

# **Ending Impunity Through Law: Evaluating the ICTY's Success as a Transitional Justice Mechanism for Bosnia and Herzegovina**

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## **Introduction: The Roots of International Criminal Law as Transitional Justice**

The road to transitional justice through international criminal law is fundamentally shaped by its relative youth, and stacked with jurisdictional, prosecutorial and political obstacles. The short lifetime of international criminal law renders this transitional justice mechanism particularly malleable, ambiguous in its promises and absent of any sort of 'ideal example' to follow. These elemental obscurities of international criminal law, as a concept, make difficult the ability to determine successful outcomes when employing this body of law to achieve transitional justice. For these reasons, it is important to firstly understand the earliest propagation of international criminal law, the 1945 Nuremberg Trials, in order to perceive why exactly it was introduced to society, what purpose(s) it was initially intended to serve and whether it was even worthwhile to continue its legacy from the start. Understanding the intentions behind this body of law, as a whole, enables a more comprehensive assessment of the success of the International Criminal Tribunal for the Former Yugoslavia, as a specific mobilization of this body of law, in establishing transitional justice, a specific end goal of an international judicial body.

Lead Prosecutor at the Nuremberg Trials and key figure associated with the formulation of international criminal law, Benjamin Ferencz, noted in his opening statement at Nuremberg: "Vengeance is not our goal, nor do we seek merely a just retribution. We ask this Court to affirm by international penal action man's right to live in peace and dignity regardless of his race or creed. The case we present is a plea of humanity to law" (Ferencz, 1947, p. 494). This being the goal of the first ever international criminal trial against genocidaires helps to understand what legacy of the Nuremberg Trials was intended to leave, regardless of its outcome (Lemnitzer, 2015). The International Center for Transitional Justice's definition of transitional justice refers to societies' responses to "the legacies of massive and serious human rights violations" through "accountability, acknowledgment, and redress for the harms [...] suffered" and offers "a path toward a peaceful, just, and inclusive future where past crimes have been acknowledged and redressed and citizens and leaders agree that violence and human rights abuses can never again happen" (ICTJ, n.d.).

Coupling the founding goal of international criminal law posited by Ferencz with the definition of transitional justice helps illuminate that An appropriate definition of success, when using the International Criminal Court (or its predecessors) for transitional justice, is one that centers on 1) legal accountability of individuals who have instigated, directed or catalyzed grave atrocities, so as to deter instigations of such violence, 2) ending legacies of violence and enforcing acknowledgment of them for prevention, 3) appropriate redress of harms, however necessary for the specific case, whether through reparations or rehabilitation and 4) a ensured future of citizens AND leaders agreeing that such violence and human rights abuses can never happen again. These four requirements can be merged to develop a more comprehensive and situationally appropriate framework for assessing the 'success' of the International Criminal Tribunal for the Former Yugoslavia (ICTY) in administering transitional justice specifically regarding Yugoslavia's bloodiest conflict, the Bosnian War, from 1992-1995, between and among Bosniaks (Bosnian Muslims), Bosnian Serbs and Croats in Bosnia and Herzegovina (BiH).

## **Framework Description**

As mentioned above, the idealized success of an ICC case for the sake of transitional justice is a holistic and integrated justice following grave atrocities, and is comprised of four main aspects. For the sake of this framework, these are: Legal success, or the effectiveness of the ICC in using international criminal law to enforce accountability through successful conviction, prosecution and incarceration (for the sake of its deterrent effect) of key parties, and it is indicated through three criteria: 1) legitimacy (i.e., jurisdiction), 2) impartiality, indicated through the extent to which *all* sides of the conflict are heard based on diversity among nature of trials and associations of defendants, and 3) Competence, which is based on the amount and length of incarcerations made through cases—given the overall goal, in this case, of incarceration as a deterrent—as well as whether precedents were set by any cases. The precedent aspect is of particular importance in the ICTY because the Tribunal was only the second iteration of international litigation of genocide and war crimes, so any precedent-setting cases are ultimately to the benefit of the ICTY's case because they show an expansion of the body of international criminal law.

The second aspect is Procedural success, or the generalized functionality of the ICTY, comprised of its 1) Accessibility, regarding the amount of languages accommodated in the court proceedings, which ensure all involved parties are given the space to communicate in their native languages/to the fullest extent, and 2) Statute Adherence, regarding the ICTY's adherence to legally prescribed procedures outlined in the Statute of the ICTY established by United Nations Security Council Resolution 827. This indicator specifically speaks to whether the Tribunal achieved the goals it set out for itself, offering a very base dimension of success.

