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INTERNATIONAL CRIMINAL LAW REVIEW
21 (2021) 67-96

International Criminal Law Review
brill.com/icla

Relativising Atrocity Crimes: The Message of Unconditional Early Release of Perpetrators Convicted by the ICTY (1998 – 2018)

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Abstract

Despite being found guilty of egregious acts, crimes against humanity and war crimes, 54 of the 90 perpetrators sentenced by the International Criminal Tribunal for the Former Yugoslavia (ICTY) were granted unconditional early release (UER). This article argues that UER did a disservice to two principal expressive purposes of punishment - moral condemnation of the crimes and the overall norm projected by the ICTY, the 'universal repugnance of group-based killing'. Fundamentally, punishment of perpetrators signifies the inherent worth of victims. Interviews with key stakeholders in Bosnia and Herzegovina revealed that the interviewees largely concurred with authors who posit that punitive justice conveys valuable messages to audiences. This article complements expressivist theories by demonstrating the extent to which expressivism was negated as perpetrators were granted UER. Finally, it proposes how early release in future tribunals and courts might be tailored to counter the negation of international criminal justice's expressive value.

Keywords

expressivism – victims – unconditional early release – atrocity crimes – remorse – International Criminal Tribunal for the former Yugoslavia (ICTY)

1 Introduction

Between 1998 and 2018, the International Criminal Tribunal for the former Yugoslavia (ICTY) granted unconditional early release (UER) to 54 of the 90 persons it had found guilty of atrocity crimes, usually after serving two-thirds of their sentence.[1] This article argues that granting UER to unrepentant perpetrators did a disservice to the two principal expressive purposes of punishment - moral condemnation of the crimes and the overall norm projected by the Tribunal - the norm being, in the words of Drumbl, the 'universal repugnance of group based killing'.[2] This argument is based on the analysis of interview data which largely concurred with authors who posit that the most fitting purpose of punishment for atrocity crimes is its expressive capacity. These expressivist theorists assert that punitive justice conveys valuable messages to audiences.[3] The extent to which these 'justificatory theories'[4] are realised – that these messages *are* conveyed and *understood* by the audiences - when punishment is dispensed remains empirically unexplored in the international criminal justice field.[5] This article addresses this lacuna as it reports findings from one case study, that of selected stakeholders of the ICTY in Bosnia and Herzegovina (BiH). In doing so it proposes that, despite atrocity crimes being of a different nature to ordinary serious crimes, there is a fundamental message that is common to both: the vindication of the value of the victim. This

1 As of February 2017. See: https://www.irmct.org/en/about/functions/enforcement-ofsentences, accessed 3 December 2019. Between 1998 and 2013 UER was granted by the ICTY President, and thereafter by the UN's International Residual Mechanism for Criminal Tribunals' President. In January 2019 the UNIRMCT introduced conditions upon release. This article is based on one chapter of the author's doctoral dissertation, P. Yarnell, *Ending Justice Early in The Hague: The Unconditional Early Release of Perpetrators Convicted by the ICTY* (Ulster University, June 2020). I would like to extend my sincere thanks to all interviewees in Bosnia and Herzegovina, and to Aldijana for scheduling, interpreting and transcribing many of these interviews. A special thanks to Professor Bill Rolston for constructive feedback.

2 Mark Drumbl, *Atrocity, Crime and Punishment* (Cambridge University Press, Cambridge, 2007), p. 174.

3 Diane Marie Amann, 'Message as Medium in Sierra Leone', 7(2) *ILSA Journal of International & Comparative Law* (Spring 2001) 237–246; Bill Wringe, 'Why Punish War Criminals? Victor's Justice and Expressive Justifications of Punishment', 25 *Law and Philosophy* (2006) 159–191; Drumbl, *ibid.*; Robert Sloane, 'The Expressive Capacity of International Punishment: The Limits of the National Law Analogy and the Potential of International Criminal Law', 43 *Stanford Journal of International Law* (2007) 39–94; Kristen Fisher, *Moral Accountability and International Criminal Law: Holding Agents of Atrocity Crimes Accountable to the World* (Routledge, Abingdon, 2012).

4 Fisher, *ibid.*

5 Tim Meijers and Marlies Glasius, 'Trials as Messages of Justice: What Should Be Expected of International Criminal Courts?', 30(4) *Ethics and International Affairs* (2016) 444.

proposal contributes further to these theories of punishment's expressive capacity by proposing the reason *why* the universal repugnance of group-based killing is an existing norm that should be articulated. It does so on the basis that international criminal justice continues to be a means by which at least some perpetrators of atrocities are held to account.

Section 2 clarifies why the ICTY's practice of UER was problematic and required exploration, and explains how this exploration was undertaken. Section 3 considers those authors who have argued that international criminal justice's most valuable asset is its expressive capacity rather than its ability to fulfil just deserts or deter criminals in punishing – although they are not exclusive.[6] Section 4 provides an analysis of data from semi-structured interviews in BiH which illustrate the widespread belief that the primary purpose of the ICTY's punishment was its symbolic condemnation of the crimes. This section proposes *why* this condemnation held significance for stakeholders and it draws on Hampton's proposition that punishment provides a specific expression, a vindication of the victims, which these interviewees in effect referenced. Section 5 concludes with recommendations for future International Criminal Tribunals (ICTs), the International Criminal Court (ICC), and any domestic courts dealing with atrocity crimes to tailor early release in a fashion which counters the negation of international criminal justice's expressive capacity, its authoritative moral condemnation of the crimes and the norm projected as a result.

2 Exploring the Problem with the ICTY's Grant of Unconditional Early Release

First, on a normative basis, there was an irony that perpetrators of atrocity crimes were treated more generously than perpetrators of serious crimes in a domestic law setting as they were released unconditionally. The widespread national practice is release on probation, parole or conditional release, where perpetrators' behaviour is monitored, and they can be returned to jail if they breach any conditions. Further, this more favourable treatment violated the principle of proportionality: 'that for a system of punishments as a whole to be just, serious crimes should … be punished more severely than less serious ones'.[7]

6 Henry L.A. Hart, 'Aims of Criminal Law', 23 *Law & Contemporary Problems* (1958) 401–441.

7 Wringe, *supra* note 3, 185.

Second, on a more societal level, due to its unconditional nature, perpetrators were free to return to the crime scene where they were often greeted as heroes by welcoming crowds of jubilant supporters[8] but to the dismay of others, exemplified by protestors on one occasion sewing their lips shut in protest.[9] The research was primarily motivated by a desire to understand the extent to which this practice had any societal impact on a post-conflict, ethnically divided country.[10] It did so on the basis that the ICTY had recognised the population of the Socialist Federal Republic of Yugoslavia (SFRY) as stakeholders in the justice process as they asserted that 'it will be essential for the ordinary citizens of the region … to be satisfied that justice has been achieved'.[11] As UER effectively cut short retributive justice, an examination was required of the extent to which audiences in BiH perceived UER as having an impact on justice.

In order to understand the societal impact in BiH, 51 interviews were conducted with a range of stakeholders, totalling 57 individuals. Semi-structured interviews were held with 10 judges (all but one were deciding war crimes cases); 10 prosecutors and four defence lawyers working on war crimes cases; 20 non-governmental organisations (NGOs), civil society organisations (CSOs) and victims' associations (VAs) working on victim and conflict related matters; five staff from Inter-Governmental Organisations (IGOs)[12] and five independent experts.[13] Interviews were voluntary and many interviewees did not respond, suggesting that those interviewed had an interest in the topic and a desire to share their opinion – generally negative. Therefore, it may be the case that those people who did not respond were, at least, not dissatisfied with UER.

8 Jonathan Choi, 'Early Release in International Criminal Law', 123 *The Yale Law Journal* (2014) 1783–1784; Jovana Mihajlović Trbovc, 'Homecomings from The Hague: Media Coverage of ICTY Defendants After Trial and Punishment', 28(4) *International Criminal Justice Review* (2018) 406–422.

9 Choi, *ibid.,* 1784.

10 Florian Beiber, *Post-War Bosnia: Ethnicity, Inequality and Public Sector Governance* (UNRISD and Palgrave Macmillan, Basingstoke, 2006); Constance Grewe and Michael Riegner, 'Internationalized Constitutionalism in Ethnically Divided Societies: Bosnia-Herzegovina and Kosovo Compared', in Armin Bogdandy and Rüdiger Wolfrum (eds.), 15(1) *Max Planck Yearbook of United Nations Law* (Brill, Leiden, 2011) pp. 1–64.

11 ICTY Annual Report, 2000, para. 195.

12 Two EU staff members interviewed separately; one senior staff from the Council of Europe and one senior staff member from the UNDP.

