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Natures and Functions of the Residual Mechanism of the International Criminal Tribunals: International Environmental Factors for Establishing a Legacy of Transitional Justice

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Abstract

Approximately 20 years have been passed since the International Criminal Tribunals (ICTs) commenced transitional justice efforts in post-conflict countries. As a completion strategy for the International Criminal Tribunal for Yugoslavia (ICTY), International Criminal Tribunal for Rwanda (ICTR), and Special Court for Sierra Leone (SCSL), residual mechanisms were established such that the jurisdictions could absorb the roles and functions of these ICTs. While the residual mechanisms were not established as internationally integrated organ, they shared many functions by dividing their functions into "continuing (ongoing) functions" and "ad hoc functions", which were not limited to prosecution of war criminals.

Although international society faced similar concerns regarding completion of post-World War II ICTs, this paper argues that the newly developed residual mechanisms function differently than earlier residual practices implemented after the Nuremberg and Tokyo Trials. At the era of Nuremberg and Tokyo Trials, there were no concrete international legal norms for punishing war criminals. The functions of the Subsequent Nuremberg Trials were also limited to prosecution of war criminals for only pursuing retributive justice against the leaders of the axis powers.

This paper analyses the newly developed functions of the residual mechanisms derived from international environmental factors that define functions of today's ICTs that are engaged in peacebuilding in post-conflict countries. Specifically, this paper points out that there are three international environmental factors that have influenced the policies and procedures of ICTs and their successor institutions of residual mechanisms: (1) the pursuit of peacebuilding, (2) development of the field of international criminal legal affairs, and (3) demands for respecting human rights as fundamental elements of the global constitutionalism.

1. Introduction

Upon completion of their mandates, several ICTs[1] are facing a new challenge—ensuring a lasting and positive legacy. The International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR), notable institutions that forged the path for developing the field of transitional justice

in early 1990s, have been implementing their completion strategies since 2003. In 2004, the Special Court of Sierra Leone (SCSL) also began their efforts to close their court and establish a legacy. These international criminal tribunals established successor institutions using residual mechanisms. Until now, studies in the field of transitional justice have not focused on the mechanisms of transitional justice post-completion.

This research gap exists because of the ambiguous definition of transition in the field of transitional justice. Kritz, a notable researcher who advanced the study and practice of transitional justice, focused on the transition from authoritarian to democratic regimes in his book "Transitional Justice: How Emerging Democracies Reckon with Former Regimes" (1995). This was a popular theme in the field because many researchers discussed the transitions of authoritarian states in South America and Eastern Europe. However, beginning in the 1990s, researchers shifted their focus to another type of transition in post-conflict situations in accordance with the international concerns acknowledged by the establishment of ICTs and issues of peacebuilding in post-conflict situations. Some scholars stressed the difference between transitioning from authoritarian to democratic regimes and transitioning from conflict to peace.[2]

However, as Bell emphasized, the scholars and practitioners of transitional justice do not use a common, fixed definition of the term 'transition' (Bell, pp. 23-24). Recently, instead of narrowly defining 'transition,' transitional justice scholars have a tendency to apply a broad definition by perceiving transition as the comprehensive societal changes or the process of legitimizing present regimes (Winter 2013, pp. 227-31).

The problem with this ambiguity is that it led many transitional justice researchers to focus only on the mechanisms established during transitions, which, in turn, meant that the researchers had little to no interest in matters arising in the post-transition phases or regarding measures for establishing a transitional justice legacy to follow after the transitional justice institutions come to a close. Transitional justice institutions are not meant to last; rather they are intentionally restricted by a commencement and completion period. Just as the field of transitional justice contemplates future-oriented goals, like preventing atrocities by studying the past, it should also contemplate the process of ensuring that current transitional justice efforts provide mechanisms to impart transitional justice legacies for the future.

From this perspective, this paper sheds light on how the environmental factors of today's international society establish a legacy of transitional justice by developing residual mechanisms of ICTs. The residual mechanisms are successor institutions of the ICTs—leaving behind a legacy of their activities. The mechanisms involve not only the prosecution of remaining perpetrators but also the enhancement of a rule of law culture within these jurisdictions by assisting the local justice system or managing their judicial activities records. As case studies of the residual mechanisms of ICTs, this paper specifically describes the functions of the Mechanism of the International Criminal Tribunals (MICT) and Residual Special Court for Sierra Leone (RSCSL).

The functions of the residual mechanisms are totally different from practices observed after the completion of the Nuremberg and Tokyo tribunals. By analyzing the features of the residual activities observed after the completion of the Nuremberg and Tokyo Trials, this paper discusses how current environmental factors in international society, which were not present in the Nuremberg and Tokyo Trials era, have influenced the residual mechanisms.

2. Residual Mechanisms of the International Criminal Tribunals

Since the early 1990s, international society has repeatedly attempted to address matters related to mass atrocities in conflict countries by establishing ICTs, whose judicial activities are confined to limited time-frames in specific jurisdictions. As part of their ICT mandates, the ICTY, ICTR, and SCSL have established successor institutions

through residual mechanisms of MICT and RSCSL to develop a legacy in each jurisdiction.

Given that both ICTY and ICTR were formed as "ad hoc" international tribunals, they were destined to be closed. These ICTs were established by the Security Council of the United Nations (UN) under Chapter VII of the Charter for prosecuting perpetrators who planned or committed severe human rights abuses in conflicts in the former Yugoslavia and Rwanda. The tribunals had temporal jurisdiction over cases committed during specific timeframes of the conflicts (UN, 1993a). From the outset, the tribunals were established as temporary institutions. The report submitted by the UN Secretary General on the creation of the ICTY in 1993, stated that "the life span of the international tribunal would be linked to the restoration and maintenance of international peace and security in the territory of the former Yugoslavia, and Security Council decisions related thereto" (UN, 1993b). Although there were set end dates for these ICTs in their foundational documents, criticism against the practical effectiveness of certain activities of each tribunal propelled discussions about their completion strategies (Raab, 2005, pp. 82-102).