The third aspect is Success with Transitional Justice Outcomes, or the short-term outcomes of the case. This dimension of success is particularly important in the case of the ICTY in BiH because of the ethnic fractionalization that took place among Bosniaks, Bosnian Serbs and Croats (ICTY, "The Conflicts"). The specifically fragile context of the Balkans in the fall of the former Yugoslavia meant that true and complete justice required the assurance of reparations following prosecutions of the leaders, otherwise, the ICTY's work would make little difference in the overall region. This dimension is comprised of 1) reparations indicators, which speak to the extent that the ICTY delivered on appropriate redresses for harms done and the accessibility of these reparations for *all* victims, 2) the impact on the domestic rule of law by the ICTY's involvement, or, whether the ICTY's presence has sufficiently altered the function of domestic judiciaries, as prescribed by the statute, such that the domestic legal system functions parallel to the ICTY in handling war crimes and genocide convictions and refers certain cases to the ICTY that should be handled by them.

The fourth and final dimension of success that is crucial to this analysis is the Long-term successes, referring to the sustainable peace which, ideally, should be instilled by the ICTY in BiH following the war. This dimension is defined by 1) capacity building, or if institutions are noticeably stronger in the periods following conclusion of the ICTY, and if there has been an increase of qualified judicial actors/personnel in judicial institutions, further qualifying the reinstatement of rule of law in transitional justice contexts, 2) social reparations, which refer to the easing of ethnic tensions in BiH, because they were the major driver of conflicts in the Bosnian War, and if there is social recognitions have been made to the legacies of violence or if the history is revised to hide these facts. This is important because the last step of genocide is revising histories to cover up that it ever happened (Bengston, 2022), thus allowing the cycle to renew itself. Additionally, there is 3) Peacebuilding, or indications of political and economic stabilization as well as a reduction in overall conflict in the jurisdictional area. Collectively, these four dimensions of success can allow for a more pointed assessment of the ICTY's handling of atrocities specifically related to the Bosnian War, but comprehensive in the sense of covering the entirety of what success *ought* to look like in ICC facilitation of transitional justice.

## **Bosnian War, ICTY Mandate**

In the resulting fractionalization of the former Yugoslavia the Bosniaks and Croats of Bosnia voted, via referendum, for the independence of Bosnia on February 29, 1992, which was protested by Bosnian Serbs (Reuters Staff). Following this declaration of independence, there are three major ‘areas’ or instances of conflicts that are of interest to the ICTY in Bosnia: first, the initial Siege of Sarajevo, which began on April 6, 1992 and continued until February 29, 1996 in the capital of Bosnia and displaced around 200,000 people; second, the Foča Rape Camps (in which over 20,000 rapes occurred) and sexual violence from 1992-1995 in general, as the ICTY was the first international judicial body to handle sexual violence; and finally, the Srebrenica Genocide inflicted by Bosnian Serbs who invaded a UN “safe area” in July 1995 and killed upwards of 8000 Bosnian men and boys and displaced the town’s women and children to exact this bloodshed (ICTY, “The Conflicts”). It was on May 25, 1993, that the United Nations Security Council voted unanimously to establish the International Criminal Tribunal for the former Yugoslavia with Resolution 827, which doubly served as the formal statute of the Tribunal. The statute of the International Criminal Tribunal for the Former Yugoslavia is a crucial document because, similar to the mandates of UN peacekeeping missions, it simultaneously serves as a mission plan for the Tribunal, but differs in that it also acts as the main mode of legal legitimation by establishing the jurisdiction of the Tribunal in subject matter, actors, location and temporal period (Doctors Without Borders, n.d.). Even when this is legally thorough, the ICC and international tribunals still rely on the cooperation of involved states/territories/governments (Power, 2002).

Additionally, it is crucial to acknowledge the difference between the ICC and international tribunals like that for the former Yugoslavia and Rwanda, in that, international tribunals are necessarily *ad hoc*; they are not permanent establishments, so they naturally exist on a time constraint unlike the ICC, and are not endowed with universal jurisdiction, so the crimes they are able to address are constrained to those directly related to conflict that the tribunal was created to address (Frisso, 2011; ICTY, “Mandate and Crimes under ICTY Jurisdiction”). The jurisdiction of the ICTY is of the utmost importance because it essentially determines the extent to which the ICTY can *legitimately* act. Recognizing both the extensiveness of the crisis at hand in BiH and the fraught issue of jurisdiction, it becomes clear why an analysis of the ICC or an international tribunal requires a framework catered to the specific case.

