Redeemer's University Nigeria, Journal of Jurisprudence & International Law (RUNJJIL) Volume 4(1) 2024

# An Analysis of the Legitimacy of International Criminal Tribunals

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**Abstract**
*World War II(WWII) precipitated the establishment of the International Military Tribunals. This article examines the legitimacy and effectiveness of international criminal tribunals within the international criminal justice system. Due to the absence of an international tribunal with centralised jurisdiction over all states, such tribunals must navigate complex jurisdiction and state sovereignty issues. Nonetheless, the establishment of institutions such as the Nuremberg and Tokyo Tribunals (International Military Tribunals), the International Criminal Tribunal for Former Yugoslavia (ICTY), and the International Criminal Tribunals for Rwanda (ICTR) has aimed to create specialised jurisdiction. International criminal tribunals play a crucial role in ensuring that individuals responsible for serious crimes are held accountable. They also serve as a deterrent to prevent future atrocities and aid in reconciliation and restoring peace in post-conflict societies. The article examines the tension and assesses the purpose and significance of international criminal tribunals within the larger context of international law. This article argues that despite these tribunals' perceived flaws, their contribution to the development of international criminal law is hard to overstate. Additionally, it is argued that legitimacy is not a one-off act; rather, it is both a process and outcome that requires due diligence throughout the tribunals' establishment, existence and discontinuance. The doctrinal research method was used to analyse the legitimacy and effectiveness of these tribunals. It was found that the extent of their jurisdiction and enforcement affected states' sovereignty, raising concerns about their legitimacy. The article concludes that legitimacy is not static; rather, the power dynamics of international criminal tribunals require their legitimacy to meet the international community's changing needs. States cooperation, the rule of law, and cognisance of international norms are essential for legitimacy and effectiveness.*

**Keywords**: ICTR, ICTY, Legitimacy, Nuremberg tribunal, Tokyo tribunal.

## Introduction

The inter-war period indicated that the system established by the League Covenant addressing the illegality of aggressive war was ineffectual. The United Nations Charter intended to ameliorate the situation,[1] although the preamble proclaims the determination of: "the peoples of the United Nations….to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind."[2] Article 1 of the Charter replicates the foundational principle of the Covenant of the League of Nations. It stipulates: "To maintain international peace and security, and to that end take effective collective measures for the prevention and removal of threats to peace and for the suppression of acts of aggression or other breaches of peace" The principles entrenched in the United Nations Charter reflect the drafters' intention to maintain international peace and order to regulate inter-state relations, and to protect human rights and dignity of the human person.

Be that as it may, the proliferation of norms in the international community espouses limitations on state sovereignty, which means the protection of human rights is no longer within the exclusive domestic jurisdiction of the state.[3]Hence, protecting human rights in international law becomes relative depending on the particular circumstances[4]. However, where the threshold of violation of human rights is higher, especially if it falls within the "grave", "severe" or "gross" threshold, universal jurisdiction may be triggered, or supranational courts can assume jurisdiction.[5] The emergence of these norms inadvertently results in the fragmentation of public international law, which mirrors 'an uneven normative and institutional development and evolution in inter-state relations.'[6]The institutional development indicates the emergence of different dispute resolution mechanisms with their special laws and specifics.

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[1] Leslie Green, *The Contemporary Law of Armed Conflict* (3rd Edition Juris Publishing, Manchester University Press 2008)297-303.

[2] The United Nations Charter 1945, Preamble.

[3] Malcolm Shaw, *International Law*( 7th Edition, Cambridge University Press)199,471-475.

[4] In *Nationality Decrees in Tunis and Morocco*, PCIJ, Series B, No, 1923; *Nowergian Fisheries* case, ICJ Reports , 1951, p. 116.

[5] Ibid ; The Rome Statute 1998, Article 17.

[6] Margaret A. Young, 'Fragmentation' in T Carty(ed), Oxford Bibliographies in International Law, Oxford University Press, 2014 )1 ;Martti Koskenniemi, Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law vol.21 ( The Erik Castren Instituutt research report 2007) 207-301.

Consequently, the ambience of international criminal law is not left out. It is no gainsaying that international criminal law has witnessed an unprecedented progression in its development. The Nuremberg and Tokyo tribunals, the International Criminal Tribunal for the former Yugoslavia (ICTY), the International Criminal Tribunal for Rwanda (ICTR) and the International Criminal Court (ICC) have contributed to the jurisprudence of international criminal law. These judicial mechanisms have a common denomination-jurisdiction over grave breaches of human rights and international humanitarian law. This article argues that despite these tribunals' perceived flaws, their contribution to the development of international criminal law is hard to overstate.

The IMTs, the first of their kind in the history of international criminal law, introduced individual criminal responsibility, a limitation to the immunity doctrine and a check against impunity. The IMTs prosecuted the leaders responsible for the grave violations of human rights and international humanitarian law.[7] Nevertheless, some commentators have contended that the IMTs delivered 'victor's justice.'[8] a digression from the intended mandate of the tribunals. In a similar vein, the emergence of the subsequent ad-hoc tribunals, the ICTY and ICTR created pursuant to the United Nations Security Council(UNSC) Resolution[9] raises questions on the legitimacy of these judicial mechanisms, partly based on the origin of its powers, i.e., UNSC resolution and the circumstances surrounding its operations.

The legitimacy of the Nuremberg and Tokyo Tribunals, the ICTY, and the ICTR stems from their capacity to deliver justice for severe human rights abuses during the conflict.[10] They function as crucial mechanisms for ensuring individuals are responsible for their conduct and establishing an accurate record of historical events.[11] Moreover, the credibility of these tribunals is enhanced by their strict adherence to legal frameworks and the protection of due process rights.[12] Their international composition guarantees impartiality and is vital in advancing justice and fostering

[7] Leslie Green, *The Contemporary Law of Armed* Conflict(3rd Edition, Manchester University 2017)14-16.
[8] Yuma Totani, 'The Case against the Accused' in Yuki Tanaka, Tim McCormacj and Gerry Simpson (eds),*Beyond Victor's Justice?The Tokyo War Crimes Trial* Revisited(Nijhoff Publishers 2011)148-155.
[9]Frits Kalshoven and Liesbeth Zegveld, *Constraints on the Waging of War: An Introduction to International Humanitarian Law*( 3rd Edition, International Committte of the Red Cross 2001) 186-188.
[10] Guido Acquaviva, 'Human Rights Violations before International Tribunals: Reflections on Responsibility of International Organizations'2007 20(3) *Leiden Journal of International Law*, 20(3), 613-636.
[11] Richard Wilson, 'Humanities' Histories Evaluating the Historical Accounts of International Tribunals and Truth Commissions (2007)80(4) *Politics* 31-33.
[12] Acquaviva (n 10).

reconciliation in countries' post-conflict societies.[13] These tribunals have been critical in the advancement of international criminal law. Through addressing intricate legal and ethical dilemmas of wartime responsibility, they have made valuable contributions to developing international legal frameworks and norms.

The theory of legitimacy provides a valuable account of how the international community perceives the operations of these tribunals and courts, the complexities of interaction between these institutions and states that is, State Parties, affected states and neutrals[14]; it will also assess the effectiveness, strengths and potentials of these judicial mechanisms.[15]

The primary aim of this article is to trace the history of the tribunals in order to evaluate their powers and acceptance within the international sphere. The rationale for undertaking this study is to contribute to understanding international criminal tribunals and their role in promoting justice, accountability, and peace at the international level. By addressing legal ambiguities surrounding jurisdiction, evaluating their impact on international relations, promoting accountability, protecting victims' rights, assessing their deterrent effect, and identifying challenges and limitations, the study can provide valuable insights and recommendations for the improvement and future development of international criminal tribunals. The author attempts to defend the view that despite the presence of legitimacy, external factors such as socio-political factors can override or derail these tribunals' efficacy and intended outcomes. This article has been organised in the following way: it begins by discussing the theoretical dimensions of the theories of legal positivism, legitimacy, procedural justice, retributive justice, restorative justice and transitional justice in order to lay the foundation for the establishment and functions of the tribunals The second part examines the emergence and legitimacy of the Nuremberg and Tokyo tribunals. The third part reviews the ICTY and ICTR and their jurisprudence. The fourth part concludes the article.

