

‘If I Would Stay Alive, I Would Be Their Voice’: On the Legitimacy of International People’s Tribunals

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In recent years there has been a proliferation of People’s Tribunals (PTs), promising to address atrocities that have fallen through the net of a statist international legal order. However, the status of such informal tribunals has remained controversial in both literature and practice. The dominant view has been that PTs simply lack legitimate authority. Positing that, in the language game of legitimacy, PTs are put on a perpetual argumentative backfoot, this article examines aspects of their input, process and output legitimacy. It is argued that the right of victims-survivors to be heard reigns supreme and it is in upholding that right that the authority of PTs is legitimised. In the current state of international justice, PTs constitute indispensable, quasi-judicial institutions that bridge gaps in access to justice, challenge official narratives (or silences) about atrocities and, potentially, open up new avenues towards justice and recognition.

Keywords: People’s Tribunals, legitimacy, access to justice, legal pluralism, gross human rights abuses

INTRODUCTION

Whilst under arrest in Iran, B.E. resolved that: ‘if I would stay alive and get out of the prison, I would be their voice’.¹ And although B.E. did not have the opportunity to testify before a formal domestic or international court, B.E. was able to testify before the Iran Tribunal, a grassroots, international People’s Tribunal (PT) set up to investigate mass executions of political prisoners in Iran following the first decade of the 1979 revolution.²

PTs such as the Iran Tribunal have proliferated over the past few decades, promising to address atrocities that have fallen through the net of a statist international legal order and a geopolitical stalemate.³ However, their status has remained controversial in both the literature and practice. They have been

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- 1 R.M. Paulose, ‘Can You Hear the People Sing? Victim/Survivor Rights in People’s Tribunals’ in R.M. Paulose (ed), *People’s Tribunals, Human Rights and the Law: Searching for Justice* (Oxford: Routledge, 2019) 10.
- 2 *ibid.* See also P. Akhavan, ‘Is Grassroots Justice a Viable Alternative to Impunity: The Case of the Iran People’s Tribunal’ (2017) 39 *Human Rights Quarterly* 73, 74.
- 3 C. Chinkin, ‘People’s Tribunals: Legitimate or Rough Justice Special Issue: Problems Concerning Human Rights’ (2006) 24 *Windsor Yearbook of Access to Justice* 201, 210.

variously characterised as 'experiment[s] in transitional justice',⁴ 'metaphor[s] of justice',⁵ 'kangaroo courts',⁶ and 'a joke',⁷ because they lack a mandate from State authorities or State-backed international organisations. This article addresses this question, taking the view that these informal tribunals remain relatively unknown in mainstream international justice literature. With some important exceptions, such as the occasional reference to the findings of the Women's International War Crimes Tribunal in relation to the brutal treatment of 'comfort women' in Asia,⁸ their conclusions are seldom quoted and their contributions to international law remain mostly unexplored. To some extent, this lack of attention is a consequence of the dominant view amongst international legal theorists that PTs suffer from a legitimacy deficit. State actors and representatives, for example, tend to view them as usurping State powers. Indeed, when Bertrand Russell and his colleagues sought to organise the First Russell Tribunal in Paris, the French President retorted as follows: 'I have no need to tell you that justice of any sort, in principle as in execution, emanates from the state. ... This is why the government has decided to oppose the Tribunal's meeting in our country since, through its very form, the Tribunal would be acting against that very thing which it is seeking to uphold.'⁹

In response to critiques that PTs are 'wanting in terms of their legitimacy and authority'¹⁰ and that they lack a formal basis, advocates of such tribunals have sought to better articulate the sources of their legitimacy. However, the question of legitimacy of PTs remains controversial and is one that continues to be 'commonly raised'.¹¹ This article addresses this question, taking the view that PTs are 'worthy of continued scholarly attention' for the tendencies and imperatives that they reflect,¹² and for what they can tell us about the legitimacy of non-State access to justice responses.

In this article, we build on Byrnes and Simm's seminal work by unpacking and theorising the grounds for viewing PTs as legitimate and highlighting their potential role in influencing the narratives around gross human rights violations. We have adopted Byrnes and Simm's definition of a PT as: 'a civil society initiative establishing a forum for a body of eminent persons and/or experts to consider allegations of violations of specific standards of international law ...

4 J.N. Clark, 'Transitional Justice as Recognition: An Analysis of the Women's Court in Sarajevo' (2016) 10 *International Journal of Transitional Justice* 67, 68.

5 N. Tromp, 'The Right to Tell' in Paulose (ed), n 1 above, 95.

6 N. Katjasungkana and S.E. Wieringa, 'Organisation and Impact of the International People's Tribunal on 1965 Crimes Against Humanity in Indonesia' in S.E. Wieringa, J. Melvin and A. Pohlman (eds), *The International People's Tribunal for 1965 and the Indonesian Genocide* (Oxford: Routledge, 2019) 23.

7 Wieringa, Melvin and Pohlman (eds), *ibid.*, x.

8 T. Altunjan, *Reproductive Violence and International Criminal Law* (The Hague: TMC Asser Press, 2021) 83.

9 Cited in A. Byrnes and G. Simm, 'International Peoples' Tribunals: Their Nature, Practice and Significance' in A. Byrnes and G. Simm (eds), *Peoples' Tribunals and International Law* (Cambridge: Cambridge University Press, 2018) 31.

10 *ibid.*, 29.

11 *ibid.*, 30.

12 A.W. Blaser, 'How to Advance Human Rights without Really Trying: An Analysis of Non-governmental Tribunals' (1992) 14 *Human Rights Quarterly* 339, 365.

in the light of documentary and other forms of evidence presented to them in formal proceedings.¹³

PTs are diverse in their choice of subjects. They may focus, *inter alia*, on violations of human rights, the use of force by States, environmental issues and the role of international organisations. However, the focus of this article will be solely on PTs dealing with alleged gross human rights violations.¹⁴ The emergence and proliferation of such informal tribunals in recent years indicates that there has been a real need, in the current, imperfect system of international justice, for PTs to fill the gaps and fulfil some of the functions typically ascribed to States and/or international organisations. It is, however, only possible to account for this proliferation if, as discussed in the next part, one moves away from the notion of a monistic legal order and accepts a legal pluralist approach to law that also caters for justice-delivery responses from informal sources.¹⁵ While legal pluralism, therefore, provides an effective framework within which to position the work of PTs, it is certainly itself a broad church. Tamanaha, for instance, notes that legal pluralism can be framed at various levels of specificity and generality. The label legal pluralism has been used, *inter alia*, to refer:

to a plurality of interpretations of a single set of laws; to subsystems of law within a single system; to the same tribunals applying distinct bodies of law and separate tribunals applying different bodies of law within a system; to hybrid legal systems that grew out of the interaction between distinct bodies of law; to the coexistence of separate forms of law within a single society; to the coexistence of different subject matter regimes within international law; to the coexistence of multiple legal systems between and across states; and other variations. Each of these examples has been discussed in the literature on legal pluralism, though they are very different.¹⁶

