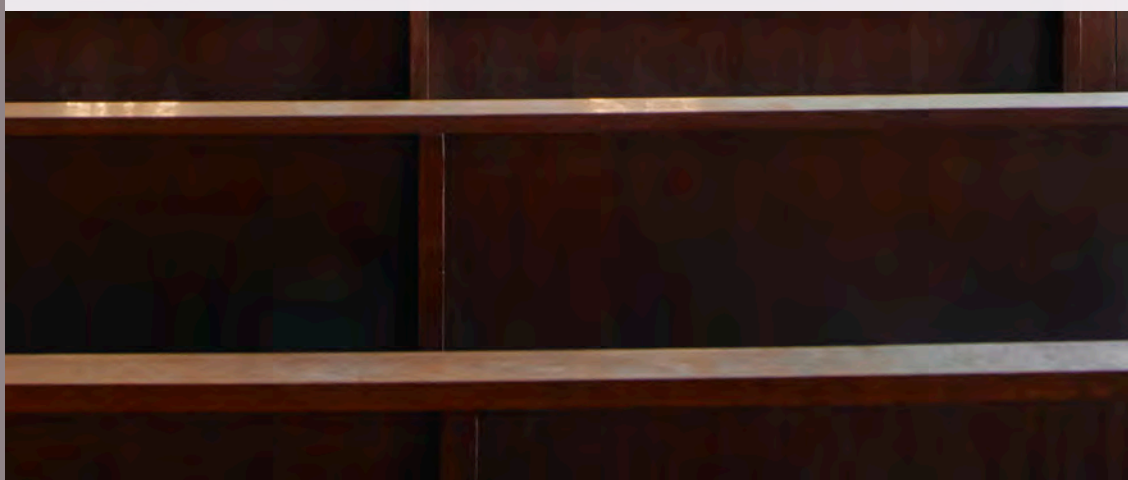
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Two Steps Forward, One Step Back: The Deterrent Effect of International Criminal Tribunals

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5

Difficulties in Achieving Deterrence by International Criminal Tribunals: The Example of the International Criminal Tribunal for Former Yugoslavia in Kosovo

Dafina Bucaj*

5.1. Introduction

The ability of a legal system to discourage certain conduct through threats of punishment or other expressions of disapproval is defined as deterrence.[1] Scholars have created a division between general deterrence and specific deterrence. General deterrence is concerned with potential future offenders, namely the ability to deter criminal behaviour in society at large. Specific deterrence, by contrast, is intended to prevent recidivism among those already investigated and prosecuted, namely dissuading these specific individuals from the commission of future crimes.[2] In this sense, deterrence is also seen as a means of preventing future crimes although, as explained in this volume's chapter on deterrence theory, prevention is a broader concept that includes deterrence through prosecutorial action, but also includes government and community-based programmes, policies and initiatives intended to exclude the commission of crimes as a socially acceptable option.

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1 Payam Akhavan, "Justice in The Hague, Peace in the Former Yugoslavia? A Commentary on the United Nations War Crimes Tribunal", in *Human Rights Quarterly*, 1999, vol. 20, no. 4, pp. 713–71.

2 International Criminal Tribunal for the former Yugoslavia ('ICTY'), *Prosecutor v. Zdravko Mucić*, Trial Chamber, Judgment , IT-96-21-T, 16 November 1998, para. 1232 ('Čelebići Camp Judgment') (http://www.legal-tools.org/doc/6b4a33/).

In relation to mass atrocities, scholars use the terminology developed by the International Criminal Tribunal for Rwanda ('ICTR'),[3] which in the *Kambanda* case held that the primary purpose of the Tribunal must be directed towards deterrence, namely "dissuading for good those who will attempt in future to perpetrate such atrocities".[4] This is based on the assumption that a threat of or actual meting out of punishment may cause potential perpetrators (or reoffenders) to adjust their behaviour. The punishment, which is directed towards leaders who contemplate engaging in criminal policies, may affect their behaviour, if the leaders engage in a so-called cost-benefit calculation.[5] Nevertheless, the connection between international prosecutions and the actual deterrence of future atrocities has been a relatively untested assumption for many years,[6] with the exception of some recent studies on the deterrence of the International Criminal Court ('ICC').[7] To date there are few general studies conducted on the deterrent effect of the international tribunals.

With regards to the International Tribunal for the former Yugoslavia ('ICTY'), past studies have focused on many aspects of the work of the Tribunal such as the long-term impact of the ICTY on: post-conflict peace building; the stigmatisation and marginalisation of ultranationalist leaders and ideologies allied with ethnic hatred and violence; the potential shoring-up of support for indicted leaders who have been supported by local political institutions in an expression of ethnic solidarity; the role of the broader public in distancing itself from indicted leaders despite a common ethnic affiliation; and the impact of indictments in reinforcing

[3] ICTY, *Prosecutor v. Dragoljub Kunarac et al.*, Trial Chamber, Judgment, IT-96-23 and 23/1, 22 February, 2001, para. 842 (http://www.legal-tools.org/doc/fd881d/); United Nations Security Council, Establishment of the International Criminal Tribunal for Rwanda ('ICTR') and adoption of the Statute of the Tribunal, Resolution 955, S/Res/955, 8 November 1994 (http://www.legal-tools.org/doc/f5ef47/); United Nations Security Council, SCOR, 54th session, 4063d, UN doc. S/PV.4063, 1999.

[4] ICTR, *Prosecutor v. Jean Kambanda*, Trial Chamber, Judgment, ICTR-97-23, 4 September 1998, para. 28 (http://www.legal-tools.org/doc/49a299/).

[5] Payam Akhavan, "Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities?", in *American Journal of International Law*, 2001, vol. 95, no. 1, pp. 7–31.

[6] David Wippman, "Atrocities, Deterrence, and the Limits of International Justice", in *Fordham International Law Journal*, 1999, vol. 23, no. 2, p. 473.

[7] Hyeran Jo and Beth A. Simmons, "Can the International Criminal Court Deter Atrocity?", in *International Organization*, 2016, vol. 70, no. 3, pp. 443–75.

the martyred image of nationalist saviours, and in turn the impact on the ICTY's reputation as a legitimate institution.[8]

Among these studies, few have examined the overall deterrent effect of the ICTY, and there is no country-specific study of Kosovo, which is the purpose of this chapter, evaluating the deterrent effect of the ICTY in the Kosovo-related conflict. The cornerstone of this chapter is to see whether the ICTY has satisfied this particular primary purpose for which it was initially created, and to evaluate the extent to which the Tribunal has contributed to the achievement of deterrence through factors such as ending and preventing further war crimes, altering the climate of impunity, and establishing a reliable historical record concerning the conflict.[9]

This chapter draws on a mixture of desk and empirical research conducted in Kosovo, as one of the situation countries with the most recent armed conflict in the former Yugoslavia and where the ICTY has had jurisdiction to try the highest-level perpetrators. Given the ending of the mandate of the ICTY,[10] the study is conducted *ex post facto*, aiming to contribute to a comparative approach of the potential of the international criminal tribunals to effectuate deterrence in conflict countries.

Respondents to the study include a variety of people from different categories of the society in general such as victims of war (including witnesses at the ICTY), representatives of civil society organisations ('CSOs') dealing with transitional justice, including from the Serb minority community, and legal professionals such as university professors, judges, prosecutors and defence lawyers. The research took the form of personal interviews and focus groups, where the respondents were asked to address issues such as:

- The effectiveness of the ICTY;
- Whether the ICTY has contributed towards ending mass violations;
- The effect on fighting a culture of impunity;
- The impact of the indictments on specific deterrence;

8 Akhavan, 2001, see *supra* note 5.

9 Ivan Simonovic, "The Role of the ICTY in the Development of International Criminal Adjudication", in *Fordham International Law Journal*, 1999, vol. 23, p. 457.

10 United Nations Security Council, Resolution 1966 (2010), UN doc. S/RES/1966, 22 December 2010 (http://www.legal-tools.org/doc/e79460/).

- The effectiveness of deterrence through the sentences imposed by the ICTY;
- The contribution of the Tribunal to changing people's mentality and preventing future crimes;
- The effect of the ICTY in triggering national trials and legal reforms;
- The possible social deterrent effect of the Tribunal through the establishment of a reliable historical record; and
- The problems and deficiencies of the ICTY, namely what the Tribunal could have done better.

There are several related issues that this chapter aims to explore in measuring the ICTY's deterrence. It has four main sections, complemented by a contextual background and conclusions. In the first section, the study focuses on the capacity and the effect of the Tribunal in the short term, namely its ability to end or influence mass violations. This section showcases the failure of the ICTY to bring an end to ongoing massive violations through evidence of the occurrence of such violations even after the Tribunal was fully functional and cases were already in progress.

The second section analyses the Tribunal's ability to affect deterrence and to create a culture of impunity as a short-term result of its work. In conducting the evaluation, emphasis is put on certain elements of the work of the Tribunal on which deterrence is dependent, such as the capacity of the indictments to deter, the severity of the sentences and the work of the Tribunal in instilling a culture of resisting impunity. The section draws a comparative analysis of the impact of the components of the Tribunal's work from indictments to sentences. The conclusion drawn is that sentencing is the most important test of the potential deterrent effect of the ICTY. As the last segment of the section develops, the ICTY has been inadequate in general in the impact of both indictments and sentences to establish a culture of fighting impunity.

The third section elaborates on the additional factors and segments of the work of the Tribunal, which can have a long-term deterrent effect, such as establishing a historical record, achieving impact in triggering national trials and domesticating legal norms. This section in particular elaborates on the impact of the Tribunal in setting the groundwork for long-term deterrence. As the section shows, there are elements to the work of the Tribunal which do not have immediate effect, but that never-

theless can have more deterrent effect in the long term. However, as the fourth section shows, the ICTY has failed in some of those aspects while succeeding in others. The chapter also explores the deficiencies of the Tribunal, expressed in the form of criticism of its work that may have a negative impact on deterrence.

Finally, the conclusion synthesises the findings that can be summarised as unsatisfactory results of the work of the Tribunal, putting an emphasis on the failure of the Tribunal to end massive violations, and its difficulties in achieving deterrence in the short term through indictments. Although the conclusion criticises the Tribunal's sentencing record, it also notes its contribution to the establishment of a culture of fighting impunity. More positive results on the longer-term setting of the grounds for deterrence have been observed, though followed with plenty of criticism. Based on the experience of Kosovo, the chapter includes recommendations for how the ICC and other tribunals might contribute to future deterrence efforts through more standardised sentencing policies that meet the threshold of severity, fewer politically influenced indictments, and improved outreach programmes.