### 1.1 Theoretical Framework

[13] Ibid.
[14] Sergey Vasiliev, 'Between International Criminal Justice and Injustice: Theorising Legitimacy' in Nobuo Hayashi and Cecilia Bailliet (eds), *The Legitimacy of International Criminal Tribunals*(Cambridge University Ptess 2017) 66-68.
[15] Ibid.

The theoretical framework relevant to the legitimacy and effectiveness of international criminal tribunals could include several interrelated theories and concepts:

1. **Legal Positivism**: This theory emphasises the importance of formal legal structures and adherence to established laws. Legal positivism is a jurisprudence school that views law as a set of rules and norms created by humans, separate from moral or social considerations.[16] The theory of legal positivism primarily asserts that law is a man-made construct. The assertion underscores the distinction between law and morality, claiming that the legitimacy of a law is derived from acknowledged legal authorities.[17] Critics contend that this division can result in moral relativism, the transfer of responsibility, and a stagnant perspective on societal transformation.[18] Furthermore, they argue that legal positivism needs to adequately acknowledge the significance of judicial interpretation and discretion in implementing laws, which may introduce moral and ethical factors into laws meant to be impartial.[19] Lastly, it could disregard societal power dynamics, potentially perpetuating systemic inequalities.[20] Despite its significant significance, legal positivism gives rise to problems regarding the interplay between law, morality, and societal norms. In the context of the international criminal justice system, the legitimacy of the international criminal tribunals may derive from their strict adherence to international law and legally binding treaties, such as the resolution that established the ICTY and ICTR, the Nuremberg Charter and Rome Statute for the ICC.
2. **Legitimacy Theory**: Legitimacy theory posits that organisations gain legitimacy when their actions are perceived as desirable, proper, or appropriate within some socially constructed system of norms, values, and beliefs. For tribunals, this means that their structures, processes, and decisions must align with international norms and the expectations of the global community. There are always power dynamics in every

[16] Pragalbh Bhardwaj and Rishi Raj, 'Legal Positivism: An Analysis of Austin and Bentham' (2014) 1(6)'*International Journal of Law and Legal Jurisprudence Studies* 2-5.
[17] Ibid.
[18] Sean Coyle, *From Positivism to Idealism : A Study of Moral Dimensions of Legality*(Routledge 2017) ;Jan Sieckmann, 'Alexy's Critique of Legal Positivism' in Torben Spaak and Patricia Mindus (eds) *The Cambridge Companion to Legal Positivism*(Cambridge University Press 2021)721-741.
[19] James Krueger, 'A Critique of Positivism as a Belief System' 20093(2) *Mizan Law* Review 342-350.Carmen Chas, 'Hans J. Morgenthau's Critique of Legal Positivism: Politics, Justice, and Ethics in International Law(2023) 5 *Jus Cogens* 59-84.
[20] Ibid.

> dimension of relationships because it thrives on inequality and asymmetrical interactions. For instance, the powerful/the less powerful, the rich/poor, the boss/the servant, the employer/the employees. Depending on the complexities of interactions, this binary classification may shift. Hence, the legitimacy of an establishment is not watertight. It could become fluid as a result of power dynamics.

For the purpose of this article, it is essential to define the term 'legitimacy'. According to Tyler and Jackson's research, legitimacy underscores three indicators:

(i)perceived obligation to defer to decisions and obey rules and laws;

(ii)the expression of trust and confidence in legal authorities;

(iii) normative alignment, i.e ., the degree to which people believe that the authorities share the values of the people in the community.[21]

Similarly, it has been argued that legitimacy is a reflection of two-prong ideas: "a basis for deference" and procedural justice is a precondition to legitimacy.[22]*D'entreves* notes that "Power, in order to be "just "must be both legitimate and law-abiding. Accordingly, the unjust ruler or tyrant may be defined *ex parte exercili* as well as *ex defectu tituli*. His rule can be unjust for the manner in which it is exercised, if he does not keep within the bounds of legality. Nevertheless, it can also be unjust, which is inevitable if it lacks the right "title" that grants legitimacy.[23]

Furthermore, Rawls introduced "the liberal principle of legitimacy," he opines:

> "Our exercise of political power is fully proper only when it is exercised in accordance with a constitution the essentials of which all citizens are free and equal may reasonably be expected to endorse in the light of principles and ideals acceptable to their common human reason."[24]

Rawls's theory posits that the "proper" exercise of political power should be in compliance with the *grundnorm*, i.e., the constitution. In addition, legitimacy requires the citizens to be free and

[21] Tom Tyler, 'Wither Legitimacy? Legal Authority in the 21st Century' (2023*) Annual Review of Law and Social Science*, 4.
[22] Tom Tyler, 'Why people Obey the Law' (Princeton University Press 2006); Tom R. Tyler 'Wither Legitimacy? Legal Authority in the 21st Century' (2023*) Annual Review of Law and Social Science* 4.
[23] Alexander P. D' Entreves, 'Legality and Legitimacy' (1963) 16(4)*The Review of Metaphysics* 687.
[24] John Rawls, *A Theory of Justice* (Belknap Press 1971) 3-10.

equal, which stems from the principle of the rule of law and democracy. Finally, it is reasonably expected for citizens to endorse the constitutional essentials. In this context, citizens could refer to the general public. The use of "may" is not required, but free and equal citizens are expected to endorse it. The citizens within this context could mean the public.

3. **Procedural Justice Theory**: This framework asserts that the fairness of the processes involved in decision-making contributes to the perceived legitimacy of the outcome. In his study, Tyler investigated procedural fairness's influence on citizen satisfaction, evaluations of legal authorities, and interpretations of fair procedures.[25] The findings indicated that assessments of procedural justice are intricate and diverse, encompassing seven factors that influence citizens' judgements: perceived fairness, ethical behaviour, honesty, possibilities for representation, decision quality, error rectification, and bias. Procedural justice is context-dependent, indicating no universally fair resource distribution and dispute resolution procedures.[26]The results confirm the previous research findings that procedural justice significantly influences satisfaction and evaluations.[27] Adherence to fair trial standards and due process for international tribunals cannot be overstated. If victims are unsatisfied with the procedure or outcome of the criminal trials, their disappointment may lead to a loss of trust in the tribunals.

4. **Retributive Justice Theory**: The international criminal justice system is founded on retributive justice, and offenders are punished proportionally to the moral magnitude of their wrongs.[28] This approach prioritises the perpetrator's punishment, addressing the wrong rather than the harm and placing the offender at the forefront.[29] Bentham's morality aims to maximise happiness among the greatest number, emphasising the state's

[25] Tom Tyler, 'What Is Procedural Justice? - Criteria Used By Citizens to Assess the Fairness of Legal Procedures' (2003)37(3)*Law and Society Review* 514-520.
[26] Ibid.
[27] Ibid.
[28] Eleanor Hannon Judah & Michael Bryant, 'Rethinking Criminal Justice: Retribution vs. Restoration', in Eleanor Hannon Judah & Michael Bryant(eds) *Criminal Justice: Retribution Vs. Restoration* ( 1st Edition Routledge 2004) 1-3;Donald Hermann, 'Restorative Justice and Retributive Justice: An Opportunity for Cooperation or an Occasion for Conflict in the Search for Justice(2017) 16(1)Seattle Journal for Social Justice 71-72. D<https://digitalcommons.law.seattleu.edu/cgi/viewcontent.cgi?article=1889&context=sjsj>
[29] Kelvin Smith and John Darley, 'Psychological Aspect of Retributive Justice',(2008) 40(1)*Advances in Experimental Social Psychology*193-236.

duty to promote societal happiness through punishment and reward.[30] The literature on deterrence argues that the primary rationale for punishing an international criminal trial is to prevent future wrongdoing.[31] Rothe and Mullins conducted a study asserting that deterrence is the underlying concept of international criminal prosecution. Rothe and Mullin's perspective is derived from criminology, as evidenced by observation.[32] According to the author, international criminal tribunals have successfully incorporated accountability and have established lasting restraints against international crimes in the global community. Deterrence theory argues that the threat of punishment can prevent crimes. In this sense, the effectiveness of international tribunals is related to their ability to deter individuals from committing international crimes.[33] According to the author, international criminal tribunals have integrated accountability and '*instilled long-term inhibitions against international crimes in the global community'*[34] International criminal law and courts may not adequately deter gross human rights violations because harsher penalties may negatively impact the occurrence of severe abuses.