For the purposes of this article, given the potential elasticity of this approach, however, one only needs to accept a ‘thin’ version of legal pluralism that allows for the possibility of access to justice initiatives being offered by non-State entities, such as PTs. As will be specified in the output legitimacy section below, to accept our arguments, there is no need to embrace a broader version of pluralism that seeks to challenge or supplant recognised international laws. With these clarifications in hand, the next part will proceed to discuss some of the limitations of international justice in the face of a statist international legal order, before discussing the legitimacy bases for PTs.

INTERNATIONAL JUSTICE AND THE STATIST DILEMMA

Wherever allegations of mass human rights violations emerge, the expectation is that the primary authority to take effective action to combat impunity, ensure

¹³ Byrnes and Simm, n 9 above, 14.

¹⁴ *ibid.*, 16.

¹⁵ B.Z. Tamanaha, *Legal Pluralism Explained* (Oxford: OUP, 2021) 4.

¹⁶ *ibid.*, 3. See also G. Swenson, ‘Legal Pluralism in Theory and Practice’ (2018) 20 *International Studies Review* 438, 438.

justice and preserve human rights rests with the affected State or with the international community of States. Such effective action could include conducting official investigations, establishing truth commissions or even initiating civil or criminal trials. This primary responsibility of States merely reflects the fact that each atrocity takes place in one or more juridically-administered territories, and that territorial control is the *conditio sine qua non* for a swift and effective remedy.

Such territorial fragmentation of responsibility only becomes a problem when States are not willing or able to take appropriate measures to respond to atrocities in their particular jurisdictions. There are, unfortunately, countless examples of States preferring to deny or to simply look the other way. And, in many such cases, international organisations, including the International Criminal Court (ICC), do not always have the necessary jurisdiction to step in. For instance, even though gross human rights violations have been alleged both in China¹⁷ and Iran,¹⁸ the ICC cannot investigate these situations because neither State is a party to the Rome Statute of the ICC.¹⁹ This brings to the fore the jurisdictional limitations of international justice, demarcated by territorial fragmentation of responsibility and enforcement deficits in the international system.

Although international law does *not* provide ‘for a comprehensive and absolute duty of all States to prosecute every serious human rights violation’,²⁰ States have, as a minimal requirement, a duty to investigate allegations of such violations.²¹ This minimum obligation to respond is necessary as it also serves as a form of ‘redress, measure of reconciliation, and prevention of further crimes’.²² However, in many cases, States have been unwilling or unable to fulfil even this minimal requirement, thus bringing into sharp relief the boundaries of international justice today: while some have spoken of a new ‘age of accountability’, the ideals of global justice remain very much subordinated to those State-centred, geopolitical realities.²³

History has shown, moreover, that States have time and again used the shield of sovereignty not only to thwart efforts to access justice but also to control the flow of information, and to make and mould official narratives. States that are permanent members of the United Nations Security Council, in particular, may (ab)use their privileges to protect themselves or their allies by vetoing calls to

17 Human Rights Watch and Stanford Human Rights & Conflict Resolution Clinic, “‘Break Their Lineage, Break Their Roots’: China’s Crimes against Humanity Targeting Uyghurs and Other Turkic Muslims” *Human Rights Watch* 19 April 2021 at <https://www.hrw.org/report/2021/04/19/break-their-lineage-break-their-roots/chinas-crimes-against-humanity-targeting>.

18 T. Kahn, ‘UN Secretary-General Condemns Iran for Human Rights Abuses’ *Foundation for Defense of Democracies* 20 October 2020 at <https://www.fdd.org/analysis/2020/10/20/un-secgen-condemns-iran/>.

19 See V. Tsilonis, *The Jurisdiction of the International Criminal Court* (Cham: Springer Nature, 2019) 27.

20 A. Seibert-Fohr, *Prosecuting Serious Human Rights Violations* (Oxford: Oxford University Press, 2009) 294.

21 C. Stahn, *A Critical Introduction to International Criminal Law* (Cambridge: Cambridge University Press, 2018) 2.

22 Seibert-Fohr, n 20 above, 287.

23 Stahn, n 21 above, 1. See also Akhavan, n 2 above, 74.

investigate the allegations.²⁴ At the same time and equipped with unparalleled resources, they may go to great lengths to deny or cover up the crimes alleged. And this may result in victims-survivors being wronged twice: the first time, when the original violations were committed and the second, when they were silenced.

In such contexts, access to justice initiatives are more likely to come from citizens and nongovernmental organisations (NGOs) rather than from governments.²⁵ And it is here that PTs gain in significance. As they are not under the direct control of States, they have the ability to create new avenues for access to justice, and to challenge the narrative about the violations in ways that, perhaps, the States involved may not have anticipated.²⁶

The Women's International War Crimes Tribunal that sought justice for the comfort women in Asia was established only after victims had unsuccessfully sought justice through national and international mechanisms.²⁷ And the Indonesian People's Tribunal (IPT) was similarly established after the promises of redress for the violence of 1965 were ignored by successive Indonesian administrations. Not only that but, '[t]o this day, there has never been an official acknowledgment or apology by the Indonesian government for the killings of 1965–66'.²⁸ And, with respect to the Iran Tribunal, Nice et al have argued that: '[t]he Iran Tribunal demonstrated that where international bodies fail to redress abuses committed by totalitarian regimes, it falls to ordinary citizens and those affected to organise redress'.²⁹

These are just some examples of international PTs that have been held in the last few years and that stand as a monument as well as counterpoint to the failure of States and the international community to act in the face of allegations of gross human rights violations.³⁰ With regards to such tribunals that do not have the patronage of State entities, however, the question remains: from where do they derive their legitimacy?