5.2. Contextual Background: The ICTY and Kosovo

Transitional justice has been characterised by the development of both retributive and restitutive processes, manifested in different forms. While it is of utmost importance that peace be restored in places of conflict with the aim of bringing an end to massive atrocities, it is likewise important that they not be repeated. The ending of impunity and bringing justice to the victims has taken a course of development parallel to the peace restoration processes. Indicting and sentencing major authors of mass atrocities are intended as a repressive measure for the perpetrator and aim at bringing justice to the victims of the violations. The internationalisation of criminal responsibility and the transcending of the borders of the responsibility to prosecute have been milestones in the development of international criminal justice. Article 6 of the Charter of the International Military Tribunal at Nuremberg, the Geneva Conventions and the Genocide Convention categorised crimes against peace (aggression), war crimes, crimes against humanity and genocide as international crimes. Following the Second World War, these changes contributed to the concept that these acts occurring within national borders are so unacceptable that they violate international law, and thus are no longer a responsibility of a sole

state but are a universal responsibility. Nowadays, based on international treaties and customary international law, the international community arguably has an obligation to bring perpetrators of war crimes to justice.[11]

International efforts to bring perpetrators of war crimes to justice have been realised with the establishment of several international and hybrid courts and tribunals to deal with war crimes, such as the International Military Tribunal of Nuremberg, the ICTY, the ICTR, the Special Court for Sierra Leone ('SCSL'), the Extraordinary Chambers in the Courts of Cambodia ('ECCC)', the Special Tribunal for Lebanon ('STL'), the Ad Hoc Court for East Timor, and – perhaps most significantly – the ICC. Nevertheless, despite these efforts by the international community, "corralling high-level accused war criminals into the dock has turned out to be a persistent problem for international criminal courts".[12]

Prior to the establishment of the ICTY and ICTR, the idea of the establishment of an international war crimes tribunal seemed noble yet unrealistic.[13] Nevertheless, the moral guilt that the international community felt for the double failure to prevent or stop massacres in the former Yugoslavia was an impetus for the establishment of the ICTY.[14] The United Nations ('UN') Security Council established the ICTY as a measure for the restoration of peace and security under Chapter VII of the UN Charter[15] and emphasised that by "bringing to justice [...] persons responsible for serious violations of international humanitarian law [...] [prosecution] will contribute to ensuring that such violations are halted and effectively redressed".[16] While people affiliated with the ICTY and ICTR "have tout-

[11] Mohamed Othman, "Justice and Reconciliation", in Elin Skaar, Siri Gloppen and Astri Suhrke (eds.), *Roads to Reconciliation*, Lexington Books, Lanham, MD, 2005, pp. 249–70; Gary J. Bass, "Managing Amnesty", Paper Presented at the Transitional Justice and Civil War Settlements workshop, Bogotá, Colombia, 18–19 October 2005; Daphna Shraga, "The Second Generation UN-Based Tribunals: A Diversity of Mixed Jurisdiction", in Elin Skaar, Siri Gloppen and Astri Suhrke (eds.), *Roads to Reconciliation*, Lexington Books, Lanham, MD, 2005, pp. 55–82.

[12] Patricia M. Wald, "Apprehending War Criminals: Does International Cooperation Work?", in *American University International Law Review*, 2012, vol. 27, no. 2, pp. 229–63.

[13] Simonovic, 1999, see *supra* note 9.

[14] Catherine Cissé, "The International Tribunals for the Former Yugoslavia and Rwanda: Some Elements of Comparison", in *Transnational Law and Contemporary Problems*, 1997, vol. 7, pp. 103–6.

[15] United Nations Security Council, Resolution 827, 25 May 1993, UN doc. S/RES/827 ('UNSC Resolution 827') (http://www.legal-tools.org/doc/dc079b/).

[16] *Ibid.*, Preamble.

ed the tribunals' ability to prevent future crime, provide retribution, achieve restorative justice, establish an accurate historiographical record, and build precedent for future prosecutions",[17] the original emphasis was on deterrence of future violations. The headline of the discussions within the Security Council's debates relating to the ICTY was the need to prosecute in order to eradicate the "culture of impunity".[18] Consequently, the justification for the establishment of the Tribunal was convincing as being based on the assumption that that the establishment of the Tribunal should discourage possible perpetrators of future violations and change the climate of impunity.[19]

In order to understand the potential impact of not just the ICTY but of any international court in Kosovo, one must understand the history behind the conflict. Unlike some characterisations at the time and since, the conflict in the former Yugoslavia was not an expression of spontaneous blood lust, but rather the result of a deliberate incitement of ethnic hatred and violence through which certain people, often referred to as warlords, elevated themselves to positions of absolute power.[20]

Kosovo is a territory in the middle of the Balkan Peninsula. It has a majority Albanian population with long-standing claims and aspirations to join the rest of the Albanian-inhabited territories in the Balkans to form a Greater Albania. For most of the twentieth century the Albanians of Kosovo have lived under Serbian rule characterised by a heavy hand.[21] Kosovo was an integral part of the Federal Socialist Republic of Yugoslavia, which was composed of seven states and two autonomous provinces, Kosovo being one of them. The architects of the Yugoslav federal system had reasoned in 1943 that the status of republic should be reserved for nations (*narodi*) as opposed to nationalities (*narodnosti*), the former having their principal homeland inside Yugoslavia and the latter outside Yugo-

[17] Ralph D. Ellis and Carol S. Ellis, Theories of Criminal Justice, Longwood, Wolfeboro, NH, 1990; Barbara A. Hudson, Understanding Justice: An Intorduction to Ideas, Perspective and Controversis in Modern Penal Theory, McGraw-Hill Education, New York, 1996.

[18] United Nations Security Council, UN SCOR, 48th session, UN doc. S/INF/49, 1993.

[19] Richard Goldstone, "Conference Luncheon Address", in *Transnational Law and Contemporary Problems*, 1997, vol. 7, no. 1, pp. 1–4.

[20] Akhavan, 2001, see *supra* note 5.

[21] Noel Malcolm, *Kosovo: A Short History*, Macmillan, London, 1998.

slavia.[22] This was the beginning of discrimination against the Albanian population in Kosovo since they were not a nation, but rather a nationality, and thus did not have the right to be a nation since it was considered that the homeland of Albanians was Albania.[23] Kosovo was one of the autonomous provinces of Serbia that enjoyed "virtually all prerogatives of a republic" until March 1989, when Serbia forcefully abolished Kosovo's autonomy, precipitating a crisis, which hastened the collapse of Yugoslavia.[24]

The loss of autonomy was a catalyst for a change in the treatment of Albanians in Kosovo. Laws were passed making it a crime for Albanians to buy or sell property without special permission, tens of thousands of Albanians were dismissed from their jobs with state-owned firms, students were barred from pursuing education, and arbitrary arrests and police violence directed towards Albanians became routine, which gave Kosovo the distinction of having some of the worst human rights violations in all of Europe.[25] As the Kosovo situation never made it to the Dayton talks, the lack of trust in the international community led to the emergence of the Kosovo Liberation Army ('KLA'), with the goal of protecting the people of Kosovo through instigating attacks on the Serbian police. The attacks were answered with severe counter-attacks, destruction of entire villages and a large number of civilian casualties. Consequently, a long-standing civil conflict was transformed into outright ethnic cleansing, a military confrontation with the North Atlantic Treaty Organisation ('NATO'), and a losing battle for a historically vital province.[26]

While the warnings issued by the international community seemed to have no effect, the first step in putting an end to the war was a result of

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22 Frits W. Hondius, *The Yugoslav Community of Nations*, Mouton, The Hague, 1968; Zoran Pajic, "The Former Yugoslavia", in Hugh Miall (ed.), *Minority Rights in Europe: The Scope for a Transnational Regime*, Pinter/RIIA, London, 1994, p. 63.

23 Richard Caplan, "International Diplomacy and the Crisis in Kosovo", in *International Affairs*, 1998, vol. 74, no. 4, pp. 745–61.

24 *Ibid.*, p. 748.

25 *Ibid.*; Helsinki Watch, *Human Rights Abuses in Kosovo 1990–1992*, Human Rights Watch, New York, 1992; ICTY, Fifth Annual Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991, UN doc. A/53/219, S/1998/737, 10 August 1998 ('UNSC Fifth Annual Report') (http://www.legal-tools.org/doc/64ecb8/).

26 Akhavan, 2001, see *supra* note 5.

the political NATO intervention. On 24 March 1999, in the absence of a UN Security Council resolution expressly authorising military action,[27] NATO began a 78-day air campaign over the former Federal Republic of Yugoslavia.[28]

On the eve of the conflict, Sandy Berger, then US national security adviser, wrote this explanation to the US Congressional leadership for the likely NATO intervention:

> NATO would be acting to deter unlawful violence in Kosovo that endangers the fragile stability of the Balkans and threatens a wider conflict in Europe, to uphold the will of the international community as expressed in various UN Security Council Resolutions, as well as to prevent another humanitarian crisis, which itself could undermine stability and threaten neighbouring countries.[29]

After the conflict, the main responsibility for restoring peace, maintaining and enforcing a ceasefire, and deterring immediate renewed hostilities lay with the NATO forces.[30] In principle, NATO did what the ICTY was not successful in doing, which was to end the mass violations and to ensure a safe environment for the citizens. Following the NATO action, the UN adopted resolution 1244, which foresaw the deployment of international security forces, known as the United Nations Mission in Kosovo ('UNMIK'), which, among other goals, held the responsibility for administering the region and ensuring peace and stability.[31]

Nevertheless, the ICTY remained one of the key institutions charged with the duty of deterring future atrocities. The potential of the ICTY in fostering general deterrence is noted by Franca Baroni:

> This is the most meaningful potential contribution that the Court can make in the former Yugoslavia, since the Court's

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[27] Dr. Javier Solana, Secretary-General of NATO, Press Statement, Press Release 040, 23 March 1999.

[28] Following the dissolution of Socialist Federal Republic of Yugoslavia, Serbia and Montenegro claimed continuity of statehood, which was not supported by other countries and the UN, and thus the name Federal Republic of Yugoslavia was retained.