13 Interviews with: professional who had worked with victims of conflict-related sexual violence; professional who had worked with victim-witnesses in Srebrenica; professional working in an independent state institution with extensive experience in IGOs; independent investigative journalist; and independent lawyer, who previously worked with the Tribunal in BiH.

Consequently, these findings do not claim to be representative of the entire population of BiH, which may have been asserted if a random sampling survey had been conducted – but they do present a deep analysis which captures a snapshot of stakeholders' perceptions of UER at a time and place, discusses patterns of shared perceptions and proposes why these perceptions were held. Further, interviewees, with one exception, perceived the ICTY as a legitimate institution despite the practice of UER. Arguably, therefore they were inclined to hold the belief that international criminal justice was a valid response to atrocity crimes. Although this is a statistically biased sample, the interviewees reinforced the conclusions of those authors, detailed below, who are in favour of punishment for atrocity crimes, and who propound its expressive capacity. First, however, before considering the research results, the general theory of legal expressivism is addressed.

3 The Expressive Value of Punishment

This section outlines the different strands of 'instrumental expressivism',[14] specifically those advocated by Hampton, Drumbl, Luban, Wringe and Fisher, who have justified punishment based on its positive expressive capacity. They assert that criminal justice holds symbolic value and is 'norm-nurturing'.[15] Other authors (including Amann, Douglas, Meijers and Glasius), who highlight punishment's expressive capacity explore the messages we get from law. For them, 'the message understood, rather than the message intended, is critical'.[16] These authors' arguments, although important, especially in relation to post-conflict society, are not addressed here.[17] Here, the instrumental expressivists' theories are explained as the research's empirical findings illustrate how some expressive values are indeed messaged through punishment and are negated as perpetrators are granted UER.[18]

Core to all expressive theories is the understanding that 'actions … carry meaning',[19] thus 'every action is also a gesture'.[20] This implies that actions do

14 Barrie Sander, 'The expressive turn of international criminal justice: A field in search of meaning', 32(4) *Leiden Journal of International Law* (2019) 853.

15 Sander, *ibid.,* 857.

16 Amann, *supra* note 3, 238.

17 Forthcoming article, 'The Messages of UER'.

18 Sander, *supra* note 14.

19 Cass R. Sunstein, 'On the Expressive Function of Law', 144(5) *University of Pennsylvania Law Review* (1996) 2021–2053.

20 David Garland, *Punishment and Modern Society: A Study in Social Theory* (Clarendon Press, Oxford, 1990), p. 255.

not occur in a vacuum; they are observed. In terms of institutions they act and have a societal audience. Legal institutions which adjudicate, and sometimes develop, laws send messages as they do so. Sunstein, elucidating on the 'expressive function of law', reasoned that legal institutions' actions are an identification of the 'norms to which [its society] is committed' or their fundamental 'principles'.[21] Similarly, Anderson and Pildes noted that 'expressive theories tell actors … to act in ways that express appropriate attitudes toward … substantive values'.[22] This can be done through legal codification of what society defines as its positive, substantive values. Sunstein provides an apt example: 'a society might … insist on an antidiscrimination law for expressive reasons even if it does not know whether the law actually helps … minority groups'.[23] What is important is not the consequences of the law but the symbolism of the law.[24] Antidiscrimination laws symbolise that the society is a tolerant one whereby all citizens are considered equal. Just as the law proscribes positive values it can also make 'statements'[25] of what beliefs it rejects by making certain acts unlawful.

Criminal law and its sanctions, ranging from a suspended sentence up to life imprisonment, is a 'prime arena for the expressive function of the law'.[26] Punishment is a message;[27] it not only signals that certain acts are wrong but the degree to which they are deemed wrong. As Kahan argued, the symbolic nature of the deprivation of liberty 'explains why non-evocative sanctions such as fines are regarded as inappropriate substitutes for more evocative ones such as imprisonment'.[28] In taking this position, since perpetrators of atrocity crimes are guilty of grievous and mass crimes, a lengthy term of imprisonment appears to be a necessity otherwise the message of condemnation could be 'readily be interpreted as empty rhetoric'.[29]

Imprisonment, depriving an individual of their liberty and removing them from society, is an equivocal denunciation of the criminal's actions that led

21 Sunstein, *supra* note 19, 2028.
22 Elizabeth S. Anderson and Richard H. Pildes, 'Expressive Theories of Law: A General Restatement', 148(5) *University of Pennsylvania Law Review* (2000) 1504.
23 Sunstein, *supra* note 19, 2027–2028.
24 *Ibid.*, 2028.
25 *Ibid.*, 2021.
26 *Ibid.*, 2044.
27 Carsten Stahn, *Justice as Message: Expressivist Foundations of International Criminal Justice* (Oxford University Press, Oxford, 2020).
28 Dan M. Kahan, 'The Secret Ambition of Deterrence', 113(2) *Harvard Law Review* (1999) 420.
29 Meijers and Glasius *supra* note 5, 436.

them there. This is cited as the 'moral denunciation'[30] justification of punishment. As Hart noted, imprisonment is a means by which the law acts on behalf of the community to resolutely express its 'existing shared community values'.[31] Durkheim referred to these existing shared values as the 'conscience collective' and posited that punishment was an intuitive response to those who transgress them and is manifested in the 'palpable symbol' of punishment.[32] This echoes Hart's description of punishment: 'condemnation plus the added consequences ... [are] considered ... compendiously'.[33] Disapproval is an essential ingredient of punishment.

This 'expression of moral outrage against non-conformity'[34] is a reaffirmation of shared social norms. Punishing those who violate these norms is a means by which society stays true to them. This denunciation is, therefore, normative[35] – a *should* be response to what is wrong. Feinberg, who appears to have coined the term the 'expressive function of punishment', asserted that it symbolised an 'authoritative disavowal'.[36] Additionally, not only is punishing simply the right thing to do, if a legal system does not punish those who transgress its norms it is effectively acquiescing to them.[37] On plain reading of this justification, or motivation, punishment is solely backward-looking, a means by which to address the wrong, to denounce it, allowing society to rid themselves of being complicit in it. However, consequentialist expressivists identify forward-looking components, including educative purposes, so long as the message is understood by those who observe it.

As the message of punishment is projected it is observed by audiences, one being the society whose norms are being affirmed. Society is not homogenous and social norms are not necessarily shared by all individuals within it which, indeed, the perpetrator's crimes illustrate. Therefore, this affirmation of the

30 Robert Cryer, 'The Aims, Objectives and Justifications of International Criminal Law', in Robert Cryer, Håkan Friman, Darryl Robinson, Elizabeth Wilmshurst (eds.), *An Introduction to International Criminal Law and Procedure* (Cambridge University Press, Cambridge, 2014); Naomi Roht-Arriaza (ed.), *Impunity and Human Rights in International Law and Practice* (Oxford University Press, Oxford, 1995).

31 Hart, *supra* note 6.

32 Emile Durkheim, *Moral Education: A Study in the Theory and Application of the Sociology of Education* (Free Press of Glencoe, New York, 1961) p. 176.

33 Hart, *supra* note 6, 405.

34 Roht-Arriaza, *supra* note 30, p.17.

35 Pildes and Anderson, *supra* note 22, 1527.

36 Joel Feinberg, 'The Expressive Function of Punishment', in *Doing and Deserving, Essays in the Theory of Responsibility* (Princeton University Press, Princeton, 1970) p. 103.

37 *Ibid.*

general law is also a means of 'educating' members of 'society about the unacceptable *nature* of the conduct condemned'.[38] Authors argue that punishment is a moral educator which can assist in 'bringing the wrongdoers to acknowledge their misdeeds and … provid[e] moral guidance more generally'.[39] Different authors focus on these different audiences and explore the extent to which they can be morally educated.[40] On this reading of punishment, moral denunciation serves a purpose, and thus is consequentialist. When persons are educated, they should act in accordance with the correct understanding of these norms. Moral education is 'at its best … directed toward character development rather than rule obedience'.[41] The notion that punishment informs a person's character through education rather than fear implies that they understand *why* the behaviour is unacceptable. Just as the length of sentence signifies how much the community judges the wrong,[42] the message clarifies why it was wrong. Therefore, the message has to be elucidated.

In criminal law those punished have been found responsible for causing harm to another. According to Hampton, the deliberate infliction of harm on another signifies that the perpetrator believed the victim is of lesser value than them. After all, they would not wish to be harmed themselves, and if they believed the victim equal, they would not have harmed the victim. Punishment as a response to the infliction of harm intrinsically recognises victims. Authors who justify punishment on the basis of it being a form of victims' 'redress'[43] reason that it is a means by which society acknowledges the victim's value - expressing to the victim, the perpetrator and society at large that all human beings have equal value. On this symbolic basis Hampton argued that punishment was the correct 'response to a wrong … [as it] … not only repudiates the action's message of superiority over the victim but does so in a way that confirms them as equal by virtue of their humanity'.[44]

Although the feature of creating victims is shared between ordinary serious crimes and atrocity crimes, there are marked differences. First, at the practical

38 Lucia Zedner, *Criminal Justice* (Oxford University Press, Oxford, 2004), p. 109. Emphasis added.

39 Roht-Arriaza, *supra* note 30, p. 17.

40 Antony Duff, *Punishment, Communication and Community* (Oxford University Press, Oxford, 2001).

41 Samuel H. Pillsbury, 'Emotional Justice: Moralizing the Passions of Criminal Punishment', 74 *Cornell Law Review* (1988–1989), 681.

