old Milošević Foe,” *Agence France Presse*, September 24, 2000.
  14. Author interview with European Union Official 1, December 6, 2004, Belgrade; author interview with European Union Official 2, December 2004, Belgrade; author interview with European Union Official 3, November 16, 2004, Belgrade; author interview with United States Government Official, April 2005, Zagreb. Days excluded for some respondents who did not want them included.
  15. Author interview with Advisor to Prime Minister Zoran Djindjić, February 11, 2005, Belgrade; author interview with Dragor Hiber, December 16, 2004, Belgrade; author interview with Cedomir Jovanovic, February 3, 2005, Belgrade; author interview with Zarko Korac, February 4, 2005, Belgrade.
  16. “Talks Stall on Extraditing Milošević to Hague: Serb Minister,” *Agence France Presse*, June 4, 2001.
  17. Author interview with Advisor to Prime Minister Zoran Djindjić, February 11, 2005, Belgrade.
  18. Author interview with Cedomir Jovanovic, February 3, 2005, Belgrade.
  19. Author interview with Advisor to Prime Minister Zoran Djindjić, February 11, 2005, Belgrade.

20. Author interview with Milan St. Protic, December 20, 2004, Belgrade.
21. Author interview with Rebeka Bozovic, January 28, 2005, Belgrade; author interview with Miroslav Filipovic, February 2, 2005, Belgrade; author interview with Gordana Matkovic, December 9, 2004, Belgrade; author interview with Vuk Obradovic, December 20, 2004, Belgrade; author interview with Dusan Petrovic, December 9, 2004, Belgrade.
22. "Vojislav Koštunica, Moderate Nationalist and Old Milošević Foe."
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29. Author interview with Ivan Simonovic, March 18, 2005, Zagreb.
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33. Author interview with Ivica Račan, March 4, 2005, Zagreb.
34. "Croatian Prime Minister Asks Vatican for Help in Pushing for EU Membership Talks," *Associated Press Worldstream*, February 22, 2005.
35. "Croatian PM Tells BBC He Would Personally Arrest Indicted Gen Gotovina," *BBC Monitoring International Reports*, April 26, 2005.
36. Author interview with Bronislaw Geremek, January 20, 2004, Warsaw.
37. Senate, *Dziennik Ustaw* (I Kadencja, 45 posiedzenia, April 19, 1991), 185.
38. Senate, *Dziennik Ustaw* (I Kadencja, 45 posiedzenia, March 15, 1991), 195.
39. Sejm, "Sprawozdanie Stenograficzne," Sejm (Kadencja X, 49 posiedzenia, 1991), 185; author interview with Grazyna Staniszevska, December 17, 2003, Warsaw.
40. Author interview with Dusan Petrovic, December 9, 2004, Belgrade.
41. Author interview with Bronislaw Geremek, January 20, 2004, Warsaw.