5. **Restorative justice theory:** Marshall defines Restorative justice as a "process whereby parties with a stake in a specific offence collectively resolve how to deal with the aftermath of the offence and its implications for the future."[35] Nevertheless, Doolin critiques Marshall's definition, contending that it is deficient in crucial aspects such as identifying the parties involved, the procedures employed to resolve, and the most effective approaches to resolving conflicts by the principles of restorative justice.[36] In addition, she suggests that the definition should consider the outcome and not only the process, as Marshall's meaning is ambiguous and could result in non-reparative

[30] Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation* (New York Macmillan 1948)
[31] Mirko Bagaric and Jon Morss, International Sentencing Law: In Search of a Justification and Coherent Framework: (2006) 6 International Criminal Law Review 253.
[32] Dawn Rothe and Christopher Mullins, 'Beyond the Juristic of International Criminal Justice System: The Relevance of Criminological Insights to International Criminal Law and its Control'(2010) 10(1) International Criminal Law Review 97-110.
[33] Mirko Bagaric and Jon Morss, International Sentencing Law: In Search of a Justification and Coherent Framework: (2006) 6 International Criminal Law Review 253
[34] Payam Akhaven,'Beyond Impunity : Can International Criminal Justice Prevent Future Atrocities?' (2001)7 *American Journal of International Law* 27.
[35] Tony Marshall, *Restorative Justice:An Overview* Accessible at http://www.antoniocasella.eu/restorative/Marshall_1999-b.pdfLast> accessed 01 November 2023.
[36] Katherine Doolin, 'But what does it mean ?Seeking definitional clarity in restorative justice, *Journal of Criminal Law*(2007) *The Journal of Criminal Law* accessible at <https://journals.sagepub.com/doi/pdf/10.1350/jcla.2007.71.5.427> last accessed 16 January 2023.

outcomes. Zehr's restorative justice principles centre the relationship between parties involved in conflict resolution, explicitly addressing the harms and needs of victims, addressing responsibilities, employing inclusive procedures, engaging victims, offenders, families, community members, and society, and striving to rectify the wrongdoing.[37] Ness and Strong categorise restorative justice into three fundamental pillars: encounter, amends, and reintegration. They assert that victims should play a central participatory role in these processes.[38] From this theory, it is inferred that restorative justice seeks to restore the harm caused by criminal behaviour. For International tribunals, this includes recognising and considering the interests of victims and communities negatively impacted during the justice process. However, it is questionable if international tribunals have the capacity to incorporate the principles of restorative justice, given that the international criminal justice system seems to be substantially founded on retributive justice.

5. **Transitional Justice Theory**: This field examines how societies address legacies of past human rights abuses, such as through trials, truth commissions, and reparation programs. International tribunals are one mechanism within this broader framework to address serious human rights violations and international humanitarian law.[39] Transitional justice is a mechanism designed to address and rectify instances of systemic or widespread human rights abuses.[40] It aims to obtain recognition for individuals who have been harmed and to advocate for advancing opportunities for peace, reconciliation, and democracy. Transitional justice refers to the application of justice in countries that are transforming after a time of widespread human rights violations.[41] It is not a distinct type of justice but rather a form of justice tailored to this society's specific needs. Occasionally, these transformations occur abruptly; in other instances, they may transpire gradually over several decades. Additionally, transitional justice pertains to how societies

[37] Howard Zehr, *The Little Book of Restorative Justice (* Good Books 2002)33.
[38] Daniel Van Ness and Karen Heetderks Strong, *Restoring Justice* (Anderson Publishing 2006)43-48.
[39] Natasha Stamenkovikj, *The Right to Know the Truth in Transitional Justice Processes* (Brill Nijhoff 2021) 29-32
[40]International Center for Transitional Justice, 'What is Transitional Justice' available at <https://www.ictj.org/sites/default/files/ICTJ-Global-Transitional-Justice-2009-English.pdf>
[41] Ibid.

address the consequences of significant and severe human rights abuses.[42] It poses some of the most challenges in law, politics, and social sciences.

These theories work together to form a comprehensive theoretical framework for analysing the legitimacy and effectiveness of international criminal tribunals. They assist scholars and practitioners in understanding the multifaceted nature of these institutions, their role in the international system, and the challenges they face in delivering justice.

## The International Military Tribunals: Nuremberg Tribunal and Tokyo Tribunals

The mandate of the Leipzig trial was to prosecute alleged German war criminals accused of having committed acts in violation of laws and customs of war in the First World War.[43]The seat of the trial was the highest Court (Supreme Court) in Germany. Notably, the rules of civil law jurisdiction, the inquisitorial criminal procedure system, were applied.[44] The Leipzig trial actively involved victims in the trials. However, it is noteworthy that these proceedings tilted more towards national trials, which could be described as a futile effort to internationalise the criminal trial.

The history of international criminal justice is traceable to the Nuremberg and the International Military Tribunal for the Far East, established in Tokyo (Tokyo Tribunal).[45] These tribunals entrenched individual responsibility for crimes against peace, war crimes and crimes against humanity committed by the German and Tokyo leaders.[46] In addition, the Tokyo tribunal shared objectives similar to those of the Nuremberg tribunal. In particular, the Nuremberg Charter referred to "war crimes, crimes against peace and crimes against humanity",[47] demonstrating the first reference to these categories of crimes and a precise definition as contained in the Charter. The Nuremberg judgment notes that "(c)rimes against international law are committed by men, not by abstract entities, and only by punishing individuals who

[42] *Valesquez Rodriguez v Honduras*, Merits July 1988.
[43]Report of the Proceeding before the Supreme Court in Leipzig, accessible at https://ihl-databases.icrc.org/en/national-practice/report-proceeding-supreme-court-leipzig> Last accessed 16 March 2023; Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties, *American Journal of International Law* 95.
[44] Ibid.
[45] Established by proclamation made by General MacArthur in 1946 to address Japanese war crimes,
[46] Madoka Futamura, *War Crimes Tribunals and Transitional Justice*(First Edition, Routledge 2008)3;The London Agreement/ Nuremberg Charter; The Charter annexed to the Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis(London Agreement), 8 August 1945.
[47] Charter of the International Military Tribunals, Annex to the Agreement for the prosecution and punishment of the major war crimes of the European Axis(London Agreement), 8 August 1945.,Article 6.

commit such crimes can the provisions of international law be enforced."[48] Hence, the investigation and prosecution of leaders of a nation for crimes committed against their subjects and other people. The trial of these top officials responsible for these crimes implies that immunity and superior orders would not avail the perpetrators of serious violations of human rights. The decision to try these leaders established a new precedent that perpetrators would face justice for committing atrocity crimes.