[29] Letter from Samuel R. Berger, Assistant to the President for National Security Affairs to The Honorable Trent Lott, 23 March 1999.

[30] William Moorman, "Humanitarian Intervention and International Law in the Case of Kosovo", in *New England Law Review*, 2002, vol. 36, no. 4, p. 775.

[31] United Nations Security Council, Resolution 1244, UN doc. S/RES/1244, 10 June 1999 (http://www.legal-tools.org/doc/12bfc3-1/).

> role is to create a serious prospect of accountability, and to convey the message that ethnic cleansing, mass killings, systematic rape and other atrocities are wrong, unjustified by any political and social plan, and that they are not tolerated by the world community under any circumstances.[32]

5.3. The ICTY Effectuating an End to Ongoing Massive Violations: An Unrealistic Short-Term Expectation

The motivation behind the establishment of international tribunals has been to end massive human rights violations and ensure an environment where such violations would not recur. This goal entails not only stopping ongoing violations but also creating an environment that is non-conducive to mass abuses. These desires, though noble, were very unrealistic in Kosovo. As far as the aim of ending violations goes, the Tribunal's ability to influence perpetrators to end mass violations has not been shown to be effective in practice.

In order to evaluate the deterrence of the ICTY, one must understand the core elements that affect deterrence, starting with the severity of the punishment as one of the main components. When measuring the benefits of a crime, in order to achieve deterrence, the expected costs must be higher than the benefits, since an offender is expected to commit a crime only when the benefits are considered to be greater than the costs.[33] From that premise stems the assumption that individuals will make rational cost-benefit decisions, and that such analyses can be influenced by punishment.[34] Deterrence is achieved when the potential offender perceives the disincentive of the legal sanction threat to be so strong that it out-

[32] Franca Baroni, "The International Criminal Tribunal for rhe Former Yugoslavia and Its Mission to Restore Peace", in *Pace International Law Review,* 2000, vol. 12, no. 2, pp. 233–46.

[33] Anna Bonanno, "The Economic Analysis of Offender's Choice: Old and New Insights", in *Rivista Internazionale Di Scienze Economiche e Commerciali,* 2006, vol. 53, no. 2, pp. 193–224; J. Robert Lilly, Francis T. Cullen and Richard A. Ball, *Criminological Theory: Context and Consequences,* 5th ed., Sage, Thousand Oaks, CA, 2011; Raymond Paternoster, "How Much Do We Really Know about Criminal Deterrence?", in *Journal of Criminal Law and Criminology*, 2010, vol. 100, no. 3, pp. 765–824.

[34] Tom Buitelaar, "The ICC and the Prevention of Atrocities: Criminological Perspectives", in *Human Rights Review*, 2016, vol. 17, no. 3, pp. 285–302.

weighs the incentives of the crime under consideration.[35] This calculation is further dependent on an individual's threshold to recognise that his or her actions could be subjected to punishment at all, which in the context of international humanitarian law may never be reached.[36] Thus, this is the reason why "perpetrators commit atrocities, including genocide, when they calculate they can get away with it".[37]

In cases of armed conflict, the possibility that rebels will lay down their weapons and stop fighting due to fear of post-war prosecution is highly unlikely.[38] "On the ground, those committing war crimes would infer that regardless of their past or future violations, they will not be held criminally accountable by the international community".[39] Even if potential wrongdoers realise that their actions will theoretically be subject to prosecution, scholars consider that there is little credible threat of punishment for individual violators of international humanitarian law.[40] Consequently, in cases where there is a lack of credibility associated with the warnings for punishment combined with the motivations behind the violations, it is more likely that crimes will continue to occur.[41]

Prior to the establishment of the ICTY there was no fear of international prosecution, and what is clear when looking at the history of the ICTY is that the Tribunal had no immediate effect. The ICTY's experience seems to show that even under a perceived threat of punishment, tri-

35 Bonanno, 2006, see *supra* note 33; Paternoster, 2010, see *supra* note 33; Johannes Andenaes, "The General Preventive Effects of Punishment", in Joseph Goldstein and Abraham S. Goldstein (eds.), *Crime, Law and Society: Selected Readings*, Free Press, New York, 1966, pp. 321–42.

36 Justin Levitt, "Developments in the Law: International Criminal Law", in *Harvard Law Review*, 2001, vol. 114, no. 7, pp. 1943–2073.

37 Kenneth Roth, "The Case for Universal Jurisdiction", in *Foreign Affairs*, 2001, vol. 80, no. 5, p. 150.

38 Raymond Aron, *Peace and War: A Theory of International Relations*, Doubleday, New York, 1981; Samuel P. Huntington, *The Third Wave: Democratization in the Late Twentieth Century*, University of Oklahoma Press, Norman, 1993; James D. Fearon, "Comments on the Ex Ante/Ex Post Problem in Transitional Justice", Paper Presented at the Transitional Justice and Civil War Settlements Workshop, Bogotá, Colombia, 18–19 October 2005.

39 Theodor Meron, *War Crimes Law Comes of Age: Essays*, Oxford University Press, Oxford, 1998, p. 196.

40 Dan M. Kahan, "Social Influence, Social Meaning, and Deterrence", in *Virginia Law Review*, 1997, vol. 83, no. 2, pp. 349–54.

41 Baroni, 2000, p. 245, see *supra* note 32.

bunals alone are unlikely to achieve general deterrence in the short term.[42] Despite the fact that the UN Security Council established the ICTY as an immediate measure to restore and maintain peace,[43] evidence clearly shows that the establishment of the Tribunal neither stopped, nor prevented future war crimes in the region since they continued to be committed in Bosnia and Herzegovina.[44] "[T]he gravest atrocity, the Serb massacre of thousands of Muslims living in and around Srebrenica, happened in July 1995, when the tribunal was fully operational and Karadzic and Mladic had both been indicted".[45] Even later on, in 1998–1999, "despite fifty-nine pending indictments before the ICTY and two publicised convictions",[46] violations of international law continued to take place in the former Yugoslavia".[47] 'Similarly, even after Milošević was indicted, forces under his control committed numerous atrocities in Kosovo despite frequent warnings by the ICTY, the UN Security Council and individual states that perpetrators would be held accountable'.[48]

Given the occurrence of mass crime violations after its establishment, many argue that the Tribunal's very reason for existence has been put into doubt, and its failures and shortcomings have been highly publicised.[49] Ivan Simonovic notes:

> Evidently, prevention failed with respect to the conflict and the area for which the Tribunal has been established. But what of the global aim of general prevention, that is, the influence upon behaviour in possible future conflicts around the world? There is no clear answer, but it seems that it depends upon whether people like Karadzic, Mladic, Martic, and Milosevic as well, are successfully brought to justice.[50]

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42 David J. Scheffer, "War Crimes and Crimes against Humanity", in *Pace International Law Review,* 1999, vol. 11, no. 2, pp. 319–26.

43 UNSC Resolution 827, Preamble, see *supra* note 15.

44 Simonovic, 1999, see *supra* note 9.

45 Theodor Meron, "Answering for War Crimes: Lessons from the Balkans", in *Foreign Affairs*, 1997, vol. 76, no. 1, pp. 2–6.

46 UNSC Fifth Annual Report, see *supra* note 25.

47 ICTY, *Prosecutor v. Slobodan Milošević*, Indictment, IT-02-54, 22 May 1999 ('Milošević Indictment') (http://www.legal-tools.org/doc/041290/).

48 Wippman, 1999, pp. 479–80, see *supra* note 6.

49 Baroni, 2000, p. 244, see *supra* note 32.

50 Simonovic, 1999, p. 457, see *supra* note 9.

Scholars like Payam Akhavan even consider that "it is unrealistic to suppose that the ICTY could have instantaneously deterred crimes in the midst of a particularly cruel inter-ethnic war in the former Yugoslavia".[51] The fact that atrocities persisted at high levels in the former Yugoslavia, even after the work of the ICTY began, shows only that the Tribunal's efforts have not succeeded in deterring enough perpetrators to make a visible impact on the course of events.[52] In addition, it has been argued that assessing a court's effectiveness by studying its deterrent impact on ongoing conflicts is both unwise and unfair since criminal justice systems in general have a limited capacity to deter crimes, the bases of this assumption being that that the gains from most of the crimes are often immediate, whereas legal costs are usually uncertain and far in the future.[53] If this is true for ordinary legal systems, which work in a timelier and more efficient manner, it must be even more so for international tribunals, which often start years after crimes have been committed.

As shown in numbers in the first seven years of its work the Tribunal only sentenced 15 individuals,[54] which clearly shows that ICTY had little or no effect on the first years of its establishment. Given such a small figure compared to the number of war criminals in the area,[55] one must evaluate the possible deterrence effect of the Court at a later time and from a long-term perspective, after the Tribunal has been fully functional and 'effective'.

5.4. The Court's Contribution to Deterrence and a Culture of Fighting Impunity: Short-Term Results

When looking at the ICTY as a whole, the work done and the feedback related to it are not very promising in terms of achieving deterrence. There is criticism of the Tribunal and the way it has handled the work and the end results. Respondents to this study have not viewed the Tribunal's

51 Akhavan, 2001, p. 9, see *supra* note 5.

52 Wippman, 1999, see *supra* note 6.

53 Buitelaar, 2016, see *supra* note 34.

54 ICTY, Sixth Annual Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991, UN GAOR, 54th session, Agenda Item 53, UN docs. A/54/187, S/1999/846, 25 August 1999 ('ICTY, Sixth Annual Report') (http://www.legal-tools.org/doc/28850e/).

55 Baroni, 2000, p. 245, see *supra* note 32.

effectiveness in accomplishing its deterrence mission as any greater. The general impression about the Tribunal not only among the victims but also among legal professionals and civil society representatives is a very pessimistic one. In the view of one of the judges, the fact that the majority of the crimes committed in the former Yugoslavia, particularly in Kosovo, were committed after the Tribunal was created is an example of the failure of the ICTY to prevent future crimes.[56]

In addition to the severity of the sentences as one of the main elements affecting the potential for deterrence, a court or tribunal's capacity to deter is also dependent on it being perceived as effective and legitimate. The test of the effectiveness of the ICTY is dependent on satisfying expectations that the Tribunal created among the citizens that "it will put the perpetrators behind bars, and the end results in that aspect are very disappointing".[57] While professionals in the legal field recognise the limited capacity of the Tribunal due to its lack of enforcement mechanisms and the nature of the crimes falling within its scope,[58] a stronger criticism and dissatisfaction with the work of the Tribunal comes particularly from the victims and civil society representatives who note that "the Tribunal has indeed failed to accomplish its biggest mission to put the perpetrators behind bars",[59] since the Court has not given a satisfactory result on the trial and sentencing of the perpetrators,[60] and the majority of the known perpetrators walk and live freely. As such, the Tribunal is often seen as a tool or mechanism created to establish peace and balance in the region rather than a body to deliver justice,[61] which questions the legitimacy of the ICTY. Therefore, there is doubt among the respondents with regards to the effectiveness of the Tribunal.