Accordingly, the next part will explore the main legitimacy bases of PTs, organising the discussion around input, process, and output legitimacy. The fact remains, however, that a rigorous legitimacy discourse is a battle to be lost for PTs, if States are taken to be the only actors for determining legitimate action around justice-delivery. In the final analysis, we strongly argue that, with their

24 S. Sengupta, 'The United Nations Explained: Its Purpose, Power and Problems' *The New York Times* 18 September 2016 at <https://www.nytimes.com/2016/09/19/world/what-is-united-nations-un-explained.html>.

25 Blaser, n 12 above, 345.

26 Most PTs model themselves on formal transitional justice mechanisms such as courts and tribunals, truth commissions and inquiries: see A. Byrnes and G. Simm, 'Reflections on the Past and Future of International Peoples' Tribunals' in Byrnes and Simm (eds), n 9 above, 264. However, PTs differ from such transitional justice mechanisms in one important respect: they are not under the direct control of States. From that fact, a number of strengths and weaknesses flow. An important strength is that PTs are able to step in when more formal systems of justice appear stymied. A significant weakness, however, is that their findings and verdicts remain unenforceable and largely dependent on social acceptance for their impact.

27 Chinkin, n 3 above, 201.

28 S.E. Wieringa, J. Melvin and A. Pohlman, 'The Indonesian Genocide and the International People's Tribunal for 1965' in Wieringa, Melvin and Pohlman (eds), n 6 above, 1.

29 G. Nice et al, 'The Iran Tribunal' in Paulose (ed), n 1 above, 111.

30 A. Byrnes and G. Simm, 'Introduction' in Byrnes and Simm (eds), n 9 above, 1.

remedial responsibility as enabling and legitimating circumstance, PTs do not actually challenge the prerogative of States, but rather complement the very notion of an access to justice that underlies State authority itself.

UNPACKING THE LEGITIMACY BASES OF PEOPLE'S TRIBUNALS

Legitimacy is a multifaceted concept that has been widely used in a number of disciplines, and is understood differently by various groups.³¹ This is particularly so in the context of international law where the concept of legitimacy has been subject to extensive scholarship.³² The following sections will focus on the input, process and output legitimacy of PTs. Input legitimacy refers to the background conditions, including the manner in which the mandate is given and the method through which PTs are created. Process (or procedural) legitimacy emphasises the methods by which PTs carry out their work. And output legitimacy refers to the outcomes of PTs and whether they are able to meet the goals for which they were set up.³³

INPUT LEGITIMACY

One of the main criticisms of PTs is their lack of a formal basis, in that 'they can never point to the state as a source of authority because they are not established by states'.³⁴ From this perspective, which is the dominant view among international legal theorists, PTs lack a sufficient legitimacy pull to initiate access to justice efforts and, consequently, their work and objectives are tainted by an aura of illegitimacy. According to this standpoint, only institutions sanctioned by States are morally and legitimately justified in engaging in justice-delivery efforts.³⁵ In other words, in the 'language game of legitimacy', non-State justice responses are necessarily perceived to lack legitimate authority and are thus

31 F. Baetens, 'Unseen Actors in International Courts and Tribunals' in F. Baetens (ed), *Legitimacy of Unseen Actors in International Adjudication* (Cambridge: Cambridge University Press, 2019) 4.

32 Legitimacy was a major topic of interest in international law as the Cold War ended, as well as in the aftermath of the Kosovo intervention and the Iraq war. As a result, some of the writings on this subject are now quite dated. See, for instance, T.M. Franck, 'Legitimacy in the International System' (1988) 82 *American Journal of International Law* 705; D. Bodansky, 'The Legitimacy of International Governance: A Coming Challenge for International Environmental Law?' (1999) 93 *American Journal of International Law* 596; M. Koskeniemi, "'The Lady Doth Protest Too Much" Kosovo, and the Turn to Ethics in International Law' (2002) 65 *The Modern Law Review* 159; R. Wolfrum and V. Röben (eds), *Legitimacy in International Law* (Berlin: Springer, 2008); J.M. Coicaud, 'Legitimacy, Across Borders and Over Time' in H. Charlesworth and J.M. Coicaud (eds), *Fault Lines of International Legitimacy* (Cambridge: Cambridge University Press, 2010); and J. d'Aspremont and E. De Brabandere, 'The Complementary Faces of Legitimacy In International Law: The Legitimacy of Origin and the Legitimacy of Exercise' (2011) 34 *Fordham International Law Journal* 190.

33 Baetens, n 31 above, 8.

34 Byrnes and Simm, n 9 above, 30.

35 A. Buchanan, 'The Legitimacy of International Law' in S. Besson and J. Tasioulas (eds), *The Philosophy of International Law* (Oxford: OUP, 2010) 81.

put on a perpetual argumentative backfoot as concerns their justification. As a matter of fact, as well as for rhetorical convenience, States routinely use the discourse of legitimacy to either seek to discredit the work of PTs or to avoid having to engage with them.

This approach has also been mirrored by some practitioners and academics. Apart from a small number of scholars and practitioners who have participated directly in the work of PTs,³⁶ experts have usually viewed them as being, at best, interesting experiments and, at worst, illegitimate. This could also explain why the work of PTs has generally not received much attention in mainstream international justice scholarship.

The exclusive association of legitimacy with State action reflects an argument that had been put forward by the 19th century legal scholar John Austin, which sees the positivity of laws as well as the actions of public authorities as being legitimate as they are the manifestation of a somehow direct sovereign's command.³⁷ However, this early and rather rigid legal positivist reasoning has been increasingly and consistently challenged – and justifiably so. Some authors have expressed concerns that State consent is a 'morally anaemic' perspective from which to depart in an analysis of international legal legitimacy, in light of the increasing importance of non-State actors within international law.³⁸ As legal pluralists have argued, there is no reason why other initiatives, not emanating from States but from civil society or citizens, may be deemed as justified or legitimate, if they fulfil a function in the same form (adherence to procedural standards) and with the same objectives (access to justice) as State adjudication mechanisms.³⁹ This is particularly so where States, for whatever reasons, forgo their 'right of first refusal' to investigate allegations of gross human rights violations.