In 2002, the President of the UN Security Council stated that the ICTY should transfer lower-level cases to local courts and complete all trial activities by 2008 (UN, 2002). In 2003, the Security Council established a blueprint for the completion strategies of the ICTY and ICTR, which entailed the completion of all their judicial activities in 2010 in resolution 1503 (UN, 2003). Resolution 1503 endorsed a three-phase completion plan by stating that the courts will complete all investigations by the end of 2004, all first instance trials by the end of 2008, and all judicial works in 2010.

To address their completion plans, ICTY and ICTR first developed their ideas on the post-completion period in their reports issued around 2005. ICTY, for instance, mentioned that their legacies were to continue judicial activities on the transferred cases from ICTY in the national courts and to provide judicial support through capacity-building for the national courts (UN, 2005). In 2007, the reports also included discussions about the MICT with respect to the ICTY and ICTR legacy-implementing projects. A letter submitted by Fausto Pocar, former president of ICTY, to the Security Council of the UN referred to the "residual judicial mechanism," which included the functions of fugitive trials, supervision and commutation of sentences of convicted persons, review of cases, witness protection, and monitoring of referred cases (UN, 2007, para. 34-35). In 2010, the original completion year for ICTY and ICTR, the UN Security Council Resolution 1966 established the MICT as a successor institution of the ICTY and ICTR (UN, 2010). MICT divided their implementing bodies into two branches: one in Hague that inherited functions of the ICTY and the other in Arusha that inherited functions of the ICTR. The Arusha branch commenced activities in 2012 and inherited all continuing functions of the ICTR after it was closed on December 31, 2013. The Hague branch also commenced activities in 2013. It will inherit all continuing functions of the ICTY after the completion of the ICTY in 2017.

In advance of the ICTR's closure, the SCSL was also closed following its completion of its mandate in 2013. The SCSL was established by agreement between the UN and the government of Sierra Leone to prosecute perpetrators who committed war crimes during the civil conflict in Sierra Leone in 2002. Although the Court was originally requested by the Security Council of the UN in Resolution 1315 in 2000, it was established as a "hybrid" court, which had both international and local judicial elements and was located in Sierra Leone.[3]

The SCSL, like the ICTY and ICTR, was established as a temporal institution of transitional justice in Sierra Leone. While the SCSL did not explicitly set out the Court's start and end date, it did begin discussing the issue of its legacy in the first annual report submitted by the president of the SCSL for 2003 (SCSL, 2003, p. 28). In 2004, the Court appointed a Completion Strategy Coordinator in August and issued the report on their completion strategy in October (SCSL, 2005, p. 25). The second annual report also provided the (1) Completion Phase, (2) Post-Completion Phase, and (3) Legacy Phase. It described a plan for creating residual judicial mechanisms to enforce trial sentences

and to possibly coordinate with the ICTY and ICTR to establish the mechanism in the post-completion phase. In 2006, the report submitted by Antonio Casesse, who was appointed as an independent expert by the Secretary General of the UN, also suggested that SCSL could establish their residual mechanism, which shared functions with the residual mechanisms of the ICTY and ICTR (pp. 57-60).

The SCSL's sixth annual report specifically suggested 10 functions of residual mechanisms, dividing them into "ad hoc functions" and "ongoing functions" (2009, pp. 50-51). The government of Sierra Leone discussed the creation of the RSCSL, as they had discussed creating the SCSL, and finally established two branches in Hague and Freetown in August 2010. The agreement was ratified by the Parliament of Sierra Leone on December 15, 2011, and RSCSL finally commenced its activities on January 1, 2014.

The MICT and RSCSL, as residual mechanisms of the ICTs, are similar. First, like their predecessor institutions, both the MICT and RSCSL were established through collaboration with the UN. As a result, they inherited the legal status of their predecessor courts derived from their fundamental constitutions. The MICT inherited the strong jurisdictions of the ICTY and ICTR under Chapter VII of the UN Charter. The RSCSL inherited the "hybrid" nature of the SCSL.

Second, they shared many functions as residual mechanisms of ICTs. As Table 1 shows, both mechanisms divided their functions into "continuing (ongoing) functions" and "ad hoc functions." The latter functions included (1) protections for victims and witnesses, (2) supervision of the enforcement of verdicts, (3) support for the national criminal judicial process, and (4) preservation of judicial records. While the MICT re-defined their functions into seven categories by emphasizing the former "continuing (ongoing) functions" from December 2016, they essentially maintained the same functions as previously defined.[4]

Table 1. Comparison of the Functions of MICT and RSCSL Defined at the Time of Establishment

	MICT	RSCSL
Ad hoc Functions	Tracking and Prosecution of Remaining Fugitives	Trial of Johnny Paul Koroma
	Appeals Proceedings	Review of Convictions and Acquittals
	Retrials	Contempt of Court Proceeding
	Trials for Contempt of the Tribunal and False Testimony	Defense Counsel and Legal Aid Issues
	Proceedings for Review of Final Judgement	Claims for Compensation
		Prevention of Double Jeopardy
Continuing (On-going) Functions	Protection of Victims and Witnesses	Witness Protection and Support
	Supervision of Enforcement of Sentences	Supervision of Prison Sentences/Pardons/ Commutations/Early Releases
	Assistance to National Jurisdiction	Assistance to National Prosecution Authorities
	Preservation and Management of MICT, ICTR and ICTY Archives	Maintenance, Preservation and Management of the Archive

Made by author based on the official websites of ICTY (http://www.icty.org/en/content/what-next) and RSCSL (http://www.rscsl.org/residual.html)