Statistical data show that the ICTY enjoyed different support at different times, which correlates with the timing of indictments and decisions based on members of which communities are being tried or sentenced.[62] In 2007, 58 per cent of the Kosovo Albanian respondents

56 Interview with local judge, Prishtina, May 2016.

57 Interview with CSO representative, Prishtina, May 2016.

58 Interview with local judge, Prishtina, April 2016.

59 Focus group discussion with victims, Drenas, April 2016.

60 Interview with CSO representative, Prishtina, May 2016.

61 *Ibid*.

62 United Nations Development Programme, *Perceptions on Transitional Justice: Kosovo 2012*, UNDP, Prishtina, 2012, p. 170.

showed dissatisfaction with the work of the ICTY and 3 per cent satisfaction to some extent, whereas 50 per cent of the Kosovo Serbs were "satisfied to some extent". By 2012 there had been significant changes, and the numbers showed a decrease to 47 per cent dissatisfaction of Kosovo Albanians and an increase of satisfaction to 27 per cent. For the Kosovo Serb community, satisfaction fell to 35 per cent and dissatisfaction rose from 20 per cent in 2007 to 30 per cent in 2012. It is possible that the levels changed due to the work of the Tribunal. Prior to 2007 the Tribunal had indicted around eight Kosovo Albanians, members of the KLA, and the then prime minister, Ramush Haradinaj, and Fatmir Limaj (then deputy of the major political party) – two of the main political leaders. At the time when the second survey was conducted these two and the majority of the Kosovo Albanians indicted had been acquitted, which may explain the increased satisfaction of the Kosovo Albanians and decreased satisfaction of the Kosovo Serbs.

However, while it is difficult to evaluate the deterrence of the Tribunal as a whole, a more realistic approach may be to evaluate certain elements of the Tribunal's work and their potential deterrent effect. Evaluating the effect of indictments, or of sentences imposed on deterrence, or at least on instilling a culture of fighting impunity, may be a more practical and fruitful approach. This section seeks to explore precisely those elements.

5.4.1. The Power of Indictments to Deter

While the typical test of the deterrent effect of a court is dependent on its sentencing and later decisions, indictments may undermine the political influence of particular leaders by incapacitating them or discrediting their leadership. A tribunal may remove people from power, since it prevents them from committing crimes, otherwise known as the 'incapacitation ability' of a court. Supporters of international courts argue that indictments and warrants carry significant deterrent value precisely because the accused may be inhibited from travelling.[63] In the case of the ICTY, the Tribunal had noted that one of its goals is imposing "imprisonment to protect society from the hostile, predatory conduct of the guilty accused".[64] The ICTY has indicted 161 people, including the highest leaders of Serbia and the leaders of the KLA, thus having a direct impact on those people.

[63] Wald, 2012, see *supra* note 12.

[64] Čelebići Camp Judgment, para. 1232, see *supra* note 2.

In principle, "even if wartime leaders still enjoy popular support among an indoctrinated public at home, exclusion from the international sphere can significantly impede their long-term exercise of power".[65]

In the case of the ICTY, this effect was decreased due to the timing of the indictments, since the Kosovo-related indictments were filed years after the war had officially ended, the mass violations had ceased, most of the high-level politicians were already effectively deprived of power and reform was underway.[66] Thus the timing of the indictments is one of the criticisms of the Tribunal. The respondents argue that the Tribunal took too long to begin, and the "trials started too late".[67] This is also true for indictments for the crimes that took place in Bosnia, and the ICTY is trying people for violations in some cases more than 20 years after the event. In the view of local judges, "for war crime trials this is usually the case, it nevertheless impacts the effectiveness since now these trials no longer have an effect".[68] In addition, the duration of the trials was so long that the impact of the trials was lost. Notwithstanding the complexity of the cases, "the Court took too long to try some cases which could have been finalised in a timelier manner, and if the trials were conducted earlier the effect would have been greater".[69]

While the ICTY has removed people from the landscape, the respondents contend that the deterrent effect of the indictments is not as powerful as one may think since most of the perpetrators, the high-level politicians, "have gone out of power before they got accused"[70] and were only surrendered to The Hague after, and not at their peak of power, with a few exceptions such as in the case of Haradinaj, while he was holding the position of prime minister. From the victims' perspective, "the indictments and arrests of high profile people such as generals have been followed with a lot of pomposity",[71] but the fact that some of the leaders have been indicted by the ICTY has not satisfied its purpose to deter first

65 Akhavan, 2001, p. 7, see *supra* note 5.

66 "Ratko Mladic's Capture is a Victory for Western Diplomacy", in *Washington Post*, 27 May 2011.

67 Interview with victims, Krushe, April 2016.

68 Interview with local judge, Prishtina, April 2016.

69 *Ibid*.

70 Interview with Serbian CSO representative, Prishtina, May 2016.

71 Interview with victim/ICTY witness, Krusha, April 2016.

and foremost, since in the end they have not been sentenced.[72] The Tribunal has also only tried the high-level politicians and leaders, whereas the actual perpetrators who have committed crimes walk free and have never been tried by anyone,[73] and this has played a significant role in this perception.

In contrast, there are those who consider that the mere issuance of an indictment, the very prospect of a trial, is itself the 'punishment' by which an international criminal court may deter.[74] Stigmatising delinquent leaders through indictment, as well as apprehension and prosecution, undermines their influence.[75] Consequently, these indicted leaders can become "international pariahs".[76] This is what is known as social censure, extra-legal sanction, or "the punishment of the society", which can take various forms such as social isolation, loss of personal contacts or a lowering of community respect.[77] At times the threat of extra-legal sanctions has been considered to have a more significant impact in deterring the general population from criminal behaviour than the threat of legal sanctions.[78]

The effectiveness of such extra-legal sanctions is difficult to prove, but there is "modest anecdotal evidence to suggest that some individual actors in the former Yugoslavia have adhered more closely to the requirements of international humanitarian law than they would have otherwise, for fear of prosecution".[79] Even though there was no immediate deterrent effect that ended mass violations since there was no actual fear of prosecution,[80] there was a noticeable change of the behaviour among the Serb forces as the threat of a NATO intervention was increasing. This was seen in intensified efforts to conceal mass graves and hide evidence

72 Focus group discussion with victims, Drenas, Gjakove, Krusha, April 2016.

73 Focus group discussion with victims, Drenas, April 2016.

74 Robert Sloane, "The Expressive Capacity of International Punishment", Columbia Public Law & Legal Theory Working Papers, Paper No. 06-112, 2006, p. 42.

75 Akhavan, 2001, see *supra* note 5.

76 United Nations Security Council, U.N. SCOR, 48th session, 3217th meeting at 13, UN doc. S/PV.3217, 1993.

77 Kirk R. Williams and Richard Hawkins, "Perceptional Research on General Deterrence: A Critical Review", in *Law and Society Review*, 1986, vol. 20, no. 4, p. 558.

78 Paternoster, 2010, p. 817, see *supra* note 33.

79 Akhavan, 1999, pp. 750–51, see *supra* note 1.

80 Theodor Meron, "From Nuremberg to the Hague", in *Milano Law Review*, 1995, vol. 149, p. 107–10.

and criminal conduct.[81] As soon as the Tribunal started its work through the indictments, "some criminals began giving up their colleagues and fellow combatants, showing an impact of the Tribunal on their behaviour".[82]

In other words, one of the biggest impacts of the Court may have been connected to the indictments, namely the surrender of the indicted to the ICTY, whether willingly or as a result of international pressure. In Kosovo, the surrender of the indicted was followed with very close attention. The best examples are the media coverage that occurred with Milošević's surrender and trial, and the surrender of the KLA leaders such as Haradinaj and Limaj.[83] The media coverage may have directly affected the perception of society with regard to the effectiveness of the ICTY.

There are different approaches with regard to the power of indictments to deter. While the direct effect of indictments is questionable, despite the incapacitation effects, the indictments are considered to have a more lasting indirect effect. The attention following the issuance of indictments and potential surrender of the indictees triggers a stigmatisation effect in society, which sets the foundations for longer-term deterrence and for establishing a culture of fighting impunity. The issuance of indictments has a limited effect on perpetrators or potential perpetrators, but is likely to have a stronger impact on the society at large.

5.4.2. Severity of the Sentences Imposed: A Failed Test for the ICTY

One of the principles of modern law is that the reduction of crime committed in connection to the punishment is dependent on the punishment's certainty, severity and celerity.[84] The more applicable such characteristics are the greater are the chances for deterrence. Of the factors, "crimes are

[81] Ellen Knickmeyer, "Mass Graves Appear Endless in Kosovo. War Crimes Inspectors Move From Site to Site Gathering Evidence and Tallying Tales of Death", in *Indianapolis Star*, 23 June 1999.

[82] Interview with CSO representative, Prishtina, May 2016.

[83] Media coverage, and newspaper articles, and some of trials were live streamed.