Scholars have generally viewed legitimacy as comprising sociological and normative dimensions.⁴⁰ From a sociological perspective, legitimacy is based on perception: 'an institution or an actor has legitimacy if its addressees provide it with acceptance and recognition, and consider its authority to be justified'.⁴¹ From that perspective, therefore, the legitimacy of institutions is subjective and depends on whether they are viewed as legitimate in the eyes of their target audiences.⁴² While State institutions like courts are normative and derive their legitimacy from their place within a rational and authoritative legal order, entities such as PTs generate their legitimacy the other way around: the outcomes of PTs become normative through increasing social acceptance and recognition of the intended target audiences. The sociological legitimacy of PTs is thus

36 See, for instance, Chinkin, n 3 above. See also Akhavan, n 2 above.

37 J. Austin and W.E. Rumble, *The Province of Jurisprudence Determined* (Cambridge: Cambridge University Press, 1995) 172. See also Tamanaha, n 15 above, 5.

38 Y. McDermott and W. Elmaalul, 'Legitimacy' in W.A. Schabas and S. Murphy (eds), *Research Handbook on International Courts and Tribunals* (Cheltenham: Edward Elgar Publishing, 2016) 231-232. See also Baetens, n 31 above, 6-7.

39 Tamanaha, n 15 above, 1.

40 Baetens, n 31 above, 5.

41 *ibid.*

42 *ibid.*, 6.

based on 'symbolic validation', that is, a public perception of legitimacy: '[i]t is thus not the foundation that legitimises PT[s], but people who trust them'.⁴³

In this sense, the proliferation of PTs may be construed as an 'act of defiance against official silence'.⁴⁴ It is a response to the failure of States to take effective action to combat impunity and a reflection of the inadequacy of the institutions of international justice when key interests are at stake.⁴⁵ From this perspective, PTs are an imperfect but remarkable attempt to reaffirm the ideals of access to justice. As Sadr argues, they address a chronic pain point in the current international order: that despite claims to the contrary, the law is not, in fact, for all.⁴⁶ Against that backdrop, the growth of PTs is a reflection of a continued faith in the power of an international rule of law to, as far as possible, offer redress for situations of injustice and to counter the metaphorical 'crime of silence'.⁴⁷ By determining allegations of gross violations on the basis of international law, and further by uncovering and documenting narratives of injustice, PTs prevent the so-called crime of silence from continuing down the generations. According to Chinkin, this may be 'a limited form of justice but it should not be discounted'.⁴⁸

In light of the above, it would be difficult for an international justice lawyer to disagree with Kaufman's view that, even with their significant controversies and weaknesses, establishing PTs in appropriate circumstances is better than the current situation of inaction.⁴⁹ But even if one accepts that PTs derive their input legitimacy, in a remedial way, from the failure of States to take effective measures, it is still necessary to locate the precise source of their legitimacy. As 'Peoples' tribunals it is clear that they derive their power and legitimacy from 'peoples', but as Byrnes and Simm rightly ask, 'If the authority of peoples' tribunals comes from peoples, who are the peoples on whose behalf peoples' tribunals claim to act?'⁵⁰

In his speech to the First Meeting of Members of the War Crimes Tribunal in 1966, Bertrand Russell suggested that his Tribunal derived its legitimacy from the imperatives of 'human civilization'.⁵¹ In his view, members of the War Crimes Tribunal were morally impelled to investigate and assess the character of the United States' war in Vietnam and to 'record the truth in Vietnam'.⁵² Accordingly, the Tribunal was acting on behalf of 'civilized peoples', as represented by a panel of 'men eminent not through their power, but through their

43 B. Duerr, 'Political Will and the People's Will' in Paulose (ed), n 1 above, 33.

44 Chinkin, n 3 above, 212.

45 *ibid.*, 210.

46 S. Sadr, 'From Painkillers to Cures' in Paulose (ed), n 1 above, 178.

47 Katjasungkana and Wieringa, n 6 above, 22.

48 Chinkin, n 3 above, 220.

49 Z.D. Kaufman, 'Transitional Justice Delayed Is Not Transitional Justice Denied' in Paulose (ed), n 1 above, 173.

50 Byrnes and Simm, n 9 above, 32.

51 B. Russell, 'Speech to the First Meeting of Members of the War Crimes Tribunal, London, 13 November 1966' *Vietnamese-American* 15 February 2005 at <https://web.archive.org/web/20050215195856/http://www.vietnamese-american.org/3.html>.

52 *ibid.*

intellectual and moral contribution to what we optimistically call “human civilization”.⁵³

Several decades later, in 2005, the World Tribunal on Iraq was convened to investigate ‘the illegal invasion and occupation of Iraq in March 2003’.⁵⁴ This informal tribunal was more explicit about the source of its legitimacy: ‘[t]he legitimacy of the World Tribunal on Iraq is located in the collective conscience of humanity’.⁵⁵ The Iraq Tribunal, in other words, derived its legitimacy from a Kantian concept of ‘conscience of humanity’, as represented by a panel of members who called themselves a ‘Jury of Conscience’.⁵⁶

Seeking to locate the initial source of a PT’s legitimacy in metaphysical concepts such as ‘human civilization’ or ‘the collective conscience of humanity’, and claiming to be acting on behalf of these groups, of course, raises well-worn questions about unjustified appropriations: who are, exactly, these groups and who is entitled to speak on their behalf?⁵⁷ It provides grounds for critics to object that ‘those who establish such Tribunals are self-appointed, messianic, single issue-based, undemocratic and are themselves unaccountable’.⁵⁸

Rather than trying to distil legitimacy from such notions, we believe that the most powerful source of input legitimacy for PTs is to be located in a basic but fundamental obligation to investigate adequately allegations of ‘untold suffering’ of victims-survivors. ‘Untold’ both in the sense of ‘significant’ (given that these allegations relate to gross violations), and in the sense of ‘unacknowledged’ and not investigated by an appropriate mechanism of inquiry.

This argument is underpinned by the notion of normative individualism, where human beings are taken to be ‘self-originating sources of valid claims’,⁵⁹ and victims-survivors constitute a special category of such persons who are deserving of our heightened attention. This is because they have suffered great injustice, and as Amir-Ul Islam observes:

[they] often have a powerful sense that what they experienced must not be forgotten, but must be cultivated both as a monument to those who did not survive and as a warning to future generations, so that a nation can be free from these crimes and atrocities; however much a government tries to bury these crimes by default,

53 *ibid.*

54 Transnational Institute, ‘World Tribunal on Iraq’ *Transnational Institute* 17 November 2005 at <https://www.tni.org/en/article/world-tribunal-on-iraq-0>.