Although MICT and RSCSL have common functions, they were not established as an international integrated organ that governs all residual mechanisms of ICTs contrary to the original discussions regarding the establishment of the RSCSL. There are several factors that contributed to the final instituted plans. First, international society required that the residual mechanisms should be smaller in function than their predecessor international courts. In the case of the MICT, for instance, the Security Council Resolution 1966 explicitly stated that "the international residual mechanism should be a small, temporary, and efficient structure, whose functions and size will diminish over

time, with a small number of staff commensurate with its reduced functions" (UN, 2010). The agreement between the UN and government of Sierra Leone for establishing RSCSL had similar descriptions, requiring the court to reduce their organizational size (UN and Government of Sierra Leone, 2010, p. 1). Criticisms on the cost-effectiveness of ICTs, particularly with respect to the ICTY and ICTR, contributed to applying this small-sized approach for establishing the residual mechanisms of ICTs.[5]

The second factor that led to the creation of unintegrated mechanisms is that the predecessor institutions of the residual mechanisms did not share international legal standards. The ICTY and ICTR were established under the international authority of the Security Council of the UN derived from Chapter VII of the UN Charter. Thus, the ICTY and ICTR statutes provide prioritized jurisdictions over the national courts and require that all member states of the UN must cooperate with the courts based on the Security Council's power derived from Articles 24 and 25 of the Charter.

On the other hand, though it contained international features, the SCSL was established as a "hybrid" court, applying both national and international laws in its judicial activities. Although the Statute of SCSL stipulated that "the Special Court shall have primacy over the national courts of Sierra Leone," they did not have the legal status to obligate the UN member states to cooperate with them because they were not established under Chapter VII of the Charter. Therefore, because of this legal variation, the residual mechanisms were not integrated.[6]

3. Differences from the Precedents: Nuremberg and Tokyo Trials

The closures of the ICTY, ICTR, and SCSL were not first instances in which the international society had to manage ICTs closures—as the international society faced the same issue upon termination of the International Military Tribunals in Nuremberg and Tokyo. However, the functions and nature of today's residual mechanisms of ICTs are totally different from the limited residual judicial activities observed in the phases following the completion of the Nuremberg and Tokyo trials.

After World War II, allied forces—led by the United States, Soviet Union, and the United Kingdom—addressed matters of justice against the axis powers—Germany and Japan—by establishing the international military tribunals. The International Military Tribunal (also referred to as the Nuremberg Trial) prosecuted German war criminals based on the Charter of the International Military Tribunal (hereinafter referred to as the "London Charter"), which was signed by the allied forces in 1945. The Nuremberg Trial commenced on November 20, 1945 and ended on October 1, 1946 after prosecuting 24 Nazi defendants under the newly defined crimes including crimes against peace and crimes against humanity.[7]

The International Military Tribunal for the Far East (also referred to as the Tokyo Trial) was also established by the allied forces to prosecute Japanese war criminals in Tokyo on January 19, 1946. The Charter of the International Military Tribunal for the Far East essentially adopted the definitions of the crimes described in the London Charter.[8] The Tokyo Trials indicted 28 military and political leaders from the Empire of Japan as "Class A" criminals who committed crimes against peace.[9]

The plan was to conduct the residual activities after the completion of these international trials. Thus, to indict the remaining Nazi defendants after the Nuremberg Trial, the Subsequent Nuremberg Trials were established by the U.S. under the Control Council Law No. 10 in 1946. Article 3 of the Control Council Law No. 10 authorized the allied forces occupying the control council areas of Germany to have a right to prosecute persons suspected of committing crimes defined by the London Charter. The Subsequent Nuremberg Trials targeted doctors or legal specialists who supported Nazi activities and were not prosecuted in the original Nuremberg Trials. In total, 12 subsequent trials led

to the prosecution of 177 defendants from December 9, 1946 to April 13, 1949.[10] Other allied forces also individually held similar subsequent trials in their occupied areas in post-conflict Germany.[11]

However, the Subsequent Nuremberg Trials were different from today's residual mechanisms of the ICTs. First, the allied forces did not establish the Subsequent Nuremberg Trials under international efforts; rather, these trials were established under the authority of individual member states of the allied forces based on Article 3 of the Control Council Law No. 10. Thus, unlike in the Nuremberg Trials in which the judges hailed from each of the four allied member states, all 12 judges in the Subsequent Nuremberg Trials held by the U.S. were Americans whose prior legal experience was in the U.S.[12]

This absence of international coordination was a result of the discord among allied member states and the absence of international criminal justice standards. Telford Taylor, the Chief Counsel of War Crimes and the Principal Prosecutor of the Subsequent Nuremberg Trials, described the differences in the attitudes of the allied member states during the Nuremberg Trials by specifically referring to the case of Gustav Krupp. In this case, Justice Jackson from the U.S., predecessor of Taylor, requested that the Court try defendant Gustav Krupp in absentia as the defendant's capacity to stand on the court was questionable because of his physical condition. Justice Jackson also proposed an alternative to prosecuting Gustav Krupp by indicting Alfried Krupp, his son, or other industrialists who cooperated with Nazi. However, the other allied member states opposed these suggestions (Taylor, 1949, pp. 22-27). Such discord among the allied forces flowed from the lack of political will in the UK for conducting further Nazi war crimes trials following the Nuremberg Trials (Taylor, 1949, p. 26, Note 67).