[84] Robert Apel, "Sanctions, Perceptions, and Crime: Implications for Criminal Deterrence", in *Journal of Quantitative Criminology*, 2013, vol. 29, no. 1, pp. 782–87; Greg Pogarsky, "Deterrence and Decision Making: Research Questions and Theoretical Refinements", in Marvin D. Krohn, Alan J. Lizotte and Gina Penly Hall (eds.), *Handbook on Crime and Deviance*, Springer, New York, 2009, pp. 241–58.

more effectively prevented by the certainty than the severity of punishment".[85]

Akhavan and Baroni argue that for a court to have a deterrent effect, it is not necessary to punish a large number of people, with Baroni suggesting some correlation between deterrence and the number of prosecutions; namely, that if the number of prosecutions is small compared to the number of the perpetrators, the chances for effective deterrence are low.[86] Others have argued that the right punishment of the right individuals can become an instrument to instil the idea of deterrence into the popular consciousness.[87] Either way, according to the respondents of this study, the ICTY is considered to have failed in rendering sufficient decisions, both in quantitative terms given that it has only prosecuted relatively few individuals, and in qualitative terms in that it has rendered less severe sentences. In total the ICTY has indicted 161 people, of whom 83 have been sentenced,[88] which is roughly half the accused. The sentences vary from life sentences towards sentences of 30–40 years of imprisonment with a majority of sentences have been less than 30 years, including sentences as short as two years of imprisonment.[89]

In the specific situation of Kosovo as the main focus of this chapter, there were approximately 17 locations investigated for the crimes that took place. Of the crimes committed in Kosovo, there were indictments filed against 15 people, divided into six Kosovo Albanians and nine Serbian leaders. The indictees included high-ranking people such as the former Serbian president Slobodan Milošević, Milan Milutinović (former president of Serbia), Nikola Šainović (deputy prime minister of Serbia), and Ramush Haradinaj (former prime minister of Kosovo). Of the 15 indictments, six of the Kosovo Albanian indictees and one of the Serbian indictees were acquitted. The case of Milošević was terminated due to his death, whereas six of the Serbian political leaders were sentenced, and

85 Cesare Beccaria, "On Crimes and Punishments", in Morris R. Cohen and Felix S. Cohen (eds.), *Readings in Jurisprudence and Legal Philosophy*, Little, Brown, Boston, 1951, pp. 346–49.

86 Baroni, 2000, see *supra* note 32.

87 Andenaes, 1966 cited in Akhavan, 2001, see *supra* note 5.

88 ICTY, Key Figures of the Cases (http://www.ICTY.org/en/cases/key-figures-cases).

89 ICTY, Judgment List (http://www.ICTY.org/en/cases/judgment-list).

one Albanian sentenced.[90] Fewer than half the indictments concluded in sentences.

According to the respondents, even in those cases that resulted in convictions, the sentences that the Tribunal has rendered are too short and disproportionate in severity to the crimes that have been committed.[91] The sentences imposed by the ICTY are considered symbolic,[92] but in a negative way. The maximum prison sentence rendered for crimes committed in Kosovo is 22 years.[93] It is contended by the respondents that not only has the Tribunal failed to create a practice that would contribute to the deterrence of future crimes, it has instead contributed to creating a culture of impunity.[94] By not imposing the "deserved sentences" and letting perpetrators, namely "known criminals such as Šešelj walk free, the Court has created a very bad example for other criminals".[95] Having spent so much time and effort in a trial such as that of Šešelj, the end results were disappointing for the victims.[96] Similar opinions also come from legal professionals, deeming the sentences rendered by the Court inadequate.[97] In addition, the Tribunal has contributed to creating distrust among the victims who "now resist coming forward and reporting their cases to the courts".[98]

The respondents are not the only ones who maintain that the sentences rendered by the ICTY are not severe enough, even less severe in comparison to the sentences rendered by other international tribunals, such as the ICTR and the SCSL. By and large, ICTR sentences are more severe than ICTY sentences, although this could be due to the fact that the ICTR has handed down more sentences for genocide.[99] The SCSL has also imposed lengthier sentences than the ICTY, varying from 15 to 52

90 ICTY, Interactive Map (http://www.icty.org/en/cases/interactive-map).

91 Focus group discussion with victims, Gjakova and Krusha, April 2016.

92 Interview with CSO representative, Prishtina, May 2016.

93 ICTY, *Prosecutor v. Nokola Šainović et al.*, Appeals Chamber, Judgment, IT-05-87/1-A, 23 January 2014 (http://www.legal-tools.org/doc/81ac8c/).

94 Interviews with CSO representatives and focus groups.

95 Focus group discussion with victims, Krusha and Drenas, April 2016.

96 Interview with CSO representative, Prishtina, May 2016.

97 Interview with local judge and prosecutor, Prishtina, May 2016.

98 Focus group discussion with victims, Drenas, April 2016.

99 Mark A. Drumbl and Kenneth S. Gallant, "Sentencing Policies and Practices in the International Criminal Tribunals", in *Federal Sentencing Reporter*, 2002, vol. 15, no. 2, pp. 140–44.

years.[100] Consequently, the sentences rendered by the ICTY are considered to be less effective, since few believe that "would-be war criminals will read the resolutions of the Security Council and stop their grave violations of international humanitarian law […] be indoctrinated to refrain from further breaches of the law and to support the shared values of the international community if one of [their] co-fighters […] receive[s] a 15-year prison sentence in The Hague".[101]

As such, ICTY sentences may not be perceived as sufficiently severe to deter. In addition, in the view of the respondents, it is seen as difficult to talk about deterrence when the people who surrounded Milošević and others are today the key political leaders in Serbia. Thus, from the Albanian victims' perspective, there is no deterrent effect when the same people are in power, indicating that the society has not been informed enough to condemn these people. In fact, the opposite is true in that these leaders are massively supported by society.[102] Members of the Serbian community in Kosovo, with regard to the Kosovo political leaders, take a similar view[103] because the societies in Serbia and Kosovo have not seen the political leaders sentenced.[104] As such, respondents believe that the ICTY has failed in its task of assuring deterrence.

5.4.3. Instilling a Culture of Fighting Impunity

Bearing in mind the scale of the impact of the indictments and the sentences imposed, it is rather difficult to say that the Tribunal has contributed to fighting impunity. In the opinion of some of the respondents, in comparing these numbers the Tribunal has instead created the commodity of impunity since the it has not managed to create a culture that involves a threat of punishment.[105] The expectations that the ICTY created for itself

[100] In a summary of the four main cases tried by the ICTR, out of nine sentences rendered, one was sentenced to 52 years' imprisonment (*RUF* case), three were sentenced to 50 years (AFRC case; *Charles Taylor* case), two others with 40 and 45 years respectively (*Kamara* and *Kallon* in CDF case and AFRC case), while only three people were sentenced to 15–25 years.

[101] Immi Tallgren, "The Sensibility and Sense of International Criminal Law", in *European Journal of International Law*, 2002, vol. 13, no. 3, pp. 561–64.

[102] Focus group discussion with victims in Krusha, April 2016

[103] Interview with Serbian CSO representative, Prishtina, May 2016.

[104] Interview with CSO representative, Prishtina, April 2016.

[105] Interview with CSO representative, Prishtina, May 2016.

do not seem to have been met. However, its work in indicting high-level people, though not meeting expectations, should not go unrecognised. The importance and the effect of the Tribunal is noted in the fact that "at least there is a body that is mandated with trying people for the massive violations of the human rights that have taken place in former Yugoslavia".[106] The respondents believe that "if the Tribunal did not exist, the situation would have been worse, as the perpetrators would not be sentenced by anyone",[107] since there "would not be any other court or body that would try these cases".[108] So in a way the existence and the work of the Tribunal have "undermined the idea that the high political leaders are immune to prosecution".[109]

The effect of the ICTY as an entity known to exist for trying war crimes is based on the fact that the Tribunal has indicted some of the key political leaders in both Serbia and Kosovo. The main example is the indictment of the former president of Yugoslavia, although the views with regards to Milošević's trial are mixed. As a former head of state, he was the highest-ranking state official indicted by a war crimes tribunal since Nuremberg.[110] Thus, the expectation was that the indictment would potentially affect the decisions to "end impunity and instill accountability on political leaders, for the decades to come".[111] At that time, the prosecution of Milošević was considered "as the litmus test for the ICTY",[112] and the expectations were very high. Milošević was never sentenced for any of his actions due to the lengthy trial and his sudden death, which resulted in the termination of the case.[113] Consequently, the ICTY never accomplished its goal of holding Milošević individually accountable, though it created the perception that no one is untouchable.

[106] View supported by the majority of the respondents.

[107] Interview with victims/witness, Krusha, April 2016.

[108] Interview with CSO representative, Prishtina, April 2016.

[109] Interview with judge, Prishtina, April 2016.

[110] William Miller, "Slobodan Milosevic's Prosecution by the International Criminal Tribunal for the Former Yugoslavia: A Harbinger of Things to Come for International Criminal Justice", in *Loyola of Los Angeles International and Comparative Law Review*, 2000, vol. 22, no. 4, pp. 553–62.

[111] "Why Milosevic Matters", in *Newsweek*, 7 March 2001.

[112] Sophia Piliouras, "International Criminal Tribunal for the Former Yugoslavia and Milosevic's Trial", in *New York Law School Journal of Human Rights*, 2002, vol. 18, pp. 515–19.

[113] According to recent information, the death of Milošević was a result of self-intoxication.

While segments of the ICTY's work in achieving deterrence may not have lived up to the expectations of the citizens, its impact cannot be denied. The role of the ICTY in the development of international criminal adjudication must be acknowledged.[114] A major impact of the ICTY jointly with the ICTR can be seen in introducing criminal accountability into the culture of international relations, helping to marginalise certain political leaders and other forces aligned with war and genocide, and discouraging vengeance by victims' groups.[115]

Despite the views of commentators on the ICTY's effect on a culture of accountability, there is division among the Kosovar respondents regarding the ability of the Tribunal to instil the idea of fighting impunity. When respondents look at the end results, namely sentencing, there is an opinion that the Tribunal has not contributed to fighting impunity. Instead, the view is that the Tribunal has created the commodity of impunity, since it has not managed to create the idea and the threat of punishment.[116] On the other hand, respondents recognise that the Tribunal has contributed to instilling at least "an idea of fighting impunity" since, if it had not existed, there would be no trials at all. Therefore, despite the flaws that the Tribunal has had, particularly in rendering decisions and sentencing people, respondents generally feel that its existence and the indictments have instilled an idea that justice needs to be put in place regardless of who the people are that have committed the actions complained of. If nothing else, the Tribunal has created the idea that no one is 'untouchable', by means of being indicted. If there had been no Tribunal, it is unlikely that any local court would have ever tried the high political and military leaders.[117] Therefore, the effect of the ICTY can also be seen in invoking the prosecutions in the national level in Kosovo and in Serbia.

5.5. Setting the Course for Future Long-Term Deterrence

There is little praise among the interviewees for the ICTY's work in terms of short-term deterrence since evidence shows that the Tribunal neither managed to end criminal actions nor contributed through its sentences to deterrence. This is attested to by the fact that the majority of the political

[114] Simonovic, 1999, p. 441, see *supra* note 9.