55 *ibid.*

56 *ibid.* Some other related sources of input legitimacy for PTs have included ‘the authority of peoples’ judgement’ and ‘the rights of citizens to ensure the universal application of human rights anywhere’: see J. Nayar, ‘A People’s Tribunal Against the Crime of Silence? – The Politics of Judgement and an Agenda for People’s Law’ (2001) 2 *Law, Social Justice & Global Development*. See also UT, ‘Summary Judgment’ Uyghur Tribunal, 9 December 2021, para 17, fn 8 at <https://uyghurtribunal.com/wp-content/uploads/2021/12/Uyghur-Tribunal-Summary-Judgment-9th-Dec-21.pdf>.

57 See, for instance, A. Duff, ‘Authority and Responsibility in International Criminal Law’ in Besson and Tasioulas (eds), n 35 above, 597.

58 Chinkin, n 3 above, 218.

59 R. Pierik and W. Werner, ‘Cosmopolitanism in Context: An Introduction’ in R. Pierik and W. Werner (eds), *Cosmopolitanism in Context: Perspectives from International Law and Political Theory* (Cambridge: Cambridge University Press, 2010) 2.

the crimes continue to haunt the nation from the debris of the history in countless ways.⁶⁰

PTs make available new and informal avenues for access to justice, through which the voices of victims-survivors may be heard. According to Chinkin, it is the power of personal testimony given to a public audience, and emulating a solemn, public hearing, that offers PTs one of the strongest sources of legitimacy:

[L]egitimacy derives from the strength of narration, supplemented by expert evidence, objective documentation and the full historical context. Above all, this provides the legitimacy of hearing those voices that are silenced by international and national judicial arenas and the moral legitimacy of victims – not state elites, nor legal representatives – speaking for themselves.⁶¹

In order for the allegations of 'untold suffering' of victims-survivors to serve as an initial basis of legitimacy for PTs, however, these entities would need to receive their mandate from the victim-survivors themselves. Rather than being designed as top-down initiatives, therefore, they should ideally be grassroots initiatives. For instance, the most important distinguishing feature of the Iran Tribunal was that it came from the grassroots, the Mothers of Khavaran, rather than Western intellectual elites and activists a world away.⁶²

It is clear, therefore, that in order for PTs to have a valid basis of input legitimacy, their mandate must derive from the victims-survivors and, indeed, their legitimacy will remain closely linked to that ongoing mandate. However, given that victims-survivors also have clear vested interests in the process and outcomes, PTs have to be structured in such a way as to ensure the independence and transparency of their processes. While, therefore, a mandate from victims-survivors is a *necessary* condition for PTs to gain initial legitimacy, it is *not* sufficient to secure broader and sustained acceptance of their work. For this, an adherence to established procedural standards ensuring impartiality and independence will also be necessary. This is required for process legitimacy, an issue that is considered next.

PROCESS LEGITIMACY

The formal rules that PTs voluntarily impose on their proceedings may be seen as another significant source of legitimation, given that a strong commitment to a legalistic approach is seen to emulate a source of procedural legitimacy that is internationally recognised. These rules are thus legitimating, it is argued in this section, because they are derived from an internationally recognised good

60 M. Amir-Ul Islam, 'Towards the Prosecution of Core International Crimes before the International Crimes Tribunal' in M. Bergsmo and C. Wui Ling (eds), *Old Evidence and Core International Crimes* (Florence: Torkel Opsahl Academic EPublisher, 2012) 235.

61 Chinkin, n 3 above, 216–217.

62 Akhavan, n 2 above, 80.

adjudicative practice. By following recognised practices such as gathering and assessing the credibility of evidence from a multiplicity of sources, conducting public hearings that are open and transparent, and delivering a reasoned decision, PTs can be viewed as not only enjoying similar procedural legitimacy of other international judicial bodies but also as reinforcing the notion of fair proceedings in the international justice system because they spring from the same belief in the coherence of applicability of rules on due process and access to justice.

Addressing the conundrum of international obligations on the one side and rule obedience in the absence of coercive powers on the other, it was Thomas M. Franck who translated Max Weber's notion of social conformity on a national level to a sociology of rule following on the international stage. Franck made clear that if legitimate authority necessitates, eventually, a coercive threat as well as the means of coercion – and glimpses of a legal positivism of a John Austin type can be sensed here again – international obligations, let alone fundamental rights, could not be explained because they would be inexistent.⁶³ On the contrary, if looked at from a purely sociological perspective, the legitimacy of rules, or of international bodies and tribunals, has much to do with the likelihood of rule following. Franck thus famously defined: '[l]egitimacy is a property of a rule or rulemaking institution which itself exerts a pull toward compliance on those addressed normatively because those addressed believe that the rule or institution has come into being and operates in accordance with generally accepted principles of right process.'⁶⁴

In this way, Weber's universal categories of legitimation for systems of social interaction are applied to the social system of international justice. For Weber, a legal order is recognised as legitimate either because the procedural rules of the judiciary are derived from a 'voluntary agreement of the interested parties on the relevant terms' or because relevant rules are regarded as 'imposed on the basis of what is held to be legitimate authority'.⁶⁵ As informal, quasi-judicial bodies, PTs do not fit the latter Weberian category of being a 'legitimate authority' in the eyes of the international community of States. This is evident in the way State actors normally refuse to engage directly with PTs, perceiving them as wanting in terms of legitimate agency.

However, with respect to the former Weberian category, PTs do have a claim to legitimacy because they rely on that belief in the lawfulness of generally recognised procedural rules of adjudication. Or as Franck articulated it, PTs rely on a 'reciprocal connection between coherence [of international rules] and legitimacy [as rule following]'.⁶⁶ Moreover, in addition to their reliance on procedural forms, the panellists they select – who often include eminent international law practitioners – further indicates their attachment to the legitimising

63 T.M. Franck, *The Power of Legitimacy Among Nations* (Oxford: OUP, 1990) 15.

64 *ibid.*, 24.

65 M. Weber, A.M. Henderson and T. Parsons, *The Theory of Social and Economic Organization* (New York, NY: The Free Press, 1947) 136.