42 Kahan, *supra* note 28, 420.

43 Roht-Arriaza, *supra* note 30, p. 18.

44 Jean Hampton, 'Correcting Harms Versus Righting Wrongs: The Goal of Retribution', 39 *UCLA Law Review* (1992) 1686.

level, atrocities result in mass victimisation, and not all victims will see their perpetrators prosecuted. Second, and especially in cases of ethnic conflict, the nature of the crime is specific. With these core differences many argue that the usual justifications for punishment in national settings is not easily transferrable to the context of international criminal law (ICL).[45] Third, the justice system and the relevant stakeholders are different. The 'theatre'[46] of international criminal justice is located outside of the 'normal workings of the established legal systems of states trying their own citizens'.[47] With these marked differences, the usual justifications, such as retribution and deterrence, are not persuasive. An eye for an eye cannot mirror mass victimisation, and punishment's deterrent effect - the threat of punishment by an external institution from committing acts which are specifically propagated by political elites - appear misplaced. These arguments are convincingly debated elsewhere.[48]

Several proponents who justify international criminal justice do so in terms of its expressive qualities',[49] that it sends important messages. Many take as a starting point Feinberg's proposition of punishment's 'functions'[50] as being symbolic 'disavowal, non-acquiescence, vindication, and absolution'.[51] Feinberg's work does not relate to ICL but is transferable as he provides an example of a government punishing a citizen of its own country for violating the rights of another state's citizen. Feinberg's two elements are relevant in the context of ICL: first, the authoritative disavowal of the crime (moral denunciation), and second, the vindication of the law. Sloane, advocating for ICL to emphasise its expressive value, paraphrased Feinberg's validation of the law argument to read, in this context, as being a means to 'vindicate international human rights norms and the laws of war'.[52] Sloane argued that international human rights law (IHRL) has 'reconceptualized international humanitarian law, in substantial part, as the human rights component of the laws of war …

45 Mark J. Osiel, 'Why Prosecute? Critics of Punishment for Mass Atrocity', 22 *Human Rights Quarterly* (2000) 118–141; Immi Tallgren, 'The Sense and Sensibility of International Criminal Law', 13 *European Journal of International Law* (2002) 561–595.

46 Marlies Glasius and Francesco Colona, 'The Yugoslavia Tribunal: The Moving Targets of Legal Theatre', in Dino Abazović and Mitja Velikonja (eds.) *Post-Yugoslavia: New Cultural and Political Perspectives* (Palgrave Macmillan, Basingstoke, 2014).

47 Wringe, *supra* note 3, 162.

48 This article need not repeat them as its contribution is to demonstrate that another purpose of punishment, expressivism, is the most appropriate justification for punishing perpetrators of atrocity crimes.

49 Sander, *supra* note 14, 853.

50 Wringe, *supra* note 3, 176.

51 Feinberg, *supra* note 36, p. 115.

52 Sloane, *supra* note 3, 71 - altering Feinberg's 'validation of law'.

[guaranteeing] … minimal levels of human dignity and decency even in times of systematic violence'.[53] Sloane's use of the word 'dignity' connects ICL with the notion of vindication of the victim's worth. When people are punished for violating the dignity of others, it affirms the person's dignity which the perpetrator has violated. Duff has argued that victims are the reason punishment should be meted out in cases of atrocity crimes, where states are unwilling or unable to punish perpetrators under their jurisdiction. Duff stated simply: 'some kind of crimes are properly our business, in virtue of our shared humanity with their victims'.[54] Implicitly, both Sloane and Duff recognise that victims are at the heart of international criminal justice, it being an instinctive reaction to fellow humans, beyond state boundaries, who have had their dignity gravely violated on a massive scale. It goes against the universal norm of the 'fundamental human rights, in the dignity and worth of the human person'.[55]

During times of mass atrocity, which requires mass participation, atrocity crimes are not necessarily considered deviant,[56] nor are they necessarily considered as such after the war has concluded. This was recognised by the ICTY's first President Cassese as he justified ICTs. He argued that they were, in general, a means to validate universal values even when these 'peremptory norms of international law (*jus cogens*)' were not held by an institution's constituents [as they] are, nevertheless, 'based on the values common to the whole community within which the institution lives and operates'.[57] Thus, international society, the community of states, requires that these peremptory norms be validated in instances where they have been skewed by a state's ruling elites. As Luban argued, the norm messaged - what he calls 'international criminal law's moral truth' - is the 'criminality of political violence against the innocent, even when your side hates the innocent as an enemy'.[58]

Meijers and Glasius described ICTs as a means to 'help to transform these values and contribute to forging a new social order'.[59] In contrast, the

53 Sloane, *ibid.*, 81.

54 Antony Duff, 'Authority and Responsibility in International Criminal Law', in Samantha Besson and John Tasioulas (eds.), *The Philosophy of International Law* (Oxford University Press, Oxford, 2010), p. 601 referencing Raimond Gaita, *Good and Evil: An Absolute Conception* (Macmillan, London, 1991).

55 Preamble of the UN Charter, 1945.

56 Drumbl, *supra* note 2, p. 8.

57 Antonio Cassese, 'Legitimacy of International Criminal Tribunals and the Current Prospects of International Criminal Justice', 25(2) *Leiden Journal of International Law* (2012), 492.

58 David Luban, 'Fairness to Rightness: Jurisdiction, Legality, and the Legitimacy of International Criminal Law', in Besson and Tasioulas (eds.), *supra* note 54, p. 577.

59 Meijers and Glasius, *supra* note 5, 438.

argument presented here is that rather that forging a new social order, ICL's message is a reaffirmation of the fundamental values that were corrupted during the conflict – it is not that societies did not have these values beforehand. As Sikkink noted, 'prohibition of murder, rape and other violent crimes exist in the criminal law of virtually all societies and cultures, there are obvious moral rules for which people believe that punishment is deserved'.[60] Although not all societies ascribe to non-discriminatory laws and practices, the Criminal Code of the SFRY prohibited murder and violent crimes. Specifically in relation to war crimes, they were punishable for a term of five to 15 years or, for the most serious cases, the death penalty.[61] What was different about the 'atrocity environment' was 'contempt for the law [and] for the victims'.[62] The power-holders in that specific society made a distinction between social groups, and victims were victims because they belonged to another social group. The state had successfully messaged that the fundamental human rights and dignity of those belonging to, or associated with, another group were not applicable. Therefore, what needs to be emphasised is the reaffirmation of a just social order, including 'messaging about the equality of persons under that order'.[63] The equality of persons is the core here, as stated by Drumbl who proposed the norm - the absolute rejection of 'discriminatory group-based killings'.[64]

For the Tribunal the two main stated purposes in sentencing perpetrators[65] were retribution and deterrence.[66] The judges tailored retribution to encompass what they had initially labelled 'reprobation', effectively, moral condemnation. The Tribunal's first judgment concluded that 'the International Tribunal sees public reprobation and stigmatisation by the international community' as a means to 'express its indignation over heinous crimes and denounce the perpetrators', and thus was 'one of the essential functions of a prison sentence for a crime against humanity'.[67] Broadly, therefore, punishment, embodied in a prison sentence, is a tangible denunciation of the crime as a whole. The phrase

60 Kathryn Sikkink, *The Justice Cascade: How Human Rights Prosecutions are Changing World Politics* (Norton, New York, 2011), p. 255.

61 Articles 37 and 38 of the Criminal Code of the SFRY, which was in force throughout the country during the course of the war; *see* European Court of Human Rights, *Maktouf and Damjanović* v. *Bosnia and Herzegovina,* Applications Nos. 2312/08 and 34179/08, 18 July 2013, para. 26.

62 Fisher, *supra* note 3, p. 64.

63 *Ibid.*, p. 65.

64 Drumbl, *supra* note 2, p. 174.

65 Albeit, not articulated in all its judgments or consistently.

66 Barbora Holá, 'Sentencing of International Crimes at the ICTY and the ICTR', 4(4) *Amsterdam Law Review* (2012) 7.

67 *The Prosecutor* v. *Drazen Erdemović*, Case No. IT-96-22-T, Sentencing Judgment, 29 November 1996, para. 64.