After this incident, in the final report on the Nuremberg Trials submitted to Harry Truman, former president of the United States, Justice Jackson recommended that the U.S. should establish their own court to try the remaining war criminals. He stated that:

> …A four-power, four-language international trial is inevitably the slowest and most costly method of procedure. The chief purposes of this extraordinary and difficult method of trial have been largely accomplished…The quickest and most satisfactory results will be obtained, in my opinion, from immediate commencement of our own cases according to plans which General Taylor has worked out in the event that such is your decision.[13]

Taylor, by referring to the January 22, 1947 note from the French Government, revealed that other allied member states shared a similar attitude with respect to establishing single-state-based residual courts for trying the remaining criminals.[14]

The lack of will from the allied forces for establishing secondary international trials can also be observed in the practices following the completion of the Tokyo Trials in Japan. In the 9th meeting of the Far Eastern Commission (FEC) held on March 31, 1948, Joseph Kenan, a chief prosecutor of the Tokyo Trials, criticized the lengthy procedures at the international tribunals and recommended that the members of the FEC not conduct further international trials for the remaining criminals.[15] Unlike the decisions to conduct individual Subsequent Nuremberg Trials, the discussion among the allied forces regarding the Tokyo Trials led to a decision to not conduct any additional trials of Japanese war criminals. Thus, on July 29, 1948, New Zealand submitted the FEC314, which proposed to terminate further trials against Japanese war criminals after the Tokyo Trials. Although it took more than 7 months and endured several revisions, the FEC adopted the FEC314/9 proposal on February 24, 1949.

During the Nuremberg and Tokyo Trials era, the international society did not have concrete legal standards for punishing war criminals. The applied laws in the Nuremberg and Tokyo Trials regarding "Crimes against

Humanity" and "Crimes against Peace" lacked concrete legal foundations based on codifications, practices, and even international *opinio juris*. For instance, the terms of "Crimes against Humanity" appeared ambiguously without codifications.[16] Punishing state officials as war criminals was also not an internationally affirmed practice as the U.S. even refused to prosecute German heads of state after World War I (Lippman, 2004, pp. 958-66). As a result, the sole authority in the special tribunal established under the Treaty of Versailles was the national court of Germany.[17]

Due to the absence of law-or practice-based norms in international society, the allied forces were not obligated to pursue justice under unified practices. The only binding norm was the political agreement that they entered into shortly before the London Conference in 1945. This created room for terminating the residual activities plan and establishing the subsequent trials authorized and conducted by individual member states of the allied forces.

Second, although few residual mechanisms were functioning after the Nuremberg Trials, the functions of the Subsequent Nuremberg Trials were limited to prosecution of war criminals. In the protocol of proceedings approved at the Berlin (Potsdam) Conference of 1945, major members of the allied forces (the U.S., Soviet Union, and the UK) agreed to prosecute Nazi leaders as war criminals, and this consensus constituted the basis of the London Agreement thereafter.[18] General Headquarters (GHQ) imported the ideas from Nuremberg to the Tokyo Trials, emphasizing the importance of punishing the perpetrators through criminal prosecution.[19]

As a result, the Subsequent Nuremberg Trials functioned only as a means for criminal prosecution. Regarding the issue of memorialization, the records from the Nuremberg Trials were transferred to the International Court of Justice when the judicial activities ended on March 14, 1950.[20] The records from the Subsequent Nuremberg Trials were managed by the U.S. only. The Tokyo Trials were not involved in the process of memorialization; thus, nearly all of the records from the Tokyo Trials were transferred to the U.S. National Archives and Record Administration after the completion of the Trials.[21] In this sense, the international trials themselves did not play a crucial role for memorializing the records with respect to the Nuremberg and Tokyo Trials.

The victims and witnesses in the Subsequent Trials were much less participatory than those in today's residual mechanisms. The Subsequent Nuremberg Trials did not provide long-term witness or victim protections. This is largely because the predecessor court was designed for pursuing retributive justice through perpetrator prosecutions as defined by the allied forces. Tokyo Trials also had a similar attitude with respect to the victims of World War II and lacked functions to protect them.

4. International Environmental Factors Influenced the Residual Mechanisms of the International Criminal Tribunals

The functional differences between the residual activities of the past and today's ICTs are the result of the environmental factors that define the nature of ICTs in international society. There are three international environmental factors that have influenced the policies and procedures of ICTs and their successor institutions of residual mechanisms: (1) the pursuit of peacebuilding, (2) development of the field of international criminal legal affairs, and (3) demands for respecting human rights as fundamental elements of the global constitutionalism.

Current residual mechanisms of ICTs were designed by inheriting their predecessor courts' functions for pursuing the goal of peacebuilding. As Table 2 shows, all the predecessor courts of MICT and RSCSL set similar goals of "restoration and maintenance of peace" under the mandates provided by the authorizations or agreement with the UN.

Table 2. Strategic Purposes and Foundational Documents of the ICTY, ICTR, and SCSL

Name of the Court	Strategic Purpose	Foundational Documents *Year and Date of Formation
ICTY	Restoration and maintenance of peace in the former Yugoslavia	UN Security Council Resolution 827 (May 25, 1993)
ICTR	Restoration and maintenance of peace in Rwanda	UN Security Council Resolution 955 (November 8, 1994)
SCSL	Promoting the process of national reconciliation and restoration and maintenance of peace in Sierra Leone	UN Security Council Resolution 1315 (August 14, 2000) Agreement between the UN and the Government of Sierra Leon on the Establishment of a Special Court for Sierra Leone (January 16, 2002)

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The goal of peacebuilding broadened the functions of ICTs as compared to the functions of the Nuremberg and Tokyo Trials, which were limited to prosecuting perpetrators. One example of the broadened functions is outreach. The outreach function has been developed through various measures to utilize ICTs' records and resources for peacebuilding. With regard to ICTY and ICTR, outreach activities were necessary to address international criticisms that the international courts could not or did not play a crucial role for restoring peace due to the distance from their jurisdictions and local people. The ICTY, in its sixth annual report submitted in 1999, stated that:

> …National courts exist within each State's criminal justice system and an institutional framework that supports the conduct of criminal proceedings. Within the international community, there are no such mechanisms to ensure the dissemination and interpretation of the work of the Tribunal. The gap thus created between justice and its beneficiaries—victims of the conflict—is exacerbated by the Tribunal's physical location far from the former Yugoslavia (UN, 1999a, para. 147).