66 Franck, n 63 above, 149. Franck assumes a sentiment of States to coherence and thus the relation between coherence and legitimacy as follows: 'The quest of states for coherence in the rules governing their conduct, however, not only assumes community but is also evidence that states share the sense of membership in such a rule community', *ibid.*, 163.

force of rule-following. PTs are designed to purposely emulate the structure of a formal court, generally separating the roles of sponsors, administrators, and tribunal members. And indeed, many PTs see themselves as following a procedure that corresponds to that of a formal court.⁶⁷ There are, however, significant divergences in the extent to which different PTs adhere to such structures and procedures. As Blaser notes, while some PTs devote extensive attention to procedure and follow definitive rules, others 'may merit critics' suggestions that they reached their verdicts before deliberations began'.⁶⁸

The latter types of PTs are problematic because, as informal bodies, PTs cannot rely on any formal legal status or on an established 'legitimate authority' for their claim to legitimacy. Rather, in approximating as much as possible recognised procedural practices, their legitimacy and credibility depends on their adherence to those adjudicative practices together with the sheer persuasiveness of their reasoning.⁶⁹ To the extent that they wish to persuade based on law and international accepted standards, a strict commitment to a legalistic approach is thus unavoidable, if not normative. For instance, writing in relation to the Tokyo Women's Tribunal, Chinkin notes that: 'the Tribunal observed ritualistic and formal court room procedures, associating it with the indicia of state judicial legitimacy. These included all witnesses taking a solemn, public oath, preparing opening prosecution statements, oral testimony supplementing written evidence, routine entering of all evidence through the Registry, full legal argument, expert testimony and explanation of historical context.'⁷⁰

This emphasis on legal processes is also one of the main differentiating features of PTs.⁷¹ As Byrnes and Simm observe: '[i]t is this emphasis on law, international law in particular, and a deliberative process of evaluation of evidence in the light of law that distinguishes these tribunals, for example, from a speech at a public rally denouncing violations of international law by states, or a political show trial.'⁷²

A strong commitment to a legalistic approach is also necessary to address critiques of bias.⁷³ A recurring critique levelled at PTs is that they are biased because of the non-appearance of the State respondents. While most PTs make a point of inviting the States that are the subject of the tribunal's proceedings, such respondents rarely reply and almost never appear.⁷⁴ Having said that, however, although they may not appear directly, in some cases, State respondents have found it necessary to engage with PTs by other means. For instance, in the case of the Uyghur Tribunal, the Peoples' Republic of China, while not appearing before the Tribunal, regularly convened official press conferences to respond to the evidence emerging from the proceedings.⁷⁵

67 Byrnes and Simm, n 9 above, 18.

68 Blaser, n 12 above, 352–353.

69 Byrnes and Simm, n 26 above, 266.

70 Chinkin, n 3 above, 215–216.

71 Duerr, n 43 above, 32.

72 Byrnes and Simm, n 9 above, 13.

73 Katjasungkana and Wieringa, n 6 above, 23.

74 Byrnes and Simm, n 9 above, 20.

75 See GT staff reporters, "'Uyghur Tribunal' Another Political Farce to Smear China's Xinjiang Policy' *Global Times* 3 June 2021 at <https://www.globaltimes.cn/page/202106/1225382.shtml>.

Be that as it may, the respondents' refusal to appear nevertheless does leave PTs exposed to critiques of perceived bias and politicisation.⁷⁶ Yet, while such non-appearance does not invalidate the proceedings per se, it is clear that a strict adherence to fair and impartial processes becomes critical for the perception of legitimacy. Indeed, to partly address this issue, the investigative/counsel arm of PTs often actively seek out evidence and arguments that such respondents could potentially have submitted or take other remedial measures. For instance, with respect to the Tokyo Women's Tribunal, while Japan was invited to participate, it declined to do so. Nevertheless, every effort was made: 'to address the legal arguments that Japan had put forward in other arenas. A Japanese lawyer provided an amicus brief on Japan's behalf. The Tribunal gave full consideration to these arguments.'⁷⁷

In the final analysis, through their adherence to a legalistic approach, PTs serve to perpetuate and reaffirm the importance of procedural principles, which is beneficial to the whole system of international justice. Process legitimacy in PTs' proceedings thus does not only mean the emulation of procedural practices for the sake of being perceived as legitimate, but also the reaffirmation of those very practices as principles of universal applicability, whether by States, international organisations or informal bodies.

In addition to process legitimacy, another important aspect of the legitimacy of PTs relates to their outputs and whether, and to what extent, these are accepted as persuasive and legitimate by different target groups, an issue that is considered next.

OUTPUT LEGITIMACY

There is no consensus over the intended aims and outcomes of PTs. These aims vary between tribunals and, indeed, between participants in the same tribunal. For some, PTs should confine themselves to establishing the facts. For others, they should engage in social activism. And for others still, they should be revolutionary in their attitudes toward existing normative structures.⁷⁸ Other aims that have been suggested for PTs include offering society an alternative history, creating a space for healing and reconciliation to take place,⁷⁹ and serving as the guardians of moral justice.⁸⁰

In this context, PTs may be said to fall on a spectrum depending on 'how closely they adhere to existing institutions, structures and issues dealt with by international law'.⁸¹ At the restrictive end of the spectrum are those PTs that

See also L. Xin, 'Second-Phase Political Farce of the "Uyghur Tribunal" Ironic and Ridiculous, Shows No Respect to 9/11 Terror Victims' *Global Times* 9 September 2021 <https://www.globaltimes.cn/page/202109/1233783.shtml>.

76 Byrnes and Simm, n 9 above, 20-21.

77 Chinkin, n 3 above, 217.

78 Blaser, n 12 above, 363.

79 Paulose (ed), n 1 above, 1.

80 T.V. Ananthavinayagan, 'Panem et Circences? People's Tribunals from a TWAIL Perspective' in Paulose (ed), *ibid.*, 68.