'public reprobation' and the words 'express' and 'denounce' imply that the judges recognised that the sentence is symbolic and that they are being observed, not only by those in the courtroom but by a larger audience. The judgment did not identify who this audience is, but over the course of its lifetime the Tribunal recognised the people of the Balkan region as an audience. It translated court documents - case summaries, indictments, judgments, and summary judgments; it also broadcast trials live from 2000 onwards, opened offices and held legacy conferences across the countries of the former SFRY.[68] Despite the criticism that attention was given to this audience 'too little, too late',[69] their actions denote that they recognised, and wished to communicate with them.

The Tribunal further believed that this expressive capacity was forward-looking, and in doing so it also recognised other audiences to which it wished to send messages. This purpose was general deterrence; it was sending the message to all persons caught up in conflict that heinous crimes such as torture can never be justified. The *Kordić* judgment recognised that people's mind-set during war is altered: 'the unfortunate legacy of wars shows that … many perpetrators believe that violations of binding international norms can be lawfully committed, because they are fighting for a 'just cause'.[70] In this context, the judges asserted that the Tribunal's punishment had an 'educational function … aim[ed] at conveying the message that rules of international humanitarian law have to be obeyed under all circumstances. In doing so, the sentence seeks to internalise these rules'.[71] The judges did not elaborate as to why these rules should be obeyed, but explicitly stated that they were sending this 'message' that 'international humanitarian and human rights law'[72] should be obeyed at all times. The invocation of adherence to IHRL is a recognition of the victim, as core to IHRL is the dignity of each human, *qua* human, and having equal worth.

4 The Impact of UER on International Criminal Justice's Expressive Values

This article limits its discussions to two particular messages the stakeholders in BiH received as the Tribunal granted UER and relates these to the theories

68 *See:* https://www.icty.org/en/outreach/home, accessed 4 December 2019.

69 Janine Natalya Clark, 'Plea Bargaining at the ICTY: Guilty Pleas and Reconciliation', 20(2) *The European Journal of International Law* (2009) 415–436.

70 *The Prosecutor* v. *Dario Kordić and Mario Cerkez*, Case No. IT-95-14/2-A, Appeal Chamber Judgment 17 December 2004, para. 1087.

71 *Ibid.,* paras. 1080–1081.

72 *Ibid.*, para. 1081.

of expressive punishment. The finding that moral condemnation was negated by UER spoke to many interviewees' perceptions of the Tribunal's key purpose. Of the 57 interviewees, 21 articulated that punishment was about sending the 'message' that the crimes were wrong and warranted punishment, using phrases such as 'to show', 'send the message', 'to say', etc. They spoke of the purpose of punishment having valuable expressive elements, specifically two of those identified by Feinberg: an authoritative disavowal and validation of the law.

4.1 *Authoritative Disavowal Diluted at UER*

The Tribunal seated in The Hague, established by the United Nations Security Council (UNSC) in New York, with foreign judges, embodied to many of its supporters in BiH (watching the Tribunal on the television, hearing the judges and lawyers second hand as interpreters translated), the rather nebulous international community. The judgments passed signified that universal principles were being recognised. Furthermore, the Tribunal itself articulated that it spoke on behalf of the international community – as above in the *Erdemović* judgment. Authors advocating for international criminal justice have argued that such tribunals can enhance their legitimacy by procedural fairness.[73] One such measure is the personnel of the institution being independent of the politics that created it. At the forefront of the ICTY were the judges. Under the Tribunal's founding legal doctrine,[74] those appointed were highly esteemed professionals presumed to be unbiased (by virtue of not being from the SFRY). Thus, their decisions should be perceived as fair and 'authoritative'.[75] Throughout the interviews those who were generally supportive of the ICTY echoed Shany's proposition. Several asserted that they trusted ICTY judges given that they were 'highly-educated people'[76] who were 'working in accordance with regulation and normative acts'.[77] The Tribunal indicted those

73 Luban, *supra* note 58, p. 579.

74 ICTY Statute, Article 13, required that 'judges shall be persons of high moral character, impartiality and integrity who possess the qualifications required in their respective countries for appointment to the highest judicial offices'.

75 Yuval Shany, 'Stronger Together? Legitimacy and Effectiveness of International Courts as Mutually Reinforcing or Undermining Notions', in Nienke Grossman, Harlan Grant Cohen, Andreas Føllesdal and Geir Ulfstein, *Legitimacy and International Courts* (Cambridge University Press, Cambridge, 2018), pp. 354–371.

76 Interview, Independent with professional experience engaging with victim-witnesses in Srebrenica, Sarajevo, 21 December 2017.

77 Interview, Judge, Sarajevo, 12 December 2017.

suspected of atrocity crimes, held public trials[78] and the judges sentenced those convicted to a term of imprisonment.

Punishment represented an authoritative disavowal of the crimes. In terms of Feinberg's proposals, the Tribunal was categorically stating that the perpetrator had 'no right to do what he did'.[79] Yet, this punishment was rarely fulfilled in practice. For ten of the interviewees UER was perceived as a direct negation of that condemnation. This sentiment was expressed by one interviewee who queried:

> can you morally condemn a certain person, a person's behaviour … your condemning … is not a mere act of condemning but it has consequences and in this case it's a prison sentence and if you do away with this … what remains of this initial act … the signal … of this moral condemnation [is a] question mark. And then we get back to the beginning … which is how far is it legitimate, or even legal to grant … an early release?[80]

For this interviewee, a non-native working for an IGO, a lawyer, with over ten years of professional experience in BiH, the expression of moral condemnation was realised via the prison sentence. Condemnation by words alone would not be adequate, as he noted, it has to have 'consequences'. When the perpetrator was granted UER, the sentence was not fulfilled. Further, his phrase, 'then we get back to the beginning' suggests that he, an audience of the message, looks back to the initial signal and queries the act of early release.

There was a notion of the trajectory of the declared sentence being undermined by the grant of UER. His query, 'what remains of this initial act' hints at the notion of the act being thwarted in some way. The sense of a trajectory losing its course was expressed by a BiH Prosecutor who was frustrated by UER and asserted that the sentence declared should simply be fulfilled. He noted that the ICTY 'should stick to the purpose of punishment – deterrence and sending the message'.[81] Another IGO interviewee, noting that he was a Serb, was bitterly disappointed with UER. Through his work, he engaged with smaller communities badly affected by the war. When asked if he believed UER could be reconciled with moral condemnation of the crime, he responded 'if

78 Eric Stover, *The Witnesses: War Crimes and the Promise of Justice in The Hague* (University of Pennsylvania Press, Philadelphia, 2005), p. 144.

79 Feinberg, *supra* note 36, p. 103.

80 Interview, IGO, Sarajevo, 21 December 2017.

81 Interview, Prosecutor, Eastern Sarajevo, 17 November 2017.

you want to give this message then we should not more or less change that narrative and provide an early release … it's wrong messaging'.[82] He concludes that the Tribunal's purpose has been distorted by UER. The Tribunal's sentence expressed moral condemnation, but unconditional early release contradicted that. This is a case of 'wrong messaging'; in his view the goal of the Tribunal has been shifted and effectively twisted.

These three quotations capture two elements of Feinberg's example of an act of an authoritative disavowal of a wrong committed, and the notion of this disavowal to a wide audience. The punisher is not addressing the perpetrator alone in condemning their act, as noted by the Prosecutor in asserting that the purpose was 'deterrence' in terms of general prevention rather than specific deterrence for that perpetrator. Feinberg's analogy of a nation state punishing a pilot of its own who has shot down another country's aeroplane:

> tells the world that the pilot had no right to do what he did, that his government does not condone that sort of thing. It testifies to government A's recognition of the violated rights of government B and, therefore, to the wrongfulness of the pilot's act.[83]

The purpose of punishment is disavowal – the punisher 'does not condone' the wrongfulness of the act. Feinberg's example hints at the *why* element, although he did not elucidate it. The wrong that has occurred is that the pilot has violated another's rights; here, those rights are of the other state by virtue of their pilot being shot down, which is denoted as the wrong which is subsequently punished. The reason why punishment is required is that a wrong has been committed. Before exploring further how this *why* element was negated at UER, let us first examine the underlying reasons why people (authors, and most importantly, a significant number of interviewees) perceive these crimes as wrong and as requiring punishment.

4.2 *Why this Authoritative Disavowal? A Vindication of Victims' Value*

Although Feinberg's work scarcely mentions victims, and he is not writing in terms of atrocity crimes, a parallel can be drawn from the above quotation in relation to the 'violated rights' of government B, by virtue of having their pilot shot down, to the context of atrocity crimes and subsequent punishment by the ICTY. Feinberg implicitly asserted that there is a world order that recognises that violent crimes committed against *any* innocent individual are

82 Interview, IGO, Sarajevo, 1 December 2017.

83 Feinberg, *supra* note 36, p. 102.

morally wrong – regardless of which government they belong to - and any government should punish such acts. Feinberg's argument implies an underlying sentiment which is so deeply ingrained that scholars frequently feel no need to explicate it. Murder and non-consensual violent acts against others are unlawful in almost all societies.[84] The following section draws on Hampton's theory, which explicates *why* the law itself is valid. This, in turn, speaks to the significance of the norm projection element of punishment for atrocity crimes, and the subsequent harm that is done at the blanket grant of UER for perpetrators.