## **Analysis with Framework**

### **Legal success:**

**Legitimacy:** The statute of the ICTY was extremely thorough in expressing the nuances of the tribunal’s jurisdiction, effectively helping the tribunal have jurisdiction over the entirety of the key conflicts. Article 1 of the ICTY Statute establishes jurisdiction over persons, not groups or political parties, responsible for “serious violations of international humanitarian law,” (Doctors Without Borders, n.d.), specifically over the area of the former Yugoslavia from 1991 onwards (ICTY, “Mandate and Crimes under ICTY Jurisdiction”). Articles 2-5 of the Statute list the crimes included in jurisdiction: genocide, crimes against humanity, “grave breaches of the 1949 Geneva Conventions” and violations of the laws or customs of war. The end date was not specified, partially because the ICTY’s introduction in the territory was

established while conflict was ongoing, with the intent of deterring the violence (Barria & Roper, 2005). This aspect of legal success is, for the sake of the analysis, satisfied.

**Impartiality:** Impartiality in the case of the ICTY is problematic in that the first indicator, the diversity of cases, was achieved—all crimes, whether committed by Bosnian Croats or Bosnian Serbs, were effectively tried. The issue, however, was that even in holding all sides accountable, it was made clear that Bosnian Serbs were the most dubious of the ICTY's legitimacy, as they were often painted as aggressors, and Bosniaks from BiH saw the ICTY as unbiased in 2004 (Ivkovich & Hagan, 2015, p. 10). Further, the nature of the ICTY, because of the variances across ethnic groups regarding legitimacy, was inherently viewed as political, especially among Bosnian Serbs (Ivkovich & Hagan, 2015). This group, however, was largely represented among those convicted by the ICTY, so the ICTY is not necessarily in the wrong, but the civilians should not be made to blame for the leaders who inflicted genocide purely because they share the same ethnic identity. The ICTY, to this effect, was impartial on its end, but its work, *in effect*, portrayed a bias against Bosnian Serbs in BiH.

**Competence:** The ICTY successfully incarcerated key individuals like Ratko Mladić, who led the forces who committed mass murder in Srebrenica, and Slobodan Milošević, the President of Serbia and Radovan Karadžić, the former President of Republika Srpska, who both instigated the aggression towards Bosniaks and Bosnian Croats in BiH (World Without Genocide, 2020). These achievements, however, were undermined by the limitations of the tribunal to issue death sentences, and to actually gain the physical presence of the convicted to incarcerate them in the Hague. The issue, too, is that the ICTY issued sentences that victims of atrocities believed were not commensurate with the crimes they committed; this view differentiated in intensity across ethnic groups but it was a common view across them. Further, a new issue is presented in the legacy of the ICTY: many of the criminals indicted and incarcerated have served their sentences and are being returned back to their communities again, which are still filled with people who keenly remember the genocide (Orentlicher, 2010). This makes difficult the ability to credit the ICTY's work in this regard because the people charged with some of the gravest crimes known to man should, ideally, remain in incarceration for a substantial amount of time. In this area, the ICTY's work was not sufficient, largely due to the constraints in which international tribunals operate, as a judicial body that lacks enforcement techniques by its nature.

### **Procedural Success:**

**Accessibility:** The languages were all accounted for in the court, but this aspect is a major drawback of the ICTY. Though victims were largely accounted for, the nature of the tribunal—which is necessarily *ad hoc*, and thus on a time limit imposed by the UN Security Council—was positioned to only value victims in the manner that the victims were able to forensically serve the court (Friso, 2011). In this regard, the ICTY was not successful because it should absolutely have space for victims to actually gain a cathartic benefit from their testifying/admitting evidence—victims should never feel that they are merely conduits to a legal end, otherwise the tribunal is losing sight of the end goal.

**Statute Adherence:** This is one of the more successful areas of the ICTY's work. Despite its debatable contributions externally, the ICTY did extremely well to staff its judicial and

administrative organs fully. Judges were all qualified, to the standards established by the mandate—although this fact is disputed by certain actors in BiH, or, the qualifications are seen as lackluster (Barria & Roper, 2005; Ivkovich & Hagan, 2015). The issue, however, is that: “[s]ome argue that states in the Security Council found the creation of the Tribunal appealing because it provided an economically and politically inexpensive means of responding to demands for international action” (Barria & Roper, 2005, p. 354). In this area, the ICTY was successful; but, the issue of mandates drafted by the UNSC is fraught and does qualify this success as not actually helpful for the *overall* success of the ICTY, in the framework of this analysis.