[115] Akhavan, 2001, see *supra* note 5.

[116] Interview with CSO representative, Prishtina, May 2016.

[117] Interviews with members of CSOs.

and military leaders who are viewed as responsible for atrocities still enjoy support and remain in power. However, in order to evaluate the full potential of the ICTY to promote deterrence, one must also look at additional components that create the preconditions for deterrence in the longer term, such as the impact of the Tribunal in the adoption of legal norms enabling future deterrence and in establishing a credible historical record which contribute to the change in mentality.

5.5.1. Domestication of Legal Norms Enabling Future Deterrence

One of the longer-term effects that the Tribunal is affiliated with is instilling humanitarian norms and respect for individual rights and incorporating norms of international humanitarian law into domestic legal systems so that the need for external punishment will be obsolete.[118] Internalisation of norms and creation of self-regulating communities have been seen to be among the long-term and transformative processes as a component of the deterrence by an international tribunal.[119] The expression of social disapproval through the legal process may influence moral self-conceptions so that "illegal actions will not present themselves consciously as real alternatives to conformity, even in situations where the potential criminal would run no risk whatsoever of being caught".[120]

The work of the ICTY and its impact can be seen from a different perspective; its role in promoting the "rule of law",[121] in the form of contributing to building trust among the population and confidence in state institutions.[122] The increased national prestige associated with accountability and the stigma attached to the failure to prosecute international crimes have also encouraged third-party states to use their courts to assert universal jurisdiction over accused war criminals. Several states have prosecuted Yugoslav or Rwandese perpetrators, even when no interna-

[118] Levitt, 2001, p. 1967, see *supra* note 36; Jean Hampton, "The Moral Education Theory of Punishment", in *Philosophy and Public Affairs*, 1984, vol. 13, no. 3, pp. 208–38.

[119] Buitelaar, 2015, see *supra* note 34.

[120] Andenaes, 1997, p. 323, see *supra* note 35.

[121] Minna Schrag, "The Yugoslav Crimes Tribunal: A Prosecutor's View", in *Duke Journal of Comparative and International Law*, 1995, vol. 6, no. 1, p. 187; ICTY, *Prosecutor v. Dražen Erdemović*, Trial Chamber, Sentencing Judgment, IT-96-22-T, 29 November 1996, para. 27 (http://www.legal-tools.org/doc/eb5c9d/).

[122] ICTY, Sixth Annual Report, see *supra* note 54.

tional indictments had been issued.[123] The ICTY is considered to have facilitated the need for and the conduct of such national trials. By trying the highest leaders, the Tribunal has allowed for the trial of the mid- and lower-level perpetrators.[124] The Tribunal, despite the mixed views about its work, is considered to have had some positive effect in triggering national courts into following the trials of the ICTY. While the ICTY has tried some of the key leaders, and failed to try others due to its inability to connect them to the crimes because of insufficient evidence, it is easier for the local courts to try these mid- or lower-level perpetrators. In practice, this can be seen in the establishment of the Special Chamber for War Crimes in Serbia, and in Kosovo in trials that were carried out under the international presence. Initially the UNMIK administration, then the EU Rule of Law mission, were charged with dealing with war crimes. Such courts can take their lead from the ICTY and try the lower-level accused. Despite the fact that some of the trials conducted in Serbia have been followed by a lot of criticism and at times have been perceived as fraudulent,[125] the fact that such trials have been initiated at all shows the effect of the ICTY.

Robert Sloane has argued that one of the most effective ways for international criminal tribunals to deter is by encouraging the growth of national institutions, laws and national norms, the so-called Benthamite model.[126] When talking about the international criminal tribunals, he emphasises:

> Their efficacy depends more on their ability to contribute to the growth and development of national laws, ethical norms, and institutions, as well as to encourage and, at times, compel national criminal justice systems genuinely to investigate and prosecute. For this reason, the expressive value of ICL sentences, the extent to which they convey, reinforce, and encourage the growth of national legal and moral norms that conform to ICL, matters more than the relative severity of the punishment in any individual case.[127]

[123] Akhavan, 2001, see *supra* note 5.

[124] Interview with CSO representative, Prishtina, April 2016.

[125] Interview with CSO representatives, Prishtina, April 2016.

[126] Sloane, 2006, p. 44, see *supra* note 74.

[127] *Ibid*.

In general, "the most effective form of law-enforcement is not the imposition of external sanction, but the inculcation of internal obedience".[128] Criminal law also deters by its long-term role in shaping, strengthening and inculcating values, which encourages the development of habitual, internal restraints.[129] Criminal law can also contribute to the prevention of atrocities by focusing on the long-term, transformative process that can lead to the internalisation of norms and the creation of self-regulating communities.[130] In Kosovo, this may have been the biggest contribution that the ICTY has made to a longer-term deterrent effect. When looking at the legal drafting process in Kosovo in the aftermath of independence, one can see that the country has adopted the majority of the international norms of criminal justice that are enshrined in international conventions. In particular Kosovo has borrowed and adopted practices and norms from the statute of the ICTY itself. Such norms have been also been adopted when drafting the Criminal Code and Criminal Procedure Code.[131] In various national trials, direct reference has been made to the jurisprudence of the ICTY, mainly by defence lawyers or international judges,[132] leading to a new approach of relying on the reasoning and sentencing as established by the ICTY as a guiding tool for the national trials.[133] Thus, legal deterrence affecting national trials and domestication of international norms may be the strongest suit of the ICTY yet.

5.5.2. Establishing an Historical Record

Part of the justification for the establishment of the ICTY was that through its work it would be able to establish a reliable historical record that would serve future generations in avoiding dangerous misinterpretations and myths.[134] There are arguments that the work of the ICTY in es-

[128] Harold Hongju Koh, "How Is International Human Rights Law Enforced?", in *Indiana Law Journal,* 1993, vol. 74, no. 4, pp. 1397–1401.

[129] Kent Greenawalt, "Punishment", in *Journal of Criminal Law and Criminology*, 1983, vol. 74, no. 2, pp. 343–46.

[130] Buitelaar, 2015, see *supra* note 34.

[131] Interview with professor of law, member of the Criminal Code drafting team, Prishtina, October 2015.

[132] As elaborated in the context section, the Kosovo justice system has been assisted by the international community including executive powers, such as trials and prosecution.

[133] Interview with defendant lawyer, Prishtina, October 2015.

[134] Goldstone, 1997, cited in Simonovic, 1999, see *supra* note 9.

tablishing history and fact-finding is crucial in building a society that opposes the commission of such crimes and recognises the accountability of those responsible. In principle, ICTY jurisprudence may have contributed to writing history, and setting out uncontested facts that these crimes took place and that the people responsible needed to be brought to justice. In the *Tadić* case, the first prosecuted, the Tribunal wrote an authoritative account of the origins of the conflict in the Balkans, proving that the ICTY has left a qualitatively distinctive historical record.

There was also general agreement among the interviewees that one of the key components of the Tribunal's success can be seen in its work in writing the legal history for the Balkans. The Tribunal has left a written legacy of the history of the massive violations that have taken place in Kosovo and in the region. Throughout its judgments, through the testimony of witnesses and its verdicts, the Tribunal has certified an uncontested history of mass violations. The decisions of the Tribunal and its transcripts can serve as a basis for a future deterrent effect. Such is the case of Milošević where, despite not having a final verdict, the evidence gathered by the prosecution contributed to documenting the crimes he was charged with.[135]

The issue with these records is that there is not a bigger audience that would actually read them. They will be read by professionals, researchers and academics,[136] "but the possibility of any politicians or military leaders reading these files is rather low".[137] This also raises the question whether this information will ever be read by the general society since the Tribunal has failed to reach society,[138] which is one of the most criticised aspects regarding its work.

5.6. The Tribunal's Failures: Negative Effects in Deterrence

The Tribunal's efforts in deterring future crimes are met with a twofold approach. While the Tribunal in its entirety is not perceived as a deterrent,

[135] Milošević Indictment, see *supra* note 47; ICTY, *Prosecutor v. Slobodan Milošević*, First Amended Indictment, IT-02-54, 29 June 2001 (http://www.legal-tools.org/doc/b11cad/); CTY, *Prosecutor v. Slobodan Milošević*, 2nd Amended Indictment, IT-02-54, 16 October 2001 (http://www.legal-tools.org/doc/5a7da2/).

[136] Interview with a judge, Prishtina, April 2016; interview with CSO representatives, Prishtina, April 2016.

[137] Interview with CSO representatives, Prishtina, May 2016.

[138] Interview with CSO representatives, Prishtina, April 2016.

there are elements to it, which have contributed to the deterrence of future crimes in the Balkans. Nevertheless, there are criticisms around some aspects of the work of the Tribunal that may serve as lessons learned for future courts and tribunals on how to increase their contribution to deterrence. The criticism of the ICTY revolves around the deficiencies in the outreach program and the flaws in legitimacy of the Tribunal due to it being perceived as political body, both of which are elements that have contributed to its failure to change the mentality on deterrence.

5.6.1. The Outreach Programme: A Major Flaw

The work of a court or tribunal needs to reach directly the ordinary citizens of the region who are the ultimate peacebuilders.[139] This requires a credible and authoritative communication of the work of the Tribunal to a wide audience in order to increase awareness of how the threatened sentences contributes to a deterrent effect. However, the ability of international courts to do so, for objective reasons such as distance from the place of the commission of the crimes and communication in the local language, has been limited.[140]

Not many people in Kosovo know what happened in the Tribunal, for what reason people were indicted and tried, and why they were received as heroes in their home countries when they were set free.[141] For many, the high level of resistance by society does not come as a surprise since, in their view, the ICTY has not done proper work in countering perceptions with facts. In the view of CSO representatives, "no one has made an effort to talk about the actual numbers and the fact that someone is responsible for the deaths of those people".[142] There is resistance on both sides towards the ICTY based on different facts; in Kosovo due to the Tribunal's attempts to balance the indictments and trials[143] and in Serbia based on the perceived imbalance.[144]

The main criticism and one of the biggest flaws is its failure to reach the people. As one of the civil society representatives argued,

[139] Baroni, 2000, see *supra* note 32.

[140] Sloane, 2006, see *supra* note 74.