This element of the expressive value of punishment, a recognition of victims' value, was proposed explicitly by Hampton, and supported by Glasgow,[85] though similarly to Feinberg, neither was justifying punishment in the context of atrocity crimes. Nevertheless, victims' value can be applied to any victim anywhere on the basis of our 'shared humanity'.[86] For Hampton, punishment is the means by which society expresses that all human beings have an intrinsic value. This reason for punishment was articulated by one interviewee, in relation to perpetrators of atrocity crimes. She argued, 'sentencing somebody to prison … it sends a message … [it] basically shows that the world recognises the amount of crime, that the victims were innocent and that persons … have been guilty for what they have been convicted of'.[87] Additionally, the interviewee affirmed that the expressive act of punishment has audiences and she identified two. First, victims are an audience, as she reasons that survivors, direct or indirect victims, are being provided with some satisfaction by the perpetrator's being punished. Second, the world is an audience and punishment signals that the perpetrator has done wrong, namely, they harmed victims. More broadly, her statement implied that victims perceived their perpetrators being punished as a recognition of their worth. This was noted - in the negative - by one interviewee in the Republika Srpska (RS) who said that the Western powers dominating the UNSC – the US, the UK and France - failed to take preventive action against atrocities because the 'Balkan[s] was too orient for them, the victims were Muslims'.[88] Although punishment was easier than prevention it was nevertheless significant as it symbolised that the international community cared somewhat about the victims – that they were not 'too orient'.

84 Sikkink, *supra* note 60, p. 255.

85 Andrew Glasgow, 'The Expressivist Theory of Punishment Defended', 34 *Law and Philosophy* (2015) 601–631.

86 Duff, *supra* note 54, p. 601.

87 Interview, NGO, Sarajevo, 27 October 2017.

88 Interview, NGO, Banja Luka, 24 November 2017.

A further reason why punishment could be perceived as bringing a sense of satisfaction to victims was due to the rhetoric of the Tribunal itself. The Tribunal routinely claimed that they considered the welfare of victims. For example, a 2003 judgment stated that victims as well as perpetrators mattered in the administration of justice: 'The Tribunal is not only mandated to search for and record, as far as possible the truth of what happened in the former Yugoslavia, but also to *bring justice to both victims and their relatives* and to perpetrators'.[89] This assertion continues today as the ICTY website lists amongst its achievements that it brought justice to victims by giving them a voice and establishing facts'.[90] Here, the ICTY stated that by dispensing retributive justice to perpetrators it simultaneously brought justice to victims.

4.3 *Plavšić*

The significance of victims' value being vindicated through punishment is best exemplified by the premature termination of punishment of one convicted perpetrator – Biljana Plavšić. Plavšić's UER was raised, without prompting, in 24 of the 51 interviews. On 27 February 2003, Plavšić was sentenced to 11 years imprisonment for crimes against humanity - persecutions on political, racial and religious grounds. She was at the forefront of the ethnic cleansing in the RS.

Prior to the conflict, Plavšić was an esteemed biologist teaching at the University of Sarajevo. As the SFRY broke up and ethnicity became a driving force as the six Republics sought independence, Plavšić became politically active. In 1990, together with Radovan Karadžić (her initial co-accused), she co-founded the Serbian Democratic Party (SDS). Her war-time propagations exhibit Hampton's notion of perpetrators evaluating themselves and debasing their victims. Plavšić, employing her biologist expertise, spoke with conviction that 'Muslims are genetically spoiled material'.[91] When degrading the Muslim population she asserted the status of the Serbs: 'we are upset by a rising number of mixed marriages between Serbs and Muslims, for they allow genes to be exchanged between ethnic groups, and lead subsequently to the degeneration of Serb nationality'.[92] On this basis she called for mass deportation: 'I would

89 *The Prosecutor* v. *Dragan Nikolić,* Sentencing Judgment, Case No. IT-94-2-S, 18 December 2003, para. 120. Emphasis added.

90 *See* ICTY website: https://www.icty.org/en/about/tribunal/achievements, accessed 20 July 2020.

91 Plavšić in *Svet*, 6 September 1993, cited Jelena Subotić, 'The Cruelty of False Remorse: Biljana Plavšić at The Hague', 36(1) *Southeastern Europe* (2012) 42.

92 Plavšić in *Oslobođenje*, May 1994, cited in Subotić, *ibid.*

like for us to cleanse Eastern Bosnia … To tell you the truth I am not very well disposed towards them [Muslims]. But if I want to be at peace, I must give them something … because then they would not keep disturbing me. This is how I perceive that 30 per cent'.[93] She was initially indicted for eight charges, including genocide, to which she pleaded not guilty in January 2001 but after a plea agreement in October 2002 she pled guilty to one count: persecutions on political, racial, and religious grounds (crimes against humanity).

Plavšić delivered a statement of guilt as part of her plea bargain. This statement epitomised international criminal justice's expressive value, a moral condemnation of the crime and a vindication of the victims, being fulfilled. As she read out her statement before the Trial Chamber the public *en masse* in the SFRY watched and heard her as it was televised. Her acceptance of moral condemnation and the norm underlying it was apparent in two sentences of her statement: 'Our leadership, of which I was a necessary part, led an effort which victimized countless *innocent people*. Explanations of self-defence and survival offer *no justification*'.[94] Hampton's proposed norm, the recognition of victims' worth, is directly referenced by Plavšić as she described the victims as 'innocent people'. Further, the acceptance of the wrong, rather than the acceptance of illegality, is spoken to as she recognised that her actions had 'no justification'.[95]

Although this statement of remorse was not accepted by all audiences in BiH,[96] it was significant nonetheless and widely reported. The significance of remorse to international criminal justice more broadly was argued by Karstedt who declared that 'any admission of guilt and … moral responsibility address vital exigencies of the international criminal courts and tribunals, their rationale, justification, and legitimacy'.[97] The significance of remorse, as argued by Karstedt, does appear to be supported by the fact that Plavšić's latter rejection was found deeply offensive, so much so that it had stayed with interviewees six years later.

93 Plavšić in *Svet*, 6 September 1993, cited in Subotić, *ibid.*

94 Plavšić's statement of guilt, *see*: ICTY website: https://www.icty.org/en/features/statements-guilt, accessed 26 June 2020.

95 *Ibid.*

96 Emir Suljagić, a Srebrenica massacre survivor, said, 'I feel like crying. There was nothing human in her words, not a note of apology. She didn't do it for me. She did it for the Serbian cause', cited Subotić, *supra* note 91, 46.

97 Sara Karstedt, '"I would Prefer to be Famous": Comparative Perspectives on the Reentry of War Criminals Sentenced at Nuremberg and The Hague', 28(4) *International Criminal Justice Review* (2018) 384.

Plavšić's UER was recalled, either as the interviewees' first recollection of hearing about UER or being the 'best evidence against early release'.[98] She was the most high-level political perpetrator who, at trial, accepted the moral condemnation of the judges as they passed the sentence. However, her charade became clear as she retracted her expressed remorse in an interview she gave in prison[99] and the 'cruelty of her false remorse'[100] was extenuated as she was granted UER.[101]

Plavšić was publicly welcomed back to the country by an ongoing denier of the genocide in Srebrenica, RS President Dodik. His private jet brought Plavšić to Belgrade where she was greeted by a well-orchestrated 'ticker-tape parade'.[102] A few days later she received a similar welcome in Banja Luka, BiH. She thanked her supporters and decried the Tribunal, saying that she regretted none of her actions during the war and explained that her guilty plea was for pragmatic purposes only.[103] At a minimum, one interviewee asserted that Plavšić's UER distorted the message of moral condemnation:

> Condemnation … to say 'this is wrong … and now you are being put away because we want to send this message to everyone' … Plavšić, there are so many people who still think she is a hero and her early release didn't help spread that message. She was convicted, but so what … she is released … all good. So that … message got scrambled completely.[104]

The belief that early release distorted the original message of moral condemnation was reflected in the use of the word 'message' as having negative and tangible consequences. The NGO Director, who had asserted that Plavšić's release was the 'best evidence against early release', applied this to the bigger picture of UER in BiH as he reflected that: 'It's a message - you can achieve your political aims with war … punishment [but] you will survive. Everything will be okay, and we will give you [UER] and further [you] become a hero in … your

98 Interview, NGO Director, Sarajevo, 7 November 2017.

99 *Vi* Magazine, cited Choi, *supra* note 8, 1783.