The event of WWII precipitated the negotiations for the International Military Tribunal (IMT).[49] The transcript of the four-power London Conference conducted from late June to early August 1945 conveys the brusqueness and necessity of the negotiations leading to the postwar Nuremberg Tribunal better than any other document.[50] At this meeting, which was completed by signing the United Nations Charter and bombing of Hiroshima, the Allies deliberated formally establishing a court to try the captured German leaders; in actuality, the conference nearly collapsed.[51] The American delegate threatened to withdraw over the issue of the court's location, the French delegate opposed plans to bring charges for crimes against peace, the British expressed concern regarding the possibility of German countercharges, and the Soviets opposed the adoption of a definition of aggression.[52] The debates were acrimonious, meandering, foreboding, repetitive, and disjointed. There were lots of miscommunications between common law and civil law delegates, who were all obligated to strengthen the interests of their respective countries. There was no certainty that a tribunal would be constituted, nor could they predict that their discussions would provide the conceptual framework for two major trials, one in Nuremberg and the other in Tokyo, until the final day. This was history in the making and an unenlightening process.[53]

The tribunal pointed out its judgement:

> "The charges that the defendants planned and waged aggressive wars are charges of utmost gravity. War is essentially an evil thing. Its consequences are not confined to the belligerent states alone, but affect the whole world…"[54]

The Nuremberg trial lasted from November 1945 to October 1946, 10 months.[55] The Nuremberg Tribunal consisted of four prominent judges from the United Kingdom, the United States of America, the French

[48] Judgment of the International Military Tribunal, Trial of the Major War Criminals, 1947, *Official Documents,* Vol, 1, p, 223.
[49] Leslie Greene, *The Contemporary Law of Armed Conflict* (3rd Edition, Manchester University Press 2017)15-17.
[50]United States Department of State, Report of Robert H Jackson, United States Representative to the International Conference on Military Trials, London, 1945.
[51] Kirsten Sellars, "Imperfect Justice at Nuremberg and Tokyo (2011) 21(4) *European Journal of International Law,* 1086.
[52] Ibid.
[53] Ibid.
[54] Cmd 6964 (1946).
[55] Robert K. Woetzel, *The Nuremberg Trials in International Law* ( First Edition , 1960, Stevens & Sons Limited 1962)1-3.

Republic, and the USSR[56]The defendants were made up of military, economic, and political high officials of the annihilated Nazi Empire.[57]The tribunal prosecuted twenty-one defendants (excluding Robert Ley, who committed suicide; the trial of Gustav Krupp von Bohlen and Halbach was postponed *sine die* due to acute illness). The tribunal had 403 open sessions. It has been reported that thirty-three prosecutor witnesses presented evidence of over 4,000 documents. Concerning the defence, there was an aggregate of sixty-one witnesses, besides nineteen defendants and 143 witnesses, which put in evidence for them via formal questions and accompanying/supporting documents.[58] The tribunals tried different German statesmen, military leaders, and high-ranking officials on four count charges:

1) the crime of being a party to a common plan or conspiracy to war of aggression;

2)crimes against peace that is planning, preparing, initiating wars of aggression/violation of international treaties;

3) and war crimes;

4)crimes against humanity.

Some commentators questioned the legality of the judges' composition and the conduct of trial proceedings because it was more political than legal.[59] The proceedings were referred to as the "trial of the vanquished by the victors, and, therefore, an act of political policy rather than a judicial proceeding."[60] The critics posit that the victors established these IMTs to punish the defeated. Contesting the rationale behind the formation of the tribunal may visit the roots of its legitimacy and operations. On the other hand, it can be argued that the Nuremberg and Tokyo Tribunals played a crucial role in establishing precedents in international law and contributed to the development of accountability standards for war crimes and crimes against humanity.

Furthermore, some opponents raised concerns about the tribunal; their criticisms centered substantially on jurisdiction, retroactivity, and selectivity,[61] the latter two of which are now

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[56] Ibid.

[57] Robert K. Woetzel, *The Nuremberg Trials in International Law* ( First Edition , 1960, Stevens & Sons Limited 1962)1.

[58] Ibid (n 2); Reports also confirm that the prosecution introduced 101 witnesses, 1,809 affidavits and 6 reports against indicted organisations, Reported evidence in the trial consisted 24 printed Volumes and 17 additional volumes of documents.

[59] Robert K. Woetzel, *The Nuremberg Trials in International Law* ( First Edition , 1960, Stevens & Sons Limited 1962 XI.

[60]Robert K. Woetzel, *The Nuremberg Trials in International Law* ( First Edition , 1960, Stevens & Sons Limited 1962 XI.

[61] Hans Leonhardt, 'The Nuremberg Tribunal: A Legal Analysis' (1949) 11(4) *Review of Politics* 449-476;George A. Finch, 'The Nuremberg Trial and International Law' (1947 ) 41(1)*American Journal of International Law,* 20-37*;* Max Radin, "Justice at Nuremberg" (1946)24(3) *Foreign Affairs,* 369-384;H. Von Hebel, 'An international Criminal

universally acknowledged as valid complaints against Nuremberg.[62]One of the flaws of the tribunal is that the London Agreement and the Moscow Declaration did not refer to victims. Still, the tribunal focused on the three crimes under its jurisdiction: crimes against peace, war crimes, and crimes against humanity. The focus on aggression takes an international law approach, recognising states as the primary victims and justice required between countries, excluding individuals as victims of aggression.[63]Article 6(c) of the Charter covered a wider spectrum of violence than war crimes, and the tribunal found that crimes against humanity were supplementary crimes to crimes against peace and war crimes.[64]Despite this, the tribunal denied the recognition of numerous German victims due to the limits of legal language. The Holocaust is demonstrated as an 'illustration' of aggression rather than the mass extermination of six million Jews, reducing its seriousness and gravity.[65] The Soviet Union's participation at the Nuremberg Tribunal further circumscribed victim recognition, with the Soviets committing atrocities such as the Katyn massacre and the mass rape of German women, which demonstrated the political nature of the tribunal.[66] Nuremberg disregarded the memory of the victims by concealing the responsibility of the Soviet Union. The tribunal only had jurisdiction to punish crimes committed by the European Axis.

In addition, the Charter was also silent on sexual and gender-based crimes. The absence of rape in Article 6 demonstrated the drafters' reluctance to recognise victims of sexual violence and the exclusion of female victims. This non-recognition could be because of the prioitisation of crimes of concern at that time with the perspective that conflict-related sexual crimes did not meet the threshold of ‘crimes of concern.’Also, given that the tribunal was the first of its kind, plausibly, perfection was not expected but a blueprint or foundation for international criminal law. Nonetheless, these perceived flaws and exclusion of some crimes could potentially negatively affect some categories of victims and generate implications for the international community.

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Court: a historical perspective’, in H.Von Hebel , J. Lammers and J. Schukking(eds), *Reflections on the International Criminal Court*(The Hague : Asser, 1999) 13-38

[62] Kirsten Sellars, ‘Imperfect Justice at Nuremberg and Tokyo’(2011) 21(4) *European Journal of International Law* 1089.

[63] Luke Moffett, ‘The Role of Victims at the International Military Tribunals of the Second World War’12(2012) *International Criminal Law Review,* 245-270.

[64] Ibid.

[65] Ibid.

[66] Woetzel, supra at 30.

Similarly, the marginalisation of victims at Nuremberg is further reiterated in its absence of victim provisions.[67]The Charter had no provisions for victim participation due to adversarial criminal procedures. Nevertheless, victims participated directly as witnesses, not in their personal capacity. They testified about their personal suffering, identifying defendants at the scenes of atrocities and witnessing the treatment of others in camps, prisons, and concentration camps. [68]A cursory look at the IMT Transcripts reveals the prosecutors' plea to the judges to consider the victims' concerns and plight in determining the judgments and punishment. For instance, the French prosecutor persuaded the judges in his closing statement "to heed the voice of innocent blood crying for justice".[69] Similarly, The American prosecutor implored the judges to ensure that "justice may be done to these individuals as to their countless victims."[70] Unfortunately, the judges did not accept any of the pleas; hence, victims were utilised as prosecution witnesses to secure a conviction for the defendants, thereby circumscribing their concerns, needs, and potential to impact the criminal proceedings and sentencing outcome. As mentioned earlier, the strict adherence to adversarial criminal procedures, rooted in common law tradition, could be the reason for the exclusion of victims.