In order to address this "gap" between the courts and local people, both the ICTY and ICTR established outreach offices and developed outreach functions around 1999. The initial outreach activities included holding public symposia on the role of the courts, radio broadcasting in local languages, and reporting judicial proceedings through their websites (UN, 1999a, paras. 146-53, 179; 1999b, paras. 108-11). SCSL also implemented outreach activities, which included holding small community meetings in Sierra Leone by cooperating with the local civil society organizations (SCSL, 2003, p. 26).

The ICTs also expanded their range of activities for capacity-building and memorialization. For instance, in coordination with the Organization for Security and Co-operation in Europe (OSCE) Office for Democratic Institutions and Human Rights (ODIHR) and the UN Interregional Crime and Justice Research Institute (UNICRI), the ICTY implemented the "War Crimes Justice Project," which was funded by the European Union from 2010 to 2011. The project included both capacity-building and memorialization programs that included legal seminars and study visits by more than 800 national legal staff working in the former Yugoslavia.[22] The ICTR has also conducted capacity-building activities for the national legal staff of Rwanda since 2000 (UN, 2006, pp. 23-27). With regard to memorialization of the courts' records, for instance, the ICTY conducted projects to translate the legal court proceedings into the local languages.[23] Both the ICTY and ICTR also implemented the Legacy Website Projects, and the ICTR launched its website on November 8, 2014.[24]

Protecting victims and witnesses is another function of the ICTs constituted by the goal of peacebuilding. The Victims and Witnesses Section of the ICTY stated that testimonies from victims or witnesses are "necessary and valuable contribution to the restoration of justice and reconciliation" (ICTY, 2007, p. 5). All the predecessor courts

of the residual mechanisms established designated units for providing protections for victims and witnesses. Both the ICTY and ICTR established the Victims and Witnesses Unit (VWU) in the registries of the courts around 1996.[25] The SCSL also established a Witnesses and Victim Section (WVS) in 2003 (SCSL, 2003, p. 25). The activities of these designated departments ranged from providing physical protections for witnesses testifying before the courts to psychological care for the victims of sexual violence.

Many continuing (on-going) functions of today's residual mechanisms were created by inheriting these activities from the ICTs that aimed at contributing to peacebuilding in their jurisdictions. In the case of MICT, for instance, the Office of the Prosecutor has actively worked toward capacity-building of the national legal staff mainly in the Great Lakes region of East Africa and the former Yugoslavia since 2016. The programs for capacity-building utilized legacy resources such as training materials or publications produced by the predecessor courts of the ICTY and ICTR (UN, 2016, paras. 61-65). In the realm of memorialization of the court records, the residual mechanisms of ICTs took on the task of memorializing and exhibiting the records through their legacy websites. The residual mechanisms of ICTs also inherited the functions of protecting witnesses and victims by building the designated departments or units in their jurisdictions.[26] In this sense, functions of the residual mechanisms arose from the broadened functions for pursuing the ICTs' goal of peacebuilding, which the Nuremberg and Tokyo Trials lacked.

In addition, development of the field of international criminal justice contributed to the creation of today's residual mechanisms, which have international qualities. International accumulations of laws and practices in the field of criminal justice after World War II provided the context for creating the residual mechanisms of ICTs, which have international characteristics and expertise as judicial organs. Although it took approximately 40 years to establish the next generation of the Nuremberg and Tokyo Trials, crystallization of the international criminal laws progressed even in the dormant era between the Tokyo Trials and ICTY. As Table 3 shows, the accumulations of the practices and laws regarding international criminal justice created the environmental factors for developing the norms that states are obligated to obey. Many practices entailed collaboration with the UN and repeated adoptions of the international criminal norms for their applicable laws. In this sense, today's ICTs do not belong to single country but rather belong to the international society even if they were designed specifically for designated jurisdictions.

Table 3. Chronological Process of the Accumulations of the Major Laws and Practices in the Field of International Criminal Justice

Year	Major Laws and Practices in the Field of International Criminal Justice
1948	Adoption by the UN General Assembly of the Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention)
1949	Adoption of the Geneva Convention relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention)
1977	Protocol Additional to the Geneva Conventions of 12 August 1949 (Protocol I)
1993	Establishment of the ICTY
1994	Establishment of the ICTR
1998	Adoption of the Rome Statute of the International Criminal Court (ICC)
2000	Establishment of the UNMIK Court (Regulation 64 Panel)
	Establishment of the Special Panels for Serious Crimes (SPSC)
2002	Establishment of the SCSL
	Establishment of the ICC
2003	Establishment of the Extraordinary Cambers in the Courts of Cambodia (ECCC)
2009	Establishment of the Special Tribunal for Lebanon (STL)
2012	Establishment of the Arusha Brach of MICT
2013	Establishment of the Hague Branch of MICT
	Establishment of the Extraordinary African Cambers (EAC)
2014	Establishment of the RSCSL

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The final factor that led to the creation of the residual mechanisms of ICTs was the development of global constitutionalism as a tool for supporting and enforcing human rights in post-conflict jurisdictions. The concept of the rule of law, which provides the basis of global constitutionalism, has been gaining legitimacy in the current international society. In the notable report on the rule of law and transitional justice submitted in 2004, the UN defined the rule of law as "a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced[,] and independently adjudicated, and which are consistent with international human rights norms and standards" (UN, 2004, para. 6). The report also stated that the roles of ICTs included "re-establishing the rule of law and contributing to the restoration of peace" (UN, 2004, paras. 38).