100 Subotić, *supra* note 91.

101 Olivera Simić, 'Bringing "Justice" Home? Bosnians, War Criminals and the Interaction between the Cosmopolitan and the Local', 12(7) *German Law Journal* (2011) 1401–1402.

102 Interview, Senior Staff Member, The Hague, 24 January 2017.

103 Olivera Simić, '"I Would Do the Same Again": In Conversation with Biljana Plavšić', 28(4) *International Criminal Justice Review* (2018) 321.

104 Interview, Independent with professional experience engaging with victim-witnesses in Srebrenica, Sarajevo, 21 December 2017.

nation, your ethnic group or religious group'.[105] Authors have detailed the 'celebratory homecomings'[106] that ICTY convicts, especially high-level perpetrators, receive as they return to the region. They outline how perpetrators portray themselves as defenders of their communities[107] and are welcomed as such.[108] These 'celebratory' returns, where perpetrators and their supporters reject the 'stigmatisation' that the Tribunal's punishment signified, were spoken of eloquently by one interviewee, a prominent Serb human rights activist in the RS. He reflected: 'he didn't change [and] he's coming back a hero … instead of the shame, instead of the guilt … all the things that these war criminals [were] fighting for … it's legitimised, privileged … as their … war glory effort'.[109]

Another interviewee, an NGO representative in Sarajevo, was deeply frustrated with UER. He believed that the Tribunal should be aware of the local context and make the message of condemnation categorical by not granting any early releases. In contrast to the RS human rights activist, who looked at the big picture, this interviewee's emphasis was on the smaller communities where perpetrators return as heroes, 'they are coming into that area, where they did the crime, to be welcomed by the folks living there as a hero, and I am also living there, in the neighbourhood - how will you feel? You know, again, what's the message?'[110] He was referring to minority populations and victims. They had been ethnically cleansed from the area, some had returned, and now those who had instigated or participated in their forced removal were glorified in that same place. Also in Sarajevo, an NGO Director considered these local returns as he reflected, 'those who have been terrorised or people who suffered during the war you know by individuals who are now being released earlier - what kind of a message does that send to them?'[111]

These interviewees implied that UER could trigger a sense of intimidation for victims who had been terrorised during the war. This was affirmed by Munira Subašić, Mothers of Srebrenica, who queried, 'How can we be expected to return to our homes in Srebrenica when the project to destroy us still lives in

105 Interview, NGO Director, Sarajevo, 7 November 2017.

106 Trbovc, *supra* note 8, 408.

107 Katarina Ristić, 'The Media Negotiations of War Criminals and Their Memoirs: The Emergence of the "ICTY Celebrity"', 28(4) *International Criminal Justice Review* (2018) 391–405.

108 Although these scholars do not make the link between early release and the perpetrators' homecomings.

109 Interview, NGO, Banja Luka, 24 November 2017.

110 Interview, NGO Representative, Sarajevo, 2 November 2017.

111 Interview, NGO Director, Sarajevo, 6 November 2017.

the heads of the Bosnian Serb leadership?'[112] UER effectively goes against the norm that was projected as perpetrators were sentenced. This norm, is summarised by Luban as 'international criminal law's moral truth … the criminality of political violence against the innocent, even when your side hates the innocent as an enemy'.[113] UER was 'twisting this whole idea of justice'[114] as it allowed them to be greeted as heroes, their crimes justified, their victims belittled, all within the context of a post-conflict ethnically divided state.[115] This was the case in BiH and could be replicated elsewhere.

4.4 *The Audiences, the Messages of International Criminal Justice and their Negation at UER*

Unconditional early release as 'counter-logic' to punishment, a negation of the ICTY's moral message and a weakening of the vindication of victims' value, was seen as applicable to international criminal justice more broadly. Over one-third of interviewees perceived the ICTY punishing perpetrators of atrocity crimes committed in the Balkans as having significance beyond their own borders.[116] This perception signifies that the ICTY, as an international criminal justice mechanism, can provide lessons for other such endeavours.

Analysis of the interview data fits with Amann's argument that, for legal expressivists, 'the intended audience … is not just the wrongdoer … it is also the Everyone … the law-abider and the law-maker, the activist and the private citizen, and even the potential victim, today and tomorrow'.[117] The idea that 'the Everyone' is addressed and receive messages as international criminal justice punishes came out strongly in interviews.

Other authors have advocated for specific audiences to be targeted, or sent particular messages when punishing atrocity perpetrators.[118] For some, political and social groups (both elites and their followers) are a key audience of

112 Subotić, *supra* note 91.

113 Luban, *supra* note 58.

114 Interview, Prosecutor, Federation, BiH, 21 November 2017.

115 Beiber, *supra* note 10.

116 Nineteen interviewees in BiH referenced the purpose of punishment as showing 'the world', 'everyone', 'other leaders' that such crimes were wrong, should or will be punished. Thus, indicative of this recognition of the ICTY having a broader audience than the Balkan region.

117 Diane Marie Amann, 'Group Mentality, Expressivism, and Genocide', 2 *International Criminal Law Review* (2002) 93–143.

118 Mirjan Damaška, 'What is the Point of International Criminal Justice?', 83(1) *Chicago-Kent Law Review* (2008) 329–365.

the no impunity norm.[119] The no impunity norm is realised by the punishment itself; the moral condemnation and victim's value are the messages encompassed in the act of punishment. Fisher argued that this no impunity norm should be expressed by focusing on punishing high-level perpetrators[120] of atrocities. This prosecutorial strategy, she asserted, would affirm a global order wherein groups of human beings are free to organise socially and politically. Luban recognised both these elites and followers as relevant audiences of what he labelled the 'norm projection'.[121] Luban suggested that this norm projection may have a deterrent effect, that foot-soldiers internalise the 'moral unacceptability of [discriminatory and violent] politics'.[122]

Fisher's proposition was echoed in BiH. Interviewees recognised other members of the international community as being an audience for the ICTY. The President of a regional court in BiH argued that punishment of atrocities 'sends a message to the entire world that this kind of behaviour during war … is not allowed and it should not happen again'.[123] Likewise, a judge at the War Crimes Chamber, BiH State Court, said that 'the ICTY … sends a message, to the people of Myanmar now'.[124] These two judges perceived the ICTY as being able to send a powerful message not only to the region but across the world. Additionally, that the message outlived the Tribunal was reflected by the judge's use of the word 'now'. Further, 'these people' could encompass not only the leaders instigating the crimes but their followers too.

As the conviction and subsequent punishment projects the message of no impunity, does the early termination of the punishment undermine this message? As unintentional as this may be, the answer for several interviewees was a clear 'yes'. In terms of receiving audiences, UER by the ICTY not only had a negative impact for the societies in the SFRY, it also sent a negative message to others. For one interviewee, UER was a direct contravention of the no impunity norm. Most worryingly for her, state leaders who instigate the atrocity crimes received this message. She asserted that UER is: 'sending the message to the world that crimes can be committed. You will be released, you can change the border[s] of territories, you can forcibly move people, and you can change ethnic structures of one nation for your own personal interest'.[125]

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119 Drumbl, *supra* note 2; Luban, *supra* note 58; and Damaška, *ibid*.

120 Fisher, *supra* note 3, p. 6.

121 Luban, *supra* note 58, p. 576.

122 Drumbl, *supra* note 2, p. 174.

123 Interview, Judge, Federation, BiH, 21 November 2017.

124 Interview, Judge, War Crimes Chamber, State Court, Sarajevo, 18 October 2017.

125 Interview, NGO, Sarajevo, 14 December 2017. Twenty years after the war, the UNHCR, in 2015, reported that 98,000 people remained internally displaced in BiH, and the issue of

Her focus on ethnic cleansing being trivialised by UER may have arisen as she was working with a number of war victims internally displaced due to the terms of the Dayton Agreement, which divided the country along ethnic lines.[126] Every day she witnessed directly the on-going harms experienced by displaced people, victims of these perpetrators who were now being granted early release from their punishment. Her comment indicated further that she perceived parallels with other countries experiencing atrocities whereby the crimes' purposes, ethnic cleansing, are achieved, and through UER this mass displacement is being relativised.

The disappointment and frustration caused by UER, for most interviewees, was due to the gravity of the crime,[127] aggravated by the typology of the perpetrators, their lack of remorse, all compounded by its unconditional nature. The first three factors (gravity, typology and lack of remorse) speak to the specific nature of atrocity crimes. The vast majority of interviewees (with the exception of most judges, one NGO representative and one survivor) perceived UER as both unexpected and inappropriate for extra-ordinary crimes.[128] Words such as 'surprised',[129] 'shocked',[130] in addition to 'disappointed'[131] and 'devastated'[132] were used in response to their initial thoughts on hearing of UER. This included practising lawyers, including those defending persons accused of atrocity crimes in BiH courts. Approximately one-third of the interviewees raised the issue of proportionality in the ICTY's early termination of punishment of atrocity crimes.