Be that as it may, the Tokyo Tribunal shared similar conduct with the Nuremberg Tribunal; while the Tokyo War Crimes trials took place from May 1946 to November 1948, it tried the Class "A" criminals.[71] The tribunals found all the defendants guilty. However, like its counterpart, victims were not granted the platform to express their views and the consequences of the Second World War on their lives during the criminal proceedings and sentencing. The sentencing traversed the death penalty, life imprisonment, and various years of imprisonment.[72] In his dissenting opinion, one of the justices highlighted the tribunal's function as victor's justice.[73] Justice Radhabinod Pal

[67] Ibid.
[68] Sam Garkawe, 'The Role and Rights of Victims at the Nuremberg International Military Tribunal, in H. Reginbogin, C. Safferling, and W. Hippel,(eds.), *The Nuremberg Trials: International Criminal Law Since 1945,* (Kluwer 2006)pp. 86-94.
[69] IMT Transcripts Vol. XIX, p.569; Luke Moffett, The Role of Victims at the International Military Tribunals of the Second World War"12(2012) *International Criminal Law Review,* 248.
[70] IMT Vol. XIX, p.434; Moffett, Supra 34.
[71] IMT Transcripts, Vol. XIX, p.569;Luke Moffett, The Role of Victims at the International Military Tribunals of the Second World War"12(2012) *International Criminal Law Review* 248;Robert K. Woetzel, *The Nuremberg Trials in International Law* ( First Edition , 1960, Stevens & Sons Limited 1962)10.
[72] Ibid.
[73] Timothy Brook, 'The Tokyo Judgment and the Rape of Nanking' (2001) 60 (3)*Journal of Asian Studies* 673–700;Fujita Hisakazu, 'The Tokyo Trial: Humanity's Justice v Victors' Justice in Yuki Tanaka, Tim McCormacj and

regarded the trial as an unjust instance of victor's justice, as it prosecuted persons for actions deemed criminal only after they had been carried out,[74] thus highlighting retroactive laws. Arguably, the allied powers involved in the criminal prosecution used positive laws as an instrument to shield them from responsibility while simultaneously prosecuting the other parties involved in the hostilities. Therefore, it seems the IMT trials were not totally free from political considerations and partiality.

Interestingly, the trial demonstrated the severity of some elements of crimes, such as war crimes and crimes against humanity. These crimes were listed. For instance, the Tokyo tribunal stated:

> "The evidence relating to atrocities and other conventional war crimes presented before the tribunals established that from the opening of the war in China until the surrender of Japan in August 1945, torture, murder, rape and other cruelties of the most inhumane and barbarous character were freely practised by the Japanese Army and Navy. During a period of several months, the tribunal heard evidence, orally or by affidavit, from witnesses who testified in detail to atrocities committed in all theatres of war on a scale so vast, yet following so common a pattern in all theatres, that only one conclusion is possible –the atrocities were either secretly ordered or wilfully permitted by the Japanese Government or individual members thereof and by the leaders of the armed forces."[75]

Furthermore, the tribunal also noted:

> "...some women were raped, and their infants bayoneted in their arms. After raping the women, the Japanese poured gasoline on their hair and ignited it. The breasts of some of the women were cut off by the Japanese soldiers."[76]

The tribunal highlighted that the senior members of the government and military command did not object to the actions of the foot soldiers.[77] In addition, the tribunal emphasised that the government failed to penalise these soldiers for these crimes,[78] thereby complicating the government officials and invoking command responsibility. The charges excluded sexual and gender-based violence. One notable category of serious crimes committed during the WWII in Japan was 'comfort women" system.; a system that coerced women and girls into sexual slavery.

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Gerry Simpson (eds), *Beyond Victor's Justice? The Tokyo War Crimes Trial* Revisited(1st Edition, Nijhoff Publishers 2011)3

[74] SN Misra,'Tokyo Trials :Redefining Dissent by an Indian Judge' available at https://www.indiandefencereview.com/news/tokyo-trials-defining-dissent-by-an-indian-judge/> accessed 25 May 2024.

[75] Tokyo Tribunal Judgment at pp 49, 592.

[76] Tokyo Tribunal Judgment at 49, 640.

[77] Richard Minera, 'Victor's Justice:Tokyo War Crimes Trial'(Princeton University Press 2016)5-10; Ibid

[78] Ibid.

The Japanese referred to them as "comfort women", a euphemism derived from the Japanese word *Ianfu.* Although the comfort women system preceded WWII, this system was operative during WWII.[79] Hence, the comfort women system, used by the Japanese Imperial Military, constituted war crimes and crimes against humanity because women and girls were forced into sexual slavery and prostitution by Japanese officials.[80] The victims have ranged from ten to hundreds of thousands, with approximately 200,000 comfort women.[81]

Given that the tribunals used expert and documentary evidence, most documents relating to Japan's conduct of war were destroyed in compliance with government directives towards the end of the war.[82]This destruction silenced the women as the comfort hotels were argued not to have existed. These women were denied justice based on the absence of evidence that women were forced into slavery during the Second World War. Unfortunately, the end of the Second World War did not stop the brothel operations in Japan.[83] One of the women stated in an interview: "There was no rest…they had sex with me every minute".[84]The Tokyo trials' silence on the acknowledgment of the victims of sexual violence meant the dismissal of their voices and concerns.

Aside from the absence of victim participation in the Charter, plausibly, the repression of the comfort women at the inception of international criminal justice illustrates all forms of sexual violence against women during armed conflict may not have been construed as substantive crimes. While these tribunals noted the existence of victims as a consequence of armed conflict, victims' presence was perceived as a means to an end-conviction and sentencing.

One of the IMT's legacies reveals that the instrumentalisation of victims as witnesses has always been the relic of criminal proceedings, especially in common law traditions from time immemorial. Victims, as instruments of prosecution, espouse a retributive function in convicting

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[79] Nicola Henry, 'Memory of an Injustice: The "Comfort Women" and the Legacy of the Tokyo Trial'(2013)37(3) *Asian Studies Review* 362-366.
[80] Ibid.
[81] Asian Women's Fund, 'The "Comfort Women" Issue and the Asian Women's Fund', 2007 accessible at <https://www.awf.or.jp/pdf/0170.pdf> last accessed 26 May 2024>
[82] Judgment, paras 937-940.
[83] Ustinia Dolgopol and Snehal Paranjape, International Commission of Jurists, 'Comfort Women : An Unfinished Ordeal,' International Commission of Jurists 141-147.
[84] Maria Rosa Henson, a Filipina woman, who was forced into prostitution in 1943. Interview conducted by Deutsche Welle in 2013. It has been reported that Douglas Arthur stopped the activities of the system in 1946; Sonya Kuki, 'The Burden of History: The Issue of "Comfort Women" and What Japan Must do to Move Forward' (2013) 1 *Journal of International Affairs* 254-256.

the accused. However, they have contributed to developing victims' emancipation and rights in international criminal justice. McCarthy, Elander, and Findlay argue that the rationale behind establishing international criminal courts and tribunals is the dispensation of 'justice for victims'.[85]If victims are aware of this, it is only natural that their expectation of justice starts from the preliminary till the sentencing phase. Victims are not instruments for prosecution, but distinct entities with a sense of belonging in criminal proceedings and sentencing processes.

Furthermore, the aftermath of gross violations of human rights and international humanitarian law presupposes the existence of victims of crimes. Since these crimes are large-scale, they inadvertently lead many individuals to the receiving end. These victims are individuals or organisations that have suffered harm in one way or another due to offences committed by perpetrators.[86] Justice must be delivered to these victims, the perpetrators, and the immediate community affected. Therefore, restoration of victims is a significant aspect of restorative justice.