Today's residual mechanisms of ICTs are expected to act as tools for building the rule of law in their jurisdictions based on the idea of human rights as a core principle. Theodor Meron, the President of the MICT and former President of the ICTY, publicly emphasized the role of MICT for protecting human rights in his address to the Security Council of the UN on establishing the MICT on June 7, 2012 as follows:

> By establishing the Residual Mechanism, the Council has helped to guarantee that the closure of the two pioneering ad hoc tribunals does not open the way for impunity to reign once more, whether for those whose trials or appeals before the Tribunal and the ICTR will not have been completed or for those remaining fugitives indicted by the ICTR who must still be brought to justice. With the Residual Mechanism, the Council has also helped to ensure that the rights of victims, witnesses, persons whose cases have been referred to national jurisdictions, and persons tried or convicted by the Tribunal and the ICTR will remain both respected and protected—even after the two original ad hoc tribunals cease to function.[27]

As Figure 1 shows, the residual mechanisms of ICTs were created by mutual influence of these three international environmental factors. The accumulation of the laws and practices in the field of international criminal justice enabled the creation of an institution that could pursue the goal of peacebuilding. The goal of peacebuilding in the ICTs broadened their functions to include outreach or capacity-building to ensure that human rights are upheld in their post-conflict jurisdictions. These three international environmental factors constitute the nature and functions of today's ICTs as one of the mechanisms of transitional justice. The residual mechanism of ICTs inherited such nature and functions from their predecessor tribunals.

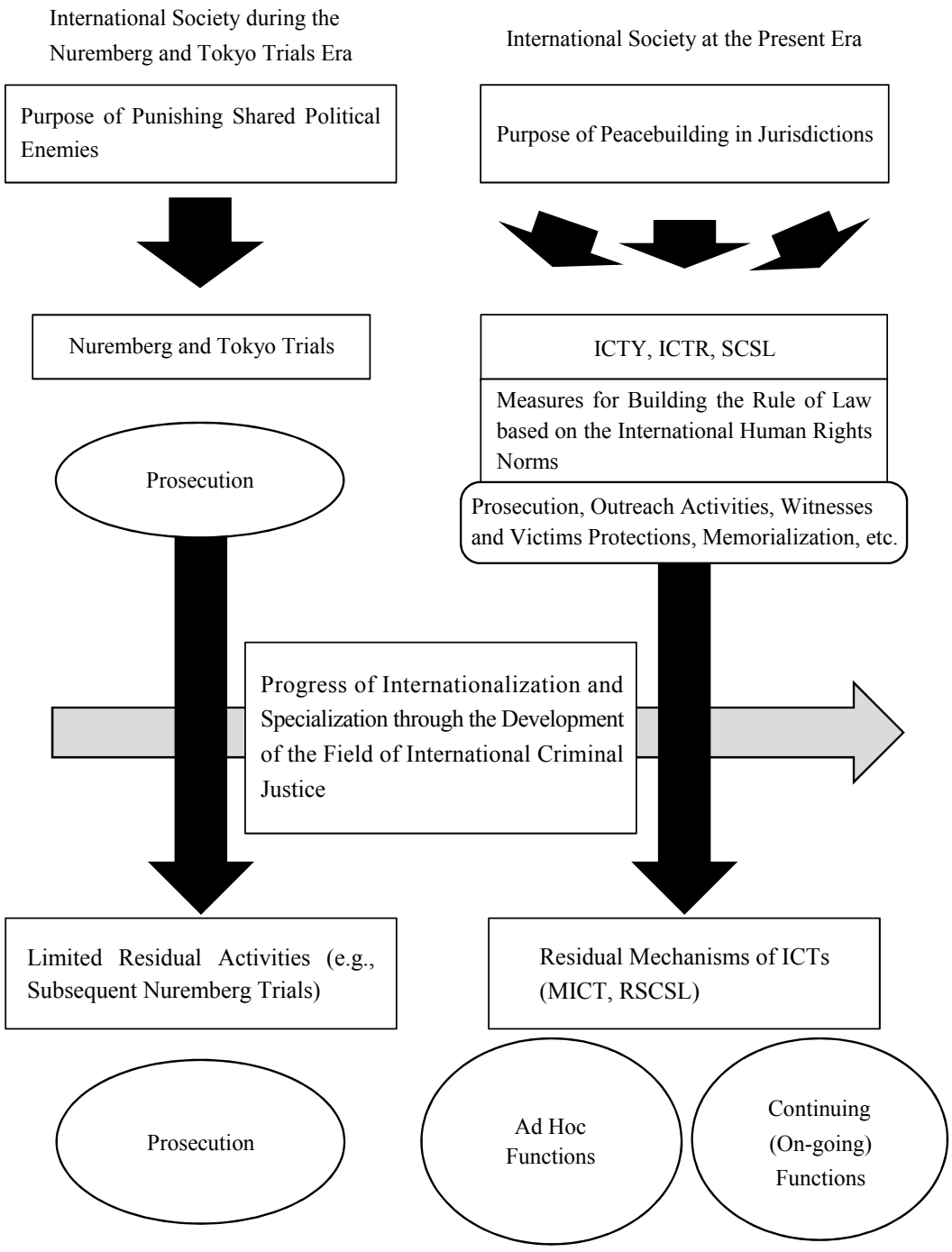

Figure 1. Model of the Interactions of the International Environmental Factors Defines Roles of the ICTs and their Residual Mechanisms (Made by Author)

5. Conclusion

This paper discussed the international environmental factors that led to the establishment of the residual mechanisms of ICTs. Today's residual mechanism of ICTs have different functions compared to those observed after the Nuremberg and Tokyo tribunals. The absence of norms influenced states to create unified international criminal justice mechanisms, which emphasized the goal of punishment through prosecution and led to limited residual

activities in the Nuremberg and Tokyo Trials era.