81 Byrnes and Simm, n 26 above, 260.

stick closely to the *lex lata*, applying 'existing positive law to the evidence put before them'.⁸² And at the other end of the spectrum are those PTs whose intended aims include more activist agendas such as challenging or expanding the sources of applicable law. Indeed, some have argued that offering a 'means of *social activism* for those whose rights have been violated' should be seen as a valuable and, possibly, central aim of PTs.⁸³

In our opinion, the closer PTs fall towards the restrictive end of the spectrum, the more their output legitimacy will be strengthened. PTs should only consider themselves as offering a 'means of social activism' to a very *limited* extent – they of course challenge existing formal legal structures by offering a remedial forum for access to justice for victims. But beyond that, it is our view that PTs should focus chiefly on their core strengths, namely, establishing an evidence-based record about what happened in accordance with recognised laws and procedural standards. This would not only benefit individual PTs but would also strengthen the perception of PTs as legitimate quasi-legal institutions in general. In this way, PTs would remain true to their underlying mandate of lending a voice to the untold suffering of victims-survivors through a process that mirrors and confirms good international judicial practices. This seemingly ideational aim of giving a voice, however, has huge practical importance. For instance, one of the most enduring functions of the IPT 1965 hearings was providing an opportunity for witnesses and survivors of the mass killings 'to tell their stories in a setting that elevated and validated their experiences as events of international, rather than merely personal, significance'.⁸⁴

Creating a credible evidence-based record of gross human rights violations should therefore remain a central focus for PTs.⁸⁵ As resourceful but often under-resourced institutions, this would enable them to focus their limited means. By carefully assessing the credibility of sources and documenting the evidence of violations, PTs may be able to significantly influence the narrative that such violations did indeed take place, particularly in the face of official denials. And this, in turn, may help to break a long silence and open new avenues for justice and recognition.⁸⁶

Furthermore, as each tribunal's very existence is a monument to an attempted silencing of alleged violations, PTs do not only have an influence on the narrative around such violations but they also have an immediate impact on the very conditions of narrativisation, by forcing States into a position where they would have to respond. Once PTs place an evidence-based record of violations in the public domain, respondent States face a difficult choice of three alternatives: ignoring, denying or changing behaviour in response to those findings.⁸⁷ Moreover, as the experience of the UT has shown, in cases where the work of PTs has gained widespread media attention, ignoring may no longer be an option for States. They would have to choose between denying or responding

82 *ibid.*

83 Byrnes and Simm, n 30 above, 7 (emphasis added).

84 B. Simpson, 'Epilogue' in Wieringa, Melvin and Pohlman (eds), n 6 above, 238.

85 Katjasungkana and Wieringa, n 6 above, 35.

86 Akhavan, n 2 above, 75.

87 Blaser, n 12 above, 365.

and, in either case, their language would need to correspond with the language used by PTs and with how they have framed the violations. In this subtle way, PTs do not require direct recognition, yet by simply verbalising gross human rights violations, they engage constructively in shaping the understanding of what happened and, to some extent, dictate the parameters of narrativisation of those violations.

Beyond establishing an evidence-based record, some PTs may also seek to assess State responsibility. However, this would depend on relevant attribution evidence being available. It is only exceptionally that PTs would seek to go further by, for instance, looking into the responsibility of individuals.⁸⁸ For instance, the Women's International War Crimes Tribunal found that Emperor Hirohito and other named defendants were guilty of rape and sexual slavery as a crime against humanity, even though the defendants had long been dead when the decisions were passed.⁸⁹ From the perspective of output legitimacy, there are good reasons for PTs to adopt more restrained approaches. Trying to assume the role of a criminal court, for instance, would require resources that PTs simply do not have. These tribunals do not have the power to indict people, issue arrest warrants and compel witnesses.⁹⁰ Furthermore, any verdicts on criminal responsibility would remain unenforceable, amounting to little more than paper tigers that could hurt the goals of anti-impunity. As Luban has argued, criminal trials are expressive acts that contribute towards reinforcing the anti-impunity norm.⁹¹ However, where punishment does not follow findings of guilt, as would be the case with PTs, this would not only undermine the output legitimacy of such tribunals but also the anti-impunity norm itself.⁹²

In recent years, PTs have gradually moved away from pursuing individual criminal responsibility or broader, more progressive goals, and have become more conservative with respect to their intended impacts. Even the Permanent People's Tribunal, which traditionally has been one of the more activist PTs, 'has mostly shifted toward that direction and rarely uses its self-invented law'.⁹³ The reasons for this shift have to do with a concern with output legitimacy. As Sadr observes: '[a]s bodies that are already struggling with issues of credibility and legitimacy, People's Tribunals are too weak and generally lack the resources, above all, to challenge the entire international law domain and replace it with 'an alternative "legal" forum for the voices of those suffering to denounce the power of dominant law which refuses to name their violation a crime'.⁹⁴

The argument here is that the output legitimacy of PTs may be enhanced when they focus attention on their core strengths. Conversely, when PTs pursue more activist agendas, this may be detrimental to their broader credibility and the overall recognition of their rulings. For instance, the IPT 1965 tried to broaden the definition of the crime of genocide by including political groups

88 Duerr, n 43 above, 24.

89 Chinkin, n 3 above, 214. See Byrnes and Simm, n 9 above, 28.

90 Paulose, n 1 above, 4-5.

91 D. Luban, 'Fairness to Rightness: Jurisdiction, Legality, and the Legitimacy of International Criminal Law' in Besson and Tasioulas (eds), n 35 above, 576.

92 *ibid.*

93 Sadr, n 46 above, 181.

94 *ibid.*

in that definition.⁹⁵ And, similarly, the International Tribunal on Crimes against Women refused to apply existing laws as 'male-products' and, instead, adopted a new notion of 'crimes against women' to supplant existing laws.⁹⁶ By going beyond the *lex lata* and pursuing more activist agendas, however, the outputs and processes of those PTs may be more easily repudiated. In this respect, one of the main critiques that has been levelled at PTs is that they are ideological and do not base their conclusions on formal legal arguments.⁹⁷ And Blaser posits that '[e]ven tribunal sympathizers express wishes that tribunal rhetoric was more restrained'.⁹⁸

In the final analysis, insofar as PTs are reliant on the language of international law for their legitimacy, as the only available, credible and 'common language for recognising the most heinous acts that have occurred in the contemporary world'⁹⁹ then, the more they seek to deviate from that standard, the more their output legitimacy will suffer.

CONCLUSION

The question of input legitimacy of PTs may be regarded as an existential one, in that, if PTs are perceived as lacking legitimacy *ab initio*, there is little they can do to rectify that original sin. Indeed, if States are taken to be the only actors for determining legitimate action in the area of justice-delivery, PTs will necessarily fall short.¹⁰⁰ However, there are several reasons for moving beyond that rigid approach and endorsing a legal pluralist perspective that, when States fail to take effective action, there remains an enduring responsibility as legitimating ground for citizens or NGOs to step in and implement access to justice initiatives.