### **Success with Transitional Justice Outcomes:**

**Reparations:** These were likely one of the ICTY’s major failures, such that, many victims who filed claims for monetary reparations, were denied these reparations arbitrarily and then, were charged court fees for the handling of their applications (Gerig, 2022). Because of the ICTY’s time constraints, the reparations were largely handled by the domestic courts, which led to such poor distribution. The ICTY had every obligation to ensure these were done but the nature of the mandate was more focused on the prosecution of criminals than issuing reparations to victims, which is counterproductive and, thus, makes this aspect a failure.

**Impact on the Rule of Law:** This was a particularly interesting takeaway from the ICTY, in that the tribunal did actually help to establish a Bosnian War Crimes Chamber on the domestic level in Bosnia (Orentlicher, 2010), which had a concurrent jurisdiction with the tribunal (Asser Institute, n.d.; Doctors Without Borders, n.d.). This court has been a feat of the ICTY, and demonstrated the potency of establishing an international tribunal in a conflict zone so as to deter conflict, and, show that the international community has a focus on the conflict inflicted by Bosnian Serbs.

### **Long-term Success:**

**Capacity Building:** This is a difficult area to assess because the ICTY was so helpful with the Bosnian War Crimes Chamber, but the chamber now faces a massive backlog of cases (Muslimovic, 2019). The judges were all qualified and the institution had demonstrable potency when the ICTY was still functional but, now, the functionality has entirely frozen up. The capacity of this court to handle the cases is not sufficient and the international tribunal, since it prioritized the development of this court, should have built in strategies to ensure its sustainability.

**Social Reparations:** This is another weak outcome of the ICTY in BiH. There are several studies which express the social fractionalization still maintained in BiH (Ivkovich, & Hagan, 2015; Orentlicher, 2010; Saferworld, Conciliation Resources, & BCSP, 2012) following the end of the ICTY’s presence in the area. As of 2012, victims’ responses to surveys in BiH demonstrated that a massive gap still existed between Bosnian Serbs and Bosniaks (Saferworld, Conciliation Resources, & BCSP, 2012), as they inhabited different areas of towns and remained separate; one young Bosnian Serb respondent even noted that “everybody feels the war, even today” (p. 5). Further, memories of the genocide are still revised based on ethnic identities (Bengston, 2022), and, because of the nature of the charges issued by the ICTY, which deemed Srebrenica—but not the Siege of Sarajevo nor the rape

camps—genocide, that only Srebrenica is acknowledged by Bosnian Serbs, because it was the only violence explicitly deemed a genocide by the ICTY. The ICTY should have done more in accurately denouncing each instance of conflict such that the history cannot be revised.

**Peacebuilding:** Conflict has largely ended but fractionalisation still exists; this, however, is largely to blame on the Dayton Peace Agreements from 1995 managed to institute an “administrative and political system that essentially institutionalises ethnic division” (Saferworld, Conciliation Resources, & BCSP, 2012, p.1), rather than the ICTY. But, the ICTY did not have to call upon the forces of NATO and its member states, but also the ICTY was only operating within the political landscape that is endowed to it, with these same states being the ones that can drive narratives in international criminal law, like the United States. For this reason, this aspect is only mildly successful because conflicts may have ceased, but the ethnic tensions remain and, thus, create a breeding ground for possible future conflicts.

## Conclusion and Limitations:

Overall this analysis is limited in its overall scope. To assess the ICTY’s effectiveness in transitional justice in BiH requires, now, analyses of decades worth of data across differing spheres: economic stability, conflict data, ethnic tensions data, victim opinions data, etc. This analysis would benefit, too, from more quantitative measurements, but this analysis took a largely qualitative approach because of the ethnic fractionalization at hand in BiH, making it an extremely subjective conflict.

Ultimately, however, it is made clear that international criminal law is a worthwhile pursuit in the larger narrative of protecting humanity’s intrinsic right to life in law. But more *has* to be done, regarding the entanglement of the UN Security Council and the ICC/international Tribunals because it leaves far too much room for politics to ultimately drive the narratives in international criminal law. If international criminal law were able to act independently of the UN, without capacity or resource constraints, then transitional justice would be easier to attain without the added red tape of politics in legal proceedings.