In describing the three international environmental factors that influenced the creation of the residual mechanisms of ICTs, which were not observed in the Nuremberg and Tokyo Trials era, this paper explained how those factors shaped the development of an institution whose main pursuit was establishing and maintaining peace. This goal of peacebuilding contributed to a greater range of ICT activities. The residual mechanisms of ICTs were established as a criminal justice institution that has both expertise and international qualities based on the accumulated norms and practices from the field of international criminal justice.

As the official UN documents also indicated, the residual mechanisms were expected to ensure that human rights are respected and enforced as a foundation of the rule of law in the ICTs jurisdictions. Today's residual mechanisms of ICTs, created by interaction of these three environmental factors, define the topology of ICTs in international society.

Notes

[1] This paper uses the term "ICTs," which includes both pure international criminal tribunals like ICTY and "hybrid" tribunals like SCSL to emphasize that both types of tribunals were influenced by environmental factors observed in today's international society.

[2] See, for example, Arthur (2009), p. 360.

[3] SCSL adopts both the national law of Sierra Leone and international laws in their cases because of this hybrid nature of the court. See UN (2000) and UN and Government of Sierra Leone (2010).

[4] MICT re-defined their functions by removing the distinction between "ad hoc" and "ongoing (continuing)" functions around the end of 2016. Specifically, the functions include (1) Tracking and Prosecution of Remaining Fugitives, (2) Judicial Proceeding, (3) Cases Referred to National Jurisdictions, (4) Protection of Victims and Witnesses, (5) Enforcement of ICTR, ICTY, or MICT Sentences, (6) Assistance to National Jurisdictions, and (7) Preservation and Management of Archives. See MICT (2016), "MICT at a Glance." Retrieved March 21, 2017 from the Official Website of MICT: http://www.unmict.org/sites/default/files/infographics/mict-at-glance-en.pdf.

[5] Security Council Resolution 1966 emphasized the temporary nature of MICT—establishing a four-year institutional term with biennial reviews thereafter. RSCSL did not set this kind of explicit timeframe in their foundational agreement between the UN and the government of Sierra Leone.

[6] The difference of the legal backgrounds was internationally recognized among scholars and practitioners as a problem of the residual mechanism of ICTs. See, Permanent Mission of Canada to the UN et al. (2010), p. 3.

[7] Nuremberg Trial Proceedings Vol.1 Indictment: Appendix A. Retrieved March 11, 2017, from http://avalon.law.yale.edu/imt/counta.asp.

[8] Specifically, Article V of the Charter of the Tokyo Trials stipulated the "Crimes against Peace" and "Crimes against Humanity" defined by the London Charter.

[9] Under the practice of the Tokyo Trial, "Class B" criminals meant those who committed conventional war crimes. "Class C" criminals meant those who committed crimes against humanity.

[10] "Subsequent Proceedings" of the Nuremberg War Crimes Trials, Jan. 27, 1949.

[11] For details of the trials held by the allied forces in their occupied areas after the Nuremberg Trials, see UN War Crimes Commission (1947-1949), "Law Reports of Trials of War Criminals, Selected and Prepared by the UN War Crimes Commission," Vol. 1-15.

[12] In total, the U.S. assigned 32 Judges for the Subsequent Nuremberg Trials. They included former domestic court judges, attorneys, and other legal experts, such as U.S. law school professors. See Taylor (1949), pp. 118-19.

[13] Report to the President by Mr. Justice Jackson, October 7, 1946. Retrieved March 10, 2017, from the website of the Avalon Project: http://avalon.law.yale.edu/imt/jack63.asp.

[14] See Taylor (1949), p. 27. See also "Substance of Note Addressed by Embassies London, Moscow, and Paris to British, French, and Soviet Governments" in Appendix K of Taylor (1949).

[15] Transcript of Informal Comments of Mr. Joseph B. Keenan, Chief Prosecutor, International Military Tribunal for the Far East, presented to Committee No.5: War Criminals, at its Ninth Meeting, March 31, 1948, p. 4.

[16] For instance, on the "Crimes against Humanity," Preamble in the Convention with Respect to the Laws of War on Land (Hague Convention II)1899 (Martens Clause) stated that "…the High Contracting Parties think it right to declare that in cases not included in the Regulations adopted by them, populations and belligerents remain under the protection and empire of the principles of international law, as they result from the usages established between civilized nations, from the laws of humanity and the requirements of the public conscious." The Joint declaration by France, United Kingdom, and Russia for the massacre of Armenians in 1915 also stated "crimes against humanity and civilization." However, these concepts of "humanity" were not incorporated in the international treaties by the end of World War II.

[17] The special trial was called "Leipzig Trial." Although the trial first listed 890 criminals to be prosecuted, the number of the criminal was reduced to 46. See, Battle (1921), p. 5.

[18] See, Protocol of Proceedings approved at Berlin (Potsdam) August 2, 1945, p. 1210.

[19] The report submitted by the State-War-Navy Coordinating Committee stressed punishment against Japanese war criminals and discussed how to prevent escape of criminals from punishment by committing suicide. See, SWNCC 57/3: Apprehension and Punishment of War Criminals (Japan), September 1945, pp. 37-38.

[20] "The Nuremberg Trial Legacy," Retrieved March 11, 2017, from https://www.peacepalacelibrary.nl/library-special/the-nuremberg-trials-legacy/.

[21] Few records of the Tokyo Trials were individually donated by the American Defense Counsels for the Ministry of Foreign Affairs of Japan. See, The Letter from Ono to Caudle, Dec. 17, 1948; The Letter from Ono to Howard, Dec. 17, 1948; The Letter from Ono to Freeman, Dec. 21, 1948. However, the records were not necessarily utilized for outreach activities of the Tokyo Trials. See, Futamura (2008), pp. 8-11.

[22] ICTY (2011), "Press Release: Project Beneficiaries Hail Achievements of the War Crime Justice Project," Retrieved March 11, 2017, from http://www.icty.org/en/press/project-beneficiaries-hail-achievements-war-crimes-justice-project.