UER was perceived as a derision of the proportionality element of retribution, including the moral condemnation of the crime. This perception was expressed by one NGO Director who believed that UER was a 'total relativisation of the crime' and his emphasis was on proportionality: 'we totally lose the sense for justice … this is not a traffic incident … we are talking about crimes

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minority returns was still an issue – 'minority returns in ethnically cleansed areas'. *See:* http://reporting.unhcr.org/node/15810.

126 Diane Orentlicher, *Some Kind of Justice: The ICTY's Impact in Bosnia and Serbia* (Oxford University Press, Oxford, 2018).

127 Seventeen of the 57 interviewees raised the gravity of the crimes committed, the mass number of victims, the ethnic hatred motivation, and/or the cruelty of the crimes.

128 One interviewee, an NGO staff member, responded in a similar vein that he was not surprised as it was a practice that happened in every country. Later, however, he expressed his anger that the practice was unconditional.

129 Interview, NGO, Banja Luka, 24 November 2017.

130 Interview, NGO, Sarajevo, 27 October 2017.

131 Interview, NGO Director, Sarajevo, 7 November 2017.

132 Interview, NGO Director, Sarajevo, 6 November 2017.

against humanity … grave breaches of international law'.[133] This interviewee described UER as his 'biggest disappointment' and believed his sense of frustration would be shared by others. He asked rhetorically 'after two-thirds of imprisonment they are released - what kind of message are we sending to victims?'[134] His question implied that victims were disrespected when UER was granted, echoes Hampton's idea of victims' vindication via punishment. What Hampton argued for the national law is applicable to international criminal justice also, 'behaviour is expressive, and the state's behaviour in the face of an act of attempted degradation against a victim is itself something that will either annul or contribute further to the diminishment of the victim'.[135] Hampton's reference was to impunity for crimes rather than the premature ending of punishment, but the interviewees' opinions illustrate that, just as the punishment sent a message, so too did its premature ending.

Interviewees, in addition to expressing their disappointment in the Tribunal's UER, proffered what could justify an early release. If early release had been undertaken along their proposals this may have countered the perceived relativisation of the crimes. Their recommendations also speak to the purpose of punishment as being a moral condemnation of the crime and a vindication of the crimes' victims. Their recommendations also provide lessons for international criminal justice more broadly.

5 Maintaining International Criminal Justice's Expressive Value

This section turns to perpetrators' remorse as a justification for early release. This was proposed by many of the interviewees. Researching in the field of international criminal justice is often not limited to exploring theories but striving for improvements in the system. Thus, making recommendations calling for adopting or amending practices based on empirical findings has the potential to contribute to enhancing its acceptance.[136] Its audiences are more likely to listen to the messages it wishes to convey.

133 Interview, NGO Director, Sarajevo, 7 November 2017.

134 *Ibid*.

135 Hampton, *supra* note 44, 1692.

136 Sarah M.H Nouwen, '"As you Set out for Ithaka": Practical, Epistemological, Ethical, and Existential Questions about Socio-Legal Empirical Research in Conflict', 27(1) *Leiden Journal of International Law* (2014) 227–260; Marina Aksenova, Elies van Sliedrget and Stephan Parmentier, *Breaking the Cycle of Mass Atrocities: Criminological and Socio-Legal Approaches in International Criminal Law* (Hart, Oxford, 2019).

5.1 *Remorse*

From a human rights perspective, exploring this societal relationship is important as a perpetrator's rehabilitation under IHRL encompasses their 'social rehabilitation'.[137] This implies that reintegration into the society, and how best to achieve this, should be considered. Additionally, IHRL obliges states to tailor imprisonment for perpetrators' return to society.[138]

Some authors have queried whether a state should concern itself with repentance,[139] which they argue could violate a person's autonomy – that a state power should not manipulate people to be repentant. It is not proposed here that perpetrators must be rehabilitated but that they have the opportunity to be rehabilitated[140] and where they claim to be rehabilitated, they should provide evidence. This is not unreasonable, especially given the gravity of the crimes, their motivation and context (based on ethnic hatred) and the divided society to which they return. In the parameters of ICL, it is, in fact, required by the International Criminal Court's Rules and Procedure of Evidence. These rules provide criteria the judges 'shall take into account' in considering an application for a reduction of sentence for perpetrators of atrocity crimes. Although the Rules do not use the word 'rehabilitation', they do imply personal reformation and perpetrators' capacity to return to society; the two principles as set out in the International Covenant on Civil and Political Rights (ICCPR). The ICC's Judges who consider a perpetrator's request for a reduction in sentence evaluate, *inter alia*, '(a) the conduct of the sentenced person while in detention, which shows a *genuine dissociation* from his or her crime; (b) the prospect of the *resocialization and successful resettlement* of the sentenced person; (c) whether the early release of the sentenced person would give rise to *significant social instability*'.[141] This third factor explicitly requires the judges to consider society, not only the perpetrator. The ICC's Rules are highlighted because the elements were alluded to by interviewees. Further, these Rules were written for the purposes of a reduction of sentence for perpetrators of atrocity crimes, whose crimes and context of return can form a baseline comparison. Finally, these rules were available for the ICTY's President and judicial

137 ICCPR, 1966.

138 ICCPR, Article 10(3); and UN Standard Minimum Rules for the Treatment of Prisoners 1955, Rule 65.

139 Andrew Von Hirsch, *Censure and Sanctions* (Oxford University Press, Oxford, 1996), pp. 73–74 responded to by John Tasioulas, 'Repentance and the Liberal State', 4(2) *Ohio State Journal of Criminal Law* (2007) 498.

140 In accordance with IHRL.

141 ICC Rules and Procedure of Evidence, Rule 223.

colleagues to consider at the first application for early release,[142] and subsequently thereafter.

The first factor the ICC judges must consider - 'dissociation from his or her crime' - on plain reading encompasses the notion of remorse. The Oxford English Dictionary defines 'dissociation … [as] the *act* of showing that you *do not* support or agree with something'.[143] Additionally, throughout scholarship, dissociation from the crime is encompassed in a perpetrator's apology for the crime, as noted by Garvey who asserted that 'apology is the self's way of accepting responsibility for its wrongdoing but at the same time disavowing the wrong'[144] and where genuine can be of value.[145] This definition and belief in its value is supported by the ICC's two decisions on reduction of sentences, both of which encompass elements of remorse as described by BiH interviewees: an acknowledgement of crimes as a wrong, recognition of the harm caused to victims and an apology. The first ICC decision on an application for a reduction of sentence rejected Lubanga's claimed disassociation from his crime as it determined that his expression of remorse '*did not acknowledge* [Lubanga's] own culpability [or an] express[ion] of *remorse or regret* to the victims of crimes for which he was convicted'.[146] In contrast, regarding Katanga's application, the judges determined that Katanga's two actions during imprisonment constituted evidence of dissociation from the crimes. First was his withdrawal of an appeal against conviction, thereby an apparent acceptance of the Trial Chamber's finding of guilt. Second was his public expression of regret to victims. He had a filmed apology to his victims – which satisfied the judges that he had 'genuinely dissociated from his crimes'.[147] Thus, his application for a reduction of sentence was granted. A genuine expression of remorse, regret for specific actions, weighed strongly in his favour.

The ICC's consideration of perpetrators' dissociation from the crime reflected much of what interviewees proposed as measures of genuine remorse. Expressed remorse was a positive act with a receiving audience. This factor was

142 D. Erdemović, Early Release Decision, June 1999, made public July 2008.

143 *See* https://www.oxfordlearnersdictionaries.com/definition/english/dissociation - emphasis added.

144 Stephen P. Garvey, 'Punishment as Atonement' 46(6) *UCLA Law Review* (1999) 1816.

145 Olivera Simić and Barbora Holá, 'A War Criminal's Remorse: the Case of Landžo and Plavšić', 21 *Human Rights Review* (2020) 271.

146 ICC Decision on the review concerning reduction of sentence of Mr. Thomas Lubanga Dyilo, 22 September 2015, ICC-01/04-01/06, para. 46.