One of the most significant findings in this section is that there was no victim participation during sentencing at the IMTs. The tribunal was designed to prosecute high-ranking Nazi and Tokyo officers responsible for war crimes, crimes against peace, and crimes against humanity during WWII.[87]However, due to the significant reliance on documentary evidence, most of the victims' were repressed, highlighting that the tribunal prioritised prosecution and accountability through individual criminal responsibility over victims' justice. Nevertheless, it is noteworthy that these IMTs are the cornerstone for developing international criminal law and recognising victims' participatory rights at the ICC.

In addition, the Charter was also silent on sexual and gender-based crimes. The absence of rape in Article 6 showed the drafters' reluctance to recognise victims of sexual violence and the exclusion of female victims. Similarly, the marginalisation of victims at Nuremberg is further reiterated in its absence of victim provisions.[88]

The Charter had no provisions for victim participation due to adversarial criminal procedures. Nevertheless, victims participated directly as witnesses, not in their personal capacity. They

[85] Conor McCarthy, 'Victim redress and international criminal justice.'(2012) 10*Journal of International Criminal Justice* 351–372 ; Mark Findlay, 'Activating a victim constituency in international criminal justice.' (2009) 3*The International Journal of Transitional Justice* 183–206.
[86] The Declaration of Basic Principles of Justice for Victims of Crime and Abuse 1985, Article 1.
[87] Garkawe (n 68).
[88] Ibid.

testified about their suffering, identifying defendants at the scenes of atrocities and witnessing the treatment of others in camps, prisons, and concentration camps. [89]A cursory look at the IMT Transcripts reveals the prosecutors' plea to the judges to consider the victims' concerns and plight in determining the judgments and punishment. For instance, the French prosecutor persuaded the judges in his closing statement "to heed the voice of innocent blood crying for justice".[90] Similarly, The American prosecutor implored the judges to ensure that "justice may be done to these individuals as to their countless victims."[91] Unfortunately, the judges did not accept any of the pleas; hence, victims were utilised as prosecution witnesses to secure a conviction for the defendants, thereby circumscribing their concerns, needs, and potential to impact the criminal proceedings and sentencing outcome. As mentioned earlier, the strict adherence to adversarial criminal procedures, rooted in common law tradition, could be the reason for the marginalisation of victims.

According to Bassiouni, these IMTs established the prospects of a functional international criminal justice system, provided it receives political support and adequate resources.[92] Hence, despite the perceived flaws of the IMTs, the influence of the legacy of the IMT on the subsequent international criminal tribunals cannot be overemphasised. In summary, the IMTs developed several significant doctrines. One strategy for dealing with crimes against humanity is to classify them as customary or general principles of law, eliminate the defence of superior commands, and incorporate the concept of command responsibility as a type of criminal participation.[93] Additionally, the decisions of the IMTs serve as judicial precedents for subsequent ad-hoc tribunals and ICC.However, despite the commendable achievements of the Nuremberg and Tokyo tribunals, there was an immense absence of clear standards for deciding suitable punishments for war crimes and crimes against humanity. The following section will analyse the emergence of the ICTY and ICTR and its legitimacy.

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[89] Sam Garkawe, 'The Role and Rights of Victims at the Nuremberg International Military Tribunal, in H. Reginbogin, C. Safferling, and W. Hippel (eds.), *The Nuremberg Trials: International Criminal Law Since* 1945, (Kluwer 2006)86.

[90] IMT Transcripts, Vol. XIX, p.569; Luke Moffett, 'The Role of Victims at the International Military Tribunals of the Second World War' (2012) 12 *International Criminal Law Review,* 248.

[91] IMT Vol. XIX, p.434; Moffett (n 35).

[92] Cherif Bassiouni, 'Establishing an international criminal court: historical survey' (1995) *Military Law Review* 55

[93] William A. Schabas, Sentencing by International Tribunals: A Human Rights Approach (1999) 7 *Duke Journal of Comparative and International Law* 461–462.

**Legitimacy: The International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda**

Due to Cold War divisions, international criminal tribunals were absent following the Nuremberg and Tokyo trials.[94] Subsequently, the UN established two tribunals in the 1990s: the International Criminal Tribunal for the Former Yugoslavia in 1993 to prosecute serious violations of human rights and international humanitarian law in the former Yugoslavia and the International Criminal Tribunal for Rwanda ("ICTR") in 1994 to address the aftermath of the Rwandan genocide.[95] The Resolution 827 states: "An international tribunal for (…) prosecuting persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia."[96] In a similar vein, Resolution 955 of the UN Security Council set up the ICTR after acknowledging the request of the Rwanda Government.[97]The "unconditional surrender" in postwar Germany and Japan differed from the "civil" conflict in Rwanda and Yugoslavia.[98] Sequel to their respective wars involving "ethnic cleansing" and "genocide," the former Yugoslavia and Rwanda lacked the political capacity, and human and institutional resources to conduct their prosecutions, necessitating the establishment of these ad-hoc tribunals.[99] Similar to its predecessors, the ICTY and ICTR had jurisdiction over war crimes, genocide, and crimes against humanity. It is noteworthy that the ICTR was the first tribunal to find individuals criminally responsible for crimes of genocide pursuant to the 1948 Genocide Convention.[100] The ICTY and ICTR, like the Nuremberg tribunal, prosecuted the most egregious human rights violators due to limited resources.[101]

The UN Security Council unanimously adopted resolution 808(1993) on February 22 1993, to address "grave breaches of humanitarian law…committed on a massive scale and in a systematic fashion" in the former Yugoslavia.[102] It is worth mentioning that none of the provisions of the ICTY Statutes granted victims participatory rights during criminal proceedings or sentencing

[94] Bruce L. Ottley and Theresa Klienhaus, "Confronting the Past: The Elusive Search for Post Conflict Justice" (2010) 45*Irish Jurist,* 109-112.
[95] On May 1993, the UN Security Council passed resolution 827 establishing the ICTY; On November 8 1994, the United Nations Security Council passed Resolution 955 establishing the ICTR
[96] Ibid.
[97] Ibid.
[98] Bruce L. Ottley and Theresa Klienhaus, "Confronting the Past: The Elusive Search for Post Conflict Justice" (2010) 45*Irish Jurist* 134.
[99] Ibid.
[100] Ibid.
[101] Ibid.
[102] S/RES/808, Security Council Resolution 808(1993). S/25704 paragraph 35.

processes. However, the preamble stressed the need to prosecute the individuals responsible for the grave breaches of international humanitarian law and to redress such violations. Paragraph 7 UN resolution 827(1993) states:

> "Acting under Chapter VII of the Charter of the United Nations, decides also that the work of the International Tribunals shall be carried out without prejudice to the right of the victims to seek, through appropriate means, compensation for damages incurred as a result of violations of international humanitarian law."[103]

Given the provision set out in paragraph 7, one can infer that the tribunal acknowledges the right of victims to seek reparations via appropriate mechanisms for the harm suffered as a result of gross violations of international humanitarian law. The following year, the UN Security Council adopted resolution 955(1994) to establish ICTR.[104] It is noted that Rwanda had specific needs by virtue of its situation compared to Yugoslavia. ICTR's situation weighed towards genocide rather than war crimes.[105] These ad-hoc tribunals were influenced by the previous IMT, especially their criminal procedures as well as their predisposition towards victims of mass atrocities. The mandate of the ad-hoc tribunals was justice for the crimes committed.