[141] Focus group discussion with witness, Krushe, April 2016.

[142] Interview with Serbian CSO representatives, Prishtina, May 2016.

[143] Focus group discussion with victims, Krushe, April 2016.

[144] Interview with Serbian CSO representatives, Prishtina, May 2016.

"whatever has happened in the Court has remained in the Court".[145] The Court has failed to reach out to citizens to inform them about why these accused are being tried and what for are they being tried,[146] hence the reason why there is so much confusion as to what the Tribunal is actually trying to accomplish.

5.6.2. Legitimacy of the Tribunal for Achieving a Deterrent Effect

The ability of a court to deter crimes is dependent on it being perceived as legitimate, which includes proving that it is not subject to political influence, but rather is fair and unbiased. Only then can it earn the trust and respect of society at large.[147] Such discussion falls within the larger peace and justice debate, but also influences whether the ICTY will have a long-term deterrent effect. The respondents' view towards the ICTY is based on allegations that it is a politicised institution that followed the directions of its political supporters and only intervened when instructed, resulting in particular leaders being spared by the Tribunal. The political stamp is seen in its creation since the Tribunal was established due to the existence of a critical mass of political will, and many of the interviewees thought its performance produced political effects. What is more concerning is that commentators and respondents regard the ICTY as an institution that relies on the political support of the states concerned and the Security Council to perform its tasks. Thus its independence and impartiality are compromised when there are political choices in selecting which cases to prosecute as part of the political reality of the situation.[148] This study has found that this is precisely the point where the ICTY has failed to prove itself. Some of the respondents believe that the indictments were used as a form of political bargaining:

> The Tribunal used the indictments for political gains, by sending messages to people that they too can be indicted and by forcing them to comply with certain requests, whereas if they co-operate and share they can even be acquitted.[149]

[145] Interview with CSO representatives, Prishtina, April 2016.

[146] Interview with CSO representatives, Prishtina, May 2016.

[147] Louise Arbour, "Progress and Challenges in International Criminal Justice", in *Fordham International Law Journal,* 1997, vol. 21, no. 2, pp. 531–36.

[148] Simonovic, 1999, p. 446, see *supra* note 9.

[149] Interview with CSO representative, Prishtina, May 2016.

To those respondents, this shows that the Tribunal itself was built as a political institution aimed at restoring peace rather than contributing to justice and putting perpetrators behind bars.[150]

The main example is the indictment of Milošević,[151] which was completed 50 days after the conflict between NATO and the Federal Republic of Yugoslavia had erupted and a peaceful settlement was no longer an option, since if filed earlier the indictment would have been considered an impediment to negotiations and harmful for the prospect of peace talks.[152] Later, it was used to pressure him and maintain public support for the NATO bombing.[153] At that time Milošević had only been indicted for crimes committed in Kosovo from January to May 1999, including several crimes against humanity, including the killing of unarmed civilians and the deportation of 800,000 Kosovo Albanians.[154]

To further see the political implications, one cannot avoid the fact that the decision to send Milošević to the ICTY was made one day before an international donors' conference in Brussels was called to raise over $1.25 billion in aid to rebuild the Federal Republic of Yugoslavia and that, prior to attending the conference, the United States stated that it would attend the conference on the condition that Belgrade co-operated with the

150 Interview with CSO representative, Prishtina, May 2016.

151 Slobodan Milošević was formally indicted by the ICTY on May 24 1999, at the height of the Kosovo crisis, while he was still president of Yugoslavia, on allegations of murder and ethnic cleansing of ethnic Albanians in Kosovo. See Dorothea Beane, "The Yugoslav Tribunal and Deferral of National Prosecutions of War Criminals", in *American Society of International Law Insights*, vol. 1, no. 4, 1996, pp. 1–4.

152 Andreas Laursen, "Nato, the War over Kosovo, and the ICTY Investigation", in *American University International Law Review*, 2002, vol. 17, no. 4, p. 765; Marlise Simons, "Milosevic to Face Charges Covering Three Wars in Balkans", in *New York Times*, 31 August 2001.

153 Michael P. Scharf, "Indicted for War Crimes, The What?", in *Washington Post*, 3 October 1999.

154 Miller, 2000; see *supra* note 110; Milošević was initially charged on 22 May 1999, on four counts: deportation, murder, murder and persecutions. The indictment was first amended on 29 June 2001, and then again on 16 October 2001, see *supra* note 135. These charges, among others, included "planning, instigating, ordering, committing or otherwise aided and abetted in a deliberate and widespread or systematic campaign of terror and violence directed at Kosovo Albanian civilians living in Kosovo in the Federal Republic of Yugoslavia, mass killings of hundred civilians, execution of campaigns of persecution against the Kosovo Albanian civilian population based on political, racial, or religious grounds".

ICTY.[155] The Tribunal has been a stick and carrot for Serbia. The CSO representatives contend that:

> Every time Serbia co-operated with the Tribunal, it appeared to be for a political reason and gain and, if there had not been these higher political gains, there is doubt about how much Serbia actually would have cooperated with the Court.[156]

Similarly, with the leaders of Kosovo, co-operation with the ICTY was insured through various tools of political pressure.[157]

Lack of trust in the Tribunal by the Kosovo Albanians has resulted in a diminution of its effects within society and a misperception of the Tribunal. Whether the Tribunal is seen as trustworthy or not also depends on the side that is being tried. One of the criticisms from both sides is the selective justice of the ICTY. Such selectivity is recognised and justified by the prosecutor for objective reasons. While in many civil law jurisdictions, all crimes are prosecuted where evidence permits, in the ICTY, the prosecutors were more selective before committing resources to investigate or prosecute, due to the difficult nature of the charges.[158] For these reasons, some commentators contend that the Tribunal often decided that the cases must be representative in terms of nationality of the victim and the perpetrator which, in the view of scholars as well as of the respondents, ought not to mean that the prosecutor should equally distribute the indictments among the national groups in the conflict.[159] In the Serbia-Kosovo conflict, the perceived attempt of the prosecutor to balance the victims with the perpetrators has damaged the credibility of the Tribunal.[160] In their view, the decision of the prosecutor on the selection of cases should be based on evidence and not some notion of moral equivalence among the parties;[161] bearing in mind that during the time when these crimes were committed, there was no such notion of equivalence, rather

[155] Bruce Zagaris, "Milosevic Turned Over to the ICC", in *International Enforcement Law Reporter*, 2001, vol. 17, no. 8.

[156] Interview with CSO representative, Prishtina, May 2016.

[157] Kosovo adopted a law on the co-operation with the ICTY in December 2013. The most recent Stabilization and Association Agreement between the EU and Kosovo contains a provision that ensures that Kosovo will co-operate with ICTY and the ICC.

[158] Arbour, 1997, see *supra* note 147.

[159] Simonovic, 1999, see *supra* note 9.

[160] Focus group discussion with victims, Krusha, April 2016.

[161] Shraga, 2005, see *supra* note 11.

one party was the perpetrator and the other the victim.[162] This is known as *juridical othering*, where the perpetrators claim that the perpetrators are from another group and use various devices to maintain plausible deniability.[163] Such reasoning is supported by the fact that the current government in Serbia continues to deny the crimes were committed and refuses to apologise for any actions.[164]

Respondents contend that one of the failures of deterrence is shown in the behaviour in the political arena. Most people who were part of the political elite at the time of the Milošević regime are today in Serbia's leadership, while the same is contended by the Serbian community in Kosovo with regard to the political leadership in Kosovo.[165] In an article published in May 2016, Robert Fisk highlights the irony of the current Serbian prime minister leading the nation towards EU integration, while the same being the person who once said "for every Serb killed, we will kill 100 Muslims".[166]

The importance of the context and the side that is being tried is seen from the responses of the Serbian community, who feel that "Kosovo is a really good example that the ICTY has not managed to end this practice of impunity".[167] They argue that, while the Serbian leaders have been tried by the ICTY, none of the Kosovo KLA leaders have been sentenced by the ICTY.

The fact that people in Serbia and Kosovo did not believe in the Tribunal and its legitimacy affects the possible impact of the ICTY. In Serbia people viewed it as a political body solely targeting its leaders, while in Kosovo the targeting of the leaders was considered unfair and unjust due to it being the defending side. Thus this conceptualisation of the

[162] Focus group discussion with victims, Krusha, April 2016.

[163] Ruth Jamieson and Kieran McEvoy, "State Crime by Proxy and Juridical Othering", in *British Journal of Criminology*, 2005, vol. 45, no. 4, pp. 504–27; Dawn L. Rothe and Christopher W. Mullins, "Beyond the Juristic Orientation of International Criminal Justice", in *International Criminal Law Review*, 2010, vol. 10, no. 1, pp. 97–110.

[164] Although the Serbian government has made an apology for the crimes committed in Srebrenica, the prime minister Aleksander Vučić had urged Russia to block a UN resolution that would have condemned the Srebrenica massacre as genocide. Robert Fisk, "Europe Has a Troublingly Short Memory over Serbia's Aleksander Vucic", in *The Independent*, 14 May 2016.

[165] Interview with Serb CSO representative, Prishtina, May 2016.

[166] Fisk, 2016, see *supra* note 164.

[167] Interview with Serb CSO representative, Prishtina, May 2016.