147 ICC Decision on the review concerning reduction of sentence of Mr. Germain Katanga, 13 November 2015, ICC-01/04-01/07, para. 50.

put bluntly by one prosecutor who said, 'You want early release? Then show us you are sorry'.[148] The use of the phrase 'show us' implies an expression to a watchful audience – that an act is seen. Fourteen of these interviewees delved further into what should be communicated. For them the concept of remorse was linked to an acknowledgement of the crimes,[149] a recognition of harm to victims,[150] and a public apology.[151] These threefold elements echoed traits encompassed in Proeve and Tudor's model of 'a remorseful person'. This is a person who 'thinks about what he did, how it affected other people, and may experience a sense of a changed self'.[152] That is, the crime is acknowledged, the harm caused to the victim is acknowledged and, as a result of this changed mind-set, the perpetrator may wish to provide an apology. Personal reformation and resocialisation were highlighted by one BiH judge who argued that the purpose of punishment was for perpetrators' 'confrontation with the atrocities committed … for them to show remorse and to offer apology'.[153]

The emphasis on the acknowledgment was for most interviewees about the recognition of victims' harm and for societal well-being. These findings illustrate some authors' assertions that apologies hold significance as they can be a means to 'vindicate victims and humble offenders'.[154] Thirteen of the 26 interviewees who wanted a perpetrator to demonstrate remorse believed an apology should be made public. One prosecutor, recognising that verifying the sincerity of remorse was difficult, proposed that a perpetrator should 'back up his remorse with a public apology to victims'.[155] For him, this public apology was not for the victims directly but rather for societal recognition of victims. One survivor articulated this, as she emphasised the lack of recognition of victims throughout the interview. She reflected that in the RS none of 'the perpetrators … had made public statements, nor did they offer their apologies' and stressed that 'people would believe them … rather than the victims'.[156]

148 Interview, Prosecutor Eastern Sarajevo, 17 November 2017.

149 Six noted that key to remorse was the perpetrator's acknowledgement of the crime they were convicted of was morally wrong.

150 Seven noted that encompassed in remorse was a recognition of harm done to victims.

151 Thirteen argued that perpetrators to be granted an early release should publicly apologise for their crimes.

152 Michael Proeve and Stephen Tudor, *Remorse: Psychological and Jurisprudential Perspectives* (Ashgate Publishing, Farnham, 2010) p. 171.

153 Interview, Judge, Sarajevo, 12 December 2017.

154 Stephanos Bibas and Richard A. Bierschbach, 'Integrating Remorse and Apology into Criminal Procedure' 114(1) *The Yale Law Journal* (2004) 85–148, 143 referencing Duff, *supra* note 40, 95.

155 Interview, Prosecutor, Federation, BiH, 9 November 2017.

156 Interview, RS, 23 November 2017.

For her, perpetrators' apology would be a message of moral condemnation of the crimes and a recognition of the victims.[157] Others also took this approach and believed that the Tribunal, not only the perpetrator, had responsibility to make these apologies known. One interviewee advocated 'remorse expressed and for people to know about it, with outreach. That would generate so much for the region, a public apology'.[158] This proposal is in line with Sloane's recommendation for the utilisation of the 'expressive capacity of international law' which calls for 'greater attention to communication and public education strategies in international criminal law … making the … sentencing process … express the extraordinarily high level of international condemnation of [international] crimes'.[159] The same rationale could be applied when the declared sentence is prematurely terminated.

5.2 *The Desired Message of Punishment for Atrocity Crimes*

Remorse for the crimes and a recognition of the moral rather than legal wrong of the crime speaks to the significance of the norm projection element of punishment. This norm projection of the micro-message, an understanding of the dignity of each individual, based on our shared humanity, regardless of race, ethnicity, religion, is key in punishing atrocity crimes. This was articulated by one interviewee who argued that punishment should express that there is 'no national reason' for crimes.[160] An internalisation of this norm would mean that individuals would have a sense of a shared humanity with all other individuals regardless of their specific religious, ethnic or political group.

Based on these findings, with this desired message in mind, caution is noted here in relation to focusing on the macro-message of the norm, perceived by Fisher, which placed emphasis on the group desire and right of groups to socially organise, although she advocated for this message to be projected to the international audience rather than the local community. It accentuates distinctions rather than commonalities. Perpetrators convicted by the ICTY had frequently committed crimes based on the victim's ethnicity, or their

157 ICC Decision on the review concerning reduction of sentence of Mr. Germain Katanga, 13 November 2015, ICC-01/04-01/07, 'Katanga's filmed apology … may be a benefit to victims from an apology being seen, not only by them, but also by the broader community, including those who may be considered 'supporters' of the sentenced person … Such an apology … can also lead to a broader recognition and acknowledgement of the harms that were done to the victims', para. 101.

158 Interview, Embassy Staff Member, Sarajevo, 13 December 2017.

159 Sloane, *supra* note 3, 84.

160 Interview, Prosecutor, Eastern Sarajevo, 17 November 2017.

affiliation with an ethnic group.[161] If, however, a simpler, more fundamental message can be projected, namely that *all* humans are equal regardless of ethnicity, nationality etc., leaders of groups would find it more difficult to shift a mind-set towards group affiliation. A mind-set which focuses on groups' rights emphasises differences and immediately opens up the potential for division rather than universality.

6 Conclusions

To conclude, based on research in BiH, there are three main reasons why international criminal justice should emphasise its expressive capacity and three subsequent recommendations for it to do so.

First, atrocity crimes in the context of ethnic conflict are fundamentally different to ordinary crimes due to their discriminatory motive or perpetration within a context of group-based hatred. Atrocity crimes happen in a context and in post-conflict society elements of that context may be ongoing. In relation to UER this means that, when the perpetrators return to the community, their social reintegration is radically different to that of perpetrators of ordinary crimes. Any institution considering a grant of early release to a perpetrator who plans to return to a post-conflict society should take into account that society, and the perpetrator's willingness to respectfully return to it. This is not an unreasonable proposal. It is in line with the second element of the notion of rehabilitation under IHRL, the perpetrator's 'social reformation'.[162] Although it may not be the normal role of a judge, where they are tasked with this responsibility, they should fulfil it to the best of their ability. This recommendation appears to have been adopted by the current Tribunal President[163] and at the ICC. Future ICTs and Courts which consider early release for atrocity perpetrators may be able to prevent the message of moral condemnation and vindication of victims being negated.

161 *The Prosecutor* v. *Kunarac, Kovač and Vuković*, Case No. IT-96-23-T & IT-96-23/1-T, Trial Chamber Judgment, 22 February 2001, para. 592.

162 Article 10(3) ICCPR.

163 Prosecutor v. Miroslav Bralo, Public Redacted Version, Decision on the Early Release of Miroslav Bralo, 31 December 2019, whereby UNIRMCT President Agius noted that, 'it is not appropriate to look at the rehabilitation of perpetrators of genocide, crimes against humanity or war crimes through the exact paradigm as rehabilitation of perpetrators of domestic or ordinary crimes', para. 38.

Second, punishment of perpetrators of atrocity crimes (mass victimisation motivated by or within the context of group-based hatred) symbolises the condemnation of the act of hatred and is simultaneously a recognition of the dignity of the victims. Consequently, UER was widely perceived of as a negation of the expression of condemnation and vindication of the victims. With this finding in mind, early release (unconditional or not) of perpetrators should be explained to stakeholders in post-conflict societies to counter these messages.[164]

Third, primarily due to its own rhetoric, many stakeholders, especially victims, expected more from the ICTY than its 'sole purpose' of bringing perpetrators to justice – which was its core mandate under the UNSCR. This is important to emphasise as international criminal justice is fundamentally about criminal accountability, despite some aspirations, expressed by scholars and others, of bringing voice to victims, providing an authoritative truth or being a means of reconciliation. Findings from BiH showed that many victims wanted criminal justice for the crimes, and although UER had cut justice short, 'that some justice was done'[165] was better than none. Stakeholders were deeply disappointed, and one factor was that the Tribunal had promised more than it could achieve.

At a practical level, international criminal justice can enhance its expressive capacity by having a 'greater degree of realism'.[166] International criminal tribunals and courts should not purport to do more than they are mandated, or able to do. They should focus on fulfilling, to the best of their abilities, their core mandate: holding perpetrators to account through a fair trial. When unrealistic promises are made, they are heard and this can lead to disappointment for those who have already suffered, the victims.

These three recommendations are reasonable and in accordance with international human rights standards. Moreover, they are straightforward; they could be followed by practitioners simply by bearing in mind the old truism – that justice should be seen to be done. Bearing this in mind, practitioners would hopefully be more aware that all actions express messages. Perhaps then they would be more likely to consider the people whom justice is meant to serve in this its final dispensation, that is, the grant, where appropriate, of early release from imprisonment to perpetrators of atrocities.

164 Again, President Agius adopted this practice as he denied early release to Bralo, stating, 'I consider that it is in the interest of transparency to identify some of the principles that guide my reasoning'; *ibid.,* para. 38.

165 Diane Orentlicher, *That Someone Guilty Be Punished: The Impact of the ICTY in Bosnia* (Open Society Justice Institutive and ICTJ, New York, 2010) p. 34.

166 Carsten Stahn, 'Between 'Faith' and 'Facts': By What Standards Should We Assess International Criminal Justice?', 25(2) *Leiden Journal of International Law* (2012) 257.