In the absence of express provisions for victim recognition in the ICTR Statute, the preamble stipulates:

> "Believing that the establishment of an international tribunal for the prosecution of persons responsible for genocide and other above-mentioned violations of international humanitarian law will contribute to ensuring that such violations are halted and effectively redressed."[106]

The above quotation infers that the ICTR statute intended to remedy the wrong or loss incurred by victims of these serious violations. In particular, effective redress may connote compensation and reparation,[107] not victim participatory rights during criminal trials or sentencing. Additionally, the preamble underscores the tribunal's deterrent and retributive function. These functions are directed to the perpetrator and future offenders. It reads:

> "Determined to put an end to such crimes and to take effective measures to bring justice to persons who are responsible for them."[108]

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[103] Security Council Resolution 827(1993), Para. 7.
[104] Madoka Futamura, *War Crimes Tribunals and Transitional Justice* (First Edition, Routledge 2008)2.
[105] S/PV. 3453, Statement of New Zealand.
[106] UN , Statute of the ICTR, Preamble 7.
[107]The New International Webster's Pocket Dictionary of the English Language, New Revised Edition(Trident Reference Publishing, 2006 Edition) 366.
[108] UN , Statute of the ICTR, Preamble 5.

The statement "bringing justice to individuals responsible for the crimes, could mean justice and satisfaction for the victims. However, the Statute left an express gap for victims' justice. Article 23, which sets out penalties, did not incorporate victims' involvement. Rather, it provides that in the determination of sentencing, the Trial Chambers shall consider the gravity of the offence and the individual circumstances of the convicted person. These pointers ensure offender-centred criminal proceedings and equality of arms.

A close call to victims' involvement during criminal proceedings was participation as victim-witnesses. Although Dembour and Haslam noted the instrumentalisation of victims as witnesses during the *Krstic* case, victim-witnesses' testimonies connoted them as objects of trials, with no sense of belonging in the criminal proceedings.[109] On the contrary, it detaches their individual experiences, replacing them as stooges for evidence gathering. Nonetheless, the ICTY trials provided a platform for victims to tell their stories and access "justice."However, justice, in this sense, is strictly retributive. Victims are not permitted to participate in their personal capacity.[110] The Statute of these tribunals does not expressly mention victims

It is no gainsaying that the role of victims as witnesses could subject them to traumatising experiences and loss of hope in the tribunals, given that on the emergence of the ad-hoc tribunals as well as the recount of their mandates, the victims might have placed them on a pedestal. A typical example of this is reflected in the Report submitted by the decisions of a Rwanda-based victims' associations, which highlighted their intention to discontinue their support for ICTR because it was not satisfied with the treatment of victim-witnesses.[111] The report demonstrates how victim-witnesses are constrained during trials.

In Osiel's words:

> "What contributes to re-establishing( the victims') self-respect is the fact that their suffering is listened to in the trials with respect and sympathy, the true story receives official sanction, the nature of the atrocities are publicly and openly discussed, and their perpetrators acts are officially condemned."[112]

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[109] Marie-Benedicte Dembour and Emily Haslam, 'Silencing Hearings? Victim-Witnesses at War Crimes Trials,15(2004) *European Journal of International Law*, 175-177.
[110] Ralph Zacklin, 'Failings of Ad Hoc International Tribunals, The Symposium: The ICTY 10 Years On: The View from Inside-A Tentative Appraisal(2004)*Journal of International Criminal Justice*,Vol.2,p.541-545
[111] International Federation for Human Rights, 'Between Illusions and Disillusions: Victims before the International Criminal Tribunal for Rwanda', accessible at < https://www.fidh.org/en/region/Africa/rwanda/Victims-in-the-Balance-Challenges >last accessed 01 April 2023.
[112] Mark Osiel, *Mass Atrocity,Collective Memory, and the Law*(Routledge 2000) 240.

Dembour and Haslam questioned the assumption that legal proceedings are a viable sphere for victims story-telling.[113] These commentators' stance reinforces the contention that the platform is offender-centred; if victims' participation is incorporated, there will arise the need to strike a balance between the rights of the defendant and the rights of the victims. The non-acknowledgement of victims during sentencing and sentence reduction is not only a legacy of the IMTs but also reflects the stance of international criminal justice in the early stages of its operations.

Arguably, the lack of attention to victims propelled the domestic jurisdiction to establish the Gacaca courts in Rwanda. The ICTR completed its mandate on December 31 2015, while the ICTY concluded its assignment on December 31 2017. The tribunals transferred their functions to the International Residual Mechanism for Criminal Tribunals (IRMCT). Its mandate is to continue the operations of the ICTR and ICTY; tracking and prosecuting the remaining fugitives, appeals proceedings, review proceedings, retrials, trials for contempt and false testimony, protection of victims and witnesses, supervision of the enforcement of sentences, and assistance to national jurisdictions.[114] The IRMCT addresses mass atrocity and conflict by punishing the perpetrators. However, criminal prosecution is one of the transitional justice mechanisms. Thus, there are limitations to the competencies of criminal trials in addressing crimes and post-conflict societies.

According to Zacklin:

> "Criminal Courts exist for the purpose of establishing individual accountability, not to uncover the fates and remains of loved ones. Nor is it their purpose to provide an official history. To the extent that a historical record is integral to individual trials it might be said that this is incidental to the work of the ICTY, but it is not its primary purpose..."[115]

It is commendable that both ICTR and ICTY contributed to developing international criminal law and enhanced individual criminal responsibility. To some extent, these tribunals' operations influenced the ICC's establishment. These tribunals reiterated that gross human rights breaches and international humanitarian law violations have been codified, and their prosecution has been accepted within the international community. Zacklin described the establishment of these ad-

[113] Marie-Benedicte Dembour and Emily Haslam, 'Silencing Hearings? Victim-Witnesses at War Crimes Trials,15(2004) *European Journal of International Law*, 151-177,153.
[114] IRMCT, 'Functions of the Mechanism', available at https://www.irmct.org/en/about/functions> lats accessed 23 May 2023.
[115] Ralph Zacklin, 'The Failings of the Ad hoc International Tribunals 2 *Journal of International Criminal Justice* (2004) pp.541-545.

hoc tribunals as "acts of political contrition," due to the omission of the Security Council to promptly address the imminent collapse of peace in the former Yugoslavia and Rwanda.[116]

The ad-hoc tribunal frameworks on international sentencing have been criticised due to their perceived need for clarity in providing a clear rationale and objective criteria, resulting in ambiguity in its application[117]. In international sentencing, it is common for judicial authorities to frequently reference domestic principles such as deterrence, retribution, and rehabilitation. However, there appears to be a need to thoroughly examine the underlying justifications for imposing sentences and the effectiveness of punitive measures. The absence of a coherent rationale has led to numerous extraneous factors that aggravate and alleviate the circumstances.[118] The International Criminal Tribunal for the Former Yugoslavia and Rwanda have flawed sentencing standards. International sentencing principles including reconciliation, retribution, and rehabilitation are unattainable. General deterrence supports the approach, but selective and inconsistent enforcement impedes it. Tribunals shall examine the guilty plea without aggravating or mitigating elements.[119]

Distance and lack of proximity to the tribunals; for instance, ICTY is located in the Hague, ICTR is located in Arusha, Tanzania.[120] Consequently, financial and distance barriers affected the victims perceptions of the tribunals.[121] It is also argued that the foreign location restrains locals who were witnesses to the crimes from testifying.[122] Furthermore, the location of the tribunals in posed struggles with accessing the witnesses and crime scenes in Yugoslavia and Rwanda Therefore, the fact the ICTR was located outside Rwanda was thought to have reduced its noticeable influence on Rwandan society. Hotis argues the delay stems from a wish to avoid Nuremberg-style unfair trial claims. The wait is due to the difficulty of investigating and apprehending war criminals in the former Yugoslavia and Rwanda and shielding witnesses who

[116] Ralph Zacklin, 'The Failings of Ad Hoc International Tribunals 2*Journal of International Criminal Justice* (2004) 541.
[117] Mirko Bargaric and John Morss, 'International Sentencing Law : In Search for Justification and Coherent Framework' (2006) 6 *International Criminal Law Review,* 254-255.
[118] Mirko Bagaric and John Morss, 'International Sentencing Law : In Search for Justification and Coherent Framework' (2006) 6*International Criminal Law Review,*193-199
[119] Ibid
[120] The ICTY, based in The Hague, and the ICTR, headquartered in Tanzania, indicate that neither tribunal was geographically proximate to the communities where grave human rights abuses and violations of international humanitarian law occurred. Phil Clark, *Distance Justice:The Impact of International Criminal Court on African Politics*(Cambridge University Press 2018)22-45.
[121] Ibid.
[122] Ibid.

would testify against them.[123] Be that as it may, the ICTR has been besieged with legitimacy issues right from its creation even though the Rwanda government had invited the UN to intervene in grave violation of international humanitarian law in Rwanda.[124]One such issue was the Rwandan delegation's frantic opposition to UN Resolution 955.[125]

Arguably, the longer a trial is for the crimes, the less victims and their communities will care and feel justice. However, these trial delays are necessary for the defendant's procedural protection.; delayed trials would be construed as frustrating for the victims' justice. The implications for the victims suggest a purely retributive justice approach and a need for a speedy trial, displacing the needs and interests of the victims. Victims in ICTY/ICTR were mainly used as witnesses whose personal interests were not taken into consideration.