Tribunal has had a major impact in its perception and acceptance. Where the Tribunal itself was not accepted, it is difficult for its decisions to make a huge impact on the deterrence of the future crimes.[168]

5.6.3. Failure to Create a Mentality That Would Enable Deterrence

One of the main questions of the research is to see whether there is a perception that the ICTY has managed to contribute to deterrence through a change in societal mentality. Most of the respondents believe that there is no in-depth change. While there has been progress in terms of changes, which mostly relate to political interests of affiliation with the European Union and benefits of the European perspective, most believe that if this were to change, the same crimes would take place again.[169] The victims in particular fear that "they are not sure that similar crimes will not occur in the future".[170] There is a high level of ethnic tension that is still present.[171] Where "all the same people who were in power during the war times are in power nowadays, and the same military leaders are in power today",[172] this shows that change is yet to happen in the mentality of the society. According to the respondents, "the same individuals have gone through metamorphoses and are leading the main processes now both in the Serbian leadership and in Kosovo".[173]

When looking at the deterrence of future crimes, there are several elements the respondents point out. First and foremost, regardless of the work the ICTY has done, the victims contend that "the criminals are still walking free",[174] since the majority of mid- and low-level perpetrators were not indicted, and of the ones prosecuted, the majority were not sentenced. Thus, for the victims the feeling is that the Tribunal has not had a deterrent effect with regard to alleged but unindicted perpetrators since, if the circumstances were to change, the majority of them agree they fear that the "same crimes would occur again".[175] The same view is also shared by legal offi-

168 Interview with CSO representative, Prishtina, May 2016.
169 View expressed by the majority of the responders.
170 Focus group discussion with victims, Krusha, April 2016.
171 Interview with a judge, Prishtina, April 2016.
172 Interviews with CSO representatives, Prishtina, April–May 2016.
173 Interview with Serbian CSO representative, Prishtina, May 2016.
174 Focus group discussion with victims, Drenas, April 2016.
175 Focus group discussion with victims, Krusha, April 2016.

cials: "If there would be conflict again in the future, the same violations would manifest again due to the longstanding hostility".[176]

The lack of the change of mentality can be objectively observed in the declarations that have been made recently by high-standing leaders of Serbia such as Vojislav Šešelj who, upon his return to Serbia, stated: "The Hague Tribunal is the wounded beast of globalisation, which destroyed the lives of Serbian leaders, army and police commanders. Our honourable generals just defended Serbia".[177] Similarly, a declaration by the head of the Academy of Sciences, that the new reality with regards to Kosovo must be accepted, spurred immediate negative reactions from all the political leaders in Serbia.[178] There is also a tendency of increased nationalism, both in Serbia and also in Kosovo.[179]

Recently, the media spread propagandistic information that Milošević had been "exonerated" by ICTY in the decision rendered on the case of Radovan Karadžić. The 'news' that ICTY "had quietly cleared Milošević of responsibility for war crimes" spread quickly.[180] Such propagandistic efforts were immediately contradicted by many. As Gordana Knezević elaborates in detail, such allegations were not grounded and the ICTY confirmed that the Appeal Chamber did not make any determination of guilt with regards to Milošević.[181] What is more concerning, though, are the declarations by some Serbian officials such as the foreign minister Ivica Dačić and labour minister Aleksandar Vulin in response to the propaganda. They include: "We all knew that Milošević was not guilty. He should get a street [named after him] and a monument in Belgrade".

176 Interview with a judge, Prishtina, April 2016.

177 Milka Domanovic, "Seselj Revives the Rhetoric of the 1990s", in *Balkan Insight*, 13 Novemver 2014.

178 *Balkan Insight* reports that the Serbian Academy of Sciences and Art ('SANU') chief Vladimir Kostić made a statement that that Kosovo "is not in Serbia's hands anymore either de facto or de jure", adding that someone should openly say that to the people. Shortly after, several senior Serbian officials, including President Tomislav Nikolić and Prime Minister Aleksandar Vučić, called on SANU to react.

179 Interview with CSO representative, Prishtina, April 2016.

180 Neil Clark, "Milosevic Exonerated, as the NATO War Machine Moves On", in *RT News*, 2 August 2016; Inserbia, "ICTY Exonerates Slobodan Milosevic for War Crimes", in *Global Research*, 3 August 2016.

181 Gordana Knezević, "Milosevic 'Exonerated'? War-Crime Deniers Feed Receptive Audience", in *Radio Free Europe*, 9 August 2016.

These declarations were believed to be trying to whitewash Serbia's wartime past.[182]

From the perspective of Kosovo society, the main test of whether the ICTY has managed to contribute to the creation of a mentality that would enable deterrence is whether the Tribunal has managed to raise awareness among the society as to why the leaders are being tried. For Kosovo Albanian society, but similarly from the perspective of the Kosovo Serbian people, the biggest problem is that the society has no clear understanding of why specific individuals were tried. According to CSO representatives, "due to the weak outreach, the Court could not counter the narrative spread by the politicians – who continue to portray themselves as victims".[183] As the judges and legal practitioners pointed out, the "citizens are still unable to tell the difference between war crimes and frontal war".[184] This stance is taken a step further by the CSO representatives who contend that "there is unwillingness to even have that discussion, as to what party did what".[185]

Although seen as a normal transition, Kosovo society refuses to believe that there are people within the KLA that may have committed war crimes. There is a belief in the society that if a person is being tried for a war crime, they are tried for the "pure war to protect the land and the family", since the Tribunal, whether in the judgments or through the outreach programme, has failed to clarify to normal people that if a person is being tried for war crimes, they are not being tried for frontal war but rather for actions against civilians. Some of the respondents understand and advocate for such clarification, a debate that has yet to take place in Kosovo, while the rest, mainly the victims, are as yet far from understanding that. In a survey conducted by United Nations Development Programme in Kosovo, when asked if they think that members of their community have committed crimes, "the overwhelming majority of the respondents from all the communities in Kosovo do not consider that members of their

[182] Sasa Dragojo, "Milosevic's Old Allies Celebrate His 'Innocence'", in *Balkan Insight*, 16 August 2016.

[183] Interview with CSO representative, Prishtina, April 2016.

[184] Interview with a judge, Prishtina, April 2016.

[185] Interview with CSO representative, Prishtina, May 2016.

community have committed crimes".[186] This shows that there is yet a lot of work to be done in terms of a mentality shift.

5.7. Conclusion and Recommendations

From the arguments presented above, one may easily infer that there is no one single conclusion that can be drawn with regard to the deterrence effect of the ICTY in Kosovo. When looking at the work of the ICTY as a whole, there are different views from different people. Thus, one must look into components or segments of the Tribunal's work and evaluate their potential for effecting deterrence. In addition, deterrence can take many forms. It is important to evaluate the deterrent effect over stages because particular segments of the work of the Tribunal have influenced one type of deterrent effect but not another.

It is uncontested that the ICTY has not had any immediate effect in terms of bringing an end to massive violations. The ICTY was established and began its work in 1993, whereas the greatest human rights violations in Bosnia and Kosovo took place in the years following its establishment. The main reason for the failure of the Tribunal to end massive violations and effectuate immediate deterrence relates to the fact that deterrence is dependent on two elements: first, that there be an actual threat of punishment; and second, that the perpetrators understand that and perceive the threat as greater than the benefit of their crimes. In times of conflict, such a cost-benefit analysis is not even taken into consideration, let alone in conditions such as the ones related to the ICTY when the threat of punishment was not a realistic one. Many consider it is unrealistic to hope that any tribunal can effectuate an immediate prevention of violations. Bearing that in mind, one must look into whether the ICTY has managed to create the idea of the threat of punishments in the course of its work, which lasted more than two decades.

The ICTY has failed in its primary test, that of rendering decisions and imposing sentences that would fulfil the criteria of certainty, severity and celerity. From the subjective perspective of the interviewees, the Tribunal has not fulfilled its main mission of putting the perpetrators behind bars. Even evaluating the work of the Tribunal objectively, the sentences handed down seem less severe compared to other international tribunals. Thus it is difficult to consider the effect of the Tribunal by virtue of sen-

[186] United Nations Development Programme, 2012, p. 7, see *supra* note 62.

tences in effectuating specific deterrence. The sentencing policy and the jurisprudence of the ICTY are not considered to have imposed a direct threat to perpetrators such that there is a threat of punishment if similar actions were to be committed in the future.

While the sentences are not considered satisfactory or capable of deterrence, one cannot disregard entirely the effect of the indictments, even their short-term effect. This can be seen in the first instance in the capability of removing people from office and the stigmatisation effects. The main criticism regarding the Tribunal is that its indictments did not result in prison sentences. Nevertheless, the indictments themselves have contributed to creating a culture of fighting impunity. By indicting the highest political leaders in Serbia and Kosovo, the Tribunal has contributed to establishing the idea that no one is untouchable, thus shifting from a commodity of impunity. However, the criticism in relation to the Tribunal is that, regardless of the fact that it has indicted the highest leaders, they were not punished, thus creating an attempt to establish a fight against impunity in theory but not in practice. Moreover, there is the perception that the Tribunal is politicised and used the indictments as a political tool, thus affecting the legitimacy of the Tribunal as whole.

On the other hand, there are aspects of the Tribunal's work which, in addition to the indictments, are considered to have indirectly influenced long-term deterrence. One of the uncontested contributions is the work of the Tribunal in writing history and documenting all the violations that have taken place. In addition, the work of the Tribunal has had an effect in triggering trials at the national level and also domesticating legal norms of criminal justice, thus creating preconditions for long-term deterrence.

While there are positive effects of the ICTY as indicated above, there is also a lot of criticism of it. From the Kosovo perspective, one of the key deficiencies explaining why the Tribunal is considered to have failed in fulfilling its deterrence mission, in addition to not meting out what is perceived to be the right punishments, is the failure to explain to the wider society why the accused were tried and what they were sentenced for. As elaborated throughout the chapter, when analysing the deterrent effect of the ICTY in Kosovo, due regard must be paid to the ethnic context since both Albanians and Serbs only perceive the Tribunal as successful when members of the other community are tried, and not when members of their own community have been tried. The Tribunal has failed to send a clear message to society as to why certain individuals were tried

and has not managed to create a separation of war crimes from war between combatants.

As long as there is still no clear difference between the two terms in society at large, and there is a perception that the Tribunal has failed to sentence the major perpetrators, one can only say that the ICTY has contributed to the creation of the idea of fighting impunity in theory, but has not created an actual practical impact in practice – a realistic perceived threat that international justice works. Bearing that in mind, it is questionable whether the ICTY has laid the groundwork and precedent for the ICC to be able to deter future crimes in the countries within its jurisdiction and beyond.

Based on the arguments presented in this chapter, there are several recommendations for international criminal institutions and the international community:

- The international community must establish more timely and efficient reactive mechanisms, and trials should take place immediately after the end of conflict since they lose effectiveness as time passes;
- Long trials are an impediment to deterrence and international bodies should conduct more timely and efficient trials, having due regard to proper administration of justice and the right to fair trial;
- International courts and tribunals should refrain from using indictments as political tools, thus preserving their legitimacy as independent and impartial bodies;
- International courts and tribunals should attempt to establish a sentencing policy to ensure severity and certainty of punishment; and
- All international courts and tribunals must ensure transparency and have strong outreach programmes that reach the ordinary people in different societies and contexts.

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Two Steps Forward, One Step Back:
The Deterrent Effect of International Criminal Tribunals

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