### Appendix 1: Transitional Justice Assessment Framework

1. Legal Success	Legitimacy	Impartiality	Competence
LS indicators	<ul style="list-style-type: none"> <li>• Does the ICC have sufficient jurisdiction over the               <ul style="list-style-type: none"> <li>○ 1) relevant country,</li> <li>○ 2) crimes and</li> <li>○ 3) temporal period?</li> </ul> </li> </ul>	<ul style="list-style-type: none"> <li>• Are all sides of the conflict equally heard? (thru diversity of trials)</li> <li>• Is the nature of the presence of the ICC politicized? (Qualitative)</li> </ul>	<ul style="list-style-type: none"> <li>• No. of successful incarcerations</li> <li>• Length of incarcerations</li> <li>• No. of pardons/missed incarcerations due to legal workarounds, etc.</li> <li>• No. of precedent-setting cases</li> </ul>
2. Procedural Success	Accessibility		Statute Adherence

<b>PS indicators</b>	<ul style="list-style-type: none"> <li>• No. of Languages Available</li> <li>• No. of victim applications to participate in proceedings vs amount of victims presumed to be affected by crimes</li> </ul>	<ul style="list-style-type: none"> <li>• Were all positions filled, as prescribed by statute's proposed composition of ICTY?</li> <li>• Were all judges qualified?</li> <li>• Were ALL proceedings followed as prescribed by the statute?</li> </ul>	
<b>3. Success in Transitional Justice outcomes</b>	<b>Reparations</b>	<b>Impact on the Rule of Law</b>	
<b>STJO indicators</b>	<ul style="list-style-type: none"> <li>• Are they centered on redressing harms or on victims' specific needs?</li> <li>• Do victims find reparations sufficient?</li> </ul>	<ul style="list-style-type: none"> <li>• Changes in legislation which correspond w/ international legal standards</li> <li>• Enforcement of the law within nation, by domestic judiciary/law enforcement</li> </ul>	
<b>4. Long term success</b>	<b>Capacity Building</b>	<b>Social Reparations</b>	<b>Peace Building</b>
<b>LTS indicators</b>	<ul style="list-style-type: none"> <li>• Noticeably stronger Judicial institutions</li> <li>• Increase in the number of qualified judicial personnel</li> </ul>	<ul style="list-style-type: none"> <li>• Does the aggressor acknowledge the harms they did?</li> <li>• Does the government honor the victims?</li> <li>• Are case-relevant ethnic/nationalistic tensions still present after the ICTY's closure?</li> </ul>	<ul style="list-style-type: none"> <li>• Reduction in the overall number of conflicts and violence in <i>jurisdictional region causally related to the same issue that the ICTY sought to handle in BiH</i></li> </ul>

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### 1. Declaring independence

- **1980:** Tito, leader of Yugoslavia died
  - economies fell apart in the leadership vacuum
  - politicians began capitalising off of the increasing nationalistic identity rhetoric and pitting groups of Bosniaks, Serbs and Croats against one another
- **1991-92:** Slovenia, Croatia, Bosnia and Macedonia declared independence from Yugoslavia
- **March 1, 1992:** Bosniaks and Croats vote on referendum for independence from Yugoslavia

### 2. Siege of Sarajevo

- **April 6, 1992:** European Community recognized independent Bosnia AND on same day, Serb militants opened fire on thousands of peaceful demonstrators, killing 5+ and wounding ~30
- **April 7, 1992:** Serb leader Slobodan Milošević blocked all roads to Sarajevo (Bosnia capital) and shut down the airport; this was the official start of the 1425-day siege
- **Feb 29, 1996:** Bosnian govt officially declared the siege was over; Sarajevo population decreased from 400k to 200k since start

### 3. Foča Rape Camps

- **1992:** (Bosnian) Serbs take control of Foča and began expelling Bosniaks
  - 2700 ppl missing or killed in Foča from 1992-94
  - Men to concentration camps, women to “rape camps”
    - Bosnian Serbs committed an est. 20k rapes between 1992-95
- **Intl Crimes committed:**
  - Grave breaches of human rights
- **Precedents set?**
  - First time(?? confirm this) that sexual violence was prosecuted in intl crim court

#### 4. Srebrenica Genocide

- **July 1995**
- **Intl Crimes committed:**
  - Invading safe place of UN
  - grave breaches of human rights abuses
    - more sexual violence; torture; mass murder
- **No. Victims/Damages**
- **Precedents set?**
- **Successes of ICTY with this**
  - Radislav Krstić was found guilty of aiding and abetting genocide, violations of the laws or customs of war and crimes against humanity and sentenced to 35 years imprisonment. Dražen Erdemović pleaded guilty to violations of the laws or customs of war and Dragan Obrenović pleaded guilty to crimes against humanity and they were sentenced to five and 17 years imprisonment respectively.
  - They got Ratko Mladic but his sentence was ended early i believe
- **Failures with this**