Be that as it may, the ICTR encountered some other challenges that undermined its legitimacy throughout its existence. One major challenge arose from the Rwandan government's rejection, as they doubted the tribunals would meet the expectations of the Rwandan population.[126]The reluctance of the Rwandan government to accept the ICTR espouses the absence of state cooperation, which sabotaged the ICTR's effectiveness. Notably, the Gacaca courts described as 'state-sanctioned criminal tribunals created by statute, whose legitimacy is derived from their status as governmental institutions,' [127] performed restorative function, which was conspicuously absent in the ICTR's proceedings.[128] Furthermore, the tribunal faced criticism for its exclusive focus on atrocities committed by the Hutu ethnic group while omitting to probe crimes perpetrated by the Tutsi.[129] These circumstances led to allegations of "victor's justice" and questioned the tribunal's credibility and accountability.[130]

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[123] Ibid*:* Hotis, "A Fair and Expeditious Trial": A Reappraisal of Slobodan Milosevic' Right to Self- Representation before the International Criminal Tribunal for the Former Yugoslavia'(2006) 6 *Chicago Journal of International Law 775.*

[124] Claire H Boost, "The Legitimacy of the International Criminal Tribunal for Rwanda" in Takeh B. K Sendze, Adesola Adeboyejo, Howard Morrison and Sophia Ugwu (eds) *Contemporary International Criminal Law Issues: Contributions in Pursuit of Accountability for Africa and the World*( First Edition, Asser Press 2023)103-105.

[125] Ibid.

[126] Ibid.

[127] Christopher Le Mon, 'Rwanda's Troubled Gacca Courts' available at <https://dullahomarinstitute.org.za/acjr/resource-centre/Gacaca.pdf > last accessed 27 May 2024.

[128] Ibid.

[129] Ibid.

[130]Victor Peskin, 'Beyond Victor's Justice? The Challenge of Prosecuting the Winners at the International Criminal Tribunals for the Former Yugoslavia and Rwanda' (2005)4(2) *Journal of Human Rights* 213-231.

The ICTR's legitimacy was further contested because it was created under Chapter VII of the UN Charter, which some believed was unnecessary since the violence in Rwanda did not threaten international peace and security.[131] Despite these impediments, the ICTR attempted to establish its credibility through implementing transparent procedures, adhering to legal norms, and promoting national reconciliation and peace.[132] The concept of legitimacy is significant for international criminal courts since it directly impacts their capacity to secure subsistence and resources from stakeholders and effectively influence the countries they serve.[133]

The research findings on international criminal tribunals have highlighted an elaborate discussion of their significant impact on global justice and accountability for grave human rights violations. These tribunals have not only played a significant role in prosecuting gross international crimes but have also influenced the international community's perception and approach to addressing such atrocities. One of the key contributions of earlier international criminal tribunals is their role in setting precedents for prosecuting gross violations of human rights and international humanitarian law. These tribunals have contributed to developing and strengthening international criminal law by establishing legal standards and principles. They have created various legal frameworks for holding individuals accountable for their actions, regardless of their position or nationality.

It is observed that external factors, such as lack of state cooperation, could question tribunals' legitimacy. Hence, regardless of how legitimate the foundation of a criminal tribunal is, it could also be influenced by non-internal circumstances that might challenge these tribunals' activities. Moreover, criminal tribunals that solely focus on perpetrators to the exclusion of victims of international crimes might raise concerns on issues of transparency and accountability because it is insufficient to address the wrong; the harm caused to victims should also be addressed and reparations issued where required.

Nonetheless, international criminal tribunals have profoundly impacted the perception of justice and the pursuit of accountability, as well as upholding the legitimacy of the criminal justice system and its challenges.

[131] Boost (n 124).
[132] Ibid.
[133] Ibid.

## Conclusion

In conclusion, the Nuremberg and Tokyo Tribunals, the ICTY, and the ICTR have played significant roles in establishing historical truth, promoting justice, and contributing to the evolution of international criminal law. Despite criticisms regarding the composition of judges and the political nature of the trials,[134] these tribunals have served as crucial mechanisms for holding individuals accountable for war crimes and crimes against humanity. These tribunals have undoubtedly influenced the field of transitional justice and have set precedents in international law. As the world continues to address complex legal and ethical questions related to wartime accountability, the legacy of these tribunals will remain significant in shaping international legal frameworks and standards.[135] It is important to note that the legitimacy of any tribunal is subject to ongoing debate and interpretation. Further analysis and discussion are necessary to fully assess the effectiveness and legitimacy of these tribunals in achieving their goals and promoting justice in the context of international conflicts. Nevertheless, it appears the future of international criminal justice may be domestic, given that there are situations where domestic jurisdiction may have primacy over supranational prosecution.

## Recommendations

Despite some of its achievements, the international criminal justice system is still a work in progress. Although the IMTs have accomplished their mandate, the legacy cannot be relegated. Although the ICTY and ICTR have completed their mandates, the International Residual Mechanism for Criminal Tribunals(IRMCT) is still in operation.[136]

It is recommended that the legitimacy and effectiveness of international criminal tribunals could be improved with a victim-oriented approach and outreach. One of the flaws of these tribunals is

[134] Woetzel Supra 55.

[135] William Schabas, *An Introduction to the International Criminal Court*(Cambridge University Press 2007) paraphrased by Bruce L. Ottley and Theresa Klienhaus, "Confronting the Past:The Elusive Search for Post Conflict Justice" (2010) 45*Irish Jurist,* 109-112.

[136] Pursuant to the completion strategy for the ICTY, Resolutions 1503 and 1534 of the United Nations Security Council received official endorsement for implementing a comprehensive three-phase plan. The projected timeline included the conclusion of all investigations by the close of 2004, the finalisation of all initial trials by 2008, and execution of all tasks by 2010. The first deadline was effectively achieved as every investigation was concluded by December 31, 2004. The emergence of the Mechanism for International Criminal Tribunals is a crucial component of the Completion Strategy. The aforementioned entity is a recently established ad hoc organisation created by adopting the United Nations Security Council Resolution 1966 (2010).

the exclusion of victims of international crimes from criminal trials. Since transitional justice seems to offer a holistic strategy for post-conflict societies, a more friendly victim approach could enhance the legitimacy of international criminal tribunals. In addition, local capacity building, especially support for the affected domestic system, would complement the functions of these international criminal tribunals.

Furthermore, increased cooperation with states would enhance the enforcement of the tribunals' decisions and effectiveness. International criminal tribunals can ensure that their decisions are fully enforced and that justice is served by working with states. It would also ensure that perpetrators are held accountable for their actions. This cooperation can involve the arrest and transfer of accused individuals, the enforcement of sentences, and evidence collection. Such collaboration between international criminal tribunals and states is essential for the effective functioning of the tribunals and for ensuring that perpetrators of international crimes are brought to justice.