This article has argued that, despite the ongoing controversies around PTs, implementing such informal mechanisms, in appropriate and *prima facie* justified circumstances, outweighs any situation of inaction.¹⁰¹ In this respect, we have also argued that, rather than trying to locate their input legitimacy in metaphysical concepts, a more worldly premise would be the 'untold suffering' of victims-survivors. Although the fundamental responsibility to respond primarily lies with States, the right of victims-survivors to be heard simply reigns supreme. Thus, we argue that State inaction, together with receiving appropriate mandates from the victims-survivors, endows PTs with a legitimate, if remedial, authority to step in. Indeed, upholding as well as performing that fundamental State responsibility is the *raison d'être* of initiating PTs. Their input legitimacy, we conclude, derives *ex negativo* from a failure of States to fulfil a key State function.

95 Wieringa, Melvin and Pohlman, n 28 above, 35.

96 Sadr, n 46 above, 180.

97 Katjasungkana and Wieringa, n 6 above, 22.

98 Blaser, n 12 above, 360.

99 Sadr, n 46 above, 180.

100 Chinkin, n 3 above, 217.

101 Kaufman, n 49 above, 173.

Furthermore, given that PTs cannot rely on any formal legal status for their legitimacy, they need to derive their process legitimacy from their adherence to established legal standards. To the extent that they wish to persuade based on law, a strict commitment to a legalistic approach is unavoidable. A visible respect for fair and impartial structures and procedures is vital for their process legitimacy. It is also necessary to address critiques of bias, particularly, given the purposeful and mostly symbolic non-appearance of the respondents. In a word, the closer the proceedings are to recognised universal standards of adjudication the higher the probability that the work of PTs is perceived as bearing the hallmarks of other legitimate legal processes. Process legitimacy in this way is, on the one hand, the performative commitment to global procedural standards and, on the other hand, the minimum requirement for any recognition of PT rulings afterwards.

As regards output legitimacy, given that there is no consensus over the intended aims and outcomes of PTs, the article has argued that they would be well-advised to focus on their core strengths. While some PTs have considered it their duty to ‘highlight shortcomings of the formal international legal system and contribute to its development and advancement’,¹⁰² we have argued that, insofar as PTs are reliant on the language of international law for their legitimacy, the more they seek to depart from that standard, the more their output legitimacy may suffer.

The point here is that, when properly implemented, PTs offer some level of access to justice ‘for those who have not received justice and who face apparently insurmountable obstacles in their quest to do so’.¹⁰³ This justice may be limited and imperfect and, in some cases, may amount to little more than a form of ‘justice as recognition’.¹⁰⁴ However, it represents an important step to counter the metaphorical crime of silence and creates a space for discussions about impunity to take place. For instance, the IPT 1965 and its aftermath generated enormous media exposure and many concluded on social media: ‘that ‘the djinn [genie] is out of the bottle’, meaning that the silence behind which New Order strongmen could hide the crimes committed by the army and militias trained by them after 1 October 1965 had definitively been broken.’¹⁰⁵

Equally, however, it is clear that PTs on their own are not sufficient to offer comprehensive access to justice. While they have their particular strengths, PTs also have significant limitations and victims-survivors may understandably also ‘continue to want a more formal level of accountability’.¹⁰⁶ In some cases, the findings of PTs have contributed to the work of more formal justice processes which may have unexpectedly opened up. For instance, one of the suspects named and identified by the Iran Tribunal was subsequently held for questioning by the Swedish War Crimes Unit who, in part, used evidence from the

102 Duerr, n 43 above, 36.

103 Chinkin, n 3 above, 202.

104 Clark, n 4 above, 68. See also Tromp, n 5 above, 78.

105 S.E. Wieringa, ‘The International People’s Tribunal on 1965 Crimes Against Humanity in Indonesia: An Anthropological Perspective’ in Byrnes and Simm (eds), n 9 above, 131.

106 U. Dolgopol, ‘The Tokyo Women’s Tribunal: Transboundary Activists and the Use of Law’s Power’ in Byrnes and Simm (eds), *ibid.*, 87.

Iran Tribunal in their investigations.¹⁰⁷ And, more recently, backbench MPs in Westminster used the findings of the Uyghur Tribunal to put pressure on the British government to either challenge those findings or to offer avenues for more formal access to justice for the Uyghurs.¹⁰⁸

In conclusion, the social recognition of PTs derives from them being a possible and, in some cases, the only possible response to an unheard yet legitimate call for action. It is, however, also clear that a rigorous legitimacy discourse is a battle to be lost for PTs, as they, almost by definition, are denied State support. In the register of this discourse, it is relatively easy for the work of PTs to be dismissed as 'illegitimate', as lacking a formal basis. However, the failure of States or the international community to act in the face of allegations of gross human rights violations, as well as the silencing of the voices of victims-survivors, is itself rarely characterised as 'illegitimate'.

It is important to highlight that, with their remedial responsibility as enabling and legitimating circumstance, PTs do not actually challenge the prerogative of State authorities, as portrayed by critics, but rather complement the very notion of an access to justice that underlies State authority itself. Or put another way, PTs challenge one set of State prerogatives, namely exclusivity in the areas of justice-delivery, to reaffirm another set of State prerogatives, namely offering access to justice for victims. As it was said, PTs may not be a *sufficient* factor in warranting comprehensive access to justice, yet, in the current state of development of international justice, they constitute a *necessary* legal institution to ensure such broader access.

Eventually, it is really either-or. *Either* refrain from action due to traditional legitimacy challenges to non-State initiatives *or* put access to justice considerations first, involve victim-survivor groups' voices directly in the (re)narrativisation of alleged crimes, come to a verdict in an open and transparent manner, and let legitimacy follow.¹⁰⁹

107 Interview with Mr Hamid Sabi, Counsel to the Truth Commission of the Iran Tribunal (March 2021).

108 Steerpik, 'Milling Flounders on Uyghur Debate' *The Spectator* 21 January 2022 at <https://www.spectator.co.uk/article/milling-flounders-on-uyghur-debate>.

109 Or, as Stradner and Drexel put it with respect to the Uyghur Tribunal, 'after its findings have been released, the Uyghur Tribunal's impact ultimately will be determined by free societies around the world. Their responses, in terms of political will and economic decision-making, will bear out how consequential international law can be when its courts have been compromised by repressive powers': see S. Stradner and B. Drexel, 'Uyghur Tribunal Is a Litmus Test of the Human Rights Establishment' *The Hill* 27 September 2021 at <https://thehill.com/opinion/international/573643-uyghur-tribunal-is-a-litmus-test-of-the-human-rights-establishment>.