[23] More than 60,000 pages of transcripts were translated into Bosnian, Croatian, and Serbian through "War Crimes Justice Project." See, UN (2012), paras. 85-88.

[24] ICTY initiated the "Legacy Website Project" since 2013. The website has yet to be launched. See, ICTY (2014), p. 20.

[25] ICTY established VWU in April 1995. ICTR established the same unit in June 1996. UN (1995), para. 108; UN (1996), para. 70.

[26] In the case of MICT, the Witness Support and Protection Unit (WISP) were established in both the Arusha (2012) and Hague (2013) branches. RSCSL also inherited the functions of WVS from the first year of activities.

[27] Remarks to the UN Security Council President Theodor Meron, International Criminal Tribunal for the Former Yugoslavia, June 7, 2012. Retrieved March 20, 2017, from http://www.icty.org/x/file/Press/Statements%20and%20Speeches/President/120607_pdt_meron_un_sc_en.pdf.

References

Arthur, P. (2009), "How 'Transitions' Reshaped Human Rights: A Conceptual History of Transitional Justice," *Human Rights Quarterly*, 31(2), Number 2, 321-67.

Battle, G. (1921), "The Trials before the Leipsic Supreme Court of Germans Accused of War Crimes," *Virginia Law Review*, 8 (1), 1-26.

Bell, C. (2009), "Transitional Justice, Interdisciplinary and the State of the 'Field' or 'Non-Field,'" *The International Journal of Transitional Justice*, 3 (1), 5-27.

Cassese, A. (2006), "Report on the Special Court for Sierra Leone."

Futamura M. (2008), *War Crimes Tribunals and Transitional Justice: The Tokyo Trial and the Nuremberg Legacy*, Routledge.

ICTY. (2007), "Information Booklet for ICTY Witnesses."

ICTY. (2014), "ICTY Outreach Programme Annual Report 2013."

Kritz, N. (1995), *Transitional Justice: How Emerging Democracies Reckon with Former Regimes*, United States Institute of Peace Press.

Lippman, M. (2004), "The History, Development, and Decline of Crimes Against Peace," *George Washington International Law Review*, 36, 957-1056

Permanent Mission of Canada to the UN, et.al. (2010), "Final Report of the Expert Group Meeting on 'Closing the International and Hybrid Criminal Tribunals: Mechanisms to Address Residual Issues.'"

Raab, D. (2005), "Evaluating the ICTY and its Completion Strategy: Efforts to Achieve Accountability for War Crimes and Their Tribunals," *Journal of International Criminal Justice*, 3 (1), 82-102.

SCSL. (2003), "First Annual Report of the President of the Special Court for Sierra Leone (for the period Dec. 1 – 2, 2003).

SCSL. (2005), "Second Annual Report of the President of the Special Court for Sierra Leone (for the period Jan. 1, 2004 – Jan. 17, 2005).

SCSL. (2009), "Sixth Annual Report of the President of the Special Court for Sierra Leone (for the period June 2008 - May 2009).

Taylor, T. (1949), "Final Report to the Secretary of the Army on the Nuremberg War Crimes Trials under Control Council Law No.10."

UN (1993a), UN Security Council Resolution 827 (1993), UN Document, S/RES/827.

UN (1993b), "Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993)," UN Document, S/25704.

UN (1994), UN Security Council Resolution 955 (1994), UN Document, S/RES/955.

UN (1995), "Second Annual Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991," UN Document, A/50/365, S/1995/728.

UN (1996), "First Annual Report of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory Neighboring States between 1 January and 31 December 1994 covering the period from 8 November 1994 to 30 June 1996, adopted at the third plenary session of the Tribunal," UN Document, A/51/399, S/1996/778.

UN (1999), "Sixth Annual Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991," UN Document, A/54/187, S/1999/846, 25 August 1999.

UN (1999), "Fourth Annual Report of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighboring States between 1 January and 31 December 1994," UN Document, A/54/315, S/1999/943.

UN (2000), UN Security Council Resolution 1315 (2000), UN Document, S/RES/1315.

UN (2002), Statement by the President of the Security Council, UN Document, S/PRST/2002/21.

UN (2003), UN Security Council Resolution 1503 (2003), UN Document, S/RES/1503.

UN (2004), "Report of the Secretary-General on the Rule of Law and Transitional Justice in Conflict and Post-conflict Societies," UN Document, S/2004/616.

UN (2005), "Letter dated 29 May 2006 from the President of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, addressed to the President of the Security Council," UN Document, S/2006/353.

UN (2006), Annex 5, "ICTR Outreach Programme," in "Letter dated 29 May 2006 from the President of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighboring States between 1 January and 31 December 1994 addressed to the President of the Security Council," UN Document, S/2006/358.

UN (2007), "Letter dated 15 May 2007 from the President of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, addressed to the President of the Security Council," UN Document, S/2007/283.

UN (2010), UN Security Council Resolution 1966 (2010), UN Document, S/RES/1966 (2010).

UN and Government of Sierra Leone (2010), "Agreement between the UN and the Government of Sierra Leone on the Establishment of a Residual Special Court for Sierra Leone."

UN (2012), "Assessment and Report of Judge Theodor Meron, President of the International Tribunal for the Former Yugoslavia, provided to the Security Council pursuant to paragraph 6 of Security Council resolution 1534 (2004), and covering the period from 15 November 2011 to 22 May 2012," UN document, S/2012/354.

UN (2016), "Assessment and Progress Report of the President of the International Residual Mechanism for Criminal Tribunals, for the Period from 16 May to 15 November 2016," UN Document, S/2016/975.

Winter, S. (2013), "Towards a Unified Theory of Transitional Justice," *The International Journal of Transitional Justice*, 7 (2), 224-44.